Towards an Expanding Enterprise Liability in Europe?

How to Analyze the Scope of Liability of Industrial Operators and their Insurers

§ 1. Introduction

Since the 1970's the scope of liability of industrial operators in the United States has expanded considerably. This expansion relates both to the likelihood of being found liable in case of an accident and to the amount of damages awarded. A tendency towards an increased liability for industrial operators seems to have started in Europe to some extent as well. The need to protect innocent victims against major industrial hazards has led both legislation and case law to expand the scope of liability. Some argue that in many cases the classic negligence standard has de facto been replaced by a strict liability rule.

In this article we will try to indicate what elements may influence the scope of liability of industrial operators. This question obviously not only relates to the situation of industrial operators, but also to their insurers. Indeed, whether or not an industrial operator will be found liable after an accident has occurred, and will be bound to pay compensation, may not only depend upon substantive tort law, but also upon the existing social security system. This may in some countries be so elaborate that it eliminates the

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need for a victim to file a tort claim. In addition the attitude of the legal community may play a role as well. Therefore, in many cases where potential liability exists, damage suits are nevertheless not brought.

Obviously the scope of liability will be dependent upon the specific tendencies in legislation and case law in different legal systems. Therefore we will not try to generalize tendencies on the scope of liability within Europe. Instead, we will provide a model that indicates some of the elements that determine the scope of liability. In some cases the situation in the Netherlands will serve as an example.

The goal of this article is merely to indicate how one could analyze a shift in the scope of liability. A next step would be to analyze the consequences of a shift in the scope of liability for the insurability of certain risks. It is, however, not possible to deal with this second step within the scope of this article.

In order to be able to analyze whether one can detect a shift in the scope of liability we will address the following elements. After this introduction we will first concentrate on shifts in substantive tort law (§ 2). Then we will turn to possible shifts in social security law that may increase the need for victims of torts to bring private damage actions. In this part we will also address the possibility of social insurers using the tort system to recover the amounts that have been paid to victims from tortfeasors via a right of redress (§ 3). Next we will look at other elements that may influence the willingness of victims to bring a claim (§ 4). Finally, we will discuss changes in the amount of damages awarded (§ 5).

To a large extent we will deal with tendencies that can be noted in various European legal systems, but that are still uncertain. Therefore we should, once more, stress that it is not the ambition of our paper to analyze whether there is indeed an expanding liability of industrial operators in Europe at the current stage. We are merely attempting to indicate the elements that need to be taken into account if one wishes to execute such an analysis either for the scope of enterprise liability today or in the future.

A few final remarks will be formulated (§ 6).

§ 2. Changes in Tort Law with Respect to the Scope of Liability

A. INTRODUCTION

In this part of the article we would like to address the question whether there have been substantial changes in European tort law recently and whether it can be predicted that other changes may occur in the near future. In many countries in Europe one can find authors that can be quoted to support the thesis that the scope of liability has indeed
expanded in recent years. This expansion of liability relates in general to enterprise liability, but also to liability of professionals, such as physicians, accountants and lawyers. In this section we shall try to sketch some of the developments that in general might have influenced this expansion. Since we have indicated that we are interested in addressing the consequences of these expansions, both for industrial operators and for their insurers, we shall also briefly address the consequences of changes in tort law for the insurability of certain risks. As far as the insurability is concerned one should keep in mind that the magnitude of the risk is determined by the probability (p) that an accident with damage (D) will occur. Changes in material tort law that affect the conditions for liability usually relate to (p). But as we have indicated in the introduction, (p) is also influenced by other factors, such as the scope of the social security system (which we will discuss in § 3) and the willingness to file claims by the legal community and their clients (which will be discussed in § 4). Changes in tort law can obviously also affect the amount of damages awarded; this will be discussed below (in § 5) as well.

In many cases it will not be possible to indicate precisely what the financial consequences of a certain change in tort law will be. It will be hardly possible e.g. to indicate whether a certain shift in case law will lead to a 10%, 25% or greater increase in the chances of an industrial operator being found liable. However, one can at least try to indicate whether an expansion in liability is due to changes in legislation or case law with respect to material tort law or to changes in the social security system. We shall now discuss some developments in material tort law that might affect the probability of an industrial operator being found liable, distinguishing between developments at the international level (B) and at the national level (C).


B. THE INTERNATIONAL LEVEL

1. Conventions

Several international conventions may be of importance for the scope of liability. Indeed, for instance with respect to civil liability for marine oil pollution and with respect to the liability of nuclear power plant operators, conventions have adopted the principle of strict liability, but at the same time limited the scope of liability by introducing financial caps. Many of these conventions have a similar strategy: the operator is strictly liable; liability is channelled to one individual, short statutes of limitation apply and financial caps are introduced. These conventions usually only apply to a specific topic, such as oil pollution, nuclear accidents or civil aviation and, therefore, probably have little bearing on the general question addressed in this article of whether industrial operators face an expanding scope of liability. Moreover, it is not all clear whether these conventions in fact lead to an expansion of liability. Through the introduction of strict liability, it could be argued that the potential for being held liable once an accident has happened is obviously greater than under a negligence rule. However, the number of potential injurers to which a victim could address his claim has 'been reduced through the channeling of liability. In addition, the amount at stake is usually seriously limited by the introduction of financial caps. Therefore, it can be argued that the scope of liability of a potential injurer under these conventions is usually more limited than under regular tort law. Moreover, the preparatory proceedings of some of these conventions also make it clear that their goal was not so much an increased victim protection, but the limitation
of risks for e.g. a nuclear power plant operator. 10 Hence, it can be argued that if there is any influence of the existing conventions on the scope of liability this influence goes more in the direction of limiting instead of expanding the scope of liability. 11

2. Council of Europe

As far as the scope of liability is concerned, we should certainly point to the recent convention of Lugano on Civil Liability for Damage Resulting from Activities Dangerous to the Environment. 12 In this convention the signatory parties agreed to a strict liability for environmental damage. In fact, this reflects a tendency in the legal systems of the various states towards the introduction of a strict liability for environmental damage. Hence, the question arises whether it is fair to argue that this convention as such will lead to an expanding scope of liability. This might undoubtedly be true for those signatory states that had not adopted a strict liability rule for environmental damage in their legal system up until that point, either by statute or through evolutions in case law. Looking at the situation in e.g. the Netherlands, one should note that the scope of liability was already relatively large as a result of art. 6:175 of the Dutch Civil Code 13 which entered into effect on 1 February 1995.

3. European Union

Originally very few initiatives were taken at the European level with respect to civil liability. However, given the initial goal of market integration of the European Economic Community, the Commission realized that it could use the classic harmonization article, Article 100 of the Treaty, to harmonize legislation in the Member States in order to equalize marketing conditions. Levelling the playing field was the message. Therefore, the most noteworthy initiative with respect to civil liability was taken by the Commission in the field of product liability as early as 1975. In the statement preceding the text of what ten years later would become the Product Liability Directive of 25 July


11. Note however, that both with respect to oil pollution and nuclear accidents, there is a tendency to amend the existing conventions to increase the available amounts as a result of political pressure.


1985, 14 one could read that market integration was not the only goal of the Directive. It also aimed at a higher level of consumer protection. 15

Again, the question could be asked whether this European Product Liability Directive constitutes an expansion of the scope of liability. Obviously this will again depend upon the state of liability law in the various Member States. For some Member States which already had elaborated product liability regimes at the time of the promulgation of the Directive, this European initiative probably did not substantially enlarge the scope of liability for manufacturers. This was probably the case for Germany, 16 but also for the Netherlands. 17 For these Member States one can even argue that national case law and/or legislation provides for an even wider scope of liability, since national law does not have the restrictions (e.g., with respect to the statute of limitation, scope of damages etc.) that are included in the Directive. 18 But for other Member States, such as e.g. Spain and Greece, 19 the Directive did probably substantially change the scope of liability of producers. In some legal systems, the answer might be somewhat mixed. For instance, in Belgium traditional case law had awarded a large degree of protection to victims standing in a contractual chain with the producer (based on the sellers responsibility to provide a guarantee against the consequences of defects of the products he

