

THE IMPACT OF
INSTITUTIONS AND
PROFESSIONS ON LEGAL
DEVELOPMENT

VOLUME 8

Edited by
PAUL MITCHELL

 **CAMBRIDGE**
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Mexico City

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9781107019003

© Cambridge University Press 2012

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without the written
permission of Cambridge University Press.

First published 2012

Printed and bound in the United Kingdom by the MPG Books Group

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data

The impact of institutions and professions on legal development / Paul Mitchell.
p. cm. – (Comparative studies in the development of the law of torts in Europe ; v. 8)
Includes bibliographical references and index.

ISBN 978-1-107-01900-3 (hardback)

1. Torts—Europe—Interpretation and construction. I. Mitchell, Paul, 1972–
KJC1640.I47 2012
346.403—dc23
2012003082

ISBN 978-1-107-01900-3 Hardback

Only available as

ISBN 978-1-107-02311-6 3-volume set

Cambridge University Press has no responsibility for the persistence or
accuracy of URLs for external or third-party internet websites referred to in
this publication, and does not guarantee that any content on such websites is,
or will remain, accurate or appropriate.

The impact of institutions and professions in the Netherlands

ESTHER ENGELHARD AND IVO GIESEN

I The impetus to reform tort liability

The current Dutch legislation and rules regarding fault liability are basically a product of case law, indirect influences such as academic writings and legal practice left aside.¹ This may seem remarkable as legislation is the primary source of law in the Netherlands: constitutionally legislation is formed by the Government and approved by Parliament.² Courts give applications of the law. From that perspective, one might expect legal developments to be governed and led substantively by statutory provisions and *iudex est lex loquens*: the court as the mere *bouche de la loi*.³ But in reality the development of fault liability has always been left to the judiciary, albeit within the elastic frame of an open statutory ruling. This can best be illustrated by focussing on the legal development

¹ W. H. D. Asser, 'Over rechtsvorming door de Hoge Raad' (2005) *Ars Aequi* 223, 224. Cf. the general observation by C. C. Van Dam, *European Tort Law* (Oxford: University Press, 2006), no. 607-2 (p. 121) that 'tort law is mainly case law which implies that the power of developing this part of the law has been with the courts rather than with the legislator'. See more generally for the field of private law J. B. M. Vranken and I. Giesen, *De Hoge Raad binnenstebuiten* (Den Haag: Boom Juridische Uitgevers, 2003), p. 6.

² Article 107, s. 1 of the Constitution (*Grondwet*) holds that civil law, civil procedural law, criminal law and administrative law are ruled by general law books and (only) specific topics may be dealt with in specific legislation. See on this I. Giesen, 'Codificatie en dynamiek in het schadevergoedingsrecht' in J. M. B. Vranken and I. Giesen (eds.), *Codificatie en dynamiek: Instrumenten ter begeleiding van de omgang met codificaties* (Den Haag: Boom Juridische Uitgevers, 2004), p. 139 (p. 142).

³ We are using this metaphor as it is generally understood, free from historical interpretations. Notably, R. Foqué, 'Evenwicht van machten en rechtsstatelijke vernieuwing' in A. Alen and L. J. Wintgens (eds.), *De Trias Politica ruimer bekeken, Staatsrechtconferentie 1999 Vlaamse Juristenvereniging* (Brussel: Larcier, 2000), p. 1 (pp. 3-4) argues this 'one-liner' tends to be misinterpreted so as to characterise Montesquieu as a too absolute legist ('statute fetishism', p. 14).

of the concepts of fault and unlawfulness; our contribution will focus on the latter. To explain the role of the courts and the legislature in this respect, we must go back to the ruling on fault liability in arts. 1401 and 1402 of the former Civil Code that was put in force in 1838 (hereafter CC (1838)).⁴ First we will discuss how the concept of unlawfulness was given its first meaning in jurisprudence and the subsequent wrestle between the legislature and the judiciary (and how this resulted in the landmark judgment of *Lindenbaum v. Cohen*). Then we will point to factors that have led to its codification in the current Civil Code of 1992 (Section III). In Section IV we will explain how more recently the meaning of unlawfulness was furthered by case law. As an integral part of the discussion we will draw attention to the persons within the judiciary that were particularly influential. In Section V we will face the challenge of unravelling to some degree how judges view their role. After we have looked into regulatory changes that have led to a shift away from fault liability (Section VI), we will end with a summary of our main conclusions.

But first it will be noted that the former Civil Code, the CC (1838), was mostly a 'codification'⁵ of the Napoleonic *Code civil*, which had stayed in force after the French oppression.⁶ Not surprisingly therefore the old arts. 1401 and 1402 were almost a copy of the articles 1382 and 1383 of the *Code civil*. In one important aspect however both sets of rules differed. Article 1382 of the *Code civil* stated that 'any act' caused by someone's fault (*faute*) made the latter liable to pay damages.⁷ Article 1401 CC (1838) gave the exact same ruling with the exception that – instead of 'any' act – only

⁴ Our report is mostly based on secondary sources: dissertations and other (legal historical) writings of authoritative lawyers, including non-judicial writings of persons that had a central role in the topic of discussion themselves.

⁵ For our purposes this 'Benthamian' expression means no more than written law with exclusive meaning (to be interpreted by courts). For a refined analysis of the term, see J. H. A. Lokin and W. J. Zwalve, *Hoofdstukken uit de Europese Codificatiegeschiedenis* (Den Haag: Boom Juridische Uitgevers, 2006), I.

⁶ After the French occupation (1795–1815) hardly any account was given of earlier existing customary law: see J. Drion, *Verzamelde geschriften van J. Drion* (Deventer: Kluwer, 1968), p. 12. Out of hatred towards the French occupier (A. Pitlo, *Het Verbintenissenrecht naar het Nederlands burgerlijk wetboek*, 5th edn (Haarlem: Tjeenk Willink, 1961), p. 23) the Dutch made their own code, albeit a mere copy of the French one.

⁷ Article 1382 *Code civil*: 'Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.' In relation to this, art. 1383 *Code civil* specified 'any act' as either active acts or mere negligence. G. E. van Maanen, ... *om te doen ophouden de menigvuldige twistgedingen: Opmerkingen omtrent de historische*

'unlawful' acts gave rise to liability.⁸ Van Maanen has shown how in the words of the legislature, in the explanatory memorandum, this new element of unlawfulness served: 'to end the many disputes that article 1382 of the French Civil Code has brought about; as it goes without saying that not any act that causes damages gives ground for compensation; only the unlawful nature of the act can bring this about'.⁹ In reality there had only been a few actual legal proceedings.¹⁰ Clearly this statement was a product of its Enlightenment time: the element of unlawfulness was expected to clarify the law and subsequently to *limit* the number of cases. Ironically, in reality adding this vague element to the ruling of fault liability by itself opened new doors for an endless body of legal disputes and case law. New interpretations of the concept of unlawfulness were used to create new results in a changing society with its modern risks.¹¹ As a result court decisions were gradually given more weight as an autonomous and separate new source of law in this field.

II The judicial change: the courts' contribution to reforming fault liability

Certainly in the first century after 1838 courts had fewer *guidelines* to enable them to give meaning to the concept of unlawfulness. To some degree they could consult earlier published case law.¹² Prior judgments in other cases were (and are) not binding, but the Supreme Court is generally

achtergrond van de onrechtmatige daad (Nymegen: Ars Aequi Libri, 1995) p. 27 argues that the distinctive factor was the actor's intention (which had to be either careless, intentional or something in between).

⁸ Article 1401 CC (1838) (our translation): 'Any unlawful act that causes damage to another obliges the person by whose fault this was caused to compensate damages.' Similar to the French art. 1383 *Code civil*, art. 1402 CC (1838) ensured this not only covered active acts but also mere negligence.

⁹ Our translation; as cited by Van Maanen, *Opmerkingen*, p. 40 ('om te doen ophouden de menigvuldige twistgedingen, welke art. 1382 van het Franse Wetboek heeft opgeleverd; daar het van zelf spreekt, dat elke daad die schade veroorzaakt, geenen grond tot schadevergoeding oplevert, en dat de onregmatigheid der daad daartoe alleen kan aanleiding geven', taken from J. J. F. Noordziek, *Geschiedenis der beraadslagingen gevoerd in de Tweede Kamer der Staten Generaal, over het ontwerp Burgerlijk Wetboek*, 2 vols., Vol. II (The Hague: Nijhoff, 1878), p. 531).

