Liability in tort for the detrimental use of fresh water resources under Dutch law in domestic and international cases*

1. Introduction

On first impression, the use of fresh water sources will not create serious problems in The Netherlands, with its abundance of canals, lakes and rivers. By nature, The Netherlands is the final destination of several major rivers in Europe, and it is not easily conceived that a water shortage could exist in a country receiving the downflow of such masses of water. This view, however, is distorted in some respects. Setting aside river water, the local sources of fresh water in this delta area are very restricted.[1] As a consequence, the country is almost entirely dependent on supplies of water from foreign sources, mainly the Rivers Rhine, Meuse and Scheldt. The large scale groundwater pollution is making this dependency ever more intensive.

Taking in river water, however, is not without problems, since the water flowing in from neighbouring countries is seriously polluted by industrial, domestic and agricultural discharges. This is putting a considerable strain on drinking water companies, in their continuous effort to use state of the art purification techniques in the production of drinking water for the population, the ultimate cost of which is borne by the consumers. Elsewhere in this book, it is explained that sustainable river basin management is desperately needed, not [197] only to improve the water quality, but also to secure the water quantity.[2] Hydrological issues concerning the River Rhine, for instance, include substantial measures to increase the river basin water retention capacity and to improve the management of the wet infrastructure. These measures presently result in the breakdown of ecosystems and the deterioration of the shores.

This sketch of the fresh water situation in The Netherlands contains the contours of the legal issues involved here. On the one hand, there is scarcity of groundwater leading to liability claims when neighbour landowners cause damage to each other's property by groundwater drainage for the production of drinking water. On the other hand, we have the pollution of surface water, giving rise to claims for damages from users of the water. In the case of transboundary pollution, which is, as indicated earlier a common phenomenon in The Netherlands in

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[1] The annual amount available is only 680 m^3 per person, which, surprisingly, makes The Netherlands one of the poorest countries in that respect (the poverty line being 1,000 m^3 per person per year).

[2] See H.L.F. Saeijs and M.J. van Berkel (Part 1); compare also their article "Global Water Crisis: The Major Issue of the 21st Century, a Growing and Explosive Problem", *European Water Pollution Control* 5 (1995), pp. 26, 37-40.

its role as end-station to great arteries, an international facet is added to the dispute. Under Dutch law, the common basis for such lawsuits is the action in tort; in addition, property law is giving some specific actions for damages in the case of neighbour water disputes, derived from the Napoleontic Civil Code, and sustained in the new Dutch Civil Code of 1992.

Claims for damages in cases of detrimental groundwater drainage used to be based on the action in tort in The Netherlands, until the enactment of the Groundwater Act, in its 1954 and 1984 version. The forms of relief offered by the courts and the legislature to neighbouring landowners, confronted with this type of damage, is discussed in section 2 of this chapter. It must be noted that tort law as an instrument to redress environmental harm is, in comparison to the other civil law countries, well developed in Dutch law, and therefore deserves our attention.

Section 3 discusses the other grounds for an action in damages in a civil law system, besides tort, i.e. neighbour law, water servitudes and nuisance. Several actions in this sphere are not based on fault liability, but on, more or less, strict liability. The Belgian and French practice in the field of nuisance *(troubles de voisinage)* is the most far reaching in this respect.

Finally, it is worth while in the case of transborder pollution, to compare the use of the common private law action in tort for environmental damage with the approach to the principles of liability for wrongful and lawful acts under public international law. This topic is dealt with in section 4. It may not come as a surprise, that the same issues known in civil law are widely discussed in international law. Interestingly enough, these principles of international law were applied once by a Dutch lower court in a civil case of transboundary pollution.[3] In section 5 some concluding remarks are made about this comparative journey, within the realm of private law and across its borders. [198]

2. Tort liability for detrimental use of fresh water sources under Dutch law in groundwater drainage cases

The production of drinking water for domestic or industrial purposes may cause harm to the area from where the groundwater is taken, as a consequence of lowering the groundwater level in the course of pumping the water out. Due to the scarcity of groundwater, harmful effects to adjacent property may easily occur. In an old, well-known case, the Dutch Supreme Court in 1944 held the Municipality of The Hague, operating a water company, liable in tort against a neighbour landowner, claiming the compensation of damage to his property, caused by the dehydration of his land.[4]

The municipal water company used the dunes in the Western part of The Netherlands owned by the municipality, to drain water for its production of drinking-water. In the draining process, water was received from the adjoining land in channels and was pumped out to reservoirs. After 1919 a new channel was dug, close to the land owned by a certain Mr. Jochems. Due to the intensive drainage of the adjacent land by the water company, the groundwater level on Jochem's land was lowered considerably. To stop further damage to his pastures, woods and garden, Jochems took part in a project with landowners in the vicinity, concerning the building and operating of a pumping station, to bring in surface water in compen-

[3] *French Potassium Mines,* Rotterdam District Court, 8 jan. 1979, *NJ* 1979, 113.
[4] *Municipality of the Hague v. Jochems*, Hoge Raad, 18 Feb. 1944, *NJ* 1944, 226.

sation of the loss of groundwater. He sued the Municipality for damages, consisting of his part in the costs of the construction and operation of the pumping station.