15. This notion can be found at several instances in the statements preceding the text; see Faure, M., 'Harmonization of product liability law in Europe' in GIRGIS (ed.), L'imprese Europea nel 1992: problemi economici e giuridici nella prospettiva del mercato unico, (Il Giurs. 1992), 395.
17. The Dutch Supreme Court had already provided for substantial protection for victims of defective products. See in that respect for instance the well known Ford case [Court of Amsterdam 27 June 1957, Nederlands Jurisprudentie (1958), 104] and (after implementation of the Directive, but based on Dutch tort law) the famous Halcion case [Dutch Supreme Court 30 June 1989, Nederlands Jurisprudentie (1990), 652] and see the Vranová case [Dutch Supreme Court 24 December 1993, Nederlands Jurisprudentie (1994), 214].
19. Bourgoignie argued that the Directive brought about drastic changes for Greece, Italy, Spain and Portugal. Other countries already had - in his view - a product liability system, which equalled the liability system of the EC directive (Bourgoignie, T., 'Responsabilité du fait des produits: arguments communs pour un nouveau débat', Revue Européenne de droit de la consommation (1987), 17).
sold), 20 but for third parties, not standing in a contractual relationship, classic tort rules applied. Even though some case law had argued that the fact of bringing a defective product on the market already constituted a tort, it seems fair to state that in Belgium the situation of third party victims has been improved (and the corresponding liability of the manufacturer expanded) with the entering into force of the Belgian Product Liability Act implementing the European Directive. 21 Moreover, this European Product Liability Directive is also important, since it reflects a tendency in European policy to opt for an increased consumer/victim protection and therefore also for an expanding scope of enterprise liability. 22

Obviously it would be worthwhile investigating what the policy options of the Commission are with respect to future initiatives concerning liability law. If these are, as some could argue with respect to the European Product Liability Directive, merely a codification of tendencies in national liability law, industrial operators should again not necessarily fear the legislative initiatives coming from Brussels any more than legislative or jurisprudential evolutions in their own country. Moreover, the scope of civil liability has traditionally been a field that has been considered as highly related to national legal culture and, therefore, not well suited to a total harmonization. 23 As a result, attempts to harmonize at the European level towards a level of consumer/victim/environmental protection which is higher than what has been customary within the Member States, will inevitably have to cope with a lot of resistance. A perfect illustration constitutes the just mentioned European Product Liability Directive, which could only finally see the light after a pregnancy of 9 years. Another illustration is the evolution of a draft of Directive concerning the liability of suppliers of services. 24 This Directive on the liability for


services could indeed substantially expand the scope of liability. A first text opted for a clear strict liability for damage caused by defectively supplied services. A later text weakened this a little towards a negligence rule with a reversal of the burden of proof. However, recently the Commission has totally withdrawn this draft Directive and is now considering promulgating specific rules for specific services (e.g. construction) instead of a generalized liability rule for all kinds of services. 25

It generally seems fair to argue that whenever a European initiative is taken, this usually consists of a strict liability rule or a reversal of the burden of proof, and is accompanied by the argument that this better suits the need of victim protection. Whether this always constitutes an expansion of the operator’s scope of liability will inevitably depend upon the existing liability rules in national law. 26 In that respect the evolution of the draft Directive concerning liability for services perfectly illustrates that too far reaching initiatives at the European level will often not be acceptable for the Member States.

There are two more recent European documents concerning liability law that should be mentioned. The first is European Directive 90/270 of 29 May 1990 concerning the use of display screens (visual display units), which has to be implemented in national law by 1 January 1997. 27 To some extent this Directive responded to the so-called ‘repetitive strain injury’ problem (RSI), which is a notion used to describe several health problems caused by a repetitive rehearsal of a similar movement. In the UK RSI has led to several successful liability claims. 28 This European Directive itself does not institute a liability regime, but forces employers to follow specific safety instructions that should prevent the repetitive strain injury or other health problems connected with computer screens. Although one could question the efficiency and usefulness of this Directive at such an early stage, when little is known about possible consequences, 29 the regulatory devices provided for in the Directive will undoubtedly also affect liability law. If indeed the safety precautions prescribed by the Directive have not been followed


by an employer a victim could claim that damage resulting from this omission has to be compensated for by the employer under the negligence rule. 30

A second domain in which European action can be expected in the near future is environmental liability. In this respect we should refer to the green paper on remediing environmental damage that was launched in 1993. 31 In this policy document the Commission discusses several options for regulation with respect to environmental liability. One can again clearly read a preference of the Commission for a strict liability rule. Whether this green paper will soon be translated into a proposal for a directive is not yet certain. However, given the policy options followed in the green paper and the recently adopted Convention of Lugano, it seems likely that whenever another initiative is taken with respect to environmental liability, it will involve the adoption of a strict liability rule. Again, we should repeat that such an initiative would not necessarily mean that the scope of liability will also be expanded. This will to a large extent depend upon the scope of national liability law.

Finally we should point to the important recent cases of the European Court of Justice, more specifically Francovich 32 and Brasserie du Pêcheur 33 which will undoubtedly have an important impact on state liability in case of violations of Community law. 34

C. National Law

1. Legislation

Many legislative actions have been taken in several European countries that have led to an expansion of the scope of liability of enterprises. 35 Indeed, for several specific areas legislators have opted for a shift from fault to strict liability. Some of these tendencies in legislation are caused by the just mentioned international evolutions. This is e.g. the case for the legislative move towards strict liability for damage caused by

35. Important differences between the legal systems exist, amongst others regarding the question what is considered to be a protected interest in tort law. We will discuss some of these issues in § 5.C.

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product defects which has to a large extent been initiated by the European Product Liability Directive, certainly in countries that did not have a particular product liability regime yet. But one can also point to other areas where either the burden of proof has been shifted or the fault concept has been broadened. This is the case in several countries with respect to environmental liability and related areas. Many legal systems have also introduced strict liability for environmental damage. One example is the German Water Pollution Act of 1957 and the subsequent Umwelthaftungsgesetz of 1990; another is the Danish Act on Strict Liability for environmental damage.

One can also note a shift towards (a form of) strict liability in the related area of liability for hazardous substances and/or activities. Examples can be found e.g. in art. 6:175 of the new Dutch Civil Code and in German law as well as in Belgium.

What can be said about this tendency as far as its influence on the insurability of certain risks is concerned? Again, it will largely depend upon the already existing legal regime in a specific country as to whether or not such a legislative move really constitutes an expansion of liability. If a clear negligence rule existed, a shift towards strict liability will undoubtedly constitute an expansion. If on the other hand, national case law already interpreted the negligence rule relatively broadly the shift towards a formal strict liability rule might not constitute such an important change in the firms exposure to liability. Second, it should be mentioned that as long as the new strict liability regime only applies to situations that occur after the entering into force of the new regime, the shift towards strict liability should not pose excessively serious problems from an insurance perspective. Indeed, as long as the new risk remains predictable the risk remains

41. For an overview see Bocken, H., ‘La responsabilité sans faute en droit belge’ in In Memoriam Jean Limpens, 85.

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insurable. One could therefore note that for instance, after the implementation of the new European Product Liability Directive, insurance policies adapted relatively smoothly to the new regime. Third, one should not forget that enterprises providing services or producing goods usually stand in a contractual relationship with a customer. This means that the consequences of an expanding liability can usually be passed on to consumers via the price mechanism. Moreover, it is very likely that in the near future there might not just be the current tendency to introduce strict liability for specific areas and activities; it is very possible that a generalized strict enterprise liability will be introduced in either legislation or in case law.

Even if this were the case it could still be argued that as long as this new legal regime only applies to activities that occur after the entering into force of the new regime, this will allow an insurer to predict and calculate the new risk ex ante and fix premiums accordingly. Unfortunately, however, an insurer will often be unable to do so in case of long term insurance policies which have not foreseen the possibility of an adaptation to a new scope of liability.

2. Case Law

a. Shift from Negligence to Strict Liability

We have already discussed the shift from negligence towards strict liability that can be noticed in the legislation of some countries with respect to many activities involving industrial operators. This tendency could often first be noted in case law. In many areas this shift took place without the formal introduction of a strict liability rule, but instead simply by broadening the fault concept. In this respect, one can point to many evolutions. First, in numerous countries, e.g. the Netherlands, courts often seem to favour

43. If at least the other conditions of insurability (control of moral hazard, avoidance of advert selection, availability of sufficient coverage and a competitive insurance market) are met.
45. Note, however, that this might cause perverse distributional effects in as much as the buyers of the product are not the potential victims. In that case the customers pay a higher price for an increased protection provided to third parties (see Faure, M. in GIRGIS (ed.), L'imprese Europea nel 1992, 395).
47. One is only left with Priest's assertion that the shift towards enterprise liability will lead to an increased use of third party liability insurance which causes more problems of controlling the adverse selection problem than with first party insurance under the negligence rule (see Priest, G., 'The Current Insurance Crisis and Modern Tort Law', Yale Law Journal (1987), 1521 and see the criticism by Vissers, K., 'The Dimensions of the Product Liability Crisis', Journal of Legal Studies (1991), 147).
victims through broad interpretations of the negligence rule as soon as physical harm has been inflicted as a consequence of an industrial activity. Again, product liability law could serve as an example to illustrate this evolution. For instance, in Belgian tort law some courts ruled that a product has to be considered defective by virtue of the simple fact that it has been brought on the market and apparently caused damage. Similar decisions could already be found before the European Product Liability Directive in the Netherlands and Germany. Also in many cases where physical harm is inflicted, a 'duty of care' will be interpreted extensively. In the recent Margereson and Hancock v. J.W. Roberts case the High Court of Justice of Leeds District Registry held that a company was liable in negligence for personal injury caused by an asbestos factory to local residents as a result of its operations over sixty years previously. It was held that the company's duty of care extended beyond its employees to the factory's immediate surroundings.

