THE EUROPEAN DIRECTIVE ON PRODUCTS LIABILITY: THE PROMISE OF PROGRESS?

Lawrence C. Mann *

*Peter R. Rodrigues***

This article summarizes the EEC Directive On Products Liability[1] and related legislation pending in the Netherlands.[2] The Directive and the Dutch Draft contain several substantive provisions which parallel doctrine in the United States. Based on an analysis of the American experience, we argue that the Directive and the Dutch Draft do not substantially expand the ability of injured persons to recover damages from the producers of defective products. Economic factors, limited discovery, and nonuniform procedural rules will retard the development of doctrinal harmony and an increased level of consumer protection within the EEC.

I. INTRODUCTION

Products liability, an American invention,[3] today preoccupies legislators and jurists throughout the industrialized world. In the United

---

* Lawrence C. Mann is an Assistant Professor of Law, Wayne State University Law School. He has lectured on products liability law at the Molengraaff Institute for Private Law in Utrecht, The Netherlands.

** Peter R. Rodrigues is a lawyer and is employed by the Molengraaff Institute for Private Law in Utrecht, The Netherlands. He is also developing a study of the consumer class action for the Institute for Consumer Research (SWOKA) in the Hague. The authors acknowledge the assistance of Elizabeth van Schilfgaarde and express their gratitude for her contribution to this article.

[1] *The Council Directive of July 25, 1985 on the Approximation of the Laws, Regulations, and Administrative Provisions of the Member States Concerning Liability for Defective Products* [hereinafter EEC Directive], 28 O.J. EUR. COMM. (No. L 210) 29 (1985); 7 PRODUCTS LIABILITY INTERNATIONAL 135 (September 1985) (The complete text of the EEC Directive is reproduced in Appendix A).

[2] Draft Products Liability Act of 1986, Tweede Kamer (House of Representatives) vergaderjaar (draft) 1985-86, par. 19,636, nos. 1-3 (Neth. 1985-86) [hereinafter Dutch Draft].

[3] Legal systems in Europe have provided relief to purchasers of defective goods for centuries. The remedies typically have involved tort, contract or some hybrid. Nevertheless, the modern understanding of the terms "products liability" is associated with the adoption of the Restatement (Second) of Torts § 402A and the evolution of case law in the United States. *See* Boger, *The Harmonization of European Products Liability Law*, 7 FORDHAM INT'L L. J. 1, 2 (1983-84).

States, the majority of the combined legislative and judicial energy expended in recent years[4] has focused upon reform measures which limit plaintiffs' rights and correspondingly narrow the scope or magnitude of the responsibility of manufacturers and sellers of defective products.[5] Federal legislative activity commenced in 1979 with the promulgation of the Model Uniform Products Liability Act (MUPLA).[6] Almost every session of Congress since the development of MUPLA has included discussion of some form of national products liability legislation.[7] State legislatures and supreme courts have recently narrowed plaintiffs' rights through reformulated substantive definitions,[8] new procedural obstacles,[9] and modification of the traditional rules of law governing damages.[10]

Similar considerations of predictability, equality, compensation, and accident avoidance[11] underpin products liability law in both the United

---

[4] Twerski, *A Moderate And Restrained Federal Product Liability Bill: Targeting The Crisis Areas For Resolution*, 18 U. MICH. J. L. REF. 575, 579-82 (1985). For discussions of recent judicial and legislative efforts, see Prentiss v. Yale and Towne Mfg., Co., 421 Mich. 670, 680-91, 365 N.W.2d 176, 180-86 (1985).

[5] Notwithstanding this general trend, several innovative decisions have expanded the ability of victims of toxic torts and defective pharmaceutical products to recover damages. *See* Sindell v. Abbott Laboratories, 26 Cal. 3d. 588, 607 P.2d 924, cert. denied, 449 U.S. 912 (1980); Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 447 A.2d 539 (1982) (Defendant manufacturer precluded from asserting the state-of-the-art defense against the plaintiffs in a strict liability, failure to warn case). *But see* Feldman v. Lederle Laboratories, 97 N.J. 429, 479 A.2d 374 (1984) (*Beshada* restricted to its facts. Strict liability applies to drug manufacturers, but defendants may plead and prove that the information necessary to identify the defect was not available).

[6] Uniform Products Liability Act, *reprinted in* 44 Fed. Reg. 62,714 (1979) [hereinafter MUPLA]. See Schwartz, *The Uniform Products Liability Act-A Brief Overview*, 33 VAND. L. REV. 579 (1980), for a brief discussion of the history of the Act.

[7] *See* Twerski, *supra* note 4.

[8] *Prentiss*, 421 Mich. at 670. Here, the Michigan Supreme Court redefined the standard of liability in design defect cases.

[9] *See* 5 ALA. CODE § 6-5-502 (Supp. 1987) (imposing a one-year limitations period from the date of injury).

[10] *See* 5 ALA. CODE § 6-5-520 (Supp. 1987) (This section modifies the collateral source rule to ensure that, plaintiffs do not receive compensation more than once for the same medical and hospital expenses); 5 ALA. CODE § 6-5-522 (Supp. 1987) (This section renders evidence of payments from collateral sources admissible); CONN. GEN. STAT. ANN. § 52-225d (West Supp. 1987) (This section provides that damages for future economic and non-economic loss in excess of two hundred thousand dollars may be paid in installment payments).

[11] Accident avoidance includes the deterrence of both manufacturer and consumer conduct which contributes to products liability accidents. A frequently mentioned rationale for the adoption of strict liability and comparative negligence is that each

States and Europe. As a result of these common concerns and the increasing number of international transactions, the substantive law in this area in both regions, whether grounded in tort or contract, tends toward uniformity. The recent adoption by the EEC of its Directive on Products Liability, which incorporates many features of products liability law in the United States, illustrates this trend.[12] Europe, however, appears to be expanding the rights of injured plaintiffs.

The EEC Directive has been the subject of much discussion.[13] Typically, publications compare the substantive doctrine in several EEC member states and discuss the potential impact of the Directive. The commentators appear to be in accord that harmonization of the law throughout the EEC is a beneficial goal and that the Directive will facilitate harmonization. Whether the incorporation of the Directive into the substantive law of the individual member states will actually expand the substantive rights of injured consumers is more problematic. For example, Reich argues that the American experience has had a conservative influence on Europe and that harmonization is "intended to stifle too far reaching member states' initiatives based upon the U.S. model."[14]

---

encourages accident-avoidance behavior. *See* Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976) (The manufacturer is in the best position to avoid the accident and injury). *See also* R. POSNER, ECONOMIC ANALYSIS OF THE LAW, 123-124 (2d ed. 1977) (The conduct of the plaintiff in relation to the burden of preventing the accident must also be considered if the Learned Hand BPL formula is to operate fairly and efficiently in determining liability).

[12] It is often stated that imitation is the highest form of flattery. The adoption by the EEC of essential principles of United States products liability law might arguably be construed as a ratification of their validity. As we seek to demonstrate, substantive principles may mean vastly different things from one country to the next. Historical dispute patterns and the procedural frameworks in the United States and throughout the member states of the EEC may largely determine how the principles are employed and interpreted.

[13] *See* Albanese and Ducas, *Developments in European Product Liability*, 5 DICK. J. INT'L L. 193 (1987); van Catwijck, *Products Liability In Europe*, 34 AM. J. OF COMP. L. 789 (1986); Dielmann, *The European Economic Community's Council Directive on Products Liability*, 20 INT'L L. 1391 (1986). Reich, *Product Safety and Product Liability -An Analysis of the EEC Council Directive of 25 July 1985 on the Approximation of the Laws, Regulations, and Administrative Provisions of the Member States Concerning Liability for Defective Products*, 9 J. CONSUMER POLICY 133 (1986); Bourgorgnie, *Product Liability: Old Arguments for a New Debate?*, 1 EUR. CONSUMER L. J. 6 (1986); Shettler, *Products Liability: A Comparison Of U.S. And EEC Approaches*, 13 SYRACUSE J. INT'L. L. & COM. 155, 156, 173-83 (1986).

[14] *See* Reich, *supra* note 13, at 136; *But see* Maddox, *Towards a Regime of Strict Liability*, 19 J. WORLD TRADE L. 508, 510 (Sept./Oct. 1985) (Maddox argues that the Directive furthers consumer protection and fair competition).

The issues of compensation and accident avoidance can be addressed on a societal scale in any number of ways. We assume that dispute patterns from one country to another have a national character that is shaped by factors including: alternative avenues of redress; perceptions of the legal system; quantitative or structural factors; and the availability of alternative compensation approaches such as social insurance. These elements along with the procedural rules compose what has been termed the "legal culture."[15]

This article analyzes the incorporation of the EEC Directive into the law of the Netherlands in order to evaluate the impact of the Directive in both a general and specific sense. As pertains to Dutch law, we argue that the Directive involves a negligible expansion of the rights of injured consumers. This conclusion as to the impact of the Directive in one member state lends support to our conclusion that the overall Directive minimally advances its express goal of harmonization of the law and provides little benefit to the consumer.

Part II is a summary of that section of the Dutch Civil Code which is the tort law basis for most products liability claims. The dominant trends within the United States are also briefly discussed. Part III reviews the main provisions of the EEC Directive and the Dutch Draft, concluding that their substantive terms and problems in drafting make harmonization of the law problematic. Part IV briefly summarizes the economic and procedural elements which compose the legal culture in the Netherlands and lays the basis for evaluating whether the new legislation advances consumer interests. Part V concludes that the Directive does not substantially expand consumer protection within the EEC and that the Dutch Draft merely codifies the existing case authority construing Sec. 1401 of the current Dutch Civil Code.

II. PRODUCTS LIABILITY IN THE NETHERLANDS

Generally, European courts scrutinize proof of causation more closely than proof of negligence.[16] The Dutch courts' activity in the area of

---

[15] *See* Friedman, *Legal Culture and the Welfare State*, in DILEMMAS OF LAW IN THE WELFARE STATE 13, 17 (G. Teubuer ed. 1986). Lawrence M. Friedman states "By legal cuture, we mean the ideas, attitudes, values, and beliefs that people hold about the legal system (cite omitted). Not that any particular country has a single unified legal culture." *Id.* at 17. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (AND THINK WE KNOW) About Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4, 58-61 (1983). The organization of legal services and access to the legal professions are determinants of litigation patterns.

