Product liability in the Netherlands

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I. Introduction

The term product liability refers to the liability of manufacturers and suppliers for personal injury and damage to property (private or commercial property) caused by a defective product. In this article an overview of product liability law in The Netherlands will be given.[1] A short history will first be presented (I) and then the actual product liability rules will be considered (II). After a short description of the law of the sales agreement (II A), which gives only a limited possibility upon which to base a claim for product liability , a description will be given of how product liability law developed from the perspective of tort law (II B), before and after the product liability Directive was implemented. Then the Product Liability Act will be addressed (II C). Finally a description will be given of practice and procedure (III), state compensation systems (IV) and potential state liability (V).

Product liability became an issue in the Netherlands in the sixties. There were various examples of product liability that attracted attention in the press. There was the so-called 'Planta-affair'. The margarine Planta was alleged to have caused a mysterious disease causing dermal irritation.[2] The Netherlands had its Softenon children.[3] In the early seventies the 'Exota-affair' brought the problem of exploding bottles to light.[4] Throughout the sixties only a few articles on the subject were published. In 1975 Schut published the first monograph.[5] Judicial decisions have always been scarce.

The Supreme court in the Netherlands, the Hoge Raad, only rendered a few decisions in the field. Before the introduction of the European Product Liability Directive (PL-Directive)[6] the general rule was that the supply of a defective product is not unlawful unless there are special circumstances.[7] One such special circumstance could be the fact that the manufacturer had advertised the product. Later the fact that the product was dangerous and caused personal injury, seemed to be sufficient.[8] The burden of proof as to negligence was shifted to the producer. In 1989 the Hoge Raad adopted the definition of defectiveness from the PL-Directive while liability was based on unlawful act.[9] After the PL-Directive was implemented the position of cases that were not covered by the directive, such as damage to commercial goods, was still uncertain.

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[1] I want to thank prof. Cees van Dam for the preparatory work he did for this contribution. I have inserted part of his text. This article is, however, entirely my responsibility. For an overview of Dutch product liability law see: L. Dommering-van Rongen, Product-aansprakelijkheid. Een rechtsvergelijkend overzicht, Deventer 2000. For a publication in English see: Ivo Giesen and Marco Loos, Liability for Defective Products and Services, in: Ewoud Hondius and Carla Joustra (eds.), Netherlands Reports to the Sixteenth International Congress of Comparative Law, Antwerpen-Oxford-New York, 2002, p. 75-113, also published at http://www.ejcl.org/64/art64-6.html (Electronic Journal of Comparative Law).

[2] For details see Schut, Produktenaansprakelijkheid, No. 51 (1974).

[3] According to Schut, Nr. 21, 25 cases were reported (in the Netherlands). 9 babies died shortly after birth.

[4] See Schut Nos. 130/131.

[5] G.H.A. Schut, Produktenaansprakelijkheid, Zwolle 1974.

[6] Directive of the Council of the European Communities of 25 July 1985 (85/374/EEG), OJ L 210/29.

[7] HR 3 March 1966, NJ 279 (sewage pipe lute).

[8] HR 2 February 1973, NJ 1973, 315 (leaking hot water bottle).

[9] HR 30 June 1989, NJ 1990, 652 (Halcion).

Gradually however, the Hoge Raad followed a comparable path. The rule is now, that it is unlawful (*onrechtmatig*) to put a product into circulation that causes damage when it is used in a normal way and in accordance with its purpose.[10] In principle this implies that the producer is not liable if the damage is caused by a wrongful use of the product. This would differ from the defectiveness-requirement of the PL-Directive, which requires the producer to take into account wrongful conduct of the user of the product, at least to a certain extent. However, as will be explained below, it seems that no difference is intended or that the Hoge Raad is slowly eliminating a difference we may have seen in previous decisions

The PL-Directive was implemented in 1 November 1990. There is at present little case law as to the interpretation of the new provisions and there are as yet no decisions of the Hoge Raad.

II. The product liability regime

A. Contract law

1. Sales agreement

Article 7.17 of the Civil Code provides that the seller must warrant that the sold product is in conformity with the agreement. This is not the case if the product does not possess the qualities the buyer is entitled to expect on the basis of the sales agreement. The buyer is entitled to expect quality and fitness for normal purposes , as well as quality necessary for the special purpose that has been agreed.

Consumers will seldom be in a position to base a product liability claim on contract. Art. 7:24 CC stipulates that if the product is sold by a professional to a consumer and the defect falls under the scope of the special product liability regulation, the seller is not liable unless the knew or should have known of the defect, or he guaranteed the absence of the defect, or in case of property damage if the damages fall under the threshold of 500 Euro.

B. Tort law

1. General principles

The general principle of Dutch tort liability is contained in art. 6:162 Civil Code (art. 1401 old Civil Code).