¹⁰ *Ibid.*, pp. 42–43.

¹¹ E.g. the risks inherent to industrialisation: the capitalist market based on competition with, more recently, innovative technical modifications and globalisation.

¹² Originally only a number of judicial decisions from the Supreme Court (then Hoog Gerechtshof) were collected and later published, but from 1839 onwards many more

followed by lower courts as it is its role to examine whether the lower court has observed a proper application of the law in reaching its decision and to promote unity of the law.¹³ If lower courts do not follow the Court's jurisprudence, their decisions will most likely be quashed in the last instance. Second, various public law rules and regulations (e.g. criminal law, administrative law etc.) give legislative indications that behaviour was or ought to be unlawful. Needless to say, particularly in the nineteenth and early twentieth centuries the scope and meaning of regulatory rules of conduct were modest compared to today. Also case law (prior to 1838) and academic writings were not clear on the matter. The Supreme Court held at one point that 'unlawfulness' meant no more than that any legal ground or justification for harmful behaviour was missing,¹⁴ but that still left the courts with great discretion to give meaning to the concept of unlawfulness.

In the legist *second* half of the nineteenth century the Civil Code was perceived to be the only source of law in this area; the judiciary merely dealt with its ambiguities.¹⁵ Florijn cites lawyers (including the president of the Supreme Court) who claimed that further development of the law was not for the judiciary but rather for the legislature (in the full acknowledgment that the latter was subjected to a political slow-down).¹⁶ This legist approach is also said to have influenced the courts' interpretation of the concept of 'unlawfulness' as meaning: against *written* law.¹⁷ In the famous *Singer v. Ivens* case the Supreme Court held that only careless behaviour that violated written rules of conduct and violations of plaintiffs' subjective rights could give rise to fault liability.¹⁸ This case was

courts' decisions were published on a larger scale in the 22 editions of *Nederlandsche Regtspraak*. This latter project ended in 1913 and was followed by the (still existing) weekly editions of *Nederlandse jurisprudentie (NJ)* and other written periodicals, and more recently internet portals, of which the main one is www.rechtspraak.nl.

¹³ In most cases it is possible to contest the Court of Appeal's decision by appealing in cassation to the Supreme Court of the Netherlands.

¹⁴ This was shown by Van Maanen in his Ph.D. dissertation of 1986, published as G. E. van Maanen, *Onrechtmatige daad: Aspecten van de ontwikkeling en structuur van een omstreden leerstuk* (Kluwer: Deventer 1986); and again in Van Maanen, *Opmerkingen*, pp. 14ff.

¹⁵ E. M. Meijers, 'De Honderdjarige burgerlijke wetgeving' in *Verzamelde privaatrechtelijke opstellen*, 3 vols., Vol. I (Leiden: Universitaire Pers Leiden, 1954), pp. 137, 141 (speech originally published in 1939).

¹⁶ E. O. H. P. Florijn, *Onstaan en ontwikkeling van het nieuwe Burgerlijk Wetboek*, (Maastricht: UPM, 1994), pp. 65 and 67.

¹⁷ W. L. P. A. Molengraaff, note discussion regarding *Lindenbaum v. Cohen* *Weekblad van het Recht* (1919) 10365, 2-3, p. 3. See also G. E. van Maanen, *De Zutphense juffrouw en de ontrouwe bediende van Lindenbaum* (Nymegen: Ars Aequi Libri, 1995) p. 13.

¹⁸ Although in some cases negligence liability was accepted based on art. 1402 CC (1838).

on unfair competition,¹⁹ but also in other cases the Court's restrictive approach led to remarkable results. In the so-called *Zutphen neighbour* case, the defendant, who lived above the storage house where there was a water leak, had refused to shut down the main water supply, saying it was midnight and she needed her sleep. As a result the plaintiff was not able to prevent his property from being ruined by the water leak. The defendant had not violated any law by refusing to turn off the water supply, nor had she (directly) violated the plaintiff's property. She had merely been negligent for refusing to help him when she could. But following the approach taken by the Supreme Court mere negligence was not enough to establish unlawfulness.²⁰

In a noteworthy discussion on how to revise private law, Gratama and Loder, two of the Justices that had ruled the *Zutphen neighbour* case, objected a few years later to the idea that courts could freely interpret the law; the contemplation or rethinking of the law should be left for the legislature.²¹ In non-judicial writings a third Justice on this case, Eyssell, the conservative president of the private law chamber of the Supreme Court from 1886 to 1912, expressed firmly his 'true dislike' towards a wider approach. Interestingly, Eyssell *did* call the result of the case unattractive. But accepting that by mere carelessness persons or companies could act unlawfully would negatively affect the freedom of competition (and subsequently the economy). He also objected to labour law protection and to leaving all fault cases to lower courts: the Judiciary's chair should not be taken by idealists.²² But there were also other voices. In a famous article in 1887 Molengraaff favoured a less narrow view regarding article 1401 CC (1838) so that the law would offer more protection against unfair competition.²³ After the *Singer* judgment and the *Zutphen neighbour* judgment

¹⁹ Copying American Singer stitching machines was not unlawful as no statutory duty was violated; HR 6 January 1905, *Weekblad van het Recht* 1905, 8163 (*Singer v. Ivens*). See Van Maanen, *De Zutphense*, p. 31.

²⁰ HR 10 June 1910, *Weekblad van het Recht* 1910, 9038 (*Zutphen neighbour*).

²¹ Cited by Florijn, 'Onstaan', 69, with reference to *Handelingen NJV* 1912, pp. 114ff. and p. 146.

²² A. P. Th. Eyssell, 'Het wetsvoorstel omtrent de onregtmatige daad en de rechtszekerheid' (1911) *Themis* 568, 597-598. Van Maanen has shown this in earlier profound studies, *inter alia*. Van Maanen, *De Zutphense*, p. 38.

²³ W. L. P. A. Molengraaff, 'De "oneerlijke concurrentie" voor het forum van den Nederlandschen rechter' (1887) *Rechtsgeleerd magazijn* 373, 386 (earlier was G. Belifante, 'Wat is onrechtmatige daad en wat is schuld, volgens art. 1401 B.W.', *Themis* 1865, p. 341; see Molengraaff, note discussion regarding *Lindenbaum vs. Cohen*, p. 2).

many lawyers supported Molengraaff's views.²⁴ It was felt that the outcome would be more reasonable if *any* negligent act or omission could in principle be qualified as unlawful.²⁵

The weight of these voices led to a legislative proposal, proposed by Minister Regout, which aimed at expanding the meaning of the concept of unlawfulness of art. 1401 CC (1838). The requirement of unlawfulness would, on the basis of this proposal, not only cover violations of written rules or subjective rights but would also cover all acts that were contrary to 'public order, good morality or the care taken by a *pater familias*'. This phrase was made more concise in a new and revised proposal by Minister Heemskerk in 1913. Clearly the legislature sought to alter the restrictive approach followed by the Supreme Court, but before the legislative procedure even started, the Court changed its position. In the landmark case *Lindenbaum v. Cohen* the Supreme Court accepted the more extensive interpretation of the requirement of unlawfulness in art. 1401 CC (1838).²⁶ This case dealt with a printer named Cohen who had persuaded an employee of the competition (Lindenbaum) to give him the price quotations for potential customers. As a result Cohen was able to offer lower prices. At that time there was no statute to sanction this behaviour; still the district court thought it unlawful, but the Court of Appeal quashed this judgment. Following the earlier line of case law it held that only those acts that are in violation of a written rule can be unlawful. The Supreme Court took the view that this restrictive approach was supported '*neither* by the words of art. 1401 *nor* by the legislative notes underlying it'. An unlawful act is 'an act or omission that is in violation of a subjective right *or* in violation of a legal duty imposed on the defendant *or is contrary to the norms of proper social behaviour*'.²⁷

The fact that in earlier years the then president of the Supreme Court, Eysell, had worded his aversion to a wide interpretation of the element of unlawfulness rather strongly makes the proposition by Van Maanen likely, that the judgment in *Lindenbaum v. Cohen* was made possible by the fact that Eysell was no longer in post.²⁸ But what had made the Supreme Court change its mind is not entirely clear. The Court hardly explained this, and extra-judicial writings are exceptional in the Netherlands: the

²⁴ Molengraaff, note discussion regarding *Lindenbaum vs. Cohen*, p. 2 (with many references) claims these supporters were 'young' academics.

