

XIX. The Netherlands

A. Legislation

1. Compensation for Damage resulting from Soil Movement due to Gas Extraction: Wet van 5 februari 2020, houdende tijdelijke maatregelen inzake een publiekrechtelijke aanpak van de gevolgen van bodembeweging door gaswinning uit het Groningenveld en de gasopslag bij Norg (Tijdelijke wet Groningen), Staatsblad (Stb) 2020, 85

This legislative proposal is the statutory regulation of a promise made in the coalition agreement of 2017 to establish a compensation fund for an independent settlement of compensation claims for all forms of damage resulting from soil movements, independent from the Dutch Petroleum Company (*Nederlandse Aardolie Maatschappij*, NAM). These soil movements are caused by gas extraction from the so-called ‘Groningen field’ or by the government’s Norg gas storage. The Institute of Mining Damage Groningen (*Instituut Mijnbouwschade Groningen*) was set up to process these claims. The creation of this institution is related to the dissatisfaction with and the distrust of (the handling of their claims for damage compensation by) the Dutch Petroleum Co. by residents of Groningen who suffered physical damage to their homes and buildings, caused by earthquakes. It is exceptional that the settlement of claims is dealt with in an administrative procedure, rather than civil law procedures. These measures are thus only temporal, as long as the Groningen situation justifies it. This proposal entered into force on 1 July 2020, except for art 13 (that provides for a deadline of eight weeks within which to decide claims) which will come into effect on a later date.

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2. Redress of Mass Damage in a Collective Action: Wet van 20 maart 2019 tot wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken, Stb 2019, 130

- 2 The most important change this legislative proposal, which was outlined in more detail in the 2014 and 2016 reports and was adopted in 2019, proposed is to make it possible to claim damages in a collective action. It entered into effect on 1 January 2020. This legislative renewal (art 3:305a *Burgerlijk Wetboek* [Dutch Civil Code, DCC]) allows the redress of mass damage in a collective action by providing a legal basis for a collective damages action.¹

3. Changes in Liability Limits in Passenger Transport: Besluit tot wijziging van het Besluit ex artikel 85 van Boek 8 van het Burgerlijk Wetboek, het Besluit ex artikel 110 van Boek 8 van het Burgerlijk Wetboek en het Besluit ex artikel 983 van Boek 8 van het Burgerlijk Wetboek, Stb 2020, 386

- 3 This decree increases a number of liability limits in passenger transport. Unlike the international liability limits of cross-border transport, these Dutch limits for liability in the case of national transport had not changed since 1991, with the exception of the adjustment to the euro. The current increase is caused by a ruling of the *Hoge Raad* (HR) in 2018 that made it clear that an increase is appropriate.² The decree increases the liability limits from € 137,000 to Special Drawing Right (SDR) 400,000 (approx € 484,000) for the following situations: death or injury of a passenger in the case of a passenger transport contract over inland waterways; death or injury of a passenger in the case of a contract for national public passenger transport; and death or injury of a traveller in the event of a passenger transport contract that is not regulated elsewhere in book 8 of the Dutch Civil Code. For delay of a passenger and loss, damage or delay of luggage in the case of a passenger transport contract over inland waterways, the limit is

¹ See also *Emanuel GD van Dongen/Anne LM Keirse*, Netherlands, in: E Karner/BC Steininger (eds), *European Tort Law (ETL)* 2019 (2020) 409, no 2.

² HR 18 May 2018, S&S 2018, 85.

raised from € 1,000 to € 1,500. The decree was enacted in September 2020 and took effect on 1 January 2021.

4. Regulation Srebrenica Claims Settlement: Civielrechtelijke regeling ter uitvoering van het arrest van de Hoge Raad van 19 juli 2019 inzake Staat/Stichting Mothers of Srebrenica, Staatscourant (Scrt) 2020, 67995

This regulation for the settlement of the damage suffered at the Dutchbat compound in Srebrenica serves to implement the judgment of the *Hoge Raad* of 19 July 2019 regarding the liability of the State towards the next of kin of the killed male refugees who stayed at the Dutchbat compound in Potočari at the end of the afternoon on 13 July 1995.³ In its judgment, the *Hoge Raad* ruled that the State acted unlawfully towards this group of male refugees and set the State's liability at 10% of the damage suffered by the next of kin as a result of this unlawful act. This legal arrangement offers the possibility to settle the claims for compensation of these surviving relatives out of court by means of a private law settlement agreement with the State. This regulation determines which persons are eligible to enter into the proposed claims settlement and under what conditions.

B. Cases

1. Hoge Raad (Supreme Court, HR) 10 January 2020, ECLI:NL:HR:2020:27: Manufacturer's Liability for Fire in Soldering Machine (*Vivat Schadeverzekeringen NV/ATF GmbH*)

a) Brief Summary of the Facts

Due to a fire, which started in a soldering machine, an industrial building and an adjacent house were almost completely burned down. The occupant of that house, who was also the director of the company, was seriously injured. In accor-

³ HR 19 July 2019, ECLI:NL:HR:2019:1223.

dance with an insurance agreement, the (legal predecessor of the) insurer compensated the damage. The insurer then sued the manufacturer of the soldering machine for losses suffered by an unlawful act (art 6:162 DCC). The dispute between the parties concerns the question whether the soldering machine was defective, ie whether it contained a design error and thus did not meet the safety requirements applicable at the time. To avoid the risk of spontaneous combustion, the storage tank and drip tray should have been physically separated from the rest of the soldering machine and provided with separate extraction. Just before installation of the soldering machine in 2006, the machine was modified: the old solder pot was replaced by a lead-free solder pot. This change was not made by the manufacturer; it was a choice made by the company using the machine.

6 The court of first instance dismissed the claim of the insurer against the producer assuming that the cause of the fire lies in the improper use of the soldering machine by the injured party himself, which cannot be regarded as a reasonably foreseeable misuse or a foreseeable abnormal circumstance that the manufacturer should have taken into account. In this line of reasoning, it cannot be concluded that the soldering machine did not offer the safety that one might expect from it and therefore the claim of the insurer was dismissed. The Court of Appeal (*Gerechtshof*) considered it to be very likely that the fire was caused by the inflammable flux fumes released from the drip tray of the soldering machine.

- (i) The Court of Appeal, after having ordered an expert report, stated that it cannot be ruled out that the aforementioned (substantial) modification of the machine was the cause of the fire.
- (ii) According to the court, the insurer had not specified or proven that the temperatures in the original machine rose to the self-ignition point of the flux vapours before the solder pot was replaced.
- (iii) According to the Court of Appeal, when designing and marketing the soldering machine, the manufacturer could not be expected to foresee any modification by a third party involving a temperature increase up to the self-ignition point of flux vapours.
- (iv) The Court of Appeal concluded that the causal relationship between the production and the introduction on the market of the soldering machine by the manufacturer in 2002 and the fire in 2006 was not established.

b) Judgment of the Court

7 The insurer challenged the decision of the Court of Appeal before the *Hoge Raad* on the four points above (i–iv) and, complained that the Court of Appeal insuf-

ficiently motivated its judgment. The Court of Appeal did not consider at all the assertion that the machine contained a design error when it was put into circulation and that the machine did not meet the safety requirements applicable at the time. According to the insurer, the fact that the machine was modified does not alter the fact that the heating elements should have been shielded (against released vapours) at the time of marketing. Moreover, it does not follow from the expert report that the temperatures in the machine could only rise to such a degree of auto-ignition temperature after this modification.