Second, in some cases the negligence rule continued to remain in existence, but a reversal of the burden of proof took place. This was for instance the case in Belgian contract law with respect to product liability. According to a decision of the Cour de Cassation of 4 May 1939, the seller of a defective product is presumed to have known the defects of the products he sold. A later decision held that the seller could still prove otherwise, but only if he could show that it was totally impossible for him to discover the product defects; he has to show invincible ignorance. Where in Belgium the presumption can, therefore, still be rebutted, in France, on the contrary, case law has held that the presumption of knowledge of the defects for the professional seller was a presumption l'ure et de l'ure and therefore not rebuttable.

Third, one could also point to evolutions in case law concerning environmental damage. Especially as far as the liability for soil clean up costs and other environmental damage is concerned, the foreseeability requirement has often been relaxed, which also substantially lowers the burden of proving negligence. This jurisprudential evolution has led to

49. See the references in footnotes 16 and 17.
51. Pacicrisie belge, [1939], I, 223.
52. And is, therefore, bound to compensate all damage to the victim according to Art. 1645 of the Belgian civil code.
interesting debates, e.g. in the Netherlands. As early as 1988, Van Dunne claimed that liability for environmental damages had generally shifted from negligence to strict liability. He also claims that Dutch law now has a strict liability for soil pollution. Vranken on the contrary argues that it is merely a broadly defined negligence rule, but not strict liability. This debate illustrates that even for specialists it is no longer easy to distinguish between the negligence and the strict liability rule. Ten
dendencies towards strict liability for environmental damage can obviously also be found outside of Dutch tort law. One can e.g. point to the famous British Rylands v. Fletcher case where a strict liability rule for damage caused by bursting reservoirs was instituted. This 19th century doctrine is now widely applied to many cases of environmental harm. Another example can be found in German case law where a reversal of the burden of proof was accepted in a 1985 environmental case.

Fourth, one can also note a broad interpretation of the negligence rule, especially as soon as physical harm is inflicted, through the fact that in many legal systems the violation of a specific regulatory safety standard automatically constitutes a fault. By raising the standard of care courts can indeed imperceptibly shift a negligence rule to strict liability.

Finally one could also illustrate the jurisprudential tendency to expand liability by reference to the domain of professional liability. Indeed, liability of professionals, e.g.

56. Van Dunne, J.M., 'De rechtspraak inzake milieu-aansprakelijkheid uit onrechtmatige daad: van schuld-
beginnig naar risicobeginnig', *Tijdschrift voor Milieuaansprakelijkheid* (1988), 33. He claims that in
the case of a creation of a dangerous situation a 'pseudo strict liability' applies (Van Dunne, J.M., 'En-
vironmental liability: continental style', *Review of European Community and International Environ-
mental Law* (1992), 396).
57. See also on Dutch Soil Pollution Cases: Taams, R. and Uithoorn, M., ‘The Dutch Soil Pollution
58. See Vranken, J.B.M., 'Zorgvuldigheidsnorm en aansprakelijkheid voor bodemverontreiniging uit het
verleden', *Weekblad voor Privaatrecht Natuurraad en Registratie* (not dated), 5953 and see Van Dunne's
reaction: Van Dunne, J.M., 'Een kanukareactie op De Rotte. De visie van Vranken op de aansprake-
lijkheid uit art. 1401 BW, in het bijzonder bij bodemvervuiling uit het verleden', *Weekblad voor
Privaatrecht Natuurraad en Registratie* (not dated), 5976.
59. See in this respect also Spier, J. ‘De maatstroom van het aansprakelijkheidsrecht’, 34
60. See Zweigert, K. and Kitz, H., *Introduction to Comparative Law*, 708 and Mullis, A. and Oliphant,
K., *Torts*, 195-200; see also the Cambridge water case, discussed in the next section
62. See for Dutch case law e.g. the so called *Jumbo II* case of 1 October 1993 (Nederlandse Jurisprudentie
[1995], 182).
physicians, attorneys and architects as well as accountants seems to be expanding in many legal systems as well. 64

As far as the question is concerned of whether these jurisprudential evolutions constitute a broadening of the scope of liability, we can again refer to what has been mentioned before. Coming from a negligence rule, a shift towards strict liability certainly expands the scope of liability. In many countries these jurisprudential evolutions have preceded legislative changes which, as such, in turn have preceded international evolutions. The bases for changes could often be found in the jurisprudential tendency to provide victim or consumer protection in individual cases. As far as the insurability is concerned, it should be mentioned that a strict liability is also insurable as long as it only applies to new risks. There are, however, two threats to the insurability that can also be noted in certain jurisprudential evolutions.

b. Retroactive Liability

Indeed, the most serious threat caused by the jurisprudential and legislative evolutions for industrial operators and their insurers are probably not the expansions of liability as such, whatever form they may take. Problems will however arise if a retroactive liability is introduced. In that case, the specific enterprise will indeed be held liable for a behaviour that was not considered wrongful at the time when the act was committed. Only through changes in case law or regulatory standards will specific behaviour in the past be considered wrongful today. Such a retroactive application of new standards seems to collide with one of the main principles of tort law, namely that the foresight of a liability ex post should give incentives ex ante for the prevention of accidents. Since the behaviour was not considered wrongful at the time, a retroactive application of new standards, either through case law or regulation could, therefore, never affect incentives for future behaviour of the specific operator. Moreover, such a retroactive liability may indeed lead to uninsurability. Indeed, the insurer was not aware of the risk at the time of the potentially wrongful behaviour of the insured. Since the risk was, therefore, not foreseeable at all, no premium could be charged for it, no specific preventive mechanisms could be required via the policy conditions and no reservations for losses could be made. The reason retroactive liability is nevertheless discussed often has to do with compensation. But even from a distributive point of view, retroactive liability could be

criticized. Indeed, in many cases, the operators who caused e.g. soil pollution in the past, may be out of business now. It is, therefore, questionable whether it is fair to shift the costs of soil clean up operations to the unlucky operators which can still be found in business today and whose behaviour at the time was not even considered wrongful. 65

Nevertheless, examples of retroactive liability can be found in the case law of several legal systems. 66 Since this retroactive liability makes a future risk calculation for operators and their insurers impossible, this jurisprudential trend seems to be highly problematic. Nevertheless, it cannot be excluded that the redistributive desire to provide victim protection may lead to an increased use of this retroactive liability, especially in cases where victims are suffering physical harm. However, when it concerns environmental damage, e.g. liability for soil clean up costs, increasingly judges or legislators seem to be becoming aware of the fact that it is not reasonable to shift all the costs of historic pollution to the operators still in business today. This led the Dutch Supreme Court to limit the polluter’s liability to the period starting 1 January 1975. 67 A subsequent Soil Protection Act also limits the ‘retroactive’ effect of this liability in the Netherlands. 68 In Flanders a Soil Clean up Decree has been promulgated following the work of an inter-university commission on the reform of environmental law in Flanders. 69 This commission, and the subsequent Decree, provide for a ground of excuse for the owner of a polluted soil who has acted in good faith, i.e. who was not aware of the fact that the specific soil was polluted. 70 Also in the recent House of Lords decision, Cambridge Water co v. Eastern Counties Leather PLC, 71 liability was denied because the foreseeability requirement was not met in this case of historic pollu-

65. Some have, therefore, argued that the actions in recovery of clean up costs in fact have the character of a lottery.


69. See Internationale Commissie tot Herziening van het Milieurecht in het Vlaamse Gewest, Voorontwerp Decreet Milieubeleid, (Die Keure, 1995); the Commission’s proposals concerning civil liability have been discussed by Deketelaere, K., ‘De voorstellen van de Internationale Commissie tot Herziening van het Milieurecht in het Vlaamse Gewest inzake aansprakelijkheid voor milieuschade’ in Deketelaere, M. (ed.), Recent ontwikkelingen inzake de aansprakelijkheid voor milieuschade, (Die Keure, 1993), 75.