The District Court of The Hague awarded his claim in 1935 and 1939 decisions, having the damage assessed by experts. The final decision was upheld by the Court of Appeal, and approved by the Supreme Court in its 1944 judgment. The tort involved in the courts' view, is the infringement of a property right, causing damage that was foreseeable to the defendant, which is considered to be against a duty of care. The requirement of foreseeability in establishing the causal connection between the activities of the water company operating the channel and the damage inflicted to adjacent property was dealt with in the following way. First, it was found that lowering the groundwater to a level of 1.55 to 1.75 m below NAP, while the adjoining land of Jochems was at a level of 1.50 to 3 m above NAP, would cause foreseeable damage, according to rules of experience. Secondly, it was found to be foreseeable that Jochems would have to take measures to prevent further damage to his land, in which the municipality was unwilling to cooperate. Since these measures provided additional profit to Jochems, namely restoring the lack of surface water flowing from the dunes to his land, the municipality refused to accept the obligation to pay all costs incurred by Jochems in building and operating the pumping station. The Supreme Court, however, held that Jochems had no choice in the kind of protective measures to be taken, when joining the communal pumping system. The Court held that the measure taken was reasonable, in the interest of the [199] municipality, and therefore it had to be considered as a foreseeable result of the municipality's tort.

Here we see an extension of the concept of foreseeability, in the sense that costs of preventive action taken by the plaintiff, exceeding the normal measures needed to repair the damage to the property, in the assessment of damage are put on the account of the defendant tortfeasor. A development came to a climax several decades later, with the Court's acceptance of the so-called "reasonable imputation of damage" as the criterion for causation.[5]

The decision drew general attention in the legal forum. Particularly the Court's reasoning regarding the municipality's defense of acting in the public interest, that is, the production of drinking water for its population. The Court held that the course followed by the municipality in the production of drinking water leading to drainage of adjacent land, could well be justified or even be required from the point of view of municipal interests, but the municipality nonetheless should have taken the detrimental consequences as regards owners of property in jeopardy, into account. By not giving regard to the interests of such owners incurring damage in the course of the exploitation of the municipal property, the municipality is acting against the duty of care.[6]

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[5] *Drinking water Resource Area Case*, HR 20 Mar. 1970, *NJ* 1970, 251.

[6] The decision stirred dust in academic circles, and gave rise to the doctrine of liability for lawful acts, and compensation of damage, which never became generally accepted, but is revived occasionally. Another view is that an act may be qualified as tortious unless the tortfeasor is wiling to pay damages (a tort with a "conditional justification"). In that case, the tortious character of the act is lifted, and as a consequence, an injunction will not be admissible. A more practical view is taken in art. 6:168 of the New Civil Code, which holds that the court may deny an injunction in the case of a tort that should be allowed on the basis of significant societal interests, although the victim is still entitled to damages.

The use of the action in tort in groundwater disputes was short-lived. After the Second World War, the Groundwater Water Companies Act of 1954 introduced a compensation claim against a party draining groundwater although acting under a permit, thereby causing harm to the property of landowners in the vicinity.[7] The Act was replaced by the Groundwater Act of 1984, which improved the position of injured neighbours.[8] The basic structure of the Act is that the neighbouring landowners must allow the drainage of groundwater, whereas the water company is under the obligation to take measures to repair damage caused, e.g. to adjust the groundwater level by additional drainage of surface water. If such measures prove too expensive, the water company may confine itself to a financial compensation. Therefore, the infringement of the property rights of the neighbours is not tortuous, but a lawful act, which nonetheless gives a right to compensation to the neighbours that incurred consequential damage. The Act [200] also introduces the possibility of the institution of levies on permit holders, to create a fund for the compensation of damage, claimed by a number of parties in a water resource area where several water companies are involved in draining groundwater at different sites.[9] This is meant to lighten a plaintiffs burden of proof in the case of multiple causation. The plaintiff may ask for compensation from the province administration, in which case its right to compensation regarding a water company is assigned to the administrative board. Since issues of causation may be highly complicated under those circumstances, as is proved by the practice in Belgium where litigation is going on for decades, this regulation, basically the institution of a compensation fund, is a considerable asset for plaintiffs in groundwater cases.[10]

The character of the statutory regulation of damages was the central issue in a 1986 case before the Arnhem Court of Appeal. A water company filed suit against its insurance company that refused to refund its compensation costs paid to a third party under the Groundwater Water Companies Act, which were held not to be covered by the company's all-risk insurance policy, for liability in law.[11] The argument was that the Act constituted an obligation arising, not from tort, but from a *lawful* act, that is, an act permitted by the law since it occurred in an operation covered by a permit received under the Act. Since it could not be qualified as

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[7] See arts. 6 and 19 of the Act; damage assessment by the Technical committee groundwater management is mandatory; the outcome, however, is only binding if parties agree to it.

[8] The damage assessment by the Technical committee is no longer mandatory; furthermore, compensation may also consist in the take-over of the property in question by the party causing the damage (water company). Compare art. 34 of the Act. For a comparison of both Acts, based on the 1975 draft of the new Act, see H.J.M.H. Geradts, "Grondwaterwet vergeleken met de Grondwaterwet Waterleidingbedrijven", *Tijdschrift voor Openbaar Bestuur* 2 (1976), p. 132.

[9] Arts. 40 and 46.

[10] Comparing the Belgian situation, Hubert Bocken, gives an overview of cases in "Het proces zonder einde: Aansprakelijkheid voor schade veroorzaakt door grondwaterwinning en bronbemaling", *Tijdschrift voor Privaatrecht* (1995), p. 1633. Bocken advocates the use of the instrument of art. 46 of the Dutch Groundwater Act, a compensation fund, in Belgian law.

[11] *Waterleiding Friesland v. Centraal Beheer*, Court of Appeal, Arnhem 29 Jan. 1986, *NJ* 1987, 1021.

a tort, the insurance company was not under obligation to compensate the liable party under the policy.[12] The Court was of the same view.

