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Tort and Regulatory Law

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The Netherlands

Tort and Regulatory Law

Rob J.P. Kottenhagen and Pepita A. Kottenhagen-Edzes[1]

General

What, in general, is the impact of administrative law rules on the tort law of your country?

Administrative law regulates the relation between the government and citizens. Public law is both administrative law and penal law. Regulatory law covers general rules.

In principle, a breach of administrative law rules constitutes an unlawful act (art. 6:162 par. 2 Burgerlijk Wetboek (Civil Code, BW). Art. 6:162 BW, par. 2 shows that a breach of an administrative law rule is not unlawful if there is a ground for justification (such as force majeure and self-defence).

Art. 6:162 BW reads as follows:

> 1) A person who commits an unlawful act toward another which can be imputed to him must repair the damage which the other person suffers as a consequence thereof.
>
> 2) Except where there is a ground for justification, the following acts are deemed to be unlawful: the violation of a right, an act or omission violating a statutory duty or a rule of unwritten law pertaining to proper social conduct.
>
> 3) 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.[2]

So a successful claim under art. 6:162 BW must meet four requirements:

- unlawfulness
- imputability
- causality
- damage.

A fifth requirement – relativity – is discussed infra no. 23

In legal doctrine and case law it is sometimes stated that a breach of administrative law as such does not constitute a tort. According to this opinion, a breach of an administrative law rule constitutes a tort only when there is also a breach of a duty of care. However, according to current law, a violation of a statutory duty is an unlawful

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[2] Translation from P.P.C. Haanappel and E. Mackaay, New Netherlands Civil Code, Patrimonial Law, Deventer: Kluwer (1990) 298.

act unless there is a ground for justification.[3] If a person acts in compliance with a statutory duty, his conduct can still be unlawful because of the violation of a right or a breach of a duty of care.

As will appear from the answers to the following questions, in Dutch law the violation of administrative law rules is important in particular in the field of unlawfulness and causation.

Are there any constitutional boundaries or guidelines for the interaction between administrative law and tort law, e.g., concerning the relationship between federal law and state or local law (if applicable) and the protective purpose of an administrative law rule?

No, there are no such constitutional boundaries or guidelines according to Dutch law.

Aside from statutory provisions, which types of administrative laws (e.g. regulations, official notifications) can in the case of their violation result in a tort liability?

Apart from statutory provisions issued by the Dutch formal legislator, liability in tort can also be based on the infringement of other generally binding regulations such as provisions of EC law that have a direct effect, as well as regulations issued by provincial and municipal authorities. Infringement of the conditions attached to licence (e.g. a licence based on an environmental law) may also constitute an unlawful act.[4]

What are the consequences (under private law), if any, when an administrative law (i.e., law or decision by a government or public entity acting as such) itself violates statutory provisions? Is liability excluded for persons who cause damage by acting in compliance with a wrongful administrative law to which they are subject? If so, is it in any way relevant that that person knew or could have known that the administrative law was wrongful?

According to art. 120 of the Constitution, a judge is not allowed to try legislation (and treaties) to the Constitution. So the Government cannot be held liable for legislation in a formal sense. In this context, legislation is understood in a broad sense. The fact that a judge is not allowed to test to the Constitution applies to the process of passing,[5] preserving and enforcing legislation in a formal sense.[6]

A judge is also not allowed to test legislation in a formal sense to the Charter of the Kingdom of the Netherlands and to general principles of justice like the principle of equality.[7] The same is true for testing whether legislation is unlawful because it is in conflict with unwritten law (of nations).[8]

An exception to this rule exists when general principles of justice are laid down in provisions of treaties and decrees of organizations of international law which are binding for everybody. According to art. 94 of the Constitution, such a provision will

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3 Asser-Hartkamp (2006) 4 III, no. 34, 54 and 55.
4 See Hoge Raad (HR) 9 January 1981, Nederlandse Jurisprudentie (NJ) 1981, 227 and Asser-Hartkamp (fn. 3) 4 III, no. 34.
5 E.g. when a certain party is not consulted, HR 19 November 1999, NJ 2000, 160.
6 Kluwer, Onrechtmatige daad (losbladig), vol. V, comment 230.
7 Kluwer (fn. 6) comment 231 and 232.
8 Kluwer (fn. 6) comment 238.

not be enforced.[9] In such a case it is possible that legislation in a formal sense is also unlawful and that the Government has to pay damages.[10]

For the Government to be held liable for legislation in defiance of European law the rules of this special law have to be applied, e.g. when European regulation is not, too late or wrongly implemented.