70. According to art. 31 § 2 of the Soil Clean up Decree of 22 February 1995, there is no duty to clean up in case of historic pollution if the user of the soil was in good faith (see Deketelaere, M., ‘Aansprakelijkheid voor historische, nieuwe en gemengde bodemverontreiniging’ in Deketelaere, K. (ed.), Het decreet betreffende de bodemsanering, (Die Keure, 1995), 135.


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tion. Note, however, that a different approach was taken in the United Kingdom’s Environment Act 1995, where a strict retrospective liability was instituted with regard to the restoration of contaminated sites.

c. Causal Uncertainty

There is a second trend in liability law, which may seriously endanger the predictability and therefore the insurability of certain risks. This concerns the tendency to shift the risk of causal uncertainty to enterprises (and therefore to their insurers). There are two well known situations that have arisen in Dutch case law that can illustrate this tendency.

The first example concerns the drug DES. It is certain that this product caused birth defects and that specific daughters of mothers who took DES during pregnancy suffered physical harm. The causal link between the use of DES by the mother and the symptoms by the daughter were not disputed. It was also known that certain manufacturers had brought DES onto the market. Uncertainty existed though with respect to which manufacturer sold a specific product to a particular mother. Several ‘DES daughters’ sued all producers that brought DES onto the market, although they could not prove from which manufacturer their mother had bought the drug. This gave rise to a debate concerning the question whether a type of proportional liability rule should be applied to apportion the burden of liability between the manufacturers. A market share liability would be an example of such a proportionality rule. The Dutch Supreme Court, however, applied a so called ‘alternative causation’ rule, meaning that the DES daughters have the possibility of claiming full compensation from any of the manufacturers. The manufacturer can still rebut the presumption by proving that he did not sell DES to the particular mother, but this will often be impossible in practice. Hence, this result equals a joint and several liability rule.


76. Note, however, that the Dutch Supreme Court only considered the causation question. Formally it still has to be decided whether bringing DES onto the market was as such wrongful. See Dutch Supreme Court, 9 October 1992, Nederlandse Jurisprudentie, (1994), 535 (C.J.H.B.). See on this case Spier, J. and Wansink, J.H., ‘Joint and Several Liability of DES Manufacturers: a Dutch Tort Crisis’, International Insurance Law Review (1993), 176.

A second example of shifting the burden of causal uncertainty relates to the employers liability for occupational diseases. In a well known Dutch Supreme Court case Cjouw/De Schelde, a victim of asbestoses could not prove at what time he had been confronted with the fatal asbestos crystal that has caused his disease. The determination of this moment was crucial for the case since Cjouw had worked for several years for the defendant firm, but had earlier worked for another enterprise, where he also worked with asbestoses. The Supreme Court once more shifted the uncertainty concerning causation to the enterprise by holding that it was presumed that the employee had been confronted with the fatal asbestos crystal during the period of his employment for the defendant. This presumption could be rebutted by the defendant by proving that it was not during the period that Cjouw was employed by the specific defendant that he came into contact with the fatal crystal. Obviously this will be practically impossible for the employer.

In both cases one is confronted with a causal uncertainty, whereby the burden of proof is shifted to the enterprise. Since causation issues are very often difficult to prove with scientific certainty, this shift of the risk of proof will often be decisive for the outcome of the case. Legal systems other than the Dutch system have been confronted with the consequences of causal uncertainty as well. This especially plays a role with regard to the so-called toxic torts, whereby a part of the population has been exposed to hazardous substances or radiation and subsequently a certain disease e.g. cancer is discovered. The problem is that unfortunately people may get this particular disease, cancer, from various sources. In that case therefore the identity of the injurer is certain, but uncertainty exists with respect to the victim. Indeed, they may well have received their disease through the so-called background risk and not through the presence of e.g. a nuclear power plant. These kind of questions have indeed arisen also in Belgium and the United Kingdom. Causal uncertainty played a role in the famous British Sellafield case where an English court had to decide on the causal relationship between childhood leukaemia and the nearby presence of a nuclear power plant at Sellafield. Similarly Belgian courts have been confronted with the question whether the physical

complaints of inhabitants of the community of Mellery in the Walloon Region was caused by the emissions from a nearby waste site. 83

An example may illustrate the difficulties that may arise when deciding these kind of questions. Suppose that in an average population only 20 persons would be the victim of a cancer, whereas it is suddenly established that this number is significantly higher in a population living nearby e.g. a power plant. Assume that in that particular population we find e.g. 30 cases of cancer. If we further assume that the marginal increase of the number of victims by 10 has been caused by the presence of the power plant, the question further arises which of the 30 victims received cancer through the background risk and who are really victims of the presence of the power plant. The Dutch Supreme Court cases that shift the risk of causal uncertainty to the enterprise would lead to dramatic consequences in this example. 84 In the particular example this would mean that we would presume that all 30 cases of cancer were caused by the power plant, unless the plant could prove that some of the cancers were not caused by its presence. This shift of the risk of proof will put an impossible burden on the plant and will effectively lead to the result that the plant will have to compensate all 30 victims. The result is that the plant pays in 20 out of 30 cases for victims whose cancer has not been caused by its presence. 85 This perverse result could be avoided through a proportionate liability rule, such as a market share liability in product liability cases. 86 The negative consequences of causal uncertainty could then be limited. A proportionate liability rule is less rigorous than the all or nothing approach of the reversal of the burden of proof. 87 The proportionate liability rule would indeed mean that all victims could claim a proportion of their damage equal to the amount which the power plant contributed to the loss. Thus the exposure to liability of the plant corresponds precisely with the amount which the power plant contributed to the risk. 88

84. Nevertheless this has been advanced by some authors. See e.g. Van Maanen, G.E., ‘De civielrechte-
jijke aansprakelijkheid voor kernongevallen naar Nederlands Recht’ in Faure, M. (ed.), Aansprakelijk-
heid voor het Nucleaire Risico, (Makuh, 1993), 19.
85. See further on these problems, Faure, M., (Geen schijn van kans. Beschouwingen over het statistisch causaaliteitsbewijs bij milieu-en gezondheidschade, (Makuh, 1993).
86. This proportionate liability rule has been defended by several American scholars (Rosenberg, D., ‘The causal connection in Mass Exposure cases: a “public law” vision of the tort system’, Harvard Law Review (1984), 851) and is also defended in the economic analysis of law (Shavell, S., ‘Uncertainty over causation and the determination of civil liability’, Journal of Law and Economics (1985), 587). The Dutch Attorney General Hartkamp also defended a market share liability in the DES case (Tijdschrift voor Consumentenrecht (1992), 241). In addition Spier pleaded in favour for a proportionate liability for latent diseases in his inaugural address, Stijgende schade, (Kluwer, 1990).
D. SUMMARY

What does this brief overview of international and national tendencies in legislation and case law teach us with respect to the scope of liability? Whether international tendencies are decisive for determining the scope of liability will to a large extent depend upon existing liability law in the particular country. In some cases where far reaching liability law existed, international conventions or European Directives will often not substantially broaden the scope of liability; this might, however, be the case in countries where this development has been absent. In any case, European Directives were often promulgated in the first place to harmonize existing legislation, since it is argued that differences could hamper competition. Even though e.g. the Product Liability Directive also argues that it wishes to achieve a higher level of consumer protection in many legal systems, the Directive did not substantially broaden the scope of liability.

The scope of national tort law can obviously be broadened through changes in legislation. These changes are, however, in many cases the codification of judge-made law. Indeed, the jurisprudential wish to provide victim or consumer protection has initiated a shift from fault to strict liability. As examples from some legal systems showed, this tendency towards strict liability was usually limited to specific areas of liability law, but in addition a general tendency towards faultless enterprise liability can be noted in Europe as well. However, the soil pollution cases in the Netherlands and the UK equally show that some defences are still allowed under strict liability, e.g. the unforeseeability of the risk. Therefore, in the end the difference between a broadly interpreted negligence rule and a strict liability rule may not be that large in practice. Obviously, it will largely depend upon legal tradition in the specific country whether a shift towards expanding enterprise liability takes place through case law or through legislation. In the common law the role of courts is traditionally larger, whereas one would expect a greater impact of legislation in continental systems. However, some examples showed that also in the continent, an important role has been played by the judiciary in expanding enterprise liability.

