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Commission I – Kommission I

AGRICULTURE, ENVIRONMENT AND FOOD PRODUCTION: THE ROLE AND LIABILITY OF THE FARMER/GROWER

AGRICULTURE, ENVIRONNEMENT, ALIMENTATION: FONCTIONS ET RESPONSIBILITES DE L'AGRICULTEUR

LANDWIRTSCHAFT, UMWELT UND ERNÄHRUNG: ROLLE UND HAFTUNG DES LANDWIRTS

National Report – Rapport national – Landesbericht

The Netherlands – les Pays Bas – die Niederlande

Dutch report – Rapport hollandais – Holländischer Bericht

Prof. G.M.F. Snijders

1. Introduction

Dutch law has no special statutory provisions for the civil liability of farmers or growers, which means that farmers and growers are subject to the general legal provisions on liability.[1] The general law on liability distinguishes between regulations on contractual and non-contractual liability. This report focuses on non-contractual liability.

The principal rule for non-contractual liability is set out in section 6:162(1) of the Netherlands Civil Code (hereinafter: 'the NCC'):

- A person who commits an unlawful act toward another which may be imputed to him, must repair the damage which the other person suffers as a consequence thereof.[2]

Unless there are grounds for justification, the following are deemed to be unlawful acts under the terms of the second subsection of the provision:

- the violation of a right;
- an act or omission violating a statutory duty;
- an act or omission violating a rule of unwritten law pertaining to proper social conduct.

An unlawful act can be imputed to its author if it results from his fault or from a cause for which he is answerable, according to law or common opinion (section 6:162(3) of the NCC). There is no obligation to repair damage when the violated norm does not have as its purpose the protection from damage such as that suffered by the victim (section 6:163 of the NCC).

In addition to this principal rule, the Netherlands Civil Code provides for various types of special non-contractual liability. For farmers product liability (section 6:185-193a) and the liability for dangerous substances (section 6:175) and for animals (section 6:179) could be of importance. While the principal rule is liability for fault, each of the above special liabilities are liabilities for risks.[3]

Under certain circumstances, a farmer's liability for environmental damage can result from his liability for the use of dangerous substances. If it is impossible to argue that the damage was caused by the use of dangerous substances, the general provisions on unlawful acts are then usually[4] applicable.

In case of new prohibitions or prescriptions it is not always necessary to make specific provisions for the civil liability of possible offenders. The statutory provisions implemented in Dutch law in connection with *Directive 91/676/EEC of 12 December 1991 concerning the Protection of Waters against Pollution caused by Nitrates from Agricultural Sources* can serve as an illustration. The directive was implemented in the Netherlands via administrative

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1 Farmers and growers will be jointly referred to below as 'farmers'.

2 The translation of provisions from the Netherlands Civil Code are quotes from P.P.C. Haanappel and Ejan Mackaay, Nieuw Nederlands Burgerlijk Wetboek, Het Vermogensrecht/Patrimonial Law, Kluwer Law and Taxation Publishers, Deventer, 1990.

3 Section 6:175 of the Netherlands Civil Code for example states that any person possessing or using a substance for use in his business or occupation, while there is evidence that this substance has properties which are such that it constitutes a grave danger to humans, is liable for any damage which may result from the use thereof.

4 This does not include serious cases of soil contamination. Section 75 of the *Wet Bodembescherming* (the Soil Protection Act) includes separate provisions on such liability.

regulations and the violation of these regulations can be deemed to be an act or omission violating a statutory duty in civil law, and therefore to be an unlawful act in the sense of section 6:162(1) of the NCC. Under the terms of that provision, a farmer guilty of violating an administrative regulation can be held liable for the damage caused to third parties. Dutch courts developed a ‘reversal rule’ for such cases: if the regulation was meant to give protection against a specific risk, and after the violation of the regulation this risk has been realised, the victim does not have to prove a causal relationship between violation and damage; the offender has to prove that a causal relationship does not exist.

A code of good agricultural practice could flesh out the unwritten law pertaining to proper social conduct.

