

# The use of tort actions in public interest cases in The Netherlands\*

## 1. Introduction. Characteristics of tort litigation in The Netherlands

Over the last decade, the use of private law to recover environmental damages in cases of water or soil pollution has increased considerably in The Netherlands. The old and reliable action in tort, the basic tool of any lawyer, was taken for that purpose. In combination with the reversal of the burden of proof, or even strict liability one finds that instrument accepted by the courts when plaintiffs claim compensation of environmental damage. This article is focusing on the use of the civil tort action in public interest cases, filed by the State or by environmental organizations. Before dealing with that subject, some introductory remarks are made on the use of tort claims in Dutch environmental litigation in general. In the following paragraphs the recent case law is discussed in which the question is raised whether the State, acting in the public interest and suing for damages, has standing in a tort case before a civil court (*Benckiser* and *Van Amersfoort* cases). The same issue is treated in regard to environmental organizations involved in public interest law suits, directed at the restoration of environmental harm (*Borcea* case). In this context the concept of ecological damage is dealt with, and also draft legislation which makes the compensation of such damage possible.

### 1.1. The development of tort law in environmental litigation

As one may know, the geographic conditions of The Netherlands have placed this country with its dense population in a rather sensitive position [480] from an environmental point of view: the abundance of water and a soil structure where ground water plays a predominant role, a setting in which industry and intensive farming have taken their toll.

A soil pollution disaster in 1979, *Lekkerkerk*, was a strong incentive for a general feeling of social responsibility for the environment, and as a consequence, triggered legislation in the early 1980s. Since then, the use of the action in tort to recover compensation for environmental damage became quite popular in The Netherlands, due to the enactment of the Interim Soil Cleanup Act in 1983, which put the government claims for soil pollution cleanup costs against polluters of the past on the footing of the common tort action (fault liability). Since then, some 150 cases are brought before the Dutch courts by the state-attorney, some of which in the mean time have reached the *Hoge Raad*, the Dutch Supreme Court. The claims involved come to a staggering total of Dfl. 1 billion, and there are

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hundreds of cases to follow. Until recently, the State did quite well in recovering cleanup costs, even if it involved pollution that occurred in the distant past; after recent Supreme Court decisions, however, the situation is less clear, while a repairment act is pending.<sup>1</sup>

In this case law, the tort doctrine proved to be a dynamic and lenient legal instrument to cope with this new kind of liability. Negligence, the duty of care, was the test to see whether polluters were liable. As always, the area of law was not brand new; cases of water pollution for instance, have been heard by Dutch courts as early as the beginning of this century, but that did not leave a mark in tort law, in the sense that it started a doctrine of environmental liability.<sup>2</sup>

[481] This development in Dutch environmental law has no counterpart in the neighbouring countries. The German tort law, for instance, by its very nature, is not well suited to play a comparable role in the handling of pollution claims. Its core lies in the infringement of subjective rights, not in the application of general duty of care (para. 823 *BGB*, German Civil Code). However, the use of the concept of *Verkehrssicherungspflicht* by the courts, holding owners of roads, buildings and industrial plants responsible for the safety of traffic on the basis of strict liability, is becoming increasingly important, also in the field of the environment.<sup>3</sup> One should bear in mind, of course, that under German law many cases of environmental damage are covered by legislation, thereby making the use of the general tort action superfluous. For cases of water pollution a 1957 statute holds the pollutor strictly liable, the *Wasserhaushaltsgesetz* (in the same sense the Swiss *Gewässerschutzgesetz*). A recent German statute, the *Umwelthaftungsgesetz* of 1991, places strict liability for environmental damage on the owner of an industrial installation, combined with a duty to insure. However, ecological damage is not considered in the statute law mentioned.

Due to the lack of legislation on civil liability for environmental damage in The Netherlands (there is a draft in its first stage), the common tort action is thriving. A survey of the characteristics of that action is following here.

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<sup>1</sup> The *Akzo Resins* and *Van Wijngaarden* cases of 24 April 1992, *TMA/ELLR* 6 (*Tijdschrift voor Milieu Aansprakelijkheid / Environmental Liability Law Review*), (1992), 131, note Van Dunné (this bi-lingual review is edited by the Institute of Environmental Damages, Erasmus University Rotterdam, publisher: Vermande, Lelystad). For the often emotional discussion of the case law, compare *TMA/ELLR* Specials of May and November 1992 (nrs. 3 and 6), in Dutch, with summaries in English. The core of the matter is the application of the 'relativity' or *Schutznorm* doctrine in this field, which is discussed below.

