



DATE DOWNLOADED: Wed Dec 1 18:51:41 2021

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Citations:

Bluebook 21st ed.

Ilse Samoy, Christopher Borucki & Anne Keirse, The Role of Belgian and Dutch Tort Law in the Legal Battle against Damage as a Result of Smoking Behavior, 15 UTRECHT L. REV. 78 (2019).

ALWD 7th ed.

Ilse Samoy, Christopher Borucki & Anne Keirse, The Role of Belgian and Dutch Tort Law in the Legal Battle against Damage as a Result of Smoking Behavior, 15 Utrecht L. Rev. 78 (2019).

APA 7th ed.

Samoy, I., Borucki, C., & Keirse, A. (2019). The Role of Belgian and Dutch Tort Law in the Legal Battle against Damage as Result of Smoking Behavior. Utrecht Law Review, 15(3), 78-98.

Chicago 17th ed.

Ilse Samoy; Christopher Borucki; Anne Keirse, "The Role of Belgian and Dutch Tort Law in the Legal Battle against Damage as a Result of Smoking Behavior," Utrecht Law Review 15, no. 3 (2019): 78-98

McGill Guide 9th ed.

Ilse Samoy, Christopher Borucki & Anne Keirse, "The Role of Belgian and Dutch Tort Law in the Legal Battle against Damage as a Result of Smoking Behavior" (2019) 15:3 Utrecht L Rev 78.

AGLC 4th ed.

Ilse Samoy, Christopher Borucki and Anne Keirse, 'The Role of Belgian and Dutch Tort Law in the Legal Battle against Damage as a Result of Smoking Behavior' (2019) 15 Utrecht Law Review 78.

MLA 8th ed.

Samoy, Ilse, et al. "The Role of Belgian and Dutch Tort Law in the Legal Battle against Damage as a Result of Smoking Behavior." Utrecht Law Review, vol. 15, no. 3, 2019, p. 78-98. HeinOnline.

OSCOLA 4th ed.

Ilse Samoy, Christopher Borucki & Anne Keirse, 'The Role of Belgian and Dutch Tort Law in the Legal Battle against Damage as a Result of Smoking Behavior' (2019) 15 Utrecht L Rev 78

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## ARTICLE

# The Role of Belgian and Dutch Tort Law in the Legal Battle Against Damage as a Result of Smoking Behaviour

Ilse Samoy\*, Christopher Borucki† and Anne Keirse‡

Can tort law play a significant role in the Dutch and Belgian legal systems in the legal fight against damage caused by smoking behaviour? This contribution looks into the compensatory function of tort law. It examines the possibility of compensating victims of damage related to the use of tobacco products. Central to that inquiry are the questions on who can potentially be held liable and on which liability grounds a claim in tort can be based. Particular attention is paid to the manufacturers of tobacco products. The latter's liability depends not only on their own conduct, but also on the health risks taken – or rather ignored – by the consumer. As the adverse effects of tobacco smoke have become commonplace, the role of tort law is rather modest. A successful claim is not obvious, but it is possible in specific circumstances.

**Keywords:** Tort law; compensation of damage; damage caused by smoking behaviour; contributory negligence

## 1. Introduction

### 1.1. *Tort law as a legal instrument against tobacco use*

Today the adverse effects of tobacco use have become an inconvertible truth. Smokers who wish to continue living in denial of those effects face a difficult time ignoring the shiny, white-boxed warnings that mark their tobacco products. However, even though the harmful nature of tobacco products is well-known, their sale and use remain legal. Worldwide, smoking behaviour is still one of the most important, yet avoidable causes of death. Governments, supranational organisations, NGOs and private actors all over the globe join hands in their quest to curtail the tobacco use epidemic, employing a whole range of diverse public policy mechanisms. Although their efforts prove to be successful as overall adult smoking rates increasingly fall and mortality rates decline, many remain caught in a web of tobacco dependence.<sup>1</sup> Therefore, calls can be heard to crack down more vigorously on the legal, but harmful tobacco goods. It is argued that the legal system too should combat those products and prevent the public health issues they cause.

This contribution seeks out an answer to the question of which role tort law plays in the legal battle against the harmful consequences of tobacco smoke. Can damage caused by tobacco smoke justify a claim in tort? The primary goal of tort law immediately clarifies and relativises its role. First and foremost, tort law concerns the search for those cases in which damage should be compensated. The result of that

\* Prof. dr. Ilse Samoy, Professor of Private Law affiliated with the Institute of the Law of Obligations at the KU Leuven, UHasselt as well as lawyer at the bar of Leuven, BE. email: [ilse.samoy@kuleuven.be](mailto:ilse.samoy@kuleuven.be).

† Christopher Borucki, PhD student affiliated with the Institute of the Law of Obligations at the KU Leuven, UHasselt, BE. email: [christopher.borucki@kuleuven.be](mailto:christopher.borucki@kuleuven.be).

‡ Prof. dr. Anne Keirse, Professor of Private Law, Utrecht University, affiliated with the Utrecht Centre for Accountability and Liability Law (UCALL), the Utrecht Centre for Shared Regulation and Enforcement in Europe (RENFORCE) and judge at the Court of Appeal in Amsterdam, NL. email: [a.l.m.keirse@uu.nl](mailto:a.l.m.keirse@uu.nl).