The author submits that the issue is still open to debate. The liability for detrimental effects of drainage practices of water companies has found a statutory regulation in 1954 and 1984, which for reasons of policy was presented in the form of an administrative rule, containing a type of liability comparable to strict liability in tort. The tortious character of this compensation, however, is still present in the background, as may also be learnt from the following case.

A group of 53 landowners and tenant-farmers had incurred damage caused by the lowering of the groundwater level over a long period, dating back to 1957, due to drainage in that area by a water company, and brought an action for damages before the District Court Almelo.[13] The Court held that the acts of the water company Wavin in the period 1957 to 1984 were submitted to the law of tort (nuisance), whereas those occurring in the period after 1984 came under the [201] Groundwater Act, enforced in 1984. It is not clear why the Court did not hold the Act's predecessor, the 1954 Act, applicable, a matter not discussed in Van Acht's note.[14] The Court was of the opinion that the water company acted negligently against the neighbouring landowners and users and therefore was liable in tort, notwithstanding the company's reasonable interests from a business and economical point of view, and the fact that it acted on the basis of a permit.

Only a few cases on groundwater compensation issues are reported. It is commonly suggested that the work of the Technical committee on groundwater management is encouraging dispute settlements.[15] Be that as it may, if parties cannot agree to a settlement and take recourse to litigation, the lawsuit following will usually be extremely lengthy.[16] This is well illustrated by a case that was brought before the Dutch Supreme Court recently.[17] The plaintiff is the owner of an estate, consisting of fish ponds, farmland and a skating rink. Due to drainage of groundwater by the Municipality of Apeldoorn and the water company Nuon, the fish ponds and ditches ran dry as well as the farm land. Under articles 6 and 19 of the Groundwater Water Companies Act of 1954, the owner requested compensation for this damage from the competent ministry in 1971. Thereupon the Technical committee brought out a report in 1980, which was acceptable to Van Arragon, but not to the defendant water company. Litigation started in 1983, leading to final

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[12] The insurance company also argued that when the obligation to compensate damage was still based on tort, as was the case before the Act was enforced, the water company's liability was not covered by the insurance policy, since it was at the company's discretion to make the act lawful by offering sufficient compensation to the victim. Furthermore, in the past such claim was never submitted to the insurance company; apparently, the insurance company alleged, the phrase "liability in law" in the policy was taken in its common sense, meaning "liability in tort".

[13] *Van de Pol et al. v. Wavin,* Rb. Almelo, 5 Feb. 1992, *Milieu en Recht* (1995) p. 69 note Van Acht.

[14] *Ibid.*

[15] *Ibid.*

[16] This is also the case in Belgium – compare Brocken, *supra* note 10; reference is made to litigation that started in the 1960s (around Bergen) and is still continuing. These cases gave rise to the Act of 10 Jan. 1977 on compensation regarding groundwater drainage, introducing strict liability. The malfunctioning of the Act is discussed by Brocken.

[17] *Van Arragon v. Municipality of Apeldoorn and Nuon*, HR 17 Nov. 1995, *RvdW* 1995, 243.

decisions of the District Court in 1989 and the Court of Appeal in 1994. The judgment of the Supreme Court was given in 1995. The extreme length of litigation is getting close to the situation in Belgium in this field. Ultimately, the plaintiff had to accept a compensation awarded by the Court of Appeal, which was far below the amount established by the Technical committee at the outset. The decisions of the Court of Appeal and the Supreme Court are quite unsatisfactory for reasons that cannot be discussed here.[18]

Matters of causation normally are an impediment for a compensation claim in groundwater cases. However, the work of the Technical committee, using all information available in administrative circles (which, incidentally, is also accessible to a plaintiff) is preventing most difficulties here. In cases governed by tort law, the requirement of causation is applied by the Courts rather leniently, due to the doctrine of reasonable imputation of consequences of the tortious act to the tortfeasor, which has replaced the foreseeability test.[19] The issue of proximity is known to cause formidable difficulties in cases where [202] multiple tortfeasors are involved. The rule on alternative causation may be used here, laid down in article 6:99 of the Dutch Civil Code (CC), which was applied by the Dutch Supreme Court in a 1992 landslide products liability case, where some DES-daughters sued a number of pharmaceutical companies that may have sold the defective drug to their mothers in the past.[20] This instrument, however, is not needed when compensation is claimed under the Groundwater Act, which as we have seen provides a compensation fund for such cases of multiple drainage in a water resource area.

Finally, a victim of groundwater drainage may also resort to claiming damages from the governmental agency that issued permits relating to groundwater management (granting of permits, conditions in permits, etc.), in an administrative procedure under the new Environmental Management Act, articles 15.20 ff.[21]

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[18] To give an indication: the water company's obligation under the Groundwater Act to take measures of repairing the damage was taken in a restricted sense by the courts; no legal interest was awarded for the period before 1983, although the plaintiff requested damages from the ministry under the Act from 1971.

[19] The leading case is *Drinking water Resource Area*, *supra* note 5. This doctrine was codified in article 6:98 of the Dutch Civil Code (enacted in 1992). The doctrine is not accepted in Belgian law, which is the major cause of the complications encountered in groundwater cases – compare Brocken, *supra* note 10.