> *Article 6:162 Civil Code*
> 1. *A person who commits an unlawful act towards another which can be imputed to him, must repair the damage which the other person suffers as a consequence thereof.*
> 2. *Except where there is ground of justification, the following acts are deemed to be unlawful: the violation of a right, an act or omission violating a statutory duty or a rule of unwritten law pertaining to proper social conduct.*
> 3. *An unlawful act can be imputed to its author if it results from his fault or from a cause for which he is answerable according to law or common opinion.*

[10] HR 6 December 1996, NJ 1997, 219 (Du Pont/Hermans); HR 22 October 1999, NJ 2000, 159 (Koolhaas/Rockwool); HR 22 September 2000, NJ 2000, 644 (Haagman c.s./VSCI); HR 29 November 2002, NJ 2003, 50 (Helm/Aerts).

This article forms part of the new Civil Code enacted in 1992. The overall structure of the Code echoes the original French Model, but Germanistic ideas are also clearly interspersed within it and at the same time allowances are made for new problems such as manufacturer's liability[11] and liability for dangerous substances.[12] Apart from the implementation of the European Directive on Product Liability[13], this is the main basis for liability of manufacturers that have put defective products into the stream of commerce. Generally the unlawfulness of the act will follow from the violation of "a rule of unwritten law pertaining to proper social conduct". If a statutory duty is violated, the act is automatically considered unlawful. The violation of a right is not considered to be a proper ground for unlawfulness in product liability cases.

2. The notion of defect under tort law

According to article 6:186 CC (the implementation of the PL-Directive) a product is defective if it does not offer the safety which a person is entitled to expect, taking all circumstances into account, including the presentation of the product, the use to which it could reasonably be expected to be put and the time it was put into circulation. The question is whether that same rule applies under tort law, that is whether the marketing of a defective product is considered to be an unlawful act. In 1989 the Hoge Raad adopted this definition of defect in the Halcion-case while the case was based on an unlawful act.[14] The Directive did not apply directly because the product was marketed in 1978-1979. This was however a case of anticipation as the PL-Directive would have been applicable if the product had been marketed later. It therefore remained uncertain whether this rule would also apply in cases that fall outside the scope of the PL-Directive, that is in cases of damage to commercial property.

As already noted, after the Halcion decision the Hoge Raad started indeed to follow a comparable path in cases of damage to commercial property. It is however uncertain whether the notion of defect differs slightly, depending on the whether it is a consumer case or not. In the case *Du Pont v. Hermans*, the Hoge Raad stated that it is unlawful if the producer puts a product into circulation that causes damage when used in a normal fashion and for the purpose it was intended.[15] This rule was repeated in the Rockwool case.[16] In a decision in 2000 (*Haagman c.s./VSCI*[17]) the rule was re-iterated, but was not considered applicable in the circumstances as the defendant was not the producer. In its most recent decision on this issue the Hoge Raad changed its mind as to this last point, because this case was also related to a supplier not being the producer (Helm/Aerts[18]).

As to the notion of defect, the Hoge Raad referred to the fact that the growers had used the product according to its normal use for the purpose it was intended for. Because the product caused damage under those circumstances, it did not offer the safety the growers were entitled to expect, taking into account the expected use. Thus the Hoge Raad tied the definition of defect from the PL-Directive to its own earlier definition. In one and the same breath the terms 'normal use' and 'expected use' were used interchangeably. It seems that the Hoge Raad indicated that no

[11] The draft new code provided for a new regulation in this respect, which was set aside when the European Community started its harmonization efforts.
[12] Markenesis, see Towards a European Civil Code (Hartkamp et al., 1994), p. 290.
[13] Directive of the Council of the European Communities of 25 July 1985 (85/374/EEG), OJ L 210/29.
[14] HR 30 June 1989, NJ 1990, 652 (Halcion).
[15] HR 6 December 1996, NJ 1997, 219 (Du Pont/Hermans).
[16] HR 22 October 1999, NJ 2000, 159 (Koolhaas c.s./Rockwool).
[17] HR 22 September 2000, NJ 2000, 644 (Haagman c.s./VSCI).
[18] HR 29 November 2002, NJ 2003, 50 (Helm/Aerts).

difference is intended or that the Hoge Raad is slowly wiping out a difference we may have noted from previous decisions.

3. The requirement of negligence

It is however not sufficient that a defect be established for the manufacturer or supplier to be liable. As we have seen in article 6:162 CC the unlawful act must be imputed to the defendant. The Hoge Raad has never accepted strict liability for defective products. The burden of proof with respect to fault has however more or less been shifted to the defendant. In the case Du Pont/Hermans the Hoge Raad decided: *Because of the nature of the unlawful act, the question whether the producer was at fault, can only be answered in the light of the circumstances to be stated by the producer.*

In the Rockwool case[19] the Hoge Raad further defined the duty of care of the producer. *Generally a producer will have to take all measures reasonably required, as a prudent manufacturer, to prevent damage caused by the product which is marketed. The producer of a new product, or a product that has been altered, has a duty to ascertain which effects the product has when used for foreseeable purposes.*