<sup>1</sup> For example, even though the number of smoking adults in the US has more than halved ever since the seminal rapport of the Surgeon General was published in 1964, more than 40 million Americans remain addicted to tobacco products, see US Department of Health and Human Services, *The Health Consequences of Smoking: 50 Years of Progress. A Report of the Surgeon General* (2014).

search is determined by resolving the tension between the viewpoints 'everyone bears their own damage' and 'do not inflict harm upon another'.<sup>2</sup> Distinguishing whether liability is warranted in an individual case depends on the weight that must be accorded to both viewpoints, which requires a balancing act between the freedom of the wrongdoer and the protection of the wronged party. In principle, those who suffer damage should carry the loss themselves ('the loss lies where it falls').<sup>3</sup> However, as an exception to this age-old rule, tort law shifts the burden of loss from the wronged party to a wrongdoer on the basis of responsibility of the latter for the occurrence of the damage. If the damage originates from the wrongful or risk-creating behaviour of a third-party, this third-party can be held liable for damages.<sup>4</sup> Where at the turn of the 19<sup>th</sup> century individual liberty and responsibility stood central, with as little interference by the government as possible, the emphasis in our contemporary, industrialised society, prone to accidents and risks, has shifted towards the safety and protection of persons against acts by others.<sup>5</sup> Law no longer concentrates exclusively on individual liberty, but is also concerned with the broader interests of the community. This extension has led to a greater protection of victims in case law and doctrine through new or broader interpretations of the rules of tort law.

A similar evolution has occurred regarding smoking behaviour and smokers. Two conflicting interests collide when a person smokes in the presence of others. The personal liberty of every person (here the freedom to smoke) stands at odds with the need for certainty of every human (here the certainty not to be exposed to the harmful effects of smoke). Once, the individual freedom of a person to smoke wherever and whenever he or she pleased was paramount. Since then, governments have gradually introduced smoking bans to protect the health and safety of other persons.<sup>6</sup> This evolution has an impact on the possibilities to combat smoking behaviour through tort law. Tobacco smoke does not only damage the health of smokers themselves, but it also has several intrusive effects on non-smokers.<sup>7</sup> On the one hand tobacco smoke causes them immediate discomfort such as an annoying smell, the irritation of eyes, nose and throat, voice loss, headaches, dizziness and nausea, fatigue and concentration problems, the deterioration of smell and taste, a persistent and pungent smell in clothes and hair, and so on. On the other hand long-term exposure to tobacco smoke increases health risks. It heightens the risk to develop lung, throat and mouth cancer, cardiovascular and respiratory diseases, allergies and tooth decay. Some of those risks can lead to disability or even death.

In line with the primary, compensatory nature of tort law this contribution enquires (1) which wronged parties could claim in tort (e.g. victims of secondhand smoke or smokers themselves) and (2) from whom

<sup>2</sup> C.H. Sieburgh, *Toerekening van een onrechtmatige daad* (2000), p. 5 ff; A.L.M. Keirse, *Schadebeperkingsplicht. Over eigen schuld aan de omvang van de schade* (2003), p. 18; A.S. Hartkamp & C.H. Sieburg, *Mr. C. Assers Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht. Verbintenissenrecht. De verbintenis uit de wet* (2015), 6-IV, para. 18.

<sup>3</sup> O.W. Holmes, *The Common Law* (1881), p. 47: 'For civil liability, in its immediate working, is simply a redistribution of an existing loss between two individuals, (...) sound policy lets losses lie where they fall, except where a special reason can be shown for interference.'; J.W. Salmond, *The law of torts* (1907), p. 10; R. Kruihof, 'Contractuele aansprakelijkheidsregelingen', (1984) *TPR* 1984, p. 233.

<sup>4</sup> S. Stijns, *Verbintenissenrecht* (2013), 1bis, p. 33, para. 41–42; H. Bocken et al., *Inleiding tot het schadevergoedingsrecht* (2014), pp. 6–7.

<sup>5</sup> H. Bocken, 'Van fout naar risico: een overzicht van de objectieve aansprakelijkheidsregelingen naar Belgisch recht', (1984) *TPR*, pp. 329–330, para. 2, T. Vansweevelt & B. Weyts, *Handboek buitencontractueel aansprakelijkheidsrecht* (2009), p. 12 ff, para. 17 ff; Stijns, *ibid.*, p. 33, paras. 41–42.

<sup>6</sup> The Belgian and Dutch legislatures, for example, prohibit smoking in all publicly accessible places that are enclosed and grants all employees the right to a smoke-free work environment. See for Belgium, wet van 22 december 2009 betreffende een algemene regeling voor rookvrije gesloten plaatsen toegankelijk voor het publiek en ter bescherming van werknemers tegen tabaksrook, *BS* 29 December 2012, p. 82.139 (act of 22 December 2009 containing a general scheme for smoke-free enclosed areas accessible by the public and protecting workers from tobacco smoke). See for the Netherlands, wet van 10 maart 1988 houdende maatregelen ter beperking van het tabaksgebruik, in het bijzonder ter bescherming van de niet-roker 1988, *Stb.* 1988, p. 342 (act of 10 March 1988 laying down measures to restrict tobacco consumption, in particular to protect non-smokers), which entered into force on 1 January 1990 and the restrictions of which have since been tightened repeatedly.