[20] See Hoge Raad, 9 Oct. 1992, *NJ* 1994, 535, note Brunner; *TMA/ELLR* 15 (1993), note Van Dunné (with English summary). The case, and its application in the field of multiple causation in environmental cease, is disussed by J.M. van Dunné, "Legal Aspects of Non-point Source Pollution of the River Meuse: a Comparative Analysis of Issues of Liability in Tort and Multiple Causation", Jan M. van Dunné (ed.), *Non-point Source River Pollution: the Case of the River Meuse. Legal, Economic, Political and Technical Aspects* (1996), p. 46. Compare also Jan M. van Dunné, *Verbintenissenrecht 2* (1993), p. 386.

[21] Compare on this subject, B.P.M. van Ravels, "Grondwaterbescherming en schadevergoeding", *Milieu en Recht* (1995), p. 76 on measures to protect the quality of groundwater (use of pesticides, etc.).

3. Case law on water pollution based on neighbour law, water servitude and nuisance

The impression that an action for damages in case of industrial or municipal pollution of river water is of recent origin is false. The legal position of municipalities discharging waste water, and the acceptance of a duty of care with respect to third parties making use of the water, is the subject of a range of cases. This range starts at the beginning of this century with the series on the pollution of the Voortse Stroom, a river in the Dutch Province of North-Brabant, receiving untreated sewage water from the municipality of Tilburg. The pollution, dating from the 1870s, gave rise to some 100 lawsuits that were filed before the local court, from 1913 until 1953. Eventually 7 of the lawsuits lead to Supreme Court decisions. Finally, after a 1953 decision, the municipality of Tilburg installed a waste water treatment plant, and thus litigation came to an end.

The cases reflect the development of law in this area. At the time of the first case, *Voorste Stroom I* in 1915, the law of tort was still underdeveloped. Liability in negligence and a duty of care to third parties were only accepted in 1919.[22] In 1915, tort still had to be based on the infringement of a statutory duty, [203] and therefore the plaintiff brought his claim under article 676 of the Dutch Civil Code, whereby the downstream landowner is granted the right to use river water for agricultural purposes. The Dutch Supreme Court took the view that by polluting the river water the upstream landowner was injuring the downstream landowner's right to make use of the water, which should be in a proper condition for such use. As a result, the upstream landowner was held liable in tort.

With the development of negligence after 1919, the courts came to accept a liability based directly on a duty of care to other users of river water, and the approach via article 676 of the Dutch Civil Code became obsolete.[23] In French law, however, the use of the identical article 644 of the Civil Code in water pollution cases is still common practice, and has led to the acceptance of a strict liability of polluters, outside the realm of negligence in tort. The obligation which article 644 of the Civil Code puts upon owners of riverside property is considered to be a "servitude" (easement) to use the river water for agricultural purposes. In an old decision at the turn of the century, the Cour de cassation has held that a riparian landowner who has permission to use river water for industrial purposes is under an obligation to respect the rights of downstream property owners, especially in preventing the water from becoming improper for normal use.[24] In a more recent decision, the Cour de cassation has ruled that a company under this article has the obligation to construct a purification plant, to the effect that the river water used by the company on its premises will be discharged into the river again in its natural purity.[25]

The tort cases involving the Voorste Stroom pollution are fitting well into the traditional doctrine of nuisance under Dutch law which is based on negligence.

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[22] *Lindenbaum v. Cohen*, 31 Jan. 1919, *NJ* 1919, 161.

[23] The current version of art. 676 of the Civil Code is art. 5:40 of the Civil Code (New Civil Code, in force since 1992). It is part of the section on nuisance, art. 5:37, which is explicitly based on tort (negligence), the general art. 6:162.

[24] Cour de cassation, 6 July 1897, *D.P.* 1987, 1.536. In the same sense, the decision of 4 Dec. 1963, *D.* 1964, 104, *La Pouponnière de Fouderaie v. Grand.*

[25] Cour de cassation, 12 Feb. 1974, *J.C.P.* 1975, II 18106, note Despax. Compare also, the recent decision of 18 July 1995, *Simoes v. Bonifas* (unpublished; available from Lexis).

A characteristic of this doctrine is the weighing of interests of the parties, whereby the duty of care of a party with respect to another party in the vicinity suffering damage, is set against the interest in operating a factory or other commercial enterprise at the site. An interesting decision in this context is *Voorste Stroom VI*.[26] The polluting city's defense, an argument based on the shortage of financial means to build a purification plant and the consequent choice of the cheaper way of disposing of the untreated waste water into the river, was rejected by the Supreme Court. It held that such a policy may be justified from a point of view of the general interest or even be obligatory under the given circumstances, but this will not relieve the Municipality from its obligation to take the detrimental effects of its policy to third parties for its account. As may be noted, the Court's reasoning is identical to that in the case of *Municipality The [204] Hague v. Jochems*, decided a year later, which was discussed previously (see *supra*, section 2).

This case law of the mid-century is still current law. It found a recent follow-up in the well-known *French Potassium Mines* case of 1988.[27] This case concerns the industrial pollution of the River Rhine with chlorides (salt) in Alsace, which caused damage to nursery firms dependent on river water in the western part of The Netherlands. The River Rhine is of vital importance as a source of fresh water to some 40 million people in several countries. The decision is a landmark case on transboundary water pollution in general. It establishes civil liability in tort for pollution of water ways across the border, an area of the law which thus far was thought solely to be governed by public international law. Furthermore, it should be borne in mind that the pollution actually involved was a minor contribution to the overall pollution at the site of the plaintiffs. Therefore, the relevance of this case for cross-border river pollution of a comparably small quantity, such as pollution from non-point sources, will be clear. In the case of substantial point source pollution, the decision can be seen as an even more cogent precedent.

