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Damage Caused by Genetically Modified Organisms

Comparative Survey of Redress Options
for Harm to Persons,
Property or the Environment

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De Gruyter

Damage Caused by GMOs under Dutch Law

Ingrid Greveling and Willem H. van Boom¹

I. General overview

1. Special liability or redress scheme for GMOs

There are no specific rules on liability or compensation of damage relating to GMO crops. 1

2. State liability

No specific rules apply to state liability for GMO crops. Therefore, the normal rules apply. Under Dutch law, public authority liability is a complex field of the law in which tortious liability under civil law (basically a negligence-based liability for wrongful state intervention) interacts and sometimes clashes with public authority "liability" under administrative law. Moreover, the concept of *égalité devant les charges publiques* may compel the state to alleviate the financial burden resting upon specific well-defined groups in society. 2

II. Damage

1. Recoverable losses

According to art. 6:95 *Burgerlijk wetboek* (Civil Code, BW), damage consists of patrimonial damage and non-patrimonial damage. Patrimonial damage 3

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² Further on this topic, e.g., *W.H. van Boom/A. Pinna*, Liability for Failure to Regulate Health and Safety Risks; Second-Guessing Policy Choice or Showing Judicial Restraint? in: *H. Koziol/B.C. Steininger* (eds.), *European Tort Law 2005* (2006) 1 ff.

includes costs incurred, loss suffered and loss of profit (art. 6:96 Civil Code). Death, personal injury, property damage and pure economic loss are on an equal footing in this regard.

- 4 With regard to non-pecuniary loss, the following is relevant. The injured party may only claim non-patrimonial damage in one of the situations mentioned in art. 6:106 Civil Code: firstly, if the liable party had the intention to cause immaterial damage; secondly, if the injured party incurred a physical injury, if his reputation or his honour is damaged, or if his person is damaged in any other way; thirdly, if the reputation of a person who has passed away is damaged (only if that person, were he alive, would also have had the right to compensation for damage to his reputation).

2. Pure economic loss

- 5 As such, pure economic loss is not special under Dutch law. If the conduct of the respondent is held to be wrongful and all the requirements laid down in art. 6:162 BW have been met, then there is liability. Liability may include pure economic loss. No specific thresholds apply with regard to pure economic loss. Having said that, it may well be possible that the court may consider the respondent not to have acted tortiously vis-à-vis the claimant on the basis that the claimant's interest was of a purely economic nature. This depends on the case at hand.
- 6 Take for instance a case where consumers lose trust in certain agricultural produce for fear of GMO contamination. Although there are no court decisions on this matter, we feel that the loss sustained by farmers who suffer from a diminishment of consumer trust in their produce will not be compensated easily under tort law. A court would certainly require proof of a wrongful act or omission leading to admixture or contamination. A GMO-farmer may possibly be held liable, for instance, for not informing neighbouring farmers of his GMO-activities – thus depriving them of the chance to take precautionary measures. In that case, liability can also cover pure economic losses such as sudden drop in turnover. Dutch law does not lay down actual admixture or interference as a formal prerequisite for liability, so in effect the adjudication of compensation for pure economic loss is feasible. Whether compensation is granted may depend on the specific facts of the case.

3. Mere fear of a loss

Non-pecuniary loss is only compensated under Dutch law under very specific conditions. The injured party can only claim non-pecuniary loss in one of the situations mentioned in art. 6:106 Civil Code, i.e., (1) if the liable party had the intention to cause non-pecuniary loss, (2) if the injured party suffered personal injury, damage to his reputation or honour (either alive or deceased!), or if his person is “personally damaged in any other way”. Mere fright over future events causing pure economic loss as such is unlikely to generate claims for non-pecuniary loss unless filed under “personal injury” or “personal damage in any other way”.

4. Standard of proof

Concerning evidence of damage, we need to distinguish three phases: evidence that the claimant has suffered loss (1), evidence that the loss was caused by the defendant (2), and evidence of the extent of the loss (3).

Regarding proof that the claimant suffered loss, the normal rules of burden of proof apply. As a starting point, the burden of proof lies on the claimant. This rule is laid down in art. 150 *Wetboek van Burgerlijke Rechtsvordering* (Code of Civil Procedure). The claimant has to prove the facts underpinning his claim regarding the obligation to compensate. To some extent this includes the fact of loss, but there is no need for precise evidence of the extent of the damage. Courts are allowed to make a rough estimate of the damage.

Evidence of *conditio sine qua non* (2) will be dealt with infra, no. III.4. Calculating the exact extent of damage (3) is not subject to strict rules of evidence. Courts have considerable room for calculating or even roughly estimating the pertinent amount.

As far as future damages are concerned, the courts are allowed to award damages either as a lump sum or as a periodic allowance (art 6:105 BW). In personal injury legal practice, both injurer and injured party generally prefer the payment of a lump sum (partly for the purpose of avoiding income tax). The payment for future damages by means of a lump sum is calculated on the basis of reasonable projections on how the future would have evolved if the injury had not occurred.

5. Nominal losses

- 12 Nominal/symbolic losses are not acknowledged as such.