<sup>7</sup> The detrimental effects of secondhand smoke have been proven repeatedly. Recently, studies have been conducted that conclude that it is even possible to identify a third category of possible victims; namely, those who are exposed to 'thirdhand' smoke. Third-hand smoke refers to toxic particles that remain present in a room for quite some time after smoking has taken place. A typical example is that of rented housing in which the tenants smoke and then move elsewhere. New, non-smoking tenants may subsequently be confronted with contaminated surfaces for months after the previous residents have moved out. See amongst others M. Martins-Green et al., 'Cigarette Smoke Toxins Deposited on Surfaces: Implications for Human Health', (2014) *PLoS ONE*, p. 12; G. Matt et al., 'When smokers move out and non-smokers move in: residential thirdhand smoke pollution and exposure', (2010) *Tobacco Control*, p. 9.

compensation could be claimed (e.g. smokers, tobacco industry, third-parties). To answer those questions the contribution examines Articles 1382–1386*bis* of the Belgian Civil Code (BCC) and their Dutch equivalents, ranging onwards from Article 6:162 Dutch Civil Code (DCC). The core of the contribution is based on Belgian and Dutch tort law, but the underlying principles are likely transposable to other legal systems. Moreover, not only is inspiration drawn from foreign legal systems as regards Belgian or Dutch sore points, the contribution is also substantiated by and illustrated with foreign case-law. After all, even though claims for damage caused by smoking behaviour are rare in Belgium and, to a lesser extent, in the Netherlands, foreign tort litigation has proved their possible success. As so often is the case, it is a matter of taking the plunge.<sup>8</sup>

The contribution does not delve into the preventive function of tort law.<sup>9</sup> Although, this function is of interest in the battle against the harmful consequences of smoking behaviour, a thorough analysis would enlarge this contribution too much. The compensatory function provides enough food for thought by itself. Moreover, in another contribution to this edition of the *Utrecht Law Review*, Gillaerts examines the preventive function of tort law in depth. Thus, the contribution adopts an *ex post* perspective, focussed on the compensation of occurred damage, rather than an *ex ante* perspective, aimed towards preventing future damage.

## 1.2. Structure of contribution

In order to reach a structured answer of the central research questions, this contribution first deals with the grounds of liability for both personal liability as well as some forms of strict liability. Therefore, sections two and three dig into the foundations of the core concepts of tort law, their components and their application.

To that end section two examines whether exposure to tobacco smoke constitutes a violation of a specific legal norm or an infringement of the general duty of care. In the first case, this violation in and of itself leads to a fault by the wrongdoer. To establish whether or not wrongdoers have exercised due care in the second case, their behaviour is tested against the conduct of a normal, reasonably prudent and forethoughtful person. An examination is made of the restraint such a person would exercise from smoking in the presence of others. Attention is also paid to the possible consequences of a contributory negligence of the wronged party, in the event that it freely and deliberately exposes itself to tobacco smoke, as well as a possible interference by contractual obligations.

In section three some forms of strict liability are highlighted.

## 2. Grounds of personal liability

### 2.1. Requirement of fault

Traditionally, three requirements for tortious liability are inferred from the core provisions of Belgian tort law. Liability depends on the joint presence of (i) a fault, (ii) a damage and (iii) a causal link between both.<sup>10</sup> A wronged party that wishes to claim damages on the basis of Articles 1382 and 1383 of the BCC must prove a fault by the wrongdoer. The latter may not lack the capacity for tortious liability and the fault must be accountable to him or her.<sup>11</sup> Tort law is fundamentally grounded in this notion of fault.<sup>12</sup> The same holds true for Dutch law. Article 6:162 of the DCC imposes liability for damage that is caused by an accountable wrong (i.e. fault).

A fault can either be a violation of a specific legal norm that prohibits or obliges certain behaviour or an infringement of the general duty of care.<sup>13</sup> In the first case, this violation in and of itself leads to a fault by the

<sup>8</sup> It has to be acknowledged that the rarity of claims in tort could also be partly explained by the fact that in Belgium and the Netherlands wronged parties may be able to rely on alternative methods of compensation more frequently than other countries. For example, both countries have a strongly developed social security scheme and are familiar with compensation funds. Compensation via those alternative pathways is not dependent on the fulfilment of the prerequisites of tort law.

<sup>9</sup> See about this function A.L.M. Keirse, *Mogelijkheden schadevoorkomingsplicht via aansprakelijkheidsrecht. Rapportage voor het Ministerie van Infrastructuur en Milieu* (2017), pp. 13–14.

<sup>10</sup> J. Ronse, *Schade en schadeloosstelling (onrechtmatige daad)* (1957), p. 54, para. 1.

<sup>11</sup> B. Dubuisson et al., *La responsabilité civile – Chronique de jurisprudence 1996–2007* (2009), I, pp. 35–36, para. 20; Vansweevelt & Weyts, supra note 5, p. 147, para. 203; Stijns, supra note 4, p. 40, para. 48; P. Van Ommeslaghe, *Droit des obligations* (2013), II.2, pp. 1236–1237, para. 841. Bocken et al., supra note 4, p. 85.

<sup>12</sup> Vansweevelt & Weyts, *ibid.*, p. 121, para. 170.