The duty of care in the case of a supplier has not yet been defined. In the case Helm/Aerts the Hoge Raad considered that the court of appeal had either applied strict liability, which is against the law, or had failed to give sufficient reasons why the supplier in question has been at fault.[20]

4. Alternative liability, market share liability

The Netherlands Hoge Raad has accepted alternative liability (joint and several) and rejected market share liability in a case concerning DES (a drug taken during pregnancy).[21] The case was referred to in the *Fairchild*-decision of the House of Lords, mainly because it is aptly described in Walter van Gerven's Casebook on Tort Law.[22] The case concerned the liability of a large number of producers that could have caused injury to a large number of plaintiffs, by putting a defective product on the market. The defective product was DES, a medicine destined to protect against premature birth, which was taken by pregnant women during pregnancy, mainly in the forties, fifties and the beginning of the sixties of the last century. Children of these mothers appeared to suffer from fertility problems and daughters had a high risk of getting cervical cancer. Six so-called DES-daughters (the daughters of the mothers who had taken the drug, who developed cancer) started a procedure against 10 producers on the basis of alternative liability. They referred to art. 6:99 of the new Civil Code, at that time not yet enacted. It was argued that the regulation applied by anticipation, as this was a principle already accepted.

The Hoge Raad applied art. 6:99 BW, which holds: 'Where the damage may have resulted from two or more events for each of which a different person is liable, and where it has been determined that the damage has arisen from at least one of these events, the obligation to repair the damage rests upon each of these persons, unless he proves that the damage is not the result of the event for which he himself is liable.'

[19] HR 22 October 1999, NJ 2000, 159 (Koolhaas c.s./Rockwool).
[20] HR 29 November 2002, NJ 2003, 50 (Helm/Aerts).
[21] HR 9 Oct. 1992, NJ 1995, 535 (DES).
[22] Fairchild v. Glenhaven Funeral Services Ltd. & Others [2002] 3 All ER 305; Walter van Gerven, Jeremy Lever and Pierre Larouche, Cases, Materials and Text on National, Supranational and International Tort Law, Oxford 2000, p. 447-452.

The court decided that this provision does not require that the plaintiff identifies and summons all possible liable persons. The provision would apply if the plaintiff proves that (a) the summoned producers had put DES into circulation in the relevant period and that they were liable for doing so; (b) that other producers also had put DES into circulation in the relevant period and that they were also liable for doing so; (c) that the plaintiff has suffered damage as a consequence of using DES but that it can not be established from which producer the used DES was obtained. If these requirements are met, the summoned parties are jointly liable, unless this would be unacceptable from a reasonableness point of view given the circumstances. A relevant factor is the probability of the chance that the damage of the victim is caused by an event for which no liable person can be determined.[23]

The decision has caused mixed reactions. There was understanding for the attempt to help the victims out of the evidentiary quagmire. Some commentators had less understanding for its consequences, that the producer can possibly be liable for a larger amount of damage that he might have caused. This downside of the decision could have been prevented by choosing a way of market share liability.[24] However, the Hoge Raad considered that this would have another downside: market share liability would wrongly put the risk of insolvency of the producer on the victims.[25]

5. Prescription / Limitation Period

For claims under tort law two prescription periods are relevant, a short one of 5 years and a long one of 20 years. Any claim for compensation of personal injury will lapse if one of the periods expires, whichever the first. Since 1 February 2004 however, this situation has changed. For personal injury which originates from events that take place after that date, only the 5 years period applies.[26]

For personal injury caused by events that took place before 1 February 2004 the 20 year period still applies. According to (the old) article 3:310 Civil Code a claim in law for compensation of injury lapses by the passing of 20 years after the event causing the injury. Awareness by the injured party of the offender or of the injury is generally irrelevant to the commencement of this period of prescription of twenty years. The period of prescription regarding a claim in law for compensation for injury may even commence before any injury was sustained. ("objective criterion"). In that case however under certain circumstances the period of prescription will not be applied because it is considered unfair.[27] This case law is developed for long term damages such as asbestos.

A claim in law for compensation of injury also (or in any case) lapses by the passing of 5 years after the commencement of the day following that on which the injured party became aware of the injury and also of the liable person. Awareness means actual awareness. The plaintiff should in fact be able to issue a claim, which is only the case if he, or in case of children his legal

[23] HR 9 October 1992, NJ 1994, 535, note CJHB (Des). See for an overview of Dutch articles on this decision: Van Gerven, p. 449 note 227. See also Giesen and Loos, 2002, par. 4.2.
[24] Advocate-General Hartkamp argued in favour of this solution in his Conclusion (advise) before the decision, nr. 12-15, following the decision of the Supreme Court of California in Sindell v. Abbott Laboratories 607 P.2d 924 (1980), which was also a case about the liability of the producers of DES.
[25] However, if the causal connections would have been known, the victim could also have been confronted with an insolvent defendant; see Akkermans, Proportionele aansprakelijkheid bij onzeker causaal verband, 1997, p. 362 ff.
[26] Law of 27 November 2003, OJ 2003, 495.
[27] HR 28 April 2000, NJ 2000, 431 (De Schelde).