According to the *Hoge Raad*, the expert endorsed the insurer's statement 8 that the soldering machine was defective because the safety requirements (of separation of the storage tank and drip tray from the rest of the soldering machine) were not fulfilled. Moreover, in view of the expert, it seems very likely that, prior to the replacement of the solder pot, the temperature of the heating elements could even rise to the auto-ignition temperature. The different interpretation of the Court of Appeal therefore required further explanation. According to the *Hoge Raad*, the Court of Appeal did not provide sufficient reasons for its finding that the heating elements ignited the flux vapours when the machine temperature exceeded the self-ignition temperature of these vapours, leaving open the possibility that no causal relationship existed between the flux vapours in the 2002 production and marketing of the soldering machine by the producer and the fire in 2006.

Furthermore, the insurer claimed that the Court of Appeal should have applied 9 the rule of the reversal of the burden of proof. According to the *Hoge Raad* case law, this reversal rule is applicable in case a standard set to prevent a specific risk of damage occurrence is violated, while the person who invokes the violation of this standard, even in the event of a dispute, makes plausible in the specific case that the specific risk against which the standard aims to offer protection has occurred (with reference to HR 2 June 2017⁴).

The insurer justly invoked a violation of a concrete standard arising from 10 two European directives (98/37/EC and 94/9/EC), ie the heating elements in a soldering machine such as this one must be protected against flammable vapours. This norm is intended to offer protection against the danger of an internal explosion, and the danger of an internal explosion materialised in this case. Under this circumstance, the *Hoge Raad* ruled that the Court of Appeal should not have dismissed the claim on the sole ground that it cannot be ruled out that the modification of the machine caused the fire. In these cases of uncertainty

4 ECLI:NL:HR:2017:1008.

about the *conditio sine qua non* relationship between the violation of the norm and the damage, the court should have applied the rule of the reversal of the burden of proof. This means that it is up to the producer to make plausible that the damage would also have occurred in case the safety requirements had been met, in other words if the design of the machine had not been faulty.

c) Commentary

- 11 This case concerns the scope of the liability of a producer and proof of the requirement of defect. It should be mentioned that the liability in this case is not based on the specific regulation of art 6:185 DCC ff that implements the European Product Liability Directive. After all, the case concerns a claim of recourse by the insurer and concerns damage that falls outside the scope of this Directive. However, the judgment would not have been different if the legal basis had been art 6:185 DCC. For both legal bases, the rules apply that the burden of proof falls to the injured person, who will have to prove the damage, the defect and the causal relationship between the defect and the damage. For the product liability regime, this is laid down in art 6:188 DCC, codifying art 4 of the Directive. A similar burden of proof is already laid down in the general art 150 of the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*, Rv), which reads: ‘the party that invokes legal consequences of asserted facts and rights, bears the burden of proof for those facts and rights, unless a different distribution of the burden of proof arises from a special provision or from the requirements of reasonableness and fairness’.
- 12 Neither the Directive nor the Dutch Code of Civil Procedure establish what standard of proof is required for a claimant to succeed and it does not determine the manner in which this proof has to be established. Therefore, courts need to rely on case law. How the proof has to be established depends on the circumstances of the case. In some situations, it might be very difficult for the harmed person to prove his/her claim, due to the technical complexity of certain products, the high costs of expert evidence, or because of limited access to certain information (for instance laboratory data).
- 13 From previous case law regarding product liability on the basis of art 6:185 DCC, it follows that the burden of proof must not be rendered too strict. Otherwise, it would be very difficult to achieve adequate protection for consumers. In a case that was brought before the court of first instance of Oost-Brabant, a woman was injured when a ladder she was using suddenly folded. The woman claimed before the court that the ladder was defective and that this was the cause of her injuries. The Court held that if a ladder, when being used in a nor-

mal manner, suddenly folds and causes damage, a defect is presumed. It is then up to the producer of the ladder to rebut this presumption.⁵ A similar example is the *Leebeek* case, in which the aggrieved party claimed to have suffered lacerations when trying to open a bottle of Pepsi and the neck of the bottle broke. The *Hoge Raad* ruled that, if it is established that the injured person tried to open the bottle in a normal manner, it must be presumed that the bottle is defective. It is then up to the producer to rebut this presumption.⁶ However, it must be emphasised that the standard should not be interpreted *too* leniently, as this might lead to the unwanted situation that the producer is held liable for damage that is not the result of the product in question.

In the present case, the rule of the reversal of the burden of proof was applied 14 on a claim based on art 6:162 DCC, but, if the product liability regime is applicable, we believe art 6:188 DCC does not prevent the judge from applying national rules on the reversal or alleviation of the burden of proof. In this sense, judges have the discretion to apply several methods: reversal of the burden of proof as regards causality (which should have been applied in the present case according to the *Hoge Raad*); the *res ipsa loquitur* rule (negligence is inferred from the very nature of an accident or injury) as regards the defect and causality (see also the aforementioned *Leebeek* case); and the reversal of the burden of proof based upon reasonableness and fairness (also stipulated in art 150 Rv).

The present case confirms that, in order to determine whether the producer 15 is liable for the damage caused by art 6:162 or art 6:185 DCC, the decisive factor is whether the damage was caused by a defect, in this case the alleged design defect, or through incorrect use, and in this case more specifically through the modification of the machine, or through a combination of both. In the present case, the Court of Appeal too easily assumed that the fire could be attributed to the modification of the soldering machine. After all, even without the modification, there was a risk of an internal explosion, given the design of the machine, which was not in accordance with the European standard. In view of the fact that a specific standard that protects against the danger of an internal explosion was violated and given that this danger materialised, the causal relationship should have been assumed by applying the reversal of the burden of proof. It would then have been the task of the producer to prove that, even without that defect, the damage would have been caused by incorrect use and modification

⁵ Rb (Court of first instance) Oost-Brabant, 20 March 2013, *Jurisprudentie Aansprakelijkheid* (JA) 2013/82.

⁶ HR 24 December 1993, *Nederlandse Jurisprudentie* (NJ) 1994/214.

of the machine. To this end, however, more facts and circumstances would have had to be stated and substantiated.

2. HR 17 January 2020, ECLI:NL:HR:2020:61, NJ 2020/137: Duty of Care of a Lawyer towards Third Parties (*Dingemans, Van Dooren, Van Gompel en Van Cauwenberg/Banning NV*)

a) Brief Summary of the Facts

- 16 A lawyer provided services for several years for two Belgian companies belonging to the same international group (hereafter: concern), which also includes a Swiss company and Dutch companies. The two Belgian and the Swiss companies had the same director. In 2005, the two Belgian companies sold a right of use of an aircraft to the American company Bell Aviation Inc. The lawyer advised on whether they were legally entitled to sell this right. The intention was that the purchase price would be paid to the Belgian companies, but ultimately, partially on the basis of a payment instruction from the lawyer to Bell, the main part of the price was paid out to the Swiss company. During the settlement of the transaction, the business concern began to fall apart and bankruptcies followed. The Belgian liquidators of the Belgian companies assigned their claims for (unlawful) advice and guidance for the sale of the right of use of the aircraft to the Dutch liquidators of the bankrupt Dutch group companies.
- 17 These sued the lawyer for malpractice and accused him of having cooperated with the diversion of proceeds from the sale of the right of use of an aircraft (approx € 2.8 million) from the assets of the bankrupt Belgian companies. As a result, the shareholders as well as the creditors of these companies would have been disadvantaged. The question at stake is whether the lawyer of the two companies, now gone bankrupt, should be held liable for damage suffered by these companies and their (joint) creditors, because the proceeds from the sale of a right of use of an aircraft of these two companies were not paid to them, but to an associated third company, which did not have enough assets to recover the claim. After the lawyer was held liable by the court of first instance, this judgment was quashed by the Court of Appeal.

b) Judgment of the Court

- 18 Firstly, the *Hoge Raad* affirmed that lawyers have to represent the legitimate interests of their clients, taking a partial attitude in doing so (art 10a para 1, un-

der b, Act on Advocates [*Advocatenwet*]). The *Hoge Raad* further ruled that, under certain circumstances, a lawyer may be obliged, when providing services to his client, to take into account the legitimate interests of third parties which are known or reasonably knowable to him and which could be impaired by (contemplated) acts or omissions related to his services. If a lawyer knows, or should reasonably understand, that such interests exist and that these interests of third parties could be harmed in an unacceptable manner by an (contemplated) act or omission, he is obliged to align his services to the client accordingly. A lawyer may rely on the correctness of the information provided to him by the client as long as there is no reasonable indication to the contrary (see also art 7.2 para 1 Regulation on the Legal Profession [*Verordening op de advocatuur*]).