<sup>13</sup> Cass. 24 May 2018, C.17.0504.N; Dubuisson et al., supra note 11, p. 22, para. 2; Vansweevelt & Weyts, *ibid.*, p. 126, para. 175; Stijns, supra note 4, p. 40, para. 49; Van Ommeslaghe, supra note 11, pp. 1217–1218, para. 829; Bocken et al., supra note 4, p. 89. See also Cass. 9 February 2017, C.13.0528.F.

wrongdoer, except for when there is justificatory ground for the wrongful behaviour.<sup>14</sup> To establish whether or not wrongdoers have exercised due care in the second case, their behaviour is tested against the conduct of a normal, reasonably prudent and forethoughtful person.<sup>15</sup>

## 2.2. Violation of a specific legal norm or breach of a legal obligation

### 2.2.1. Specific legal norms that impose a smoking ban

There exists specific legislation that imposes a smoking ban. A general smoking ban is in place in Belgium, the Netherlands and most other European countries for all public transportation, all publicly accessible enclosures, all schools, the catering industry and all workplaces.<sup>16</sup> Anyone subjected to this ban, who smokes oneself<sup>17</sup> or allows others to smoke<sup>18</sup>, commits a fault. Thus, both the smoker and third-parties can be held liable by victims of secondhand smoke.

The facts over which a Belgian justice of peace (cantonal judge) ruled on 2 November 2005 form an illustration of the violation of a specific smoking ban.<sup>19</sup> A 75-year old war veteran was a frequent passenger on the public buses of the Belgian national public transport service 'De Lijn'. He was allergic to tobacco smoke, which, on exposure, caused him to experience severe respiratory problems and irritation of the eyes. He noticed that bus drivers regularly smoked while transporting passengers, even though they were strictly prohibited from doing so. He systematically reported these incidents. Because the transport service continued to fail to enforce the legal smoking ban, he went to court. He asked the judge to order De Lijn to demand respect from its drivers for the smoking ban and to enforce it in such a way that future violations were prevented, subject to penalty payment. He also claimed damages on the basis of Article 1384(3) of the BCC, which contains the vicarious liability of appointers for damage caused by their appointees. The judge did not explicitly formulate that the bus drivers had committed a wrongful act. However, from the judgment's reasoning it transpired that this was indeed the case. The bus drivers were acting in violation of a legal prohibition and triggered liability on behalf of De Lijn. The fact that the transport service did not grant permission to smoke did not free it from this vicarious liability. The judge granted the penalty but did not award damages to the claimant. In the specific incident for which the latter claimed damages, no damage to his health could have occurred because of exposure to tobacco smoke as the claimant unjustly took matters into his own hands and pre-emptively extinguished the cigarette of the bus driver by spraying him in the face with a water gun.

The rise of a strict framework of specific legal norms aimed at reducing smoking rates among the population and banning smoking in certain areas increases the possibility that a wrongdoer to whom those norms allocate the responsibility of upholding their content can be held liable.

### 2.2.2. Rules of criminal law

Forced exposure to tobacco smoke could also amount to the violation of a specific rule of criminal law. Such a violation constitutes a fault by the wrongdoer in the sense of civil tort law, as does any other violation of a specific norm.<sup>20</sup> Marlier has conducted an extensive investigation into the question whether smoking in the presence of others, in particular of minors, is covered by a criminal qualification in Belgian law.<sup>21</sup> In the current legislative framework, the author concludes that a criminal conviction is not excluded, but is only likely in extreme circumstances. In Dutch law smoking behaviour could also fall under the qualification of several crimes. In these cases the victim of secondhand smoke could claim compensation from the smoker.

<sup>14</sup> Cass. 16 May 2011, C.10.0664.N ; Cass. 10 April 2014, C.11.0796.N ; Cass. 9 February 2017, C.13.0143.F ; Dubuisson et al., *ibid.*, p. 30, para. 13; Vansweevelt & Weyts, *ibid.*, p. 137 para. 190; Stijns, *ibid.*, p. 41, para. 50; Bocken et al., *ibid.*, p. 92.

<sup>15</sup> Cass. 5 June 2003, C.01.0252.F ; Dubuisson et al., *ibid.*, pp. 23–24, paras. 3–4; Vansweevelt & Weyts, *ibid.*, p. 127 *ff*; Stijns, *ibid.*, p. 42, paras. 51–52; Bocken et al., *ibid.*, p. 90.

<sup>16</sup> See the legislation mentioned *supra* in note 6.

<sup>17</sup> Vrederechter Mechelen 2 November 2005, A.R. 05A2530, *RW* 2005–06, p. 1153, annotation R. Blanpain. Bus drivers acting in violation of a legal prohibition of smoking, trigger liability on behalf of the transport service for which they work. The fact that the transport service does not grant permission to smoke does not free it from this vicarious liability.

<sup>18</sup> Ghent 6 May 2016, *RW* 2016–17, p. 1352. By tolerating party-goers and personnel to smoke inside a venue, its operator fails to fulfil his/her obligation to enforce the smoking ban inside the premises.

<sup>19</sup> *Supra* note 17.

<sup>20</sup> Bocken et al., *supra* note 4, p. 93.

<sup>21</sup> G. Marlier, 'De strafbaarheid van roken in het bijzijn van minderjarigen en het "aanzetten" tot roken', in I. Samoy & E. Coutteel (eds.), *Het rookverbod uitbreiden? Juridisch onderzoek, casussen & aanbevelingen* (2016), pp. 194–234.