The normative explanation for this change is usually the victim protection argument. The wish to provide victim compensation from a solvent enterprise leads to broad

90. Zweigert, K. and Kötz, H., Introduction to comparative law, 646, discuss the role of the English judiciary in expanding liability to provide victim compensation.
interpretations of the negligence standard. In some cases this hidden redistributive agenda may also lead to liability of enterprises for risks that they have not caused themselves (in case of causal uncertainty) or for risks that were unforeseeable at the time when the tort was committed (in case of retroactive liability). These tendencies may be more dangerous than the shift towards strict liability in itself. Indeed, whereas it can be argued that strict liability as such can still be insurable, this is no longer true if retroactive liability is introduced or the risk of causal uncertainty is shifted to the enterprise. Hence, one should be extremely cautious precisely with respect to these tendencies which may affect the insurability of risks.

§ 3. Developments in Social Security Law

A. INTRODUCTION

In this part of the article we will briefly address the importance of the social security system for the question how can one analyze the scope of liability of industrial operators. Our basic assumption is that for a long time victims in Western Europe, contrary to their American counterparts, did not have many incentives to bring a liability suit, since the social security system in many Western European countries provided for a relatively wide coverage of many expenses that a victim incurs when an accident happens. 93 Partially as a result of international conventions 94 and European Directives, 95 many countries have elaborated systems of compulsory first party insurance covering medical expenses. In addition, lost income is often taken care of as well. Depending upon the legal system, this is usually mandatory if one is employed and on a voluntary basis for self-employed individuals. In some cases even property losses are insured, depending upon the type of accident. This relatively elaborated first party insurance system had as a consequence that a large part of the damage to victims was taken care of already. Victims individually therefore only had incentives to sue an injurer in tort for the part of the damage that was not taken care of via the first party insurance scheme. This could in some cases be property loss, or the higher part of one's income which would not be compensated and - mostly - compensation for so-called pain and suffering for which no first party insurance is available. 96

93. See also Brüggemeier, G., Juristenzeitung (1986), 969.
94. See e.g. the European Social Charter of 18 October 1961, and ILO-conventions nr. 24 concerning sickness insurance for workers in industry and commerce and domestic servants, nr. 25 concerning sickness insurance for agricultural workers and nr. 102 concerning minimum standards of social security.
Therefore, if one wishes to analyze the scope of liability in a particular legal system, one should also take into account the extent to which damage is already compensated for via other (private or public) compensation mechanisms which remove the need to use the tort system. 97 In addition, if one wishes to analyze possible evolutions in the scope of liability one should also address possible changes in social security law. We shall discuss the Dutch case as an example to illustrate how changes in the social security system can influence the amount to which enterprises will have to intervene to provide compensation to potential victims (B). Obviously, the power of one state to change its social security system is limited by its duty to fulfill its obligations under European and international law. 98

A very much related question is whether the just-mentioned first party insurers or social security organizations have a right of redress against the injurer after having compensated the victim. One can also understand that if e.g. a health care insurer were not subrogated in the rights of the victim for the amounts paid in health care, this would seriously limit the scope of liability of the injurer. By the same token, proposed changes to increase the scope of redress for social insurers would obviously expand the scope of enterprise liability. Since again a broad discussion is taking place in the Netherlands on this topic, we will once more discuss the Dutch case as an example of how changes in the relationship between social security law and tort law via the right of redress may affect the scope of enterprise liability (C).

B. WORKERS COMPENSATION 99

Since it is not possible to discuss workers compensation issues at great length in this paper, we will discuss a few recent changes in Dutch law that illustrate the tendency of deregulation in this area which seems to be typical for the policy in the nineties in many Western European legal systems. Generally the recent Dutch changes aim at increasing the individual responsibility of an employer, inter alia for the costs associated with absence from work of his employees. The basic idea is that by making employers feel the financial consequences of absence from work directly, this will increase their incentives for an effective preventive policy.

1. Sickness Pay

Both with respect to workers compensation and safety at work, two important changes have taken place since 1994, and other recent developments merit further discussion as well. As far as workers compensation is concerned, since 1 January 1994 an employer is forced to pay his employee 70% of his salary for a period of 6 weeks. 100 Recently this system was even further changed since the Dutch government decided to completely privatize the workers compensation scheme at the beginning of 1996. The duty to pay the salary has now been extended to 52 weeks and an employer can purchase insurance coverage against the risk of having to continue to pay the salary of his employee. Another reason for this new legislation was obviously that the government expected savings of up to 600 million Dutch guilders from the new privatized system in 1998.

It is not immediately clear what the consequences of these recent changes will be for the scope of liability. Obviously, this privatization means that the costs of providing workers compensation are no longer borne by the social security system (and hence redistributed to the society at large), but are shifted to the individual employer. This duty to pay the salary exists irrespective of any liability. In principle the employee is still compensated so that one could argue that his incentives to use the liability system for compensation remain in principle unchanged. However, there is one change which may affect the need of victims to use the tort system for compensation, i.e. the salary is only paid up to 70% unless the employer agreed to pay more than 70%. 101 If the inability to work is therefore caused by a tort, a victim still has incentives to sue for the remaining 30% and obviously always for pain and suffering. 102

2. Safety at the Workplace

A second evolution concerns the safety at the workplace. The Dutch Health and Safety at Work Act (Arbeidsomstandighedenwet) has also undergone several changes since 1 January 1994. Especially important are in this respect plans that have been launched by a commission that proposes a total deregulation of the Safety at Work Act. A commission, chaired by Kortmann, proposed replacing the existing regulations aiming at safety at the workplace through a civil liability in tort to prevent accidents at work. The Safety at Workplace Act should - in the new-deregulated system - consist of only a few basic principles, supported by civil liability. Although these proposals have been seriously criticized, 103 and it is thus not clear whether these ideas will be politically

100. For further details, see Faure, M.G., Geers, A.J.C.M. and Hartlieb, T., Verzekering en de groeiende aansprakelijkheidslast, 38-40.
101. In practice a 100% compensation is often still provided based on Collective Labour Agreements.
102. In fact for the 70% he paid the employer has an incentive to sue. Indeed due to recent legislative action he has a right of redress (art. 6:107a BW).
103. See e.g. Faure, M., 'Rechtseconomische kanttekeningen bij de deregulering van de arbeidsomstandighedenwet', Sociaal Recht (1995), 140.
viable, it does seem likely that some system of deregulation, introducing a generalized duty of care for the employer, will be introduced.

Although the future evolutions with respect to these revolutionary ideas are still unclear, it is obvious that a far reaching deregulation of the Safety at the Workplace Act, aiming at an increased use of the civil liability system, may increase the scope of liability. In that case the changes will not be caused by evolutions in the tort system itself, but by external factors that force victims to make an increased use of possibilities already available within the tort system.

C. THE RIGHT OF REDRESS

1. Importance of the Right of Redress

In the right of redress civil liability and social security system come together. The right of redress concerns the possibility for (social) insurers to recover the amounts they have paid to the victim from the injurer. The scope of this possible redress will obviously have an important bearing on the total scope of liability. For instance in the Netherlands it is generally the rule that in so far as the victim has received rents from a (social) insurer, the amount that the victim can claim from the insurer will be reduced by these rents. This, however, does not benefit the injurer, since the insurer who paid the victim can exercise a right of redress for the amounts paid to the victim. This would mean that for an injurer or his liability insurer it would make no difference whether they have to pay the victim himself or his insurer. In theory the total amount of damages to be paid by the injurer should be equal in both cases. This, however, is theory. In practice the right of redress is often limited.

2. Restrictions

Indeed, in practice the scope of the right of redress is not often as large as the original rights of the victim. Problems in exercising the right of redress exist for instance when the injurer belongs to the same family as the victim. Although the normal tort laws apply in principle between family members, Dutch law generally excludes a right of redress in that particular case. This restriction is not only typical for the situation

104. This does not seem very likely, since a total deregulation of the Safety at the Workplace Act would collide with many European directives.

105. The precise effects of this change are hard to predict. Indeed, one could also argue that the current system with very detailed, precise norms should make it even easier for victims to prove the employer's negligence compared to a system where a breach of a general duty of care has to be proven.


in the Netherlands, but applies for instance also in Germany and France. Since redress is not possible within a family, one can say that the injurer and his insurer benefit from this restriction.