Here, responding to the present case, the *Hoge Raad* ruled that lawyers do 19 not have to take into account possible interests of third parties in the performance of their services with regard to a proposed financial transaction, unless, from the information provided to them by the client or other circumstances of the case, they should reasonably deduce that such justified interests could be unacceptably harmed by the services requested from them. The answer to the question whether a lawyer should reasonably come to the conclusion that such a situation may arise – meaning he will have to investigate the matter further – depends on the circumstances of the case. The mere knowledge that the company the lawyer provides his services to or the group to which this company belongs finds itself in financial difficulty is not sufficient, not even for lawyers specialised in insolvency law. The relevant circumstances also include the content and scope of the assignment and contract of services. According to the *Hoge Raad*, the Court of Appeal thus applied the correct standard in assessing the liability of the lawyer towards the creditors of the Belgian companies. The *Hoge Raad* rejected the liquidators' cassation appeal.

c) Commentary

The reasoning of the *Hoge Raad* may be welcomed, since a lawyer should not be 20 liable too easily for acts carried out on behalf of his clients; otherwise he can no longer fulfil his role as representative of his clients' interests in a proper way. When directors lose sight of the corporate interests, which may occur, the question is whether an advisor or other auxiliary is obliged to intervene. Generally speaking, they are not easily in a position to distinguish between acts with fraudulent intent and acts that may be risky but which are still commercially and legally defensible. In the present case, the lawyer only had a supporting role, namely to draw up and pass on a payment instruction. There was no indi-

cation that the lawyer should have realised that the money would disappear and that redress would be hindered. These two aspects, the supporting character of the activities and the unfamiliarity with any deceitful purpose of payment, seem to play a central role in this case, ending with the rejection of the liability claim.

- 21 Since the role of a lawyer is to plea for one side, there is, generally speaking, no need for a mandatory assessment of the interests of third parties. However, a lawyer's advice on the legal position of the client may not include any actions allowing the diversion of funds, to the disadvantage of third parties. In case a diversion of funds is requested, and the justified interests of a third party are known to him, the advocate may have a duty of care towards that third party. The crucial question therefore is whether the lawyer knew or should have known that the interests of the third party would be at stake and whether he could or should have foreseen the resulting damage (according to Advocate General Vlas in his advisory opinion in the present judgment). A duty of care towards third parties should not too easily be accepted. This case confirms once again that the relevant circumstances and especially the content and scope of the contract between the parties or other obligations of the parties involved are decisive for establishing the scope of the duty of care.

3. HR 12 June 2020, ECLI:NL:HR:2020:1046: Unlawful Testimony (Employee against Former Judge)

a) Brief Summary of the Facts

- 22 In this case, the question is whether a former legal assistant acted unlawfully towards a former judge by acting as a witness under oath in proceedings against the former judge, repeating allegations uttered by the witness years earlier in an anonymous letter to the magazine *Nieuwe Revu*. The court of first instance ordered the employee to pay € 400 in damages and dismissed the other claims. The Court of Appeal, however, ruled that the former legal assistant acted unlawfully (because she acted contrary to what is considered to be acceptable behaviour in society) and sentenced her to pay full damages referring to a follow-up proceeding for the determination of damages. The Court of Appeal based its judgment on an assessment of the circumstances of the case. According to the Court of Appeal, the allegations of the employee were questionable and the letter hardly contained any factual substantiation. For the same reasons, the employee should not have been allowed to repeat these accusations as a witness

under oath, without a prior investigation as to the correctness or (as yet) substantiation of those memories with further factual evidence. In cassation, the employee alleged that the latter judgment of the Court of Appeal was wrong.

b) Judgment of the Court

The *Hoge Raad* underlined that, pursuant to art 165 para 1 Rv, everyone who has 23 been summoned is obliged to testify, that witnesses are obliged to testify truthfully (art 177 para 2 Rv) and that the testimony must relate to the facts the witness obtained through his/her own observation (art 163 Rv). The *Hoge Raad* reiterates that these may also include impressions which have arisen in his/her mind as a result of events to which his/her testimony relates (HR 21 December 2001⁷). In certain circumstances, the *Hoge Raad* continued, a witness may be required to take cognizance of written documents or other information that could contribute to refresh his/her memory, in preparation of his/her testimony to effectuate adequate answers to questions, but the requirement of art 163 Rv that the testimony must relate to facts obtained by the witness through his/her own observation precludes him/her from being obliged to conduct an investigation into facts and circumstances not known to him/her through his/her own observation (HR 19 September 2003⁸).

Consequently, the *Hoge Raad* ruled in the present case that the employee, as 24 a witness, was obliged to testify truthfully about her recollection of events. With regard to the hearing of the witness, the *Hoge Raad* found that it was allowed to require the witness to reflect on how sure she felt about her memories, but contrary to the Court of Appeal's ruling, the witness was under no obligation to further substantiate her testimony with evidence and a prior investigation of the correctness of her memories was not required. The *Hoge Raad* ruled that, in this respect, there is a difference between what could be expected of the employee as a witness and what could be expected in the context of sending the anonymous letter. Whereas a witness is called upon by others to present his/her observations, writing and sending the letter were voluntary and personal initiatives to publicise serious accusations. The *Hoge Raad* quashed the judgment of the Court of Appeal, however only to the extent that it judged that the employee acted unlawfully

7 NJ 2002/60.

8 NJ 2005/454.

towards the former judge by repeating, under oath, the allegations made in her anonymous letter. The complaints against the first part of the judgment, deciding that the disclosure of the letter was unlawful, were dismissed. By sending the anonymous letter with unsubstantiated accusations to the press, the employee was at fault and therefore she was held liable towards the former judge. This was different for her testimony which, according to the *Hoge Raad*, did not constitute a tort. In so far, the claim of the former judge was rejected.

c) Commentary

- 25 The insinuations mentioned in the letter were widely published in the media, exposing the behaviour of a former judge. According to the *Hoge Raad*, the legal assistant in question was not obliged, when summoned as a witness, to substantiate her suspicions of an improper conflict of interest and abuse of power of the former judge with further evidence. Nor did she have to ascertain if her memories were correct prior to her testimony by making further inquiries. This decision of the *Hoge Raad* is understandable. After all, a witness' knowledge acquired by his/her own observation may include impressions which arise at a later date in his/her mind and are interwoven with the original observation. Witnesses are legally obliged to testify about their own observations and impressions, so their testimony cannot easily constitute an unlawful act (art 6: 162 DCC).