General binding regulations which are not legislation in a formal sense can sooner lead to tortious liability of Government agencies which enacted regulations,[11] e.g. Orders in Council and provincial and municipal regulations. These regulations and the way they are passed, preserved and enforced can be tortious because they are in defiance with higher regulations such as legislation in a formal sense. These lower regulations can also be tortious because they are in violation of (unwritten) general principles of justice.

So a judge can decide whether a Government agency reasonably cannot pass a certain regulation when all issues concerning it are weighed against each other.[12] Other general principles of justice are e.g. the principles of reliance and certainty of the law.

Unlawfulness of such a regulation may lead to tortious liability of the Government agency in case. Another possibility is that the judge issues a prohibition to enforce the regulation.

Administrative decisions can also be tortious[13] and they can be set aside by the administrative court, e.g. when such an administrative decision is unauthorized, is not well prepared or motivated or does not conform to legal requirements.[14] In case such a decision is set aside, an aggrieved person can claim damages. Damages can be claimed in the same procedure at the administrative court (art. 8:73 Algemene wet bestuursrecht (Statute on administrative law, AWB)) or in a tort claim at a civil court.

Of course there must be causality between the unlawful decision and damages and the tort must be subject to the scope of the rule principle (see supra no.3 and infra no.23).

In some cases one can claim damages when the decision is not set aside by an administrative court, (art. 8: 73 AWB).

If an administrative law itself governs the consequences of a breach of its own rules, in particular by providing for criminal sanctions, are such rules regarded as comprehensive (that is, excluding a tort claim)? How do the laws of tort and criminal law interact in this respect?

No, such rules are not regarded as comprehensive; tort claims are not excluded.

If in a criminal procedure it is proven that a certain fact has been committed and a sentence has been passed, this is compelling proof in civil procedure (art. 151 Code of Civil Procedure). Unless prohibited by a specific law counter proof is still possible (art. 151 par. 2 Code of Civil Procedure). However, the proven facts do not necessarily mean that a tort has been committed. It is required that the proven facts must be

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9 Kuwer (fn. 6) comment 239 and 240.
10 See Asser-Hartkamp (fn. 3) 4 III, no. 290g.
11 The text on this topic is taken from Asser-Hartkamp (fn. 3) 4 III, no. 290h and following.
12 HR16 May 1986, NJ 1987, 251.
13 Decisions of Government agencies in individual cases, see art. 1:3 (Algemene wet bestuursrecht, AWB).
14 Kluwer (fn. 6) comment 192.

sufficient to constitute a tort. If the facts that have been proven in a criminal procedure do not constitute a tort according to civil law, it is still possible in civil litigation to prove that a tort has been committed.

It is sufficient that the facts in question have been proven in criminal procedure. It is not necessary for the suspect to be punished.

If the criminal sentence does not constitute compelling evidence (e.g. because of the fact that not all the requirements of art. 151 Code of Civil Procedure have been met), the criminal sentence can still have consequences for the argumentation in the civil procedure. E.g. the judge might presume specific facts as occurred (res ipsa loquitur).

Under what conditions are administrative law rules regarded as so-called "rules with a protective purpose"? Is the protective purpose of an administrative law rule only determined by administrative law or also by the general principles of tort law?

There are no specific conditions. The protective purpose of a rule is formulated by the legislator and is laid down in the particular regulation itself.

An act or omission in breach of an administrative law rule may constitute an unlawful act. However the conclusion whether or not a breach of an administrative law rule constitutes an unlawful act in a particular case depends on the outcome of the appliance of the scope of the rule principle. This principle is laid down in art. 6:163 BW:

"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."[15]

This article stipulates that even if an unlawful act has been committed as defined in art. 6:162 BW (see supra no.2), the claim can still be disallowed:

a) if the breached standard does not envisage protection of the plaintiff (the victim), or

b) if the type of damage or the way in which damage arose falls outside the scope of that protection.

Administrative law formulates the purpose of the regulation itself. In a tort case, however, the judge determines whether the purpose of the rule is to protect the victim. This is inherent to the open norm of art. 6:163 BW. This means that the protective purpose of an administrative rule in a tort case is determined by both administrative law and tort law.

If an administrative law rule binds a legal entity, who is responsible for a failure to comply with this rule? If an individual within the organisation of the entity has to bear the respective criminal or administrative liability, does this also result in that same person being held liable in tort? How does such a liability interact with the vicarious liability of the legal entity?

If a legal entity fails to comply with an administrative rule, the legal entity itself is responsible for this failure. Under certain circumstances, individuals who gave guidance to certain behaviour or who gave instructions to another to act in a certain way can be held liable in criminal law. See art. 51 Penal Code.