representative, is sufficiently (not absolutely) certain about the causality.[28] Generally the plaintiff will only have sufficient certainty when a qualified expert gives a diagnosis.[29]

C. Product liability

1. Product liability Act 1990

The European Product Liability Directive was implemented with the Netherlands Product Liability Act of November 1, 1990. Since the Directive had to be implemented on 30 July 1988 (art. 17 Directive), the Netherlands exceeded this term by more than two years. The provisions were previously set out in articles 1407 a-j former Civil Code. With the introduction of the New Civil Code per January 1, 1992, the provisions are contained in Book, Title 3, Chapter 3, articles 185-193.[30]

The legislature followed the guidelines set out in the Directive and did not use the possibility of one of the options. As such the development risk is permitted under art. 6:185 e Civil Code, unprocessed primary agricultural produce and game were not included in the definition of products and a maximum of damages is not imposed. The option to exclude unprocessed agricultural products has been withdrawn with European Directive 1999/34[31] which was implemented as per 4 December 2000.[32]

There is one special feature of Netherlands product liability law. Formerly under article 1407 j and now under article 6:197 BW (thus having general application and not only in product liability cases), state and private insurers who pay compensation in a product liability case, have no subrogated claim for indemnity against the manufacturer under the new provisions. They do have a subrogated claim based on general tort liability. This means they will have to meet a higher burden of proof than the injured person. Whether or not the insurers will have the benefit of a shifted burden of proof with respect to fault is an unsettled issue.

There are two published cases as regards damage caused by products which were put into circulation between 30 July 1988 and 1 November 1990. In one case the court (Hof Leeuwarden) explicitly interpreted Dutch law in accordance with the PL-Directive.[33] In another case the Hoge Raad did not make clear whether or not it did so.[34] The number of cases in which art. 6:185 and following CC was applied is limited. In the following paragraphs their decisions will be analysed.

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[28] HR 31 October 2003, RvdW 169.
[29] HR 24 January 2003, NJ 2003, 3000.
[30] The currently adapted way to refer to those articles is: art. 6:185 BW and following.
[31] European Directive 1999/34/EEC, OJ L 141/20.
[32] Official Journal 2000, 493 en 494
[33] Hof Leeuwarden 18 March 1998, NJ 1998, 867 (Tetra Werke/Kuiper), with reference to ECJ 8 October 1987, Case 80/86, Rep. 1987, 3969 (Kolpinghuis). See about this case also Dommering-van Rongen, 2000, p. 88.
[34] HR 24 December 1993, NJ 1994, 214 (broken top of bottle); see par. 4 and Dommering-van Rongen, 2000, p. 14.

2. The notion of defect in general

In a blood transfusion case the District Court of Amsterdam decided that the safety expectations should be related to the general public, not to the professional direct purchasers.[35]

This case concerned a claimant who, during heart surgery, received HIV-infected blood. It was assumed that the blood had been given by a donor who had only just contracted HIV, such that his infection could not be detected by a test during what has been called 'the window period'. The first question to be answered was what the claimant was entitled to expect with regard to the safety of the donor blood as provided in art. 6. The District Court agreed with the claimant that, '... taking into account the vital importance of blood products and that in principle there is no alternative, the general public expects and is entitled to expect that blood products in the Netherlands have been 100% HIV-free for some time. The fact that there is a small chance that HIV could be transmitted via a blood transfusion, which the Foundation (defendant) estimates at one in a million, is in the opinion of the Court not general knowledge. It cannot therefore be said that the public does not or cannot be expected to have this expectation.'

3. The presentation of the product

With respect to the duty to warn, or in other words the aspect of the presentation of the product that has to be taken into account when deciding whether the product is defective, the Halcion decision is relevant because the Hoge Raad has adopted the notion of defect from the PL-Directive.[36] The Hoge Raad considered that the user does in principle not have to expect side-effects he is not warned against. The producer has a duty to warn against side effects that are reasonably foreseeable. The defendants, Upjohn, here raised a defence that seemed to be based on what in the U.S. is called the 'learned intermediary doctrine'. This means the manufacturer has fulfilled his duty to warn if he adequately warned the medical profession. The doctor is supposed to pass the information on to the patient. American courts however accept in some cases the existence of a duty to warn the patient directly. Whether such a duty exists depends on the extent in which the patient participates in the decision to take the drug, and the feasibility of a direct warning. Upjohn had pointed out they could rely on the medical profession as an intermediary: the doctors through whom Halcion had to be obtained, had a duty to take all precautionary measures to avoid serious side effects. This defence was overruled, because Upjohn had to take into account that doctors would not always know of the risks, and the patients would not recognize the symptoms as side effects from the drug. Therefore, Upjohn had a duty to warn the medical profession as well as the patients.