The Dutch Guidelines Soil Cleanup, attached to the 1983 Interim Soil Cleanup Act, giving soil pollution standards, are currently also applied in the cleanup practice in Belgium, Germany, France, Austria and the UK. These standards, however, have been reconsidered by the Dutch government recently, compare P.F.A. Bierbooms and T.W.M. Bot, *TMA/ELLR* 7 (1993), 1. As a consequence, adapted standards, so-called 'intervention standards', are in force as of May 1994 (by Decree).

<sup>2</sup> Compare the series of *Voorste Stream* cases of the Dutch Supreme Court, discussed below, the first of which dates from 1915; the last one, no. VII, is of 1952, and there are a hundred-odd District Court decisions on this river, which started to be polluted in 1874.

<sup>3</sup> The courts have further developed here the *Verkehrspflicht* (traffic duty), compare H. Kötz, *Deliktsrecht*, 5th ed., Frankfurt (1991), nr. 232 *et seq.*; K. Zweigert and H. Kötz, *Einführung in die Rechtsvergleichung, Band II*, 2nd ed., (1984), p. 399 *et seq.*

## 1.2. Some characteristics of Dutch tort law: fault or strict liability?; causation

One of the central themes in tort law in general, and therefore also in the field of environmental liability, is the question as to the basis of liability: fault or strict liability? In The Netherlands this is a widely debated issue, especially with regard to environmental liability. In the author's opinion environmental liability can be characterized as a *pseudo strict liability*; 'fault' remains the basis for liability but it has been so manipulated by the Courts that fault virtually corresponds to strict liability. The latter principle is found in modern legislation in the area of civil liability, both national and international. The point of departure for this viewpoint is what is [482] known as the *creation of danger* doctrine. This doctrine is described in a well known Dutch textbook as follows: 'he who takes a lawful risk is responsible for the consequences, even if the harm caused is realized outside his fault'.<sup>4</sup>

The problem is that the 'creation of danger' or 'risk' doctrine, almost a century old, and adopted in The Netherlands at the turn of the century from the German doctrine, gathered dust and was lost to view in most textbooks on the law of obligations. Usually the fault doctrine is set forth in its classic form; sometimes it is more objectified or replaced by a legal presumption of fault, such as in the case of the liability for things (the battlefield for the dispute surrounding this doctrine). In these textbooks the creation of danger doctrine and its supporters are never named.

Some authors, however, take the position, based on a return to the concept of fault, that only the *awareness of danger* makes a person liable for damages he caused. Even in pollution cases, the issue is *to know or should have known* that danger would be created, and thus no duty to investigate is imposed. This prevails not only in the law of the 1960s, which is presently at issue in a number of soil pollution cases, as well as under current law and future law.<sup>5</sup> However, it is not possible to ignore the creation of danger doctrine in either the literature or case law of this century. It is not based on an *awareness of danger*, but on the contrary on an *increase of the danger* by an action for which one bears the risk, without there being a question of fault. Thus the term, 'creation of danger', which was circulated in a report of the *Nederlandse Juristenvereniging* (The Netherlands Law Association) of 1913 and which is a translation of *Gefährdungshaftung*, a concept that was gaining ground in Germany since 1879. Examination of older literature is fascinating: one recognises many modernisms already vigorously advocated in Germany in the last quarter of the 19th century and in The Netherlands in the first decades of the 20th century.<sup>6</sup> Those in [483] today's business world

<sup>4</sup> Pitlo-Bolweg, *Verbintenissenrecht*, 8th ed., (1979), p. 327 *et seq.*, 344 *et seq.*; also 7th ed. (1974), 6th ed. (1964). Compare also, Van Dunné, 'Een kamikaze-actie op de Rotte. De visie van Vranken op de aansprakelijkheid uit art. 1401 BW in het bijzonder bij bodemvervuiling uit het verleden.' *WPNR* 5976 (1990), and also Van Dunné, *Verbintenissenrecht, Volume 2*, 2nd ed., Deventer: Kluwer (1993), p. 445 *et seq.*; compare also, for other tort elements discussed here: p. 335 *et seq.*, 560 *et seq.*

<sup>5</sup> See J.B.M. Vranken, 'Zorgvuldigheidnorm en aansprakelijkheid voor bodemverontreiniging uit het verleden.' *WPNR* 5953-55 (1990).

<sup>6</sup> In German literature, Loening (1879) discussed a duty to guarantee attached to a hazardous undertaking to compensate for damages; Steinbach (1888) based liability of an entrepreneur on the benefits he reaped through his actions, while Mataja advocates apportioning liability on an economic basis. A. and R. Merkel (1888 and 1895, respectively) assumed

who oppose strict liability are a century behind legal developments.