Comment [MSOffice1]: I think the meaning is not so clear here. Who lead the behaviour of others?this is ok OK

If an individual within the organisation has to bear criminal liability, this does not mean that there is also liability in tort. See supra no..20 and 21..

[15] Translation from Haanappel and Mackaay (fn 2) 299.

If an individual of a legal entity can be held liable in tort, the plaintiff can hold the individual liable and claim in tort according to art. 6:162 BW. However, the employer can also be held liable (vicarious liability) in tort according to art. 6:170 par. 1 BW. Therefore the plaintiff has a choice. If the employee is held liable, he can have recourse to his employer unless he acted intentionally or consciously recklessly; see art. 6:170 par. 3 BW.

When the employer is held liable, he can have recourse to his employee only if the employee acted intentionally or consciously recklessly.

Are legal entities themselves subject to an administrative liability in your country? What are the consequences of such a liability under private law? If applicable, does the administrative liability of a legal entity also result in a tort liability? How does the administrative liability of a legal entity interact with its vicarious liability?

Yes, legal entities can be subject to an administrative liability, e.g. if the legal entity does not meet the conditions of a statute or even a licence, the legal entity can be forced to pay a penalty or even to close the entity.

If there are consequences under private law depends on whether the entity can be held liable in tort or not.

As regards vicarious liability, see infra (supra) no..29

Safety Regulations and Provisions Aiming at Environmental Protection

Of what importance are (a) statutory safety regulations, and (b) provisions aimed at environmental protection for the tort law of your country?

The importance of safety regulations and provisions aiming at environmental protection in tort law

Safety regulations and provisions aiming at environmental protection are relatively important in Dutch tort law,[16] especially when they concern safety regulations that aim to protect third parties from damage. Regulations for environmental protection do not always have this specific goal, e.g. because they exclusively aim at the protection of the environment as such. Unless mentioned otherwise, in this text we will refer to safety regulations in the meaning as defined above. Whether in a certain case such a safety regulation is applicable will be judged by the court.

Unlawfulness

In case of acting or omitting to act in breach of statutory regulations (safety norms or environmental norms), this can be of importance for the court when deciding on the issue of unlawfulness. See generally supra no. .4

Causality

In some cases when specific safety norms are violated, according to the Hoge Raad (see infra no.37), causality in the sense of a condition sine qua non between the unlawful act (the violation of the norm) and damage is assumed.[17] The victim does

[16] The research in this paper concerns especially liability for damage as a result of death or injury of the victim. Nevertheless this may be also true for other damage such as damage to property. Compare Asser-Hartkamp (2005) 4 I, no. 434 and 434a.

[17] In this context we talk of the violation of written rules. The special meaning of the violation of safety norms is, according to Dutch law, also applicable to unwritten norms.

not have to prove causality (as he normally has to, see art 150 Code of Civil Procedure). There is a shift of the burden of proof: now the defendant has to prove that damage would also have occurred if he had not violated the safety norm.

For these cases, the Hoge Raad has formulated stringent requirements[18] for the qualification of a norm as a safety norm.[19] The first requirement is that there must be a violation of a norm which seeks to prevent a specific danger that would cause damage. The second requirement is that one who pleads the violation of a safety norm has to convince the court that the specific danger the norm aims to protect has been realized.

The rule that a *specific* norm must have been violated means that the violation of a general duty of care is not sufficient to shift the burden of proof in regard to causality. This is true e.g. for the norm laid down in art. 7:453 BW: a medical assistant has to act as a good and competent medical assistant would act. When the assistant acts in violation of this norm, causality between conduct and damage is not presumed and there is no shift of the burden of proof. On the other hand, acting in defiance of a certain medical protocol indeed can shift the burden of proof.[20] This is also true for the violation of the norm that a driver who drank too much alcohol is not allowed to drive a car: if he still does so and he causes an accident, causality is assumed between the violation of the norm and the accident. The aim of this specific norm is to prevent traffic accidents.[21]

The rule that the victim has to make plausible that the specific danger which the norm aims to protect has been realized means that, in case the damage arose due to a cause other than, for example a traffic accident, the victim has to prove the damage was caused by the accident.[22] This means also that in cases where damage (e.g. an illness) might be the result of the environment as a consequence of the violation of a safety norm or the result of other causes as well, there is no shift of the burden of proof. In such cases it is not possible to make plausible that the impairment of the environment caused the damage.[23]

If a shift of the burden of proof cannot be based on the violation of a safety norm, there may be other arguments to do so.[24] A discussion of this topic however is beyond the scope of this paper.