[16] *See* Reich, *supra* note 13, at 134.

products liability reflects this general tendency. Products liability, as a component of private law, has expanded significantly during the past thirty years. This expansion has largely been achieved by the courts through a relaxation of the plaintiff's burden of proof. In some instances the defendant must now shoulder the burden of proving freedom from fault.[17]

The bedrock of products liability law in the Netherlands is section 1401 BW[18] which provides: "Every unlawful act that inflicts damage upon another obliges the person by whose fault the damage is caused to indemnify the other person."[19] An unlawful act has been defined in a much celebrated decision of the Dutch Supreme Court as conduct which: (a) breaches a statutory duty; (b) infringes upon the rights of another; (c) is contrary to good morals; or (d) is contrary to the carefulness regarding another's person or property required in society.[20] The plaintiff's burden of proof in tort includes four elements: unlawfulness, fault, causation, and damage.[21] Fault constitutes the subjective element of the unlawful act, ensuring that the actor is responsible for his conduct. This interpretation of section 1401 was the starting point for an unprecedented growth in case law which has made tort law one of the major subjects of private law in the Netherlands.[22]

In 1957, the Amsterdam Court of Appeals rendered an opinion suggesting that the plaintiff need not prove fault.[23] That case involved a collision between a Ford van and a motorcyclist. The van apparently failed to remain in the proper driving lane due to a manufacturing defect in the steering column assembly.[24] Ford Netherlands denied any

---

[17] *See* Judgment of June 27, 1957, Hof Amsterdam, [NJ] 104 (1958). The five intermediate appellate courts (Gerechtshof) are cited with the prefix "Hof" followed by the name of the city in which the court sits.

[18] BW (Burgerlijk Wetboek) indicates the Civil Code of the Netherlands; NBW (Nieuw Burgerlijk Wetboek) indicates the New Civil Code of the Netherlands.

[19] H. TEBBENS, INTERNATIONAL PRODUCT LIABILITY: A STUDY OF COMPARATIVE AND INTERNATIONAL LEGAL ASPECTS OF PRODUCT LIABILITY 101 (1979).

[20] Judgment of January 31, 1919, HR, NJ 161. HR indicates the Hoge Raad der Nederlanden which is the Supreme Court of the Netherlands. There are nineteen general trial courts, called Arrondissementsrechtbank and cited as "Rb.", and sixty-two District Courts, called Kantongerecht and cited as "Ktg.". The District Courts are limited to matters involving five thousand Dutch Guilders (approximately two thousand and five hundred dollars in U.S. currency) or less, landlord-tenant cases, and labor cases.

[21] *See* FOKKEMA & HONDIUS, INTRODUCTION TO DUTCH LAW 138 (1978); ASSER-RUTTEN-HARTKAMP III (1986).

[22] *See* FOKKEMA & HONDIUS, *supra* note 21.

[23] Judgment of June 27, 1957, Hof Amsterdam, NJ 104 (1958).

[24] An element of the steering assembly, the tail-feather, was not properly riveted to the steering wheel.

fault, arguing that the relevant components were supplied by Ford of America and that inspection by Ford Netherlands was economically unfeasible and should not be required. The court considered the defect to be clearly observable and serious, indicating that Ford Netherlands acted at its own peril when it failed to perform intensive inspections of components supplied by Ford of America. Moreover, the court rejected Ford Netherlands' argument that the economics of its business did not permit such inspections. This decision by the Amsterdam Court of Appeals, however, was not binding on all courts in the Netherlands.[25]

However, the Dutch Supreme Court in a 1973 decision adopted the approach to manufacturing defects established in the *Ford* case.[26] In this case, a hot water bottle, allegedly equipped with a locking device to prevent leaking, severely burned a baby. A nurse who came to the home to assist with the baby failed to read the instructions prior to using the hot water bottle. The defendant argued that it is always possible that a bottle will leak and that the nurse's failure to follow the instructions and check the bottle was the cause of the accident. Both the trial court and the court of appeals rejected the plaintiff's claim. The trial court found that a reasonable person would have been aware of the danger created by the hot water bottle.[27] In affirming the trial court, the court of appeals noted the possibility of leakage from a hot water bottle is widely known and elimination of such possibility would have been very difficult, if not impossible. The Supreme Court reversed the court of appeals and held that the lower courts should have addressed the issue of whether the danger presented by the hot water bottle was sufficient to preclude its sale.[28] The Supreme Court also stated that a manufacturer must foresee imprudent users and that placement of a warning upon a dangerously defective product is insufficient. Although the court did not expressly relax the plaintiff's burden of proof, the case is now regularly cited for the proposition

---

[25] Other Dutch courts did not follow the decision of the Hof Amsterdam. *See* Judgment of December 21, 1967, Hof Den Bosch, NJ 402 (1968); Judgment of November 11, 1969, Rb. Breda, NJ 315 (1971).

[26] Judgment of February 2, 1973, HR, NJ 315.

[27] *See id.*

[28] Subsequently, the Amsterdam Court of Appeals found that the hot water bottle presented a foreseeable danger and that it should not have been marketed. Judgment of March 1, 1974, Hof Amsterdam, NJ 486. The opinion of the Supreme Court is also interesting because the court apparently believed a manufacturing defect was involved despite the defendant's argument that it was possible for any of its products to leak.

that the defendant must demonstrate non-negligence in a products liability case involving a manufacturing defect.[29]

The extent to which Dutch law reverses the burden of proof in products liability cases involving defective-design or failure-to-warn claims is obscured by a dearth of case law.[30] One appellate court decision suggested that the plaintiff must carry the burden of proof in a case alleging the failure to properly warn or instruct.[31] In this case, the plaintiff sustained an eye injury while painting his ceiling with a product containing gypsum and lime. The plaintiff alleged that the manufacturer should have provided a warning. The court found for the defendant, indicating that the effects of gypsum and lime are commonly known. This language suggests a reasonable consumer standard for failure-to-warn claims in products liability cases.

In a recent decision involving alleged defects in the prescription drug Halcion, a trial court rendered an opinion indicating that the plaintiff in a design or warning case must prove fault.[32] Halcion is manufactured by Upjohn, an American pharmaceutical company. The plaintiffs alleged that they suffered from damaging side effects of Halcion, including addiction to the drug.[33] The plaintiffs raised both design and warning claims. The court found that Halcion was not defective by its nature nor by the manner in which it was presented to the consuming public. In reaching its decision, the court balanced the beneficial effects of Halcion with the risks associated with its use and indicated that some side effects must be accepted. Significantly, the court reviewed the standard set forth in the EEC Directive[34] and held: (a) the risk of detrimental side effects for a registered drug must be accepted;[35] (b)

---

[29] *See* SCHUT, PRODUKTENAANSPRAKELIJKHEID 236-39 (1974).

[30] The Supreme Court has rendered two written opinions in the past 50 years. Judgment of April 6, 1933, HR, NJ 881 and Judgment of February 2, 1973, HR, NJ 315. The lower courts have rendered not more than twenty-five opinions in the same period of time. G.SNIJDERS, PRODUKTVEILIGHEID EN AANSPRAKELIJKHEID 150 (1987).

[31] Judgment of November 13, 1979, Hof Den Bosch, NJ 370 (1980).

[32] Judgment of June 28, 1984, Rb. Arnhem, 2 TvC. 82 (1985).

[33] The main active ingredient in Halcion is benzopdiazapan which is commonly found in tranquilizers and sleeping medication.

[34] The Court reviewed Section 4 of the revised draft of the EEC Directive of 1979. Section 4 stated: "A product is defective, if while used or consumed for its intended purpose, it fails to provide the safety to persons or goods which the user is entitled to expect, taking all of the circumstances into account, including the presentation of the product and the time when the product was put into circulation." G. SNIJDERS, *supra* note 30, at 191, n. 200.

[35] The statute providing for the registration of drugs is the WET OP DE GENEES-

Halcion was admitted into many other countries subsequent to the Dutch complaints; (c) there was no unacceptable risk when used according to Upjohn's instructions; and (d) Upjohn exercised the requisite level of carefulness regarding the foreseeable side effects of Halcion.[36]

The court of appeals reversed the trial court and ordered further proceedings consistent with its opinion.[37] The court first noted the serious nature of the side effects, including loss of memory, panic, suicidal ideation, and substantial headaches. Given the risk of these side effects, the court stated that it suspected the defect of the 1 milligram tablets resulted from the excessive size of the dosage. The court also noted that the .25 and .5 milligram tablets of Halcion were defective if the accompanying instructions were inadequate. The court, however, refrained from holding that the 1 milligram tablet was defective and ordered the selection of three expert witnesses: a drug expert, a psychiatrist, and a family doctor. The court indicated that the resolution of the defect issue would depend upon the expert determination of whether the 1 milligram dosage of Halcion caused the plaintiff's injuries.

The decision of the court of appeals in the Halcion case is instructive for several reasons.[38] The court stated that a product is defective when it fails to provide the safety which a person is entitled to expect under the circumstances; a consumer is not expected to be aware of side effects not included in warnings or instructions. Despite the similarity in the language used by the court and the language of Article 6 of the EEC Directive, the court found that the Directive was not applicable, indicating a reluctance to anticipate the Dutch Legislature's adoption of a strict liability approach to product defects. The decision also confirms that the burden of proof in a warning or design defect case is not relaxed under current Dutch law. This approach is consistent with Article 7 of the EEC Directive which requires that the proven

---

MIDDELENVOORZIENINGEN 1958, [S.] 408 (1958). Under its provisions most drugs must be approved by a government agency. Registration appears to be a process designed to ensure that a drug meets minimum standards. Vitamins are currently exempt from registration.

[36] Judgment of June 28, 1984, Rb. Arnhem, 2 TvC. 82 (1985).

[37] Judgment of July 7, 1987, Hof Arnhem, 4 TvC. 272.

[38] The Halcion case is also significant because it clearly assumes that a manufacturer of pharmaceutical products has a duty to warn the ultimate consumer. This sharply contrasts with the "learned intermediary" theory currently in vogue in the United States. *See* Reyes v. Wyeth Laboratories, 498 F.2d 1264 (5th Cir. 1979), *cert. denied*, 419 U.S. 1096 (1974); Odgers v. Ortho Pharmaceutical Corp., 419 Mich. 686, 358 N.W.2d 873 (1984). The Halcion case is currently on appeal to the Dutch Supreme Court.

risks be balanced against all of the relevant circumstances, including the manner in which the drug is prescribed, the content of the warning or instructions, the probability of injury, and the utility or benefit of the product. Additionally, the court's selection of experts illustrates the power of the Dutch judiciary to maintain control over litigation. This tight control of the expert selection process exemplifies the difference between products liability litigation in the Netherlands and the United States.[39]

Some cases suggest that the burden of proving fault may be relaxed in express warranty cases. The principal case in this area was based on section 1401 of the Civil Code. The defendant, a supplier of glue, advertised that its special glue was appropriate for drain pipe connections. The glue, which was purchased by a Dutch municipality, did not perform as advertised. The Court found the defendant supplier liable as a result of the defendant's advertisements. The Supreme Court further found the defendant liable for failure to prove freedom from fault.