6. Mass losses

- 13 The *Wet Collectieve Afwikkeling Massaschade* (WCAM), the 2005 Collective Settlement Mass Damage Act, supports efforts to settle claims for mass losses with a minimum of judicial intervention. The main focus of the legislator was on designing an efficient mechanism for the settlement of events causing mass personal injury but it seems that the Act is of more practical relevance for securities litigation.
- 14 The WCAM 2005 allows parties to a voluntary collective settlement contract to request the Amsterdam Appeals Court to declare this settlement binding on all victims. Art. 7:907 Civil Code provides that an amiable settlement “concerning the payment of compensation for damage caused by an event or similar events concluded between a foundation or association with full legal competence and one or more other parties which have committed themselves by this agreement to pay compensation for this damage may, at the joint request of the parties that concluded the agreement, be declared binding by the court on persons to whom the damage was caused, provided the foundation or association represents the interests of these persons pursuant to its articles of association”.
- 15 The Amsterdam Court will consider the settlement according to specific standards of fairness. Moreover, if the Court declares the settlement binding on all victims, individual victims may opt out during a certain period (art. 7:908 Civil Code).

III. Causation

1. Uncertainty of merely potential causes

- 16 In the case of multiple uncertain causes, art. 6:99 Civil Code (alternative causation) provides as follows. When the damage may have resulted from two or more events for each of which a different person is liable and it has been determined that the damage may have been caused by at least one of these events, each one of these persons is jointly and severally liable and therefore liable to repair the damage, unless he can prove that the damage is not a result of the event for which he is liable.³ Note that if it is unclear

who *violated* certain rules, art. 6:99 will not come into play: for joint and several liability it must be ascertained that the defendant did in fact violate the relevant rules – as others did – but remain uncertain which of these violations *caused* the damage.

As far as uncertain causation is concerned in cases where the defendant is responsible for potential cause A and the claimant is responsible for potential cause B, there may be room for awarding damages proportionate to the likelihood that cause A was in fact the sole cause. In a recent decision (*Nefalitt v Karamus*), the Dutch Supreme Court ruled that where an employee who had been exposed to asbestos dust by his negligent employer and had also smoked for years could not prove which of these potential carcinogenics caused his lung cancer, the employer was liable in proportion to the (statistical) likelihood that the asbestos exposure had in fact caused the cancer.⁴ The basis for this proportionate liability was found in the special legal relationship between employer and employee, which in the eyes of the Court justified the extensive application by analogy of art. 6:101 (1) Civil Code (contributory negligence).⁵ 17

2. Complex causation scenarios

As mentioned supra, in scenarios comparable to DES, the Dutch Supreme Court applies joint and several liability. The example given in the question, however, is not necessarily such a case. Joint and several liability can only be applied if there is evidence that the defendant acted wrongfully and his wrongful act was adequate to cause the damage at hand. If it remains unclear which batch was contaminated, the first question to answer is whether the defendant did in fact act tortiously. If it is clear 18

3 Hoge Raad (HR) 9 October 1992, *Nederlandse Jurisprudentie* (NJ) 1994, 535 (DES). Cf. *W.H. van Boom*, Multiple Tortfeasors under Dutch Law, in: W.V.H. Rogers (ed.), *Unification of Tort Law: Multiple Tortfeasors* (2004) 135–150.

4 HR 31 March 2006, *Rechtspraak van de Week* (RvdW) 2006, 328.

5 Art. 6:101, par. 1, BW reads: “When the damage is partly caused by an occurrence that can be imputed to the injured party, the obligation to pay compensation is reduced by apportioning the damage between the injured party and the liable party in proportion to the degree in which the occurrences that can be imputed to the parties have contributed to the damage, provided that account is taken of the disparity of the seriousness of the respective faults, or other circumstances of the case, to decide whether equity demands that an alternative apportionment or full recovery takes place or that the obligation to pay lapses.” On art. 6:101 BW, see, e.g., *W.H. van Boom*, *Contributory Negligence under Dutch Law*, in: U. Magnus/M. Martín-Casals (eds.), *Unification of Tort Law: Contributory Negligence* (2004) 129–148.

that he in fact acted wrongfully, then imputation to him of the uncertain causation is possible within the framework of art. 6:99 Civil Code.

3. Force majeure

- 19 A prima facie wrongful act is considered not to be wrongful whenever force majeure justified it (art. 6:162 BW). As far as causation is concerned, force majeure in the sense of external causes other than the wrongful act may mitigate liability altogether (for lack of *conditio sine qua non* link between wrongful act and damage) or reduce the obligation to compensate damage (art. 6:101 BW).

4. Threshold to prove causation

- 20 According to Dutch law, a two-stage test must be applied. First, the well-known *conditio sine qua non* (“but for”) test is applied. According to this requirement, there is a causal link between the damage and the wrongful act if the act was a necessary condition for the existence of the damage. In other words: without the act there would not be any damage. Unsurprisingly, Dutch courts do not apply a “scientifically approved” threshold as far as the degree of likelihood is concerned but rather an open-textured standard of the court’s conviction based on all the evidence put forward and ultimately “on the balance of all probabilities”.
- 21 With regard to the burden of proof concerning causation, the Dutch Supreme Court (Hoge Raad) has in recent years developed the so-called *omkeringsregel*, the “reversal rule”. In a number of decisions the Hoge Raad has stated that if an act which constitutes a wrongful act is known to create the risk that a specific damage will occur, and if this risk subsequently materialises (so the damage occurs), the causal link between the damage and the act is presumed unless the respondent proves otherwise. In recent cases, the scope of this rule has been limited to cases in which the risk that materialised was of a certain specific nature that could be associated easily with the wrongful act. Hence, the rule is easily applied to contamination of a neighbouring crop if the contaminating substance is easily associated with a specific GMO crop in the area. It is unlikely, however, that it can be applied in a case where a GMO-farmer has acted wrongfully by not taking precautionary measures against migrating pollens and a drop in profits is experienced by all corn-producing farmers after negative publicity. Although there may be evidence of the intermedi-