In contemporary Dutch case law the line of pseudo strict liability can be recognized in the *Kamerik Community Centre* case, which is a model in many environment cases.<sup>7</sup> The *Hoge Raad*, the Dutch Supreme Court, held there was a duty to investigate as well as a duty to warn. The case concerned a bucket of unknown liquid that was put out with the trash, which subsequently turned out to be caustic soda lye left behind by painters. The *Hoge Raad* held that setting out a bucket of unknown liquid is wrongful, ‘unless one knows or has *legitimate reasons* to assume that a liquid is involved that causes no danger on human contact’. The term ‘legitimate reasons’ is decisive for the duty to investigate. Liability does not attach if one monitors the trash bag and at pick-up ‘warns of the presence therein of a bucket containing a *potentially hazardous substance*’ (my italics). One sees here the increase of danger through the action which lies in the risk sphere of the actor.

In a more recent, and larger, environmental case the duty to investigate was again encountered in *Benckiser*<sup>8</sup>, the German firm Benckiser sent large quantities of cyanide containing gypsum for processing with the transport company Bos, at approximately one third of the prevailing price. Bos dumped the gypsum in eight locations in The Netherlands in violation of the law. The State sought compensation from Benckiser. Benckiser had not obtained a licence to dump, and the processing of the material had failed. In that context the Court of Appeal in The Hague imposed a duty to investigate on Benckiser. Benckiser should not have transferred the waste to a waste-processing firm without first carrying out a *thorough investigation* with respect to the firm’s reliability, particularly if there were indications that the firm only operated in pursuit of profit. The *Hoge Raad* concurred in this judgment. The Court of Appeal in The Hague held that Benckiser lacked a ‘sense of responsibility’; it should have investigated how Bos disposed of the waste. According to the Court of Appeal, [484] Benckiser ‘closed its eyes and knowingly assumed the risk that afterwards there would be something fishy about the affair’. Here we see the risk element dealt with; the Court of Appeal also considered whether the dumping of the gypsum was foreseeable for Benckiser and ‘therefore imputable to it’.

Another well-known theme of environmental tort liability is *causation*. In most environmental liability cases the causal relationship between discharge and pollution is complicated from a technical point of view and, as a consequence, also from a legal point of view. The proximity of damage, under the doctrine of causation, often is the bottle-neck of compensation claims. In modern tort law, however, the development of the doctrine in this century, from the old *conditio sine qua non* theory, via the adequacy theory (with its foreseeability test), into the reasonable imputation of damage theory, definitely is a support for a plaintiff in pollution cases.

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that each person must bear the costs arising from the pursuit of his interests, and Unger, in his renowned book, *Handeln auf eigene Gefahr* (1891), gave a push to the concept of *Gefährdungshaftung*: increasing danger and thus the risk of damages gives rise to liability. This approach to liability was quickly adopted in The Netherlands, by Paul Scholten (1899), Bruins (1906), Ribbius (1906), Van Leeuwen en Hijmans (1913).

<sup>7</sup> HR 8 Jan. 1982, *NJ* 1982, 614, note Brunner.

<sup>8</sup> HR 14 April 1989, *NJ* 1990, 712, note Brunner/Schultsz; *TMA/ELLQ* 3 (1989), 90, note Addink and Braams.

Established by the Dutch Supreme Court in the 1970 mini-pollution case of *Water-extraction area*<sup>9</sup> (an accident with a tanker-lorry), the imputation theory found another application in the above mentioned *Kamerik Community Center* case of 1982, the disposed bucket of toxic liquid. Here the Court held that:

in principle it does not matter whether the exact way in which the injury through contact with the substance is caused, in the case in question, was foreseeable for the party which failed to take into account the relevant standard of care.

This decision is widely cited in soil pollution cases; it was followed by the District Court Rotterdam in the *Shell Gouderak* case, which involved a government cleanup claim of over Dfl. 130 million.<sup>10</sup> It may be noted, that in this approach by the courts the principle of risk taking (the creation of danger) in the liability issue, is extended to the establishment of the causal connection. As a consequence, negligence and causation can be reduced to the same denominator, reasonable imputation.

[485] Incidentally, a similar development can be found in German tort law, although less explicit compared to Dutch law. In German case law of the 1950s and 1960s the *Adäquanztheorie* has developed into a doctrine of imputation based on reasonableness, *billigerweise Zumutung*.<sup>11</sup>

The establishment of negligence by the courts in environmental tort cases involves the weighing of interests of the parties, which may lead to the protection of reasonable expectations of the plaintiff in the use of non-polluted natural resources, as for instance river water. A leading case in this field, also a standard for trans-boundary water pollution, is the 1988 *French Potassium Mines* case of the Dutch Supreme Court. Here Dutch nursery firms were fighting the salt pollution of the Rhine by the French *Mines de Potasse d'Alsace*.<sup>12</sup>

This decision has received much international publicity in the past, a side-effect which was welcomed by plaintiffs, originally the Foundation *Reinwater*, though the salination of the Rhine is just one of the minor evils threatening this river, of vital importance for some 40 million people in several countries. The Low Countries have, understandably, a keen interest in the proper, maintenance of this waterway. It must be noted that a complicating factor in this case was the fact that the huge discharges of chlorides into the Rhine by MDPA, which caught the imagination of the general public, caused only 'relatively minor damage' to plaintiffs, in the formulation of the lower courts. The Potassium Mines account for a 40% of the total industrial salt discharge into the Rhine, which in peak years

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<sup>9</sup> HR 20 March 1970, *NJ* 251.