The lack of appellate authority and the independence of the judiciary obscure the limits of products liability doctrine in the Netherlands. Civil law countries such as the Netherlands do not adhere to the doctrine of *stare decisis*.[40] A decision of the Supreme Court is, strictly speaking, not binding on the lower courts in future cases. Nevertheless, the reported cases demonstrate a pattern of cautious expansion of the rights of injured consumers over the past thirty years. Opinions establishing that the plaintiff need not prove fault, or that fault is inferable from the existence of a defect and the surrounding circumstances, parallel the approach taken in the United States.[41]

---

[39] A Dutch litigant's ability to present evidence through both experts and lay witnesses is controlled by the court. A party desirous of calling a witness at trial must obtain the permission of the court. Rv. § 199 *et seq.* (citation to the Wetboek van Burgerlijke Rechtsvordering, the Dutch code of civil procedure). The court may deny such requests unless the proffered testimony is relevant to an essential fact in dispute. The judge, on his own initiative, may also order that an expert witness be selected. Selection remains in the control of the parties if they can agree to either one or three experts. Rv. § 222 *et seq.*

[40] COMPARATIVE LAW, CASES-TEXT-MATERIALS, 597-99 (Schlesinger, Baade, Damaska & Herzog eds. 1988). The editors carefully note, however, that this general proposition must be qualified in several aspects. *Id.* It is also important to note that American courts do not always strictly follow the doctrine of *stare decisis*.

[41] *See* Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal. 2d 453, 150 P.2d 436 (1944); Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897 (1963).

The reluctance of the court in the Halcion case to impose strict liability on Upjohn also mirrors current doctrinal developments in the United States. In both the Netherlands and the United States, a consensus is developing that design defect cases test the decision-making process and judgments of the defendant manufacturer. In such cases, the finder of fact must weigh the choices made by the defendant against the practical and feasible alternatives existing at the time the product left the control of the manufacturer.[42] Thus, design claims and warning claims are subjected to a negligence standard. A strict liability approach is only warranted with manufacturing defect claims and express warranty claims.

III. THE EEC DIRECTIVE AND THE NETHERLANDS DRAFT BILL

A. Content of the Directive and the Dutch Draft

The EEC Council promulgated the final Directive on Products Liability on July 25, 1985.[43] The Directive had undergone numerous revisions since the first draft in 1974, and promulgation of the Directive in 1985 was unanticipated since debate on such issues as the state of the art defense (commonly referred to in Europe as the "development risk" defense) and monetary limitations on liability had impeded the progress of the draft Directive. As is customary with EEC legislation, the Directive provides the member states with a period of time within which to conform their national laws to the directive's terms.[44] The Dutch legislature, subsequent to the promulgation of the EEC Directive, has taken a draft products liability law under advisement which includes all of the provisions required by the EEC Directive.

Under the Directive and the Dutch Draft, a product is defective when it does not provide the safety which a person is entitled to expect, taking into account all of the surrounding circumstances, including the representation of the product, the use to which the product can reasonably be expected to be put, and the time when the product was

---

[42] *See* Prentiss v. Yale Mfg. Co., 421 Mich. 670, 365 N.W. 2d 176 (1985); Section 104(c) Uniform Products Liability Act, *reprinted in* 44 Fed. Reg. 62,714 (1979); Birnbaum, *Unmasking the Test for Design Defect: From Negligence to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 610 (1980).

[43] EEC Directive, *supra* note 1.

[44] Member states must have conformed their national laws by August 1, 1988. *Id.* at art. 19.

placed into circulation.[45] A product is not considered defective solely because a better product is subsequently marketed.[46]

Manufacturers (producers) are strictly liable for damage caused by manufacturing defects.[47] Paragraph 6 of the preamble expressly states that liability without fault is the "sole means of adequately solving" the problems associated with complex products in a technological age. Paragraph 11 provides, however, that a producer may escape liability under certain circumstances specified in Article 7 of the Directive. Of particular importance is Article 7(e) which provides a "state of the art" defense. Neither the preamble nor the Directive expressly limit Article 7(e) to merely design cases, and it is thus technically possible, under the Directive, for a producer to assert a "state of the art" defense in a case involving a manufacturing flaw. This construction of the Directive, however, is at odds with the above-mentioned language of the preamble to the effect that liability without fault is an essential element of the Directive.

The Directive and Draft both contain a provision which establishes a minimum damage threshold of 500 European Currency Units (ECUs).[48] Damage is defined as death, personal injury, and property damage.[49] Damage to property caused by a defective product used professionally is not compensable.[50] The Directive, and hence the Draft, do not authorize compensation for non-material damages such as pain and suffering. The Directive allows each member state to establish a limit on the liability of a producer for any single product involving "similar" claims of defect and "similar" injuries of not less than 70 million ECU.[51] The Dutch Draft does not include this limitation.

A producer includes (a) the manufacturer of a finished product or component part, (b) the producer of any raw material, or (c) any person

---

[45] *Id.* at art. 6; Dutch Draft, *supra* note 2, at § 1407b.

[46] EEC Directive, *supra* note 1, at art. 6.1(c)(2); Dutch Draft, *supra* note 2, at § 1407b.

[47] *See* EEC Directive, *supra* note 1, at arts. 6-7; Dutch Draft, *supra* note 2, at §§ 1407a, 1047b. *See also* Preamble to the European Products Liability Directive, EEC Directive, *supra* note 1, at Appendix A.

[48] EEC Directive, *supra* note 1, at art. 9(b); Dutch Draft, *supra* note 2, at § 1407e; *See also* Paragraphs 6 and 11 of the Preamble to the EEC Directive, EEC Directive, *supra* note 1, at Appendix A.

[49] EEC Directive, *supra* note 1, at art. 9(a),(b); Dutch Draft, *supra* note 2, at § 1407e.

[50] EEC Directive, *supra* note 1, at art. 9(b); Dutch Draft, *supra* note 2, at § 1407e.

[51] EEC Directive, *supra* note 1, at art. 16.1.

who by placing his name, trademark, or other distinguishing feature on the product represents himself as its producer.[52] An importer or supplier can also be deemed the producer of a defective product where the actual producer is unknown.[53] Neither the Directive nor the Draft makes any provision for cases where the foreign producer is known but insolvent or otherwise judgment proof. In cases where a foreign producer is insolvent, the supplier is not subject to the Directive if it complies with Article 3.3. This article merely requires that a supplier provide "the injured person" with the "identity of the producer or the person who supplied him with the product." Article 3.3 further stipulates that in the event an imported product causes injury and the product does not indicate the name of the importer, the importer must also identify the producer or supplier of the product to the "injured person." Article 3.3 makes no reference to insolvency. Thus, supplying the identity of an insolvent producer or other person would appear to fully meet its terms.

In addition, the producer and hence the supplier and importer are not subject to the terms of the Directive where the state of scientific knowledge was not sufficient at the time of circulation of the product to enable the existence of the defect to be discovered. Component suppliers are also completely immune where the defect is attributable to the design of the product manufacturer's design or instructions.

The defenses available to a producer substantially parallel defenses available in many states of the United States.[54] The Directive and Draft each provide a three year statute of limitations on claims.[55] The limitation period commences on the day the plaintiff becomes aware or reasonably should have been aware of the damage, the defect, and the identity of the producer.[56] The Directive and Draft each contain ten year statutes of repose.[57] In addition, a defendant producer may relieve itself of liability by showing: (1) it did not place the product in "circulation"; (2) the defect did not exist at the time the product was placed in circulation; (3) the producer is not a professional producer;

---

[52] *Id.* at art. 3; Dutch Draft, *supra* note 2, at § 1407c.

[53] EEC Directive, *supra* note 1, at art. 3.3.

[54] E.g., statutes of limitations, subsequent modification, statutes of repose, characterization of the defendant as a product seller, causation, etc. *See generally* 2 AMERICAN LAW OF PRODUCTS LIABILITY 17-64 (1987); FRUMER & FRIEDMAN, 2A PRODUCTS LIABILITY §§ 16C[1]-[3] (1987).

[55] EEC Directive, *supra* note 1, at art. 10; Dutch Draft, *supra* note 2, at § 1407f.

[56] *Id.*

[57] EEC Directive, *supra* note 1, at art. 11; Dutch Draft, *supra* note 2, at § 1407f.

or (4) the defect is attributable to compliance of the product with mandatory regulations issued by public authorities.[58] In addition, the Directive allows each member state to elect whether to allow a defendant producer to claim as a defense that the state of scientific and technical knowledge at the time when the product was placed into circulation was not sufficient to enable the existence of the defect to be discovered. In Europe this defense is known as the "development risk" defense and should logically have application in the area of drug products. Some authors claim that "development risk" is distinguishable from consideration of the "state of the art" because the former is not a part of the balancing which is essential to determine whether a product was defective at the time it left the control of the manufacturer.[59] According to this view, consideration of development risk involves only the question of whether the defect was discoverable.

B. Analysis of the harmonizing effects of the Directive and Dutch Draft

The aims of the Directive (and presumably the Draft) as stated in its preamble are as follows:

> (1) The prevention of unfair competition caused by the different product liability rules of law among the member states;
> (2) The elimination of obstructions in the free movement of goods;
> (3) The protection of the consumer; and
> (4) The just allocation of the risks between the consumer and the producer of products.[60]

There is no empirical evidence that divergent rules of products liability law have provided a substantial obstacle to the free movement of goods within the EEC. Similarly, the debate within the EEC regarding the relationship of products liability rules to unfair competition produced

---

[58] EEC Directive, *supra* note 1, at arts. 1 & 7; Dutch Draft, *supra* note 2, at § 1407a.

[59] Howells, *United Kingdom's Consumer Protection Act 1987 - The Implementation of E.C. Directive on Product Liability*, 3 EUR. CONSUMER L. J. 159, 164 (1987). "The development risks defense applies when the product is defective, but there was no means of discovering the defect when it was put into circulation." *Id.* *But see* Dielmann, *The European Economic Community's Council Directive on Product Liability*, 20 INT'L LAW. 1391, 1395-96 (1986). This appears, at least with respect to design defects, to be a distinction without a difference. Assuming a useful product and a design which involves a threatened harm which is unknowable at the time the product is circulated, the likely result is that the designer is not negligent and hence the product is not defective.