ate cause of the negative publicity reflecting on corn as such, the market price mechanisms ruling corn trade are far too complicated to say that a drop in profits in corn farming is typically associated with negligent GMO-farming.

Obviously, the *conditio* requirement is too extensive; without any further delimitation too many causal links between act or omission and damage would be seen as cause of the damage. Therefore, if the first stage of the test has been satisfied, a second is applied: the imputation test. The test is laid down in art. 6: 98 BW, which reads:

“Compensation can only be claimed insofar as the damage is related to the event giving rise to liability in such a fashion that the damage, also taking into account its nature and that of the liability, can be imputed to the debtor as a result of this event.”

This test was developed in case law. For instance, the Dutch Supreme Court decided (HR 20 March 1970, NJ 1970, 251, Waterwingebied) that for the establishment of the causal link it was also necessary that the damage was reasonably imputable to the act (or omission as the case may be). This requirement was thus called the requirement of “reasonable imputability”. For a specific damage caused (in the sense of *conditio sine qua non*) by an unlawful action to be imputable, there are a number of relevant factors that have to be weighed up. In general, the damage should not be too exceptional a result of the unlawful action, nor in such a distant relation to it that it cannot reasonably be imputed to the liable person.

The aforementioned case law has been codified in art. 6:98 BW. However, art. 6: 98 BW identifies only two of many factors that decide imputation: the nature of the damage and the nature of the liability. Although foreseeability of the damage is not mentioned in art. 6:98 BW, it is surely an important factor as well. As far as the nature of the damage suffered is concerned, both case law and doctrinal writings are inclined to stretch the limits of causal connection very far whenever bodily harm is involved, somewhat less far when damage to property is involved, and the least far in the case of loss related to neither of the two former categories (i.e. pure economic loss).

It must be stressed that before the “reasonable imputability” test can be invoked, in principle the *conditio sine qua non* test should be met first. There are, however, specific conditions under which the requirement of *conditio sine qua non* does not apply, for instance in case of alternative causation or in case of two independent concurring causes that each would constitute an adequate condition to bring about the entire damage. These were dealt with supra III.

5. Special rules on causation

- 26 There are no specific rules relating to GMO cases, but it seems that the rules of art. 6:98 BW are most relevant in such cases. We refer to supra, no. 22.

IV. Types of liability

1. Fault liability

(a) Special rules governing fault

- 27 No specific statutory rules or case law are applicable. Therefore, the general principles apply. As a starting point the burden of proof lies on the claimant.
- 28 In general, the injured party has to prove a) the facts that give rise to liability,⁶ and b) the causal connection between these facts and the damage incurred (*conditio sine qua non*).⁷ Thus, the claimant has to prove the facts underpinning his claim regarding the wrongful act committed. According to art. 150 of the Dutch Code of Civil Procedure, the burden of proof may be reversed by the court if a special (statutory) rule so requires or if reasonableness and fairness demand such reversal.⁸

(b) Impact of specific rules of conduct

- 29 Violation of rules – either statutory or generally accepted in the line of GMO business – helps the case of the claimant. Fault-based liability for unlawful acts is based on art. 6:162 BW. Fault-based liability consists of four elements: there must be an unlawful act, the act must be imputable to the actor, there must be damage and there must be a causal link between the damage and the unlawful act.
- 30 Firstly, there must be a wrongful act. Art. 6:162 Civil Code defines three types of wrongful act: the infringement of a subjective right, an act or omission violating a statutory duty (e.g., importing a banned GMO-product), or “conduct contrary to the unwritten standard of conduct seemly in society”,

6 Effectively, the legal qualifications of “wrongful”, “imputable”, etc. do not need proof in the strict sense. See I. Giesen, *Bewijs en aansprakelijkheid* (2001) 14 f.

7 Cf. Giesen (fn. 6) 112 f.

8 Giesen (fn. 6) 98 f. Note that exact proof of the *calculation* of the amount in damages is not required.

the so-called “maatschappelijke betamelijkheid”. This latter category is the most important one. It can be considered a residual category: whenever the injured party cannot base his claim on either of the first two categories, the third provides a comfortable fall-back option. Because of its open texture, many claims are based on this category. Violation of a statutory rule that purports to protect the interest that was in fact damaged by the violation constitutes a wrongful act vis-à-vis the damaged person. Violation of a customary rule may constitute violation of the standard of conduct seemly in society and may thus constitute a wrongful act in its own right.

2. Product liability

(a) Development risk defence

With regard to product liability, the Dutch legislator fully implemented **31** the European Directive on Product Liability. The Dutch legislature has chosen to allow the “state of the art” defence (see art. 6:185 (1) (e) Civil Code), and not to exclude non-pecuniary loss.