²⁵ Molengraaff, 'De "oneerlijke concurrentie"', 24.

²⁶ HR 31 January 1919, *NJ* 1919, 161 (*Lindenbaum v. Cohen*).

²⁷ *Ibid.* (our italics).

²⁸ Van Maanen, *De Zutphense*, p. 47.

Court as such decides the case and individual views of the Justices can rarely be found. Clearly the great number of opponents of the narrow view had put pressure on the Court. Surely its decision reveals to some degree how the authoritative Justices on the case viewed their role. In Florijn's study we have also found the statement made prior to this case by one of its Justices, Feith, that in his view courts *had* a role to play in the development of the law.²⁹

III The extent and importance of legislative change

Owing to this changed point of view of the Supreme Court, following the broader concept of unlawfulness, the heat was taken out of the prior legislative proposal by Heemskerk. The *Lindenbaum v. Cohen* ruling was applauded by those who thought it was impossible for the legislature to regulate the entire legal community (under the *Singer* case law the unlawful character of the act needed to be based on the violation of a written rule or subjective right).³⁰ But critics argued that the Supreme Court had overstepped its boundaries by coming to a result that the legislature, by adding the requirement of unlawfulness next to fault, had clearly not wanted. To Kappayne van de Coppello, former advocate and member of the Senate, this had been a result of the poor state of the Civil Code that forced the legislature to revise it. It was he who, in 1919, right after and with reference to *Lindenbaum v. Cohen*, first initiated this.³¹ Since the turn of the nineteenth century, there had been many voices that the CC (1838) was not suited for the changed, industrialised society and its new social needs, especially in other fields of law such as labour law and rent law.³² The CC (1838) was known for its many lacunae, and together with the many unclear writings and contradictions of the Code this prompted further calls to have these deficiencies eliminated by a governmental committee, led by Kappayne. Several years before, in 1880, the then Minister of Justice, Modderman, had formed another governmental committee to draft a new Civil Code (formally the initiative to create new legislation is taken by the Government or by Parliament). But this project, though supported by the most prominent legal periodical, *Weekblad van het Recht*,

²⁹ Florijn, *Onstaan*, p. 69.

³⁰ Molengraaff, note discussion regarding *Lindenbaum vs. Cohen*, p. 3: 'those, to whom striving for laying down the entire law in the Civil Code is delusional, will welcome this decision that allows harmful acts to be judged by unwritten law as well' (our translation).

³¹ Florijn, *Onstaan*, p. 74.

³² Meijers, 'De Honderdjarige burgerlijke wetgeving', p. 140.

never saw the light of day.³³ Similarly the committee led by Kappeyne, later by Limburg, failed to make the necessary changes. Even further went the plea, at the celebration in 1938 of the 100th anniversary of the Code, by former advocate and prominent Leiden professor Eduard Meijers for a complete recodification of the Code.³⁴ Meijers argued that as a result of the many lacunae and technical ambiguities in CC (1838), the law was formed by the judiciary. In his view this caused a lack of uniformity as well as legal uncertainty.³⁵ An argument for this could also be found in the Constitution, as it obliged the State to codify the law.³⁶ But the other speakers at the celebration felt that a recodification was impossible and preferred to leave it to the judiciary to deal with the lacunae of the existing Code. One of them was Scholten, Meijers' colleague at the University of Amsterdam. He claimed that the quest for a new Civil Code could only be political.³⁷

Because of the Second World War, the decision was left to rest. In 1940 Meijers (along with all 2,500 Jewish civil servants in our country, among which there were 41 professors and the Chief Justice of the Supreme Court) was suspended, and two years later he was arrested and transported to Westerbork. In these years Meijers managed to continue some of his academic work, which even included certain drafts for a new Civil Code. After the war, in 1945 he came back to Leiden and started to work again. According to another great lawyer of that time, the Amsterdam law professor Pitlo (who was later found controversial because of his alleged anti-Jewish beliefs), the postwar legal practice and enterprises were not at all in favour of a recodification because of the legal uncertainty this would bring.³⁸ But in the spirit of 'rebuilding the nation' the old criticism in the legal arena finally found political gain.³⁹ Also other factors seem to

³³ Drion, *Verzamelde geschriften*, p. 12; Florijn, *Onstaan*, pp. 52 and 54; V. J. A. Sutö, *Nieuw Vermogensrecht en rechtsvergelijking: Reconstructie van een wetgevingsproces (1947-1961)* (Den Haag: Boom Juridische Uitgevers, 2004), p. 1, n. 1.

³⁴ Meijers, 'De Honderdjarige burgerlijke wetgeving', p. 139.

³⁵ *Ibid.*, p. 141.

³⁶ Drion, *Verzamelde geschriften*, p. 11.

³⁷ P. Scholten, 'De codificatie-gedachte vóór honderd jaar en thans' in P. Scholten and E. M. Meijers (eds.), *Gedenkboek Burgerlijk Wetboek 1838-1938* (Zwolle: W. E. J. Tjeenk Willink, 1939), p. 30. This is also noted by Florijn, *Onstaan*, p. 101.

³⁸ Pitlo, *Het Verbintenissenrecht*, p. 32.

³⁹ *Ibid.*, p. 22 mentions the postwar sentiment as a substantive argument for recodification. Florijn, *Onstaan*, p. 97 warns this should not be given much weight as such but rather as a circumstantial cause. His study shows the real reasons came from the technical dissatisfaction with the old Code.

have played a role, such as the dissatisfaction with the Supreme Court's role during the war.⁴⁰ A member of the Senate requested in 1947 that the Minister of Justice have the Civil Code 1838 fully revised or even have a new Code drafted by Meijers for the reason that the former was outdated, given the great social changes.⁴¹ Drion, who later played a leading role in the codification process, referred to the role of politicians in those days as the 'pushing power' in drafting the new Code.⁴²

In 1947 Meijers was assigned the task to draft a complete codification. He was assisted first by Drion, then Franken. The (then) Minister of Justice, Van Maarseveen, felt that owing to the CC (1838)'s obsolete rules and deficiencies, written law would gradually be overridden by lawyers' law. He shared Meijers' concerns that it was unfit to deal with society's complexities and would result in legal uncertainty. It would suffice to make the old code more coherent and to codify case law.⁴³ The purpose was a thorough technical revision to make clear what the law was again. It would then be for the judiciary to apply and interpret the law, not to make it. The recodification of the Civil Code is seen as the largest and most ambitious Dutch legislative project of the twentieth century,⁴⁴ but Meijers' working method was strikingly simple. He used the old Code, reformulated the rule and examined whether it had to be maintained for practice. If so, he studied it and if necessary he codified existing case law. For specific legal matters he sought the opinion of experts and if they differed internally he asked Parliament. Other national laws were studied and incidentally used as a source of inspiration.⁴⁵ Meijers' drafts were critically assessed by a committee of about ten academics and legal practitioners.⁴⁶ For each topic two of them were approached: one to report and comment and another

⁴⁰ Generally it was felt the Supreme Court had been disappointing as it had not protested in any way or even raised any argument in its decisions against the undermining effects of the occupation on our law system.

⁴¹ W. G. Belinfante, 'De Totstandkoming van het Nieuwe Burgerlijk Wetboek' in *Het Ontwerp B. W. Voordrachten gehouden op het Landelijk Congres 1961 voor Juridische Faculteitsverenigingen* (Deventer: Kluwer, 1961), p. 35. Cf. Sutö, *Nieuw Vermogensrecht*, p. 1 (with reference to the *travaux préparatoires* (Part I. *Algemeene. Deel*), p. 1).

⁴² Drion, *Verzamelde geschriften*, p. 18. His brother, H. Drion, Professor of Law in Leiden, was from 1969 onwards Justice of the Supreme Court and from 1981 even deputy chairman of the Supreme Court.