<sup>10</sup> District Court Rotterdam 9 October 1987, *TMA/ELLQ* 1 (1987), 98, note Van Dunné; the Court of Appeal The Hague pronounced an interim-judgment in this case on 10 Jan. 1991, but did not rule on this issue. It concerns the dumping of 15.000 kg of drins (pesticides), on what was to become a building site. In its final judgment of 19 Nov. 1992, the Court simply dismissed the claim, referring to the Supreme Court's 24 April 1992 decisions, cited in note 1, *supra*; compare also note 15, *infra*, and text. The decision of the Supreme Court in *Shell Gouderak* is expected in September 1994.

<sup>11</sup> BGH 1 June 1959 *BGHZ* 30, 154, 157. Compare H. Kötz, *Deliktsrecht*, 5th ed., Neuwied (1991), nr. 150, et seq.

<sup>12</sup> HR 23 September 1988, *NJ* 1989, 743, note Nieuwenhuis/Schultsz; *TMA/ELLQ* 3 (1989), 26, note Van Dunné. Compare also the author's article in *TMA/ELLQ* 2 (1988), 33.

reached a staggering amount of 22 million tons. After a reduction in 1987, the mines still discharge a daily amount of 10.000 tons. However, their contribution to the salination at the site of the nursery firms is only 14,5-17% and 8,8% respectively, due to seawater influences in the Dutch coastal areas. Under these circumstances, the mines are only minor polluters, which makes the case even more interesting. Most water pollution is caused by a number of minor polluters, making it hard to hold liable in tort an individual polluter, causing relatively little damage. Therefore, the present decision is of paramount importance for water pollution in general. Although some improvement is made, at the moment still hundreds, and sometimes even thousands of tons of toxic substances are discharged into the Rhine by industries of [486] riparian states. Some years ago it was calculated that total discharge equalled one-sixth of the tonnage of goods shipped on that river. Not to mention two other rivers flowing into The Netherlands: the Meuse and the Scheldt, also heavily polluted. We are at the end of the line, and therefore strongly interested in the acceptance of a good neighbour doctrine in this field.

In this context, it is remarkable to note that the Hoge Raad in its decision, upholding the tort principle applied by the The Hague Appeal Court, resembling the rule of *sic utere tuo ut alienum non laedas* in public international law, is using the terms ‘extreme pollution’ and ‘extensive discharges’. This seems not quite appropriate in the case at hand. The approach of the highest court reminds us of the law of nuisance, where the gravity of the nuisance inflicted and the weighing of interests are the central issues. In the present situation the economic interests of the discharging company are weighed against the interests of the downstream user of the river water, and the specific use made by that party. Thus, as the *Hoge Raad* ruled, there is a reasonable expectation of the said party that a river will not be polluted extremely by extensive discharges. There is a direct line to a 1915 decision in the case of the pollution of the *Voorste Stream*, a small river near Tilburg.<sup>13</sup> In that case however, the water had become completely unusable as a consequence of municipal discharges of waste water. The court held that ‘some pollution, caused by normal use of the water by the upstream user’ should be accepted by the downstream owner. Thus a basic level of nuisance had to be tolerated by adjacent property owners, the general rule of the law of nuisance. In the *Potassium Mines* case the court actually is going much further, although this is disguised by the wording chosen, in the traditional French, apodictic style.

## **2. The position of the State in environmental tort claims; the requirement of ‘relativity’ (*Schutznorm* theory) and the requirement of the interest protected by the tort provision**

A classic question which is posed when the State, or any government agency, is making use of the tort action in seeking compensation for environmental [487] harm, is that of the so-called doctrine of Relativity, or *Schutznorm* theory. This doctrine, taken from the German example, was adopted by the *Hoge Raad* in 1928. Although under attack from notable authors such as Paul Scholten, Meijers,

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<sup>13</sup> HR 19 March 1915, *NJ* 1915, 691, *Voorste Stream I*, a decision based on art. 676 *BW* (Dutch Civil Code), which gives riparian owners the right to use riverwater for irrigation purpose, which means, in the Court’s opinion, un-polluted water. Compare art. 644 *French Code Civil*, and in the same sense, *Cour de Cassation*, 6 July 1897. In a more recent decision, the court imposed an obligation to build a purification plant on a company polluting a river, *CdC* 12 Febr. 1974, *JCP II* 18 106, note Despax.