Similar restrictions exist, for instance, when the insurer is an employer or a colleague of the victim-employee. In that particular case a right of redress is also excluded according to Dutch law. Once more this restriction is not typically Dutch. It also applies for instance in France. This restriction is obviously highly important in cases of enterprise liability. It excludes a right of redress in many work related accident situations.

Another restriction on this right of redress is indeed typically Dutch. According to this rule, the liability rule according to which the (social) insurer wants to sue the injurer is decisive for knowing whether there exists a right of redress or not. If the action against the injurer is brought under the classic tort rules, no problem exists and the right of redress can be executed. However, if the liability of the injurer is based on the strict liability under the new Dutch Civil Code, a right of redress cannot be based on that same strict liability rule but can only be based on the general negligence rule (art. 6:162 BW).

3. Expanding the Right of Redress

These examples show that although in theory the position of the (social) insurer executing a right of redress is the same as the position of a victim, this is not at all the case in practice. To a large extent liability insurers benefit from these restrictions on the right of redress. They will have to pay less to the social insurers seeking redress than they would have had to pay to the victims directly. In the Netherlands a debate was recently launched on expanding the right of redress of social insurers. Recently a right of redress was introduced for the employer who is forced to pay the wages of his employee during his absence because of illness. In other countries, for instance Belgium and France, the employer already possesses a right of redress under common tort rules. Expanding the right of redress obviously increases the scope of liability for injurers and their insurers. Moreover, in the Netherlands the administration is also considering abrogating the restrictions on the right of redress discussed above in cases of work related accidents.

108. § 67 of the Versicherungsvertragsgesetz and § 116 of the Soziale Gesetzbuch.
111. Art. L 121-12 of the Code des Assurances.
112. It can be found in the so-called "Tijdelijke regeling verhaalsrechten". See Van Maanen, G.E. and Römers, P., De Tijdelijke regeling verhaalsrechten, (Ars Aequi, 1994).
113. See the discussion of this privatisation which forces employers to continue to pay the wages during one year above § 3.E.
One can conclude therefore, that although many European countries traditionally have rights of redress for first party insurers, these rights are always more restricted than the rights the victim himself could exercise against the injurer or his insurer. These restrictions obviously benefit the injurer and his insurer. In case of a tendency to increase this right of redress the scope of liability will be widened as well.

§ 4. Changes in the ‘Willingness to Claim’

A. INTRODUCTION

In § 2 we sketched several evolutions at the international level and in national legislation or case law that may affect the likelihood of a law suit being brought against an industrial operator. In § 3 we discussed the importance of factors outside of tort law that may equally affect the chance that victims will be forced to use the tort system. In this part we shall also discuss a few factors that do not affect material tort law itself, but may cause victims to increasingly use the already existing possibilities in tort law. Indeed, the question whether in a particular case a law suit will be brought will to a large extent depend upon the role of the actors in the legal system, being the victims or consumers themselves in the first place, secondly the providers of legal services, mostly attorneys, and thirdly the judiciary. The attitude of these groups may to some extent influence the chance that the tort system will be used.  

B. VICTIMS

The question whether a victim will bring a liability suit can to some extent depend upon procedural instruments that can improve the position of a victim. In this respect one can think of procedural means that could make the access to justice easier, such as a collective right of action. Such a collective right of action has been introduced recently in many Western European legal systems, especially in environmental and consumer law, and could indeed give rise to a higher number of claims. In the Netherlands even a generalized right of action for groups was introduced in art. 3:305 a and b of the Dutch Civil Code.

114. The importance of the willingness to claim has also been addressed by Haazen, O.A. and Spier, J. in Bolt, A.T. and Spier, J. (eds.), De uitbreidende reikwijdte van de aansprakelijkheid uit onrechtmatige daad, 42-43.


Nevertheless a collective right of action will usually not lead to damages that are awarded to the acting group, but mostly only to an injunction. Class actions American style are not known in European procedure law. Also in e.g. the Dutch DES case every individual victim acts as a plaintiff in the court, although all separate cases can be joined.

In the area of workers compensation or accidents at work, the labour union will usually play a large role in the litigation.

With respect to the victim's willingness to file a claim we should also point to the phenomenon of insurance. If a victim has insurance coverage to provide for his legal fees this barrier to starting a legal action will be removed. Obviously the insurer will exercise a marginal control with respect to the chances that the claim will be successful, but only in cases where it is ex ante undoubtedly clear that no serious claim exists will the insurer deny coverage. In many countries the number of insurance policies for legal fees is increasing rapidly. The removal of this barrier through insurance coverage may, in combination with a larger awareness of the possibility to claim, indeed lead to an increase in the number of law suits, although there is no empirical research to support this assumption yet. The issue of whether a victim has insurance coverage for legal fees or not can obviously affect the decision of the insured to file a law suit.

In addition one should note that the willingness to claim may increase greatly when victims become organized. Some associations of patients aim to increase the awareness of patients that they can e.g. file a law suit against a physician in case of medical malpractice. In the Netherlands almost every new disease results in a patients association. The introduction of such an association, for instance in the case of whiplash damage, often has a substantial influence on the number of victims as well. In many cases the mass media will also bring the possibility of bringing a liability suit to the


118. Note, however, that pleas can be heard in favour of a limitation on the number of claimants in mass torts cases such as e.g. DES in order to make a settlement with all potential victims possible. See the inauguration address of Dommering-van Rongen, L., *Schade vergoeden door fondsvorming*, (Kluwer, 1996).

119. The number of insurance policies has doubled e.g. in the Netherlands since 1988 (see *Verzekerde van cijfers*, Verbond van Verzekeraars, (1994), 42).

120. Note that we are not arguing that the number of claims will increase because of moral hazard created through the insurance coverage. There might simply be a number of justified claims that would otherwise not been brought given the process risk and the amount of legal fees.
attention of victims. This is the case for recent phenomena such as the Repetitive Strain Injury (RSI) and the Organico-Psycho-Syndrom (OPS). For instance the University of Amsterdam published a brochure indicating how an employee could bring a law suit against an employer who is liable for OPS. Whether these claims that are called for by patient organizations and the mass media will eventually be successful, will, however, to a large degree depend upon the organization of the legal services.

C. THE ROLE OF THE BAR

1. Monopoly Rights

Obviously the bar can play an important role in the decision to file a law suit. However, although many monopoly rights still exist in this respect, in many cases other professionals have a right to represent a victim in court as well. This is for instance the case for the already mentioned trade unions. In many legal systems a representative of a trade union may represent an employee in court in a claim against his employer. This is e.g. the case in the Netherlands before the ‘Kanton-judge’ and in Belgium before the labour court. However, given their monopoly right, attorneys still will play an important role. Nevertheless, it should be mentioned that in many legal systems the monopoly rights of attorneys are the subject of serious criticism. For instance in the Netherlands Brunner noted that pleas may shortly be heard in favour of an abrogation of monopoly rights for attorneys as early as 1980. Recently, the deregulation wave in the Netherlands also reached the area of legal services. The Dutch ministers for justice and economic affairs have argued in favour of a deregulation of the bar.

The question, however, arises whether there is any relationship between the monopoly rights of attorneys and the possible number of claims. It is highly doubtful that the abrogation of a process monopoly will lead to more claims. Indeed, for instance in the Netherlands and in many other legal systems, attorneys already lack a monopoly concerning workers compensation claims. Nevertheless, many victims still use the services of attorneys and there is also no proof that attorneys bring fewer claims than other providers of legal services e.g. representatives of a trade union.

122. The brochure is called *Je hersens op het nachtkastje* (Your brains on the night table).
126. There is, on the other hand, Belgium empirical research that has shown that the success rate of representatives of the trade union is greater than that of attorneys: Keyers, L. and Peeters, B., ‘Rechtshulp bij betwistingen voor de arbeidsgerechtied, *Belgisch Tijdschrift voor Sociale Zekerheid* (1984), 177.