[60] *See*, EEC Directive, *supra* note 1, at Preamble.

no substantial empirical proofs. While it is certainly theoretically possible, and perhaps probable, that divergent standards of liability provide some producers with a competitive advantage, this proposition has not been proven. The goals related to unfair competition and the free movement of goods appear merely theoretical and are therefore not at the essence of the EEC's concern. Thus, the principal focus of the Directive appears to be the expansion of consumer protection. This aim necessarily involves the allocation of risk between the producer and consumer and hence the burden of proof in products liability claims of both a complex and simple nature. The extent to which the aim of consumer protection is furthered will provide the benchmark of the Directive's success or failure.

Harmonization of the law is a critical step in achieving a common and expanded level of consumer protection within the EEC. Absent some unifying principles or theories of recovery, legal recourse against the producer of a defective product may vary with the national origin of the producer and consumer and the situs of the accident and injury.

The Directive is intended to supplement the law of the member states.[61] If the terms of the Directive are clear, it should follow that each member state would have at least one common theory of liability in products liability cases. Therefore, the Directive can be evaluated in terms of the degree to which it provides a doctrinal least common denominator. A number of problems with the Directive and Draft, with inconsistent procedural law, and with national differences in dispute patterns raise serious doubts about the prospects of uniformity of law and substantial improvement in the level of consumer protection within the EEC.

The Dutch Draft and the Directive create several problems of interpretation. For example, both repeatedly use the term "circulation" without clarification.[62] It is not clear whether a prescription drug is put

---

[61] The Preamble states: "Whereas under the legal systems of the Member States an injured party may have a claim for damages based on grounds of contractual liability or on grounds of non-contractual liability other than that provided for in this Directive; in so far as these provisions also serve to attain the objective of effective protection of consumers, they should remain unaffected by this Directive. . . ." *Id.*

[62] Article 7 of the Directive and Section 1407a of the Draft state, in pertinent part: "The producer shall not be liable as a result of this Directive if he proves: (a) that he did not put the product into circulation; or (b) that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him . . . ; or (e) that the state of scientific and technical knowledge at the time when he put the product

into circulation at the time of shipment to a pharmacy, at the time of distribution to an intermediary distributor, or at the time of sale to a consumer.[63] Similarly, the legislation fails to define the kind of activity which constitutes circulation of a product. Is the distribution of a sample for purposes of market tests sufficient, or must there be a sale? Does a gift or donation constitute circulation of a product? Does transmission of a product to a laboratory for purposes of testing constitute circulation?[64]

Article 11 of the Directive, which provides a ten year statute of repose, also contains the term "circulation."[65] In addition to the obvious hardship for plaintiffs who sustain injury from a product defect which has a long latency period, e.g., drugs or durable goods such as an automobile, the provision is subject to divergent interpretations as to when the period of repose commences. The possible solutions to the problems of construction created by use of the term "circulation" are not at issue. However, the term invites the development of divergent substantive standards.[66] The Directive has opened the door to competing interpretations of its terms, thereby directly undermining the stated purpose of harmonization of the law.[67]

---

into circulation was not such as to enable the existence of the defect to be discovered." EEC Directive, *supra* note 1, at art. 7. The terms "put into circulation" are also used in Articles 6(1) and 11 of the Directive. *Id.* at arts. 6(1), 11. The same is true for Sections 1407b and 1407f of the Draft. Dutch Draft, *supra* note 2, at §§ 1407b, 1047f.

[63] This question is particularly problematic because both the Dutch Draft, and the Directive contain a clause which makes the law applicable only to those products which were put in circulation after the respective effective dates of the Draft and Directive. The clause is found in the Dutch Draft in Section II. The Directive contains this clause in Article 17.

[64] Perhaps the answer to these questions can be supplied by reference to Article 3.2 of the Directive which defines a producer as ". . .any person who imports for sale, hire. . .or any form of distribution in the course of his business." Based upon Article 3.2 it can be argued that the drafters of the Directive were concerned with "any form of distribution" for purposes of Article 7 as well as Article 3.

[65] EEC Directive, *supra* note 1, at art. 11; Dutch Draft, *supra* note 2, at § 1407f.

[66] The Dutch Draft approaches the problem by indicating in the explanatory memorandum that a product has been circulated when it is available for common use. Tweede Kamer, vergaderjaar 1985-1986, par. 19,636, no. 3, p.8. The Dutch Draft does not, however, define the term "common use."

[67] The EEC Court of Justice can provide a remedy for problems associated with conflicting interpretations. Courts of the member states can petition the Court of Justice to provide an interpretation of the Directive and rule on the issue of whether a Member States national law conforms to the Directive. H. SCHERMERS, INTERNATIONAAL PUBLIEKRECHT VOOR DE RECHTSPRAKTIJK 125-8 (1982).

Similarly, the provision establishing a threshold amount in controversy for claims involving damage to property other than the product itself is also a source of ambiguity.[68] In the Dutch Draft, if the claim satisfies the threshold of 500 ECUs, the plaintiff is entitled to compensation for all of the damages proved at trial, including the threshold amount. A claim involving less than the threshold amount cannot be founded upon the provisions of the Dutch Draft. In the French and German translations of the Directive, however, plaintiffs may only recover an amount in excess of the threshold set forth in the statute.[69]

The Directive defers to the member states' national laws in several areas, including rights of contribution[70] and suspension of the limitation period.[71] In addition, the Directive allows the member states to fashion the applicable law in several critical areas, including whether to allow a "state of the art" defense[72] and whether to impose a limit upon damages caused by "identical items with the same defect."[73] Differing national law with respect to limitation periods and rights of contribution may result in divergent liability insurance rate-making practices.[74] The

---

[68] Article 9 of the Directive (English version) states: For the purpose of Article 1, 'damage' means: . . .(b) damage to, or destruction of, any item of property other than the defective product itself, with *a lower threshold of 500 ECU*,. . ." EEC Directive, *supra* note 1, at art. 9. We believe, on the basis of the Directive (Dutch version) that the drafters intended to establish 500 ECUs as a floor of damages. The above quoted language can be read to establish 500 ECUs as a ceiling. 500 ECUs is a little more than five hundred dollars, depending upon currency fluctuations.

[69] Tebbens, *De Europese Richtlijn Produktaansprakelijkheid*, 12 NEDERLANDS JURISTENBLAD [NJB] 369-374 (1986).

[70] EEC Directive, *supra* note 1, at arts. 5 (joint and several liability), 8.1 (contribution).

[71] *Id.* at art. 10.2.

[72] *Id.* at art. 15.

[73] *Id.* at art. 16. EEC Directive Article 16 provides in pertinent part that: "Any Member State may provide that a producer's total liability for damage resulting from a death or personal injury and caused by identical items with the same defect shall be limited to an amount which may not be less than 70 million ECUs." *Id.*

[74] Liability insurance rates depend upon an actuarial process which quantifies the magnitude of an insured's risk in dollars and cents. Where possible, the calculation is based upon the insured's history of claims. *See* U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCTS LIABILITY (Final Report of the Legal Study) I-21-4 (1976). Claim pay-outs, whether through settlement or verdict, should therefore covariate with liability insurance rates. A statute of limitations of one year should yield lower rates than a three-year statute of limitations, for a one year statute would allow for fewer claims. Rules of law governing contribution should also affect the liability insurance rate-making process because they directly effect insurer claims experience by either reducing or expanding net insurer payouts. *See generally* Morris, *Enterprise Liability and the Actuarial Process-The Insignificance of Foresight*, 70 YALE L.J. 554, 560-581 (1961).

freedom to choose whether to allow a state of the art defense or to impose limits upon damages for injuries caused by identical products with the same defect is therefore not consistent with the goal of harmonization of the law. Indeed, assuming that reduced insurance rates covariate with competitive advantage in the market place, some member states may be motivated to take advantage of the terms of the Directive to shield national producers of products.

By its own terms, the Directive is supplementary to the national law of the member states.[75] After the effective date of the Dutch Draft, a plaintiff in the Netherlands will be able to commence a products liability action and allege claims under the Draft as well as section 1401 of the Civil Code. The likelihood that plaintiffs will file cases based upon multiple theories of recovery is great. In France, however, concurrence of actions is not possible. Under French law, the plaintiff must make an election between tort and warranty.[76] This type of divergent situation, combined with the potential for further divergence as a result of poor drafting and elections by individual member states, may mean that complete harmonization of products liability law has been postponed to the distant future.

The Directive is nevertheless a positive step, albeit a cautious one. In its preamble, the Directive acknowledges that it merely "opens the way towards greater harmonization." The terms of the Directive therefore require the Commission to submit a report to the Council which summarizes the effect of the Directive on "consumer protection and the functioning of the common market."[77] In addition, the EEC Court of Justice, at least structurally, has the capacity, if not the inclination, to ameliorate differences in interpretations of the Directive's terms.[78] Although the Directive does not markedly advance the substantive law of a country like the Netherlands, it may have greater impact on member states that require strict proof of negligence in products liability actions.[79]

---

[75] EEC Directive, *supra* note 1, at art. 13.

[76] Boger, *supra* note 3, at 19.

[77] EEC Directive, *supra* note 1, at art. 16(2).

[78] Whereas the national courts of a member state may certify a question arising in a case to the EEC Court and request an explanation of the EEC Directive or other EEC legislation, the Supreme Court of each Member State *must* certify such questions. *See* EEC Treaty art. 177(c), 98 Tractatenblad 91 (1957); H. SCHERMERS, *supra* note 67.

[79] In Italy, the plaintiff must prove fault. *See* Taschner, *Product Liability-Actual Legislation and Law Reform in Europe*, in CONSUMER LAW IN THE EEC 115 (G. Woodroffe ed. 1984). In regard to England, Weatherill states: "Recovery under the law of tort, though free of this restriction [privity], so that litigation against a

It should also be kept in mind that the United States, notwithstanding numerous attempts, has failed to enact national legislation which would harmonize products liability law throughout the fifty states.[80]

IV. LEGAL CULTURE

Comparison of the Dutch approach to products liability with that of the United States is difficult for several reasons.[81] The divergent origins of the substantive law, differences in procedural law, demographic and economic factors, and differences in social insurance practices define two distinct legal cultures. In large measure, the common law in the United States has evolved through the successive application of both statutory and case law to specific fact patterns, whereas in the civil law countries, rules and moral precepts, embodied in a code, are applied to specific cases. This difference in the Dutch and American legal legacies is arguably the source of divergent popular perceptions and expectations. The identification and measurement of key perceptions about the law is beyond the scope of this article. We have limited our observations to matter that is more easily identified and quantified. It is noteworthy, however, that relatively recent trends mitigate the historical differences between common law and civil law traditions. The expansion of the freedom of civil law judges to develop the law through interpretation of the code[82] and the increasing activity of federal and state legislative bodies reflect a tendency toward uniformity of approach.

