British Institute of International and Comparative Law

Global Perspectives on Corporate Climate Legal Tactics: Netherlands National Report

Professor Dr Elbert de Jong | Daan van Maurik LL.M

Version 1.0 February 2024

British Institute of International and Comparative Law

Mission Statement

The British Institute of International and Comparative Law exists to advance the understanding of international and comparative law, and to promote the rule of law in international affairs.

Vision

To be a leading research institute of international and comparative law and to promote its practical application by the dissemination of research through publications, conferences and discussion.

Table of Contents

Mission Statement 2

Vision 2

Executive Summary 5

Acknowledgements 7

1. Causes of Action 8

A. Climate Change Law/Environmental Law Statutory Provisions 8

B. Human Rights Law 8

i. Urgenda v. the Netherlands and the meaning of the ECHR 10

ii. Human rights and horizontal climate change litigation 12

iii. Soft law in horizontal climate change litigation 12

iv. Legislative initiatives 14

C. Tort Law 15

i. Public and private nuisance 16

ii. Tort of negligence 18

iii. Negligent or strict liability for failure to warn or inform 24

iv. Trespass 25

v. Impairment of public trust resources 25

vi. Fraudulent misrepresentation 25

vii. Civil conspiracy 25

viii. Product liability 25

ix. Insurance liability 26

x. Unjust enrichment 27

xi. Causation 27

D. Company and Financial Laws 30

E. Consumer Protection Laws 31

F. Fraud Laws 33

G. Contractual Obligations 33

H. Planning and Permitting Laws 33

I. Other Causes of Action 34

2. Procedures and Evidence 35
A. Actors Involved 35
i. Claimants 35
ii. Defendants 35
iii. Third-party intervenors 35
iv. Potential claimants and defendants 37
B. Elements of the Procedural Framework 37
i. Standing 37
ii. Justiciability 40
iii. Jurisdiction 40
iv. Group litigation / class actions 40
v. Apportionment 40
vi. Costs of proceedings 41
C. Defences 41
i. The autonomy of tort law 41
ii. Fair share, drop in the ocean and ineffectiveness 42
iii. The role of the legislator 44
iv. The relationship between public and private law: permit defences 45
v. Societal interests and socially beneficial conduct 46
D. Evidence 47
E. Limitation Periods 49
3. Remedies 51
A. Damages 51
B. Injunctive relief 51

Executive Summary

In recent years, the Netherlands has proven to be an important legal system in the context of climate change litigation. For some, it is even a forerunner. To a great extent this is because of the success of the claimants in the case of *Urgenda v. the Netherlands* (hereafter: *Urgenda*). In this vertical climate case, the court ordered that the Dutch State must reduce its greenhouse gas emissions with 25% by 2020 compared to its emissions levels in 1990. Another example of vertical climate change litigation involves a case in which Greenpeace unsuccessfully asked for a court order to oblige the State to attach stricter emissions reduction conditions to the financial support that KLM Royal Dutch Airlines received during the corona pandemic. These cases fall within a broader development in which civil law based public interest litigation is being used to counter alleged government failures in, among other things, protecting the living environment.[1]

The case *Milieudefensie v. Royal Dutch Shell* is an example of, for the claimants, successful horizontal climate change litigation. The case is pending on appeal, but because of the success of Milieudefensie and the uniqueness of the court order, it already received considerable attention worldwide (see e.g., Part 1 C ii, *Unwritten standard of care in the Shell case*). Another example is a case of Fossielvrij NL, an NGO, against KLM Royal Dutch Airlines, where the company is sued for alleged greenwashing. This case is pending at the District Court of Amsterdam (see e.g., Part 1 E). In January 2024, Milieudefensie announced that it will start mitigation litigation against ING, a Dutch bank (see Part 1 C ii, *The case of Milieudefensie against ING*).

Although some (potential) impactful climate change litigation has taken place or is still taking place in the Netherlands, we are only at the beginning of a new development and the law has yet to be developed and crystallized. In other words, Dutch civil law is still evolving in the context of climate change and the legal state of the art is not settled, and has to mature further in the upcoming years. Given this state of the art, in this report we explore the *potential* links with Dutch liability law and climate change litigation against corporations (i.e., horizontal climate change litigation).

---

[1] One could also say that civil law is used to regulate risks and civil courts are asked to operate as risk regulators. See E.R. de Jong, 'Private Law at the crossroads: judicial risk regulation in the context of health and environmental risks', in: M. Dyson (ed.), *Regulating Risk through Private Law*, Intersentia 2018, p. 375-398. See in Dutch L. Enneking & E.R. de Jong, 'Regulering van onzekere risico's via public interest litigation?', *Nederlands Juristenblad* 2014/23, pp. 1542-1551. See about this issue in relation to Urgenda M.A. Loth, 'The Civil Court as Risk Regulator: The Issue of Its Legitimacy', 9 *European Journal of Risk Regulation* 66 (2018).

Most likely there will be more horizontal climate change litigation in the near future.[2] In particular, the responsibilities and liabilities of financial institutions are in the spotlights,[3] which is illustrated by the recent announcement of a case against ING.

Like many systems, Dutch liability law can be (roughly) divided into fault liability and strict liability. In particular Article 6:162 of the Dutch Civil Code (hereafter: CC), which lays down the rules on fault liability, is important in the context of climate change litigation. Further, the Netherlands is part of the European Union, and European law undeniably has an important influence on Dutch private law. In addition, the Netherlands has a monistic legal system: in vertical climate change litigation, international law (if certain conditions are met) has direct effect and takes precedence over national law (cf. Articles 93 and 94 of the Dutch Constitution). European and international law can also be of relevance in horizontal litigation. Moreover, the use of soft law in determining, inter alia, the applicable standard of care, is quite accepted in Dutch tort law. Although we address these sources of law separately, Dutch climate change litigation can only be understood when one views these several sources of law in connection with each other.[4] This also holds true for the rules on standing in public interest litigation, which are, compared to other systems, relatively favourable to the claimants (see Part 2 B, i).

The most prominent cases are those in which an actor is sued for its allegedly unlawful emissions and unlawful (policy) failure to reduce these emissions. Other proceedings deal with misleading information about the environmental impact of certain products or services. Litigation about adaptation is not pending at this moment. Also, litigation on information and reporting duties on (financial and liability) risks that a company runs because of climate change, as well as on the measures that the company takes to reduce those risks, is not available, but is expected.

---

2 E. Brans & K. Winterink, 'Aansprakelijkheid van particuliere ondernemingen voor schade door klimaatverandering', in: C. Backes, E. Brans & H-K Gilissen (red.), *2030: Het juridische instrumentarium voor mitigatie van klimaatverandering, energietransitie en adaptatie in Nederland*, Boomjuridisch 2020, p. 79-96; E.R. de Jong, 'Klimaataansprakelijkheid van private ondernemingen', *NTBR* 2021/1. Former Advocate General Spier already for years predicted the rise of vertical and horizontal climate change litigation. He can be seen as one of the most important thinkers, if not the most important, in Dutch tort law scholarship and in particular in relation to climate change accountability and liability. He extensively published on this matter, and we can warmly recommend his latest book: J. Spier, *Climate Litigation in a Changing World*, The Hague: Eleven 2022. See also E.R. de Jong & J. Spier, 'Climate Change. A Major Challenge and a Serious Threat to Enterprises', *Dovenschmidt Quaterly* 2013(1), p. 34-40.

3 E.R. de Jong, 'De dreigende werking van klimaataansprakelijkheid van financiële instellingen', *NTBR* 2022/4, afl. 2; P. Heemskerk & R.H.J. Cox, 'Bancaire klimaataansprakelijkheid onder invloed van duurzaamheidswetgeving', *MvV* 2023, p. 93-106; R. van den Bosch & P. Brouwer, 'Klimaat & Duurzaamheid, uitdagingen en dilemma's voor banken', *NJB* 2021/424, about the implications of and challenges for banks that come along with the increase of regulations in the context of sustainability. See also: B.W.G. van der Velden, T. Sweerts & S. Aarts, 'Procederen over duurzaamheid in de bancaire sector', in: F.P.C. Strijbos e.a., *Duurzaam bankieren (Onderneming en Recht nr. 143)*, Deventer: Wolters Kluwer 2023, ch. 14.

4 See in relation to *Urgenda*; R. van Gestel & M. Loth, 'Urgenda: roekeloze rechtspraak of rechtsvinding 3.0.?' *NJB* 2015/1849.

In terms of remedies, Dutch law allows for both claims seeking compensation for climate change damage (compensatory litigation) and for claims seeking an injunction to stop or to prevent the (threat of an) infringement of a legal obligation. Here one could think of an injunction to reduce climate change related risks by obliging actors to reduce emissions (preventive litigation). For the latter category of cases, Article 3:296 CC is the basis. Knowledge of that provision is necessary to understand *Urgenda* and the climate case against Shell. To date, in the Netherlands we have not seen compensatory horizontal climate change litigation.

Lastly, both *Urgenda* and the *Shell* case have been published in English on rechtspraak.nl. Please see: http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2019:2007 (*Urgenda*) and https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2021:5339 (*Milieudefensie et al. v. Royal Dutch Shell*).[5] Below, we will only address some essential points of both cases. Although *Urgenda* is a vertical case, it contains elements that are relevant in the context of horizontal climate change litigation. We therefore also touch upon some aspects of *Urgenda*.

Acknowledgements

Daan van Maurik BSc, LL.M is a PhD candidate at the Utrecht Centre for Accountability and Liability Law, Utrecht University. Prof. Elbert de Jong is professor of Private Law at Utrecht University. He is also the co-director of the Utrecht Centre for Accountability and Liability Law and a deputy judge at the Court of Appeal of Arnhem-Leeuwarden.

The authors would like to thank the following members of the Expert Group for the Netherlands for their valuable comments and suggestions on earlier versions of this report: Dr. Tim Bleeker, Dr. Anneloes Kuiper and Marieke Palstra LL.M.

[5] All websites have been assessed on the 14th of January 2024.

1. Causes of Action

A. Climate Change Law/Environmental Law Statutory Provisions

In 2021, the European Climate Law (EU) 2021/1119 was adopted, which lays down the objectives of a climate-neutral European Union by 2050, and 55% greenhouse gas emissions reduction by 2030, compared to 1990 levels. The European Climate Law is further concretized through a set of further legislation: 'Fit for 55'. This package consists of several laws that aim to ensure a fair, competitive, and green transition by 2030.

The Dutch Climate Law has been in force since 2019. Since 2023, the law aligns the Dutch reduction goals with the European climate goals. According to Article 2 section 1, the law provides a framework for the development of policies aimed at irreversibly and incrementally reducing greenhouse gas emissions in the Netherlands to limit global warming and climate change. The law sets as goals that the Netherlands:

a. reduces net greenhouse gas emissions to zero by 2050 at the latest, and
b. aims for negative emissions of greenhouse gases after 2050.

The law stipulates that to achieve this target by 2050, the government shall strive for a 55% reduction in greenhouse gas emissions by 2030, compared to the emissions levels of 1990, and full carbon-neutral electricity production by 2050. The law also requires the government to implement climate policy plans aimed at achieving these objectives for the next ten years (Article 3 section 1). These policy plans have to be reviewed and determined each five years (Article 4 section 1). The law does not contain specific provisions on corporate responsibility for climate change (e.g., reduction responsibilities or specific sectoral targets), nor does it contain provisions on corporate accountability or liability for climate change.

What the implications of these laws are for corporate climate accountability is still unknown. However, it is conceivable that they also have implications for legal actions to hold corporations accountable for their contribution to climate change and for mitigating climate damage (see also the link with the CSDDD, Part 1 B iv).

B. Human Rights Law

Introduction: general framework

To date, the Netherlands has no specific legislation on corporate responsibility and liability for the protection of human rights. Nonetheless, provisions of international human rights law might be relevant in climate change litigation, and then in particular for determining the applicable standard of care. In general, a distinction can be made between (at least) four types of relationships between international human rights provisions and national private law.

1) First, there is the possibility that international human rights laws have direct effect and hence provide an independent legal source on which the parties can base their claim (Article 93 of the Dutch constitution). Also, provisions of international human rights law that have direct effect, take precedence over provisions of national law (Article 94 of the Dutch constitution). In *vertical* climate change litigation this is an important category (see e.g., *Urgenda*) given the monistic nature of the Dutch legal system.[6] In horizontal climate change litigation the direct application of international human rights law is not likely.
2) Second, human rights provisions can also be used to interpret and/or specify open norms of national law, such as the rules on negligence or nuisance. In this situation, the legal basis for the applicable standard of care remains the rule of national tort law. The same, more or less, applies to soft law provisions (see below Part 1, B iii). This relationship between national private law and international human rights law, and soft law, is clearly present in the *Shell* case, and is probably the most relevant in the context of climate change litigation against corporations. Thus, in general, it is possible that, for instance, Articles 2 and 8 of the European Convention on Human Rights (hereafter: ECHR) play a role in specifying the duty of care in horizontal climate change litigation. What this role exactly looks like, and what the additional value of invoking human rights provisions is, is however unclear at this moment.
3) Third, some legal systems have separate legal provisions in their civil code on liability for the violation of human rights. To date, as has been stressed above, the Netherlands has no (specific) legislation on corporate responsibility and liability for human rights and/or climate change. However, at both the national and the European level legislative initiatives are undertaken that are relevant in this regard (see below Part 1, B iv).
4) Lastly, it is possible that the protection offered by human rights provisions is already offered by rules of national tort law or that national tort law even offers a higher level of protection.[7]

---

[6] See about the direct effect of Articles 2 and 8 ECHR in *Urgenda* also: E.R. de Jong, 'Rechterlijke risicoregulering en het EVRM: over drempels om de civiele rechter als risico-reguleerder te laten optreden', *NTM/NJCM-bulletin* 2018/2, p. 207-231.

[7] See about this latter point C.C. van Dam, 'Verantwoordelijkheid en aansprakelijkheid voor leveranciers en afnemers', *NTBR* 2022/45; C.C. van Dam, 'Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights', *Journal of European Tort Law*, vol. 2, no. 3, 2011, pp. 221-254. See about the interaction between private law and soft law also L.F.H. Enneking, 'Van beleid naar gepaste zorgvuldigheid in mondiale waardeketens. Over de wisselwerking tussen due diligence wetgeving en het privaatrecht', *NTBR* 2022/43.

i. Urgenda v. the Netherlands and the meaning of the ECHR

Although *Urgenda* was a vertical climate case, the reasoning in *Urgenda* provided a blueprint for some elements of the reasoning in the *Shell* case. We therefore address the main features of *Urgenda*.