Smits and Wolfsbergen, this doctrine is still in the text-books, and what is more important, is still applied by the highest court in environmental tort cases, as we will see shortly. In the words of an adherent of this Relativity doctrine, it involves 'someone who violates a legal norm and thereby commits a tort is only required to make good the damage caused by this action *if the contravened norm has the effect of protecting the injured party with respect to the violated interest*'.<sup>14</sup>

This subject will be confusing for the German reader, familiar with the *Schutznorm* theory under German law. Unlike its German counterpart, namely, the Dutch relativity requirement is also applied in cases where no personal, subjective right is infringed, and only a duty of care is involved, which gives rise to an action in negligence. This approach was corrected in case law in the 1950's, at the suggestion of the advocate-general, Langemeijer (a correction still bearing his name in the text-books), but in recent decisions the *Hoge Raad* seems to have lost this adaptation of the doctrine out of sight.

In the 1990 case, *State v. Van Amersfoort*, a case of soil pollution in the distant past ('the old sore', or *Altlasten*), the Dutch Supreme Court held as to the relativity requirement, that it should be reasonably clear for the pollutor at the time of his acting that the State is taking care of 'the cleanup interest', and the environment in general. The general opinion in society may be of importance here, the court stated. Also the defendant's argument was rejected, that this care for the environment should be based on *statutory* obligations at the time. As a matter of fact, this was already ruled in the 1978 case of *State v. HAL*, involving the clearing of a ship wreck after a collision in international waters in or near a shipping lane (the *Zuidpool*).

This rather subtle approach of the old doctrine, that had to be reconciled with contemporary views on tort liability for environmental pollution, was rather harshly disturbed by two more recent soil pollution cases, *Akzo Resins* and *Van Wijngaarden*, referred to before.<sup>15</sup> The *Hoge Raad* established [488] the point in time at which it should have been sufficiently clear to a pollutor that the government's duty of care for the environment would lead to soil cleanup actions, thereby incurring cleanup costs, at 1 January 1975. In the submission of this author, this ruling is unfortunate from a legal and a societal point of view.

An issue closely related to the relativity requirement, and in the opinion of some authors even identical to that requirement, is another common question raised in case the State is pursuing a tort claim in the public interest, namely, whether the State has an interest which is protected by the Civil Code tort rule, Article 6:162 *BW* (formerly, 1401 *BW*). The question came up in two 1970's cases, *Municipality of Limmen v. Houtkoop* and *Rijksweg 12* (National Highway 12).<sup>16</sup> The last decision involved the administrative function of the State and the cost of taking measures to divert traffic and to limit damage to the environment. In this case, as the

<sup>14</sup> Rutten, in: Asser-Rutten III, *Verbintenissenrecht*, Zwolle (1983), p. 131; compare Asser-Hartkamp III, (1990), nr. 95, *et seq.*

<sup>15</sup> Compare note 1, *supra*. The 1992 Supreme Court decisions have triggered a repair-bill to the 1983 Interim Soil Protection Law (Bill no. 21 556); after strong opposition in the Dutch Senate, the government was forced to adapt its proposal considerably (Bill 23 589, a so-called *novelle*; compare Van Dunné, *TMA/ELLR* 7 (1993), p. 149). Both bills were enacted as of 14 July 1994.

<sup>16</sup> HR 9 Nov. 1973, *NJ* 1974, 91, note Prins; HR 19 Dec. 1975, *NJ* 1976, 280, note Scholten.

result of a driving error, a tanker-lorry overturned and was stripped open, and the inflammable and toxic contents of the tank threatened to spill into a ditch. The measures taken by the State, the costs of which it sought to recover from the tortfeasor, were carried out in the execution of its duties of administration and maintenance of Rijksweg 12 as a public highway. The defendant saw in this a basis for the argument that the State was obliged to take the measures in question in the general interest according to the regulations of public law, so that the duty of care that was violated did not extend to the protection of those interests of the State which were damaged in the present case. The defence further proposed that the State interest involved was not intended to be protected by section 1401 *BW*. Both arguments were rejected by the *Hoge Raad*. With regard to the first, it was considered that the State had indeed sustained substantial damages in taking the necessary measures and that its obligation to do so in promotion of the general interest under the stipulation of public law had no bearing on this.