---

manufacturer is possible, is limited by the requirement that the consumer show that the defendant is at fault in causing her loss." Weatherill, *Consumer Safety Legislation in the United Kingdom*, 2 EUR. CONSUMER L. J. 81,83 (1987). *See also* Boger, *supra* note 3, at 45.

[80] Although the United States has not succeeded in enacting federal legislation, the law governing products liability in the majority of the fifty states is substantially in accord with the provisions of MUPLA. The United States also has a common procedural framework with most states having adopted rules of procedure which are largely modeled upon the Federal Rules of Civil Procedure. Finally, except for Louisiana, each of the fifty states shares a common law heritage.

[81] The multiplicity of theories of recovery and varying doctrines or interpretations of doctrine from one state to another show that there is not a uniform body of substantive law within the United States with which to compare Dutch law. Nevertheless, it is possible to discuss trends in American products liability law in a manner which allows for comparison with the Dutch Draft and the EEC Directive.

[82] *See* Judgment of June 28, 1984, Rb. Arnhem, 2 TvC. 82, 1985, *rev'd*, Judgment of July 7, 1987, Hof Arnhem, 4 TvC. 272. The Upjohn case involving the drug Halcion is illustrative of the latitude afforded the Dutch judiciary. The trial court's reasoning in support of its finding that Halcion was not defective was based on an EEC Directive which had not yet been adopted by the Dutch legislature and on the fact that other member states continued to allow Halcion to be sold. *Id.*

A. Quantitative Factors[83]

The Netherlands, approximately one-third of the geographic size of the state of Michigan, has a population of 14.5 million. For every one hundred thousand people, there are five judges and thirty-three lawyers.[84] Galanter found almost fourteen times more lawyers per million and fifty-three times more lawsuits filed per thousand in the United States than in the Netherlands.[85] In 1986 there were 58,404 civil cases filed in Dutch trial courts.[86]

The comparative data for products liability cases may be even more revealing than the data for all case types combined. Data is not available for products liability case filings in the Netherlands, but in the past fifty years, there have been no more than twenty-five published opinions involving allegedly defective products. Only five of these opinions involved an injured consumer as a party plaintiff. Injured consumers prevailed in two of the five cases. The remaining cases involved employers, insurers, and professional users as plaintiffs.[87] American experience with products liability litigation is vast. The best estimate in 1976 was that 60,000 to 70,000 cases were being filed annually.[88]

Substantial differences in civil case filings suggest to some commentators that Americans are too prone to sue.[89] There is certainly no reason to assume that products manufactured in the Netherlands or imported into the Netherlands are free of defects; the Netherlands is not free of accidents. The EEC Commission has stated that a principal reason for adoption of a Directive on Products Liability is the four

---

[83] In this section we compare the Netherlands with the United States and specifically with the state of Michigan. Aside from the obvious reason of familiarity, Michigan was chosen as a basis of comparison because its population, although smaller than that of the Netherlands, is large enough to make comparison meaningful. Moreover, Wayne County, Michigan is a very popular venue for products liability cases.

[84] Verwoerd & Blankenburg, *Beroep op De Rechter Als Laatste Remedie*, 33 NJB 1045, 1046-47 (1986). Blankenburg found a ratio of 6.5 attorneys per judge in the Netherlands and 26 attorneys per judge in the United States. He concluded that the variance was explained by the relatively more active role of judges in the Netherlands. *Id.* at 1047.

[85] Galanter, *supra* note 15, at 52.

[86] MAANDSTATISTIEK RECHTSBESCHERMING EN VEILIGHEID, CENTRAAL BUREAU VOOR DE STATISTIEK, no. 4 (April 1987).

[87] G. SNIJDERS, *supra* note 30, at 150.

[88] U.S. DEP'T OF COMMERCE, *supra* note 74, at xxxvii. *See also* Verwoerd & Blankenburg, *supra* note 84. The growth in products liability litigation has been explosive.

[89] *See* Galanter, *supra* note 15, at 5-8, 51-61.

to five million accidents and injuries per year in the EEC which involve defective consumer products.[90] In the Netherlands, the limited data available indicates that there are approximately 2.3 million home and leisure accidents per year.[91]

Differences in the number of attorneys and the existence of the contingent fee in the United States are perhaps partial explanations for the distinct litigation patterns in the two countries.[92] Meaningful comparison, however, requires an examination of the incentives and disincentives for, and the structural role played, by litigation in the two societies. Comparison of the access to courts and to the legal profession, relative costs, potential rewards, alternative processes of dispute resolution, and alternative compensation schemes may provide a clearer picture of the context within which products liability rules operate in each country.

For example, the differences in the number of lawyers may reflect divergent views on the role of the law in society. The number of Dutch trial attorneys is deliberately maintained at a relatively small number through a guild system. In the Netherlands, only a small fraction of law university graduates actually become certified to practice in court. The Dutch equivalent of an American trial lawyer is termed an "advocat." An advocat is a lawyer who is competent to represent clients in court. To become an advocat, a law school graduate must find an advocat who will either hire him or allow him to apprentice for a

---

[90] COMMISSION OF THE EUROPEAN COMMUNITY, TEN YEARS OF COMMUNITY CONSUMER POLICY, A CONTRIBUTION TO A PEOPLES EUROPE 38 (1985).

[91] The study was conducted by the Stichting Consument en Veiligheid (Foundation of Consumer Safety). W. ROGMANS, ERNST EN OMVANG VAN ONGEVALLEN IN DE PRIVESFEER (1982). For purposes of the study, an accident is defined as an injury requiring medical treatment. A product was involved in approximately 90% of the accidents. The research also found, on the basis of user opinion, that product defects contributed to an accident in approximately 14% of the cases. *Id.* at 72.

[92] Typically, the contingent fee and the large number of attorneys in the United States are cited as factors which distinguish products liability and other personal injury litigation in the United States from litigation patterns in Europe. *See* Galanter, *supra* note 15, at 55 (With regard to differences in Japanese and American litigation patterns Galanter concludes: "The real check on Japanese litigation is the deliberate limitation of institutional capacity: the number of courts and lawyers is kept small."); Hollenshed & Conway, *An Overview: International Products Liability*, 16 TRIAL 50, 52 (Nov. 1980) (The authors cite the availability of skilled counsel as a feature distinguishing American products liability litigation); Malott, *Litigation Mentality: U.S., Europe, Japan*, 10 DIRECTORS & BOARDS 14 (1986) (Malott points to the contingent fee as an important feature distinguishing American from European products liability litigation patterns).

period of three years.[93] Each year, approximately 2500 persons graduate from Dutch law schools, but only a small fraction become advocats.[94] In the United States, all law school graduates who are members of the bar may lawfully represent clients in court, although many have only infrequently done so.

B. Procedural Factors

The rules regarding costs and attorney's fees are of principal concern to a plaintiff in a products liability action. This is particularly true where complex issues involving the design or composition of products are involved. Dutch law imposes the burden of paying costs upon the loser of a lawsuit. These costs are fixed by rule, but do not correspond with the actual costs and attorney's fees.[95] A potential litigant must therefore assess the likelihood of success against the risk of losing and thus paying her adversary's costs, a portion of the attorney fees of the prevailing party, and her own attorney fees.

In addition, procedural obstacles, particularly for complex products which have not been tested in litigation in the Netherlands or elsewhere,[96] make it difficult for a Dutch litigant inexpensively and expeditiously to obtain the documents that are crucial to proving negligence and causation. Dutch procedural law does not provide for the discovery of documents upon the demand of an adversary or for deposition practices similar to the procedures provided for in most rules of civil procedure in the United States. In the Netherlands, the recipient of a request for

---

[93] Stageverordening 1955, Staatscourant [STCT.] 11. The Stageverordening contains the rules governing the practice of law and admission to the bar association.

[94] Based on conversations with individuals employed by the Dutch National Bureau of Statistics, unpublished data indicate that there were 2,784 graduates of Dutch law universities for academic year 1985-1986.

[95] *See* Rv arts. 56 and 57. Costs include fees paid to the court clerk, filing fees, fees assessed by expert witnesses and a portion of the attorney fees of the prevailing party. *See generally* FOKKEMA & HONDIUS, *supra* note 21, at 239. Four percent of Dutch households have insurance (legal aid insurance) which will pay all of the costs, including attorney's fees. Vos, *Nederlandse advocaten en Verzekeraarspartners*, 64 ADVOCATENBLAD 370 (1984).

[96] Although we know of no litigation where a Dutch attorney was able to avail himself of the documentary fruits of litigation pursued in another EEC member state or the United States, the recent filing of more than one thousand dalkon shield cases by the Consumentenbond in the United States indicates that attorneys and other interested parties follow litigation filed in venues outside the Netherlands. (The Consumentenbond is the primary consumer organization in the Netherlands.) This event is reported in Bogaard & Snijders, Waar Geen Wil Is, Is Geen Wet, SWOKA Rapport No. 63, pp. 34-35 (1988).

documents may elect not to produce them.[97] Moreover, a witness can elect not to respond to oral questions prior to and during trial.[98]

In the United States, the Torts Restatement § 402A and its progeny were adopted substantially after the reform of discovery rules. In spite of the expanded discovery allowable under the Federal Rules of Civil Procedure and most state rules, it was nevertheless evident that the burden of proof in a products liability case was too heavy. One of the principal rationales for the adoption of a so-called "strict liability" standard was the plaintiff's heavy burden of proof.[99] Today, most commentators agree that a plaintiff in a case alleging a design defect must prove that an alternative design was feasible which would not have caused the accident.[100] This burden can easily require reconstruction of the accident which in turn necessitates some understanding of the operation of the product and its components. Generally, the producer of a defective product is likely to know far more about the operation of the product than anyone else. Denial of access to test results, design drawings and memoranda, and the opinions and statements of the persons responsible for the creation of the product means that cases involving simplistic products and obvious defects or cases financed by organizations are far more likely to reach the Dutch courts.[101]

---

[97] This procedure sharply contrasts with discovery under the Federal Rules of Procedure which generally require that an adversary in litigation produce documents. FED. R. CIV. P. 34. Substantially similar rules govern discovery in all of the fifty states. Typically, in the early stages of most products liability suits in the United States, the plaintiff's attorney will make a Request for Production of Documents. Dutch law does provide for a form of preliminary hearing (voorlopig getuigenverhoor). RV. §§ 876-881. *See generally* FOKKEMA & HONDIUS, *supra* note 21, at 249-54. This procedure is no alternative to open discovery, however, because it is initiated prior to the filing of an action and is very limited in scope. If it involves a person or corporation that is likely to become a defendant in a subsequent suit, the person cannot be required to testify against herself or produce documents that would be self-incriminating. Legislation is currently pending in the Netherlands which will allow a party to be called as a witness during a preliminary proceeding and at trial. *See* Sec. 214, Tweede Kamer, Zitting 1981, no. 10, p. 8.