Another point decided by the Hoge Raad concerning the duty to warn, was related to the frequency of the side effects. American courts used to answer the question when a duty to warn exists by the 'appreciable number test'. The manufacturer did not have a duty to warn against a remote possibility of harm due to an unusual reaction from use by a very small percentage of the potential customers. Later, the courts have freed themselves from such a numerical standard. While a low probability of injury or a small class of endangered users are factors to be taken into account in determining what is reasonable, these factors must be balanced against such considerations as the nature of the drug, the necessity for taking it, and the magnitude of the increased danger to the individual consumer. Information must be given of any risks of death or serious harm, no matter how rare, as well as information concerning side effects where there is a

[35] District court Amsterdam 3 February 1999, NJ 1999, 621 (blood transfusion). See also the critical comments of Dommering-van Rongen, 2000, p. 40 and 114-115.
[36] HR 30 June 1989, NJ 1990, 652 (Halcion).

substantial probability of their occurrence, no matter how mild. The Hoge Raad followed this line by ruling that the producer has a duty to warn against side effects as serious as the ones in question, even when the frequency is low.

The presentation of the product was also in question in a case concerning a 16 year old girl, who inserted a mini tampon incorrectly: she inserted it in the urethra and not in the vagina. She only succeeded to do so after she had put Vaseline on the tampon (following advice from her mother …). After the insertion she could not remove it and surgery was necessary. The girl suffered damage and held the producer of the mini tampon liable. The court dismissed her claim. Firstly, it decided that the instructions for use were clear enough, also for those using the product for the first time. Secondly, it deemed the design of the tampon not to be defective, because it was only possible to insert it incorrectly with a lot of effort and pain (and Vaseline).[37]

4. The proof of the defect

The injured person only has to prove that the product was defective, not that it was defective the moment it left the producer. The producer may rebut this presumption by showing it is plausible that the defect did not exist at the time he supplied the product. To prove that the defect existed at the time of marketing has always been especially difficult in exploding bottle cases.[38]

The peculiar feature in the Dutch product liability case concerning a lemonade bottle was not that it exploded but that the top of the bottle broke off.[39] This happened when the barman in the canteen of a football-club tried to open it. The barman was injured and held the producer of the lemonade bottle liable. The accident took place in the autumn of 1988, a few months after the EC-Directive had to be implemented in Dutch law. As the implementation Act entered into force more than two years later, the Dutch court was obliged to interpret Dutch law in accordance with the PL-Directive, by assuming that the bottle entered into commerce after the implementation date (30 July 1988). If the Dutch Hoge Raad did so, then it did so by implication only.

The key issue in this case was the burden of proof of the defect, because the producer denied that the bottle was defective and argued that it was likely that the bottle had broken owing to another cause, probably that of using too much force. It is clear that the barman could not prove the defect by simply showing the broken bottle, since the bottle could also have been broken because of his wrongful conduct. On the other hand it would be too burdensome to oblige the barman to prove the defect of the bottle itself. The Hoge Raad took an intermediate view and decided that if the barman could prove that he had opened the bottle in a normal fashion, this would lead to the factual presumption that the damage had been caused by a defect of the bottle. It was then up to the producer to rebut this presumption and to prove that

[37] District Court Zwolle 24 April 2002, Praktijkgids 2002, 5921 (X/Johnson and Johnson).
[38] HR 24 December1993, NJ 1994, 2141 (broken top of bottle).
[39] HR 24 December 1993, NJ 1994, 214 (broken top of bottle), about which also Dommering-van Rongen, 2000, p. 14. See also Court of appeal Leeuwarden 21 December 1994, TvC 1995, p. 122: a cyclist suffered damage when the fork of his bike broke. After investigation of the fork, the producer destroyed or mislaid it. The court considered that this fact had to be taken into account to the detriment of the producer as regards the burden of proof of the defect. The court accepted the statement of the cyclist with regard to the place of the crack and with that the cause of the defect. An opposite decision can be found in Court of appeal Amsterdam 27 August 1998, VR 1999, 67 (desk chair): soon after a desk chair broke it was welded by the employer of the victim; for that reason the court put the burden of proof of the defect on the victim.

the bottle was nevertheless not defective.[40] This decision can be seen as an application of the *res ipsa loquitur*-rule, a rule which is also applied in other European legal systems.

5. Influence of compliance of product safety regulation

Compliance with government regulations is not a defence in itself. This is clear because only compliance with mandatory regulations is a defence if the defect is due to this compliance (art. 7 sub d PL-Directive, art. 6:185 par. 1 sub d CC). This was also confirmed by the Hoge Raad in the Halcion case. Although the registration of the drug in question was cancelled after the claims had been made, the District Court of Arnhem decided against the claimants. The District Court considered the way the product was introduced, and especially the registration procedure, was a relevant factor for the question of liability. This factor should be taken into consideration, because it can be an indication that the harmful side-effects are acceptable. This may be true, but the fact that the registration was withdrawn at the time of trial, indicates that the authorities no longer considered the drug sufficiently safe. The Court of Appeal reversed the decision considering that registration and approval of the text of an enclosed instruction leaflet does not relieve a manufacturer of a prescription drug of responsibility. This decision was confirmed by the Hoge Raad. The Hoge Raad limited its decision to the field of drugs. The European Community and Benelux rulings that form the basis for the Dutch legislation on drugs explicitly mention that registration does not relieve the producer from liability.