The violation of a safety norm can also have consequences for the extent to which damages will be imputed to the tortfeasor. This is because of the fact that, according to Dutch law, the extent of the duty to pay damages is, according to art. 6:98 BW, also defined by the nature of the liability and by the nature of the damage:

Reparation can only be claimed for damage which is related to the event giving rise to the liability of the debtor in such a fashion that the damage, also taking into account its nature and that of the liability, can be imputed to the debtor as a result of this event.[25]

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[18] In this paper we will refer to recent case law of the Hoge Raad. In former case law it was easier to consider a norm as a safety norm.

[19] *C.H. van Dijk*, Omkeringsregel: HR 19 March 2004, NJ 2004, 307 and HR 9 April 2004, NJ 2004, 308; Tijdschrift voor vergoeding personenschade 2004, 2, 63 ff.

[20] HR 19 March 2004, NJ 2004, 307.

[21] HR 8 April 2005, Rechtspraak van de Week (RvdW) 2005, 52.

[22] HR 9 April 2004, NJ 2004, 308.

[23] Asser-Hartkamp (fn. 16) 4 I, no. 436e.

[24] This appears from e.g. HR 19 March 2004, NJ 2004, 307.

[25] Translation from Haanappel and Mackaay (fn. 2) 268.

The violation of a safety norm constitutes a specific form of liability in the sense that the violated norm aims to protect third parties from damage. Therefore the violation of a safety norm may lead to the result that the tortfeasor is obliged to compensate damage that he would possibly not have had to compensate in other cases, such as damage that is an unlikely result of an unlawful act.[26]

In your country, to what extent are tort law and regulatory law rules on these topics considered to have identical or similar objectives?

Both tort law and regulatory law rules have the same goal: protection of damage. Regulatory law rules are general in character: damage has not yet occurred and there is no direct threat that damage will occur. In tort law one can compensate damage or try to prevent damage by a court injunction or interdiction.

Comment [MSOffice2]: Not sure what you mean here: .there is no immediate cause for damage to occur

Nevertheless an individual can make an appeal to regulatory law rules, e.g. when a concern operates without a licence or when a concern operates in defiance of a safety rule. It is therefore possible that someone refers to the conduct of another in defiance of safety rules. In such a case one may ask the government to uphold the rule. In this sense administrative rules are individualised.

On the other hand, it is possible to use tort law for general goals, e.g. when a pressure group uses tort law for the protection of the interest they wish to protect; see art. 3:305a BW.

Are these regulations and provisions per se regarded as statutes with a protective purpose? Are individuals covered by the protective purpose of these rules? Does a breach of such rules constitute a wrongful act in your legal system? Or does it bring about a strict liability?

When safety rules or rules for the protection of the environment are created, it will be clear that these rules are regarded as statutes with a protective purpose.

Individuals are covered by the protective purpose of these rules; see supra no..23 In tort law individuals are protected when they fall within the scope of the rule principle of art. 6:163 BW; see supra no. 23.

In general one can say that a breach of such rules constitutes a wrongful act; see supra no.23

The violation of safety norms and norms for the protection of the environment generally does not bring about a strict liability. Nevertheless strict liability is possible in several situations. However, this form of strict liability is not based on the infringement of safety norms or environmental laws but is linked to certain factual circumstances such as selling a defective product or the realisation of a danger that is inherent to a substance or causing a traffic accident with a car.

If applicable, please elaborate on statutory schemes with regard to safety regulation and/or environmental protection that introduce compulsory liability insurance.

According to Dutch law, there is no duty to insure oneself for damage as a result of the violation of safety norms or environmental norms. However, compulsory insurance for damage incurred by third parties is possible when damage that is caused by certain factual circumstances apart from the violation of safety norms or environmental norms is concerned. A good example is the WAM (Liability of Motor Vehicles

[26] See Asser-Hartkamp (fn. 16) 4 I, no. 434.

Act). This insurance is addressed to the protection of someone who has been harmed by motorized traffic. For a right of payment based on the WAM, the defiance of a safety norm is not a requirement per se..[27]

Fault-based Liability

A Breach of Administrative Law Rules

What role does a breach of safety regulations and environmental law rules play in the field of fault-based liability?

See supra no..1 and 34

Does the mere breach of such a rule constitute wrongfulness or are there any additional requirements, such as, e.g., the violation of a duty of care and fault?