In *French Potassium Mines*, the Dutch Supreme Court's approach to the matter resembles that in nuisance cases in general. The Court held that the question of negligence should be answered by taking into consideration the character, severity and the extension in time of the damage to third parties, with respect to the circumstances of the case. The dischargers of toxic substances should in their conduct be guided by weighing their own interests against those of the downstream users of river water. In particular the circumstance that this use is sensitive to the substances emitted should be of importance here, the Court ruled. Furthermore, the downstream user is justified in expecting that the river will not be polluted excessively by considerable discharges.

This latter phrase, however, should be taken with a grain of salt. The lower court had established that the Potassium Mines' contribution to the salt pollution of the Rhine water was of "a relative minor proportion", due to the substantial contribution of sea water to the salination of the surface water in that part of The Netherlands. The Potassium Mines' salt discharges into the Rhine reached in peak years a staggering amount of 22 million tons, which accounts for a 40 per cent of

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[26] *Gem. Tilburg v. Haas et al.*, HR 19 Mar. 1943, *NJ* 1943, 312. Compare this author's comments in "De Franse Kalimijnen-zaak en Milieu-aansprakelijkheid. Een Tussenbalans", *TMA/ELLR* (1988), p. 38, with English summary.

[27] HR 23 Sept. 1988, *NJ* 1989, 743, note Nieuwenhuis and Schultsz; *TMA/ELLR* 12 (1989) (with English translation), note Van Dunné (with English summary).

the total industrial salt discharge into this river. However, its contribution to the salination at the site of the nursery firms was only 14.5 and 8.8 per cent respectively. Under these circumstances the Mines are only minor polluters, which makes the decision of special interest for this topic. It should also be noted that the emission of chlorides did not create a health risk in the use of river water by the plaintiffs. The damage concerned is pure economic damage, namely additional costs of water treatment for the nursery firms. As regards causation, the linear relation between emission and impairment was not contested.

[205] Another point of interest here is the Potassium Mines' defense that the chloride discharges are to be dealt with in accordance with the Bonn Salt Treaty of 1976, under rules of public international law. The emissions were within the standards laid down in that treaty, which came about after 25 years of negotiations, and clearly is a compromise of all interests involved. The Supreme Court, rejecting that argument, held that the treaty is only binding upon the concluding states, and not upon individual citizens of those states in relation to others. As a consequence, civil claims in transboundary river pollution can be brought before the Court, on the basis of Dutch tort law.[28]

The competence of the Dutch Court, at the location where the damage occurred, is based on a decision of the European Court of Justice, at the request of the Dutch Court in the *French Potassium Mines* case.[29] The Court held that a plaintiff in a transboundary tort case has the option of selecting either the court of the country where the damage has been suffered, or the court of the country where the defendant had committed the tortious act, i.e. in case it is a commercial dispute and article 1 of the EEX Convention is applicable.[30] As regards the law governing the dispute, the plaintiff has a comparable choice, according to rules of private international law on tort liability, which in the commonly used German terminology is expressed as the choice between *Fallort* and *Handlungsort.* Incidentally, in the *French Potassium Mines* case the Dutch plaintiffs chose Dutch law, with the consent of the French defendant, whose law in environmental cases runs along stricter lines of liability than Dutch law.

The pollution of the River Meuse has thus far not led to decisions of the Dutch Supreme Court. The litigation instituted by a Dutch NGO against the Belgian company Cockerill Sambre regarding water pollution caused by PAHs in the production of cokes resulted in a very unsatisfactory decision of the Court of Appeal Den Bosch (Bois-le-Duc) in 1994. The Court ruled that in the absence of a

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[28] The Potassium Mines' appeal to the conditions of its permit was rejected by the Court of Appeal – which was confirmed by the Supreme Court – since, according to French law, and taking into account the wording of the permit, it did not relieve the defendant of its liability in tort (which is also the case under Dutch law).

[29] A prejudicial decision of the Luxembourg Court. European Court of Justice, 30 Nov. 1976, *NJ* 1977, 494. For this subject, see also Gerrit Betlem, *Civil Liability for Transboundary Pollution: Dutch Environmental Tort Law in International Cases in the Light of Community Law* (1993).

[30] If the dispute is treated as a administrative matter, this may create a problem, since the EEX Convention will then not be applicable. Compare European Court of Justice, 16 Dec. 1980, *Schip & Schade* 46 (1981), *Otrate* (the state's action for damages for costs of removal of a ship wreck is a civil case under Dutch law, whereas in the law of most EC countries administrative law is applied to such a case).

clear written norm in regard of the emission of the particular toxic substances, no action in tort would lie against the polluting company.[31]

In this context, reference should also be made to an adjacent area, the maintenance of waterways. The decision of the Dutch Supreme Court in the *Bargerbeek* case of 1981 comes to mind, where it was held that the water authority was under a duty of care to third parties for the proper maintenance of [206] the local brook.[32] Here the plaintiffs crop was damaged by an inundation, due to deficient maintenance of the brook. The Court held that the water authority had some discretion in its operations, thereby also taking into account financial aspects. In recent case law, however, this latter aspect is given less weight.[33] In his note Brunner defends the reversal of the burden of proof of the plaintiff in cases such as the one at bar.

One may conclude from this survey of Dutch case law, that a Municipality or industry, engaged in the emission of waste water into rivers, according to Dutch tort law is under a duty of care regarding downstream users of river water such as drinking water companies etc. It is further under duty not to discharge toxic substances into surface waters which will cause detriment to parties using the water in the production of drinking water, or similar purposes. In the light of the international character of this topic it may be of interest to give an overview of Belgian and French private law regarding river pollution, being the jurisdictions of the upper course of the River Meuse, where most of the pollution originates.