⁴³ Florijn, *Onstaan*, p. 95. Belinfante, 'De Totstandkoming van het Nieuwe Burgerlijk Wetboek', p. 36 explains the fact that Meijers was asked to draft a new Code for three reasons. First, he was 'the greatest lawyer' of those days in our country, and second, he had been a known proponent of a revision, while lastly he had placed himself at the Minister's disposal for this task. All three reasons are also pointed at by Florijn, *Onstaan*, p. 105.

⁴⁴ Florijn, *Onstaan*, p. 1. ⁴⁵ *Ibid.*, p. 113.

⁴⁶ Belinfante, 'De Totstandkoming van het Nieuwe Burgerlijk Wetboek', p. 37. See also Florijn, *Onstaan*, p. 117.

to criticise the comments made by the former. The results were discussed with special experts who were invited to participate in the discussion. The first draft for the chapter on the law of obligations (Book 6), including the section on fault liability, was finished in 1950.⁴⁷ But there were concerns in Parliament that Meijers would single-handedly make too many choices with regard to the new draft. To ensure his drafts would merge with the wishes of Parliament and therefore gain sufficient political support, Meijers posed questions for Parliament to answer.⁴⁸ Partly based on this, he prepared his final drafts and, reputedly without influence of the Ministry Departments, these were finally sent to Parliament.

Meijers' work had been expected to reach completion in two years. However, partly owing to these lengthy procedures it took a good seven years (at least) to finish the introductory title and the first four books of the new Civil Code.⁴⁹ After Meijers' death in 1954, a committee was appointed to continue this work, despite calls to end the project. It was formed by three active members of Meijers' governmental committee: Leiden professor J. Drion (who as an academic had preferred to be joined by the two latter, *inter alia* given their practical knowledge) and the Advocate-General of the Supreme Court J. Eggens, together with Justice of the Supreme Court F. J. de Jong. They are referred to as the 'Triumvirate' (*het 'Driemanschap'*). Drion was in charge of the tort law section. Attempts were now made to codify the existing case law and doctrine, which made the final drafts of Book 6 look quite detailed and academic.⁵⁰ From the 1970s onwards this process progressed considerably by virtue of the fact that one person, Government Commissioner Wouter Snijders, who was also Justice at the Supreme Court, was primarily in charge of the recodification of Books 6 and 3.⁵¹ Snijders is said to be the *auctor intellectualis* of many legislative notes, including those regarding Book 6, but the provision on fault liability was hardly changed.⁵² Tort law, and the rest of Book 6, passed Parliament in 1980 before they became law in 1992.⁵³

⁴⁷ Florijn, *Onstaan*, p. 107.

⁴⁸ Belinfante, 'De Totstandkoming van het Nieuwe Burgerlijk Wetboek', p. 38. On special topics, for instance notary law, Meijers would consult certain professions (p. 38). See also on this Florijn, *Onstaan*, p. 124.

⁴⁹ How much of the eventual result (our current Civil Code) was actually based on Meijers' work and personal notes is not entirely clear; see Florijn, *Onstaan*, pp. 106ff.

⁵⁰ *Ibid.*, p. 207. ⁵¹ *Ibid.*, pp. 363ff.

⁵² *Ibid.*, 384; and Sutō, *Nieuw Vermogensrecht*, p. 253. Article 6:162 CC has not been changed dramatically compared to Meijers' draft.

⁵³ The same is true for Book 5 and parts of Book 7 of the Civil Code 1992. Book 4 (law of succession) has only been completed very recently, owing to the many objections of the notary profession after its first draft.

The new ruling on fault liability, art. 162 of Book 6 CC, is, dogmatically and in its terminology, different from the text of art. 1401 CC (1838), but it is based on a codification of the existing (case) law and academic writings.⁵⁴ Different from the old provision, art. 6:162 CC defines the requirement of unlawfulness as to include mere negligence, based on the revolutionary change brought about by *Lindenbaum v. Cohen*. Only minor textual changes were made in this respect. In *Lindenbaum v. Cohen* the Supreme Court mentioned both behaviour in violation of good morals *and* behaviour contrary to norms of proper social conduct as separate grounds for unlawfulness. In line with the earlier proposal of Heemskerk,⁵⁵ which never gained force, the legislature has chosen *not* to take over the first part of the criterion as formulated by the Court (violations of good morals: in Dutch *goede zeden*), as in case law this had hardly received any substantive meaning.⁵⁶ As a result, in the words of art. 6:162 CC an act or omission is unlawful if, without justification, it violates the victim's subjective right, or if it breaches a statutory norm, *or* if it is 'contrary to norms of proper social conduct' (i.e. negligent).

What matters more than these exact words is that this third criterion (negligence) leaves it to the judiciary to decide its meaning. In terms of lawmaking it differs substantially from the two other criteria for unlawfulness: violation of a subjective right or breach of a statutory norm.⁵⁷ Surely these latter two criteria need *interpretation* by the courts, but they each have a more concrete and a more definite meaning; they are embedded in statutory norms and treaties that guarantee the protection of personal rights or impose certain duties. Subsequently there is a distinction between the lawmaking tasks of courts regarding these two unlawfulness criteria and the third criterion. The latter requires more than mere interpretation; courts need to create rules that enable them to decide when behaviour is negligent (while for the violation of a subjective right this is to a good degree decided by looking at whether other written norms offer protection of such rights). This seems to run parallel with Meijers' perception of lawmaking, incorporated in the Code. To Meijers, courts must in principle only 'interpret' – that is, in his view, explain – the words and rules found

⁵⁴ For example, it requires that the tortfeasor can be held 'accountable' for his unlawful acts or omissions. This concept of accountability has replaced the old requirement of fault that courts had been determining by objective factors (the test was not 'Was the defendant personally to blame?', but 'What can we expect of the average prudent man in his shoes?').

⁵⁵ See above, p. 147. ⁵⁶ *Parl. Gesch.*, Book 6, pp. 614 and 617.

⁵⁷ E. Engelhard, 'Toerekening van een onrechtmatige daad' (2000) *NTBR* 514, 514ff.

in written law (what does 'subjective right' mean, does the injunction to give priority to traffic members on a major road include pedestrians?). But for matters that are too difficult to capture by written rules, courts must be given room to create new rules themselves through the use of legal terms or phrases in the Code that have no definite meaning, such as the phrase 'contrary to norms of proper social conduct'.⁵⁸ By introducing many open norms such as these, the legislature, as principal lawmaker, enables courts to decide cases freely based on their appreciation of the facts and circumstances.⁵⁹ Based on this idea of 'free lawmaking' the Civil Code has many examples of such open norms next to the third criterion for unlawfulness, compared to the CC (1838). Article 6:2 CC, for example, has replaced art. 1374 CC (1838) by ruling that debtors and creditors are bound not only to contractual agreements and/or the law, but also to the law and to 'good faith standards' (*eisen van redelijkheid en billijkheid*: standards imposed by reasonableness and fairness). A similar rule for contractual obligations was laid down in art. 6:248 CC. While through the use of these open norms the courts are free to make further rules, the legislature has the final say.⁶⁰ But as was said before, in reality, tort law is generally viewed as *de facto* judiciary's law; that means: the courts as a factual lawmaker.

How far the judiciary's role in lawmaking goes compared to the legislature is still debated.⁶¹ The constitution leaves courts room critically to assess written law; it solely prohibits courts to question formal legislation and treaties.⁶² The strict distinction that Meijers made between the interpretations of written rules on the one hand and 'free lawmaking' came from a less steady perception of courts as lawmakers than today.⁶³ But

⁵⁸ J. M. Smits, 'E. M. Meijers (1880–1954)' in C. J. H. Jansen, J. M. Smits and L. C. Winkel (eds.), *Zestien juristen en hun filosofische inspiratie* (Nijmegen: *Ars Aequi*, 2004), pp. 61–74 (p. 64), with further references to J. H. A. Lokin, 'De plaats van Meijers in de legistische traditie' in *Tekst en uitleg* (Groningen: Chimaira, 1994), pp. 143–170, and L. Reurich, 'Pragmatische rechtswetenschap' (2003) *RM Themis* 126–131.

⁵⁹ *Parl. Gesch.*, Book 6, p. 66.

⁶⁰ In art. 3:12 CC Meijers has even – albeit in general terms – laid down *how* courts in their role of 'free lawmaking' should come to their judgment of what is fair or reasonable: 'by taking account of common principles, of Dutch legal views and beliefs and of the public and private interests at stake'.