(b) Alternative routes

Apart from the strict liability on the basis of the European Directive, man- **32**ufacturers’ liability for defective or unreasonably unsafe products can in most cases also be based on the general fault liability for wrongful acts. The Dutch Supreme Court has stipulated some “hard and fast rules” in this respect. First, there is the very general rule that a manufacturer acts wrongfully if he markets a product that causes damage when it is used in a normal fashion and in accordance with its purpose. Second, there is the rule that a manufacturer is at fault if he does not assure himself of the absence of possible unsafe characteristics and flaws in his product.⁹ These two rules in combination provide a strong basis for fault-based liability in most of the actual product liability cases, where lack of inspection or lack of utmost care in production methods provide the main sources of danger.

As a side note, we do not believe that the strict and formal application by the **33** ECJ of the full harmonisation effect of Directive 85/374/EEC really stands in the way of continuation of the Dutch domestic tortious liability regime. Firstly, it should be noted that fault-based liability was already a basis for

⁹ HR 6 December 1996, NJ 1997, no. 219, and HR 22 October 1999, NJ 2000, no. 159.

product liability under Dutch law before promulgation of the Directive and therefore it seems to constitute an exception as referred to in art. 13 of the Directive. Moreover, although the Court has ruled that adding compliance with the recall duty to the conditions under which a manufacturer can exempt himself from liability was contrary to art. 7 and 15 of the Product Liability Directive, it did not rule that construing a recall duty under national law as a local remedy for tortious breach of the material duties under the GPSD was contrary to art. 13 of the Directive. Moreover, it could be argued that “after sales duties” under general tort law principles (for instance, recall duty) are altogether outside the scope of the Product Liability Directive. If, for instance, a public authority decides that a manufacturer should recall the defective product and the manufacturer refuses to do so, this may constitute both a criminal or administrative offence under the GPSD (depending on the domestic implementation of the GPSD) and a tortious breach of statutory duty vis-à-vis any consumers who sustain injuries after such a breach. We would argue that since breach of statutory duties as such surely constitutes a source of tortious liability under domestic legal systems in the sense of art. 13 of Directive 85/374/EEC (i.e. art. 13 allows continuation of tortious liability for breach of statutory duties if such liability predates the Directive), the GPSD can be enforced through common tort law rules. Moreover, breach of the recall duty does not necessarily injure the same consumers as the defective products as such do, hence enforcing the GPSD through tort law does not constitute a competing system of liability for defective products.¹⁰

(c) Impact of compliance with rules and regulations

- 34 As a rule, compliance with regulatory standards is relevant but does not preempt liability. It delivers evidence that there was compliance with regulatory law and that the defendant did not act wrongfully in that respect. However, civil law standards may go beyond the level of precaution demanded by regulatory standards. Therefore, there may be cause for a court to rule that a duty of care under the general standard of “conduct seemly in society” was breached even if all statutory rules were complied with.¹¹ This depends, inter alia, on the nature of the details and the drafter’s intent with the regulation.

10 On the interpretation of art. 13 in light of the ECJ rulings, see, e.g., *S. Whittaker*, Form and Substance in the Harmonisation of Product Liability in Europe, *Zeitschrift für Europäisches Privatrecht (ZEuP)* 2007, 865 ff.; *J.-S. Borghetti*, *La Responsabilité du Fait des Produits* (2004) 563 ff.

3. Environmental liability

(a) Implementation of the Environmental Liability Directive 35

The Environmental Liability Directive (2004/35/EG) has been implemented in the *Wet Milieubeheer* (Environmental Management Act), art. 17.6–17.18, 18.2g.¹²

(b) Environmental liability regime beyond the scope of the Directive 36

There is no specific liability regime that specifically covers environmental harm and that exceeds the scope of the Directive. However, the strict liability for hazardous and noxious substances (art. 6:175 Civil Code) may be relevant with regard to environmental damage. The concept of damage is nevertheless restricted to the traditional heads of damage (property damage, reasonable clean-up costs, etc). On art. 6:175 Civil Code, see, *infra* no. 41.

(c) Claimants in cases of environmental harm 37

The Dutch legislator has fully implemented Directive 2004/35/EC in the public law Environmental Management Act. To the extent that harm to biodiversity and harm to the environment are recoverable under the regime of the Directive, a designated competent authority is authorised to claim expenses under public law. Private parties are not competent to claim under the Directive, but neither are their rights under private (tort) law affected. Consequently, proprietors of contaminated soils can still claim compensation from tortfeasors under common tort law principles.

11 See, e.g., HR 10 March 1972, NJ 1972, 278. Cf. R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes, in: W.H. van Boom/M. Lukas/C. Kissling (eds.), *Tort and Regulatory Law* (2007) 197, no. 59 ff. See also E. Bauw, *Privaatrechtelijke betekenis van zorgplichten in de milieuwetgeving* (1996) 96–102.

12 Parliamentary Proceedings 2007–2008, 30 920. Staatsblad 2008, 166, 178.

(d) Special liability regime for losses sustained by individuals

38 No such special regime exists in The Netherlands. The common rules on wrongful acts and omissions (art. 6:162 BW) apply.