[98] *See* Judgment of Feb. 1, 1963, HR, NJ 157 (1964).

[99] Greenman v. Yuba Power, Inc., 59 Cal 2d 57,63, 377 P.2d 897, 901 (1963).

[100] *E.g.*, Birnbaum, *supra* note 49, at 648-9; Twerski, *supra* note 4, at 604-7; Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV. 551, 572-3; Hulsen, *Design Liability and State Of The Art: The United States And Europe At A Crossroads* 55 ST. JOHN'S L. REV. 450, 462-75 (1981); *Prentiss*, *supra* note 7, at 694. The *Prentiss* court, in stating that the test is whether the manufacturer's design was unreasonably dangerous, cites Owens v. Allis-Chalmers, 414 Mich. 413, 427 (1982). *Owens* required that the plaintiff prove that a safer design was practical and feasible.

[101] *Compare* Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955, 959

Rules governing damages are also a significant factor in Dutch products liability litigation. Dutch law governing damages for pain and suffering and the set-off of funds received from collateral sources result in comparatively reduced verdicts.[102] Funds received from social insurance and funds received as a result of private insurance contracts are not appropriate elements of damages in a civil action.[103] The law governing compensable damages and the comprehensive nature of the social insurance system mean that there are fewer rewards to be obtained through litigation.

Section 1406 BW provides for damages in wrongful death actions, while section 1407 BW governs the damages available to an injured plaintiff. In wrongful death actions under section 1406, a spouse, child, or parent has standing to claim damages in a civil action. Compensable damages are limited to lost income. Pain and suffering and loss of consortium are not legitimate elements of damages. In cases under section 1407 BW, the plaintiff may recover damages for pain and suffering as well as lost wages and damage to property. This difference with regard to non-material damages is of little import given the relatively few instances in which substantial non-material damages are recovered. One study of compensation for pain and suffering in the Netherlands found only about five hundred published and unpublished judgments during a ten year period where non-material damages were recovered.[104] Van der Veen compared the amount of damages awarded for pain and suffering with the magnitude of the injury. In the cases involving disabling injuries, including total loss of vision, total loss of hearing, total loss of speech, and total loss of ambulation, the range of damages for pain and suffering was seventy thousand guilders to two hundred thousand guilders.[105] Van der Veen found only one prod-

---

(1976) (involved a stuck accelerator; whether or not a manufacturing or design flaw is involved,"Conditions like these, even if resulting from the design of the products, are defective and unreasonably dangerous without the necessity of weighing and balancing the various factors involved.") *with* Garst v. General Motors Corp., 207 Kan. 2, 484 P.2d 47 (1971)(involved very complex balancing and evaluation of alternative designs).

[102] *E.g.*, Judgment of April 18, 1980, Rb. Groningen, [VR] 4 (1981) (A twenty-four year old, brain damaged and totally disabled as a result of medical malpractice, received $50,000); Judgment of February 25, 1981, Rb. Leeuwarden, VR 1 (1984) (A fifteen year old, brain damaged and totally disabled by a traffic accident, received $50,000); Judgment of October 5, 1982, NJ 804 (1983) (A twenty-seven year old, totally disabled and paraplegic as a result of work-place accident, received $50,000).

[103] *See* Asser-Hartkamp I., Zwolle, 8th ed. pp. 386-91 (1988).

[104] Van der Veen, Smartegeld, *Verkeersrecht* 1985, no. 6, p. 121-260.

[105] Van der Veen, Smartegeld, *Verkeersrecht* 1988, No. 6, p. 121-260. In United

ucts liability case,[106] and there, the plaintiff, a bystander who was struck in the eye by a stone thrown from a lawnmower, sued the user of the lawnmower rather than the manufacturer.

Under Dutch law, an injured plaintiff who receives funds from social insurance programs may not recover damages in a civil action for lost wages and medical expenses already the subject of reimbursement through social insurance.[107] Thus, an accident victim who receives social insurance benefits can only recover uncompensated wages, the value of damaged property, and non-material damages. Actions to obtain such damages are referred to as "supplementary actions." In addition, under some of the social insurance laws, the social insurers have recourse against the manufacturer of a defective product or other culpable defendants to the extent of the benefits paid.[108] Under the Dutch Draft, this recourse is not available to either social or private insurers.

There is little statistical data regarding supplementary actions, but the literature suggests that such actions are of marginal utility.[109] One study of traffic accident victims found that approximately 15% of the compensation paid to these victims involved settlements with or civil actions against a culpable party, with more than 50% of this amount involving compensation for non-material damages.[110] The majority of the remaining pay-outs involved compensation for property damage.[111] Assuming that persons injured in traffic accidents are more likely to seek redress than consumers injured as a result of a defective warning or design (because of the burden of proof problem), the adoption of the Dutch Draft should have little or no impact on products liability case filings.

United States jury awards, particularly for product liability and malpractice claims, contrast sharply with awards in the Netherlands. One study of jury verdicts in Cook County, Illinois and San Francisco County, California, which was conducted by the Rand Institute for Civil Justice, suggests that jury awards in urban venues, particularly

---

States currency, this is approximately thirty-five thousand to seventy-five thousand dollars.

[106] See Judgment of June 3, 1982, Rb. Zutphen (unpublished).

[107] Judgment of November 28, 1969, HR, NJ 172 (1970)(private insurance); Judgment of December 17, 1976, HR, NJ 351 (1977) (social insurance).

[108] *See* WAO § 90 *infra* note 18 and accompanying text; ZFW § 83b *infra* note 17 and accompanying text; ZW § 52a *infra* note 16 and accompanying text.

[109] Bloembergen, *De Invloed van Verzekeringen*, 9 NJB 182 (1980).

[110] *Id.*

[111] *Id.*

for products liability and medical malpractice claims, have increased substantially. Median and mean jury awards for products liability and malpractice cases rose sharply from 1960 to 1984. The median doubled, and the increase in the mean varied from 200 percent to 1000 percent. This growth sharply contrasts with the almost constant or declining mean and median statistics for automobile personal injury cases.[112] The mean for product liability and malpractice jury awards exceeds $1,000,000.[113] The median statistic exceeds $150,000.[114]

C. *Social Insurance*

We contend that the social insurance programs of the Netherlands reduce the incentive there to pursue products liability claims.[115] The benefits payable to the victim of an accident and injury in the Netherlands are substantial. Several social insurance programs provide a comprehensive safety-net for the victims of all accidents. Thus, sustenance for the injured is not based upon the individual assertion of rights within an adversarial model; rather, the state provides protection to the victims of accident and injury through statutory law establishing layers of insurance. The ZW (Ziektewet - Sick Statute),[116] the ZFW (Ziekenfondswet - Sick Fund Law),[117] the WAO (Wet op de Arbeids Ongeschtiktheidsverzekering - Workers Disability Act of 1967),[118] the AAW (Algemene Arbeids Ongeschiktheids Wet - The General Act on Disability of Work),[119] and the AWBZ (Algemene Wet Bijzondere Ziektekosten - General Act on Special Medical Costs)[120] are the principal social insurance statutes for injured persons. The ZW and the WAO

---

[112] *See* Hensler, Vaiana, Kakalik & Peterson, *Special Report, Trends in Tort Litigation: The Story Behind the Statistics* (Pub. Rand Inst. Civ. Justice) at 14-18 (1987).

[113] *Id.*

[114] *Id.*

[115] Empirical support for this proposition is not available. Our argument is therefore based upon the assumption that the injured victims of defective products, operating with complete economic information, make choices which maximize their economic positions. This assumption is flawed in that it is very doubtful that injured consumers possess such knowledge or always make rational economic choices. There is some evidence that a number of factors have an impact upon the decision to file a claim including educational and income levels and the perception that a civil proceeding is too costly or too risky. *See* Weatherill, *supra* note 79, at 8; Galanter, *supra* note 15 at 13-14.

[116] SCHUURMAN & JORDENS, ZWOLLE No. 5 (van Pelt ed. 1983).

[117] SCHUURMAN & JORDENS, ZWOLLE No. 95 (Sneep ed. 1987).

[118] SCHUURMAN & JORDENS, ZWOLLE No. 162 (Blok ed. 1985).

[119] SCHUURMAN & JORDENS, ZWOLLE No. 151 (Blok ed. 1988).

[120] SCHUURMAN & JORDENS, ZWOLLE No. 166 (Sneep ed. 1986).

focus on general disability benefits, and the AWBZ and the ZFW are concerned with medical costs. The AAW deals with both medical and general disability benefits.

The ZW, adopted in 1930, provides a fund which is composed of contributions from employers (5% of gross income) and employees (1% of gross income). Under the ZW, an employee is entitled to 70% of her last earned wage starting almost immediately after the incidence of accident or sickness.[121] The duration of payment is limited to one year. For the first six weeks, the employer is required to supplement the benefits payable under the ZW to 100% of the last earned wage.[122] In addition, many collective labor agreements provide that employers will continue the supplement for the entire year of benefits under the ZW, and in some cases for a second year.[123]

If further assistance is needed following the exhaustion of disability benefits pursuant to ZW, the WAO and the AAW will continue to provide assistance to the injured victim. The WAO and the AAW abolished cause-related disability compensation. Compensation for loss of income up to a rate of 70% is now provided irrespective of the cause of the disability. The AAW provides a benefit payment to anyone who is unable to work for more than one year. Benefits under the AAW are limited and are based upon the extent of disability of an applicant. Benefits under the WAO are also pegged to a determination of the extent of disability. An employee who has exhausted her ZW benefits is entitled to continuing benefits under the WAO upon a finding that she is disabled.[124] A doctor selected by the board administering the fund determines disability status.[125] The WAO and AAW provide the victim of a non-work-related traffic accident with the same protection as the victim of an industrial accident. The WAO, however, is

---

[121] ZW art. 29.

[122] BW art. 1638c.

[123] *See* JASPERS & RIPHAGEN, SOCIAAL ZEKERHEIDSRECHT 39 (1987).

[124] ZW art. 29(52 week limit); WAO art. 19.