⁶¹ Asser, 'Over rechtsvorming', 224; and I. Giesen and H. Schelhaas, 'Samenwerking bij rechtsvorming: De instelling van een Periodiek Overleg van Rechtsvormers (POR)' (2006) *Ars Aequi* 159, 159.

⁶² Article 120 of the Constitution (*Grondwet*).

⁶³ S. K. Martens, 'De grenzen van de rechtsvormende taak van de rechter' (2000) *NJB* 747 notes how in the early fifties no mention of any role of lawmaking was made: only of keeping unity and certainty of law, when legislation was proposed to extend the grounds for

even in those days critics argued that both were inseparable, as the 'mere' application of written rules too required a critical assessment and, if needed, *contra legem* decision by the judiciary.⁶⁴ In case law a few, admittedly more exceptional, examples of this can be found: instances where the Supreme Court took the liberty of setting the legal result of a clear-cut rule aside for more fair results. Famous are the cases regarding the prescription of asbestos claims (where the Court first allowed the plaintiff's claim despite the fact that the prescription period had expired) and cases concerning accidents with motor vehicles (where the Court has created serious limitations for principal defences).⁶⁵ Also the Court seems to have accepted proportionate liability: in 2006 an asbestos claim of a smoker was awarded although he had *not* shown that his lung cancer could not have been caused but for the exposure to asbestos (the 'but for' causality test, as read in article 6:162 CC).⁶⁶ Although the results in all these cases were welcomed, the legal doctrine is critical of the idea of courts, or better yet the Supreme Court, deciding cases contrary to what written rules dictate. The judiciary should be neutral and not change the law based on singular cases brought forward by singular parties. It is not equipped to do so and not subject to parliamentary control. Also, the (technical) reasoning by the Court gives hardly any insight into the political choices behind its decisions.⁶⁷

IV Further changes by the judiciary

Before we will explain how the process of 'free lawmaking' has developed further based on the negligence criterion for unlawfulness, it must be noted that the explanatory notes by the legislature did give some indications to help courts to decide the unlawfulness question under art. 6:162 CC. More particularly an important note was made in respect of the first criterion for unlawfulness: violations of a subjective right. The legislature noted that the fact that the defendant has caused property damage or an injury to the plaintiff does not by itself make his or her behaviour

cassation (while much later, in the late eighties, the lawmaking role was mentioned by the Minister).

⁶⁴ Smits, 'E. M. Meijers', p. 65.

⁶⁵ See for example HR 28 April 2000, NJ 2000, 430 (*Van Hese/Koninklijke Schelde*); and on the traffic liability cases see Ernst, *Traffic*, pp. 137-139, and below, p. 158.

⁶⁶ HR 31 March 2006, JAR 2006, 100, LJN AU6092 (*Karamus/Nefalit*).

⁶⁷ See G. J. Wiarda, *Drie typen van rechtsvinding*, 4th edn, ed. T. Koopmans (Deventer: W. E. J. Tjeenk Willink, 2005), pp. 78ff.

unlawful.⁶⁸ This was in line with existing case law. For the rest the legislature left it to case law and academic writings to set the boundaries for this unlawfulness criterion.⁶⁹ Courts were thus faced with many cases raising the question when there was negligence in terms of unlawfulness.

Based on the open formulation of the third criterion for unlawfulness ('contrary to norms of proper social conduct') various sub-rules for various fault cases can be deduced from case law. For this purpose the cases on fault liability have been categorised into various types, dependent on the context in which the damage was caused: for example cases that deal with dangerous operations, cases that deal with professional wrongs, cases that deal with sport activities and the like. These sub-rules must help courts to decide when negligent behaviour in a certain context may or may not be qualified as unlawful. A landmark case in this respect was and is the so-called *Cellar hatch* (*Kelderluik*) case in 1965. In this case a delivery boy of the Coca Cola company had left a cellar hatch open that was close to the toilet in an Amsterdam bar. He had merely placed a few chairs around it, while he was carrying the crates up and down from the cellar and in and out of the bar. Was leaving the hatch open unlawful to the customer (the plaintiff) who, while headed for the toilet, had fallen down and was seriously injured? The Supreme Court laid down criteria by which this question should be answered according to whether the behaviour in question has caused a direct risk to life, body or property.⁷⁰ In remarkably general wordings the Court gave four criteria that need to be taken into account when deciding if negligent behaviour that increases the risk of property or injury damage is unlawful.⁷¹ These '*Cellar hatch* criteria' are even today the leading criteria for courts to decide whether dangerous behaviour may lead to fault liability.⁷²

The Supreme Court has further distinguished between acts that are unlawful and acts that are a mere 'unfortunate matter of events' for which the actor cannot be held liable in law. For example, accidentally hitting a tennis partner in the eye with a tennis ball,⁷³ swinging a branch during a walk with friends in the woods⁷⁴ and making the wrong move while

⁶⁸ *Parl. Gesch.*, Book 6, p. 614. ⁶⁹ *Ibid.*

⁷⁰ HR 5 November 1965, *NJ* 1966, 136 note GJS (*Cellar hatch*).

⁷¹ These criteria are: the probability of this negligent behavior for the victim, the chances that damage would result from this, the seriousness of the result if damage occurred and the costs of taking precautionary measures to avoid damage.

⁷² See for example HR 28 May 2004, *NJ* 2005, 105 note CJHB (*Jetblast*).

⁷³ HR 19 October 1990, *NJ* 1992, 621 and 622 note CJHB (*Tennis*).

⁷⁴ HR 9 December 1994, *NJ* 1996, 403 note CJHB (*Swinging branch*).

moving a heavy cupboard⁷⁵ have been qualified as 'unfortunate matters of events', which means there can be no risk of liability for these acts in similar situations. On the other hand, not warning trainees before roll-blading to wear helmets,⁷⁶ and, after feeding sheep in the vicinity of crops, leaving onion remainders behind that subsequently start rotting and spreading a plant disease⁷⁷ were in the circumstances of the case each qualified as 'unlawful behaviour'. In making these choices, using the *Cellar hatch* criteria, the Supreme Court *in fact* gave directions to society: these cases put a price tag on certain activities. At the same time however these case decisions (with the exception of the *Cellar hatch* case) can hardly be seen as general rules, given that situations are rarely *exactly* alike: a slight difference of the circumstances could lead to a different outcome.

In some other lines of cases the Supreme Court's interpretation of the concept of unlawfulness has gone further; the Court has laid down general rules that have introduced special conditions for fault liability. We will briefly point at the three most common examples of cases: those concerning liability for pre-contractual negotiations, traffic liability and State liability. As far as pre-contractual liability is concerned the legislature left it openly to case law to make law,⁷⁸ although it was never doubted that parties have the right to decide not to continue their negotiations with others. But the Supreme Court has, case by case, created a far-going and rather detailed system of rules regarding different stages of pre-contractual negotiations.⁷⁹ Earlier attempts to create a special rule for this in the Civil Code had failed.⁸⁰ Technically this was brought under the umbrella of fault liability or, as an alternative option, under the general good faith clause, but that was considered of secondary importance. The latter in our view seems indicative of a growing inclination to perceive case law as having to do with what really matters and thus supreme over legislation, which is of a more technical and thus lesser importance. Not because of a lack of a proper legal basis but rather (seemingly) influenced by critical

⁷⁵ HR 12 May 2000, *NJ* 2001, 300 note JH (*Sisters moving a cupboard*).

⁷⁶ HR 25 November 2005, *JA* 2006, 1 (*Skeelers*).

⁷⁷ HR 25 November 2005, *NJ* 2007, 141 note CJHB (*Rotting onions*).

⁷⁸ *Parl. Gesch. Inv.*, p. 1448.

⁷⁹ J. M. Barendrecht, 'Pure Economic Loss in the Netherlands' in E. H. Hondius (ed.), *Netherlands Reports to the Fifteenth International Congress of Comparative Law* (Antwerpen/Groningen: Intersentia Rechtswetenschappen, 1998), pp. 115–135, §3.1; M. R. Ruygvoorn, *Afbreken van onderhandelingen* (Deventer: Kluwer, 2005).