In my opinion the principle as formulated by the District Court, was correct, but it was wrongly applied. The registration was a relevant factor, only it was withdrawn. Registration is relevant because it shows a competent body had looked at the safety of the product and had approved it. This is an indication the product is indeed safe. But if the registration authority withdraws the registration, this indicates that the grounds for approval must at least be doubted.

6. The development risk defence

In the blood transfusion case referred to earlier the development risk defence was also under discussion.[41] The court decided that this defence does not only apply to the knowledge of the risk but also to the avoidability of it. Since in this case it was scientifically impossible to detect the HIV contamination during the so-called window period, the court rejected the claim of the patient. In the English NBA-case and the German Mineral Water Bottle-case it was held that the development risks defence only applies to the fact whether the risk could be known, not whether it could be avoided. The latter view can be considered to be the right one. This means that the Amsterdam District Court wrongly dismissed the claim of the patient.

7. The manufacturer or supplier

The injured party will have to identify the manufacturer of the final product. Strict liability applies to the manufacturer of the finished product (and of component parts or raw materials), any person who held himself out as a producer, and importers. Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product (art. 6:187 al. 4 CC). The interpretation of what is a reasonable time, was subject of decision in the following case.

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[40] In accordance with the regime of the PL-Directive, the Hoge Raad furthermore decided that the producer had to prove that the defect did not exist when it was put into circulation (cp. art. 7 sub b), that the defect could not have been discovered at an earlier date (cp. art. 7 sub e) and that the product was not used in accordance with its intended use (art. 6 al. 1 sub b).

[41] District Court Amsterdam 3 February 1999, NJ 1999, 621 (blood transfusion). See also the critical comments of Dommering-van Rongen, 2000, p. 40 and 114-115.

Mohammed AK bought an electric cooker in an 'It's' shop. When he used this cooker at home a fire broke out. It was assumed that this fire had been caused by a defect in the electric parts of the cooker. The plaintiff, who did not have fire insurance, held 'It's' liable for the damage. Initially 'It's' acknowledged liability but three weeks later denied it and referred the plaintiff to the importer of the cooker. The President of the District Court of Breda[42] decided that the withdrawal of the acknowledgment could be considered as a justified use of the reasonable time mentioned in this provision and dismissed the claim against the supplier. As a consequence of this the plaintiff had to hold the importer liable for the damage but he was bankrupt. The plaintiff argued that application of art. 3 al. 3 PL-Directive in this case was not reasonable on three grounds: the importer was bankrupt, 'It's' was a big nationwide chain of shops and that the plaintiff did not have fire insurance. The President of the Court rejected these arguments because they were irrelevant in the context of the Directive.

The producer is not liable if he proves that he did not put the product into circulation. This does not mean that he must have supplied it to the ultimate consumer or the retailer. Kuiper bought a (refill) CO^2 capsule from the Dutch importer of a German producer (Tetra Werke). The capsule was intended to be used in a CO^2-system which was also brought on to the market by Tetra Werke. Kuiper suffered damage and held Tetra Werke liable. The question was raised whether the producer had put the capsule into circulation. The court held that this was the case since Tetra Werke had passed the capsule on in the chain of distribution.[43]

8. Prescription / Limitation Period

The injured party must submit its claim within three years after it became aware or should have been aware of the injury, the fault and the identity of the manufacturer (article 6:191 section 1 CC). The right to compensation lapses ten years from the commencement of the day following that on which the manufacturer has brought the product causing the injury into circulation (article 6:191 section 2 CC).

III. Practice and procedure

1. Pre-trial discovery

There is no pre-trial discovery and document disclosure in The Netherlands. Procedural law in The Netherlands is not based on the principle of parties to litigation being obliged to inform each other in full. Neither does the party for whom it seems the least burdensome to provide information as a rule have to provide such information.

The obligation to provide information is based on a party's general obligation to furnish the facts and assert his rights as well as his burden of proof in respect of such facts and rights. However, it is becoming apparent that arriving at the truth is considered increasingly important. This development is consolidated in some new provisions in the Code of Civil Procedure. Article 21 stipulates that the parties are obligated to state the facts that are relevant for the decision, in full and truthfully. According to article 22 a court may in all cases and at any state of the proceedings order the parties or one of them to clarify certain statements or disclose certain documents relevant to the case. Parties may refuse if there are significant

[42] Pres. District court Breda 8 December 2000, KG 2001, 28 (Al Kholali/It's Electronic).
[43] Court of appeal Leeuwarden 18 March 1998, NJ 1998, 867 (Tetra Werke/Kuiper); see about this case also Dommering-van Rongen, 2000, p. 88.

grounds. The court decides whether the grounds justify the refusal and if that is not the case the court may draw an appropriate inference.