A breach of such a rule constitutes an unlawful act. There are no additional requirements, such as the requirement that the tortfeasor violated a duty of care as well. For liability in tort, it is necessary that the unlawful act can be imputed to the tortfeasor (see supra no.2). In principle, unlawfulness and imputability are separated from each other. The plaintiff has to claim and if necessary to prove both unlawfulness and imputability. When the unlawful conduct or omission is established, in practice fault is often (but not always) assumed. If this is the case, the defendant has to prove that there was no fault. The judge can impose on the defendant an aggravated duty to motivate in relation to the absence of fault. If the defendant succeeds in doing so, the plaintiff can prove that there still is fault. This manner of reasoning is (amongst others) used in cases of violation of safety norms.[28]

If the tortfeasor has violated an administrative rule, to what extent does his liability depend on the protective purpose of the rule?

See supra no..22

To what extent is the tortfeasor allowed to prove that he would also have caused the damage if he had acted in compliance with the relevant rule?

See supra no.:4 in legal doctrine and case law it is often stated that a breach of administrative law as such constitutes a tort. According to this opinion, a breach of an administrative law rule constitutes a tort only when there is also a breach of a duty of care.

Acting in defiance of law rules is unlawful as such and, therefore, there is no reason for the tortfeasor to prove that damage would also have occurred if he had acted in compliance with the law rules. Nevertheless, in some cases acting in violation of regulations has been assumed not to be unlawful.[29]

What are the consequences of a breach of an administrative law rule on the allocation of the burden of proof, in particular where causation, wrongfulness and fault are concerned?

See supra no..40 and 53

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[27] Kluwer, Onrechtmatige Daad (OD) III.9, comment 345.

[28] See also Onrechtmatige Daad I (*Jansen*) art. 6:162 par. 3, comment 57 ff., especially comment 59.1.

[29] See Asser-Hartkamp (fn. 3) 4 III, no. 34, 54 and 55.

Can a breach of an administrative law rule result in a claim for punitive damages?

Punitive damages are not known in Dutch law.

Acting in Compliance with Administrative Law Rules

Can a tortfeasor be held liable in tort (for the purposes of obtaining either compensation for damage or an injunction) even if he acted in compliance with all relevant administrative law rules, or does your legal system allow the "regulatory permit defence"?

The "regulatory permit defence" is not known in Dutch law. When someone acts in compliance with the rules of administrative law, in tort law both compensation for damage or for an injunction are still possible, e.g. when there is a breach of a duty of care. The leading case on this topic dates from 1972.[30] The facts are as follows. The plaintiff is the owner of a fruit orchard. The defendant was granted a license to dump household refuse in a small lake near the orchard. This activity attracted many birds which destroyed the plaintiff's orchard. According to the Supreme Court, acting within the limits of the provisions of a license as such is no protection to tortious liability. The influence of a license on tortious liability depends on three factors:

- the nature of the license;
- the interest that is pursued by the license and
- the circumstances of the particular case.

However, there are exceptions to this general rule. When a statutory regulation is focused on certain concrete situations, the defence that one is acting in compliance with this regulation will be accepted more easily.[31]

In the Covra case[32] there was also an exception formulated to the general rule as mentioned above. Covra was issued with a license by the Ministry of Economic Affairs which was based on the Nuclear Energy Act for the Storage of Nuclear Waste. They had to follow and keep within the limits of certain terms. A foundation for the protection of interests of the environment initiated a procedure against the Ministry in an administrative court. In their opinion the license was unlawfully granted.

According to the administrative court, however, the license was not granted unlawfully.

The foundation then started a tort action, not against the Ministry but against the licensee, Covra and in a civil court. They stated that Covra would act tortiously, if they did not adhere to the more stringent terms in the license.

The civil division of the Dutch Supreme Court ruled, however, that the common interests were weighed already when the license was issued. Since the administrative court upheld the license, according to the Supreme Court it is not possible to make more stringent demands on the license in civil law.

So the conclusion is that when a party acts in compliance with a license that, according to an administrative court, has not been unlawfully granted, the civil court will not judge the license again in a tortious setting in the context of common interests.

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30 HR 10 March 1972, NJ 1972, 278, *Lekkerkerker – Vermeulen*.
31 *C.C. van Dam*, Zorgvuldigheidsnorm en aansprakelijkheid, Deventer: Kluwer (1989) 97.
32 HR 17 January 1997, NJ 1998, 656, *Covra – Miljoenen zijn tegen*.

What the foundation actually tried to do was to use tort law for a general goal; in this case for the protection of the interest they wish to protect i.e. the environment. This possibility for a foundation to start an action based on common interests as such is enacted now in the Civil Code in art. 3:305a. According to this article, an association or foundation with full legal capacity is entitled to an action for the purpose of protecting the interests similar in kind which are held by other persons, insofar as it promotes these interests according to its articles of association. Such an action, however, cannot relate to money damages.