(e) Cartagena Protocol

39 The Cartagena Protocol has been ratified. The Dutch government considers agreements such as the Cartagena Protocol as important instruments that deserve ratification and implementation, provided that they lead to a workable balance for both importing and exporting nations.¹³

4. Other strict liability regimes

40 Here, there may be two relevant sources of liability. Vicarious liability (art. 6:170 Civil Code) and strict liability for hazardous substances (art. 6:175 Civil Code).¹⁴ For vicarious liability see *infra* Question V.

41 Art. 6:175 Civil Code defines the liability for hazardous and noxious substances. Liability rests on anyone who uses or keeps the dangerous substance in his profession or business. As follows from the criteria of art. 6:175, non-professional possessors cannot be held strictly liable. Art. 6:175 Civil Code may be relevant if it is generally acknowledged that the GMO crop poses a specific, inherent and serious threat to life and limb and this risk materialises. Hence, this strict liability can only be applied to inherent dangers of substances which are scientifically proven at the time of the damaging event or exposure. This is not (yet) the case.

42 Art. 6:175 creates strict liability for dangerous substances used or kept in the course of business or trade. The article defines a dangerous substance as a substance of which it is known that it has such properties as to pose a special danger of a serious nature to persons or things. Such a “special danger” is posed in any case (according to the article) by substances which are explosive, oxidative, flammable, or poisonous as defined in specific public law legislation. We do not think that, according to the current state of science, GMOs as such can be considered dangerous substances. This may depend, however, on the specific case and the specific dangers the GMO may pose to persons or things. The Ministry of Justice has taken

13 See Parliamentary Proceedings 2005–2006, 26 407, 25.

14 See generally *W.H. van Boom/C.E. du Perron*, *The Netherlands*, in: B.A. Koch/H. Koziol (eds.), *Unification of Tort Law: Strict Liability* (2002) 227–255.

the position that GMO crops are unlikely to fall under “dangerous substances” in the sense of art. 6:175 Civil Code.¹⁵ Whether this will also be the courts’ position, remains to be seen.

Liability arises if the “special danger” materialises. Since the danger is defined as being “to persons or things”, compensation of *pure* economic loss cannot be based on this article. Hence, we believe that even if a GMO was to be considered a dangerous substance under art. 6:175 Civil Code, a mere drop in turnover as a result of the absence of consumer confidence in crops neighbouring a GMO crop would not be deemed compensable damage. 43

According to art. 6:178, liability on the basis of art. 6:175-177 is excluded, *inter alia*, in the following situations: 44

- the damage is the result of armed conflict, civil war, revolt, riots, insurrection or mutiny;
- the damage is the result of a natural event of an exceptional, unavoidable and irresistible nature;
- the damage is solely caused by following an order or regulation of the government;
- the damage is intentionally caused by a third party;
- the damage is (the result of) a nuisance, pollution or any other consequence for which no liability would have existed on the basis of the general principles of tort law if the defendant had caused it intentionally (so the damage is considered an ordinary burden that one has to bear).

V. Vicarious liability

1. Scope of vicarious liability

We understand the concept of vicarious liability to reflect a liability without wrongfulness or fault of one person for the tortious acts of another person. Hence, we would consider this to be a strict liability for others’ 45

15 See *Notitie Ministerie van Justitie – Aansprakelijkheid voor schade in het kader van coëxistentie van gg-gewassen en conventionele en biologische gewassen*, in: *Coëxistentie Primaire Sector – Rapportage van de tijdelijke commissie onder voorzitterschap J. van Dijk*; commissiepartijen: Biologica, LTO Nederland, Plantum NL en Platform Aarde Boer Consument (2004) B57.

torts. There are typically two sources of such liability: art. 6:170 and art. 6:171 Civil Code.¹⁶

- 46 Art. 6:170 Civil Code defines the strict liability of the employer for tortious acts committed by employees. According to this article, strict liability for tortious acts of employees lies on the person in whose service the employee fulfils his duties if the risk of committing a mistake was increased by the assignment to fulfil the duty and the employer had control over the conduct of the employee. The scope of art. 6:170 Civil Code is wide in the sense that not only labour contracts are covered but also more flexible contract forms which constitute some form of hierarchy between the provider of a service and the client.
- 47 In addition to art. 6:170 there is art. 6:171 Civil Code. This article deals specifically with independent contractors. If such an independent service provider is hired by a client and performs activities in the exercise of the client's business, the client is liable vis-à-vis third parties for torts committed in the course of these activities. Note that art. 6:171 imposes vicarious liability only if the independent contractor was actually or seemingly a part of the business process of the client. If, however, an outsider – such as the potential victim – can easily see that the independent contractor is not part of the business process of the client, then there is no liability under art. 6:171 Civil Code.¹⁷ Obviously, this substantially restricts the ambit of art. 6:171.

2. Liability for people further up the food or feed production chain

- 48 If we disregard contractual liability, the question becomes one of imputation of tortious conduct of others. Liability for upchain torts is rather limited under Dutch law, although there are cases in which downward chains were recognised under a duty of care vis-à-vis end-users to inspect the quality of the semi-products that were delivered before processing these into end-products.¹⁸ Moreover, the Product Liability Directive seems to impose joint and several liability to a large extent on the entire chain for upward negligence. See art. 6:185 (1) (b), art. 6:187 (2) and (4), art. 6:189

16 Note that there is also art. 6:172 Civil Code, imposing vicarious liability on the principal for torts committed by the agent in the execution of his duties as an agent.