Recent cases against the government regarding liability for health and environmental risks, have often invoked the doctrine of positive obligations as enshrined in Articles 2 and 8 ECHR. Article 2 ECHR protects the right to life, and Article 8 ECHR the right to respect for private and family life. The doctrine of positive obligations contains that, where appropriate, the government must proactively take measures to prevent (threatened) violations of the rights protected by, inter alia, Articles 2 and 8 ECHR.[8] In some (but by no means all) cases, a violation of this doctrine has been established. However, in general this doctrine is applied with judicial restraint and in a significant number of cases where this doctrine has been invoked by the claimants, no violation was established. Examples are proceedings about government policies in the context of the risk of a Q-fever epidemy,[9] asbestos,[10] tobacco,[11] and air pollution.[12]

In *Urgenda*, Articles 2 and 8 ECHR were successfully invoked. Also, Article 13 ECHR played a significant role in the court's reasoning. Based on these articles, the court of appeal of The Hague had ordered the Dutch State to reduce its greenhouse gas emissions by at least 25% by the end of 2020 compared to 1990 levels. The Supreme Court rejected the State's appeal in cassation. Crucial in *Urgenda* firstly is that Urgenda and the State agreed that there is a genuine threat of dangerous climate change in the coming decades (see about this more in depth in the section on evidence, Part 2, B). This threat will jeopardize the lives, welfare and living environment of many people over the world, including the Netherlands. It was also an established fact that some of these consequences are already occurring. The doctrine of positive obligations as developed under Articles 2 and 8 ECHR was the direct basis for the reduction order in the ruling of the court of appeal of The Hague, and consequently the Supreme Court assessed the cassation appeal under the ECHR framework (and not on the basis of the tort of negligence, which was considered by the first instance court).

In *Urgenda* the Supreme Court held that a contracting state to the ECHR is obliged to take suitable measures if a real and immediate risk to people's live or welfare exists, and the State is aware of those risks. Interesting is the (implicit) interpretation of the requirements 'real' and 'immediate'. The court, in our opinion rightly, seems to connect the term 'real' with the level of certainty and likelihood that the litigious climate risks will materialize. The

---

[8] See on this doctrine and its relevance for Dutch tort law: E.C. Gijselaar & E.R. de Jong, 'Overheidsfalen en het EVRM bij ernstige bedreigingen voor de fysieke veiligheid', *NTBR* 2016/6, p. 36-45.

[9] District Court The Hague 25 January 2017, ECLI:NL:RBDHA:2017:587, *JA* 2017/42 comm. J.H.G. Verweij-Hoogendijk (*Q-koorts*).

[10] Supreme Court 2 June 2017, ECLI:NL:HR:2017:987, *NJ* 2017/372, comm. J. Spier.

[11] District Court The Hague 9 November 2015, ECLI:NL:RBDHA:2015:12746 (*Tabakslobby*).

[12] Court of Appeal The Hague 7 May 2019, ECLI:NL:GHDHA:2019:915, *NJ* 2019/352.

term 'immediate' seems to refer to the degree of (un)avoidability of the risks. In addition, the court reasoned that the obligation to take preventive measures also applies when it comes to environmental hazards that threaten large groups or the population as a whole, even if the hazards will materialize over the long term. This is interesting, since most of the case law of the European Court of Human Rights (here after: ECtHR) on Articles 2 and 8 ECHR relates to situations where there are threats to individual persons or a delineated/specified group of individuals. The court further reasoned that while Articles 2 and 8 ECHR are not permitted to result in an impossible or disproportionate burden being imposed on a state, those provisions do oblige the State to take measures that are actually suitable to avert the imminent hazard of dangerous climate change as much as reasonably possible.

With respect to the partial responsibility of the State, the court first reasoned that the Netherlands is a party to the United Nations Framework Convention on Climate Change (UNFCCC), which is based on the premise that all members to the treaty must take preventive measures. It further reasoned that each country is responsible for its own share, and that the State cannot escape this responsibility by arguing that its emissions are limited, and a reduction order would have little impact. Articles 2 and 8 ECHR were also important for this reasoning, since according to the court there is a grave risk that dangerous climate change will occur and endanger the lives and welfare of many people in the Netherlands. Also, Article 13 ECHR played a curial role in this reasoning. The Supreme Court held that national law must offer an effective legal remedy against a violation or imminent violation of rights that are safeguard by the ECHR. I.e., national courts must be able to provide effective legal protection. Accepting the defences brought forward by the State would be at odds with this requirement. This reasoning, i.e., the need to offer an avenue for effective legal protection, was essentially also followed by the district court of The Hague in the *Shell* case (see Part 2 C).

Lastly, the court held that the constitution requires Dutch courts to apply provisions of the ECHR.[13] Courts thus have a mandate to offer legal protection, also against the government. This legal mandate is according to the Supreme Court an essential element in a democratic state under the rule of law. Yet, the Supreme Court adopts a reticent attitude. The reduction target imposed on the State is limited to the lower limit of 25% (Urgenda also asked for a higher reduction target). Also, it is up to the State to determine which specific measures it takes to comply with the order.

[13] In this respect, it is also important to note that the fact that Urgenda itself cannot complain to the ECtHR given article 34 ECHR, because it is not a potential victim of the threatened violation of 2 and 8 ECHR, does not alter Urgenda's rights to invoke these articles on the basis of Dutch law. The applicability of the ECHR in the Dutch national legal system is determined by the Dutch constitution system.

ii. Human rights and horizontal climate change litigation

In the context of corporate climate change litigation, human rights provisions such as Articles 2 and 8 ECHR, might also be of relevance. Although human rights provisions most likely do not have a direct legal effect in horizontal litigation (see above), it is possible that they are used to specify the duty of care that a corporation has on the basis of national law. For instance, in the *Milieudefensie v. Royal Dutch Shell* case, the court reasoned that the right to life and the right to respect for private and family (Articles 2 and 8 ECHR and Articles 6 and 17 of the International Covenant on Civil and Political Rights (hereafter: ICCPR)), indirectly also influence the assessment of Shell's climate change policies, together with a mix of international soft law instruments laying down human rights obligations for corporations. It further reasoned that corporations have an autonomous obligation to protect human rights: given the fundamental interest of human rights and the value for society they embody, human rights play a role in the legal relationship between Milieudefensie and Shell. Therefore, the court applies human rights and the values they embody in its interpretation of the unwritten standard of care. From there on, the reasoning resembles parts of the *Urgenda* reasoning, stipulating that Articles 2 and 8 ECHR offer protection against the consequences of dangerous climate change caused by greenhouse gas emissions. According to the court, the serious and irreversible consequences of dangerous climate change in the Netherlands and the Wadden region, pose a threat to the human rights of Dutch residents and the inhabitants of the Wadden region. The reasoning in *Urgenda* regarding Article 13 ECHR essentially also has been followed by the court: the court reasoned that it is the task of civil courts to provide legal protection when legal obligations are at risk of being breached and to provide an effective legal remedy against that (future) breach, even if other actors are partly responsible for causing dangerous climate change and (also) fail to take preventive measures (see Part 2, C).

iii. Soft law in horizontal climate change litigation

International soft law contains responsibilities for corporations to respect and protect human rights. In the *Shell* case, these provisions played an important role in specifying the national law provision on the tort of negligence (Article 6:162 CC, see below Part 1, C ii), in particular in relation to the scope of the responsibilities of Shell. That is, soft law provisions in particular provided the basis for accepting the obligation to also reduce scope 2 and scope 3 emissions.

The use of soft law in specifying, for instance, the tort of negligence is generally accepted in Dutch tort law; examples can be found in various contexts ranging from liability of legal professionals, medical liability, and construction liability. In that respect, the use of soft law in the *Shell* case *as such* is not surprising, although in literature there

is debate about the question whether these specific soft law provisions can be invoked.[14] Questions, however, arise in relation to the content and the scope of the duty of care that the court accepted on the basis of soft law (i.e., the obligation of effort of Shell to reduce scope 2 and scope 3 emissions), and the legal strength of the soft law documents that provided the basis for this part of the judgment.

Although, the use of soft law is quite common and accepted in Dutch civil law, an explicit legal framework for determining which, when and to what extent soft law can be used when specifying the applicable duty of care, has not been created by the Supreme Court (nor the legislator). Based on an analysis of the use of soft law in specific case law, scholars have examined the circumstances under which soft law is given weight and hence can be used to specify the applicable duty of care. The following circumstances that can be relevant for determining the legal authority of soft law in private law disputes have been identified;[15]

- Commitments and declarations by companies to comply with soft law provisions provide strong reasons for applying soft law that the company has committed itself to;
- The fact that the government encourages compliance with soft law regulation, or even expresses the expectation that companies will comply with soft law, also might be a reason to give weight to soft law;
- The level of support for the relevant soft law within the relevant sector indicates the legal room for invoking it;
- The nature and scope of the soft law rule that is invoked. Here a distinction can be made between soft law provisions that lay down detailed technical rules that are specifically relevant for a set of specific situations versus rules that potentially have a general normative scope and a broad range of application, i.e., a potential legal precedential effect. In the latter case, so it has been argued in literature, courts should be more reluctant to use soft law, specifically when this would fill gaps in national rules and/or influence the legal scope of national private law;[16]

---

[14] E.g., A. Hammerstein, 'Vraagtekens bij een vonnis', in: W.J.M. van Veen e.a., *De klimaatzaak tegen Shell: schriftelijke uitwerking van het seminar over het vonnis van de rechtbank Den Haag van 26 mei 2021 inzake Milieudefensie tegen Royal Dutch Shell Plc* (ZIFO-reeks nr. 35), Deventer: Wolters Kluwer 2022, p. 11-17 en B.M.H. Fleuren, 'Het Shell-vonnis bezien vanuit internationaalrechtelijk perspectief: UN-soft law als potentiële bron voor afdwingbare rechtsplichten voor bedrijven?', in: J. van Bekkum e.a. (red.), *Geschriften vanwege de Vereniging Corporate Litigation* 2022-2023, Deventer: Wolters Kluwer 2023, p. 421-438.

[15] See about soft law in the context of climate change K. Arts & M.W. Scheltema, *De grenzen voorbij* (NJV 2019-1); See in general I. Giesen, *Monografieën Privaatrecht, alternatieve regelgeving en privaatrecht*, Deventer: Kluwer 2007, who extensively discuss the circumstances under which soft law can become binding; K.J.O. Jansen, 'Verkeersopvattingen en private regelgeving. Over maatschappelijke opvattingen als bron van ongeschreven privaatrecht', *NTBR* 2020/5, with further references; C. Hoekstra, 'Maatschappelijke normvorming en de ongeschreven zorgvuldigheidsnorm: een gezichtspuntencatalogus', *Weekblad voor privaatrecht, notariaat en registratie*, 2023/7419, pp. 539-552.

[16] See specifically Jansen, *NTBR* 2020/5.

- Considerations related to the adaptation of soft law, such as the involvement of experts, the transparency of the drafting process and representativeness of the drafters, are relevant in assessing the strength of soft law;
- The extent to which the legal issue that is being addressed is (exhaustively) regulated by (specific) statutory provisions. Also, the extent to which the soft law is consistent with legislation, and similarities or differences in the rationale behind the legislation and the soft law provisions, are important for determining what weight is attached to soft law. For reasons of legitimacy, it is obvious that courts will be reluctant to use soft law if it deviates from (the rationale behind) statutory provisions. Likewise, considerations of legal certainty, equality, and consistency, in general constitute ground for restraint in the use of soft law in those cases where a statutory provision applies that specifically regulates the legal question at hand. If a statutory provision does not yet exist but legislation is in preparation to that end, much depends on the state of the legislative process. Civil courts are usually reluctant to act in a law-making capacity on issues for which legislation is in preparation;
- According to some authors, what also matters is whether the soft law provision regulates a socially controversial or politicized issue. It seems to us that this viewpoint as such does not carry much weight. Rather, it seems relevant whether, and why, the legislator has or has not adopted legislation and about which specific points there is legislative discussion/ambiguity.

iv. Legislative initiatives

Finally, at least two legislative initiatives in the area of business and human rights should be noted. Both at the national (Wetsvoorstel verantwoord en duurzaam international ondernemen) and the European level (Proposal Corporate Sustainability Due Diligence Directive, hereafter: CSDDD) legislative proposals for corporate due diligence laws are pending.

The legislative process on the Dutch proposal is currently on the backburner.[17] The cabinet acknowledges that companies 'must account for the world around them', from 'climate impact to eliminating child labor'. However, it prefers that the rules in this context are laid down at the European level. The cabinet is concerned that the Netherlands might impose stricter standards on corporations than other countries, which might undermine an economic level playing field and the Dutch business climate.

With respect to the CSDDD, climate related risks and climate damages (in so far that it can be determined to what extent damages are (not) climate change related) are not

[17] See https://nos.nl/artikel/2463972-verplichting-verantwoord-ondernemen-voorlopig-uit-zicht-kabinet-trapt-op-rem.

explicitly covered by the scope of the due diligence provisions (Articles 4-14 CSDDD) and the liability provision of Article 22 CSDDD.

The proposed directive contains a specific reporting provision on climate change.[18] Article 15 requires that certain companies have a 'climate plan' to ensure that their business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5°C, as laid down in the Paris Agreement, and the objective of achieving climate neutrality by 2050, and where relevant, the exposure of the corporation to coal-, oil- and gas-related activities. Article 15 does not set any specific emissions reduction goals. For some authors, Article 15 CSDDD can be seen as a (partly) codification of the *Shell* ruling.[19] However, a major difference between the proposed directive and the *Shell* case is that the *Shell* case imposes reduction targets, including scope 3 emissions, instead of the obligation to come with a plan. The question also is to what extent the directive covers scope 3 emissions. Lastly, the question is whether an obligation to come with a plan is already laid down in the Corporate Sustainability Reporting Directive (hereafter: CSRD).[20] Under the CSRD companies are also required to report on the impact of their activities on people and the environment.

C. Tort Law

Introduction

The general clauses of Dutch tort law are laid down in Book 6 of the Civil Code. Title 3, section 1 of Book 6 provides the general rules on liability on the basis of an unlawful act (*onrechtmatige daad*). Article 6:162 CC is the main provision.[21] It provides the most important basis for horizontal tort law based claims in the context of climate change, both for mitigation and adaptation claims. It can also apply to vertical cases. Article 6:162 CC is specifically tailored to claims for compensation. Nonetheless, the duty of care of Article 6:162 section 2 CC can also be enforced through an injunctive relief (see Part 3 B).

To establish liability for damages, five elements have to be met: 1) unlawful conduct, 2) harm, 3) causation, both factual and legal (see Article 6:98 CC), 4) attribution and

---

[18] T.M.C. Arons & E.C.H.J. Lokin, 'The Corporate Climate Transition Plan: How to Ensure Companies are Paris-Proof', *Ondernemingsrecht* 2023/35.

[19] T.M.C. Arons & E.C.H.J. Lokin, 'The Corporate Climate Transition Plan: How to Ensure Companies are Paris-Proof', *Ondernemingsrecht* 2023/35.

[20] Arons & Lokin, *Ondernemingsrecht* 2023/35.

[21] Article 6:162 determines that: 1) a person who commits a tort against another which is attributable to him, must compensate any consequential loss suffered by the other. 2) Except where there are grounds for justification, the following are considered as torts: the violation of a right and an act or omission breaching a duty imposed by law or a rule of unwritten law relating to proper social conduct. 3) A tort is attributable to a tortfeasor if it is due to his fault or to a cause for which he is responsible at law or pursuant to generally accepted principles.