Regarding the discharge of untreated waste water into the surface water by municipalities, we find decisions comparable to the Dutch case law discussed so far in Belgian case law. In the case of the *Julienne,* a small river flowing into the Meuse, fish farmers sued the Municipality and the Walloon Province. The Court of Appeal Liège held both defendants liable in tort by acting negligently in disregarding the fish farmers' interests. Furthermore, the Municipality infringed the Surface Water Act of 1971 and the Province acted negligently by refraining from building a water treatment plant.[34] In the *Brugelette* case a similar action was brought before the Cantonal Court by local bee-keepers against the Municipality of Brugelette, which approved of pollution of a brook by industrial discharges of waste water, causing damage to their beehives and its populations. The Judge of first instance held the Municipality liable in tort (negligence) and imposed an obligation to bring the pollution to an end, under a recognizance.[35]

A typical aspect of Belgian environmental law, and of French law as well, is the use of the action in nuisance, *troubles de voisinage,* to the effect that strict liability of the person disturbing the "balance" in the neighbourhood is assumed (article 544 of the Belgian Civil Code). The nuisance caused to other persons must be abnormal. The actor is under a general obligation to restore the equilibrium by

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[31] *Cockerill Sambre v. Foundation Reinwater et al.*, Court of Appeal Den Bosch, 31 May 1994, *TMA/ELLR* 41, 46 (1995). Compare for this subject van Dunné, *supra* note 15, p. 57.

[32] HR 9 Oct. 1981, *NJ* 1982, 332, note Brunner.

[33] See Van Dunné, *Verbintenissenrecht, supra* note 21, p. 452.

[34] Court of Appeal Liège, 9 Feb. 1984, *JT* 1985, 320, note Jadot.

[35] Cantonal Court (Justice of the Peace) Lens, 27 May 1986, *RGAR* 1987, nr 11 250; confirmed by District Court Bergen, 23 Dec. 1986. Compare also Cantonal Court Lens, 9 Apr. 1990, *AR* 1990, 6 661.

paying a reasonable compensation and no negligence is required.[36] The Belgian Supreme Court held in a 1973 decision that a plaintiff confronted with difficulties of proving negligence of the defendant in a common tort action, may [207] resort to the nuisance action as an alternative. This action is basically an infringement of property rights of persons located in the neighbourhood.

Case law offers interesting examples of the use of this instrument in environmental disputes. A municipality had to pay compensation to the owner of a fish pond which was polluted by the discharge of untreated sewage water into a local canal. A farmer was held under the obligation to pay damages to adjacent farmers when pesticides sprayed on his land were carried along with rainwater and caused pollution of farm land in the vicinity.[37]

In French law we find a similar use of the action in nuisance. In a 1971 decision the Cour de Cassation held that the obligation to give compensation for impairment in case of *trouble de voisinage* is not based on negligence *(faute)*.[38] At times the compensation consists of building purification works or at least an indemnification of the costs required. In a 1972 decision the defendant had to pay the costs of a river clean-up.[39] It should be noted, however, that the French courts are led by the economic position of the defendant polluting company in determining the amount of compensation involved.

4. The comparison of civil law (tort) and public international law with respect to the principles governing wrongful acts causing cross-border pollution

The topic of this chapter, the detrimental use of fresh water sources, is treated in a civil law approach. However, the international character of the topic, where transboundary pollution is concerned, asks for a comparison with public international law, and the solutions offered in that field.[40]

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[36] Belgian Supreme Court, 6 Apr. 1960, *Arr. Verbr.* 1960, 722; in establishing this rule of law, the Court is referring to the Constitution. For this subject, compare L. Cornelis, *Beginselen van het Belgische buitencontractuele aansprakelijkheidsrecht* (1989), p. 670; H. Bocken, *Het aansprakelijkheidsrecht als sanctie tegen de verstoring van het leefmilieu* (1979), p. 270. See also Brocken, *supra* note 10.

[37] Compare, respectively: District Court Turnhout, 3 June 1985, *Res Jura Imm.*, 1985, 181; District Court Hoei, 25 Juni 1986, *R.G.A.R.*, 1987, nr 11 280.

[38] Cour de cassation, 4 Feb. 1971, *J.C.P.* 1971, II 16781, note Lindon. The same holds for a situation where otherwise the requirements for liability according to art. 1384 of the Civil Code would apply, the Court decided in 1984. See for this subject: Geneviève Viney, *Traité de droit civil V, Obligations* (1988), p. 90; H. Mazeaud and F. Chabas, *II biens* (8th edn., 1994), p. 1341; E.H. Hulst, *Grondslagen van milieu-aansprakelijkheid* (1993), p. 337.

[39] Cour de cassation, 17 Feb. 1972, Bull. civ., II nr 50, p. 36, cited by Viney with other cases and literature, *supra* note 32. Compare also: Ph. Malaurie and L. Aynes, *IV Les Biens* (3rd edn., 1994), p. 1070.

[40] In the discussion of this matter in this paragraph, reference will be made to an extensive publication of the present author on the subject in 1991, which, incidentally, was written in conjunction with Johan Lammers. See J.M. van Dunné and J.G. Lammers, *Reports to the Netherlands Association of International Law 1991, Aansprakelijkheid voor Schade door Grensoverschrijdende Milieuverontreiniging: Volkenrechtelijke en Civielrechtelijke Aspecten* (1991). Special reference is made to the present author's treatment of public international law concepts, in regard to those in civil law, p. 132.