2. Product liability

When implementing *Council Directive 85/374/EEC* of 25 July 1985 *concerning the Liability for Defective Products*, the Dutch legislature originally seized the opportunity to make an exception for agricultural products. This had repercussions for the definition of the 'products' in section 6:187(1) of the NCC, to which the regulations on product liability are applicable. The text of the provision originally read as follows:

- For the purposes of articles 185-193a inclusive, a ‘product’ means a moveable thing, even if it has become a component of another moveable or immoveable thing, as well as electricity, but with the exception of agricultural and hunting products. ‘Agricultural products’ mean products of the soil, of stock-farming and of fisheries, with the exception of products which have undergone a first treatment or processing.

At the time, the exception was defended by arguing that it was necessary to ensure that Dutch agriculture did not suffer from unfair competition from outside the Netherlands, in view of the fact that it was not certain whether and to which extent agricultural products remained outside the scope of product liability in other Member States.[5]

Council Directive 85/374/EEC was amended in May 1999 in connection with the BSE-crisis and other food safety scandals[6], and this amendment dispensed with the directive's original ‘option’ to make an exception for agricultural products. The amendment was implemented as of 4 December 2000 via an amendment of section 6:187(1) of the NCC, and entailed the deletion of the entire passage after the word ‘electricity’.[7]

The concept of ‘product’ was therefore widened in the text of the Act. This had as a consequence that farmers could be held responsible as ‘producers’ in the sense of the regulations; farmers became liable for the damage caused by a defect in their products, just like other producers.

It should however be pointed out in this connection that, in the case of damage caused by an agricultural product, it can be exceptionally difficult to trace the producer. Even if it were possible to confirm that a consumer has suffered damage, for example as a result of eating an apple or a head of lettuce, it is likely to be far from simple to track down the grower or farmer who can be held liable as this product’s producer. In order to improve the traceability of agricultural products, eggs must for example now be marked with a stamp, so that it is possible to confirm their origin.

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[5] See on this subject G.M.F. Snijders, *Produktenaansprakelijkheid in de landbouw.* Agr.R 1990, p. 361-376.

[6] Directive 1999/34/EC.

[7] Bulletin of Acts, Orders and Decrees, (Stb) 2000, 493 and 494.

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There is some case law on the liability of producers of phytosanitary and similar products for the damage which these products cause to farmers[8], but no judgements on farmers' product liability have been published in the Netherlands to date.

3. The use of phytosanitary products and pesticides

The regulations for the use of phytosanitary products and pesticides are based on the *Bestrijdingsmiddelenwet 1962*[9] *(*the 1962 Pesticides Act), via which a large number of EC regulations and EC directives and the regulations based thereon were implemented.

The Pesticides Act is in the first place the basis for the admission – and the investigation which precedes that admission – of pesticides to the Dutch market. Specific conditions for the use of the relevant product may be imposed in order to obtain approval for the use of the relevant product in the Netherlands, for example concerning the crops on which the product may be used and the permissible quantities. The act also offers the scope for implementing general prohibitions and prescriptions concerning pesticides which have already been approved. Article 13 for example can lay down further rules, for example for the use of pesticides, and the violation of a prescription or prohibition is a criminal offence[10].

In 1994 the *Besluit vakkennis- en vakbekwaamheidseisen bestrijdingsmiddelen* (the decree on the professional know-how and skills required for the use of pesticides) was implemented on the basis of article 13 of the act[11]; since 1 July 1996, it is an offence to use pesticides professionally or for industrial purposes, unless the user holds the appropriate permit. A permit-holder must be able to demonstrate that he has the know-how necessary for the responsible use of pesticides, for example by submitting a certificate recognised by the Dutch Ministry of Agriculture, Nature Management and Fisheries. A permit is valid for five years and can be extended after the expiry of this period for five years.

