do not seem at all prepared to stretch the concept of causal connection to find such liability for the damages caused by manufacturing defects.

If the law is to be changed, it will occur only because of a legislative act brought about by the pressure of public opinion. That the public, and the manufacturers themselves, are more and more aware of the importance of the safety element in cars is shown by the increase in public discussion of this subject. Typically, at the 1967 Turin Automobile Show, a well-known Italian automobile designer received considerable attention and publicity for his presentation of a prototype of a car which accentuated ultimate safety rather than pure beauty.

The Netherlands

FRANS J. J. VAN HEEMSTRA *

The question of products liability has been the subject of rather lively debate among Netherlands legal scholars ever since illness and even more serious physical injury was suffered on a broad scale by such defectively-made consumer products as Planta Margarine and Thalidomide sleeping pills. Under existing laws the liability of the manufacturers of these products was not clear. A further reason for debate has been the proposed extension of the liability of a manufacturer in Section 6.3.13 of the new Civil Code, which has not yet been enacted. Finally, products liability has been discussed in the context of proposals by insurers in the Netherlands to exclude this risk from legal liability policies and make them the subject of separate insurance.

The liability of the seller for damage caused by goods sold by him is covered by: (a) the general provisions regarding contract nonperformance,[1] including the provisions for "unknown defects" in the sections on the contract of purchase and sale; [2] (b) the contractual liability established by a warranty of the manufacturer or dealer; and (c) liability generally for an unlawful act, which is covered by the Tort Statute of the Civil Code.[3]

* Member of the New York Bar. M.C.L., University of Amsterdam. L.L.B., New York University Law School.

[1] Civil Code, Sections 1279-1284 [hereinafter cited by section number only].

[2] §§ 1540-1548.

[3] §§ 1401, 1402, 1403.

General Contract Liability

We first examine the special provisions in the Civil Code concerned with the contract of purchase and sale, which hold the seller liable for unknown defects, that is, defects making the goods sold unfit for the use for which they are intended.[4] If the seller did not know of the defect, the purchaser's relief is limited to return of the goods or reduction of the purchase price;[5] only if the seller knew of the defects, that is, if he acted in bad faith, shall he be liable for all damages caused by the goods.[6] A professional seller is not presumed to have known of such defects (as in the French law), and since the provisions apply only for the sale of specific goods, it is only of limited use to the purchaser thereby damaged.

In some cases, the courts have come to the aid of a purchaser by assuming in the contract of sale an express or implied agreement that the lack of the particular quality resulting in unfitness for the intended use constituted a breach of contract and that therefore the limitations mentioned above on damages were not applicable but that all damages suffered must be paid for because of the breach of contract.[7] Under the general breach-of-contract provisions applicable to sales of generic goods or where an implied warranty of quality is assumed as stated above, the purchaser can recover damages caused by the defective goods, subject to some of the following limitations. Under Section 1281 of the Civil Code, the seller of the defective goods may claim that acts of God or chance caused the defect; however, he will have to prove not only that the defect was caused without his fault, but also that it was not within the sphere of the risk assumed in manufacture. It is the general opinion that manufacturers are liable for employees and the equipment used, and accordingly a failure in the manufacturing process almost invariably leads to liability on the part of the manufacturer.[8]

A second limitation on the seller's liability for defective products is twofold; under Section 1283 the damages must have been forseeable at the time of the sale—unless seller knew of the defect—and in any event the damage must have been immediately and directly caused by the defect. The Supreme Court has expressed the requirements of

[4] § 1540.
[5] § 1542.
[6] § 1544.
[7] [1963] N.J. 288 (S. Ct.).
[8] *Asser, Losecaat Vermeer-Rutten* 275, 276 (2d ed.).

subjective forseeability and objective probability in one criterion, namely, that the damage must be the result expected to occur, assuming a defect, under the normal rules of experience.[9]

Liability Under Warranty

A guarantee given by a manufacturer or dealer concerning the qualities of a product may be the basis for liability for damages resulting from a defect and incurred by an ultimate consumer or user. A dealer may be liable thereunder even though the defect originated with the manufacturer, and the consumer may sue the manufacturer who issued the guarantee even though no contractual relationship existed between them.[10]

Tort Liability

The Tort Statute, contained in Sections 1401, 1402, and 1403 of the Civil Code, provides in substance that every unlawful act causing damage to another obligates the party at fault to make payment for damages caused by his fault. The Supreme Court of the Netherlands has defined an unlawful act as "an act or omission which either violates the rights of another, or is contrary to the legal duties of the tort feasor, or is unethical or lacks the degree of care due in relations of the community with respect to the person and goods of another." [11]

Under this Statute the courts have frequently held a manufacturer or dealer liable on the ground that it was unlawful to bring goods into commerce without insuring that they would be safe when used in the normal course of business. However, in all cases the courts have required proof of the fault of the parties sought to be held liable or of their employees. Even though the burden of proof was reversed in some cases and the manufacturer or dealer had to prove that he had exercised due care, the basis of liability remained his fault. A short outline of some of the more important cases follows.