Therefore, in Dutch law, in this context a difference is made between common interests and individual interests. The conclusion is that even if an administrative court finds that a license has not been unlawfully granted, for an individual it is still possible to start an action against the licensee in tort. However, a civil court will not judge on the weighing of common interests when this has already been done by an administrative judge. In this situation a claim based on tort will not be honoured.

Can the general duty of care go beyond these rules?

Yes, see (supra no.4).

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Does it make a difference for the allocation of the burden of proof concerning wrongfulness and fault whether the tortfeasor succeeds in proving that he has acted lawfully (as far as the relevant administrative law rules are concerned)?

Yes, see supra no..53

Compensation from other Sources

Are there any other sources of law besides tort law, e.g., in administrative law itself or in the broader field of the law of obligations, which impose liability for damages caused by a breach of such a rule?

As far as we know there are no other sources. However, there is a possibility to add a civil claim in a criminal procedure, see art. 51 Code of Criminal Procedure. According to this article, someone who suffered damage as a result of a criminal act can include a claim for damages in the criminal procedure. The damage must have been caused directly by the criminal act. An action is also possible by relatives when the direct victim is deceased. This of course is only possible if the defiance of the administrative rule is also a criminal act as such.

Does your legal system provide for compensation (either from the party who benefited, a fund, or government), if an administrative law rule permits an infringement of interests of another person? What are the requirements for such an "indemnification" claim?

Art. 49 of the Wet op de ruimtelijke ordening (Town and Country Planning Act) has to be mentioned first - especially as it has recently been modified[33] – as being most appropriate to address the question. When damage occurs as a result of a decision concerning a local plan, the mayor and aldermen have to pay damages when it is not reasonable this damage is for account of the victim, e.g. as a result of an administrative decision to set up a local plan, or when another party concerned is exempted from the terms of the local plan. This can lead e.g. to the depreciation of a house when, according to a new local plan, houses may be built while, according to a former plan, this was not possible. This can lead to a devaluation of the privacy of the already existing houses. There is no right to damages when compensation would be available by some other means.

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[33] Staatsblad 2005, 305.

Some decisions on local plans are made by the government on request of a third party, e.g. when an exemption from a local plan is allowed for the granting of a building licence which itself violates the local plan. According to art. 49a of the Wet op de ruimtelijke ordening, there is a possibility that the government agrees with the petitioner that damage that will be suffered by third parties will be paid by him, the petitioner.[34] When the petitioner makes a contract with the government, he is considered as an interested party of the decision the mayor and aldermen will make regarding the request for damages.[35] This means the plaintiff can try to exercise some influence either on the adjudication of damages or on the amount of damages.

This construction is an example of a situation in which the government can infringe someone's rights, while at the same time there is a possibility to pay damages (e.g. the infringement of proprietary rights which leads to pure economic loss).

In several other regulations it is also possible to claim damages if an administrative rule permits an infringement of interests of another person. However, both the provisions for compensation and for the requirements differ in these regulations. Therefore there is no general answer to the question. Most of these regulations relate to the infringement of the government itself and not to third parties who, in compliance with an administrative rule, infringe the right of someone else.

A good example is the Onteigeningswet (Compulsory Purchase Act): the government has to pay damages when the procurement of land is necessary to reach a public goal.

In this context several environmental Acts can also be mentioned. According to art. 73 Wet bodembescherming (Protection of Land Act), one can claim damages when there is a duty to accept that there will be research undertaken to determine whether : the land of which one is the rightful claimant has been polluted. There are no special requirements. According to art. 74 par. 3 Wet bodembescherming, one has no right to damages if the damage can be imputed to this person or when this person will be unjustly enriched if he is awarded damages.

According to art. 60 Wet op de luchtverontreiniging (Air Pollution Act), a rightful claimant can claim damages when the government has to make use of real property to determine the pollution of the air.

A last example is art. 15.20 Wet milieubeheer (Environmental Conservation Act), although in this context there is no infringement of someone's rights: when damage occurs as a result of an administrative decision, damages can be claimed, e.g. when there is an administrative decision relating to the application of a certain environmental license or to the terms that are stated in the environmental licence. This is also true when, previously, an environmental licence was not necessary, but according to new regulations it is or in the case of new regulations for the protection of the environment.

Apart from these rather specific Acts, there is also a more general right to compensation of losses which arise as a result of action taken by the government. In these cases damages have to be paid when someone suffers or will suffer damage and it is not reasonable it is for account of the victim. When the government does not pay

Comment [MSOffice5]: Think this would have to be re-formulated.and it is not reasonable that the damage will be for his account (that he has to pay the damage himself) ok OK

[34] This article is included in the act, after the Hoge Raad decided (HR 2 May 2003, Landelijke Jurisprudentie Nummers (LJN) AF2848) SEEMS SOMETHING IS MISSING HERE One cannot exculpate damages to the petitioner by means of a civil contract. Art. 49a concerns requests to modify local plans or requests for an exemption of certain terms of a local plan.