On February 29, 2000, the *Lozingenbesluit open teelt en veehouderij*[12] (the discharges decree for open fields crops and stock-farmers] was implemented, on the basis of section 13 of the Pesticides Act, but also on the basis of the *Wet verontreiniging oppervlaktewateren* [Pollution of Surface Waters Act] and in order to implement *Directive 91/676/EEC concerning the Protection of Waters against Pollution caused by Nitrates from Agricultural Sources*. This 'discharges decree' lays down rules for the discharge and use of pesticides in the vicinity of surface waters, and stipulates that a cultivation-free zone must be preserved along surface waters, unless a screen is mounted between the crop and the surface water, and then only if no crop protection agents can drip from the screen and run into the water. The width of the zone depends on two things: the crop (because of their height, fruit trees for example need a broader zone than potatoes) and on the type of spraying equipment (the zone can be narrower if the spraying equipment allows for better aim).

The *Residubesluit*[13]*,* (the residues decree), which had been introduced as early as1964 on the basis of section 16 of the Pesticides Act, lays down maximum levels for the pesticides, pesticide components or conversion products which are permissible in or on foods without these foods becoming unsuitable for consumption.

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8 See for example a judgement rendered by the Netherlands Supreme Court (HR) on October 22, 1999, NJ 2000, 159 and HR December 6, 1996, NJ 1997, 219. See on the subject of the liability of the seller of a defective phytosanitary product HR April 27, 2001, NJ 2002, 213 and on the importer's liability HR November 29, 2002, NJ 2003, 50.

9 Published in the Netherlands Bulletin of Acts, Orders and Decrees (Stb), 1962, 288.

10 See article 1a under 3 of the *Wet Economische delicten* (the act on economic offences)

11 Bulletin of Acts, Orders and Decrees, (Stb) 1994, 578

12 Bulletin of Acts, Orders and Decrees, (Stb) 2000,43

13 Bulletin of Acts, Orders and Decrees,)Stb) 1964, 319

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No case law has yet been published on a farmer's civil liability on the basis of the decree on professional know-how and skills required for the use of pesticides or on the discharges decree.[14] The residues decree did however provide grounds for a decision on criminal liability: in that case the suspect was freed in view of the fact that although the quantity of ethion on his grapefruit was higher than the levels permitted under the residues decree, it was lower than the level permitted under Directive 88/298/EEC.[15]

4. Production rights

A Dutch farmer's freedom to operate his farm in a certain way is restricted by a host of statutory rules and regulations. A large number of far-reaching production restrictions which could be discussed here became effective in the 1980s. In the late 20th century, farmers acquired what are euphemistically known as 'production rights', which entailed that it became possible to operate cost-effectively within certain sectors of agriculture only if and to the extent that their production did not exceed the rights the farmers had acquired. The milk quota, the sugar quota and the manure production rights are good examples of such 'production rights'.

The milk and sugar quotas will not be discussed in any more detail here. In the first place, they are both based on European legislation. The details of the implementation of the relevant EC regulations in the Netherlands will undoubtedly differ from the way in which these are executed and applied elsewhere[16], but the similarities are so great that a more or less detailed discussion is not justified here. Secondly, milk and sugar quotas do not lead to any liability issues which are significant in connection with the present subject.

This is not the case with manure production rights. These are based on the one hand on Dutch law (although these are affected by for example *Directive 91/676 concerning the Protection of Waters against Pollution caused by Nitrates from Agricultural Sources*), but on the other hand, manure production rights can be deemed to be licences or administrative authorisations for the realisation of certain farming activities which may affect the environment.

In terms of manure legislation, it is possible to distinguish between regulations on (1) the farm where the manure is produced, (2) the quantity of manure which a farm is entitled to produce and (3) the way in which manure can be used, depending on the circumstances, including the quantity of manure. This report will largely focus on the second category.

Under the terms of section 55 of the *Meststoffenwet* [the Fertilisers Act], every farmer has a basic manure production right of 125 kg of phosphates for each hectare of the agricultural land he farms per year. The act has an annex which fixes the standard annual production of phosphates and nitrates and this can be used to determine how many animals of a certain kind can be kept, on average, per hectare. This is designed to ensure some degree of balance between the number of animals and the surface area of the farm. Because of the link between the extent of the right and the surface area of the agricultural land on a farm, the basic manure production right is sometimes also referred to as the land-linked manure production right.