5) relativity (see also Article 6:163 CC – which is about the scope of protection of the violated standards).

Article 6:162 CC stipulates three categories of unlawful conduct: the breach of a right, violation of a statutory duty or violation of standards under unwritten law. In practice, the application of the first category is scarce. Also, there are no specific legislative provisions that impose reduction or adaptation obligations on corporations. Therefore, in the context of climate change litigation the third basis for unlawfulness (unwritten law, or: negligence) is the most relevant. In addition, the doctrine of nuisance is closely connected to the doctrine of negligence. Specifically in the case law on nuisance important notions can be found that are relevant in the context of climate change litigation.

Title 3 of Book 6 also lays down the most important qualitative liabilities under Dutch law, such as liability of the possessor of a defective item (Article 6:173 CC); the possessor of a defective building or construction (Article 6:174 CC); the possessor of dangerous substances (Article 6:175 CC); the operator of a refuse dump (Article 6:176 CC); the operator of mining activities (Article 6:177 CC); and the producer of a defective product (product liability - Article 6:186 CC, see Part 1 C viii).

Book 2 of the civil code provides specific rules on corporate and directors' liability (see Part 1 D). Article 6:162 CC is also applicable in this context.

i. Public and private nuisance

The doctrine of nuisance applies to, in particular, the creation and spreading of smell, noise, smoke, toxic substances or disturbance of the (local) living environment. The basis of a nuisance claim lies in Article 6:162 CC, sometimes in combination with Articles 5:37, 5:38, 5:39 and 5:40 CC. Dutch tort law does not make a distinction between public and private nuisance, but a claim on the basis of Article 6:162 CC in the context of environmental risks can resemble notions of both private and public nuisance. The starting point of Dutch law is that not every nuisance is unlawful: people have to tolerate some nuisance from each other. In order to assess the (un)acceptable level of nuisance, the judge needs to assess "the nature, severity and duration of the nuisance and the damage caused by it in relation to the further circumstances of the case, including local conditions (…)".[22] (See Part 2, c iv on the meaning of permits).

The nuisance provisions in Book 5 in particular regulate nuisance caused by owners of property, and cover situations of nuisance incurred by owners of other properties in the neighbourhood. Articles 5:38, 5:39 and 5:40 CC contain specific provisions on nuisance to owners of properties created by, inter alia, changes made in the water course by the property owner. These provisions have not yet been related to issues of

[22] Supreme Court 16 June 2017, ECLI:NL:HR:2017:1106, *NJ* 2017/265.

climate change liability, but might in the future become relevant in the context of adaptation measures taken by property owners.

In the context of unlawful emissions, a sharp distinction between (public) nuisance and negligence is not easily drawn. The scope of the nuisance doctrine and the criteria to assess wrongfulness overlap to a great extent in this context. Therefore, the added value of nuisance-based claims is limited in, at least, cases about unlawful emissions. This in particular holds true for the abovementioned Articles of Book 5 CC, which was also noted by the District Court in the *Urgenda* ruling: "in so far as Urgenda has relied on section 5:37 CC of the Dutch Civil Code (nuisance), the court is of the opinion that in addition to that which is stated below about the duty of care, this section does not have an independent meaning".[23] Nonetheless, case law that primarily has been developed in the context of nuisance liability, for instance about partial responsibility for nuisance (see below) and the relevance of the existence of and compliance with public law provisions (such as statutory provisions or permits) (see part 2, C iv) is very relevant in the context of climate change litigation.

Nuisance case law and partial responsibility

The case law on unlawful nuisance provides grounds for the existence of partial responsibility in the case of pollution, and hence also in the context of (horizontal) climate change mitigation litigation (see for the human rights dimension of this topic Part 1 B i and ii). Here, the *Kalimijnen* judgement is of relevance. In this case, growers sought compensation from French companies that discharged salt into the water of the Rhine River. The growers used the Rhine water to water their crops. Their damages arose from the *combination of the joint* discharges of the *individual* mining companies.[24] The Supreme Court ruled that also in this situation the obligation exists to consider the interests of downstream users, and that excessive discharges, although in itself perhaps not harmful, can constitute an unlawful nuisance.

The *Kalimijnen* judgement deals with a situation of linear causation: it was established that the cumulation of each discharge caused the specific damage, and it was possible to determine the proportionate contribution of the separate discharges to the damage. That is possibly a relevant difference with greenhouse gas emissions and the risks ensuing from it. In addition, the judgment also relates to a situation where there was (factual) proximity between the perpetrator and victim. Nonetheless, in the *Shell* case the District Court of The Hague, like it did in the first instance *Urgenda* ruling, in our

---

[23] District Court The Hague 24 June 2015, ECLI:NL:RBDHA:2015:7196, par. 4.51

[24] W.Th. Nuninga & G.M. Veldt, 'Normstelling voor deelverantwoordelijkheid in het ongeschreven recht', in: C.G. Breedveld-de Voogd (red.), *Sluitertijd. Reflecties op het werk van Jaap Hijma*, Deventer: Wolters Kluwer 2020, p. 109-121, par. 3-4. M.A. Loth, 'Ieder het zijne' Oftewel: hoe in het Urgenda-arrest deelveroorzaking deelverantwoordelijkheid rechtvaardigt', *RM Themis*, 2020, afl. 2, p. 89-93; T.R. Bleeker, *Aansprakelijkheid van leidinggevenden* (dissertation UU), Deventer: Wolters Kluwer 2021, IV.5.7.3 Deelveroorzaking.

eyes rightly, accepts the relevance of the *Kalimijnen* judgement in assessing the duty of care to reduce emissions, and hence the existence of partial responsibility of companies to reduce emissions to prevent dangerous climate change. It ruled that the Shell group has an individual partial responsibility to do its part regarding the emissions of the Shell group, which it can control and influence.[25]

ii. Tort of negligence

Negligent failure to mitigate or adapt to climate change[26]

As mentioned above, in particular the unwritten standard of care, as laid down in section 2 of Article 6:162 CC, and which resembles the broadly accepted reasonable person yardstick,[27] is relevant in the context of corporate accountability and liability for climate change. It provides the basis for several potential claims, for instance in relation to mitigation, adaptation, and duties to inform and warn about climate change related (financial and physical) risks. The standard is applicable in horizontal and vertical tort law litigation.

As a rule of Dutch unwritten law actors have a duty to take into account, and potentially act on behalf of the interests of another. In the context of the creation of dangers to life, health and the environment actors have an obligation not to impose unacceptable risks on others. The basis for examining the wrongfulness in the context of endangerment is laid down in the leading judgement *Kelderluik,*[28] which provides a formula that is similar to other Western legal systems.[29] In later case law, this doctrine has been developed, specified, and broadened. Although the *Kelderluik*-formula is primarily designed in the context of daily life risks and accidents,[30] its application is not limited to such risks (it also has been applied to, e.g., asbestos risks).

This list of relevant circumstances is non-exhaustive and varies according to the characteristics of the risk involved, the nature of the parties involved and their, if any, relationship. In general, relevant criteria are the likelihood of the materialization of the risk, the level of (un)certainty about the risk, the severity and nature of the risk, the nature of the risk creating act and the burden of taken precautionary measures.[31]

---

[25] C.f. Supreme Court 23 September 1988, ECLI:NL:HR:1988:AD5713 (*Kalimijnen*), *NJ* 1989/743, comm. J.H. Nieuwenhuis, par. 3.5.1.

[26] The following section is partly based on I. Giesen, E.R. de Jong & M.A. Overheul, 'Risks: how Dutch tort law responds to risks and how the law can shape risks', in: M. Dyson (ed.), *Regulating Risk through Private Law* (Intersentia 2018), p. 165-193.

[27] See e.g., 4:102 Principles of European Tort Law.

[28] Supreme Court 5 November 1965, ECLI:NL:HR:1965:AB7079; See further C.C. van Dam, *Aansprakelijkheidsrecht* (BJu, The Hague 2020),p. 68 et. seq.

[29] E.g., the Principles of European Tort Law, Article 4:102. See also C.C. van Dam, *European Tort Law*, Oxford: University Press 2013, nr. 805 en 806.

[30] Supreme Court 5 November 1965, ECLI:NL:HR:1965:AB7079.

[31] In literature, there is some debate about the exact formulation (and hence content) of the relevant criteria to be applied. K.J.O. Jansen, 'Hoe luiden de kelderluik factoren?', *NTBR* 2018/14.

The formula provides judges with flexibility to make an assessment tailored to a specific risk situation.[32] However, the application of the formula is not arbitrary. Based on established case law applying the criteria, some general rules can be identified.[33] It is settled case law that:

- the absence or inadequacy of regulations governing the litigious risks does not alter the fact that an actor may be under an obligation to take safety measures under unwritten law;[34]
- a small probability of severe harm may already provide ground for an obligation to take precautionary measures;[35]
- in general, a corporate actor is expected to have a high level of knowledge about the risks associated with its actions. Actors should proactively research risks associated with their actions;[36]
- uncertainty about a risk is as such no reason for postponing safety measures, it sometimes also provides ground to do further research;[37]
- for serious risks, the cost of the measures to be taken is of less or no importance;
- the fact that the risky behaviour is socially accepted or encouraged, facilitated, or stimulated does not preclude the establishment of wrongfulness;[38]
- the fact that the risky conduct is common in the relevant sector and that other actors are likewise not exercising due care does not prevent an actor from being held accountable for his wrongful conduct;[39]
- for severe risks, physical safety measures are preferred to issuing a warning.[40]

---

[32] Opinion of Advocate-General Spier for Supreme Court 9 July 2010, ECLI:NL:PHR:BL3262, *RvdW* 2010/898 (*Enschedese vuurwerkramp*), sub 9.10.2.

[33] G.E. van Maanen & S.D. Lindenbergh, 'Aansprakelijkheid voor eigen gedrag op grond van art. 6:162', in J Spier (ed.), *Verbintenissen uit de wet en Schadevergoeding*,Deventer: Wolters Kluwer 2015, 23-89; T Hartlief, 'Een dijkdoorbraak in het aansprakelijkheidsrecht: over schuld- en risicoaansprakelijkheid en de bijzondere positie van de overheid', in T. Barkhuysen, W. den Ouden & M.K.G. Tjepkema (eds.), *Coulant compenseren? Over overheidsaansprakelijkheid en rechtspolitiek, Deventer: Kluwer 2012, p. 201 & 217.*

[34] E.g., Supreme Court 6 April 1990, ECLI:NL:HR:1990:AB9376, par. 3.4, *NJ* 1990/573, comm. P.A. Stein (*Janssen/Nefabas*); Supreme Court 25 juni 1993, *ECLI*:NL:*HR*:1993:AD1907, par. 3.8.4, *NJ* 1993/686, comm. P.A. Stein (*Cijsouw I*).

[35] See C.C. van Dam*, European Tort Law*, Oxford: University Press 2013, nr. 805 en 806; Supreme Court 8 January 1982, ECLI:NL:HR:1982:AG4306, *NJ* 1982/614, comm. C.J.H. Brunner (*Natronloog*); Supreme Court 17 December 2004, ECLI:NL:HR:2004:AR3290, *NJ* 2006/147, comm. C.J.H. Brunner (*Hertel/Van der Lugt*); Supreme Court 25 November 2005, ECLI:NL:HR:2005:AT8782, *NJ* 2009/103, comm. I. Giesen (*Eternit/Horsting*).

[36] For references see E.R. de Jong, *Voorzorgverplichtingen* (diss. UU), Den Haag; BJU 2016, par. 10.2.4. See also K.J.O. Jansen, *Informatieplichten. Over kennis en verantwoordelijkheid in contractenrecht en buitencontractueel aansprakelijkheidsrecht* (diss. Leiden), Deventer: Kluwer 2012, p. 380.

[37] De Jong 2016; see also C.C. van Dam, 'Taxus revisited. Een kleine taxonomie van het kennisvereiste', *MvV* 2015, afl. 7-8, p. 229-234.

[38] Supreme Court 2 October 1998, ECLI:NL:HRZC2721, *NJ* 1999/683, comm. J.B.M. Vranken (*Cijsouw II*).

[39] Supreme Court 2 October 1998, ECLI:NL:HRZC2721, *NJ* 1999/683, comm. J.B.M. Vranken (*Cijsouw II*).

[40] This is particularly true in the case of employers' liability, see Supreme Court 11 November 2005, ECLI:NL:HR:2005:AU3313 (*Bayar/Wijnen*).

Foreseeability of the harm & generalization techniques

Under fault liability, a person can only be held liable for damage that was reasonably foreseeable at the time of the act or omission. There is no case law on the foreseeability requirement in the context of climate change. In practice, foreseeability will only be relevant (or: an issue) in retrospective claims for damages where the unlawfulness of past behaviour has to be assessed. In those cases, the scientific knowledge available at the time of the occurrence of the litigious harm is often more advanced than it was at the time of the unlawful act. This could lead to the situation where litigation deals with risks that were an uncertain or unknown consequence of the emissions at the time of the emissions, but which are certain and known at the moment the harm occurred and the litigation is initiated. This discrepancy is not present in preventive/prospective litigation.

In determining the required degree of foreseeability of the harm, generalization techniques are used. Generalization techniques aim to abstract from certain unforeseen or unforeseeable consequences of the conduct of the defendant, when assessing the unlawfulness of that conduct.[41] Such techniques for instance have been used in cases dealing with asbestos risks. The general rule is that if a hazard is realized in a manner or with consequences unknown to the actor, the actor may nevertheless be liable if he failed to take the measures he ought to take with respect to the foreseeable risks that were associated with his behavior. The actor can escape liability by showing that the unforeseeable or unforeseen harm would have occurred even if he had taken the measures with regard to the risks known (to him).[42] The idea behind this technique is that ignorance of the specific risk in question does not exclude the possibility that the risk creating actor, in view of any other risks of which he was or should have been aware, should have refrained from his conduct that caused the damage.[43] Also, a condition for applying this rule is that the unforeseen or unforeseeable event that causes the harm, and that gives rise to the litigation, belongs to a category of risks that were known at the time of the unlawful behavior.[44] For instance, if an actor is held liable for the consequences of a specific flooding, which was unforeseeable at the time that the

---

41 The basis of this technique is laid down in HR 8 January 1982, ECLI:NL:HR:1982:AG4306, *NJ* 1982/614, comm. C.J.H. Brunner (*Natronloog*).