The issue was taken up again in the *Benckiser* case, mentioned earlier, when discussing case law on the duty to investigate as regards the environmental consequences of disposal of toxic waste.<sup>17</sup> Before the District Court Dordrecht, the defendant, the German company Benckiser, succeeded in persuading the chief judge that the interest of the State, as a general environmental interest, did not qualify as one of the interests protected [489] under Article 1401 *BW* inasmuch as the State has other public law recourses at its disposal, such as the governmental sanctions of Article 49 *Wet Chemische Afvalstoffen*, *WCA* (Chemical Waste Materials Law). In a verdict of 25 June 1987, however, the Court of Appeal The Hague reversed, emphatically holding that the State, in addition to the public law remedies available in this case under the *WCA*, does indeed have civil law remedies at its disposal, and thus ‘can knock at the door of the civil judge’. In this decision, the Court of Appeal invoked Article 21 *Grondwet* (Constitution), which states that the care of the government should be aimed at the ‘Protection and improvement of the living environment’, Article 21 *Interimwet Bodemsanering* (Interim Soil Cleanup Act), which permits governmental authorities to sue in tort, and finally the concrete nature of the violation of environmental law, namely serious pollution in 8 locations due to the disposal of cyanide-infected waste gypsum, and thus no mere ‘vague and general concern regarding compliance with environmental legislation’.<sup>18</sup>

The *Hoge Raad* upheld the Court of Appeal decision. According to the Dutch Supreme Court, the State not only had a general interest, namely compliance with environmental law, but also a specific interest under the circumstances, that is severe soil pollution which led to extensive cleanup costs.<sup>19</sup> One can deduce from this decision that if damages are incurred by the government, the requirement of ‘interest’ within the meaning of Article 1401 *BW* is satisfied. This was stated explicitly in the 1990 decision in *State v. Van Amersfoort*, which we discussed earlier.

The conclusion may be drawn from this case law, that the State, or a government agency in general, will not be hindered in an tort action under Article

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<sup>17</sup> *Supra*, note 8, and accompanying text.

<sup>18</sup> Court of Appeal The Hague, 25 June 1987, *TMA/ELLR* 2 (1988), 53, note Kottenhagen-Edzes.

<sup>19</sup> HR 4 April 1989, *NJ* 1990, 712, note Brunner/Schultsz; *AA* 1990, p. 469, note Van Duné.



6:162 *BW* because of the requirement of a civil law interest protected by that provision, as long as it suffers damages it endeavours to recover.

### 3. The position of environmental organizations when using tort actions in the public interest

A crucial issue in environmental litigation is whether environmental organizations have standing to sue in civil courts. In the *French Potassium Mines* [490] case, the Foundation *Reinwater* was denied standing to sue by Rotterdam District Court, upon which the nursery firms took over litigation, which eventually ended before the *Hoge Raad*, after a 14 year fight. Incidentally, some of the delay was caused by the presentation of the issue of the Dutch Court's competence to hear the case before the European Court. The position of environmental groups became much brighter after a landmark decision of the *Hoge Raad* in 1986, *The Nieuwe Meer* case, ruling that cases brought before the civil courts in which environmental organizations in pursuit of the public interest sue a pollutor in tort may be heard by the courts.<sup>20</sup> In that case plaintiffs, several environmental organizations, sought an injunction of the disposal of toxic sludge by a government agency in a rural area. As regards the interest of plaintiffs in the injunction claimed, required to bring a tort action, the court ruled that the collected interests of the plaintiff organizations, are considered to be interests that are protected by the tort provision, Article 1401 (old) *BW*. Such interests, the court held, basically directed at the realization of an injunction of acts causing harm to the environment, are well suited to be 'collected' in legal action. Thus an efficient protection in law is obtained against the threat of a violation of such interests, which as a rule regard substantive groups of citizens, whilst the consequences of an eventual violation are hard to predict.

In this law suit no damages for environmental harm were claimed by the plaintiff organizations, therefore that question was left open. The legislature, taking up the hint given by the highest court, drafted a bill on class actions in 1988 (on the 'right of collective action'). Following the *The Nieuwe Meer* case closely, no remedy for damages was offered, only the injunction of harmful activities. This was repaired in the second draft of January 1992, although in a restricted way: damages may be claimed only, if the plaintiff organization is thereby acting on behalf of its members (Article 3:305a, section 3 *BW*). So the action for damages caused to the environment from the point of view of the public interest is not available under the new law.<sup>21</sup> However, the discussion on this issue was stimulated by a recent Rotterdam Court decision, on the Romanian bulk carrier *Borcea*.<sup>22</sup>

The case involved the spillage of crude oil on the North Sea by the *Borcea* after a collision off the coast of the Southern Netherlands, causing [491] harm to sea birds and polluting beaches. The plaintiff, the Dutch Association for the Protection of Birds, made expenses to save birds contaminated with oil, which costs it claimed in damages from the owner of the *Borcea*, on the basis of negligence in causing the oil spill. The District Court, finding no precedent in the *The Nieuwe*

<sup>20</sup> HR 27 June 1986, *NJ* 1987, 743 note Heemskerk; AA 1986, p. 638, note Nieuwenhuis.