17 See HR 10 January 2001, NJ 2002, no. 75.

18 See, e.g., HR 6 December 1996, NJ 1997, no. 219, and HR 22 October 1999, NJ 2000, no. 159.

Civil Code, the implementation of art. 1, 3, 5, 7a–7f, 8 lid 1 of the EC Product Liability Directive (85/374/EEC).

3. Can someone further down the feed or food chain include someone further up it in a trial against him/herself?

No specific rules apply and therefore the defendant can summon any third party in an ancillary proceeding (*vrijwaring*) aimed at shifting the loss onto this third party in the event that the defendant fails in his defence in the main proceeding. Neither the court nor the defendant can compel third parties to join the main proceedings. 49

VI. Multiple tortfeasors

Joint and several liability of multiple tortfeasors is dealt with in art. 6:102 (1) Civil Code. This article states: 50

“If two or more persons are each obliged to compensate the same damage, they are jointly and severally liable. In order to determine their contribution as amongst themselves on the basis of article 10, the damage is apportioned amongst them by applying the standard set in article 101, unless another division is demanded by statute or juristic act.”

The subject of *hoofdelijke aansprakelijkheid* covers a wide range of concurrent liabilities. According to the present law of obligations, there is no fundamental distinction – that is, from a dogmatic point of view – between joint tortfeasorship (*Mittäter, Gehilfe*, etc.) and concurrent tortfeasorship (*Nebentäter*). Both types of tortfeasor are covered by the same flexible system of joint and several obligations. 51

Where the acts of A and B combine to cause harm to V, each is liable to V for the whole loss. So, in principle both A and B are liable in full. According to the general rules of tort law, tortfeasor A is liable in full for the damage that is caused by his act in a *conditio sine qua non*-sense, unless it is unreasonable to impute the resulting harm to the act that he committed (the legal causation as laid down in art. 6:98 BW).¹⁹ Possibly, either A or B is not to be held liable at all if the resulting harm cannot be imputed to 52

19 On the topic of causation according to Dutch law, see *W.H. van Boom*, The Netherlands, in: B.A. Koch/H. Koziol (eds.), *Compensation for Personal Injury in a Comparative Perspective* (2002) 213, no. 9 f.

the act that was committed. This may be the case, e.g., when the damage caused was unforeseeable to either A or B. However, the mere fact that another cause was a necessary condition for the harm to materialise is not a sufficient reason for not applying the rule of liability in full.

VII. Defences

1. Licence/permission to grow GM material

- 53 As explained supra no. 34, the mere fact of having a licence or permission from a public authority does not as such render the operator of any risky activity immune from liability. It may depend on the circumstances whether the operator has breached other rules or acted in a negligent manner.

2. Consent/assumption of risk

- 54 Again, this depends on the specific case. Consent and assumption may be valid defences, either in the sense of justification for wrongful behaviour or in the sense of contributory negligence mitigating the obligation to compensate damage. Whether such a defence holds will depend on the specific case.

3. Third-party influence

- 55 As a rule, third-party behaviour will be considered to cause joint and several liability rather than to be a full or partial defence against liability. See art. 6:102 Civil Code, which we dealt with supra, no. VI. In some cases, however, third-party behaviour leads to a full release from liability. For instance, sabotage may be a full defence against strict liability for hazardous and noxious substances under art. 6:175 Civil Code. See art. 6:178 (a) and (e), as mentioned supra no. IV.4.44.

4. Prescription

- 56 Limitation periods (prescription) in the cases envisaged by this study do not deviate from the normal periods that apply in tort cases. Briefly explained, these periods are:

- In case of death and personal injury, a period of five years starting from the day that the claimant had cognizance of both the damage and the liable person.²⁰
- In case of soil or water contamination and air pollution, a combined period of (1) five years starting from the day that the claimant had cognizance of both the damage and the liable person and (2) thirty years running from the day of the most recent or final occurrence.
- In other cases, a combined period of (1) five years starting from the day that the claimant had cognizance of both the damage and the liable person and (2) twenty years running from the day of occurrence.

The product liability prescription period consists of a combined three and ten years period (art. 6:191 Civil Code = art. 10, 11 Directive). 57

5. Other defences

There are no specific defences that we are aware of. 58

VIII. Remedies

1. Pecuniary compensation

(a) Bodily harm

There are no specific rules, so the regular remedies apply. 59

(b) Property losses

There are no specific rules on liability or compensation of damage relating to GMO crops. 60

(c) Economic losses

There are no specific rules on liability or compensation of damage relating to GMO crops. Therefore, the common rules of private tort law apply. Whether 61

²⁰ This new prescription period for death and personal injury was inserted in the Civil Code in 2004.

an organic farmer can claim the full costs of restoring a field rather than the full costs minus the return from conventional crops is a matter of the court's discretion. The court is allowed to calculate the damage in accordance with the nature of the damage (art. 6:97 Civil Code). As agriculture is mostly a commercial activity, it seems logical to require the farmer to mitigate his damage (art. 6:101 Civil Code) by farming conventional crops in the meantime.