Of interest is a recent attempt in the Netherlands to press criminal charges against the tobacco industry for the manufacturing of tobacco products. Reference can be made to Kool, who has thoroughly examined that case and the prosecution of the tobacco industry in general.<sup>22</sup> The victims of the alleged crime are the smokers themselves. The alleged wrongdoer in a civil claim in tort are manufacturers of tobacco products.

### 2.2.3. Labour law

Dutch labour law might also provide fertile ground for a claim in tort. It is possible that specific provisions oblige employers to provide a smoke-free working environment. Whenever that obligation is not met victims of secondhand smoke can claim compensation from their employer.

An example of such specific labour law provisions can be found in the Dutch case *Riphagen/Isala*, which made its way all the way up to the Dutch Supreme Court (*Hoge Raad*).<sup>23,24</sup> A woman was employed full-time from 1 October 1999 until 1 July 2000 as a medical secretary to two doctors in a hospital. Prior to her appointment she was already asthmatic. Both doctors were heavy smokers. During working hours the secretary was exposed to their tobacco smoke, which aggravated her asthma. Because of the timeframe of this case the Dutch legislation imposing the general smoking ban, which contains the right to a smoke-free working environment, was of no avail to the secretary as that legislation only took effect on 1 January 2004. Nonetheless, she claimed damages from the hospital for actual damage and future damage as a result of having to work in a smoke-filled environment. The cantonal judge of the court in Zwolle considers that the hospital committed a fault.<sup>25</sup> The violated legal norm is Article 7:658 of the DCC, which contains the obligation to provide a safe work environment, in conjunction with Article 3 of the Law on Working Conditions (*Arbeidsomstandighedenwet*)<sup>26</sup> and Article 4.9 of the Resolution on Working Conditions (*Arbeidsomstandighedenbesluit*),<sup>27</sup> which both stipulate that the employer must organise labour in such a way that it has no adverse effects on the health of employees. The judge decided that from these articles flows the obligation for an employer to guarantee non-smoking employees to be able to work and take a break in an environment that is completely smoke-free. Thus, a specific obligation to secure a smoke-free work environment is derived from a general obligation to provide a safe work environment. As the secretary was exposed to tobacco smoke in breach of that obligation the cantonal judge accepted a causal link between the working conditions and the (aggravation) of the secretary's health complaints.

Subsequently, the hospital lodged an appeal against this decision. After all, it cannot be excluded that, in light of the secretary's medical history, the aggravation of the health complaints would have arisen even if her workplace would have been completely smoke-free. In order to obtain more clarity about the causal link between the alleged worsening of the complaints and the secondhand smoke, the court of appeal in Arnhem ordered an expert examination by a pulmonologist. On the basis of the expert report and the medical history of the secretary, the court ruled that the likelihood that the exposure to secondhand smoke had led to the aggravation of the health complaints was as great as the chance that other factors, which were not attributable to the hospital, accounted for the worsening. Therefore, the court held the hospital liable on the basis of Article 7:658 of the DCC for 50% of the damage caused to the secretary.<sup>28</sup>

Next, the hospital filed in cassation. It argued that the fact that asthma is a chronic affliction with a varying progression, for which no cure is available, indicated that the aggravation of the health complaints was not a consequence of the exposure to tobacco smoke, but rather that it was inherent to (the course) of the disease itself. The Supreme Court replied that the court of appeal apparently deduced from the expert report that the health complaints of the secretary worsened during the period in which she worked for the hospital and that the likelihood that this aggravation was the result from secondhand smoke was the same

<sup>22</sup> R.S.B. Kool, 'Op (te) smalle leest? – De betekenis van het strafrecht voor de bestrijding van legale gezondheidsbedreigende risico's', in A.L.M. Keirse et al. (eds.), *Ongezonder en (on)geoorloofd* (2018), pp. 313–334, in particular p. 324 ff.

<sup>23</sup> Note that the Supreme Court of the Netherlands is a court of cassation, which does not rule on the facts of a case.

<sup>24</sup> See A.L.M. Keirse, 'De meerokende of uitgerookte werknemer en zijn kansen in het aansprakelijkheidsrecht', (2010) 9 *NTBR*, pp. 352–360.

<sup>25</sup> Rb. Zwolle 17 June 2003, ECLI:NL:RBZWO:2003:AH9100, *WR* 2004, p. 48.

<sup>26</sup> Wet van 18 maart 1999 houdende bepalingen ter verbetering van de arbeidsomstandigheden, *Stb.* 1999, p. 184 (act of 18 March 1999 laying down provisions for the improvement of labouring conditions).

<sup>27</sup> Besluit van 15 januari 1997 houdende regels in het belang van de veiligheid, de gezondheid en het welzijn in verband met de arbeid, *Stb.* 1997, p. 60 (decree of 15 January 1997 laying down rules in the interests of safety, health and welfare at work).