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seems to be little reason to assume that the mere abrogation of the monopoly to plead would by itself lead to an increase in the number of claims.\textsuperscript{127}

2. Contingency Fees

Another development that might influence the willingness to claim relates to the way in which attorneys are remunerated for their services. In most continental legal systems it is prohibited for attorneys to make fees dependent upon the outcome of the case.\textsuperscript{128} In some countries this prohibition of the so-called \textit{pacta de quota litis} (known in the common law countries as contingency fees) has been laid down in the Code of Civil Procedure e.g. in Belgium.\textsuperscript{129}

Although contingency fees were therefore traditionally prohibited for a long time, some voices have been heard recently in favour of allowing this system of payment in the Netherlands. One reason is that Dutch law firms operate on an international market in competition with - \textit{inter alia} - American law firms which could have a comparative advantage if they were allowed to charge contingency fees. Therefore it is not unlikely that e.g. in the Netherlands contingency fees will be allowed in the near future.\textsuperscript{130}

More important than the question whether or not contingency fees will be allowed is obviously the question of what the influence of a contingency fee system will be on the incentives of attorneys to file a law suit. The feeling exists that the tort crisis of the U.S. was partially due to attorneys being paid on a 'no cure, no pay' basis, and bringing frivolous law suits. The reluctance to introduce contingency fees in the Netherlands is also attributed to the fear that this will lead to an increase in the number of claims.\textsuperscript{131} From an economic point of view it is true that a contingency fee system may provide better incentives to attorneys to invest a lot of effort in winning a case. On the other hand, the system should not necessarily lead to more claims, since an attorney will only file a law suit if he estimates that he has a reasonable chance of success, given that his personal interest is at stake. Claims that have no chance of being won in court will also not be filed in a contingency fee system.\textsuperscript{132} However, there may be one rea-

\textsuperscript{127} In economic theory it has, however, been pointed out that when the number of market participants increases, so will competitive pressure, which may lead to an increase in the number of claims (Cooter, R. and Ulen, Th., \textit{Law and Economics}, (Scott Foresman, 1988), 484, although they admit that there is no empirical support for the proposition 'more lawyers causes more claims').

\textsuperscript{128} See for the Netherlands, Hellingman, K., 'An economic analysis of the regulation of lawyers in the Netherlands' in Faure, M. \textit{et al.}, \textit{Regulation of Professions}, 167-169.

\textsuperscript{129} Art. 459, al. 1 of the Code of Civil Procedure prohibits any \textit{ex ante} agreement on the fee which is dependent on the result of the case. See Faure, M., 'Regulation of attorneys in Belgium' in Faure, M. \textit{et al.}, \textit{Regulation of Professions}, 97-98.


\textsuperscript{131} Van der Schans, E., \textit{Advocatenblad} (1994), 665.

son to assume that contingency fees may increase the number of claims. This has to do with the fact that until now many victims did not use the possibilities of the tort system in Europe, either because they were unaware of them or because their damage was taken care of through the social security system. If one takes into account a deregulation of the social security system in combination with a larger public awareness of the possibilities of the tort system, the contingency fee system may obviously provide incentives to attorneys to file additional claims.

3. Reimbursement of Legal Fees by the Losing Party

A final element that may play an important role in the decision to file a law suit or not has to do with the question whether a potential victim can claim his legal fees back from the losing defendant, and equally the question whether the losing victim faces the risk of having to reimburse the legal fees of the defendant. The American system globally accepts that every party takes care of his own legal fees. It has been argued that the fact that an American plaintiff cannot be held liable for the legal fees of the defendant in cases of unsuccessful claims provides too little incentive to the victim to think twice before starting a law suit, and hence leads to an excessive high number of claims. 133 In most European countries it is accepted that a successful plaintiff may get (a part of) his legal fees back from the losing defendant. In the Belgian system these amounts are limited and much lower than the actual fees to be paid to an attorney; in Germany the winning plaintiff can recover part of the legal fees of the defendant, which are fixed according to the BRAO. 134 In the Netherlands a similar principle applies; this duty to pay the costs is limited to a certain amount and does not cover all costs; 135 in the Netherlands case law has extended the possibility for victims to claim reasonable costs necessary as compensation from the injurer. 136

Anyway, compared to the American system the fact that a losing party can be bound to compensate part of the legal fees of the winner will obviously be an important deterrent against frivolous law suits; one can expect a lower number of claims than in the

133. This point has especially repeatedly been made by Gordon Tullock. See e.g. his *Trials on trial*, (Columbia University Press, 1980).
134. *Bundesrechtssanordnung*.
135. So Hugenholtz, W. and Heemskerk, W.H., *Hoofdlijnen van Nederlands Burgerlijk Procesrecht*, (Lemna, 1996), 113-118 and Spier, J., 'De grenzen der buitengerechtelijke kosten', *Aansprakelijkheid en Verzekering* (1995), 55. This rule, however, only applies to attorneys fees for litigation; for so called 'extra court' costs a full compensation is due, provided these costs are reasonable as required by art. 6:96 of the Dutch Civil Code.
American system where a plaintiff only risks the legal fees he paid to his own attorney in case of a failure. 137

D. THE JUDICIARY

Obviously the role of the judiciary will be important in relation to the question whether a claim will be successful or not. We have already mentioned above that to a large extent the jurisprudential shift from negligence towards strict liability has been caused by the wish of judges to provide victim compensation as soon as physical harm is inflicted. The chance that claims are brought is obviously only affected by the judiciary in an indirect way, e.g. by broadening the negligence standard. The judiciary itself can obviously not decide upon the number of claims that will be brought. However it can play an important supportive role once claims are brought.

§ 5. Developments with Respect to the Amount of Damages

Obviously, the scope of liability is not only influenced by the probability that a liability suit will be brought against an injurer, but also by the amount of damages awarded to the injured party. In addition, the question who has a right to claim damages can also play a major role for determining the scope of liability. We will give several examples of how an expansion can also be noted in this domain, taking once more the Dutch situation as a starting point.

A. CAUSATION, WHIPLASH-INJURY AND EMOTIONAL DISTRESS 138

A first issue to be addressed is causation. The victim can claim compensation for all the damage that has been caused by the injurer. According to Dutch law, as far as physical harm is inflicted, all damage can be attributed to the injurer as long as this is reasonable, taking into account elements such as the probability that a certain damage would occur. Although there are many theoretical differences between the legal systems, the amount to which physical harm is attributed to the injurer does not seem to be very different in practice. 139 More problems arise, however, as soon as the physical complaints of the victim are not very precise. This occurs especially in case of so-called


138. This is referred to as ‘psychische schade’ in Dutch tort law.

whiplash-injury. This causes many claims in the Netherlands. Insurers argue that this is caused by the relatively lenient criteria of causation in the Netherlands. It seems fair to state that the more lenient the criterion of causation is, the sooner a variety of emotional distress and injuries will also be attributed to the tortfeasor. In fact, a reversal of the burden of proof often takes place. The problem is indeed not so much that the victim must prove a causal relationship between his (e.g. emotional distress) complaints and the accident, but that the tortfeasor has to prove that these complaints have not been caused by the accident. He will often fail to deliver that proof. Allowing emotional distress as a component of the damage to be compensated by the injurer will inevitably increase the scope of liability.

B. PAIN AND SUFFERING

Although a clear objective criterion for establishing amounts of pain and suffering is lacking, it would go too far to state that these amounts are merely fixed in an arbitrary manner. Courts will rely heavily on amounts awarded in similar cases. Therefore, if higher amounts are awarded for specific cases of serious injury, this may equally lead to an increase of amounts awarded in other cases with more or less serious injury. In the Netherlands one could see this tendency after a relatively large amount was awarded in the so-called AMC case. This concerned a case of a seriously ill person who was infected with the HIV virus through the negligence of a male nurse. This case concerned a man in middle age. This inevitably raises the question of whether damage awards for pain and suffering should also be increased in all cases where young persons suffer permanent bodily harm. This example shows that in case of pain and suffering one or a few landmark decisions can in theory lead to an overall increase in damage awards.

Finally we should point to the introduction of punitive elements into European tort law, which can be noted when it comes to fixing damage awards in cases of pain and suffering. European legal systems, unlike the North-American systems, generally do not know of so-called punitive damages that may greatly exceed the amount of the actual loss suffered and are inflicted upon the tortfeasor as a kind of private punishment. Obviously an introduction of punitive damages in Europe would lead to an important increase in the scope of liability. Although some authors have discussed the possibility of introduc-

ing punitive damages in e.g. Dutch tort law, it is not very likely that this instrument will be formally introduced in Europe in the near future. What may happen however, is that punitive elements will be introduced in tort law when compensation for pain and suffering has to be fixed. Since the amounts are dependent upon equity considerations, the blameworthiness of the injurer may influence the amounts awarded for pain and suffering. If one accepts that idea, the result would be that higher amounts for pain and suffering would be awarded in a case of e.g. intentional harm caused to the victim in a fight, than when the same type of injury is the result of a traffic accident caused by the injurer's negligence. Once more, this idea may generally lead to an increase of damage awards.