In dairy farming, for example, there is often a responsible balance between the number of milking cows on a farm and the surface area, which means that the land-linked manure

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[14] The decisions rendered by the Chairman of the administrative law section of the Netherlands Council of State on February 11, 2000, AB 2000, 175 and March 16, 2000, AB 2000, 176 concern the question whether and to which extent conditions can be imposed when a discharge permit is issued.

[15] Court of Appeal of The Hague, February 3, 1989, NJ 1989, 541.

[16] The milk quota is based on EEC Regulation 3950/92, OJ L 405 and EEC 536/93, OJ L 57. Both these regulations are elaborated in the Netherlands in the *Regeling Superheffing 1993,* published in the Netherlands Official Gazette (Staatscourant) 1993, 60. The sugar quota is based on EEC Regulation 1785/81 OJ L 177 and is elaborated in an annual 'Suikersysteem'; a contract between the relevant industries and organizations of farmers.

production right is adequate. But this is completely different for the intensive stock-rearing industry (for example pig-farming, poultry-farming and calf-fattening), as these tend to keep considerably larger numbers of animals than permitted according to the land-linked manure production right. Originally that was possible only if these farms also had non-linked manure production rights or manure quotas. The number of non-linked rights were fixed for each individual farm on the basis of a reference year; for the pig and poultry farms, this was based on the number of animals as of May 1984, while for calf-fattening farms, this was the number of animals in 1986. As of January 1, 1994, the non-linked manure production rights can be transferred from one location to the other and from one farm to the other under certain conditions. [17] By making it possible to re-locate the rights from one farm to another, the rights became transferable, and acquired a market value.

Pig-farms were dropped from the system of manure production rights as of 1 September 1998, and instead, the extent of a farm's 'pig rights' and/or 'breeding sow rights'[18] was fixed on the number of animals in fact kept in 1995 or 1996, minus 10%. There was a similar process in respect of poultry as of January 1, 2001; the poultry-farmers no longer have manure production rights but 'poultry rights'.[19]

A farmer producing more manure than permitted according to the rights granted to his farm is required to pay a fee, and this fee is so high that it is prohibitive.

5. Civil liability for complying with statutory provisions in general and, more specifically, for abiding by the terms of a licence

The introduction to this report had already pointed out that the violation of statutory provisions can be deemed to be an act or omission violating a statutory duty, and therefore an unlawful act in the sense of section 6:162(1) of the NCC. In this connection, the closing lines of the introduction devoted brief attention to the 'reversal rule', developed in case law. But what is decided in case of compliance? Is it possible for an act which complies with the relevant statutory provisions, or with the terms of a licence, to be an unlawful act under certain circumstances?

According to established case law, the last question can be responded to in the affirmative[20]. Even the possession of a permit and the compliance with the conditions which that implies do not, in general, entitle the permit-holder to exercise his rights in a manner which would otherwise be unlawful vis-à-vis third parties if he held no permit. It should however be pointed out in this connection, that the chances of an unlawful act diminish in proportion to the extent to which statutory provisions or the terms of a permit lay down more precise details for the way the covered activity must be undertaken. Prescriptions or terms which lack such more specific rules on standard behaviour contain codes of conduct which contain no reference to the bounds of the acceptable when undertaking the activity covered by a permit vis-à-vis third parties. In that

[17] This re-location became possible with the implementation of the *Wet verplaatsing mestproductie*, (Act on the relocation of manure production), Bulletin of Acts, Orders and Decrees (Stb), 1993, 686.

[18] This occurred upon the implementation of the *Wet Herstructurering Varkenshouderij*, (Act on the restructuring of the pig-farming industry), Bulletin of Acts, Orders and Decrees (Stb), 1998, 236.

[19] The system of poultry rights is provided for in chapter 2 of the *Meststoffenwet* (the Fertilisers Act) (section 58*a*-58*y*).