4. HR 19 June 2020, ECLI:NL:HR:2020:1090 and HR 19 June 2020, ECLI:NL:HR:2020:1082: Liability of Doctors and Hospitals (Prejudicial Procedure for PIP Breast Implants and Miragelplombe)

HR 19 June 2020, ECLI:NL:HR:2020:1082

a) Brief Summary of the Facts

- 26 In 1992, a Miragelplombe – a cushion used in ophthalmology to seal a retinal tear – was applied in the medical treatment of a patient who had been diagnosed with retinal detachment. However, years later, the patient reported to have complaints and multiple (recovery) treatments were required. It turned out that a stich from the surgery had broken through the eye and, more than a year

later after the removal of this stich, that the plombe had broken through the conjunctiva. The producer of the Miragelplombe medical device ceased its production as of 1995, long before the medical complaints and the recovery treatments of this patient. The patient brought a claim against Radboudumc (hereinafter: the hospital) for material and immaterial damage caused by the Miragelplombe on the ground of an attributable shortcoming (art 6:75 in conjunction with art 6:77 DCC). The court of first instance found that this shortcoming was not attributable to the hospital and rejected the claim. On appeal, the Court of Appeal decided differently, classifying the occurrence as malpractice and ordered compensation. The hospital was thus ordered to compensate the damage which occurred as a result of the Miragelplombe used in the operation. The Court of Appeal stated that art 6:77 DCC holds that liability for shortcomings caused by inferior devices is strict. The court judged that the Miragelplombe, due to its composition and properties, proved to be unsuitable for its purpose, therefore constituting a failure of performance to be attributed to the hospital that implemented the plombe. The facts that the use of the Miragelplombe at the time of its use was state of the art and that medical practitioners at this time were not aware of the complications it caused do not detract from that conclusion, according to the Court. The Court of Appeal ruled that it is not unreasonable to attribute the failure of performance to the hospital. According to the Court of Appeal, the mere unfamiliarity of a (future) defect in auxiliary equipment was not sufficient to justify an exception to the main liability rule pursuant to art 6:77 DCC. This article states that a failure in performance of a contract that is caused by the use during this performance of a thing which is unfit for its purpose is, as a rule, attributable to the person performing and using the thing. The hospital appealed in cassation (and the injured party filed a cassation cross-appeal).

b) Judgment of the Court

The point of departure in cassation is that the plombe is a tool used in the performance of an obligation, as referred to in art 6:77 DCC. In case an object, which was state of the art at the time, is implemented in a patient's body as part of a medical treatment, the mere fact that it, on the basis of subsequent medical insights, is no longer considered suitable by its nature, and thus no longer suitable for the treatment concerned, does not mean that the use of that object must be regarded as a failure in performance (and thus a breach of contract of medical services). In such a case, the rule of art 6:77 DCC is not applicable. This article foresees strict liability in case a thing used in the performance of a contract

is unfit for its purpose resulting in a failure in performance. And thus if such a failure is not established, art 6:77 DCC is not applicable. A different view would be incompatible with the nature of the contract of medical services and the care to be provided by the care provider (art 7:453 DCC). According to the *Hoge Raad*, this is in line with the fact that there is also no failure in performance when a doctor employs treatment methods that, according to medical insights at the time, are appropriate at the time of treatment, but subsequently are no longer assessed as being state of the art as a result of newly emerged medical insights.

HR 19 June 2020, ECLI:NL:HR:2020:1090

a) Brief Summary of the Facts

- 28 A woman underwent breast augmentation surgery at (the legal predecessor of) the Jeroen Bosch Hospital Foundation (hereinafter: the hospital) on 13 January 1984. Two silicone prostheses were placed and replaced in 1997. Due to pain suffered and capsular fibrosis in the left breast, a capsulectomy was performed and the left breast prosthesis was replaced by a Poly Implant Prosthesis (PIP) in 2000. Such a PIP implant is now considered to be inferior because of an increased risk of bursting and leaking. Around 2010, the French health inspection found that (some of) the PIP implants were filled with industrial silicone gel. The French legal entity called Poly Implant Protheses, which had covered up its use of industrial silicone gel in its implants for many years, had been marketing the implants as if they were filled with medicinal silicone gel and thus committed fraud. Since 2010, the marketing and use of PIP implants has been prohibited by the Dutch public health inspectorate. In 2012, when the implants in the case at hand were replaced, the PIP implant was found to be ruptured. It is unknown whether or not this PIP implant was filled with industrial silicone. In these proceedings, the woman concerned sought a court order to establish liability of the hospital for the damage she suffered as a result of the insertion of a PIP implant and a financial compensation order for € 25,000 as an advance payment, plus statutory interest, as well as a conviction of the hospital to reimburse the full-scale damage, to be specified in detail in a follow-on proceeding. In this case, the court of first instance ruled that the inserted PIP implant must be regarded as unsuitable auxiliary equipment as referred to in art 6:77 DCC and that its use constituted a failure in the performance of the medical treatment agreement, but that this failure cannot be attributed to the hospital. After an appeal lodged by the woman, the Court of Appeal, by interlocutory judgment,

requested a preliminary ruling from the *Hoge Raad*. The questions put forward were: i) whether a hospital is liable for damage resulting from the insertion of a defective PIP implant; ii) whether the shortcoming is attributable to that hospital; and iii) if it is, generally speaking, relevant to the answers to these questions whether the defect only consists of the risk of premature leakage of the implant common to all PIP implants or if it also entails an extra risky implant consisting of industrial silicones instead of medicinal silicones.

b) Judgment of the Court

In the case of medical services, it is generally required that the items used by the care provider in the performance of the contract are suitable for their intended use, assessed according to the medical insights at the time. An implant must therefore be suitable according to prevailing medical insights and must meet the legal standards applicable at the time of use. The mere circumstance that a certain type of implant, state of the art at the time of use, is considered less suitable or even unsuitable for the medical treatment provided, on the basis of medical insights obtained at a later date, does not constitute a failure in the performance of the obligation of the care provider. A PIP implant filled with industrial silicone, however, was considered unfit by the prevailing medical insight at the time of its use and so did not meet the applicable legal norms. According to the *Hoge Raad*, the use of such implants therefore constitutes a failure in the performance of the obligation that rests on the care provider. The use of a PIP implant not filled with industrial silicone, but with an increased risk of rupture and leakage – ie a greater risk compared to other implants with the same function – constitutes, in principle, a failure in the performance of the agreed medical services unless such implant was state of the art according to the medical insights at the time. If it is established that the implant used in this case had an increased risk of rupture and leakage, it is up to the care provider to demonstrate that the implant, despite this feature, was state of the art at the time, so that its use does not constitute a failure of performance.

For liability to be established, it is required that the failure in performance is attributable to the debtor. According to art 6:75 DCC, a failure in performance cannot be attributed to the debtor if it is neither due to his/her fault nor for his/her account pursuant to the law, an agreement or generally accepted principles. The standpoint of art 6:77 DCC is that a failure in performance caused by an inferior tool or instrument is in principle attributable to the debtor. It would be otherwise only if attribution were unreasonable given the circumstances of the case. Such an exception is assumed in case the implant falls short because

of the fraudulent composition of industrial silicone. The reasons given by the *Hoge Raad* are the following. In this case, large-scale and serious fraud in the production and marketing of the implants was committed. Because of this, any (greater) expertise of the care provider with regard to the unsuitable implant, and thus inequality of arms between doctor and patient, does not play a role in this case. A different judgment, in which the care provider would be liable for damage suffered by patients as a result of the implants, would lead to a large number or, in some cases, extensive number of damages claims against which the care providers in the Netherlands cannot easily insure themselves since they only have a very limited possibility to obtain insurance coverage. In addition, the producer of the PIP implants has gone bankrupt, so it is impossible for the care provider to use its right of recourse against the producer.