<sup>21</sup> Bill on Group Actions in Civil Lawsuits, in force as of 1 July 1994. For a critical discussion of the bill, see P. Klik, *TMA/ELLR* 8 (1994), 34 (with English summary).

<sup>22</sup> District Court Rotterdam 15 March 1991, *TMA/ELLR* 6 (1992), 27, note Van Maanen. There is also a criminal case, reported by T. Blom in *TMA/ELLR* 7 (1993), nr. 2 (Special on Criminal law and the Environment).

*Meer* case, had to make a decision of first impression. It thereby stressed the status of the plaintiff organization, a respectable association, acting in the interest of the birds for a period of 90 years. In combination with the view that the saving and the protection of sea birds according to opinions accepted in society, is a public interest deserving protection in The Netherlands, the court found that the plaintiff also had a comparable interest of its own. The violation thereof, gives the remedy of an action for damages to plaintiff, in addition to that of an injunction of the harmful activities. Therefore, in the opinion of the court the costs made by plaintiff in saving the birds, including overhead costs of maintaining a bird shelter and bird receiving centre (in total: Dfl. 255.000) could be recovered. As to the negligence of the *Borcea*, in a classic fault liability approach, the court laid the burden of proof on plaintiff; the case was settled eventually.<sup>23</sup>

An analysis of this decision shows that the court managed to evade the hard question as to whether the birds association could make use of a tort action when claiming damages, namely costs made for the rescue of the birds, thereby acting in the public interest. By accepting a personal interest as well at the side of the association, the court found a rather easy solution of a difficult question. An analogy may be found here with the situation where the State is acting in the general interest, but also making personal costs in cleaning up the environmental mess. As we have seen, also in that situation the courts had little difficulty in finding a personal interest of the State, which was harmed by the tortfeasor, and therefore admitting an action for damages in tort.

[492] Meanwhile, the Rotterdam case furthered the legislative debate on the compensation of environmental damages, more specifically, ecological damages. The 1989 Hazardous substances bill was not quite clear on the compensation of damages as at stake in the *Borcea* case; at least, some authors doubted whether such damages could be claimed under the proposed bill, which as a matter of fact, stressed the physical nature of damages that may be compensated.<sup>24</sup> In a reaction, the Minister of Justice explained that this fear was ill-founded and that the Rotterdam Court decision would be valid under the proposed legislation. Reasonable measures for the prevention or reduction of environmental harm, may give rise to an action for damages as regards the costs made in that respect.<sup>25</sup> Again, the es-

<sup>23</sup> Actually, the court was of the opinion that the captain of the ship could have acted negligently by failing to report the oil spill to the proper authorities, if it is established that in response to such report, measures would have been taken that would have limited or prevented the damages to plaintiff. As a consequence, the burden of proof placed on plaintiff was in regard to the causal connection between the omission to report and the plaintiffs damages.

<sup>24</sup> Bill nr. 21 202, 1989, 'Annex to Books 3, 5 and 8 New Civil Code with rules concerning the liability for hazardous substances and pollution of air, water and soil'. The core articles, numbered 6.3.2.7a, *et seq.*, will be included in Book 6 BW as Article 6:175, *et seq.* That first article reads:

1. 'The possessor of a substance of which it is known that it has such characteristics that it produces a particular danger of a serious nature for persons or property is liable whenever that danger is realized. As special danger of a serious nature holds in each instance that the substance is explosive, oxidizing, inflammable or very highly inflammable as well as toxic or very toxic according to the criteria and methods specified under Article 34, third section, *Wet Milieugevaarlijke stoffen* (Environmental Hazardous Substances Act)'. Compare further, Acts of Parliament, 1988-1989, 21 202, no. 3; 1990-1991, no. 6.

<sup>25</sup> Acts of Parliament, 1990-1991, 21 202, no. 6, at p. 33; compare also p. 26, on ecological

establishment of a personal interest of the plaintiff in question, and damage to property, is stressed in this context.

The central question, however, regarding the compensation of pure ecological damage, which was addressed to the legislature by the environmental organization *Natuur en Milieu*, was answered in rather vague terms. Such compensation is accepted, from the point of view of the drafters of the bill, if the character of the harm inflicted is physical damage to personal property. The irreparable harm to the eco-system may, in principle, be the source of property damage, it is continued, and it is at the discretion of the judge whether an alternative use of the area in question would reasonably lead to compensation.<sup>26</sup>

To come to a conclusion, the discussion on the compensation of eco-damages has only started in The Netherlands. Hard questions have been reformulated into easier ones, in case law and legislative drafts. It is to be expected that the 1989 draft-EC directive on toxic waste, as amended in [493] 1991, will be of influence here, introducing the compensation of eco-damage, in the sense of restoration of the environment, or an indemnification of the costs thereof.<sup>27</sup>