⁸⁰ Meijers had convinced his working committee to draft a rule, but in the continuing process after his death this was decided otherwise; Florijn, *Onstaan*, p. 123 (with references).

voices in literature, the Court is nowadays more reluctant to allow pre-contractual liability.⁸¹

Governmental liability cases form another field of fault liability cases in which the Supreme Court has created special rules that go beyond a mere interpretation of art. 6:162 CC. The Court has shown a miraculous interpretation of the concept of unlawfulness in cases in which the State had operated on good grounds (e.g. by bringing criminal proceedings against a person who cannot be found guilty of the alleged crime or by enforcing a regulation that farmers have to kill stock). Originally in such situations civilians that suffered damages and asked compensation based on art. 6:162 CC would see their claim refused by dint of the fact that the State's operation is not unlawful. But in some of these situations⁸² the Supreme Court has sought ways to circumvent this by arguing, for instance, that based on the principle of *égalité devant les charges publiques* the State should have offered compensation, and the fact that this was not done made its operations unlawful after all.⁸³ Also, administrative decisions that have been quashed in an administrative procedure are without further ado – by that mere outcome of the administrative procedure – regarded as unlawful acts.

The most far-going line of cases that introduced jurisprudential sub-rules in respect of art. 6:162 CC, and that challenge its basic understanding, deals with traffic liability. To explain this we must first briefly touch upon the fact that throughout the 1990s the Supreme Court has (also) laid down a system of *strict* liability that seriously exceeds the protection already offered by the legislature in the statutory ruling (the strict liability laid down in article 185 VVW). Based on this entirely jurisprudential system the owner or keeper of a motor vehicle will always be liable for at least 50 per cent or even 100 per cent of the damages to non-motorised traffic members (cyclists, pedestrians) who were run over, unless the latter acted intentionally or with gross negligence (see, more extensively on this, below, p. 158). In the context of *fault* liability, however, in the reverse situation – in which a motor vehicle is damaged by a non-motorised traffic member (now being the defendant) – the Court has held analogously that

⁸¹ *Inter alia* HR 18 June 1982, NJ 1983, 723 (*Plas v. Valburg*); HR 14 June 1996, NJ 1997, 481 (*De Ruitertij v. MBO*); and HR 12 August 2005, CO4/163HR (*CBB v. JPO*).

⁸² Not always: in the case where a convict who was rightfully sent on leave had committed assaults, the court did not accept the principle of *égalité devant les charges publiques* to back up (indirectly) the fault liability claim vis-à-vis the institution; HR 28 May 2004, NJ 2006, 430 (*Convict on leave*).

⁸³ HR 30 March 2001, NJ 2003, 615 (*Staat v. Lavrijsen*).

the latter can only be held liable based on art. 6:162 CC if he has caused the damage by intent through gross negligence.⁸⁴ As a result, contrary to what art. 6:162 CC promises, mere fault will not entitle the motorist victim to compensation unless he can show the damage was due to intent or gross negligence on the part of the non-motorised defendant. Further, he will only be entitled to *full* compensation if *he* (the plaintiff!) can prove that he has *not* been at fault himself, for example by driving too fast.⁸⁵ It is doubtful, to say the least, whether the court has not overstepped its authority by limiting the motorised victim's right to compensation based on the general art. 6:162 CC to this extent.

Also outside the scope of art. 6:162 CC there have been occasions on which the Supreme Court was criticised in academic writings for having displayed a too far-reaching understanding of its role as lawmaker.⁸⁶ A famous example of this concerns the strict liability of keepers of motor vehicles towards non-motorised traffic members: here, the Supreme Court has reduced the possibility of raising the Act of God and the contributory negligence defences laid down in written law (art. 185 of the Traffic Act and art. 6:101 CC of the Civil Code respectively). The Court used several cases to create a whole new system, holding basically that unless the non-motorised victim was grossly negligent there can be no Act of God or contributory negligence for more than 50 per cent (the so-called '50 per cent rule'). For children below the age of 14 years old, the contributory negligence defence has been set aside by the Court completely: no contributory negligence, unless the child acted intentionally or with gross negligence (the '100 per cent rule'). This extraordinary regime of protection inspired the legislature to draft an even more protective ruling, but this was subject to interest groups and after a few revisions the legislative process was frozen again.⁸⁷

The cases mentioned above are all examples of occasions on which the Supreme Court has created rules that gave a completely new and/or challenging meaning to written liability rules. In general it is its task to judge whether the law has been applied correctly by the lower courts in the

⁸⁴ HR 6 February 1987, *NJ* 1988, 57 (*Saskia Mulder*); HR 4 May 2001, *NJ* 2002, 214 (*Chan v. Maalsté*).

⁸⁵ HR 4 May 2001, *NJ* 2002, 214 (*Chan v. Maalsté*).

⁸⁶ See, in general, Giesen and Schelhaas, 'Samenwerking bij rechtsvorming'.

⁸⁷ E. Engelhard and G. E. van Maanen, 'Een nieuw voorstel verkeersaansprakelijkheid in de maak: De belangrijke - ook minder voorzienbare - consequenties van Korthals' ingreep in het wetsvoorstel Verkeersongevallen' (1999) *VR* 353.

individual case and to promote the development and unity of the law.⁸⁸ To give an accurate picture though we have to admit these examples are of challenging cases; in fact most judgments of the Supreme Court are less innovative and concerned with the specific motivation of concrete judgments. Second, the arguments used by the Supreme Court tend to be rather technical and lack much colour as far as the underlying factual and/or political interests of the legal issues at stake are concerned.⁸⁹ In this respect Vranken and Giesen have pleaded that the Supreme Court puts more weight on its task of furthering the development of the law and promoting unity of law.⁹⁰ But how do the Court or its justices see their task themselves?

V How judges consider their role vis-à-vis the legislature

In general it seems that both the Supreme Court and the legislature do not cross swords.⁹¹ The Court (formally) takes the view that it is its task to do justice and explain the law in individual cases, in a way that promotes legal consistency and coherence. In various instances it has refused to accept legal results that are not consistent with written law or with the systematic or dogmatic choices behind this, because it has felt that it is the role of the legislature to make those changes – even in respect of changes that it thought might be socially desirable.⁹² As said, the three lines of cases that we referred to above thus do not represent our everyday jurisprudence. Rather they are concerned with special areas of law in which the Supreme Court has created new, general rules on top of the existing written framework of open rules. In the examples that we used, this often ran counter to the legal results that would normally have followed from

⁸⁸ J. B. M. Vranken and I. Giesen, *De Hoge Raad binnenste buiten* (Den Haag: Boom Juridische Uitgevers, 2003), p. 5.

⁸⁹ This was also one of the points of criticism mentioned by Vranken and Giesen, *ibid.*, p. 1 in their experiment of having some grand decisions of the Supreme Court rewritten by themselves and a number of other academics.

⁹⁰ *Ibid.*, p. 6.

⁹¹ Giesen and Schelhaas, 'Samenwerking bij rechtsvorming', p. 166.

⁹² In 2002 the court was presented with a dreadful case (HR 22 February 2002, *NJ* 2002, 240 note JBMV) of a mother confronted with the crushed skull of her child, who had been run over by the defendant. Although the court allowed the nervous shock claim, it refused to award damages for 'mere' bereavement (affectionate damages) with reference to the statutory regime by which these damages are excluded. It admitted that this regime might be socially unacceptable ('onvoldoende tegemoet komt aan de maatschappelijk gevoelde behoefte') but it felt it was not for the judiciary to decide how to revise it. See also Giesen and Schelhaas, 'Samenwerking bij rechtsvorming', p. 163.

the written rule (or the system of written rules or rationale behind it). For that reason it has been argued that in doing so it was sitting in the legislature's seat.

Interestingly, even the critics have hardly given any account of the persons that were influential in the development and change of fault liability in the above cases. This seems particularly interesting when the courts are faced with controversial political matters: that is, matters that would require an exercise of power giving direction to society that clearly exceed the interests of two individuals involved in court proceedings.⁹³ To give an example, in the eighties the Supreme Court was asked whether the – politically controversial – decision of the State regarding the stationing of cruise missiles was contrary to rules of international law (and, based on that violation of written law, unlawful). The Supreme Court ruled that it was *not*, but the Advocate-General Mok had argued that NATO's policy to use the missiles to protect peace was a political choice that was not to be judged by the courts in the first place.⁹⁴ Other such cases of a political character have come before the courts, such as claims after strikes and the so-called 'wrongful life' claims, but even those have hardly raised any debate as to the *person* of the judge. The critical notes and discussions concern the outcomes (the judgment of the Court), rather than the persons behind the judgments.