c) Commentary

- 31 In these two judgments, the *Hoge Raad* set out the criteria on whose basis courts must assess whether a medical treatment provided and the use of a medical device constitute an attributable failure in the performance of the contract of medical services and thus in short constitute malpractice. Both judgments relate to the risk distribution when using unsuitable devices in the context of medical services. Article 6:77 DCC reads that where, in the performance of a contractual obligation, a thing is used which is unfit for its purpose, the resulting failure in the performance of the obligation is attributed to the debtor, unless this would be unreasonable in view of the terms and scope of the contract from which the obligation arises, generally accepted principles and other circumstances of the case. In the decision on the *Miragelplombe*, the *Hoge Raad* explicitly places the question of unsuitability against the background of the obligation arising from the medical treatment agreement. If the use of the medical device is appropriate according to the prevailing medical insight at the time of use, the use of that item does not constitute a failure in performance. According to the *Hoge Raad*, in the PIP case, breast implants filled with industrial silicone were unsuitable according to the prevailing medical insights, so their use in the implementation of a medical treatment agreement do in fact constitute a failure in the performance, which is in principle attributable to the hospital on the basis of art 6:77 DCC. The judgment to the contrary that the shortcoming at hand caused by industrial silicone-filled breast implants is not attributable to the hospital is characterised by the very special situation: large-scale, sophisticated fraud by a party that has since gone bankrupt. The main responsibility lies with the legal entity Poly Implant Protheses and the care providers are too distant from the

producer's ruse and deceit to share its responsibility. The sophisticated nature of the fraud meant that the care provider did not have a knowledge advantage with respect to the patient. The large-scale nature of this fraud, the possible abundance of the claims as well as the bankruptcy of the fraudster mean that care providers would run a significant liability risk, against which they would only be able to obtain limited insurance coverage. For these reasons, the *Hoge Raad* apparently considers attribution of the failure in performance caused by the use of industrial silicone-filled breast implants to care providers unreasonable, applying the exception of the provision of art 6:77 DCC. That judgment is strongly case-related and therefore cannot be extrapolated to the attribution of shortcomings in other types of cases. In principle, an implant not filled with industrial silicone but with medical silicone that nevertheless has an increased risk of cracks and leaks common to such implants also constitutes a failure in performance, unless the user demonstrates that the implant was nevertheless state of the art at the time of use and thus did not constitute a failure. If the failure is established, this failure is in principle attributable to the debtor, unless this would be unreasonable given the circumstances of the case.

The added value of these judgments is that they nuance the risk distribution 32 provided for in art 6:77 DCC. Crucial in this respect is the broader context of the obligation at hand. In this approach, the question as to whether or not a failure in performance is to be established precedes the question whether or not this shortcoming is to be attributed to the obligator. First, it must be established whether or not a risk was unacceptably ignored before the issue of risk distribution arises. In the context of interpretation of the obligations at hand and judging what could have been expected from the debtor, there is room to also take into consideration individual circumstances, such as the content of the obligations the parties agreed upon and the justified expectations of the parties involved, in addition to objective circumstances regarding, amongst others, the notion of defectiveness of a device and the safety the general public is entitled to expect. This represents a more nuanced approach than art 6:77 DCC at first glance apparently suggests. The current understanding of art 6:77 DCC leaves room for performance commitment instead of a result commitment, depending of course on the content and scope of the contract at hand. The risk of using state of the art medical devices that only later turn out to be defective is not in principle borne by the care provider. A parallel with the development risk defence in the context of European product liability is to be noted. In most Member States, including the Netherlands, producers can free themselves from product liability if the defect of the product could not have been discovered due to the state of the scientific and technical knowledge at the time when the product in question was put into circulation.

5. HR 26 June 2020, ECLI:NL:HR:2020:1148, NJ 2020/293: Duty of Care of the Dutch State towards Dutch Women and Children in Northern Syria (*Women and Children/ State of the Netherlands*)

a) Brief Summary of the Facts

- 33 A number of women, of their own accord, travelled from the Netherlands to jihadist conflict zones in Syria and Iraq, controlled by the Islamic State (IS). Since the fall of IS, these women, a substantial number of whom are Dutch nationals, and their children, have been held in refugee camps in northern Syria, controlled by Syrian-Kurdish authorities, in appalling conditions. The women and children unsuccessfully called for the Dutch State to bring them back to the Netherlands, but the State refused.
- 34 The women then demanded a preliminary injunction, in a summary proceeding before the Preliminary Relief Judge of the court of first instance in The Hague, requesting that the Dutch State be ordered to bring them and their children to the Netherlands as soon as possible. The Preliminary Relief Judge ruled that the State has no jurisdiction in the refugee camps (and therefore no appeal can be made on the provisions of the ECHR or CRC), but that the State, on the basis of the general duty of care pursuant to art 6:162 DCC, is bound to care about the harrowing fate of the children and to offer them protection. Since protection cannot be realised in any other way, the State was ordered to make every effort to bring the children and, where appropriate, their mothers back to the Netherlands. Upon appeal, the Court of Appeal in The Hague ruled that the State neither has jurisdiction over these women and children, nor effective control in Syria and Iraq and thus a direct appeal to international human rights treaties was impossible. Nevertheless, the Court of Appeal stated that, assessing the basis of art 6:162 DCC and weighing the interests of the women and children on the one hand and the State's interests on the other, was called for (cf HR 23 September 1988⁹). This allows an indirect appeal, with limited effects of fundamental rights to further specify the duty of care pursuant to art 6:162 DCC. This balancing of interests resulted in the Court of Appeal's judgment that the State could reasonably refuse to make an active effort to remove the women and children from the refugee camps in Syria and Iraq.

⁹ NJ 1989/743.

b) Judgment of the Court

In cassation, 23 women and 55 (apparently, at the moment of the judgment as many as 56) children firstly argued that they fall under the jurisdiction of the (Dutch) State and that the State therefore has human rights obligations towards them under the ECHR and the International Covenant on Civil and Political Rights. Secondly, they argued that the State acts unlawfully pursuant to art 6:162 DCC by not bringing them back to the Netherlands and by not making any efforts to do so. According to the Court of Appeal, the requirement of jurisdiction has not been met, because the women and children are outside Dutch territory. Nor are the circumstances, put forward by the women and children, exceptional enough to justify that they, although they are not on Dutch territory, nevertheless fall under the jurisdiction of the Dutch State. The *Hoge Raad* agreed with the Court of Appeal's judgment. If the view of the women and children is to be followed, it would represent a general exception to the main rule that the jurisdiction of a State only extends as far as its territory. This does not preclude that the State has a special responsibility towards Dutch citizens, even where the State has no jurisdiction. The case of these women and children is closely related to questions of (national) security and foreign policy. The policy of the State in these areas to a great extent depends on political and policy considerations in connection with the circumstances of the case. This means that it is not for the court to make decisions in these areas. Moreover, courts must be cautious with regard to considerations made by the State. They can only verify whether the State weighed up all interests involved and whether the State has formed its policy in a reasonable manner. 35

In view of the State's (security) interests and the circumstance that the women travelled to the jihadist conflict zone of their own accord, the *Hoge Raad* ruled that the Dutch State had not acted unlawfully towards the women and children. Despite the compelling interests of women and children, the State of the Netherlands has no obligation to bring them back to the Netherlands and does not have to make any efforts to do so. 36

c) Commentary

An interesting aspect of this ruling is the consideration that the Dutch State has certain obligations based on the duty of care laid down in the general tort clause of art 6:162 DCC towards persons of Dutch nationality even in situations where jurisdiction is lacking. On the basis of art 1 ECHR, States are only obliged to guarantee the rights and freedoms as enshrined in the ECHR with regard to per- 37

sons under their jurisdiction. The *Hoge Raad* now makes it clear that, under Dutch law, even if a person does not come under the jurisdiction of the State, the State still has human rights responsibilities (cf *Mothers of Srebrenica* case, HR 19 July 2019¹⁰). Also welcome is the clarification that the *Hoge Raad* gives by indicating the road to follow: although human rights treaties do not apply directly, they can nevertheless play an indirect role in the balancing of interests for the application of the duty of care pursuant to art 6:162 DCC. It is noteworthy that the legitimacy test also focuses on interests of the State that may outweigh the human rights interests of individual citizens. That the security interests of the State outweigh the interests of the women and children in the present case is understandable, given the restrictedness of judicial review of decisions of the executive branch when it comes to national security and foreign policy. The Dutch State should not turn its back on these women and children, but the way to proceed in this matter is, in light of the numerous issues regarding safety and security which are at stake and within the boundaries of lawful behaviour, up to the government, not the court.