42 Supreme Court 25 June 1993, *ECLI*:NL:*HR*:1993:AD1907, *NJ* 1993/686, comm. P.A. Stein (*Cijsouw I*); HR 29 November 2002, ECLI:NL:HR:2002:AE5162, *NJ* 2003/549 comm. JMBV (*Legionellabesmetting*); Supreme Court 17 December 2004, ECLI:NL:HR:2004:AR3290, *NJ* 2006/147 (*Hertel/Van der Lugt*); Supreme Court 17 February 2006, ECLI:NL:HR:2006:AU6927, *NJ* 2007/285, comm. C.J.H. Brunner (*Heesbeen/Van Buuren*); Supreme Court 31 March 2006, ECLI:NL:PHR:2006:AU6092, *NJ* 2011/250, comm. T.F.E. Tjong Tjin Tai (*Nefalit/Karamus*); Supreme Court 9 July 2010, ECLI:NL:HR:2010:BL3262, *NJ* 2015/343, comm. T. Hartlief (*Vuurwerkramp Enschede*); Supreme Court 7 June 2013, ECLI:NL:HR:2013:BZ1721, *NJ* 2014/99, comm. T. Hartlief (*Lansink/Ritsma*). See also Adovcate General Spier, ECLI:NL:PHR:2004:AR3290, nr. 7.20 in his opinion for Supreme Court 17 December 2004, ECLI:NL:HR:2004:AR3290, *NJ* 2006/147, comm. C.J.H. Brunner (*Hertel/Van der Lugt*).

43 Jansen 2012, p. 370.

44 E.g., Jansen 2012, p. 371-372; De Jong 2016, p. 103-106.

unlawful emissions occurred, the rule can be applied if it is known that the emissions created or increased the risks of floodings in general.

Unwritten standard of care and corporate climate change policies

An important issue is whether the unwritten standard of care, and in particular the doctrine of hazardous negligence, is also relevant in the context of climate change risks, for instance those created by failures to mitigate greenhouse gas emissions. Second, the issue arises whether, next to the assessment of acts and failures to act, the doctrine also applies to *corporate (and governmental) climate policies*. Although the Supreme Court did not (yet) give a ruling on these issues, in our estimation both questions have to be answered affirmatively.[45] For already quite a while, arguments have been made in literature that the unwritten standard of care and, more specifically, the doctrine of hazardous negligence also applies to matters of climate change risks. The argument here is that there are no fundamental differences between the notion that one should not expose another to an unacceptable risk in cases of 'normal' and individual endangerment on the one hand, and cases of risks that have a much greater potential of harm, such as climate change risks, on the other. Of course, there may be important differences in specifying the applicable standard of care in both situations. The crucial point, however, is that the rationale behind the doctrine of hazardous negligence applies to situations of endangerment at a 'micro' level, and at a 'macro' level.

Unwritten standard of care in the first instance ruling in Urgenda

In the first instance ruling in *Urgenda* the District Court of The Hague followed the abovementioned line of reasoning that climate change risks are different than risks normally covered by the doctrine because "the central focus in this case is on dealing with a hazardous global development, of which it is uncertain when, where and to what extent exactly this hazard will materialize. Nevertheless, the doctrine of hazardous negligence […] bears such a resemblance to the theme of hazardous climate change, so that several criteria […] can be derived from hazardous negligence jurisprudence."[46] The Court of Appeal took a different route for assessing the Dutch climate change policies: on appeal the court's assessment was based on Articles 2 and 8 ECHR. Consequently, the doctrine was not part anymore of the legal framework for examining Dutch climate change policies on cassation, and thus the Supreme Court did not assess

---

[45] See for criticism on the application of the unwritten standard of care in *Urgenda*; R. Schutgens, 'Urgenda en de trias. Enkele staatsrechtelijke kanttekeningen bij het geruchtmakende klimaatvonnis van de Haagse rechter', *NJB* 2015/1675, afl. 33, pp. 2270-2277. See critical in relation to the application on corporate policies: H.J. de Kluiver, 'Onderneming & duurzaamheid. Over ondernemen, mensenrechten, milieu en klimaat mede in Europees Perspectief', *WPNR* 2023/7404, p. 299 - p.318, p. 308, p. 2274-2275. See on this subject also E.R. de Jong, 'Urgenda: rechterlijke risicoregulering als alternatief voor risicoregulering door de overheid?, *NTBR* 2015/46, p. 319-326, p. 322.

[46] District Court The Hague 24 June 2015, ECLI:NL:RBDHA:2015:7145, par. 4.54.

the applicability of the doctrine of negligence to governmental climate change policies. In the advisory opinion, which was followed by the Supreme Court, the Advocates General, however, explicitly considered the applicability of the doctrine of hazardous negligence.

Unwritten standard of care in the Shell case

The unwritten standard of care of Article 6:162 section 2 CC (and a variation on the doctrine of hazardous negligence) was also the legal basis for the claim of Milieudefensie against Royal Dutch Shell. The District Court of The Hague accepted that this provision provided the basis for assessing the climate change policies of Shell.[47]

For specifying the unwritten standard of care, and hence for its substantive assessment, the court used viewpoints that are derived from the (national) doctrine of negligence, international (human rights) treaties and soft law provisions. Its assessment of the lawfulness of Shell's current policies was informed by:

1) The policy-setting position of RDS in the Shell Group
2) The Shell group's CO_2 emissions
3) The consequences of these emissions for the Netherlands
4) The right to life and the right family life of Dutch residents
5) The UN Guiding Principles
6) RDS' control and influence of CO_2 emissions of the Shell Group and its business relations
7) The measures that are needed to prevent dangerous climate change
8) Possible reduction pathways
9) The challenge of preventing dangerous climate change on the one hand, and meeting the demand for energy worldwide on the other
10) The ETS system and other cap and trade emissions systems that apply outside the EU, as well as permits and other (statutory) obligations of the Shell Group
11) The effectiveness of the reduction obligation
12) The responsibility of States and society
13) The onerousness for RDS and the Shell Group to meet the reduction obligation
14) The proportionality of the reduction obligation

The specific assessment of these criteria can be found in the verdict which is available in English. In Part 2 C we address the, in our eyes most important, defences that have been assessed in the *Shell* case.

---

[47] District Court The Hague, 26 May 2021, ECLI:NL:RBDA:5339. The court also considered that 'that the Shell group is one of the world's largest producers and suppliers of fossil fuels, and that it's emissions, and those of its suppliers and customers, exceed those of many countries. These emissions cause dangerous climate change, which creates severe risk to human rights (such as the right to life and the right to respect for private and family life)'.

Soft law and human rights law (see point 4 and 5 above) are important building blocks for the reasoning of the court, in particular with respect to the scope of Shell's obligation to reduce emissions. On the basis of an analysis of the various protocols and guidelines for climate change for non-state actors, drawn up by the 'University of Oxford in 2020'[48] the court concluded that it is internationally endorsed that companies bear responsibilities for scope 3 emissions (as stressed in part 1 B iii, this circumstance can be an indication that the specific soft law provision can be used in specifying the rule of national law). The court has included this - according to the court - widely endorsed starting point in its interpretation of the unwritten standard of care. In literature, however, there is debate about the question whether in this case the soft law provisions can provide a basis for legal obligations.[49]

In the end, the court did not establish a violation of Shell's duty to reduce emissions, but a *threat* of a violation of that duty, which suffices for issuing an injunction (see Part 3 B). The court considered that Royal Dutch Shell has enhanced the Shell Group's policy and is working this policy out in more detail. However, the court considered that the policy is not concrete, has many caveats and is based on monitoring social developments rather than the company's own responsibility for achieving emissions reduction.

Ultimately, in order to take away this threat, the court ordered that "RDS, both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell group, to limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels".[50] In its substantive reasoning the court held that Shell has an *obligation of result* with respect to the Shell Group's CO_2 emissions (scope 1). As regards its suppliers and customers (scope 2 and 3), RDS has a *significant best-efforts obligation*, which means that RDS must use its influence through the corporate policy for the Shell Group, for instance by setting requirements on suppliers in its purchasing policy. RDS has freedom in determining how it meets its reduction obligation.

---

[48] See footnote 62 of the judgment.

[49] E.g., A. Hammerstein, 'Vraagtekens bij een vonnis', in: W.J.M. van Veen e.a., *De klimaatzaak tegen Shell: schriftelijke uitwerking van het seminar over het vonnis van de rechtbank Den Haag van 26 mei 2021 inzake Milieudefensie tegen Royal Dutch Shell Plc* (ZIFO-reeks nr. 35), Deventer: Wolters Kluwer 2022, p. 11-17 en B.M.H. Fleuren, 'Het Shell-vonnis bezien vanuit internationaalrechtelijk perspectief: UN-soft law als potentiële bron voor afdwingbare rechtsplichten voor bedrijven?', in: J. van Bekkum e.a. (red.), *Geschriften vanwege de Vereniging Corporate Litigation* 2022-2023, Deventer: Wolters Kluwer 2023, p. 421-438.

[50] District Court The Hague, 26 May 2021, ECLI:NL:RBDA:5339, par 5.3.

The case of Milieudefensie against ING

In January 2024, Milieudefensie announced litigation against ING, a Dutch bank. It demands that ING will halve its total emissions and stops cooperating with polluting companies (such as oil and gas companies). According to Milieudefensie, ING should take three types of measures that should prevent that ING contributes to dangerous climate change in the future. Milieudefensie demands that:

1) ING aligns its climate policy with the 1.5°C goal of the Paris Agreement;
2) ING reduces its CO_2-emissions by 48% and at least 43% by 2030 compared to 2019;
3) ING will ensure that it is not involved in the negative climate impact of large corporate customers. To that end ING must, according to Milieudefensie:
    a. require a proper climate plan from all large corporate customers;
    b. stop financing and supporting large corporate customers who do not have a good climate plan within a year;
    c. require fossil customers to stop using fossil fuels and to draw up a good phase-out plan;
    d. stop new financing and support for fossil customers who continue with fossil expansion or do not have a proper phase-out plan;
    e. stop all financing and support of fossil customers who after one year still continue with fossil expansion or do not have a proper phase-out plan.

The claim is based on Article 6:162 section 2 (CC) and Article 3:296 CC (see Part 3 B). Partly on the basis of the *Shell* case, Milieudefensie argues that companies in the Netherlands have a legal responsibility to respect human rights and adhere to their duty of care. According to Milieudefensie, contributing to dangerous climate change leads to a violation of the duty of care under Article 6:162 CC.

iii. Negligent or strict liability for failure to warn or inform

Dutch law does not contain a strict liability for a failure to warn. The fault liability of Article 6:162 CC provides the basis for liability for a failure to warn. Under circumstances a duty to warn can exist (see also Part 1 C ii). To date, there is no litigation about a duty to warn against climate related harm. Important to notice is that the expected effectiveness of a warning is important in examining the duty to warn. A lack of (expected) effectiveness of a warning in mitigating the risk of harm, could mean that safety measures with a direct risk-reducing effect have to be taken. [51]

[51] Supreme Court 28 May 2004, ECLI:NL:HR:2004:AO4224, *NJ* 2005/10, comm. C.J.H. Brunner (*Jetblast*); Supreme Court 11 November 2005, ECLI:NL:HR:2005:AU3313 (*Bayar/Wijnen*).

iv. Trespass

Under Dutch law, there is no specific action of trespass under civil law. A similar ground under common law would be filed under the general provision on the unlawful act (Article 6:162 CC).

v. Impairment of public trust resources

Under Dutch law, there is no action of impairment of public trust resources. A similar ground under common law would be filed under the general provision on the unlawful act (Article 6:162 CC).

vi. Fraudulent misrepresentation

In the case of non-contractual liability, the claim will be based on Article 6:162 CC. In contract law Article 3:44 CC (Deceit or Fraud, *Bedrog*) and Article 6:228 CC (Error, *Dwaling*) are relevant.

vii. Civil conspiracy

Dutch law has no distinct ground like civil conspiracy, but there are legal grounds on which civil conspiracy can lead to liability. For example, under Article 6:162 CC, liability can be assumed when two or more parties cooperate to commit an unlawful act that causes damage to another person (see also apportionment Part 2 B v). They would then be jointly and severally liable. Related is Article 6:166 CC which provides that when more than one person of a group commits a tort, the members of the group, under some circumstances, can be held jointly and severally liable for the entire damage unless they prove that the damage is not attributable to them (see also apportionment Part 2 B v). To date, there is no litigation on civil conspiracy and climate change.

viii. Product liability

To date the provisions on product liability have not been related to climate change litigation. Nonetheless, we will explore their relationship more in depth below.

Article 6:185 CC et. seq., provides the main rule on product liability (i.e., liability for a defective product). Article 6:185 CC et. seq., is the implementation of the European Product Liability Directive. It provides a scheme for liability for damages caused by defective products. Whether a damaging product is defective should be assessed by determining what level of safety the user can expect from the product given all the circumstances of the case.[52] This level of safety also depends on the safety measures that have been taken by the producer. Article 6:162 CC serves as a rests category, for instance when due to the shorter limitation period (see Article 6:191 CC) Article 6:185 CC is not applicable. The Supreme Court has aligned both articles in the context of

[52] See e.g., European Court of Justice 5 March 2015, C-503/13 & C-504/13, ECLI:C:2015:148 (*Boston Scientific Medizintechnik*), par. 38.

liability for a defective product, meaning for example that the test for examining wrongfulness in case of liability for a harmful product is the same as the defectiveness test under Article 6:186 CC.

For at least two reasons the relevance of product liability in the context of corporate climate change liability is expected to be limited. First, the defectiveness test is about the *safety* consumers are entitled to expect from a product. The question is to what extent the notion of safety also includes environmental endangerment, in particular endangerment to the broader public. Secondly, according to Article 6:190 CC, liability on the basis of Article 6:185 CC only extends to loss caused by death or personal injury and loss caused by the product to another thing. However, if the conditions of Article 6:190 CC are not met, Article 6:162 CC could provide the basis for assessing harm caused by products.

Nonetheless, an interesting question is whether a product that causes excessive greenhouse gas emissions is a defective product and/or whether the marketing of such a product is unlawful, either under Article 6:162 CC or 6:185 CC. Relatedly, the question arises whether and when a company must warn about the environmental consequences of a product under the rules on product liability or the general rules of Article 6:162 CC. No case law or literature has yet appeared on these questions.

Currently, a proposal for a new Product Liability Directive is pending. According to the commission this proposal "considers the nature and risks of products in the digital age and circular economy".[53] However, the proposed rules are more tailored to digital products than considerations of the circular economy.[54]

ix. Insurance liability

On the 23rd of June 2016, a severe storm passed over the southern part of the Netherlands. This storm was accompanied by wind gusts and hailstones of up to ten centimeters in diameter at times (a so-called 'supercell'). These stones had grown so large due to extraordinarily strong winds. The storm caused approximately two billion euros worth of damage. In the policy conditions of most of the insurers that were sued, damage due to storm was covered but damage due to hail was not. One question was what the cause of the damage was, an issue that was raised in several legal proceedings. Crucial points in this litigation are the interpretation of the clause in the insurance agreement and the applicable standard of causation in insurance law. In 2021 the Supreme Court gave a substantive judgment on the matter.[55] Together with

[53] COM (2022) 495 def., explanatory notes, p. 2-3.
[54] See also P. Verbruggen & J. van Vliet, 'Duurzaamheid in het buitencontractueel aansprakelijkheidsrecht: de belofte van drie Europese wetgevingsvoorstellen, *WPNR* 2023/7407, p. 276-288.
[55] Supreme Court 15 October 2021, ECLI:NL:HR:2021:1523.

the opinion of the Advocate General Hartlief, this judgment provides food for thought about the insurance coverage of climate-related damages.

x. Unjust enrichment

Article 6:292 CC provides the ground for liability on the basis of unjust enrichment. In theory it is possible to relate this article to climate related harm, but it is very unlikely that this will be done successfully.

xi. Causation

Factual and legal causation

Dutch tort law requires factual causation and legal causation (see Article 6:98 CC). In this section, we address the issue of factual causation. The rules on factual causation are tailored to claims for compensation (see Part 3 B about the role of causation in preventive litigation).