<sup>28</sup> Hof Arnhem 4 September 2007, ECLI:NL:GHARN:2007:BB4880. See also A.L.M. Keirse, 'Werkgevers proportioneel aansprakelijk voor meeroken op de werkvloer (annotation under Hof Arnhem 26 September 2006)', (2007) *Jurisprudentie Aansprakelijkheid*, no. 60.

as the probability that it has another, non-work related cause. That judgment, which found that a causal link between the health complaints and the exposure to tobacco smoke can be assumed, based on the findings of the expert pulmonologist, in spite of the absence of objective medical data, is intertwined with a valuation of a factual nature and cannot be re-examined in cassation. The Supreme Court referred to the Dutch procedure for the determination of damages for the question regarding the exact extent of the damage suffered as a result of secondhand smoke in the workplace.<sup>29</sup>

In Belgium employees cannot claim in tort against their employers for physical damage incurred in the fulfilment of their employment contract.<sup>30</sup> Instead, they have to rely on the insurance for occupational hazards that the employer is obliged to take out. Thus, for this head of damage the exposure of employees to tobacco smoke falls outside of the scope of general tort law.<sup>31</sup> In France<sup>32</sup> the Court of Cassation held in cases where an employee was exposed to asbestos that employers by virtue of the contract of employment are bound by an obligation of result regarding the safety of their employees.<sup>33</sup> Failure to meet that obligation can give rise to civil liability of employers as such a failure constitutes an inexcusable fault when the employers were or should have been aware of the danger to which the employees were exposed, yet failed to take necessary and adequate measures to protect the employees. Hence, the scope of occupational risks for which an employer can be held liable is broader than in Belgium. Liability might extend to situations in which employers fail to safeguard their employees against damage caused by tobacco smoke.<sup>34</sup> Currently, similar rulings are not possible in Belgium. In the applicable French labour law the notion of 'inexcusable fault' is used as the limit of the immunity of the employer, whereas Belgian labour law requires intent by the employer.<sup>35</sup> Thus, Belgian law is more restrictive.

#### 2.2.4. Specific regimes of liability

Regard must also be held to specific legal liability regimes outside the general tort system. The personal and material scope of specific liability regimes determine who can claim compensation from whom.

A specific liability regime is, for example, in force in the aviation sector.<sup>36</sup> In Belgium and the Netherlands, liability for air transport safety is determined by the interaction between the Montreal Convention of 1999<sup>37</sup> and the European Regulation on air carrier liability in the event of accidents.<sup>38</sup> Liability for accidents during international flights between Member States is exclusively governed by the Montreal Convention. The convention has a wide scope of application. Moreover, the European regulation declares this treaty-based liability regime applicable to all transport performed by European air carriers, regardless of whether that transport would fall under the applicability of the Montreal Convention without this referral rule. In addition, the Dutch legislature has transposed the liability rules laid down in the convention, which applies to international flights, integrally into national law. The liability regime of the Montreal Convention not only has a very broad scope of application, but is also passenger-friendly.<sup>39</sup> An important restriction, however, is that there must be an 'accident' if the broad liability regime is to apply.

<sup>29</sup> HR 9 January 2009, ECLI:NL:HR:2009:BG4014, *LenS* 2009, p. 17.

<sup>30</sup> Art. 46, Arbeidsongevallenwet van 10 april 1971, *BS* 24 April 1971, p. 5201. The immunity of the employer is lifted when the employer or his or her appointees intentionally caused the accident which caused the occupational harm. The immunity is also not applicable to damage caused to goods.

<sup>31</sup> Compare with asbestos-related damage, E. De Kezel, *Asbest, gezondheid en veiligheid* (2013), p. 288, para. 535.

<sup>32</sup> Where tort law is historically influenced by the same Napoleonic Civil Code as in Belgium.

<sup>33</sup> Cass.Fr. Soc. 28 February 2002, n°00-10.051, n°00-11.793, n°13.172, n°99-18.389, n°99-17.201, n°99-18.390 and n°99-21-255; Cass. Fr. Civ. 2 26 November 2016, n°14-26.240.

<sup>34</sup> The conception of inexcusable fault in the asbestos-related case has been extended to a case in which an employee committed suicide, see Cass.Fr. Civ. 2 22 February 2007, n°05-13.771.

<sup>35</sup> See e.g. Art. L452-1, Code de la sécurité sociale. See for Belgium *supra* note 30.

<sup>36</sup> See I. Koning, 'Letselschade en luchtreizen; onbeperkt en exclusief', in J.M. Beer (ed.), *Verkenningen binnen het letselschaderecht* (2012), p. 57 *ff.*

<sup>37</sup> Montreal Convention for the Unification of Certain Rules for International Carriage by Air, signed 28 May 1999.

<sup>38</sup> Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents, *OJ L* 140, 30 May 2002, pp. 2–5.

<sup>39</sup> See Koning, *supra* note 36, p. 57 *ff.*

An American case illustrates an application of this specific liability regime. In the cases *Olympic Airways v Husain*<sup>40</sup> and *Husain v Olympic Airways*<sup>41</sup> an asthmatic airplane passenger on an international flight was seated in the smoke-free area of the airplane, three rows from the smoking section. The passenger and his wife repeatedly requested the airplane personnel to be resealed as tobacco smoke travelled into the rest of the compartment. The request was denied by the flight attendant, who argued that no free seats were available. The passenger suffered an asthmatic attack and died. His wife sued the aviation company by filing a wrongful-death suit. She relied on the Montreal Convention that holds the aviation company liable for the death of a passenger caused by an accident on international flights. The US Supreme Court held the aviation company liable because its behaviour constituted a fault. The flight attendant's repeated refusal to reseat the passenger was a link in the chain of causes leading to his death along with the exposure to tobacco smoke. Moreover, the attendant's rejection of an explicit request for assistance was an unusual or unexpected event external to the passenger, which constituted an accident.