6. HR 9 October 2020, ECLI:NL:HR:2020:1603: Commencement of Short Limitation Period in a Case of Compensation Due to Inadequate Tax Advice (Professional Error of Tax Advisor)

a) Brief Summary of the Facts

- 38 A director and major shareholder of a construction company group sold his companies, but remained a shareholder of three companies within this group (these remain inactive, but contain considerable capital). These companies were unified into a private limited liability company (*Besloten Vennootschap*, BV) by a legal merger. On the advice of a tax advisor (hereafter: the consultant), the director emigrated to Switzerland and transferred the management of the companies to Malta (in order to minimise the tax burden). In 2005, the tax inspector nevertheless imposed retroactive taxes in connection with dividend profits amounting to almost 24 million Dutch guilders. With the assistance of the consultant, the client, without success, lodged a notice of objection to the assessment. The *Hoge Raad*, which gave its judgment on 27 February 2015, ruled for

¹⁰ ECLI:NL:HR:2019:1223. See also under no 4 above.

the tax inspector and made the tax assessments irrevocable. In 2015, the client filed a claim for damages against the consultant for providing inadequate tax advice. In these proceedings, he and the private limited liability company sought a declaration in court that the consultant had breached their contract for services by not acting as a reasonably skilled and reasonably acting service provider should act, that he should be liable for the damage they suffered as a result, and that the advisor is to be ordered to pay financial compensation for that damage. The advisor invoked prescription.

The court of first instance dismissed the claims and ruled that the short 39 limitation period of art 3:310 para 1 DCC commenced on the day after the decision (ie the rejection) on the notice of objection lodged with the tax inspector of 18 December 2008. The Court of Appeal upheld this judgment and ruled that the limitation period began even earlier, namely on the date on which the additional assessments and retroactive taxes were imposed (ie 14 December 2005).

b) Judgment of the Court

In cassation, the director opposed the judgment that the limitation period had 40 started to run on the date of the additional assessments. In accordance with art 3:310 DCC, a subjective prescription period of five years starts to run the day after the plaintiff is aware of both the damage and the liable person. According to (previous case law of) the *Hoge Raad*, unfamiliarity with or uncertainty about the legal assessment of the facts and circumstances relating to the damage and the person who is liable for damages does not stand in the way of the commencement of the limitation period of art 3:310 para 1 DCC. However, this legal assessment does not concern the knowledge and insight required when assessing the soundness of professional services rendered, contrary to what could be deduced from earlier rulings of the *Hoge Raad*. A lack of this knowledge or insight may mean that the injured party is still not sufficiently certain that his damage was caused by inadequate or incorrect services given by the service provider. In the same way as the correct knowledge or correct insight may be lacking with regard to the malpractice of, for example, medical service providers, this may be the case with regard to the actions of, for example, a tax or legal service provider. Furthermore, the *Hoge Raad* ruled that the period pursuant to art 3: 310 DCC starts to run only when the injured party becomes sufficiently certain – not necessarily absolutely certain – that his damage was caused by shortcomings or erroneous actions by the service provider. In view of the circumstances put forward by the plaintiffs, who pointed to the fact that the consultant was the expert in this matter and they depended on him, and that he

had assured them repeatedly that the inspector's position was incorrect and that he in due course would be proven right, the Court of Appeal should not, at least not without providing further grounds for its judgment, have ignored the claims of the director and the private limited liability company that they, in view of the reassuring statements of the consultant, were not yet sufficiently certain that the advisor had failed to comply with his obligations at the moments, established by the court of first instance and the Court of Appeal as starting moments for the limitation period for prescription. This must therefore be investigated further after referral of the case (to a different Court of Appeal).

c) Commentary

- 41 The *Hoge Raad* interprets the prescription periods in light of the principles of reasonableness and fairness. In previous case law, the *Hoge Raad* ruled that the subjective prescription period of five years only starts to run after the aggrieved creditor, being aware of the damage and the liable person, is truly able to file a claim for the compensation of the damage (HR 31 October 2003¹¹). A presumption of a claim of the creditor towards the debtor is insufficient, but, on the other hand, absolute certainty is not required; one should be sufficiently certain. What matters is the extent to which it is sufficiently foreseeable for a creditor that a claim for damages against this debtor exists. For the running of the subjective period, a plaintiff must not only be aware of the damage and the identity of the defendant, but also of the fact that someone made a mistake and that this mistake resulted in damage. Anyone who is sufficiently aware of damage as well as of the person who is liable for it, generally is also sufficiently aware of related legal assessments. Errors of law occur at a person's own risk, ie unfamiliarity or uncertainty with regard to the legal assessment of facts and circumstances is not relevant for Dutch law rules on limitation periods (HR 4 May 2018¹²). It would be contrary to the principle of legal certainty if the commencement of a prescription period depends on when the plaintiff seeks legal advice.
- 42 Nevertheless, in the present case, the *Hoge Raad* ruled that a legal assessment could be relevant in the case of prescription issues with regard to professional errors. But that is only so insofar as the legal assessment is needed to assess the services offered to become sufficiently certain that a mistake was made.

11 NJ 2006/112.

12 ECLI:NL:HR:2018:677, NJ 2018/239 (TMG-Staat).

After all, without knowing this, the plaintiff is not truly able to sue the liable person. Whereas unawareness or misunderstanding of the fact that liability law provides a remedy is in general not a justification for postponement of prescription, this is different in cases where the unawareness or misunderstanding is caused by the defendant himself due to malpractice. If a creditor has no reason to question the adequacy of services provided or if he has no reason to assume that a mistake was committed because of reassuring statements and actions of the service provider himself, there is not sufficient certainty that he has suffered harm as a result of a breach of contract and therefore the subjective prescription period starts to run. The *Hoge Raad* ruled that legal knowledge as to whether professional services rendered were sound, gained by further legal advice or a legal judgment given by a third party may be relevant for the commencement of the short prescription period of art 3:310 para 1 DCC. This ruling means that this starting moment becomes less predictable. The different outcomes in the various instances of this case illustrate that judges, in balancing the pros and cons of prescription and balancing legal certainty with justice may differ as to where the right balance lies. In our view, this judgment of the *Hoge Raad* is in line with earlier case law downplaying the harsh effects of the rules on prescription.¹³

7. HR 27 November 2020, ECLI:NL:HR:2020:1887: Limitation Period in the Event of Non-Registration of a Prenuptial Agreement in the Matrimonial Property Register

a) Brief Summary of the Facts

In 1972, a husband and wife got married. In 1992, a marriage contract was drawn up and entered into by notarial instrument. In 2011, the man was admitted to the statutory debt-rescheduling scheme. The husband's administrator, who was appointed to conduct his fiduciary administration, refused to place a claim of his wife on the list of recognised unsecured claims of competing creditors. The wife started legal proceedings to have her claim included on the list. During those proceedings, the administrator stated that the marriage contract of 1992