C. WHO IS A VICTIM?

The scope of liability of the injurer also depends upon the number of persons who may claim to have a right to sue the injurer as a victim. This is related to the question which interests are protected in tort law in some legal systems. This plays in particular a role when the victim dies as a result of the accident. The question of who can claim damages in such a case is not answered in a uniform way in the many European legal systems. In Belgium and France relatives of the deceased generally have a right to claim damages for pain and suffering based on Art. 1382 of the Code Civil when they had a close relationship with the deceased. In the United Kingdom specified relatives of the deceased receive a statutory compensation of £ 3,500 whereas in Germany and the Netherlands relatives have no right to compensation for their pain and suffering in principle. Sometimes the victims try to avoid this restriction by arguing that they have suffered so-called shock damage, being emotional distress caused by the fact that one is confronted with an accident or with the consequences of an accident. Therefore, relatives will argue that they are not claiming compensation for the death of a beloved one, but for a harm they are suffering themselves. In that respect there are also a number of differences between the European legal systems. The question of who has a right to compensation for shock damage is not answered in the same way. Apparently several circumstances play a role when the question has to be answered whether a particular person can claim to be a victim of the shock or not, e.g. the presence of the claimant at the accident and the relation of the claimant to the 'first' victim, the fact whether the person saw the accident actually happen or only heard of it second hand, and finally the question whether the claimant is a relative of the 'first' victim or not. There is obviously a relationship between the question whether relatives have a right to

146. For recent evolutions in English case law in that respect see Kottonhagese, R.J.P., 'Shockschade: een rechtsgebied in beweging', *Nederlands Tijdschrift voor Burgerlijk Recht* (1996), 120.
compensation for pain and suffering on the one hand, and the importance of compensation for shock damage on the other hand. In countries where relatives already have a right to compensation for pain and suffering they will not have an incentive to claim shock damage additionally; hence, the topic of shock damage is, for instance, not an issue in Belgium where relatives can claim compensation for pain and suffering directly. In Germany, on the other hand, where relatives cannot claim for pain and suffering, there is a limited right to compensation for shock damage. In the Netherlands, where no right to compensation for pain and suffering for relatives exists, parliamentary history provides for an argument in favour of compensation for shock damage and pleas are also heard in favour of compensation for shock damage in the literature; in case law, however, this right has not yet been acknowledged. It should be noted, however, that in the Netherlands legal doctrine and in Germany the legislator are considering granting a right to compensation for pain and suffering to relatives. Such a legislative recognition of the position of relatives would obviously remove the pressure to grant compensation for shock damage.

Clearly, the enlargement of the possible number of claimants, either through case law or legislation, will lead to an increase in the scope of liability for insurers and their insurers. Generally, it seems fair to state that one cannot only note an increasing tendency to recognize more persons as victims and hence as possible claimants in case of an accident, but also the tendency to increase the amounts awarded for pain and suffering, and this can lead to an expanding scope of liability.

§ 6. Concluding Remarks

In this article we have tried to sketch the factors that may influence the question of whether there is, or will be, an expanding enterprise liability in Europe. Obviously it has not been possible to discuss this evolution in many legal systems in great detail. Indeed, the scope of liability still depends to a large extent on national law. Therefore it is not possible to provide an insight to evolutions in tort law in the various European countries. This is an area where many differences still exist. The scope of liability of enterprises is probably also closely linked to national legal culture. Given the subsidiarity principle it is therefore possible to assume that there may not be room for a total harmonization of tort law in Europe. Even if one therefore has to accept that the scope of liability of enterprises will inevitably differ, it might be possible to indicate a

149. See Bolt, A.T., Begroting van schade, verandering en verzekering, 30.
151. Zweigert and Kutz spent 110 pages on tort law in their famous Introduction to Comparative Law, (635-745). Since we had to be brief, we could only mention a few recent evolutions. For details we refer to the references in footnotes.
few developments that have taken place in several European countries. Moreover, it seems possible to indicate the elements that influence the scope of liability. In defining these common evolutions we have attempted to look for a new *ius commune* in these common developments.

A tendency towards an expanding liability can certainly be noted in the legislation and case law of many legal systems. However, whether these increasing new possibilities will effectively be used will also depend upon factors other than tort law. An important role may be played by the public awareness of the possibility for bringing claims, which can be supported by the mass media. In addition the question of whether tort law will be needed to provide victim compensation will also depend upon the scope of social security law. For instance, in the Netherlands claims for employers liability for occupational diseases were filed only for asbestos related diseases until recently. In those cases only compensation for pain and suffering was claimed, the other components of the damage being compensated through the social security system. The real scope of liability in those cases depended upon the possibility of the first party insurer exercising a right of redress. If an increasing privatization of social security law forces victims to increasingly use the tort system an increase in the number of claims could be expected as well as an increase in the amount of damages awarded for pain and suffering.

This generally seems to be an important difference between American and European tort law. Priest claimed that the American tort and insurance crisis has to a large extent been caused by the fact that the tort system is increasingly used for compensatory reasons. This is understandable in the American context, with an almost non-existent public health care system. Many of the cases that give rise to a liability claim in the U.S. will never go to court in Europe, because the damage is taken care of via the social security system. Another reason why the tort system is more popular in the U.S. than in Europe has to do with claims awareness and the willingness to file a law suit. This difference may be attributed to non-material factors, such as the existence of a ‘litigating society’ in the U.S., but obviously also has a clear economic rationale in the fact that European victims often lack incentives to sue, since a large part of their damage is compensated through mechanisms other than tort law. The different structure of the legal procedure in the U.S. and Europe may also explain the higher number of tort suits in the U.S. In American legal procedure a losing party does not risk having to pay the legal fees of the winning party, which may provide incentives for too many frivolous law suits. As far as damage awards are concerned in Europe, several developments in the direction of increased awards can also be noted. However, many European

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countries are still reluctant to award large sums for pain and suffering. It is still considered immoral to gain financially from one's suffering. The well-known high damage awards provided by juries in American tort cases usually relate precisely to pain and suffering.\(^{154}\)

Given these differences there seems to be little reason to fear a European tort or insurance crisis yet. However, if the tendency which can be noted in some case law, to provide compensation even if a finding of liability would have no preventive effect since it cannot influence the injurers future incentives to take care continues, it may indeed result in uninsurability. This fear relates specifically to the tendency to hold some enterprises retroactively liable and to the tendency to shift the burden of causal uncertainty to enterprises. These tendencies point to a realistic fear of a European tort crisis.

This article could not discuss evolutions in many countries in detail. Usually the Dutch or Belgian case were used as examples of certain developments. The article attempted to indicate how the scope of liability and its development could be analyzed; this method of analysing the scope of liability might therefore also be applicable to legal systems other than the few discussed in this article.

The recent evolutions in tort law are so complex that many interesting issues could not be discussed in this paper. Further research is therefore required, amongst others on the question whether the recent evolution sketched in this paper can be considered efficient. For such a normative evaluation of these developments one would need tools other than a mere legal analysis. One possibility would be to use the economic analysis of law. Specifically accident law has received a lot of attention from this so called 'Law and Economics' research.\(^{155}\) Second, attention could also be paid to the question of what the reaction of insurers would be to an expanding enterprise liability. We have discussed some of the recent developments in the light of the insurability of risks. But also more generally the question could be asked what kind of devices could insurers use to protect themselves against (unpredictable) changes in the scope of liability.\(^{156}\) Finally attention could also be paid to the question whether there should be any task for the European Community with respect to liability and insurance. We indicated earlier that, given subsidiarity, this task will inevitably be rather small since the scope of liability is traditionally very much linked to national legal culture. One can therefore also note that until now the European Community has only been active in specific fields of liability law, e.g. product liability. Attempts to harmonize other fields of liability law, specifically liability for services, have not yet been successful. Generally, the question whether a market integration indeed requires harmonization of all liability law would merit further

154. Although the involvement of a jury may also lead to an easier finding of negligence especially if the defendant is an insured corporation, see Zweigert, K. and Kötz, H., Introduction to Comparative Law, 693.
155. See e.g. Shavell, S., Economic Analysis of Accident Law, (Harvard University Press, 1987).
156. Some of these issues have been addressed in Spier, J. (ed.), The Limits of Liability.
research as well. Perhaps, a search for common roots and principles is more useful than a formal harmonization, which neglects differences in legal culture. This article has attempted to provide a modest contribution to this search for a *ius commune* by analysing a few developments towards expanding liability that seem to be common in many European legal systems.