### 2.3. Breach of general duty of care

Harmful behaviour that does not violate a specific legal norm can still breach the general duty of care and so give rise to liability.<sup>42</sup> The general duty of care uses the conduct of the *bonus pater familias* as a yardstick. This fictitious person is a normal, reasonably prudent and forethoughtful person placed in the same circumstances as the wrongdoer. It goes without saying that normally prudent persons restrain themselves from behaviour that endangers the safety and or health of other people even when no legal provision specifically obliges them to do so. Nonetheless, contrary to what is the case with a violation of a specific legal norm, there is no automatic establishment of a fault if a danger to safety or health occurs. A wrongdoer's conduct must always be tested against that of the *bonus pater familias*. Would a normally prudent person secure a smoke-free environment? Does the causation of secondhand smoke breach the general duty of care?

These questions are most pertinent in those cases that (still) lack legislation imposing a smoking ban. Examples are parents who smoke in their cars or homes in the presence of their under-aged children, smokers in football stadia or on the platforms of railway stations, and so on. In turn, they raise the question whether existing smoking bans can be regarded as applications of a broader duty of care to secure a smoke-free environment. It is clear that for quite a considerable time already a change of mentality has occurred in regard to smoking. Where advertisements for tobacco products once were part and parcel of public advertising in the streets, it is now prohibited to advertise tobacco products. Instead, an increasing number of awareness campaigns appear that underline the harmful effects of smoking in order to prevent addiction and that promote attempts to quit. Moreover, the scientific evidence for the detrimental effects of smoking are overwhelming. It seems reasonable to say that the *bonus pater familias* has had a similar change of heart. However, it is too early to draw the conclusion that in our contemporary society and the current state of tort law, a normally prudent person would never smoke in the presence of another person.

On rare occasions the Belgian Court of Cassation, the highest judiciary instance, has derived an obligation of result from the general duty of care in specific circumstances. This is the case, for example, in a judgment of 5 January 2012 in which the court declared a principal obligation to provide correct information if the person who requested this information is entitled to rely on the belief that this information is correct due to the particular capacity of the person who provides the information.<sup>43</sup> In the context of smoking this could mean that the Court of Cassation in the future might recognise a principal obligation to ensure a smoke-free environment if the person who faces secondhand smoke finds himself or herself in a vulnerable position and is entitled to rely on the belief that he or she will not be exposed to tobacco smoke because of the particular capacity of the smoker. This vulnerable position could be the result of a juvenile or senile age, pregnancy, asthma, poor health and so on. As the Court of Cassation only seldom derives a specific obligation of result from the general duty of care, this hypothesis in the context of secondhand smoke remains speculation.

<sup>40</sup> *Olympic Airways v Husain*, 540 U.S. 644, Supreme Court of US, 24 February 2004, <[http://www.tobaccocontrol.org/files/live/litigation/1878/US\\_Olympic%20Airways%20v.%20Husain.pdf](http://www.tobaccocontrol.org/files/live/litigation/1878/US_Olympic%20Airways%20v.%20Husain.pdf)> (last accessed on 19 September 2019).

<sup>41</sup> *Husain v Olympic Airways*, 316 F.3d 829, US court of appeals, 12 February 2002, <<http://www.tobaccocontrol.org/litigation/decisions/us-20020212-husain-v-olympic-airways>> (last accessed on 19 September 2019).

<sup>42</sup> Dubuisson et al., supra note 11, p. 23, para. 3; Vanswevelt & Weyts, supra note 5, p. 127, para. 176; Stijns, supra note 4, p. 42, para. 51; Van Ommeslaghe, supra note 11, p. 1220, para. 830; Bocken et al., supra note 4, p. 93.

<sup>43</sup> Cass. 5 January 2012, *Pas.* 2012, p. 35. See for the remarkable nature of this judgment I. Boone, 'Actualia buitencontractueel aansprakelijkheidsrecht', in CBR (ed.), *CBR Jaarboek 2012–2013* (2013), p. 378.



Similarly, the general duty of care under Dutch law mainly gives rise to obligations of means, yet can also result in obligations of result. There is no unanimous answer to the question that has come up in legal practice, whether employers should protect their employees against tobacco smoke by means of a smoking ban, absent any explicit legal provision in this respect, which was lacking under older law. Nonetheless, its answer should be in the affirmative. Generally speaking, the Supreme Court has held that if the medical sciences establish a link between exposure to a certain substance and the risk of the onset of a certain (lethal) disease, it depends on various circumstances as from when the employer is obliged to take measures to prevent or at least protect against that disease. Of importance are, amongst other things, the seriousness of the threat, as well as the degree of causal certainty.<sup>44</sup>

The case *Nooijen/PTT post*<sup>45</sup> and the aforementioned case *Riphagen/Isala*<sup>46</sup> both show that employers have to protect their employees against tobacco smoke, even in the absence of a specific, explicit legal provision obliging them to do so.<sup>47</sup> At the turn of the century the postwoman Nooijen instigated a claim in order to have a smoking ban imposed at her workplace at PTT Post. Because of the timeframe of this case the Dutch legislation containing the general smoking ban cannot be relied upon. Nonetheless, the judge granted the claim. Similar to the cantonal judgment in *Riphagen/Isala* the judge held that Article 7:568 of the DCC, Article 3 of the Law on Working Conditions and Article 4.9 of the Resolution on Working Conditions oblige employers to organise labour in such a way that it has no adverse effects on the health of employees. Employers have to guarantee non-smoking employees to be able to work and take a break in an environment that is completely smoke-free. The judge ruled that the danger of tobacco smoke must primarily be dealt with at its source by implementing organisational measures. A general smoking ban is well-suited to achieve that goal and is deemed generally appropriate inside of office buildings.