To establish liability (among other things) the causal relationship between the (alleged) norm violation and the damage occurred must be established. The main rule here is that the injured party needs to assert, and if sufficiently disputed, to prove (see Article 149 and 150 Code of Civil Procedure), that there is a condicio sine qua non-relationship (hereafter: c.s.q.n.) (i.e., the but-for-test applies) between the wrongful conduct (or, in case of strict liability, the situation that gives rise to liability) and the harm incurred. Under the c.s.q.n.-requirement the actual situation after the event giving rise to liability, must be compared with the hypothetical situation as it would have been if the event giving rise to liability had not occurred. If it is established with a reasonable degree of probability that in the hypothetical situation the damage would not have occurred, then a causal relationship is established. The claimant has to assert and proof the existence of *specific causation*, i.e., that *his* damage was caused by the unlawful emissions of *the defendant*. The proof of generic causation, i.e., that the unlawful emissions of the defendant are in a *generic sense* capable of causing the harm, does not suffice.[56]

To date, there has been no litigation, nor is litigation pending, in which the principal rule on the but for test and nuances to it have been applied to issues of climate change liability. In literature, however, attention is being paid to this issue. Moreover, on the basis of current case law, it is possible to elaborate on the link between causation and climate change liability, and the issues that arise in that context. Claims based on a failure to take adaptive action will probably raise less difficult questions than claims

[56] See about the issue of generic causation in Dutch tort law E.R. de Jong, 'Generieke causaliteitsonzekerheden bij het bewijzen van een oorzakelijk verband. Over de grensgebieden van causaliteit', *NTBR* 2021/6.

involving wrongful emissions. In these cases, the c.s.q.n.-requirement will prove to be a serious hurdle, and the question arises as to whether any relief exists.

Causation and the Kalimijnen-judgment

In the context of climate change litigation on mitigation claims, the previously cited *Kalimijnen* judgment (Part 1 C i),[57] which dealt with salt pollution of a river by several discharges, may be of interest. In that case, the Supreme Court reasoned that each polluter is responsible and liable for its share of the overall harmful discharge. What is important here, however, is that this case was about a linear causal connection between the individual discharges and the harm. Commentator Nieuwenhuis notes in this respect 'that each of the perpetrators caused part of the damage entirely independently. If one polluter, responsible for 15% of the salt load, stops discharging, while another, responsible for 20% of the salt load, continues to do so, there is still damage, but less damage'.[58] That possibly is an important difference with the risks of greenhouse gas emissions, which raises the question whether the reasoning in this case also extends to climate change harm caused by unlawful greenhouse gas emissions. Also the question arises whether any minimum threshold of contribution to the harm does exists. I.e., does a very small contribution also suffice to apply this rule? The same issue arises in the context of proportionate liability.

Article 6:99 CC: joint and several liability

Article 6:99 CC regulates the situation where the damage is caused by two or more events, for each of which a different person is liable and where it has been established that the loss has arisen from at least one of these events. In that situation, the liable party is jointly and severally liable for the entire damage unless he proves that the harm is not the result of an event for which he is liable. One condition for applying this article is that 'the damage was caused by at least one of these events'. Also, the rule does not apply when separate events each caused only a part of the damage.[59] This (most likely) means that in case of unlawful emissions for which several parties are liable, Article 6:99 CC will not be applicable.

Proportionate liability in general

Another nuance to the c.s.q.n.-requirement is the doctrine of proportionate liability, which was accepted by the Supreme Court in *Karamus/Nefalit*. In that case, an employer with lung cancer claimed damages from his employer who unlawfully

---

[57] Supreme Court 23 September 1988, ECLI:NL:HR:1988:AD5713 (*Kalimijnen*), *NJ* 1989/743, comm. J.H. Nieuwenhuis

[58] Comment Nieuwenhuis on Supreme Court 23 september 1988, *NJ* 1989/743, comm. J.H. Nieuwenhuis.

[59] C.H. Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel II. De verbintenis in het algemeen, tweede gedeelte*, Deventer: Wolters Kluwer 2021, nr. 95.

exposed him to asbestos. However, the employer also did smoke for a certain period. Therefore, it was not possible to determine the cause of his lung cancer, and to meet the but-for-test. 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.'[60]

Currently, the doctrine of proportional liability is generally accepted. For instance, it is applied in the context of employer liability, government liability for, inter alia, a deadly shooting incident in Iraq,[61] liability of financial advisers and institutions,[62] and medical liability.[63]

It is established case law that:

- the doctrine must be applied with restraint;
- the judge must justify its application, in particular with reference to the nature of the violated standard and the nature of the violation of the standard;
- the doctrine may not be applied in case of a very low or very high probability that the damage was caused by the conduct of the defendant;[64]
- Under current law, a probability of about 10% is the absolute lower limit.[65]

Proportionate liability and climate change liability

The last two points mentioned, which are similarly applicable under the loss of a chance doctrine,[66] raise questions in cases dealing with liability for unlawful emissions. In particular, the question arises when the probability is too low for establishing

---

60 Supreme Court 31 March 2006, ECLI:NL:PHR:2006:AU6092, *NJ* 2011/250, comm. TFE Tjong Tjin Tai (*Karamus/Nefalit),* par. 3.13.

61 District Court The Hague 7 October 2020, ECLI:NL:RBDHA:2020:10058.

62 Supreme Court 24 December2010, ECLI:NL:HR:2010:BO1799, *NJ* 2011/251, comm. T.F.E. Tjong Tjin Tai (*Fortis Bank,Fortis/Bourgonje*).

63 Supreme Court 23 December 2016, ECLI:NL:HR:2016:2987, *NJ* 2017/133, comm. S.D. Lindenbergh; HR 27 October 2017, ECLI:NL:HR:2017:2786, *NJ* 2017/422, comm. S.D. Lindenbergh (*Caudasyndroom*).

64 This makes sense because in the case of a very high probability, the c.s.q.n.-requirement is met and thus the damages must be fully compensated. In the case of a very low probability, the opposite applies.

65 Supreme Court 19 July 2019, ECLI:NL:HR:2019:1223; Supreme Court 14 October 2022, ECLI:NL:HR:2022:1454.

66 Although the Dutch Supreme Court ruled that proportionate liability and liability for loss of a chance are separate doctrines, it is commonly accepted that both doctrines are very similar.

proportionate liability. Is a company's (global) contribution of (say) 0,5% to global greenhouse gas emissions sufficient for applying the doctrine?[67]

Given the current case law, the short answer is no. However, this case law has been developed in relation to other types of risks, involving different causation issues than the issues that arise in the context of climate change liability. Thus, the question is whether there are (legal policy) reasons to deviate from this case law and nonetheless accept the applicability of the doctrine. On the one hand, an argument in favour of extending the doctrine to climate change liability is that without any relief, mitigation-based liability would in any event fail on the causation requirement. This undermines the efficacious enforcement of the substantive duties enshrined in tort law and it could give a free pass (at least from a liability law perspective) to pollute through excessive emissions. On the other hand, accepting proportionate liability in the context of climate change might seriously hollow out the requirement of causation for establishing liability. The risk is that with the acceptance of a form of proportionate liability in a single case involving a low probability that the defendant's behaviour caused the harm, proportionate liability becomes the main rule and the c.s.q.n-requirement is eroded to such an extent that it loses its function to delineate the scope of liability. Lastly, the argument can be made that if its applicability is accepted, especially given the magnitude of the damage caused by climate change, there is a danger of creating an unaffordable system of liability law.[68]

D. Company and Financial Laws

Corporate law can play a role in shaping climate liability. Dutch law contains a distinction between internal and external directors' liability. Internal directors' liability concerns the liability of directors towards the company (Article 2:9 CC) and external director liability concerns the liability towards third parties. There is a focus in Dutch literature on the liability of corporate directors for environmental violations.[69] To date, we are not aware of any Dutch lawsuits that qualify as climate lawsuits under directors' liability. It has been mentioned in literature that (internal) director's liability is unlikely to be relevant in the context of climate change.[70]

The basis for external director liability is Article 6:162 CC. One important element in examining directors' liability is the 'serious fault' criterion (*ernstig verwijt-criterium*), which differs from the ordinary requirements of Article 6:162 CC and makes its

---

[67] Cf. I. Giesen, 'Proportionaliteit in de klimaatdiscussie', *NTBR* 2012/51, p. 383-384.

[68] This potential unaffordability stems from the many and in percentages small causal contributions to the occurrence of climate change (which can lead to liability of a significant number of actors), combined with the overall damages.

[69] See for example: T.R. Bleeker, *Milieuaansprakelijkheid van leidinggevenden* (dissertation UU), Deventer: Wolters Kluwer 2021.

[70] S.J. van Calker & J.P.M. Steenkamp, 'Het Shell-vonnis en bange bestuurders', *Ondernemingsrecht* 2022/31, p. 178.

application more stringent.[71] The basis for internal director liability is Article 2:9 CC. Here too, the serious fault criterion applies. When assessing whether the director committed a serious fault, all relevant circumstances of the case must be taken into account. In principle, a director can be seriously blamed if he (intentionally) violates statutory provisions intended to protect the legal entity.[72] Another possible avenue in the realm of company and financial laws is direct shareholder action. In the Netherlands, there is a growing trend of direct shareholder action concerning climate-related issues. Shareholder activism aims to promote or accelerate more ambitious climate policies. Groups like *Say on Climate* and *Follow This* engage in a form of shareholder activism by submitting resolutions at shareholders' meetings. Client Earth's lawsuit against directors of Shell in the United Kingdom would be less conceivable in the Netherlands because it is settled case law that so-called derived actions (in which, for example, shareholders hold a corporation liable for depreciation of their shares due to a tort committed by that corporation) are not accepted.[73]

Lastly, there is discussion in literature about the standards of care that apply to financial institutions in the context of climate change.[74]

E. Consumer Protection Laws

A potentially important legal framework is provided by consumer law and general contract law, for instance in relation to issues of greenwashing and the failure to deliver on environmental properties of the product or service that were promised.

There are several grounds provided by consumer protection laws on which potential climate change claims can be based. First, the rules on unfair commercial practices are of relevance. The European Directive on unfair commercial practices is implemented in the Dutch legal system in Articles 6:139a – 6:139j CC and can be used as a legal basis to protect consumers against misleading environment claims (i.e., falsely claiming that a product, service or a company has sustainable properties that it does not appear to have in reality, or to a lesser extent).

One example from Dutch case law in which this path was followed is the *Fossielvrij NL v. KLM Royal Dutch Airlines* case. In that case, the NGO Fossielvrij NL brought a claim stating that KLM Royal Dutch Airlines infringes some of the rules on unfair commercial practices. Fossielvrij NL claims that the airline violates these rules with its "Fly

---

71 Supreme Court 8 december 2006,ECLI:NL:HR:2006:AZ0758, *NJ* 2006/659, *Ondernemingsrecht* 2007/36, comm. Wezeman (*Ontvanger/Roelofsen*).

72 Roest, T&C BW, commentaar op Artikel 2:9 BW.

73 Supreme Court 2 December 1994, ECLI:NL:HR:1994:ZC1564, *NJ* 1995/288 (Poot/ABP).

74 E.R. de Jong, 'De dreigende werking van klimaataansprakelijkheid van financiële instellingen', *NTBR* 2022/4, afl. 2; P. Heemskerk & R.H.J. Cox, 'Bancaire klimaataansprakelijkheid onder invloed van duurzaamheidswetgeving', *MvV* 2023 (3); B.W.G. van der Velden, T. Sweerts & S. Aarts, 'Procederen over duurzaamheid in de bancaire sector', in: F.P.C. Strijbos e.a., *Duurzaam bankieren (Onderneming en Recht nr. 143)*, Deventer: Wolters Kluwer 2023, ch. 14.

Responsibly" campaign, which offers consumers to financially compensate or mitigate the climate change impact of a flight. In addition, KLM would misleadingly state that it takes measures to work together with consumers to create a more sustainable future, and that they are together (KLM and the consumers) on the road to sustainable travel. According to Fossielvrij NL, KLM fails to mention that both KLM and the airline industry are counting on further 'business as usual' growth in air traffic, something that would be contrary to the reduction goals that are laid down in the Paris Treaty. Also, KLM's claims would suggest that KLM is fully committed to addressing the climate crisis and has the solutions to do so. According to Fossielvrij NL, KLM's advertising creates false confidence amongst passengers that flying can be done sustainably, even amongst people who are concerned about flying and the climate.[75]

Another possible legal basis is the legal figure of misrepresentation and error in contract law, as laid down in Article 6:228 CC (*dwaling*). This provision comes into the picture in case of contractual relationships and is particularly relevant in contractual relationships between corporations and non-consumers (B2B), as consumers can benefit from specific rules that are beneficial to them. Yet still the general rules of contract law also apply in a B2C relationship. Under these rules a false or misleading statement made about the sustainable nature of a product or service could constitute misrepresentation and error (Article 6:288 CC), which gives rise to the annihilation of the contract.[76]

A last potential ground for climate change claims is a breach of contract, which can give rise to liability for damages (Article 6:74 CC) or termination for breach of contract (Article 6:265 CC). Dutch law contains specific rules on breach of a contract covering the sales of goods. Article 7:17 CC states that a good must have the properties that corresponds to the contract. A good does not comply with the contract if, considering the nature of the good and the statements made by the seller about the good, it does not possess the properties that the buyer was entitled to expect under the agreement. In a B2C sales contract, it shall be presumed that the good did not meet the agreement, if the deviation from what was agreed upon becomes apparent within a period of six months after delivery (Article 7:18 section 2 CC). Although there is no case law yet that applies these rules in the context of climate change liability, there seems to be support for the idea that sustainability aspects of a product should be considered as 'properties' as well, which would mean that products that are offered as being sustainable even though they are not in reality, can be non-conform and hence can constitute a breach of contract.[77]

---

[75] District Court Amsterdam 7 June 2023, ECLI:NL:RBAMS:2023:3499.
[76] J.E.S. Hamster, 'Vijftig tinten groen – de vele civiele kleuren van greenwashing', *NTBR* 2022/49.
[77] Hamster, *NTBR* 2022/49, with references to A.G. Castermans, *De Burger in het burgerlijk recht* (oratie Leiden), 2008, Den Haag: Boom Uitgevers 2009.

F. Fraud Laws

Provisions in Dutch law to combat fraud may play a role in so-called VAT carousel fraud in emissions trading.[78] This type of fraud involves entrepreneurs charging VAT but failing to declare it to the tax authorities. Provisions of Dutch law on fraud are embedded in administrative and criminal law. These are among others forgery (*valsheid in geschrifte*, Article 225 Criminal Code), concealment (*verzwijging* Article 227a Criminal Code), fraud (Article 326 Criminal Code) and embezzlement (Article 321 Criminal Code).