¹³ See for example HR 24 February 2017, Rechtspraak van de Week (RvdW) 2017/298, discussed in *Anne LM Keirse/Tom Bouwman*, Netherlands, in: E Karner/BC Steininger (eds), *European Tort Law (ETL) 2017 (2018)* 412, no 14 ff; HR 24 March 2017, NJ 2017/313, discussed in *Keirse/Bouwman* in: *ETL 2017 (supra)* no 22 ff; HR 22 March 2019, ECLI:NL:HR:2019:412, discussed in *ETL 2019, Van Dongen/Keirse* (fn 1) no 21 ff.

had not been filed in the matrimonial property register. The civil law notary had executed the prenuptial agreement deed, but subsequently had not registered it in the matrimonial property register, as a result of which, it did not have legal effect towards third parties (art 1:116 DCC). After this professional error that occurred in 1992 became known, the woman started proceedings in 2014 to hold the notary liable. There are two different starting points in Dutch prescription law that simultaneously also determine the length of the prescription period. There is the subjective period of five years, discussed in the previous section regarding case 6 (no 38), whose running is postponed until the day after the plaintiff is aware of both the damage and the person responsible for it. And there is the objective period of twenty years which starts to run following the moment that the cause of the damage occurred. This objective prescription period is decisive in the present case. Both the court of first instance and the Court of Appeal ruled that the woman's claim is time-barred due to the expiry of the objective twenty-year limitation period of art 3:310 para 1 DCC.

- 44 The Court of Appeal linked the commencement date of the twenty-year limitation period to the moment in which the civil law notary failed to fulfil his obligation to register and verify the prenuptial agreement. The woman lodged an appeal in cassation against this judgment, stating that the notary failed to fulfil his duty to register the deed for many subsequent years, since he could have followed up on his duties, could have discovered his mistake and could have repaired his omission. Referring to the notion of continuous tort and to a case decided in 2019 and discussed in our report in the previous Yearbook,¹⁴ she argued that her claim had not yet prescribed.

b) Judgment of the Court

- 45 The *Hoge Raad* first pointed out that art 3: 310 para 1 DCC stipulates that a right of action to be compensated for damage becomes time-barred in any event on the expiry of twenty years following the event which caused the damage. Subsequently, the *Hoge Raad* referred to the parliamentary history and consolidated case law expressing that legal certainty is the essential basis of this limitation period. It starts to run upon the occurrence of the damage causing event, even if the injured party is not aware of the existence of his claim (HR 31 October 2003)¹⁵, if it is as yet uncertain whether there will be damage, or if the damage

¹⁴ *Van Dongen/Keirse* (fn 1) no 18 ff.

¹⁵ ECLI: NL: HR: 2003: AL8168 (NJ 2006/112).

only came to light at a later date (HR 28 April 2000¹⁶). Legal certainty with regard to the twenty-year statute of limitations in particular demands a starting point fixed by objective standards. According to the *Hoge Raad*, the objectively given point in time when the event, which may consist of an act or omission, causing the damage occurred is decisive (HR 28 April 2000¹⁷). The starting time does not depend on the personal circumstances of the creditor (HR 25 June 1999¹⁸). In this case, the *Hoge Raad* ruled that the starting moment of the long limitation period is to be set at the last moment in which the civil law notary could still have arranged for the deed to be registered, without failing to fulfil his professional obligation and thus breaching the contract. This means that the prescription period of twenty years started to run in 1992 and had expired long before she filed her claim against the notary.

c) Commentary

The *Hoge Raad* ruled that the fact that it had been possible for a long time to register the prenuptial agreement and the circumstance that the notary thus could have prevented the damage long after the first moment of the shortcoming in 1992 do not preclude the starting point for the limitation period from being set at the last moment the notary could have registered the prenuptial agreement without failing to fulfil his obligations and breaching his contract. Thus, the starting point of the prescription period is not postponed if the damage can be prevented at a later date after the first moment of breach of contract. In Dutch prescription law, the cause of action and commencement of the objective prescription period is generally a sudden occurrence of a tortious act. Only under specific circumstances, where the event consists of a succession of facts with the same cause, does the prescription period start to run after the last fact or, in case the damage is caused by a defective construction, the prescription period only starts to run as soon as the defective and dangerous condition that caused the damage has ceased to exist. However, in this case, the cause of action was a one-time event, namely the omission of the notary to register the marriage contract. 46

16 ECLI: NL: HR: 2000: AA5635 (NJ 2000/430).

17 ECLI: NL: HR: 2000: AA5635 (NJ 2000/430).

18 ECLI: NL: HR: 1999: ZC2934 (NJ 2000/16).

8. Personal Injury

- 47 The most significant developments of last year in the field of personal injury have been summarised above. Most notable is that the Act on the Settlement of Mass Damages Claims in a Collective Action (*Wet afwikkeling massaschade in collectieve actie*, WAMCA), which entered into effect on 1 January 2020. This new Law allows individuals to claim compensation in a collective action. Previously, individual victims had to start separate procedures for compensation if parties did not reach a collective out-of-court settlement after a judgment pursued by a collective interest group, finding that the defendant is liable for the damage it caused. The goal of the WAMCA is to promote more effective and efficient collective compensation, both in the fields of personal injury and material damage.
- 48 The settlement of cases concerning personal injury, both in the context of mass and individual claims, has been a matter of concern for a much longer period of time. In the media, in the House of Representatives, in the personal injury sector and in the literature, there have been lengthy discussions about the settlement of personal injury cases and the way in which that process can be improved. There was a need for broad research into the characteristics of long-term personal injury cases, so that it becomes clearer where improvements could be sought. The Utrecht Centre of Accountability and Liability Law (UCALL) started such a study in December 2018. It was commissioned by the Personal Injury Council at the request of the Ministry of Justice and Security. This empirical-legal study aims to identify the most important characteristics of personal injury claims that have been pending for two years or more, and have therefore become long-running cases. Limiting the duration for settling the personal injury claim is of great importance for all parties. The main conclusion is that, in most cases, there are several reasons why a long-term case has not yet been settled after two years, such as the fact that the final medical conditions of the victims are still uncertain and disputes concerning causality, the extent of the damage and the expected attitude and collaboration of the parties. There is not one single reason or circumstance to be named as the dominant characteristic that occurs in the majority of the cases. Mostly a confluence of events and circumstances can be pointed out.

C. Literature

1. *E Bauw/J Biezenaar/J van Mourik, Commentaar & Context Wetgeving collectieve actie [Commentary & Context Legislation collective action] (Boom juridisch 2020)*

The legal rules for collective action have been amended and supplemented several times since their introduction in 1994. The entry into effect of the Act on the Settlement of Mass Damages Claims in a Collective Action (on 1 January 2020 is the most far-reaching. It opens the possibility of collective compensation actions before the courts, while the previous Collective Settlement of Mass Claims Act (*Wet collectieve afhandeling massaschade*, WCAM) allowed for binding collective settlements. A complex set of interrelated rules has now been introduced into the Dutch Civil Code and the Code of Civil Procedure. This book provides insights into the content and background of the current legal regulations on this matter. Relevant passages from parliamentary history are presented for each article, complemented with a commentary by the authors, with references to other sources, such as relevant case law. 49

2. *C van Dam, Aansprakelijkheidsrecht [Liability law] (Boom juridisch 2020)*

The third edition of this handbook presents a complete overview of non-contractual liability law and the law of damages. The book includes the latest developments in legislation (such as the Act on the Settlement of Mass Damages Claims in a Collective Action) and case law (such as the judgments discussed in ETL 2019¹⁹) as well as the relevant developments in EU law (such as the implemented EU directive on the right to compensation for harm caused by infringements of Union competition law). Other current topics mentioned are: Srebrenica, Chrom-6, Q-fever, football player Appie Nouri, State lottery statements on Facebook, Twitter and Instagram, self-driving cars, robots and algorithms. One of the new chapters in this edition deals with the obstacles an injured party faces in order to enforce a claim, in particular due to procedural and material inequality between the injured party and the wrongdoer. The various 50

¹⁹ *Van Dongen/Keirse* (fn 1) no 2.

measures taken in recent years to reduce these obstacles, such as the reimbursement of extra-judicial costs, the partial dispute procedure and the expanded possibilities within criminal proceedings are also discussed.