In the Acetylene Cylinder case,[12] the defendant, a manufacturer of welding apparatus, leased a cylinder filled with acetylene to the employer of the plaintiff. The defendant had purchased the cylinder

[9] [1927] N.J. 658 (S. Ct.).

[10] [1948] N.J. 383 (Rotterdam); [1950] N.J. 106 (Court of Appeal, The Hague).

[11] [1919] N.J. 161 (S. Ct.).

[12] [1933] N.J. 881 (S. Ct.).

secondhand, and it exploded in the hands of the plaintiff, injuring him. The Supreme Court, reversing the Court of Appeals' dismissal of the complaint, held that under the factual circumstances the defendant had disregarded the care required in community relations by not inspecting the cylinder before leasing it. Possible defects created the risk of great danger. The defendant's fault consisted in not assuring himself that the cylinder was properly filled. The note of Professor E. M. M. Meijers, the author of the proposed Civil Code of the Netherlands, approvingly commented on the Court's decision, which established that delivery of an object potentially dangerous if defectively made constitutes an unlawful act by dint of a failure in the degree of care due in community relations even though, in the subject case, it was impossible to check the fitness of the cylinder.

In a decision of the Court of Appeals of Amsterdam, the court held the assembly plant of the Ford Motor Company in the Netherlands liable for damages suffered by a passing motorcyclist as a result of collision with an automobile assembled in defendant's plant.[13] It was established that a defective part of the steering mechanism, received from Ford's plant in the United States and assembled into the vehicle, was the immediate cause of the collision. The court held the defendant liable under Section 1401 on the ground that it was not compatible with the care due in community relations to bring into commerce cars with defects which seriously jeopardized the safety of traffic. The court found further that there was liability for damage caused to any user of the road since the damage was forseeable. It is understandable that such a mistake could be made in the technology of mass production, but the assembly plant carries the risk therefor. It is further understandable that Ford's assembly plant assumed that Ford U.S.A. furnished components free from defects and therefore exercised no special quality assurance controls at the assembly plant, but this is assumed at the assembly plant's risk. A key part of the decision, however, was that the fault-holding rested on the expert's finding that the defect was clearly noticeable and should have been detected by defendant's personnel. So, again in this case, there was no liability without fault.

In a recent case [14] the defendant manufacturer had sold faulty sewer pipe connecting materials to the contractor of the municipality of Heemskerk. The manufacturer had advertised the material as being

[13] [1958] N.J. 104.

[14] [1966] N.J. 279 (S. Ct.).

of high quality, and this induced the municipality to require the use of it by the contractor. There was no contractual relationship between the municipality and the manufacturer. The material was defective, and the municipality, suffering damages as a result of its use, sued the manufacturer under Section 1401. The Supreme Court held that the appellant-manufacturer could have forseen that not only the contractor but also the municipality would be induced by its advertisement to use its product and that it should have realized that use of a defective product would cause serious damage to the ultimate owner. Under such circumstances, the municipality did not have to prove in detail the specific negligent acts and omissions causing the defect. The court found liability for full damages although the manufacturer in its contract with the contractor had limited its liability; this limitation applied only to the parties to the contract and was no defense against the consumer's claim for damages under Section 1401.

In a note commenting on the decision, the well-known Dutch scholar, Professor P. J. Scholten, concludes that liability was partially based on the fact of the advertising, which the court almost treated like a kind of warranty. The unlawful act was not so much the defective delivery per se, but the defective delivery under the specific circumstances of the case including the advertising; without such advertising the damaged party would have had to prove fault on the part of the manufacturer for the defective materials.

Under the proposed Civil Code, products liability on the part of the manufacturer will be provided for specifically in Book 6, paragraph 3, Section 13:

> Anyone who manufactures and brings or causes to be brought into commerce a product which creates as a result of a defect unknown to him a danger to person or property, if damage is caused as a result thereof, is liable as if the defect had been known to him, unless he proves the defect was not due to his fault, or due to the fault of another who worked at the product at his instance, or due to the failure of equipment used by him.

The Government memorandum accompanying this section mentions that, under present law, liability of the manufacturer can only be based on proving his or his employees' fault for causing the damage by making a defective product. In view of present technology it becomes more and more difficult to prove such fault. It is therefore understandable that the jurisprudence in industrial countries has