G. Contractual Obligations

In literature, contract law is linked to greenwashing. Among others, the abovementioned rules on liability for a breach of contract (Article 6:74 CC) annihilation due to misrepresentation (article 6:228 CC) and termination for breach of contract (Article 6:265 CC) can be relevant. In addition, in literature there is discussion about the obligations of financial institutions to implement contractual conditions in relation to sustainability, and in certain circumstances to cancel a contract if those conditions are not met. Also, there is attention for the possible obligation of financial institutions to refrain from contracting with entities that are not acting in accordance with European and/or international climate change goals (i.e., the Paris Agreement).[79]

H. Planning and Permitting Laws

The laws on planning and permitting are mainly laid down in (environmental) administrative laws. In one case, civil law remedies have been invoked. In 2019, the Dutch government announced that it will phase out the production of coal which is used to produce electricity to adhere to international climate obligations and the *Urgenda*-ruling.[80] To that end, the law 'Wet verbod op kolen bij elektriciteitsproductie' entered into force on the 20th of December 2020. Coal companies RWE and Uniper responded to the introduction of this law by claiming financial compensation for the mandatory phase out of coal-powered electricity production, stating that their right of property under the ECHR was violated by this law. In November 2022, the District Court of The Hague ruled that whilst the law indeed infringes RWE's and Uniper's right to property, this infringement was not unlawful.[81] The court reasoned that the infringement of the right to property was proportionate and that the interests of the claimants were sufficiently considered. The court also found it important that it was foreseeable to the owners that such a ban would be imposed if the power plants' emissions were not significantly reduced before 2020, for

---

78 R.A. Wolf, 'Btw en emissierechten: een klimaat voor fraude?', *WFR* 2010/88.

79 See fn. 3.

80 The introduction of the Prohibition of Coal in Electricity Production Act was partly prompted by the earlier Dutch supreme court decision in *Urgenda*: Parliamentary Papers II 2022-2023, 36 197, nr. 3 (MvT).

81 District Court The Hague 30 November 2022, ECLI:NL:RBDHA:2022:12653; District Court The Hague 30 November 2022, ECLI:NL:RBDHA:2022:12628; District Court The Hague 30 November 2022, ECLI:NL:RBDHA:2022:12635.

example by firing with biomass or by capturing and storing or reusing greenhouse gases. This did not happen at the MPP3 power plant and the Eemshaven power plant. As for the Amer power plant, it already runs almost entirely on biomass. The owner could foresee that this power plant would not be allowed to be converted back to a coal-fired power plant, at the time when the subsidy on (woody) biomass firing will end in 2027. On January the 1st of 2022, the decree on compensation for loss resulting from administrative acts concerning the production reduction of coal plants entered into force. In 2023, the government awarded the companies financial compensation.

I. Other Causes of Action

We have not identified other causes of action.

2. Procedures and Evidence

A. Actors Involved

i. Claimants

To date, four civil law based corporate climate cases have been initiated in the Netherlands. In the *Milieudefensie v. Royal Dutch Shell* case, the claim against Royal Dutch Shell was brought by seven NGOs together with 17.379 individual claimants that had granted power of attorney to Milieudefensie. The district court ruled that the individual claimants were inadmissible (see more Part 2 B i). Another case that is currently pending is a case brought by the NGO Fossielvrij NL against Royal Dutch Airline KLM. The case concerns alleged greenwashing related to an advertisement campaign. In June 2023, the District Court of Amsterdam positively ruled on the standing of the NGO.[82] In 2021, energy companies RWE and Uniper brought a claim seeking financial compensation of the Dutch government for the mandatory phase-out of coal-fired electricity production in the Netherlands. The District Court of The Hague ruled that whilst the law indeed infringes the right to property of the energy companies, this infringement is not unlawful.[83] The companies, however, received compensation for loss resulting from lawful administrative acts. Lastly, in January 2024 Milieudefensie announced litigation against ING, a Bank.

ii. Defendants

To date, litigation has been initiated against producers of fossil fuels (Royal Dutch Shell), an airline (KLM), a bank (ING) and the government (financial compensation for phasing out of coal plants).

iii. Third-party intervenors

Article 217 of the Code of Civil Procedure determines that a party with an interest in a case between other parties, can make a request for a joinder or intervention in that case. In case of intervention a third party joins as an independent party to the proceedings. If a third party wishes to join one of the other parties to the proceedings, this is called joinder. A party may intervene if it wishes to assert an independent right of action, or at least to challenge the judgment on appeal on the basis of an independent right of action.[84] A joining party is entitled to raise factual and legal arguments independently. However, the role of the joining party is limited to bringing forward facts and legal grounds that support the position of the party the joinder supports. The joining party may only put forward facts and grounds which the party it supports could also put

[82] District Court Amsterdam 7 June 2023, ECLI:NL:RBAMS:2023:3499.
[83] District Court The Hague 30 November 2022, ECLI:NL:RBDHA:2022:12628; District Court The Hague 30 November 2022, ECLI:NL:RBDHA:2022:12635.
[84] Supreme Court 14 March 2008, ECLI:NL:HR:2008:BC6692; *NJ* 2008/168.

forward itself. He must accept the dispute as it stands at the time of joining, and he is bounded by the ambit of the legal dispute between the litigants.

A party needs to have a sufficient interest in joining or intervening in the pending proceedings. This is the case when the third party may be adversely affected by an outcome of the proceedings. Adverse effects in this context are to be understood as the adverse factual or legal consequences of the upholding or rejection of the claim.[85] In case of intervention, a sufficient interest may consist in the fact that, in connection with the consequences of the judgment, there is a risk of prejudice or loss of a right or that the position of the intervening party may otherwise be disadvantaged.[86] Precedential effects do not suffice for establishing sufficient interest. The requirements of due process may also block admissibility. This is the case if allowing the joinder or intervention would lead to unreasonable delay of the proceedings in the main legal action (Article 20 Code of Civil Procedure).

On appeal in the *Shell* case, two third parties asked the court to intervene or to join: *Clintel* and *Milieu en Mens*, two NGOs that are seemingly sceptical towards climate change science and policies in general and critical about the ruling in first instance. The court concluded that both Clintel and Milieu en Mens had standing as meant under Article 3:305a CC (see Part 2 B i). The requests of Clintel were dismissed. In the court's opinion, Clintel did not define its asserted claim or its asserted right of action in sufficiently concrete terms, so that it could not be established that it had a sufficient interest in intervening. The joinder request was also rejected.[87] Important here is that Clintel contests some parts of current climate science, which Shell and Milieudefensie both acknowledge and do not dispute in the proceedings. The court reasoned that it must take as its starting point the facts that have been established between Milieudefensie and Shell (see also Part 2 D). After joinder by Clintel, the court is not allowed to take into account divergent views of Clintel regarding facts and circumstances that Shell and Milieudefensie do not dispute. Therefore, Clintel did not have a sufficient interest in joining.

The request of Milieu en Mens to join was approved. Milieu en Mens is concerned that the actual consequences of the adjudication of the claims could be detrimental to Milieu en Mens' constituency. Milieu en Mens for instance fear that fossil fuel prices will rise unacceptably because of upholding the claim of Milieudefensie. As a result, according to the court, Milieu en Mens has a sufficient interest in joining.[88]

---

[85] Supreme Court 28 March 2014, *NJ* 2015/206, par. 5.3; Supreme Court 12 June 2015, *NJ* 2015/295; *JBPr* 2015/64.

[86] Supreme Court 28 March 2014, *NJ* 2015/206, par. 4.1.2

[87] Court of Appeal The Hague 25 April 2023, ECLI:NL:GHDHA:2023:735.

[88] Court of Appeal The Hague 25 April 2023, ECLI:NL:GHDHA:2023:736. In literature, the requests of Clintel and Milieu and Mens led to a discussion about the spreading of disinformation in legal proceedings. T. Bleeker, 'Klimaatdesinformatie in de rechtszaal', *M&R* 2022/113; L. Bergkamp, 'Desinformatie over

Lastly, Dutch civil law offers some possibilities for third parties to submit an amicus curiae brief. This is possible in preliminary question proceedings before the Supreme Court (Article 393 section 2 Code of Civil Procedure) and cassation in the interest of the law. Both have not been applied in the context of climate change litigation.

iv. Potential claimants and defendants

After the ruling of the district court in the *Shell* case, Milieudefensie sent a letter to 29 of the, according to Milieudefensie, most polluting companies active in the Netherlands, asking them for their climate plans, whilst threatening to pursue legal action if these companies did not comply with Milieudefensie's request and/or the plans would not have been aligned with the Shell ruling.[89] These potential defendants include financial institutions, which is based on the idea that they can financially back or facilitate activities that contribute to climate change, the food sector, the industrial sector and the transportation sector.

B. Elements of the Procedural Framework

i. Standing

Article 3:303 CC provides that only those with a sufficient interest are entitled to a legal claim. Article 3:305a CC provides rules on standing in collective action claims for damages and claims for idealistic purposes that aim to protect the public interest. It stipulates that a foundation or association with full legal capacity can institute an action intended to protect similar interests of other persons to the extent that its articles of association promote such interests, and these interests are sufficiently safeguarded (section 1). To date, most of Dutch climate change litigation was initiated by NGOs and concerned idealistic actions for the protection of the public interest (i.e., public interest litigation). There are no claims for collective climate change (related) damages pending.

In short, the applicable requirements for standing ex. Article 3:305a CC are:

- A foundation or association with full legal capacity can institute legal action (section 1);
- The legal action must serve to protect similar interests (section 1);
- The foundation or association must promote these interests according to its articles of association (section 1);
- The interests of the represented persons must be sufficiently safeguarded (section 2, which also provides further rules on this matter).

vermeende "klimaatdesinformatie", *M&r* 2022/144 & T. Bleeker, 'De misleidende retoriek van lobbyclubs Clintel en BEG', *M&R* 2022/115.

89 See https://milieudefensie.nl/actueel/foe-letter-to-ceos-13-january-2022-1.pdf

In (lower) case law, the application of the abovementioned criteria differs between actions with an idealistic purpose and collective claims for damages. This is in particular the case with respect to the requirement of representativeness (see below).

Also of relevance is Article 1018c lid 5 Code of Civil Procedure, which stipulates that the substantive consideration of a collective claim takes place only if and after the court has decided:

a. that the claimant meets the admissibility requirements of Article 305a, subsections 1 through 3, of Book 3 CC […];
b. that the claimant has made it sufficiently plausible that bringing a collective claim is more efficient and effective than bringing an individual claim because the factual and legal questions to be answered are sufficiently common, the number of persons whose interests the claim is aimed at protecting is sufficient and, if the claim is aimed at compensation, they alone or jointly have a sufficient financial interest;
c. that no summary evidence of the unsuitability of the collective claim is apparent at the time the action is brought.

In the Shell case, the court reasoned that Milieudefensie pursues an action that serves an idealistic purpose. Such actions seek to protect public interests which cannot be individualized because they accrue to an undefined and unspecified (large) group of people. According to the district court the public interest of preventing dangerous climate change by reducing greenhouse gas emissions can be protected in an action for idealistic purposes. A related issue addressed by the court was whether the idealistic action of Milieudefensie complies with the requirement of 'similar interest'. This requirement entails that the interests at stake must be suitable for bundling, meaning that they can be addressed in the same legal proceeding, to safeguard an efficient and effective legal protection of those whose interests are at stake. The court concluded that the interests of current and future generations of the world's population are not suitable for bundling, given the substantial differences in the impact of climate change in different areas of the world. Also, the court reasoned that there needs to be a sufficiently close connection with the Dutch legal order. For this reason, the court ruled that only those claims that aim to protect the interests of Dutch residents and those living in the Wadden area were admissible.[90]

In the *Shell* case, there were 17,379 individual claimants involved, who had appointed Milieudefensie as their legal representative. The claims of the individual claimants were declared not admissible. The court reasoned that 'a claimant must have an independent, direct interest in the instituted legal proceedings'. Also, the court reasoned that there is only room for the individual claimants if they have a sufficiently concrete

[90] District Court The Hague 26 May 2021, ECLI: NL:RBDHA:2021:5337, par. 4.2.4.

individual interest. Also, the parliamentary papers of Article 3:305a CC state that in public interest litigation "citizens, individually, are generally not entitled to institute proceedings due to a lack of interest."[91] The court held that the interests of the individual claimants were already served by the actions of the NGO's and that they do not have an interest in a separate claim.[92]

In the greenwashing case *Fossielvrij NL v. KLM* case, KLM argued that the defendant should not be admissible in its claim. KLM argued that Fossielvrij NL is primarily recognized as an organization that combats dangerous climate change, but not as an organization that stands up for the interests of misled consumers. Moreover, Fossielvrij NL had not shown that all Dutch people accepted it as its representative. The court did not go along with these arguments and ruled that application of this representativeness test is not required in case of actions for idealistic purposes under Article 3:305a CC.[93]

Another argument of KLM was that the claims brought by Fossielvrij NL cannot lead to the NGOs ultimate goal of preventing or mitigating dangerous climate change and that Fossielvrij NL would therefore lack a sufficient interest (thereby also referring to Article 3:303 CC). In this regard, the court ruled that Fossielvrij NL is free to choose which path it takes to achieve their stated goals. Moreover, the court ruled that at the current stage of the litigation, i.e., during the admissibility phase, a link between misleading advertising that may contribute to dangerous climate change and the goals of the NGO as expressed in its statutes cannot be excluded.[94] The court reasoned that this point can and should be further debated in the substantive part of the proceedings.

Debate about the requirements for standing: representativeness

Currently, questions arise as to whether, and if so how and to what extent, the representativeness of the litigating interest group should be assessed in claims for an idealistic purpose. In (lower) case law there are differences in the way the representativeness of interest group is being examined; some courts only marginally test their representativeness while others (even) rule that this test does not apply to actions for idealistic purposes (but only to claims for collective damages). In February 2023, the House of Representatives adopted an (amended) motion, asking the government to explore which further requirements for admissibility under Article 3:305a CC should be imposed on interest groups with an idealistic purpose (i.e., in the context of public interest litigation). In particular the motion refers to the requirement of representativeness. According to the submitters of the motion, which can partly be seen as a response to the *Urgenda* ruling, 'public interest litigation can have major consequences for the public interest, while the

[91] Parliamentary Papers II 1991-1992, 22 486, no. 3, p. 21 (MvT).
[92] District Court The Hague 26 May 2021 ECLI:NL:RBDHA:2021:5337, par. 4.2.7.
[93] District Court Amsterdam 7 June 2023, ECLI:NL:RBAMS:2023:3499, par. 4.17.
[94] District Court Amsterdam 7 June 2023, ECLI:NL:RBAMS:2023:3499, para. 4.15 & 4.25-4.27.

representativeness of the organizations initiating it can be extremely low.'[95] In response to the motion, the Minister for Legal Protection announced that the government will not take any action at this moment, but that this issue will be taken into account during the general evaluation of the Law on collective claims in 2025.[96]

ii. Justiciability

Dutch law does not contain a concept of justiciability similar to common law systems. When all procedural requirements are fulfilled (e.g., standing, validity of the summons etc), courts have an obligation to decide on a claim brought before them. This follows from Article 26 of the Code of Civil Procedure which contains a prohibition on the denial of justice (Verbod op rechtsweigering). Also, Dutch law does not know a political question doctrine.[97] The political nature of a legal question or the possible political and societal implications of a case, thus must be addressed in the substantive assessment of the legal claim, given the applicable legal framework.

iii. Jurisdiction

Issues of jurisdiction are generally governed by regulations of international private law. In determining the applicable law in *Milieudefensie v. Royal Dutch Shell,* the court considered the applicability of Articles 4 and 7 of Rome II, which determines the law applicable to non-contractual obligations. The court concluded that Dutch law was applicable to the case under Rome II.[98]

iv. Group litigation / class actions

Dutch law contains different possibilities for group litigation. One option is the accumulation of individual claims, which allows individuals to pool their claims together through a power of attorney or assignment. It is also possible to litigate against multiple tortfeasors. Next, interest groups can initiate collective claims for damages as well as public interest litigation (See Part 2 b i).

v. Apportionment

As discussed in Part 2 A iii actors can make a request to join or to intervene. Defendants can also indemnify other (potentially) liable parties (Article 210 Code of Civil Procedure).