(d) Harm to animals

- 62 If a cow is harmed by feed to the extent that it needs replacement, the cost of such replacement is awarded. The cost of replacement will usually be the market value of the animal in question. The market value will usually reflect its potential for producing milk or meat. The mere fact that an animal eats contaminated feed will – as far as we can foresee – not constitute harm to the animal. It could constitute pure economic loss in the sense that the produce will have a lower market value. If there is liability, such pure economic loss may be compensated within the framework of art. 6:162 and 6:98 Civil Code.

(e) Costs of disposal

- 63 These costs are recoverable within the framework of art. 6:162 and 6:98 Civil Code.

2. Non-compensatory damages

- 64 The Dutch legal system does not avail itself of punitive or exemplary damages.

3. Other remedies

- 65 Art. 6:103 Civil Code gives the court a discretionary power, at the request of the injured party, to award damages in any other form. This enables the imposition of a duty of reparation in kind, provided that is the appropriate remedy in the specific circumstances.

4. Costs of pursuing a claim

(a) General cost rule

The general rule is a diluted “loser pays” rule: the loser has to pay the costs of the opposing party according to a standardised valuation method. This method does not reflect the true cost of litigation and thus merely compensates to some extent. This standardisation does not apply, however, to pre-trial costs (i.e. all relevant legal costs, expert costs, etc. accrued prior to serving and related to pre-trial legal activities). Therefore, if the court sustains the claimant’s assertion that the defendant is liable vis-à-vis the claimant, then the claimant can also claim reimbursement of these pre-trial costs (art. 6:96 Civil Code). 66

(b) Costs of establishing causation

There are no specific rules concerning the covering of sampling and testing costs. Costs associated with sampling and testing of GMO presence in other products may be considered to be pecuniary loss (art. 6:96 (2) (b) Civil Code) if these costs are accrued to assess damage and liability. Hence, sampling and testing of GMO presence in products constitute part of the loss suffered by the injured party. Such costs may even be recoverable under tort law – even if the test does not prove actual GMO presence – provided that the liability of the GMO farmer is established. For example: a farmer has used some GMO in his crops in breach of a statutory ban, and consequently the GMO crop is suspected of having contaminated other crops of an adjacent farmer. The farmer pays for testing his crop and he claims the cost of these tests from the GMO-farmer. The test reveals that no admixture has occurred and customers have continued purchasing the products of the claimant. Hence, the farmer does not suffer any damage, but the GMO farmer is still liable for breach of a statutory provision. If the test proves GMO presence but no admixture, the respondent GMO farmer can be held liable for the expenses incurred in connection with the test. The basis for this claim is art. 6:96 Civil Code: the claimant is to be reimbursed for the reasonable cost of assessing liability and possible damage even if the wrongful act turns out not to have caused damage.²¹ 67

²¹ See HR 11 July 2003, NJ 2005, no. 50.

5. Advance cover

- 68 There is no general or specific statutory duty on “operators” to take out liability insurance, although specific public law legislation does enable local authorities to oblige some operators to take out some form of insurance or a bank guarantee for clean-up costs related to ultra-hazardous activities.²² In practice, this does not seem to apply to GMO-farmers.

IX. Cross-border issues – Conflict of laws

1. Conflicts rules applicable before (or instead of) Rome II

- 69 To a large extent, the Dutch conflict law regime concerning cross-border GMO torts is identical to the Rome II Regulation. From a formal point of view, there seems to be one big difference between these two regimes. The Dutch 2001 Conflict of Laws (Tort Cases) Act (*Wet conflictenrecht onrechtmatige daad*, WCOD, Stb. 2001, 190) starts from the *lex loci delicti* rule (with a number of exceptions) whereas the Rome II Regulation seems to start from the *lex loci damni* rule (again with a number of exceptions). In practice, the differences between the two regimes will not be very substantial, with the exception of environmental damage. Art. 7 Rome II Regulation gives the victim of environmental damage the option to choose from (at least) two legal systems, whereas art. 4 of the WCOD exclusively points to the *lex loci damni*.²³

2. Special regime for cross-border claims

- 70 We are not aware of any such special regime, apart from the private international law regime under the 1973 Hague Convention on the Law Applicable to Product Liability.

22 Besluit financiële zekerheid milieubeheer, in: Staatsblad 2003, no. 71, based on art. 8.15 Wet milieubeheer.

23 On the conflict between the WCOD and the Rome II Regulation, see, e.g., L. Strikwerda, Van ‘lex loci delicti’ naar ‘lex loci damni’, Weekblad voor Privaatrecht, Notariaat en Registratie (WPNR) 2008, no. 6780, 993 ff.

X. Cases

- 1. Due to the adventitious presence of GMOs in a field, maize which is normally sold as conventional contains GMOs beyond the legal labelling threshold. This is not discovered before the final stage of the food production chain by the producer of taco chips. The whole production is lost since the supermarket chains refuse to accept delivery from the producer.**

(a) Who can sue along the chain of distribution?