[20] See in this connection for example as long ago as 1914 (the Netherlands Supreme Court (HR) judgement of January 30, 1914, NJ 1914, 497) when the Supreme Court ruled that a baker was liable for the damage which his neighbours suffered as a result of the nuisance he caused, although the baker held the environmental permit which he required for operating his business. See also for example the Supreme Court judgements (HR) of June 14, 1963, NJ 1965, 82 and of March 10, 1972, NJ 1972, 278.

case, the tolerance to be exercised by third parties vis-à-vis the permit-holder is not covered by the code of conduct[21].

By way of illustration, reference can be made in this connection to a judgement by the Netherlands Supreme Court which has nothing to do with the agricultural sector, but which revolves around a principle which could also be applied in full to agriculture[22]. This judgement concerns damage caused by a registered medical product, which had government approval: a tranquilliser called 'Halcion'. Its manufacturer, Upjohn, which was held liable for this damage, defended itself by arguing that, in principle, it was authorised to market a product which had qualified for registration in the Netherlands register for proprietary medicinal products in keeping with the *Wet op de geneesmiddelenvoorziening* (the Supply of Medicines Act). According to Upjohn, this rule could be derogated from only if "the circumstances are such that it must have been clear to the manufacturer that the *College ter beoordeling van geneesmiddelen* [the Dutch Medicines Evaluation Board] would, in all reason, not have proceeded with registration or would have been unwilling or unable to maintain the unamended registration, in the light of the facts which were known or should have been known to the person which acquired that registration". In this connection, the Supreme Court considered as follows: "This argument, which entails that registration is a fact which can eliminate the manufacturer's liability in civil law, can not be deemed to be correct."

6. Conclusion

Dutch law has many regulations which restrict the freedom of farmers to operate their farms in the manner they deem most appropriate. Many of these rules are designed to promote food safety or protect the environment, and the violation of such rules is usually a criminal offence. The offender is furthermore also liable for the damage caused to third parties as a result; an act or omission violating a statutory duty is an unlawful act in the sense of section 6:162 of the NCC. For this reason, in case of new prohibitions or prescriptions it is not always necessary to make specific provisions for the civil liability of possible offenders.[23]

No judgements have been published on the civil liability of farmers for using pesticides and phytosanitary products which contaminate water or soil or pollute the air. This does not however mean that liability is not relevant or should not be taken seriously. In the first place, the existence of the scope for civil liability undoubtedly has an important preventative effect. People are more likely to refrain from an act which is prohibited because they run the risk of being punished, but also because there is a good chance that they will be held liable for the resulting damage. The 'reversal rule' referred to in the introduction has only reinforced this preventative effect. This is one of the reasons why product recalls are relatively common in the Netherlands, and why they are largely voluntary.

In the second place, there is a certain tradition of settling damage claims out of court in the Netherlands. If there can be little doubt about liability, there is little point in taking the matter to court. Legal proceedings generate publicity, and publicity could for example damage the manufacturer's reputation. Even the implementation of *Council Directive 85/374/EEC concerning the liability for Defective Products* has resulted in very little product liability case law compared with other countries.[24]

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[21] S.C.J.J. Kortmann, *Vergunning voor onrechtmatig handelen?* Included in *Goed en Trouw*, essays offered to Prof. W.C.L. van der Grinten, W.E.J. Tjeenk Willink, Zwolle, 1984, p. 461-478.

[22] Netherlands Supreme Court, June 30, 1989, NJU1990, 652

[23] It is in fact no guarantee that separate statutory provisions for product liability would have been drawn up if Council Directive 85/374 EEC had not made this obligatory.

[24] At the time of the publication of my PhD in 1987, I concluded that all the Dutch courts together had rendered fewer judgements on product liability in the course of history than the German *Bundesgerichtshof* renders in a year. There has been no substantial change in this pattern since then.

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The compliance with the relevant statutory provisions does not rule out civil liability; and the fact that he holds a permit or licence issued by the competent authority, equally does not give a permit-holder *carte blanche* to cause damage to third parties.