This is not surprising. First, it would not be just if only the judges who decide the case were held (individually) accountable for the outcome; the lawyers arguing the case may in some situations be the real force behind the changes of the law.⁹⁵ Surely it is the judge who decides the outcome. But even then the Dutch court system⁹⁶ works in such a way that decisions are formally given by the court as such, not by personal judgments. In the lower district courts in civil liability law cases the vision of the judge, albeit not necessarily corresponding with his or her personal vision, is clear, as

⁹³ Cf. J. Bell, *Policy Arguments in Judicial Decisions* (Oxford: Clarendon Press, 1983), pp. 6ff.

⁹⁴ HR 10 November 1989, *NJ* 1991, 248 (*Cruise missiles*).

⁹⁵ Vranken suspects the influence of lawyers who argue their clients' cases on the development of the law is underestimated; J. B. M. Vranken, *Mr C. Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk Recht Algemeen Deel: Een vervolg* (Deventer: Kluwer, 2005), no. 20.

⁹⁶ The Netherlands is divided into 19 legal districts (areas in which several local communities are united), each with its own court. The districts are divided into 5 areas of appellate jurisdiction, each with its own Court of Appeal. These courts re-examine the facts of the case and will give a new, independent judgment in second instance.

this will be in principle the one judge deciding the case.⁹⁷ However, more complex district court cases will be ruled by three judges. Although their names will be mentioned under the judgment there are no deliberations or opinions from the judges separately or in their professional person as such; these only come from the court as such. Also cases that come before the Courts of Appeal will be ruled by three judges. In (the Civil Chamber of) the Supreme Court claims are adjudicated by five or three justices (*raadsheren*), depending on the degree of difficulty and the legal and social importance of the case, but there we do see the (often extensive and more often than not followed) advice of the Advocate-General, preceding each judgment.

There have been examples of judges giving quite extrovert views on legal issues within their authority as a judge but this is (and always has been) quite exceptional. We mentioned the name of Eyssell (see above, p. 146) as one of the driving forces behind the restrictive approach initially taken by the Supreme Court, in the *Singer* case in 1905 and in the *Zutphen neighbour* case in 1910. As said, Eyssell was a conservative lawyer and the president of the Dutch Supreme Court. In 1911, while still head of the Supreme Court, Eyssell published an article in a high-quality legal periodical in which he made strong arguments against the legislative proposal to opt for a wider concept of unlawfulness, a private law disaster as he called it.⁹⁸ In this article he advocated the restrictive approach by which mere negligence was not sufficient to found tort liability *in person*. The arguments for this were supported by his conservative political beliefs: if unfair competition was not in violation of any written law and was nevertheless sanctioned with civil liability, this would affect all competition and harm economic growth.⁹⁹ As we explained above this makes Van Maanen's view likely that it could only have been after Eyssell had left the Supreme Court, in 1919, that the court gave its ruling in *Lindenbaum v. Cohen*, in which the Court opted for a more extensive concept of unlawfulness.

As we have also shown above, this latter decision (in the case of *Lindenbaum v. Cohen*) seems to have been influenced by academic writings. However, it is difficult to know whether and how personal contextual circumstances or the system as such may have influenced the case law development of fault liability as described above. As far as fault liability is

⁹⁷ More particularly this will be so if the case is decided by the so-called sub-district sector. This deals with cases concerning rent, employment and hire purchase, as well as claims for civil liability below €5,000 (€28,000 as of July 2011).

⁹⁸ Van Maanen, *De Zutphense*, p. 38.

⁹⁹ *Ibid.*, 39. See also above, p. 146.

concerned we can only speculate as to whether there is any influence at all. With regard to the personal contextual circumstances this is extremely difficult to grasp, as factors such as the judge's social and religious background, political preference and individual way of life are hardly known or found relevant.¹⁰⁰ As far as training is concerned, judges are trained and promoted separately from attorneys and, once in the job, there is a system where, if a judge sits in the civil section, as is the case at most courts, he can only do so for a number of years. Judges then generally will be asked to move to a different section of the court.

Rather than speculate on this we would like to point at three more general factors that seem to be of influence. First, there might be an influence – namely strengthening the meaning and role of the judiciary – coming from the fact that from 1913 onwards case law was systematically published and annotated. Second, developments with regard to the limited grounds for cassation may influence the role and position of the judiciary.¹⁰¹ For example, originally this did *not* include situations where the legal grounds that the court used in the motivation of its decision could not have the legal result as envisaged by the court.¹⁰² But currently it recognises motivations that are incomprehensible as a ground for cassation as well. A third factor of influence regarding the role and position of the judiciary may be the changing style of judicial decisions. Over the last century the Supreme Court has made a shift from the concise – French-style – model to the more elaborate – German-style – model of court decisions.¹⁰³ This is not just in the *number* of words: a change of style can also be noticed with regard to the content of the decisions.

VI Regulatory changes

A *The importance of 'regulatory change'*

It must be noted that during the period studied legislation and regulations seem to have gained importance, although this is not special to liability

¹⁰⁰ C. J. J. M. Stolker, 'De politieke rol van de rechter in het burgerlijk recht' in M. G. Rood (ed.), *Recht en politiek: Nationale en internationale beschouwingen* (Zwolle: Tjeenk Willink, 1993), pp. 53–83.

¹⁰¹ Grounds for cassation are either procedural mistakes by the court (*error in procedendo*) or violations of substantive rules (*error in iudicando*).

¹⁰² L. E. H. Rutten, 'De cassatiegronden van art. 99 RO en de motiveringsplicht' in *Rechtspleging* (Deventer: Kluwer, 1974), pp. 237, 239.

¹⁰³ Van Dam, *European Tort Law*, no. 607.

law. Over the last two centuries several parts of civil liability law have been removed from the scope of fault liability. The fault liability rules in those areas were then replaced by stricter forms of liability or even ruled by forms of public regulation and/or (mandatory) insurance systems. Below we will discuss some of those areas briefly. In most areas, however, we see combinations of systems, as Dutch basic compensation comes from social security rules (and liability law therefore only offers special protection as a 'second layer of protection'). Fault liability is thus operative next to a form of no-fault liability and certain types of social and/or private insurance as well as private or public law funds and regulations.

A good example of this is the recovery of damages caused by workplace injuries. This part of law is to a great extent governed by statutory rules on public and/or private insurance and liability law. The Netherlands – as most other European legal systems, including the UK – has a long history of legislative endeavours to regulate the employee's right to compensation for workplace accidents.¹⁰⁴ Also, in each country several of these public and private law systems are in operation, therefore each has different 'layers' of protection.¹⁰⁵ More concrete, in 1901 the Dutch Government proclaimed the Industrial Accidents Act (*Ongevalwet*), amended in 1921. This served to replace the special regime of employers' fault-based liability by a public law duty imposed on employers to take out mandatory insurance for damages to their employees arising from workplace accidents. Prior to this, employees struggled with several problems. From the beginning of the nineteenth century they had been in a position of having to sue their employer for accidents due to the latter's negligence but in practice such claims only gradually started to take hold in the last quarter of the nineteenth century, from 1871 onwards. In the Dutch transport, catering, medical and chemical industries, for instance, special funds covered damages, which – after a modest start in the seventeenth and eighteenth centuries – slowly grew to become professional insurances only covering those who paid contributions.

In 1967 this system was replaced by one of social insurance that covered the basic risk of medical expenses and income loss regardless of the way they were caused, and liability law covering the rest of the damages.

¹⁰⁴ E. Engelhard, 'Shifts of Work-Related Injury Compensation. Background Analysis: The Concurrence of Compensation Schemes' in S. Klosse and T. Hartlief (eds.), *Shifts in Compensating Work-Related Injuries and Diseases* (Vienna/New York: Springer, 2007), p. 9.