3. *GM Veldt, Europese productnormen en privaatrechtelijke normstelling [European product standards and private law standard setting] (Wolters Kluwer 2020)*

- 51 This dissertation offers a broad perspective on current non-food product safety law and its interaction with private law. It goes beyond product liability law, discussing also numerous related private law provisions. The research performed by Veldt provides valuable insights for anyone concerned with product safety standards. The thesis answers the central research question of how European product standards affect the private law duties that economic operators in the supply chain owe to consumers, to each other and to competitors. What is the meaning of European product standards to the setting of standards in private law? When is a product standard only one of the relevant circumstances in the formulation of a private law standard? When does a product standard largely cover a private law standard in the sense that the product standard forms the legal starting point? And on what circumstances and factors does this depend? These questions are central when it comes to European product standards and the setting of standards in private law. This book provides answers from a European legal institutional as well as from a private law perspective.

4. *LA Bach Kolling, Vaststelling van aansprakelijkheid van bestuurders: een stappenplan [Establishing directors' liability: a roadmap] (Celsus Juridische Uitgeverij 2020)*

- 52 Although directors' liability has gained much attention in literature and case law, there still is a lack of clarity about the legal system related to that liability. In view of the layered structure of the Civil Code, the author of this book examined whether and in what way directors' liability can be placed in the system of general contractual and extra-contractual liability law. In this way, the author wants to provide more clarity as to when and on what grounds a director can be held personally liable. By using such a systematic approach, grey areas can be more easily addressed and resolved, which helps to refine standards that apply to directors' liability. In addition, doctrines that apply to general contractual

and extra-contractual liability law offer solutions for bottlenecks in the determination of directors' liability.

5. *JM van Dunné, Schadevergoeding voor mijnbouwschade door bodemdaling en aardbevingen. Het Dossier Groningen Publicaties 2002–2020 [Compensation for mining damage resulting from subsidence and earthquakes. The Groningen Dossier Publications 2002–2020] (Uitgeverij Paris 2020)*

This book consists of a collection of earlier publications on financial compensation for mining damage from an author who was involved as a consultant in developments concerning the Mining Act 2003, its amendment in 2015 (reversal of the burden of proof), the WAG cs/NAM procedure, and the decision of the Court of Appeal Leeuwarden 2018 (loss of housing value). The book provides an instructive representation of law-making in this field as well as insights into the possibilities of a civil law claim for financial compensation or repair of mining damage under current liability law. Many options have not yet been applied in practice. Mining is also carried out outside the city of Groningen (oil, gas, salts) and the rule of art 6:177a DCC is in such cases not applicable. The author illustrates that knowledge of the geological context in combination with case law in related areas has added value in this respect. 53

6. *D Eijsermans-van Abeelen, De uitkering van massaschadeclaims [Disbursement of mass damage claims], dissertation Tilburg University (Proefschriftmaken 2020)*

This dissertation describes the actual settlement of mass claims in the Netherlands. It focuses on the final phase of the WCAM-trajectory, in which the compensation scheme, agreed upon in the settlement agreement, is implemented. This implementation phase is referred to in this study as the distribution process. The Collective Settlement of Mass Claims Act, part of the Dutch system for collective settlements of mass damage, is seen by many as an efficient way to collectively settle (international) mass damage. Very little, however, is known about the distribution process that follows the universally binding settlement agreement. Although the distribution plan is part of the settlement agreement, 54

information about the distribution process and what takes place during this process is often not publicised and there is no (legal) obligation to do so. This lack of information about the benefits and therefore also the actual settlement of mass claims raises questions. These may include questions concerning the party or parties charged with the enforcement of a judgment and the associated settlement agreement, the role of the claim foundations in this process, the manner in which the amount to be paid out is determined per individual victim (the claiming rate), the (assets) management of the settlement funds or, otherwise established, total amount eligible for distribution. The thesis also presents information on the occurrence of the mass damage, the conclusion of the settlement agreement, the termination of the distribution process, the handling of unknown claims, the handling of any remaining amount, the specific activities and supervision during the distribution process and the associated costs that may or may not be charged to the settlement fund and thus the claiming rate. The study shows that several aspects of the distribution process can be further professionalised and standardised. The author therefore proposes several amendments and additional provisions.

7. *R Rijnhout/EGD van Dongen/DW van Maurik/I Giesen, Langlopende letselschadezaken. Een empirisch juridisch onderzoek naar kenmerken van letselschadezaken die niet binnen twee jaar zijn afgesloten [Long-running personal injury cases. An empirical legal study of characteristics of personal injury cases that are not closed within two years] (Boom juridisch 2020)*

- 55 In 2019 and 2020, the Utrecht Centre for Accountability and Liability Law (UCALL) conducted research into long-running personal injury cases. The central question was: what are the characteristics of personal injury claims that have not been closed within a period of two years? Several methods to collect data, such as literature study, the study of actual cases and the use of questionnaires, provided a better insight into the characteristics of these cases. Perceptions of victims as well as of professionals working in the personal injury field were also included in this study. The main conclusions are that, in most cases, there are several reasons why cases are not settled after two years and that it does not come down to one particular reason or circumstance that occurs in the majority of the cases. The researchers present a number of interesting reflections on the characteristics of personal injury cases that have been examined.

8. *K Maes, Secundaire aansprakelijkheid. Een rechtsvergelijkend onderzoek naar de reikwijdte van de zorgplicht van beheerders van private ruimten* [Peripheral tortfeasor liability. A comparative law study into the scope of the duty of care of private area owners] (Boom juridisch 2020)

In Dutch case law, injured parties, instead of suing the immediate (actual) tortfeasor, sometimes hold the so-called secondary or ‘peripheral tortfeasor’ liable for damage caused. The latter is blamed for not having prevented the actions by the immediate tortfeasor that caused the damage. In literature and case law, there is some level of restraint with regard to the assessment of the liability of peripheral tortfeasors. In this dissertation, the author examines the scope of the duty of care of private area owners as peripheral tortfeasors, including a comparison with the liability of peripheral tortfeasors in American law. Inspired by the American idea of ‘several liability’, a partial system is developed as an alternative legal concept for the current Dutch joint and several liability system. 56

9. *LABM Wijntjens, Als ik nu sorry zeg, beken ik dan schuld? Over het aanbieden van excuses in de civiele procedure en de medische tuchtprocedure* [If I say sorry now, will I plead guilty? About apologising in the civil and medical disciplinary procedure] (Boom juridisch 2020)

Although receiving apologies is experienced by victims as very valuable, it has been argued that apologies can lead to negative legal consequences for the provider. However, there is still much uncertainty about the legal consequences. This dissertation examines the role of apologies in civil and medical disciplinary proceedings. To this end, this dissertation involves a literature search, an observational and an interview study, and an extensive case law study. The results nuance the legal obstacles to offering an apology identified in the literature. Furthermore, the author shows that the obstacles that remain can be removed in a simple manner, and states that the legal risks of giving apologies are tempered by the positive effects of apologising. This study offers new insights into the way in which legal proceedings can be set up so that they meet the immaterial interests of victims. This study also provides more clarity for norm viola- 57

tors/wrongdoers, litigation representatives and insurers, by stating under what circumstances apologies can be safely offered.