In the development of rules of public international law regarding cross-border pollution of the last decades a central role is being played by the UN International Law Commission (ILC). Its study on "international liability for injurious consequences arising out of acts not prohibited by international law", commenced in [208] 1978 and resulted in a Sixth Report in 1990, containing draft articles for a convention on the subject, written by the Special Reporter Julio Barboza.[41] Another current draft covering transboundary pollution is the 1994 ILC draft Articles on the law of the non-navigational uses of international watercourses. The principles and norms designed in this draft, however, are too broad and vague to be of much use in international water disputes, according to Lammers in his paper for the conference. A more detailed discussion of this topic, and the related matter of the 1992 Helsinki Watercourses Convention (Convention on the Protection and Use of Transboundary Watercourses and International Lakes), and the Charleville-Mézières Treaty on the protection of the River Meuse, concluded by the riparian states in 1994, falls outside the scope of this contribution.

The slow pace of law-making in the field of international law regarding transboundary pollution has drawn several comments from observers in the past; that by Gaines cannot be left unquoted: "the persistent obstacle has been the unwillingness of governments to yield State sovereignty over national resources in order to secure a clear definition of State responsibility".[42] A common distinction made in public international law is that between wrongful acts and lawful acts. The former usually are governed by the criterion of due diligence, a duty of care based on fault liability which in its application in practice is similar to negligence, i.e. acting against norms generally accepted in the society of nations. The use of severe standards of negligence in practice, has as its consequence the blurring of the border line between fault and strict liability. This is comparable to the situation that has existed for a considerable time already in the field of private tort law in most European countries. The real difficulty in the international sphere is constituted by treatment of lawful acts under public international law. It may be tempting to accept strict liability here, as is advocated by several authors. That concept, however, is quite unusual in international treaties, and a state practice in that sense is practically non-existent. As a consequence, some international lawyers, like Brownlie, would prefer the application of the standards for wrongful acts, i.e. due diligence which are also in the case of lawful acts thought to be sufficiently severe.[43] In this context, some writers make a distinction between continuous pollution and accidental pollution, in an effort to keep the injunction out in the latter situation, the introduction of which clearly would make some states even more hesitant to accept state liability in the area of lawful acts (e.g. Handl).

As regards the prospects of the work of the ILC on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, one may wonder what assets are in stock for the handling of international water disputes. The choice for the acceptance of a state liability based on the con-

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[41] This draft is discussed at length by J.G. Lammers, *supra* note 40, p. 72, in combination with WCED Experts Group on Environmental Law, *Legal Principles for Environmental Protection and Sustainable Development* (1986).

[42] Sanford E. Gaines, "International Principles for Transnational Environmental Liability: Can Developments in Municipal Law Help Break the Impasse?", *Harvard Internat. Law J.* 313 (1989), p. 30.

[43] For sources, see Van Dunné and Lammers, *supra* note 40.

cept of due diligence, comparable to fault liability, has drawn a number of [209] critical comments from international law scholars over the years, that seem convincing in the civil law tradition. However, due diligence-fault liability was advocated by Johan Lammers in his 1984 thesis and in the 1991 Report, basically for pragmatic reasons, namely the creation of a treaty acceptable to a reasonable number of states. If the lengthy and laborious preparation of the draft by the ILC reflects the future procedure of establishing the treaty, there still is a long way to go in international law. A practical approach, therefore, may make sense.

Interestingly enough, the legal policies underlying state liability as advocated by several authors such as compensation of damage, deterrence, prevention and peaceful vindication of rights, are quite familiar to the civil law reader. The same holds for the principles involved here, such as equity, good neighbourliness or comity, solidarity, equality, duty to cooperate and unjust enrichment

In other areas too, an intertwining of public and private law can be found. When reading the water treaty between France and Spain that was tested in the well-known *Lac Lanoux* Arbitration, it strikes the reader that the wording of the Act added to the treaty: "The downstream lands are obliged to receive from the higher lands of the neighboring country the waters which flow naturally therefrom together with what they carry without the hand of man having contributed thereto", is taken almost literally from a water servitude in the French Civil Code, article 640.[44] As a consequence, knowledge of the relevant French private law can be most helpful in the construction of that paragraph of the Act. What is meant here, is a real and cogent obligation resting on the downstream land to receive the water, which characterizes the water servitude in French law and other legal systems based on the Napoleontic Code (such as that of The Netherlands).

An example of the use of international law in a civil case, on the other hand, is the interlocutory decision of the District Court Rotterdam in the *French Potassium Mines* case.[45] The Court applied the principle of *sic utere tuo ut alienum non laedas* ("in the use of property, act in such a way as not to harm another person") taken from international law, in a private law tort litigation. Leading authors, like Sir Hersch Lauterpacht, are cited extensively by the Court. In the final decision, the *sic utere* principle is placed in juxtaposition with the action based on negligence. In appeal, however, The Hague Court of Appeal found little difficulty in setting aside in a sweeping statement, the international concept, foreign to national tort law doctrine. Thus, negligence is again being placed in a casual way on the throne of the land of tort, a decision not tested in that respect before the Dutch Supreme Court.

Interestingly enough, the civil law origin of the *sic utere* principle is stressed by Lauterpacht in his textbook, as taken from the law of nuisance in common law. Therefore, it could be seen as belonging to the "general principles accepted [210] by civilized nations", mentioned as a source of international law by

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[44] See art. 12 of the Additional Act of 26 May 1866 to the three Treaties of Bayonne, *Lac Lanoux Arbitration (France v. Spain)*, Arbitral Tribunal, 16 Nov. 1957, 24 ILR 101 (1957).