Apportionment in Dutch civil law refers to the process of assigning liability and damages among multiple parties who may be liable for the harm. The rules on apportionment belong to the substantive rules of Dutch tort law. The relevant provisions have not been invoked in climate change litigation.

---

[95] Parliamentary Papers II 2022 - 2023, 36169, nr. 37.
[96] Letter of the Minister of Legal Protection, 17 April 2023, 36 169, nr. 39, p. 3.
[97] See on this issue R. van der Hulle, *Naar een Nederlandse political question-doctrine?* (diss. Radboud University Nijmegen), Deventer: Wolters Kluwer 2020.
[98] District Court The Hague 26 May 2021, ECLI: NL:RBDHA:2021:5337 para. 4.3.1. et. seq.

Article 6:99 CC provides rules for the situation where the loss may have resulted from two or more events, for each of which a different person is liable (see Part 1 C xi).

Article 6:102 CC provides rules on the concurrent liability of different persons for the same injury. The various persons are then jointly and severally liable to the injured party. Concurrence of liability of different persons may result from different events for which different persons are liable. The damage may also result from only one and the same event for which different persons are liable.

Article 6:166 CC provides rules on liability for unlawful acts by groups, and how liability and damages must be distributed in that context. Under this article, each distinct tortfeasor is liable for the full extent of the damage caused, unless it can be proved that the damage is not attributable to him. In our estimation it is doubtful whether the material requirements of group liability under Article 6:166 CC will be met in climate change cases.

vi. Costs of proceedings

Dutch civil law provides that the costs of the proceedings, including the costs incurred by the other party, are entirely borne by the party that is ruled against (Article 237 Code of Civil Procedure). If a claim is partially dismissed, the court has discretion to determine the distribution of costs. In doing so, the court may choose that each party bears its own costs or that the party that was partially unsuccessful in its actions bears the full costs of the claimant.

C. Defences

Defences brought forward in climate change litigation to a great extent relate to the applicability, scope and interpretation of the procedural and substantive legal rules that are invoked. These have been discussed above. Below we focus on some arguments that transcend these specific rules and essentially relate to the legitimacy and effectiveness of climate change litigation. The defences we discuss are thus either implicitly or explicitly related to the role of the courts in climate change litigation and raise the question whether (mitigation related) litigation is the right avenue for addressing the climate crisis.

i. The autonomy of tort law

As we discussed earlier, substantive law contains important starting points for the existence of partial responsibility (see Part 1 B ii and C i). The acceptance of partial responsibility in both *Urgenda* and the *Shell* case was, logically, of major importance for the substantive assessment of many defences brought forward.

Several defences brought forward in both Urgenda, and the Shell case are linked to or based on fair share arguments. In these defences a combination of the following (sub) arguments has been brought forward:

- The argument that the emissions of the defendant are in an absolute sense small and as such *not dangerousness*. Therefore, no obligation to reduce these emissions would exist;
- The argument that, given the *emissions levels* of the defendant, imposing a reduction order on a single defendant is only a drop in the ocean and hence makes no difference in mitigating climate change;
- The argument that others (also) *fail to reduce* emissions, which also would make a reduction order for a single defendant ineffective;
- The argument that other actors will step in if (only) the defendant reduces emissions (i.e., substitution effects);
- The argument that the use of national tort law leads to a fragmented and inconsistent framework of reduction obligations, and hence that it is up to the (international) legislator to lay down the applicable responsibilities.

Below we will address the assessments by the courts of these arguments more in depth. The recurring fundamental idea in these assessments is that actors might have an *autonomous* (partial) responsibility to reduce greenhouse gas emissions. This duty is autonomous because 1) its existence is founded in national tort law (and in the case of *Urgenda*, human rights law), and a lack of legislative action does not alter this existence, 2) its existence is not dependent on the behaviour or policy of other actors (States, companies nor civilians) (i.e., an actor cannot evade responsibility by pointing out to the possible behavior of third parties) and 3) it can be enforced by private law remedies.

ii. Fair share, drop in the ocean and ineffectiveness

One defence brought forward, is that accepting a greenhouse gas reduction obligation of one actor (i.e., the defendant) makes no difference if other actors continue to emit (i.e., the drop in the ocean argument). A fundamental objection to this argument is that its acceptance leads to a form of collective immunity and thus collective irresponsibility, legitimized by civil courts. This is the case because (almost) anyone can invoke this argument and hence the acceptance thereof would make it impossible to ask civil courts to offer legal protection against harmful consequences of greenhouse gas emissions. Thus, the Supreme Court[99] ruled in *Urgenda* that, given its constitutional task to offer legal protection if needed, the possibility to seek legal protection against the unlawful creation of climate risks cannot be excluded right away. Therefore, the court held that "the assertion that a country's own share in global greenhouse gas emissions is very small and that reducing emissions from one's own territory makes little difference on a global scale, [cannot] be accepted as a defence. Indeed, acceptance of these defences would mean that a country could easily evade its partial responsibility by pointing out other countries or its

[99] On how the Court of Appeal dealt with these type arguments see E.R. *de Jong*, '*Urgenda* en de beoordeling van *macro-argumenten*', *Maandblad voor Vermogensrecht* 2019, afl. 4.

own small share".[100] Fundamental to this line of reasoning are, among other legal provisions, Articles 2, 8 and 13 ECHR (see section Part 1 B i).

Closely related to the foregoing is the defence that other actors (also) *fail* to take their partial responsibility. The Supreme Court in *Urgenda* ruled in response to this argument that "partly in view of the serious consequences of dangerous climate change as referred to in 4.2 above, the defence that a state does not have to take responsibility because other countries do not comply with their partial responsibility, cannot be accepted."

In the *Shell* case, Shell made the argument that a reduction order would be ineffective or even counterproductive in reducing global emissions. It argued that establishing a duty of care to mitigate climate change risks would have no effect or would even be counterproductive as other companies will fill the gap that Shell would leave as a result of living up to a mitigation obligation.[101] I.e., the argument here is that the *implementation* of a court order might have unwanted counterproductive effects. The district court, however, dismissed this argument. The court reasoned that "it is also important here that each reduction of greenhouse gas emissions has a positive effect on countering dangerous climate change. After all, each reduction means that there is more room in the carbon budget. The court acknowledges that RDS cannot solve this global problem on its own. However, this does not absolve RDS of its individual partial responsibility to do its part regarding the emissions of the Shell group, which it can control and influence."[102] Next to this, it was not convinced that perfect substitution would indeed take place. Lastly, it stressed that other companies also have an obligation to protect human rights and hence to reduce emissions.[103]

In our opinion this line of reasoning should be approved. The defence brought forward emphasizes the possibility of other actors failing to live up to their responsibilities despite a court ruling that does hold the defendant himself responsible. Also, the defence appeals to the impossibility to remedy multiple violations of an obligation to prevent dangerous climate change. But even despite this lack of enforcement, actors who are not held accountable in court may still have an obligation to prevent dangerous climate change.[104] This line of reasoning is as such not new. It follows from case law on asbestos risks that the fact that other actors are likewise not exercising due care, does not preclude the defendant's liability for his wrongful conduct.[105]

Also, in literature some scholars argue that the actual contribution to reducing global greenhouse gas emissions is relevant for assessing the adequacy and legitimacy of a

---

[100] Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41, comm. J. Spier (*Urgenda*), par. 5.7.7.
[101] District Court The Hague 26 May 2021, ECLI: NL:RBDHA:2021:5337, par. 4.4.49.
[102] District Court The Hague 26 May 2021, ECLI: NL:RBDHA:2021:5337, par 4.4.49
[103] District Court The Hague 26 May 2021, ECLI: NL:RBDHA:2021:5337, par. 4.4.49.
[104] D.A. Kysar, What Climate Change Can Do About Tort Law, 41 *ENVTL. L.* 1, 48, p. 51.
[105] Supreme Court 2 October 1998, ECLI:NL:HRZC2721, *NJ* 1999/683, comm. J.B.M. Vranken (*Cijsouw II*).

mitigation order.[106] This also implies that courts should substantively assess the possible counterproductive effects of a court issued reduction order. As far as we are concerned, however, the question is to what extent such effects can be adequately taken into account by civil courts. It goes without saying that a judge must have adequate empirical knowledge about both positive and negative effects of its ruling on greenhouse emissions reductions. That is not so easy, if not impossible in the current state of affairs. There is simply too little research yet on the effects and impact of climate change litigation to get an adequate and *complete* picture of the specific effects of litigation on the reduction of emissions.[107] That litigation can have both negative and positive effects is no question. The problem, however, is that, as things stand now, knowledge about the *specific effects* possibly *resulting* from climate change litigation is not complete. Nor is there knowledge that convincingly *predicts* what specific effects may occur as a result of a possible ruling. Given the methodological challenges involved, it is very difficult to obtain this knowledge and to predict what the future effects of a (possible) judgment most likely will be.

iii. The role of the legislator

Shell also argued that states must determine the playing field and the rules for private parties, and that private parties cannot take any steps until states determine the framework. It also argued that government policy is needed to bring about the required change on the energy market. In addition, according to Shell the energy transition must be achieved by society as a whole, not by just one private party. Lastly, it asserted that including scope 3 emissions in the reduction order has the effect that the problem for society as a whole is passed on to energy companies. The court addressed these arguments by referring to its reasoning in assessing Shell's legal obligations, thereby

---

[106] In English: B Mayer, 'Judicial Interpretation of Tort Law in Milieudefensie v. Shell: A Rejoinder' (2022b) 11 Transnational Environmental Law 433; Benoit Mayer, "The Duty of Care of Fossil-Fuel Producers for Climate Change Mitigation: Milieudefensie v. Royal Dutch Shell District Court of The Hague (The Netherlands)." *Transnational Environmental Law* 11.2 (2022): 407-418; In Dutch: L. Smeehuijzen, 'De veroordeling van Shell tot 45% CO2-reductie in 2030. Over legitimiteit en effectiviteit', *NJB* 2022/458. See also about the implications of the effects of the Shell-ruling: J. Spier, 'Milieudefensie v Shell: een sirenenzang? Suggesties voor een beter alternatief' in: W. J. M. van Veen, A. Hammerstein, J. L. Smeehuijzen, A. F. Verdam & J. Spier, *De klimaatzaak tegen Shell (ZIFO-reeks nr. 35)*, Deventer: Wolters Kluwer 2022; J. Spier, 'SDGs: tussen droom en daad: een processie van Echternach: Het Shell-vonnis: stormram of eendagsvlieg', *Tijdschrift voor Vennootschapsrecht, Rechtspersonenrecht en Ondernemingsbestuur*, 2021 afl. 6, p. 176. L. Bergkamp, 'De effectiviteit van het rechterlijk bevel tot emissiereductie in klimaatzaken', *Nederlands Juristenblad* 2023/113.

[107] See for studies on this matter inter alia IPCC, *Climate Change 2022. Mitigation of Climate Change* (Working group III for the 6th IPCC Assessment Report, 2022), 31; K. Bouwer & J. Setzer, 'New Trends in Climate Litigation: What Works?' (Working paper presented at the New Trends in International Climate and Environmental Advocacy Workshop, Johns Hopkins University SAIS Europe and European University Institute 2020); J. Peel, A. Palmer & R. Markey-Towler, 'Review of Literature on Impacts of Climate Litigation: Report' (London and Melbourne: Children's Investment Fund Foundation and University of Melbourne), www.unimelb.edu.au/__data/assets/pdf_file/0008/4238450/Impact-lit-reviewreport_CIFF_Final_27052022.pdf; T.D. Lytton, 'Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits', (2008) 86 *Texas Law Review* 1837.

stressing that Shell is not the only party that is responsible for preventing dangerous climate change in the Netherlands and the Wadden region, and that the burden of solving this problem is not passed on to Shell alone: the court stressed again that Shell does bear an individual and partial responsibility, which it can and must effectuate through its corporate policy for the Shell group.

Essentially, this line of reasoning can also be discerned in cases dealing with other risks, where the argument that the government should regulate the risks have been dismissed. On several occasions, civil courts filled regulatory gaps by adopting duties of care under unwritten law that require companies to manage risks. Courts have done so in the context of several health and environmental risks, including asbestos risks, [108] but also in the context of financial risks.[109] From that case law, one can see that civil law has a vital role to play in those cases where public law is absent or allegedly fails. This case law also stresses the notion that tort law contains autonomous duties in the context of risks (see above Part 2 C i).

iv. The relationship between public and private law: permit defences

Defendants could also argue that their activities are carried out under a permit that was lawfully issued by the authorities. A consistent line of jurisprudence (primarily developed under the doctrine of nuisance, see Part 1 C i) holds that the presence or absence of a permit is not automatically decisive for examining whether there is unlawful conduct and/or unlawful nuisance.[110]

Whether there is an unlawful act or unlawful nuisance must be assessed on the basis of various aspects of private law (such as the nature, seriousness and duration of the nuisance). According to established case law, what weight should be attached to the permit in weighing those factors, depends on the nature of the permit and the interests pursued by the regulation on which the permit is based, in connection with the circumstances of the case.[111] Nevertheless, a permit can indeed have a safeguarding effect. A permit precludes liability "when it was granted, all the interests involved in the action were weighed and the purpose of the permit is to provide an exhaustive regulation for all those interests concerned."[112]

---

[108] See in particular Supreme Court 6 April 1990, ECLI:NL:HR:1990:AB9376, *NJ* 1990/573, comm. P.A. Stein (*Janssen/Nefabas*); Supreme Court 25 June 1993, *ECLI*:NL:*HR*:1993:AD1907, *NJ* 1993/686, comm. P.A. Stein (*Cijsouw I*); Supreme Court 17 December 2004, ECLI:NL:HR:2004:AR3290, *NJ* 2006/147, comm. C.J.H. Brunner (*Hertel/Van der Lugt*); Supreme Court 25 November 2005, ECLI:NL:HR:2005:AT8782, *NJ* 2009/103, comm. I. Giesen (*Eternit/Horsting*).