[35] Art. 49a par. 2, Wet op de ruimtelijke ordening.

damages, the administrative decision can be repealed by the administrative court.[36] It is also possible to claim damages as a result of action taken by the government in civil court.[37]

For damage as a result of air pollution, the Fonds luchtverontreiniging (Pollution of the Air Fund) has to be mentioned. According to this Fund, there is a right for compensation of damage which is the result of air pollution and which is caused by unknown originators.[38] Because in these cases the originators are unknown, it is possible that damage can occur - despite the existence of a licence – because it was not foreseen.

Finally we mention art. 6:168 BW:

1) The judge may reject an action to obtain an order prohibiting unlawful conduct on the ground that such conduct should be tolerated for reasons of important societal interests. The victim retains his right to reparation of damage according to this title.

2) In the case referred to in art. 170, the servant is not liable for this damage.

3) The judge may still issue an order prohibiting the conduct where a condemnation to pay damages or to furnish security is not complied with.[39]

To a certain extent this article is also relevant for answering the question, because, according to Dutch law, conduct in compliance with an administrative license can be unlawful in civil law. Although the judge will not prohibit this conduct, the victim retains his right to reparation of damage. In this context, conduct is unlawful when there is a violation of a right or a breach of a duty of care (see supra no.4).

Some Cases

In 1976 a chemical plant, operated by company A, was granted a permit to emit a certain amount of exhaust gases into the air. According to the most recent technological standards, this amount could be significantly reduced at a reasonable cost. However, the government regulations have not been updated since the 1970s. Can a local farmer, who suffers damage to his crop as a result of the emissions, claim damages from either the government or the plant operator?

The farmer can claim damages from the plant owner in tort.[40] Whether or not the government regulations are updated, the farmer has a duty of care to operate within certain limits.

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[36] See the leading cases of the Judicial Division of the Council of State of 12 January 1982, Administratiefrechtelijke Beslissingen (AB) 1982, 299 (*Paul Krugerbrug*) and *Paul Krugerbrug II*, 22 November 1983, AB 1984, 154. See on recent case law *K.J. de Graaf/A.T. Marseille*, De werkelijke en wenselijke rechtsmachtverdeling bij aansprakelijkheid voor publiekrechtelijk handelen, Nederlands Juristenblad (NJB) 2004, 779-784.

[37] HR 18 January 1991, NJ 1992, 638 (*Leffers – De Staat*). More recently e.g. HR 3 April 1998, AB 1998, 256 (*Meiland – De Staat*) and HR 30 March 2001, RvdW 2001, 71. See on this topic *P.C. Knijp*, Civielrechtelijke aansprakelijkheid van de overheid jegens derden voor toepassing van strafvorderlijke dwangmiddelen, Nieuwsbrief BW 2001, 91-93.

[38] Art. 15.24 ff. Wet milieubeheer.

[39] Translation from Haanappel and Mackaay (fn. 2) 301.

[40] *H. van Boom/I. Giesen*, Civielrechtelijke overheidsaansprakelijk voor het niet voorkomen van gezondheidsschade door rampen, NJB 2001, 1675-1685.

In this kind of case in doctrinal writing the government is assumed as a "peripheral tortfeasor".[41] There is, as yet, no civil litigation on the question whether the government can be held liable when regulations have not been updated or when there is a lack of regulations. In question I.4 is observed, that the judge is not allowed to try legislation in a formal sense to the Constitution and the Charter of the Kingdom of the Netherlands. This being so, according to Van Boom and Giesen, this must also be true when there is, as a result of omitting to create legislation, no legislation at all. However, when there is absolutely no justification for not creating legislation, it should be possible to hold lower regulation agencies liable.[42]

We agree on this point of view.

A specific statute with regard to occupational hazards compels employers to have certain protective measures in their workshops. B runs a one-man workshop in which no employees or visitors are ever present. Assuming that in that case the regulatory provisions do not apply, can B nevertheless be held liable in tort by a one-time visitor to the workshop that is injured as a result?

Of course B can always be held liable in tort in general when the injured party meets all the requirements of art. 6:162 BW (supra no 2.) and 6:163 BW (supra no 23). When the regulatory provisions as such do not apply, B cannot be held liable in tort for violating a statutory norm.