[45] *Supra* note 3. For a discussion of the decision, which has drawn attention in other countries, see van Dunné, *supra* note 26, p. 34. Compare also J. van der Meer, *TMA/ELLR* (1987), p. 16 (note Court of Appeal's decision). The Court's final decision is from 16 Dec. 1983, *NJ* 1984, 341; Court of Appeal The Hague, 10 Sept. 1986, *TMA/ELLR* (1987), p. 15.

article 38 of the Statutes of the Permanent International Court of Justice.[46] As far as the connection between international law and civil law is concerned, the circle is closed. It may also be noted that the concept of negligence in English law, with its duty of care towards third parties, is based on the concept of the good neighbour, introduced by Lord Atkin in his famous opinion in the landslide case of *Donoghue v. Stevenson* of 1932. Again, good neighbourliness is an old concept of international law, derived from the Roman concept of *comitas* or comity by seventeenth century international lawyers such as Grotius. Here we see the circle appearing once more.[47]

The overall conclusion can be that the state of affairs in international law renders little inspiration to the civil law brethren. This is due to the international law maker's policy based on the middle of the road approach, to secure the acceptance of a treaty by a sufficient number of states, including those that are not liability-prone, of which there are so many. In this context, it seems that Gaines' observation of the situation *in internationalibus* is correct, when he wrote: "Questions of liability and compensation for environmental harm have undergone dramatic doctrinal development in the municipal legal systems, while international law remained essentially static".[48] Strict liability for environmental damage definitely is the trend in the area of national law, EC or treaty law. The Brundtland Report of 1986 advocated that type of liability, and it was endorsed by the ministers of the environment of the EC countries in Strasbourg in the following year as the basis for future policy.[49] In the European Union, the EC Commission has not been sitting idle in the past years, urged to take action by the European Parliament. The production of hazardous waste, to give just one example, was the subject of a 1989 Draft EC Directive (amended in 1991), which is characterized by strict liability of its producer. We find the same regime in the field of the transport of toxic waste, where under the 1989 Geneva Convention on Civil Liability for Damage Caused During the Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD), the transport company is held strictly liable. An important step in the same direction was taken by the Council of Europe with the drafting of the Lugano Convention of 1993 on civil liability for damage resulting from activities dangerous to the environment. Articles 6-8 of the Convention contain a no-fault liability for an [211] operator involved in dangerous activities or in the exploitation of a site for the permanent deposit of waste.

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[46] L. Oppenheim, H. Lauterpacht (ed.), *International Law* I (8th edn. (1955)), p. 346 cited by the Rotterdam Court in its 1979 decision, *supra* note 3, p. 319: "The conferment and deprivation of nationality is a right which International Law recognises as being within the exclusive competence of States; but it is a right the abuse of which may be a ground for an international claim. The duty of the State not to interfere with the flow of a river to the detriment of other riparian States has its source in the same principle. The maxim, *sic utere tuo ut alienum non laedas*, is applicable to relations of States no less than to those of individuals; it underlies a substantial part of the law of tort in English law and the corresponding branches of other systems of law; it is one of those general principles of law recognised by civilised States which the Permanent Court is bound to apply by virtue of Article 38 of its Statute".

[47] Compare for this topic, J.M. van Dunné, "Rhine Pollution by Industrial Discharges: New Dimensions of the Good Neighbour Doctrine?", *Rechtstheorie Beiheft* 12 (1991), p. 375.

[48] Gaines, *supra* note 42, p. 315.

[49] Brundtland Report, Oxford University Press (1987).

5. Conclusions

Reviewing our excursion into international environmental law, one cannot but come to the conclusion that compared to civil liability for pollution in an international setting, the developments in international law concerning that subject are presenting a quite different scene, where strict liability is still considered a novelty. Moreover, due to a chronic shortage of case law from the Permanent International Court of Justice or Arbitral Tribunals on transboundary pollution disputes, the cases widely discussed in the international forum are aging over the years (*Trail Smelter, Lac Lanoux, e tutti quanti*). Therefore, hope must be placed in the work of the ILC and subsequently the traditional and time consuming tug of war around a treaty that has survived the draft stage. This is not a comforting thought though, at least not for an environment in jeopardy.

As a consequence the role of a civil law approach to liability in international disputes, such as the ones concerning the detrimental use of fresh water sources, still seems to be well-founded and increasingly of current interest.[50] Meanwhile, it is suggested that international lawyers may take notice of the state of the law in field of tort liability under national law, to their advantage in dealing with the development of the adjacent international law of transboundary pollution. In the sphere of solutions for environmental problems too, there is safety in numbers.

As a closing remark, it may be noted that water disputes are commonly governed by the rule of good neighbourliness, be it in civil law, in the guise of an action in nuisance, *troubles de voisinage*, water servitudes or plain negligence. In international law the *sic utere* principle or the comity of nations figure. The words of Lord Atkin in his opinion in *Donoghue* v. *Stevenson* in 1932 come to mind. They are still the right setting, as were those of his Roman colleague in the remote past, handing down the *sic utere* maxim for generations to come. Lord Atkin said:

> There must be, and is, in some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances … The rule that you are to love your neighbour becomes in law "you must not injure your neighbour"; and the lawyer's question "Who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then in law is my neighbour? The answer seems to be - persons who are so closely or directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

A distant mirror indeed.

[50] For a comparable view on the role of civil law in the litigation and settlement of international disputes, with regard to the underdeveloped character of state liability under international law, see Gaines, *supra* note 42, p. 342.