The only actual obligation to submit documents may be found in articles 843a and b. However these articles contain a very limited provision which only applies to cases where the applicant is a party to a legal relationship and the documents are related to that relationship (such as obtaining a copy of a contract) or to cases where a party lost a means of evidence which another party still has in its possession.

2. Attorneys and fees

Plaintiffs will need an attorney if they have to go to a district court. The Netherlands Bar has become more professional and has now several specialist associations. The first association created was the Association for Personal Injury Attorneys (Vereniging Letselschade Advocaten, LSA). Attorneys who want to become a member must follow a specialist education.

Plaintiffs will have to pay for the costs of the attorney unless they have legal expenses insurance or they are entitled to legal aid. Legal aid is given on an individual basis. There is no possibility to get legal aid for representative actions, nor to obtain large sums of money in order to do research before an action is brought in court. In case the plaintiffs wins his case in court, legal fees will be awarded but the plaintiff will not be able to reclaim his full costs from the defendant. The awarded legal fees will be calculated on the basis of a fixed fee per action in court depending on the interest at stake. This is called the liquidation tariff (liquidatietarief). Out of court expenses however, incurred in order to establish liability and the extent of the damages, are fully reimbursable.

The introduction of "no cure no pay" and of "contingency fees" has been debated for years. The current state of affairs is that they are not permitted for attorneys belonging to the Netherlands Bar. Some organisations do operate in this manner, but then the attorney is paid by the organisation whether the case is successful or not. Attorneys are restricted in their freedom to make arrangements of this kind by the Code of Conduct, which states that attorneys are not permitted to base their salary on a proportionate share of the value of the outcome achieved with their assistance.

The Board of the Netherlands Bar (*Nederlandse Orde van Advocaten*) has suggested undertaking an experiment in the use of such fee-arrangements , but the Minister of Justice has taken steps in order to annul the decision of the Netherlands Bar.

3. Class and representative actions

In a case of comparable interests, a foundation or association with full legal powers may act in court, provided that these are interests that the organisation represents under its articles of association. The legal action cannot involve monetary damages (Article 3:305a of the Dutch Civil Code, *BW*). According to Article 3:305b of the Civil Code, legal entities under public law can also file a suit regarding the protection of other persons' interests, in so far as these interests have been entrusted to this legal entity. A legal entity under public law is defined in Article 2:1 of the Civil Code, and includes the State, the provinces, the municipalities and so on, as well as other bodies to which part of the government's task has been entrusted.

The American-style class action suit brought by one or more individuals who act on behalf of a group of non-specified others is not possible in the Netherlands. Such groups can set up an organisation for this purpose, however.

If they do, then according to Article 3:305a of the Civil Code they cannot enter a group claim for damages. They can ask the court to render a declaratory judgement that a certain behaviour is wrongful, or that the defendant is liable pursuant to Article 6:185 of the Civil Code (product liability). There are a few mettlesome problems with this approach, however. The decision concerning wrongfulness is only binding between the parties. There are therefore certain advantages to initiating proceedings in the name of the injured parties or to having the organisation act as the individual plaintiffs' authorised representative. In that case, however, the plaintiffs have to be identified in advance. The organisation cannot take on the role of authorised representative once the proceedings have commenced, but anyone who wishes to come on board as the authorised representative of a third party during the course of the proceedings may join in the action in that capacity.

An organisation can also have claims assigned to it for collection. If the same organisation then also wishes to act for plaintiffs who have assigned their claims after the proceedings commenced, it may do so on the grounds of the right to bring a group action, as set out in Article 3:305a of the Civil Code. The right to bring a group action makes it possible for a broadly defined group to act without a list of their names having to be submitted which the other party can then inspect for defence purposes. This does, however, offer the other party the option of mounting a defence against a claim submitted by the unknown plaintiffs. In general it will quickly be assumed that the other party's behaviour towards later interested parties was also wrongful. The actual situation does not necessarily have to be the same for every potential plaintiff, however.

Finally, the most simple way of joining plaintiffs in one action is by way of so-called subjective accumulation. Subjective accumulation applies in the situation where, in one and the same writ of summons, more than one party acts on the side of the plaintiff and/or on the side of the defendant. The legislature did not include any stipulation in case of subjective accumulation. In general accumulation is allowed. Defendants may however resist subjective accumulation, when any coherence between the claims justifying collective hearings for practical purposes, does not exist. The absence of such coherence does not lead to the plaintiff having no cause of action. The plaintiffs may claim the separation of the proceedings pending should insufficient coherence exist.