A handicap is here, that the concept of 'damage', in property, and more important: non-property damage, in Dutch legal doctrine is rather underdeveloped, as it is, to my impression in many other jurisdictions as well. In other tort cases, such as in the field of traffic accidents or medical malpractice, or in contract cases, such as unfair dismissal or the compensation for the loss of goodwill, we are not impressed by the difficulty of assessing a damage relating to personal grief, the loss of physical ability, the loss of income or the certainty of a job. The computing of such damages, sometimes with the aid of complicated models, leads to numbers in guilders and even cents. If damage to the environment is concerned, however, the lawyer feels ill at ease, and is inclined to suggest that we are confronted with an extraordinary legal problem. It is of course not easy to come to a workable solution here, but to my judgment, the problem is not of an exceptional kind, but of a technical and legal nature, and therefore to overcome with some effort. It is not a matter of principle; in the sense that our legal system, in civil law or common law, does not provide for the *novum* of compensation of damage to the environment at large. The example of compensation schemes found in some jurisdictions give hope that a solution of this problem will be reached in the near future.<sup>28</sup>

In the given situation, it is only a human reaction to look for easy solutions, and lawyers are not any different, in that respect. The focus on the existence of property damage in a physical sense, and the expenditure of costs related to meas-

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damage in general.

<sup>26</sup> Op. cit. note 25, at p. 26.

<sup>27</sup> Compare also the Convention on Civil Liability for damage resulting from activities dangerous to the environment, Council of Europe, Lugano 21 June 1993, Article 7, sub *c* (compensation for impairment of the environment limited to the costs of measures of reinstatement actually undertaken or to be undertaken, a familiar concept in international treaties on oil pollution at sea).

<sup>28</sup> For the concept of 'contingent valuation methodology' (CVM) surveys to measure economic non-use value attached to the environment by citizens in the case of natural resource damages in American legal practice, see Richard Stewart's article in this book. Compare also E.H.P. Brans, *TMA/ELLR* 8 (1994), 'Liability for ecological damage under the 1992 Protocols to the Civil Liability Convention and the Fund Convention, and the Oil Pollution Act of 1990', p. 61, at p. 85 *et seq.*

ures of prevention and reduction of environmental harm, is an easy way out. Restricted as it may be, that approach still is a step in the right direction, as far as the endangered environment is concerned. [494]

#### 4. Conclusions

We have thus given an overview of the use of the tort action in the public interest in The Netherlands, by the State (or any government agencies) and environmental organizations.<sup>29</sup>

One may conclude, that the common tort action is a useful and reliable instrument in pursuing environmental claims in the hands of the government or non-profit organizations, a welcome extension of public law means. Dogmatic obstacles abound, but they are tackled in an efficient way by the courts, and therefore not hindering plaintiffs too much in reaching their goal, finding compensation for environmental damage. The lenient structure of Dutch tort law, as regards concepts of negligence and causation, is helpful here, although foreign legal import, such as the *Schutznorm* or relativity theory, is still causing considerable problems in reaching reasonable results.<sup>30</sup>

The acceptance of class actions in this field by the Dutch Supreme Court, followed closely by the legislature, is also giving environmental organizations new chances in fighting harm to the environment. The concept of ecological damage is encountered in recent case law, and to some extent covered in draft legislation, but still is rather vague and in need of legal tinkering.

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<sup>29</sup> Another instrument used by Dutch government agencies in fighting pollution is that of environmental covenants, or even contracts, concluded with the industry and aimed at the reduction of toxic discharges on a long-term basis. Over the last decade, scores of such covenants have been agreed to in a broad range of industrial activities. Also a number of environmental contracts may be mentioned, between the City of Rotterdam and industries in several countries on the reduction of Rhine pollution. Compare for this subject, the Proceedings of the international conference, held in Rotterdam, 1992: J.M. van Dunné (ed.), *Environmental Contracts and Covenants: New Instruments for a Realistic Environmental Policy?*, Lelystad: Vermande (1993).

<sup>30</sup> Richard Stewart's forceful criticism of the use of the tort model in the field of natural resource damages in American law, which deserves the attention of Continental lawyers, cannot be discussed here. In the assessment of his criticism, however, one should bear in mind that a comparison of the legal systems concerned should be taken into consideration. Costs of litigation in tort cases in a civil law system as that of The Netherlands, are a fraction of those in an American litigation, since practices as the contingency fee system, 'no cure no pay' and punitive damages are not accepted on the continent, and lawyers fees generally are moderate. In American asbestos litigation for instance, the figures are that 60% of the damages awarded to victims was received by the lawyers and experts involved (\$ 4 billion out of \$ 7 billion).