Company B has for years been violating all sorts of regulations with regard to public safety rules. Although there is a government agency that has the legal powers to fine and even close company B down, this agency has seldom acted upon information of the violations. It has visited the company once and has issued a list of shortcomings that the company was supposed to remedy. The company did not remedy the shortcomings and the agency never returned or reprimanded the company. Some time afterwards, a serious accident occurred at company B, which would have been prevented from happening if the company had complied with the safety rules.

Can the injured persons hold the company liable for the damage? And if so, could the company raise the defence of lack of supervision by the regulatory agency?

The injured persons can hold the company liable for damage in tort; art. 6:162 and 6:163 BW. See supra no. 2 and 23 However, it is not possible for the company to raise a defence of lack of supervision by the regulatory agent.

Could the injured persons claim damages from the government agency?

In only one case of the Hoge Raad[43] is this is issue dealt with although the facts were somewhat different. In 1983 there was a fire safety control in the restaurant, Boeddha. In 1988 there was a fire and visitors were both killed and injured. However, according to the court, there was no duty for the municipality to undertake extra controls between 1983 and 1988 and so there was no liability.

In the case law of the lower courts there are a few examples in which injured persons could claim compensation from a government agency.[44] In all these cases liability

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41 *Van Boom/Giesen*, NJB 2001, 1676.
42 *Van Boom/Giesen*, NJB 2001, 1678 and 1679.
43 HR 22 June 2001, LJN-no: AB2237 (*Restaurant "Boeddha"*).
44 Recently on this topic *C.L.G.F.H. Albers*, Overheidsaansprakelijkheid voor gebrekkig toezicht en ontoereikende handhaving. De geest uit de fles?, Nederlands Tijdschrift voor Burgerlijk Recht (NTBR) 2005, 482-496.

was based on the duty of care principle,[45] but this is only possible in exceptional circumstances. If the administrative agency does not use its competence to maintain orders, this failure to do so is not unlawful as such. There is liability only in case of a very severe shortcoming, intentional or wrong advice and severe shortcomings in supervising. Normally the competence to maintain is assumed to be as discretional for the administrative agency.

In one case the claim was denied.[46] According to this court decision, toleration and legalisation of dangerous activities in a residential district by the municipality is not unlawful. This case law is different from case law of administrative courts; according to these courts, in principle, there is a duty to maintain orders.[47]

There is also an important verdict of the European Court of Human Rights which contradicts the opinion of the District Court of The Hague.[48] According to the European Court, the violation of art. 2 EVRM (the right to life) as a result of insufficient control or not-maintaining orders may lead to liability of the administrative agency.[49]

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[45] See Court of Appeal Amsterdam, 9 August 1990, Bouwrecht (BR) 1991, 308 (Ruurlo). In this case, a building license was applied for for the restoring of a hotel in an old farmhouse. A civil servant noticed that there was a very dangerous situation: one could easily fall out of the window of the attic, because it had not been built in conformity with the provisions of the license. However, he did not report this to the mayor and aldermen. A few months later a 14-year-old girl fell out of the window and was seriously injured. According to the Court of Amsterdam, now there is tortious liability for lack of inspection and control. See also District Court of Utrecht, 26 August 2003, Jurisprudentie Bestuursrecht (JB) 2003/304 (Oudewater). In this case one started building a house without an adequate building license. Plaintiffs were neighbours and they went to civil servants several times to voice their concerns on this project. There was a risk of subsidence of their house or of other forms of damage. Damage did in fact occur and the municipality was held liable in tort by the Court of Utrecht, because of seriously shortcoming. See finally the District Court of Rotterdam, 26 May 2004, Nederlandse Juridische Feitenrechtspraak (NJF) 2004, 508 (Caldic Chemie BV – Rotterdam). There is liability only in case of a very severe shortcoming of regulation at all, intentional or wrong advice and severe shortcomings in controlling. According to the Court of The Hague in 2003 e.g., this was not the case in the fireworks disaster and there was no liability in tort for the government. Also in all other cases in this field, liability in tort is denied.

[46] District Court of The Hague, 24 December 2003, JB 2004/69 (Vuurwerkramp Enschedé).

[47] *Albers*, NTBR 2005, 488 ff.

[48] European Court of Human Rights, 18 June 2002; European Human Right Cases (EHRC) 2002, 64.

[49] See *Albers*, NTBR 2005, 486 and *T. Barkhuysen/M.L. van Emmerik*, Europese grenzen aan het gedogen van gevaarlijke situaties en aan beperkingen van overheidsaansprakelijkheid bij ongelukken en rampen, Overheid en Aansprakelijkheid (2003), 109-121. (this is a law journal)