¹⁰⁵ *Ibid.*

Interestingly, employers now face the – much wider – financial risk of disability *regardless of its cause*, as they are required to continue the employee's salary payments during the first two years of work-related disability (as well as most of the social security premiums). Based on special reimbursement rules the employer has the right to claim the salary back from the liable person (art. 107a of Book 6 of the Civil Code); similar rules in social security law provide for reimbursement rights of social insurance carriers. It must be noted though that many employers take out additional private insurance for their employees, which is limited to the risk of workplace accidents, although on a voluntary basis. As employers' risk of civil liability for accidents caused by violations of safety rules or of good employment is, however, very strict, with a very limited contributory negligence defence (art. 658 of Book 7 of the Civil Code), the system is not as different from the former insurance model as one might expect. There are still voices promoting the reintroduction of a special no-fault insurance for the *risque professionnel*, similar to that in Belgian or German law. Why, it is asked, should the employer have to pay for personal risks run by his employees in their private lives such as going on a skiing trip? But these voices, raised in parliamentary debates and literature, are not likely to be heeded in the near future.

A similar trend is noticeable for traffic liability (dealt with above, p. 158) and product liability. As for product liability law, this has evolved, owing to the EU Directive on Product Liability, into a strict liability regime. Concepts such as defect and causal link were no longer interpreted by national standards but, at least partly, by European standards.¹⁰⁶

B *Techniques used in place of fault liability*

As was seen above, in the early twentieth century a no-fault compensation scheme was introduced to remove fault liability for workmen's compensation. Fault liability was now replaced with a statutory duty for employers to take out insurance for the personal damages of their workmen. The employer could in principle not be held liable for any damages

¹⁰⁶ J. H. Nieuwenhuis, 'De verwoestende kracht van de rechtswetenschap' (1988) 6 *Justitiële Verkenningen* 23, 25; I. Giesen and M. Loos, 'Liability for Defective Products and Services: The Netherlands' in E. Hondius and C. Joustra (eds.), *Netherlands Reports to the Sixteenth International Congress of Comparative Law (Antwerpen/Oxford/New York: Intersentia, 2002)*, pp. 75–113 (also published at www.ejcl.org/64/art64-6.html).

of the victim-employee, certain exceptions (intentional wrongdoing, property damage etc.) left aside. The obligation to pay compensation was now *not* primarily an individual employer's responsibility but was shared collectively, by *all* employers, based on this statutory insurance.¹⁰⁷ Employers were now faced with the statutory obligation to pay for the entire insurance, in the form of insurance contributions (premiums). Certain employers could also offer their employees direct relief instead of taking out private insurance. Where the insurance had been taken out, the insurance contributions were calculated based on the accident risk of their branch: the higher the risk, the higher contributions would be (which can be taken to give employers good incentives to minimise this risk). In practice, however, most companies that had their own medical service would handle claims themselves and pay directly to the victim, without reporting the accident to the public institution in charge of controlling and securing insurance protection, the *Rijksverzekeringsbank* (Public Insurance Bureau).¹⁰⁸

C *Reasons for the removal from fault liability*

This 'shift' from civil liability was the result of a growing social awareness of the problems employees faced within the system as it stood, and employers' fear of a flood of claims.¹⁰⁹ It was inspired by similar shifts in other European countries (Germany, France). More and more, the risk of accidents caused by employment was perceived as a risk inherent of the production process. Therefore, its costs were part of the production costs that were to be borne by the one who also gained the profits: the employer.¹¹⁰ This line of thinking seems similar to German law (though different from the English - political - view of industrial accidents as being a shared responsibility of both the employer and employee). Not surprisingly, therefore, the Dutch statutory insurance resembled greatly the German statute.

¹⁰⁷ E. Engelhard, *Regres* (Deventer: Kluwer, 2003), pp. 163ff; and 'Shifts of Work-Related Injury Compensation', pp. 28-32.

¹⁰⁸ The State inspectorate authority that granted pensions or benefits based on the Industrial Accidents Act was then entitled to collect these back from the liable party. For those purposes it was given an action for reimbursement. See *ibid.*, p. 164.

¹⁰⁹ E. Engelhard, 'Shifts of Work-Related Injury Compensation', nos. 6 and 33 (with references).

¹¹⁰ *Ibid.*, no. 43.

The fact that this shift has not lasted was for a small part related to difficulties in case law regarding the question of what made an accident fall under the special protection of the insurance model. More fundamentally, in 1945 the so-called Van Rhijn Committee was formed by the Minister of Justice, to examine the options for forming a scheme of social insurance. This committee felt that public insurance would have to be carried by the public at large; to put it bluntly, the more collective the paying community the more certain the insurance would be. For this reason it was doubted whether the *risque professionnel* would still serve as the foundation for public insurance, and the committee also pointed at the benefits of not having to decide when and if the cause of the accident was in fact work. Nevertheless it decided *not* to extend the *risque professionnel* protection of the Industrial Accidents Act 1901 and 1921 to all injuries regardless of their cause. It feared this would cost too much and also hesitated to deprive employees of their special treatment. Towards the end of the fifties however, the more favourable position of victims whose injuries were caused at work received more criticism. The idea took hold that the State should guarantee a minimum living standard for all its citizens in all situations, as general as possible, based on the so-called *risque social*. This led to the (former) WAO of 1967 and other social security legislation. In addition to social security benefits the victim can obtain damages by civil liability law. In more recent years serious cuts in these benefits have been accompanied by a strong emphasis on the citizen's own personal responsibility. Arguably, in doing so the Government indirectly stimulates its citizens to claim damages.¹¹¹

It seems difficult to identify the politicians behind the changes, or the particular bureaucrats that have been influential in the way that the regulatory system operated. For the development of liability without fault Paul Scholten (1875-1946) has played a significant role. In 1899 Scholten pointed in his dissertation to the fact that statutory provisions gave rise to liability in many instances based on other grounds than fault. The need for liability without fault was caused by the fact that many accidents could not be linked to any personal fault but were due to legal persons and their business processes. Therefore he also predicted that 'in the future' the legislature would have to expand those instances of no-fault liability

¹¹¹ *Ibid.*, no. 87.

with many more.¹¹² Further, in his opinion it would be up to the courts to establish rules for liability if – based on ethical beliefs and socio-economic relations – there were reasons to impose liability, even in the absence of fault. At this point the legislative proposal for the Industrial Accidents Act had already been made. Scholten thus also referred to this legislative proposal to argue that certain forms of responsibility based on other grounds than personal fault were already recognised. For him that was an extra argument to accept liability on other grounds than personal fault.

VII Conclusions

Let us briefly summarise the main points and then draw some overall conclusions from this. We started our survey by explaining why the requirement of unlawfulness of the defendant's behaviour was added to the 1838 CC, next to the requirement that this behaviour was due to his fault. To the late-nineteenth-century courts this implied that the defendant's behaviour needed to have violated a *written* law or a subjective right of the plaintiff; liability could not simply be based on mere negligence (fault). The Supreme Court felt that it was beyond its authority to change the law in this respect. At the same time this conservative approach strengthened the political views of its then president, who strongly adhered to the idea of free competition (not to be hindered by the risk of negligence liability). But after he retired, the growing number of calls to expand fault liability to cases of mere negligence, followed by sluggish legislative proposals, led a new chamber of Justices to revise the law. In the landmark case *Lindenbaum v. Cohen* the Court stretched the requirement of unlawfulness to include mere negligence.

With reference to this decision, politicians claimed that the 1838 CC was outdated, and voted for the recodification of the Civil Code. The ruling on fault liability, drafted by Professor Meijers, was based on existing case law: it not only included the traditional criteria for unlawfulness but also the third criterion as formulated in *Lindenbaum v. Cohen*: mere negligence. The first two were left to further interpretations by the courts, but the third criterion allowed courts more freedom in lawmaking, as it would be impossible to capture all negligent behaviour by written rules (although we have shown that in the legal reality, where judges, in part

¹¹² P. Scholten, 'Schadevergoeding buiten overeenkomst en onrechtmatige daad' Ph.D. thesis, Amsterdam (1899), p. 151.

led by academics, critically assess the law, this dichotomy between mere interpretations and 'free lawmaking' is not at all clear-cut). This process of 'free lawmaking' with regard to the question of when merely negligent behaviour is unlawful has led to a great number of cases that have been categorised and that each contain special part-rules by which this question in similar cases must be answered. Together with the fact that the other requirements of fault liability (fault and causality) are also typical judge-made law, this shows how the primacy of fault liability really is with the courts.