[125] Until recently, the unavailability of work in the employment market was a legitimate basis for a finding that a disabled individual was entitled to benefits. Under the old procedure, experts would evaluate the claimant and determine if any type of work existed within the range of the disabling impairment. Even if the experts found that the claimant could perform some type of work, the unavailability of such work in the employment market rendered the claimant eligible for social insurance benefits. Recently adopted legislation now limits the ability of claimants to continue receiving benefits as a result of the unavailability of work within the range of their work capacities. AAW art. 5 (1986); WAO art. 18 (1986).

limited to employees, as the bulk of the WAO fund consists of employee contributions.[126]

Medical costs and the costs of rehabilitation are covered by the AAW, ZFW, and the AWBZ. Under these statutes the costs of normal medical treatment, extraordinary treatment, and rehabilitation are compensated. The ZFW provides a fund which pays for employee medical costs such as doctors fees and prescription drugs. The costs of prosthesis, automobile modification, home remodeling, training, physical adjustments in the work environment, etc., are paid from the AWBZ fund.[127]

Comparison of the Dutch social insurance system with the social insurance system in the United States is complicated by the federalistic approach to social insurance in the United States. State programs provide varying levels of benefits in addition to those provided through the federal social security system. State welfare schemes are excluded from consideration in this article because they generally are unavailable to an individual who is already receiving Supplemental Security Income (SSI)[128] or Social Security Disability (SSD)[129] benefits at a maximum level.[130]

The United States federal compensation scheme essentially consists of the SSI and SSD programs, which extend throughout the United States. Most states have also enacted Workers' Disability Compensation legislation and some form of welfare legislation. SSI operates on the basis of need, whereas SSD is only available to individuals who have made sufficient payments into the system.[131] A disabled individual is eligible for SSI if his annual income does not exceed $1,752.[132] SSI benefits (federal contribution) may reach $340 per month.

---

[126] WAO art. 77.

[127] *See* Peters-Sekino, *Product Liability, Tort And Insurance In The Netherlands*, (unpublished paper on file with the Wayne State Law Review) 12, n.5. A forklift driver injured in a traffic accident received compensation for expenses which included necessary modifications in his home and automobile his wheel chair, driver's lessons, and adjustments in the work place necessary to allow him to continue employment.

[128] 42 U.S.C. §§ 1381-1383(c) (1982 & Supp. III 1985).

[129] 42 U.S.C. §§ 401-433 (1982 & Supp. III 1985).

[130] The Netherlands also has welfare legislation which provides a family with approximately 1500 guilders per month. *See* the Bijstandswet (Public Assistance Act) Staatsblad 1963, No. 234 and Toeslagenwet (Additional Charge Act) Staatsblad 1986, No. 562. In addition, each family, irrespective of income, receives a subsidy for each child in the household. A rent subsidy may be available depending on the amount of rent and income. In the case of an injured person, should benefits under the ZW, WAO and AAW not reach the social minimum, additional benefits will be paid under the Additional Charge Act. *See* A. JASPERS & J. RIPHAGEN, SOCIAAL ZEKERHEIDSRECHT 151 (1987).

[131] *See* 20 C.F.R. § 404.130 (b)(1),(2) (1987).

[132] 42 U.S.C. 1382 (a)(1)(A) (1982 & Supp. III 1985).

Also, there exists United States federal legislation designed to provide for the costs of rehabilitating individuals and returning them to the labor force. The Rehabilitation Act established the Federal Rehabilitation Service Administration.[133] This program provides qualified applicants with funds for limited adjustments to a home, such as an access ramp or the purchase of a modified motor vehicle.[134] Funds for transportation are only available where the recipient has no other means, such as suitable public transportation, to travel to and from work. Any device which is not related to employment is not compensable under the Act. Thus, personal care items such as beds, in-house lifts, modified shower stalls, etc., are not compensable under the Act.[135]

As noted earlier, benefit levels for workers' compensation vary from state to state. Generally, the statutes compute benefits as a percentage of average weekly wage. Many statutes also have established a ceiling limiting the amount of wages upon which benefits can be paid. Most state limits are substantially below two-thirds of the average weekly wage earned prior to the onset of the disabling injury or condition. Indeed, the majority of the limits are below the standards set by the National Commission on Workers' Compensation.[136] One study of workers' compensation benefits in asbestos cases found that the compensation paid was less than 25 percent of gross pre-tax income.[137] Some statutes also limit the duration of benefits.[138] Most workers' compensation statutes provide for the payment of medical treatment but do not extend to home, vehicle, and work site modification.

Our limited review of the benefits available in the Netherlands and the United States suggests that the Dutch system of social insurance

---

[133] 9 U.S.C. § 702(a) (1982).

[134] 29 U.S.C. § 723(a) (1982).

[135] Benefits to support a disabled individual's personal needs may be available under 29 U.S.C. § 723. This program has never been fully funded by Congress and operates on an experimental basis. For example, in Michigan, the program is only available in the cities of Ann Arbor and Port Huron.

[136] *See* U.S. DEP'T OF COMMERCE, *supra* note 74, at VII 85-86. The National Commission's standards call for complete reimbursement of medical and rehabilitation-related expenditures and payment of two-thirds of income, with a ceiling of 100 percent of a state's average weekly wage. *See also* J. NACKLEY, PRIMER ON WORKERS' COMPENSATION 110-115 (1987) (containing tables showing the level of benefits and ceilings in the United States).

[137] W. JOHNSON & E. HELER, ECONOMIC CONSEQUENCES OF ASBESTOS-ASSOCIATED DISEASES, 272 (I. Selikoff ed. 1982); Johnson & Heler, *The Costs of Asbestos-Associated Disease and Death*, 61 MILBANK MEMORIAL FUND Q. 117 (1983).

[138] *See generally* M. FRANKLIN, TORT LAW AND ALTERNATIVES 776-83 (2d Ed. 1979).

has a greater scope and provides benefits of a greater magnitude. In the work environment, a worker may avoid any wage loss for a period of two years after the occurrence of a disabling condition. In addition, the devices and training needed to return even the victims of catastrophic injury to the labor force appear to be more available in the Netherlands.[139]

In the Netherlands, accident victims are entitled to certain benefits as a matter of right. This distributive approach contrasts with the United States where adversarial proceedings involving standardized bargaining play a more prominent role. Studies of the litigation process in the United States have convincingly established that the filing of a lawsuit in most cases is a routine step symbolizing that serious bargaining has commenced.[140] Substantive and procedural rules of law, such as tort law governing products liability, are sources of individual empowerment which allow injured individuals to negotiate compromise solutions which have a cash value.[141] This adversarial model is prevalent in the products liability sphere, where a large percentage of the compensation paid by insurers in the United States for product-related injuries involves accidents within the workplace. "Preliminary ISO data also indicate that while workers' products liability claims represent only 11 percent of the products liability incidents, these tend to be larger claims accounting for almost 50 percent of the total insurance payouts."[142]

Although the issue requires a more comprehensive study, the comparative analysis of social insurance systems suggests that there is less need to use products liability actions to obtain necessary and sufficient medical, rehabilitative, and living assistance in the Netherlands. In

---

[139] One area which requires further study involves a comparison of the processes necessary to obtain benefits in both countries. The relative ease of obtaining relief through the various programs may be a significant factor in such a comparison. Workers' compensation and social security in the United States frequently involve adversarial proceedings and the retention of attorneys.

[140] Most civil suits in the United States result in settlements. *See* Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Galanter, *supra* note 15, at 32-33. Adjudication provides a background of norms and procedures against which negotiation and regulation in both private and governmental settings take place. The bargaining endowment which courts bestow on the parties includes not only the substantive entitlement conferred by legal rules, but also the rules that enable those entitlements to be vindicated, for example, a rule excluding evidence favorable to another party or jeopardizing the claim of a party.

[141] *Id.*

[142] U.S. DEP'T OF COMMERCE, *supra* note 74, at VII-85.

addition, dramatic differences in the rules of law governing employer liability also may explain the absence of any significant amount of products liability litigation there. Dutch employers must provide a safe workplace and are not immune from employee civil actions. The jurisprudence involving workplace civil actions is voluminous when compared with products liability-related jurisprudence. Workplace accidents in the Netherlands generate civil actions against the employer, whereas in the United States, similar accidents generate third-party claims against product manufacturers.

A combination of structural and economic disincentives in the Netherlands and structural and material incentives in the United States explains much of the difference in the patterns of civil case filings. These incentives and disincentives involve obvious cost factors associated with attorney's fees and cost-shifting rules, and hidden cost factors associated with procedural rules and the substantive rules governing damages.

V. IMPACT OF THE EEC AND DUTCH LEGISLATION

A. Complex Claims

Products liability claims alleging a design defect or the failure to properly warn and instruct are often far more complex than cases alleging a manufacturing flaw. Manufacturing defects can be measured against the standards of the manufacturer and products in the same product line. Design and warning cases require that some external standard be utilized in attempting to measure the product or the conduct of the manufacturer. The EEC Directive defines a defective product as one which does not provide the safety that a reasonable consumer is entitled to expect. In adopting this definition, the EEC is signaling that it endorses a negligence standard for design and warning cases. For design cases, this approach frequently requires that a plaintiff prove that a feasible and practicable alternative design was available at the time the product subject to litigation left the manufacturer's control.[143]

---

[143] Birnbaum, *supra* note 42, at 598. U.S. DEP'T OF COMMERCE, *supra* note 74, at xliii. Notwithstanding the widespread adoption of strict liability approaches in the United States, the Interagency Task Force stated: "The tort-litigation system does not, in general, impose absolute liability on manufacturers of products. In many situations, a jury is asked to balance the economic burden on the manufacturer to produce a safe product against the probability that the product may cause injuries and the severity of those injuries." *Id.*

Assuming that the Directive requires a plaintiff to carry the burden of proving negligence, causation, and damages, plaintiffs in the Netherlands will continue to find themselves incapable of adequately assessing the strength of a particular case prior to the commencement of a civil action. With complex products such as automobiles, and with the fuel system integrity issue, both the causation and the negligence issues may involve extensive, complex proofs that require reconstruction of the accident sequence, and even the staging of crash tests. Not only the safety of the product, but also the design process is on trial.[144] The capacity to assess a particular case either prior to its commencement or early in the pretrial phase is therefore an important index of access to the courts in products liability cases.