Assuming that the supermarket chain is allowed to refuse the delivery, the producer of taco chips may try to claim compensation from his counterpart (in contract) or any of the previous links in the chain that can be held accountable (in tort).²⁴ Although the damage sustained by the taco producer is in part purely economic, this as such does not preclude liability in tort. If any of the businesses in the production chain was aware of the problem or should have had procedures in place that could have prevented the distribution and processing of the maize (e.g., arrival and/or exit inspections), then the taco producer may state a claim on the basis of negligence (“conduct contrary to the unwritten standard of conduct seemly in society”; art. 6:162 Civil Code; see supra no. 30). Note that, as a rule, the links in the trading or production chain are not responsible in tort for acts and omissions elsewhere in the chain. 71

The mere fact that the legal labelling threshold was surpassed may in itself constitute a breach of a statutory duty owed by the farmer to the taco producer. Whether the duty was indeed owed to the producer depends on statutory interpretation and the analysis of the protective scope of this specific piece of regulation. In practice, however, this issue seems less decisive as Dutch law avails itself of the broad concept of negligence (“conduct contrary to the unwritten standard of conduct seemly in society”; art. 6:162 Civil Code; see supra no. 30). As a result, even if the scope of the regulation was not intended to protect the producer, a court may still find that the farmer owed a duty of care under this broad concept of negligence. 72

24 Note that the case is not covered by the strict liability of the Product Liability Directive.

(b) Would the case be solved differently if the GMO content was below the labelling threshold?

73 This depends on the specific circumstances: if the taco producer was allowed to expect the raw materials to be fully GMO-free, then obviously something has gone wrong in the production chain and those businesses negligently omitting to implement precautionary measures can be held liable in tort.

(c) Would the case be solved differently if the admixture was not adventitious, but occurred due to the disregard of segregation rules, for example?

74 This may shift the focus from one tortfeasor to another. Again, all depends on the exact facts of the case. These facts will point towards the exact link that failed within the chain. Disregard of segregation rules may constitute negligent breach of the duty of care under the rule of “conduct contrary to the unwritten standard of conduct seemly in society” (art. 6:162 Civil Code; see *supra* no. 30).

(d) Would the case be solved differently if the GMO found was not admitted for production in your jurisdiction?

75 Depending on the exact cause of the admixture, this may shift the focus from one tortfeasor to another. Again, all depends on the exact facts of the case. These facts will point towards the exact link that failed within the chain.

**(e) If the admixture had occurred on a non-GM field and it transpires that the GM seeds were blown from:
(i) neighbouring fields; or (ii) a truck passing by, would the farmer of the affected field be liable for all or part of the loss caused further down the distribution chain?**

76 If we concentrate on tortious liability and exclude possible claims of contractual counterparts, then the question is whether the farmer committed a wrongful act. What did he do wrong? Possibly, he could be held liable if there is a custom among farmers of his kind to perform “exit inspections”.

If not, it seems unlikely that the farmer would be liable for this external cause.

2. **Twenty years after the sale of GM maize used for food products, it turns out that it has certain disadvantageous health effects for humans.**
 - (a) **Can the producers be held liable at this point for risks unknown at the time of growing the maize? Who would be liable – the seed producer/farmer/food producer/distributor/ etc?**

This is ultimately a matter of interpretation of the Product Liability Directive, specifically the “state of the art” or “development risk” defence. At face value, it seems unlikely that risks unknown at the time of distribution of the produce into the trade chain will be imputed to any of the links in the chain. 77

- (b) **Can compensation already be claimed at a point when the negative health effects have not yet materialised, but are expected to according to scientific expertise/mere rumours?**

This is ultimately a matter of interpretation of the Product Liability Directive, specifically the “state of the art” or “development risk” defence. At face value, it seems that scientific expertise may be decisive in shifting the development risk from the consumer to the chain. 78

- (c) **Would it make any difference if the GM maize had only been in use for feed, causing harm to the animals, which may or may not cause harm to humans consuming the meat as well?**

If we interpret the question to be one of scientific uncertainty concerning causation of health impairment, this would be an obstacle for the consumer’s claim to compensation. In principle, the consumer has to prove causation (art. 6:188 Civil Code = art. 4 Product Liability Directive). 79

3. **The driver of a food logistics company discovers that a farmer, from where he regularly picks up agricultural products fails to obey mandatory segregation rules or food or feed hygiene standards, which may lead to the admixture of GM and non-GM produce sold and packaged separately by that farmer. Does he or his employer have a duty to warn, i.e. warn the recipient of the allegedly “non-GM” produce?**
- 80 As a rule, the mere fact that someone has knowledge of failure to comply with specific regulation does not put him under a duty to inform other interested parties. Assessing the existence of a duty to warn under the rule of “conduct contrary to the unwritten standard of conduct seemly in society” (art. 6:162 Civil Code) involves a number of factors. According to case law, a great many factors determine impropriety in any concrete case, e.g., foreseeability of the loss (also described as the chance of a loss occurring as a result of the act), the degree of blameworthiness, the costs of avoiding the loss, the nature of the damage, and the relationship between the injured party and the injurer.²⁵
- 81 It seems obvious that if concrete lives are at stake, the duty to warn or even intervene is more likely to arise than if there is a mere commercial interest at stake.

25 Most of these criteria originate from the landmark decision HR 5 November 1965, NJ 1966, no. 136. See further on the subject: *J. Spier*, *The Netherlands – Wrongfulness in the Dutch Context*, in: H. Koziol (ed.), *Unification of Tort Law: Wrongfulness* (1998) 94 f.