[109] E.g., W.H. van Boom, *Privaatrecht en Markt*, Den Haag: Boomjuridisch 2020, p. 210-212.

[110] Supreme Court 10 March 1972, *NJ* 1972/278, comm. G.J. Scholten (*Vermeulen/Lekkerker*). More recent Supreme Court 21 October 2005, ECLI:NL:HR:2005:AT8823, *NJ* 2006/418 & Supreme Court 2 September 2011 ECLI:NL:HR:2011:BQ5099, *NJ* 2011/392; Supreme Court 16 June 2017, ECLI:NL:HR:2017:1106, *NJ* 2017/265, par. 3.32.

[111] Supreme Court 21 October 2005, ECLI:NL:HR:2005:AT8823, par. 3.5.1.

[112] G. Snijders, 'Gelede normstelling in het aansprakelijkheids- en schadevergoedingsrecht; normen van publiek- en privaatrechtelijke aard', in: G. Snijders & A.G. Castermans, *De gelede normstelling in het*

In the Shell case the court ruled that: "given the emissions reduction targets of the ETS system, RDS can rest assured that the interests to be considered, which are also at issue in these proceedings, were fully and correctly weighed by the issuing body/bodies when the emission allowances were issued. It concerns the reduction target strived for with the ETS system. To that extent, the ETS system has an indemnifying effect. The indemnifying effect of the ETS system means that – insofar as it concerns the reduction target of the ETS system – RDS does not have an additional obligation with respect to Scope 1 and 2 emissions in the EU that fall under the system. Those are Scope 1 emissions of the Shell group in the EU and the Scope 3 emissions in the EU of the end-users of the products produced and sold by the Shell group, which are covered by the ETS system – as Scope 1 emissions of the consumers. However, the ETS system only affects a part of the CO2 emissions for which RDS is responsible. Furthermore, the ETS system only applies in the EU, while global Scope 3 emissions influence the dangerous climate change in the Netherlands and the Wadden region (see 4.4 (2.)). Finally, the reduction target of the ETS system is not identical to RDS' reduction obligation. Insofar as RDS' reduction obligation extends beyond the reduction target of the ETS system, RDS will have to fulfil its individual obligation. RDS cannot rely on the indemnifying effect of the ETS system insofar as this system entails a less far-reaching reduction target than a net reduction of the CO2 emissions (Scope 1 through to 3), relative to 2019, for the Shell group. So, the ETS systems only covers a small part of the Shell group's emissions. Only for these emissions, RDS does not have to adjust its policy due to the indemnifying effect of the ETS system".[113]

v. Societal interests and socially beneficial conduct

Related defences are that the challenged conduct is socially accepted, considered to be useful or even (financially) encouraged by the government. Although these circumstances carry (limited) weight, they do not preclude that socially useful and desirable conduct may constitute wrongful conduct (cf. also Article 6:168 CC).[114] The judgment in the *Shell* case resembles this, since a core element of the court's reasoning is that the (social) costs of not taking mitigation measures are so much higher than the (social) benefits of the emissions, that therefore the social interests served by these activities do not relieve Shell of its obligation to take measures.[115] Similar considerations can be found in other cases on (hazardous) negligence (see Part 1 c ii).

---

aansprakelijkheids- en schadevergoedingsrecht (pre-adviezen VASR), Kluwer 2021, p. 1-47, p. 32. See also: See J.H.A. van der Grinten, 'Vermeulen/Lekkerkerk: een springlevend uitgangspunt', *Jurisprudentie Milieurecht* 2007, p. 844-850, p. 846, Also Advocate General Langemeijer ECLI:NL:PHR:2017:227, sub. 2.6 , opinion for Supreme Court 16 June 2017, ECLI:NL:HR:2017:1106, *NJ* 2017/265.

[113] District Court The Hague 26 May 2021, ECLI: NL:RBDHA:2021:5337, para. 4.4.46 & 4.4.47.

[114] Court of Appeal Arnhem-Leeuwarden, 17 December 2019, ECLI:NL:GHARL:2019:10717, para. 7.25 & 7.26.

[115] District Court The Hague 26 May 2021, ECLI:NL:RBDHA: 2021:5337.

D. Evidence

There are several sources of evidence that are used in climate change litigation, such as:

- Attribution science reports
- IPCC reports
- Annual reports on the emission gap of the United Nations Environment Program (UNEP)
- Annual reports of corporations
- Sustainability reports of corporations
- Reports of the Carbon Disclosure Project
- Internal corporate reports on climate change and greenhouse gas emissions

These sources, and other insights and knowledge on climate science, can be submitted in mainly two ways: the litigating parties can bring them forward as evidence or the evidence comes forward through expert testimony. To date, in Dutch climate change litigation the scientific sources of evidence were all brought forward by the litigants directly and no expert testimony has yet taken place.

For understanding the use of evidentiary sources in climate change litigation, the following fundamental rules and principles of Dutch procedural law are relevant. Article 149 of the Code of Civil Procedure stipulates that unless the law provides otherwise, the court may only base its decision on those facts or rights which have come to its knowledge or have been asserted in the proceedings, and which have been established in accordance with the requirements of procedural law. Facts or rights asserted by one party and not or insufficiently disputed by the other party, shall be taken by the court as established, unless this would lead to a legal effect which is not at the free determination of the parties. Another fundamental rule of Dutch procedural law is that the party asserting facts or legal effects, bears the burden of prove, unless any special rule or the requirements of reasonableness and fairness dictate a different distribution of the burden of proof (Article 150 Code of Civil Procedure). If a party fails to meet the burden of proof the court will not consider the facts or legal effects in its decision (see Article 149 Code of Civil Procedure, and the exception contained therein). An example can be found in relation to the defence that a reduction order would cause carbon leakage or substitution effects. In both *Urgenda* and the *Shell* case, the court was not convinced by the possible occurrence of carbon leakage or (perfect) substitution effects. In Part 1 C xi we discussed some nuances to the division of the burden of proof in the context of proving causation.

Moreover, Dutch procedural law is based on the doctrine of the *vrije bewijsleer*, under which the valuation of evidence is in principle left to those courts that assess and establish the facts (i.e., district courts and the courts of appeal, but in general not the Supreme Court)

(Article 152 section 2 Code of Civil Procedure).[116] Whether or not a fact has been established is determined by the subjective judgment of the court. In general, a fact will be established if the judge has 'a reasonable degree of certainty' about its existence. This subjective assessment is, however, to some degree made objective by the judge's obligation to give reasons for his decision. In principle, but with exceptions, judges have considerable freedom in attaching weight to different pieces of evidence.

The autonomy of the parties

As becomes clear from the above-mentioned, the principles of party autonomy and judicial passiveness have a central place in Dutch procedural law. These principles entail that the litigating parties determine when to litigate, the subject matter of the litigation and the facts to consider. They also determine whether, and to what extent, judges will substantively engage with climate science. To what extent evidentiary issues arise therefore depends primarily on the (factual) debate between the parties. Noteworthy in this regard is that the District Court of The Hague, in its *Urgenda* judgment, considered that it does not have expertise in the field of climate science and that it for that matter relies on what the parties have submitted in this regard and is established between them.[117] These principles are also indicative for the boundaries of the litigation process: as discussed in Part 2 A iii, the fact that Milieudefensie and Shell agree on (certain) scientific insights was one of the reasons why Clintel, who adheres to a different view on these insights, was not allowed to join in the proceedings.

Discretion of the fact establishing court

Civil courts have considerable discretion in appointing court experts. According to hitherto established case law, it is left to the discretion and policy of the factual judge to decide whether he needs expert information. Furthermore, in the evaluation of expert evidence, the fact-based courts enjoy a relatively wide latitude. In determining whether the conclusions arrived at by an expert in his report are followed in the decision of the court, the court must however take into account all the relevant facts and circumstances put forward by the parties and, on the basis of those arguments put forward by the parties, test in full whether there is reason to depart from the conclusions of the expert. The judge will have to address 'specific objections' to the expert's opinion made by the parties if these objections constitute a sufficiently reasoned challenge to the correctness of the opinion. The court has a limited duty to state reasons regarding its decision whether to follow an expert opinion. If the judge follows the opinion of the court appointed expert, he will generally not have to motivate his decision beyond stating that the reasoning of the expert appears to be convincing to him.

---

[116] See e.g., *Asser Procesrecht/Asser 3* 2017/52 et. seq.
[117] District Court The Hague 24 June 2015, ECLI:NL:RBDHA:2015:7145, par. 4.3.

Battle of experts

This freedom also exists when the parties dispute the opinion of an expert appointed by the court, by invoking divergent views of party experts they have consulted (i.e., in case of a 'battle of experts'). If the court follows the opinion of the court appointed expert, the court will generally not have to justify its decision beyond indicating that the reasoning used by the court expert appears convincing. If, however, the court does not follow the expert's opinion, a more comprehensive duty to state reasons applies, which means that the court must provide its judgment with a justification that gives sufficient insight into the underlying reasons for diverging from the expert opinion, to make its reasons verifiable and acceptable both to the parties and to third parties, including the higher court.[118] In particular, this comprehensive duty to state reasons raises a threshold for departing from the opinion of a court-appointed expert. The reason for a judge to consult an expert lies in the fact that the judge must give an opinion on matters of which he has not sufficient expertise. Unless there are obvious errors in the expert's opinion, it is not obvious that the judge will subsequently give substantive reasons for not following the expert's opinion. If he does or wants to do so, the question is whether he can comply with the abovementioned obligation to state reasons without obtaining a new expert opinion (and thus an expert paradox arises).[119] It is therefore generally accepted that in case of a battle of experts this more comprehensive duty to state reasons raises a barrier to depart from the court appointed expert's opinion.

E. Limitation Periods

Dutch law contains rules on absolute limitation periods and relative limitation periods. The main rule regarding limitation follows from Article 3:306 CC: a legal claim expires after twenty years, unless the law provides otherwise. Article 3:310 CC provides the main rules on the limitation of claims for damages. Section 1 stipulates that a right of action to compensate for damage prescribes on the expiry of five years from the beginning of the day following the one on which the person prejudiced becomes aware of both the damage and the identity of the person responsible for it (relative limitation period). In any event, a claim expires twenty years following the event which caused the damage (absolute limitation period). Section 2 of Article 3:310 CC stipulates that if the harm results from air, water or soil pollution, or from the realization of a danger referred to in Article 175 of Book 6 (liability for hazardous substances) or from the movement of soil as referred to in Article 177(1)(b) of Book 6 (liability for mining activities), the right of action shall in any event be prescribed on the expiry of thirty years

---

[118] E.g., Supreme Court 5 December 2003, ECLI:NL:HR:2003:AN8478, *NJ* 2004/74 (*Nieuw Vredenburgh/NHL*), par. 3.6; Supreme Court 9 December 2011, ECLI:NL:HR:2011:BT2921, *NJ* 2011/599 (*Flevoziekenhuis*), par. 3.4.5; Supreme Court 17 February 2017, ECLI:NL:HR:2017:279, *RvdW* 2017/261, par. 3.4.3.

[119] Cf. Supreme Court 8 September 2006, ECLI:NL:HR:2006:AX3171, *NJ* 2006/493 (*Vakantiehuizen*), par. 3.8.

from the occurrence of the event which caused the harm. According to section 3, an event for the purpose of section 2, means a suddenly occurring fact, a continuous fact, or a succession of facts with the same cause. It further stipulates that when the event consists of a continuous fact, the period of thirty years referred to in section (2) shall start to run after this fact ceases to exist. Where the event consists of a succession of facts with the same cause, the period shall start to run after the last fact. Section 5 gives specific rules for claims for compensation of damage by injury or death: these claims prescribe only upon the expiry of five years from the beginning of the day following the person prejudiced has become aware of both the damage and the identity of the person responsible.

There is a vast amount of case law that provides more specific rules on when the limitation period begins. In the context of mitigation claims for damages a relevant question is whether the wrongful emissions that contributed to the damage in question are to be regarded as a continuing tort. Also, the question may arise when the harmful event has started, and possibly stopped, and whether the harmful event has to be seen as a continuing harm. The answers to these questions will be important for determining when the limitation period has started (and thus ended). In certain circumstances, the limitation periods can be put aside on the basis of rules on reasonableness and fairness. There is no case law or literature on these matters in the context of climate change liability.

3. Remedies

A. Damages

Dutch law adheres to a closed system of damages. Article 6:95 CC determines that the loss which must be compensated pursuant to a legal obligation to pay damages shall consist of loss to property and other intangible loss as far as the law confers a right to damages thereof. To date, there is no litigation about compensation for climate related harm.

B. Injunctive relief

Article 3:296 CC stipulates that when an actor is obliged to give, to do or not to do something towards one another, this actor may be ordered to do so by the court upon the demand of the person to whom the obligation is owed. This article is the backbone of preventive climate change litigation in the Netherlands. The injunction action is forward-looking by nature and its function is to prevent or to stop (the threat of) a violation of a legal obligation that the defendant owes towards the claimant. Article 3:296 CC was invoked in *Urgenda*, the *Shell* case and the recent case against ING. Also, in the case against KLM of Fossielvrij NL, the claimant is, among other things, requesting a court order that obliges KLM to stop with certain (allegedly) unlawful misleading statements.

Central to Article 3:296 CC is the existence of a legal obligation and the (threat of a) violation thereof. The basis for this obligation can, for instance, be provided by Article 6:162 section 2 CC, and more specific the rules on nuisance or hazardous negligence (see Part 1 C i et. seq.). The violation of this duty of care can also provide the legal ground for claims for damages. However, it is important to stress that in terms of legal requirements, the injunction action differs from claims for damages. Most importantly, the causation requirement does not apply in injunctive relief proceedings. Unlike in an action for damages, it is not required to prove a c.s.q.n.-connection between the wrongful act and the specific damages, nor does the attribution requirement of Article 6:98 CC apply. Issues of causation can, however, play a role in determining the applicable legal obligations, but these questions differ from traditional issues that arise under the c.s.q.n.-test. Think for instance about the question whether a minimum threshold of contributing to climate change is needed to accept partial responsibility to reduce emissions (e.g., the question of minimum causation). Another important difference between injunctive relief proceedings and claims for damages is that the *occurrence of harm* as such is not a constitutive requirement for granting injunctive relief (which it is under claims for damages, see Part 1 C ii).[120] The *risk of harm* does play a

[120] T.R. Bleeker, 'Aansprakelijkheid voor klimaatschade: een driekoppige draak', *NTBR* 2018/2.

crucial role in determining whether a legal obligation to act exists and whether there is a (threat of a) violation of that obligation. The risk of harm might also be relevant in determining the existence of sufficient interest in the context of standing (see Part 2 B i).

Charles Clore House
17 Russell Square
London WC1B 5JP

T 020 7862 5151
E info@biicl.org

www.biicl.org

A company limited by guarantee
Registered in England No. 615025
Registered Charity No. 209425

British Institute of
International and
Comparative Law