Under any substantive rule, except a rule incorporating an absolute liability standard, the plaintiff must be able to evaluate the defendant manufacturer's test procedures, test results, alternative designs, etc., as a necessary part of the negligence calculus. Obtaining early in the litigation the documents which record these factors is the most inexpensive means of evaluating the worth of a particular case. Absent these documents, a litigant must retain experts to redesign the product without knowing whether an alternative design was explored by the producer or whether such a design was feasible or practicable given the technological limitations and the economics of the marketplace. This lesson is made clear by the *Halcion* case. The plaintiffs in that case would probably not have been able to meet their burden of proof but for the existence of a document of the defendant Upjohn Corporation. The court of appeals based much of its decision on an Upjohn memorandum which stated in regard to the 1 milligram tablet, "The strength is to be deleted to minimize the possibility of the inappropriate dosing of the product."[145]

The difficulties caused by the relative inaccessibility of relevant documents are compounded by the absence of any tradition of complex products liability litigation in the Netherlands. No section of the plaintiff's bar has a history of practice in the complex products area, and no readily available network of attorneys and technical support people exists to provide consultation and direction for attorneys who require

---

[144] *Id.*

[145] Judgment of July 7, 1987, Hof Arnhem, 4 TvC. 272. This memorandum and the decision to withdraw the 1 milligram tablet from circulation arguably involve subsequent remedial measures which would not be admissible into evidence in the United States. *See* FED. R. EVID. 407.

assistance.[146] Thus, even assuming that the attitudes of potential plaintiffs are sufficiently ripe for litigation, and that the incidence of accidents and injury attributable to defective products is frequent, a substantial number of potential law suits may remain unfiled and unrecognized by attorneys.[147] It is also noteworthy that most Dutch families purchase liability insurance.[148] A comparison of the lesser burden of proof in a negligence claim against an insured homeowner, with the heavy burden in a product design claim suggests that, even where recognized, the products claim will likely not be filed.

By setting forth the "development risk" as a distinct defense, the Directive sends a confusing signal. If development risk is the same as consideration of the state of the art, then the separate provision of Article 7 is redundant. If, on the other hand, consideration of the development risk is something distinct from consideration of the state of the art, then defendant producers will be able to raise the state of technical and scientific knowledge in two contexts. Available technology will at the time of circulation be a part of the risk-utility balancing which occurs in cases involving design defects, and subsequent to the determination that a product is defective, a defendant producer may then raise the defense that the defect was not discoverable. In many cases where a plaintiff proves that an alternative design was within the state of the art, the issue of discoverability of the defect may be moot. For this reason, the development risk defense logically seems confined to the areas of drug products and toxic torts. These areas involve injuries which occur after substantial periods of latency. In such cases, it is arguable that a producer could not have known of the potential harm.

It should also be noted that development risk could also be raised in a case involving a manufacturing defect.[149] Should the courts of the

---

[146] Of the universities in the Netherlands, three offer law courses in products liability. The existence of a trial bar with technical competence is a major factor distinguishing America from Europe. Hollenshead & Conway, *supra* note 92.

[147] For example, lawnmower cases involving a person injured by a projectile are frequently filed as products liability claims in the United States. Thus, the duty to properly design appropriate guards and provide proper instructions is well recognized. In the Netherlands, such injuries are more likely to generate a claim against the operator of the product.

[148] In 1983, approximately 85 percent of Dutch households were protected by liability insurance. *See* ASSER-RUTTEN-HARTKAMP, *supra* note 21, at 102.

[149] *See* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). The defendant argued that the alleged flaw in a wooden wheel was not discoverable absent a test which would have destroyed the wheel. *See* KEETON, OWEN & MONTGOMERY, PRODUCTS LIABILITY AND SAFETY, CASES AND MATERIALS 47 (1980); MacPherson v. Buick Motor Co., 145 N.Y.S. 462, 463 (1914).

member states apply the development risk defense in manufacturing defect cases, the declaration of strict liability in the preamble of the Directive would be rendered meaningless.

B. Smaller Claims

Time and money present important obstacles to commencement of a lawsuit. In addition, significant psychological barriers related to commonly held perceptions of the legal process particularly influence small claim filings by consumers.[150] The Directive and Draft do not encourage the filing of small claims. Small claims which are likely to involve less than $500.00 are excluded. Although potential plaintiffs in the Netherlands still have recourse to suit under existing provisions of the Civil Code, as has been previously discussed, such claims are not likely to mature into civil actions in court.

Figure No. 1

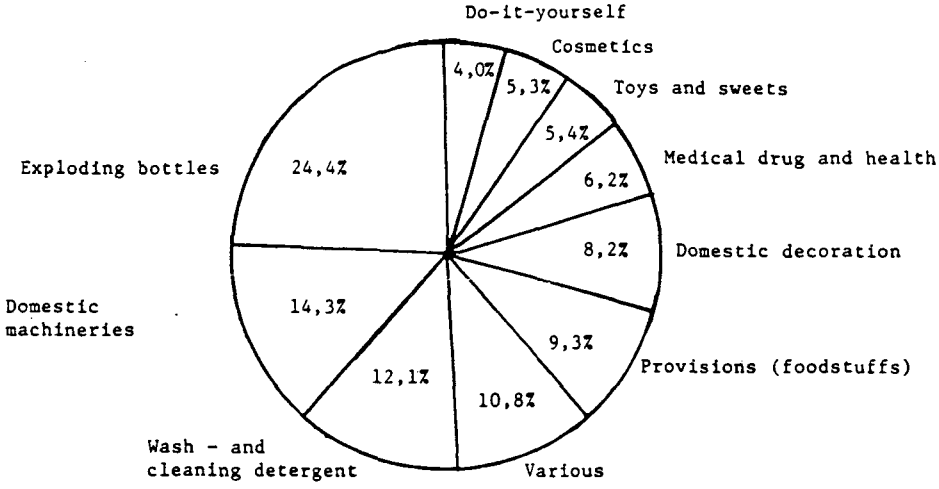

Figure No. 1[151] is a pie chart of the claims or grievances accumulated during a one week campaign by the Dutch Consumer Union, the Consumentenbond. During April 1985, the Consumentenbond initiated a one week campaign in which it collected consumer product complaints. Fifteen hundred complaints were collected, most of which involved

---

[150] *See* Francken, 20 *Consumentenzaken voor het Kantongerecht*, SWOKA ONDERZOEKSRAPPORT 53, (1984) (Den Haag); *see also* Galanter, *supra* note 15, at 23.

[151] This graphic is reprinted with the permission of the Consumentenbond. Translation provided by Peter R. Rodrigues.

small claims.[152] If the distribution of the complaints depicted in Figure No. 1 is illustrative of the general pattern in the Netherlands, then by far the largest number of consumer product grievances concern smaller claims. It is inconceivable that the majority of individuals injured in some manner by these defective products would shoulder the burden of pursuing the matter in court, even in the case of a manufacturing defect. The producers of defective products which are not likely to cause major injury are therefore often able to completely externalize the costs of their negligence.

However, in some circumstances the Consumentenbond and the so-called Complaint Boards may provide injured parties with redress for small claims. Occasionally, the Consumentenbond will shoulder the burden of pursuing a producer of a defective product by paying the legal costs of one of its members. This is done for a limited number of test cases which involve an interest commonly shared by consumers.[153] Also, in limited instances, the Complaint Boards provide an acceptable alternative path of redress. Complaint Boards may in some cases be subsidized by the government. The boards exist primarily in the service areas.[154] Their organizational structures vary: some are sponsored by industry or trade associations;[155] others were developed through the joint efforts of trade groups and the consumer unions.[156] The boards usually confine themselves to contract matters.

In contrast, the District Courts, which generally hear matters involving 5,000 guilders or less,[157] do not provide a means of redress for small claims. The obstacles of time and money preclude access to the courts by individual plaintiffs.[158] Individual persons appear as party plaintiffs in only 0.7 percent of all of the cases filed in the District Courts.[159] A draft bill is currently pending in the Tweede Kamer (House of Representatives) of the Netherlands which would make the District Courts more accessible by revising the procedural rules.[160]

---

[152] *Aan gebreken geen gebrek, Dossier Produktveiligheid en Produktenaansprakelijkheid*, Consumentenbond (Apr. 1985).

[153] *E.g.*, Judgment of February 25, 1986 Rb. Haarlem (unpublished—*Eisinga v. Stichting Diaconessen Ziekenhuis*—defective pacemaker).

[154] *Id.*

[155] *See generally Wegwezer bij Consumentenklachten* 9 (1984) (Pub. SER Den Haag).

[156] *Id.*

[157] 5,000 Dutch Guilders are worth approximately $2,500 in U.S. currency.

[158] See Francken, *supra* note 150.

[159] *Id.* at 57.

[160] Tweede Kamer, vergaderjaar 1986-1987, par. 19,976, nos. 1-2.

There has also been some discussion in the Netherlands of representative actions which provide organizational standing to sue.[161] Dutch law does not provide for such actions in products liability cases. Recently, the Tweede Kamer adopted a motion calling for the Dutch Government to enact legislation creating a representative action for consumer organizations as soon as possible.[162] Representative actions based on case law have been limited to claims involving injunctive relief. For smaller product liability claims, e.g., exploding bottle cases, expansion of the representative action to provide the Consumentenbond with standing would greatly expand corporate accountability and consumer protection. Some form of modified class action might also accomplish these goals with respect to both small and large claims.

CONCLUSION

The Directive, by providing at least a somewhat uniform doctrinal basis for liability within the EEC, is a step forward. Although case authority in the Netherlands had already established a strict liability approach for manufacturing defects, the Directive extends this approach to countries which still require proof of negligence or rely upon lack of privity as a limitation. However, uniformity of substantive rules, even were the Directive to achieve this goal, and we contend that it does not, is insufficient absent a common framework for discovery. Common procedural devices which promote relatively inexpensive access to information in the control of the producers of defective products are critical to easing the plaintiff's burden of proof. Modification of Dutch procedural law is the critical element in allowing access to the courts for products liability claimants where a complex product design or warning claim is concerned. To the extent that aspects of procedural law in the Netherlands and other member states restrict the information discoverable by the plaintiff, the number of products cases reaching the courts will remain limited notwithstanding the changes brought about by the Directive. Moreover, variances in procedural law will probably result in forum shopping and divergent outcomes in substantially identical cases.

---

[161] *See* Misleading Advertising Act of 1981, Wet Misleidende Reclame, BW §§ 1416a-1416c. The new Civil Code also provides that consumer organizations have standing to pursue class relief in actions involving unreasonable standard terms in consumer contracts. *See* Standard Terms Act, Wet Algemene Voorwaarden, NBW §§ 6.5.2A.1 - 6.5.2A.13.

[162] Tweede Kamer, vergaderjaar 1986-87, par. 19,754, no. 6.

The adoption of the EEC Directive and its incorporation into the national law of the member states is a guarded step toward the harmonization of national laws in this area. While providing at least one somewhat uniform body of black letter doctrine, it opens the door to contradictory interpretation. In addition, non-uniform procedural practices and the restricted discovery of documents prior to trial means that the EEC Directive may have a widely differing impact from one member state to another. With respect to its express aim of protecting consumers, the Directive is merely adequate. The Directive and the Dutch Draft do not substantially further the interests of consumers involved in either complex or relatively smaller claims. With respect to the Netherlands, the Directive is not a significant advance beyond the existing rules of law set forth in the cases construing section 1401 of the Civil Code. It is arguable that, overall, the promulgation of the Directive will therefore retard further efforts to increase the level of consumer protection in the Netherlands.