4. Expert opinion

There is no rule obliging a court in any case to appoint experts. According to article 194 CCP a court may, on request of a party or by virtue of its office, order the opinion or the hearing of an expert. The court may decide to abstain from appointing an expert if it is capable on the basis of its experience to form an opinion itself, for example by consulting technical documents or other sources.[44] If the court appoints an expert, the decision contains the appointment, the form in which the opinion has to be given (usually a date before which the report has to be submitted, or else the date of the hearing) and the scope of the opinion (usually in the form of questions). The court may order the expert to give further explanation, after the first report has been submitted, in writing or orally (article 194 par. 5 CCP). This

[44] Court of Appeal Arnhem 22 January 1924, W 11 163, idem Parl. History to the Law of Proof page 327.

provision is new and was introduced with the new Code of Civil Procedure per 1 January 2002. The law is silent on the nature of such a hearing. According to the Parliamentary History the nature of the hearing will be comparable to the hearing of witnesses of fact, that is to say that first the judge and then the parties can ask questions.

Under the old Procedural Code it was standard practice for the courts to ask for a written report by an expert. Oral reporting hardly ever happened. The courts generally did not grant requests to hear the expert. They preferred to ask for further written comments. There is no reason to believe this has become different since 2002.

Under the old Code parties could make use of their own experts, but only through written reports. There was no possibility to have party experts testify. Under the new rules the situation with respect to written reports by party experts has not changed. Parties can still submit written reports by experts of their choice. Since 2002 however parties may now ask for their experts to be heard in court. Article 200 CCP explicitly states that experts who are not court appointed, can also be heard as an expert witness. The court may permit such a hearing if a party asks for it.

In practice this means that if the defendant submits an expert report, the plaintiff then may ask for an order to have a witness hearing to hear that expert in court, and vice versa. It also means that this is not standard practice; there must be a reason for the request, which generally will be that the report is not sufficiently clear. The court may deny the request, which decision cannot be appealed.

IV. State Compensation systems

There is a tendency in case of mass disasters or mass torts to ask the government to introduce a compensation scheme. There is also a tendency to claim compensation from the government on the ground that the government has been negligent in its task of supervising the safety of its citizens. The government did introduce compensation funds incidentally. One can mention two funds that cover damages where product liability claims were also a possibility. The first is the Bijlmerfund, which relates to the accident with a Boeing of El Al in the Bijlmer area near to Amsterdam in 1994. The second relates to an outbreak of the Legionella disease amongst visitors of the flower show in Bovenkarspel in 1999. These funds cover limited amounts of money. The Dutch government seems to adopta more distant attitude towards this sort of fund.

V. Potential State liability

State liability has become an issue since a number of accidents, such as the aircraft accident in the Bijlmer area, the legionella outbreak in Bovenkarspel, the fire in a bar in Volendam and the explosion of a fireworks plant in Enschede. In these cases the direct cause of the damages lies other than with the government but it bears some responsibility for the safety of the victims. The liability of the government may be problematic in such cases because they are mass disaster cases where the person who is directly responsible is not able to fully compensate the victims. This can not however be a ground upon which state liability can be denied. In principle the state can be liable for negligence, also when it acts in its public

capacity.[45] In the field of defective products, two sorts of arguments might be used: either the government failed to enact adequate safety legislation or the government failed to supervise existing regulations. The first type of argument will seldom lead to liability as it will be very difficult to construe a legal obligation for the government to introduce legislation. On the other hand the possibility cannot be completely excluded. The second type argument is used more frequently. Two decisions however show that the courts are very reluctant to accept liability of the state.

The first is still a first instance decision and it relates to the Enschede disaster.[46] It is not a product liability case, but it is illustrative. The state and the community of Enschede were held to have been negligent in protecting the citizens of Enschede against the risk of explosion of fireworks. The court considered the state has much freedom with respect to the form and content of regulation. The plaintiffs had failed to make clear why the regulation with respect to explosives was in itself insufficient in the sense that the state had not fulfilled its obligation to protect life and property of the citizens. The system of licensing production and storage of fire works was considered sufficient because if the conditions of the license had been met in this case the explosion would not have taken place. A second ground for holding the state liable in this case was the fact that several governmental agencies were involved in the supervision. One of the problems in this case was that certain fireworks were incorrectly labelled. The court was of the opinion that the supervisory body was not aware of that and they could rely on the actual labelling.

The second decision is from the Hoge Raad.[47] There is no liability when the damages of the plaintiff do not fall under the scope of protection of the standard that has been breached (relativity, or remoteness). Although it is not yet certain if the Hoge Raad intented to use this concept to limit state liability, it seems that this is the case. A flat-bottom craft had sunk and caused damage to a dredger. The cause of the damage was corrosion of the bottom of the flat-bottom craft. The Shipping Inspection had inspected the ship and issued a certificate. The Hoge Raad denied liability because the regulation does aim at safeguarding the shipping traffic in general but not at protecting individual financial interests of third parties.

[45] HR 20 November 1924, NJ 1925, 89 (Ostermann).
[46] District Court The Hague 24 December 2003, NJF 2004, 185.
[47] HR 7 May 2004, RvdW 2004, 67.