However, in the case *Meins/Hollands Casino* the judge rendered a very different judgment. Meins worked as an employee in a casino without a smoking ban.<sup>48</sup> He supervised the course of play in the central hall of the casino amidst the smoking guests. Meins struggled with health complaints regarding his respiratory system and lungs. He related those complaints to his cramped and smoke-filled working environment. Hence, he applied to the Dutch court for the establishment of a total smoking ban in the casino, save for a designated smoking area. In order to counter this claim, the casino invoked the Decision concerning exceptions to a smoke-free workplace,<sup>49</sup> which at the time allowed for catering facilities to let employees in the workplace come in contact with tobacco smoke. The judge who ruled on this case in preliminary relief proceedings held that the duty of care that rests on employers in the hotel and catering industry did not go so far as to oblige the establishment of a smoke-free workplace. The main reasoning for this judgment seems to be that the judge did not want to lightly dismiss the decision, which protected the casino. At the time the Minister of Health left it up to the catering industry itself to implement a general smoking ban via self-regulation. Therefore, in light of that policy and the explicit legislation the judge deemed it appropriate to adopt a cautious approach. Relying on the decision, the casino did not breach a duty of care towards the employee in the eyes of the judge. The employee should simply decide to work elsewhere.

Furthermore, it is conceivable that a person who lights up a cigarette near the gates of a primary school at the moment that the children are leaving the building acts in breach of the general duty of care by exposing the children to secondhand smoke. The children can be regarded as vulnerable, because they cannot enforce their wishes not to be exposed to tobacco smoke from adults nor are they fully aware of the harmful effects of secondhand smoke. This differs from the situation where parents remain standing at the gates in the morning to have a conversation once their children have entered the school building. Here one can presume that the parents, as adults, can address the smoker and ask him or her to stop or can remove themselves from the smoker's vicinity.

A final, fictitious case topic is the following. A toddler is vulnerable to falling ill because of its premature birth. Its parents are divorced. On the basis of a residence scheme the child spends certain weekends with its

<sup>44</sup> HR 25 June 1993, *NJ* 1993, p. 686 (*Cijsouw I*).

<sup>45</sup> Rb. Breda 25 April 2000, *KG* 2000, p. 119 (*Nooijen/PTT Post*).

<sup>46</sup> *Supra* notes 25, 28 and 29.

<sup>47</sup> See in more detail about both cases Keirse, *supra* note 24, pp. 354–356.

<sup>48</sup> Rb. Groningen 15 May 2007, LJN BA5126 (*Meins/Holland Casino*); A.L.M. Keirse, 'Wanneer zal de lucht geklaard zijn? Hoe de rechter aanspraken op een rookvrije werkvloer toetst', (2007) *LenS*, pp. 5–9.

<sup>49</sup> Besluit van 15 december 2003, houdende uitvoering van artikel 11a, vijfde lid, van de Tabakswet (Besluit uitzonderingen rookvrije werkplek), *Stb.* 2003, p. 561 (decree of 15 December 2003, implementing article 11a, para. 5 of the Tobacco Act (Decree on exceptions to the smoke-free workplace)).

father. Upon return, the mother notices every time that the child reeks of tobacco smoke. She also notices that the child develops respiratory tract infections after a number of stays with the father. A father who exposes his toddler, with poor health, continuously to tobacco smoke when taking care of him/her, breaches the general duty of care. Any normal, reasonably prudent and forethoughtful person would ensure a smoke-free environment for the toddler during its stay. This entails that the father not only refrains himself from smoking in the presence of the child, but also encourages family members and visitors to smoke outside of the vicinity of his child.

A principal aspect of the general duty of care is the foreseeability of the damage. According to consistent case law by the Belgian Court of Cassation, an infringement of the general duty of care can only give rise to tortious liability if the damage was foreseeable (except for when the wrongdoer intentionally breaches the general duty of care).<sup>50,51</sup> This means that it must be ascertained whether a normally prudent person, when placed in the same circumstances as the wrongdoer, would have foreseen the damage and taken the necessary measures to avert it. Only reasonable foreseeability is required as it is sufficient that the wrongdoer could expect certain damage, without needing to have the exact occurrence and exact extent of the actually occurred damage in mind.<sup>52</sup> Under Dutch law, a more or less comparable assessment is made when considering the duty of care by applying the so-called 'Cellar Hatch'-criteria (*Kelderluik-criteria*). The Supreme Court put forward that the following aspects must be taken into consideration when a situation of endangerment arises: (i) the degree of probability that the required attention and care could be disregarded, (ii) the likelihood that that disregard might lead to accidents, (iii) the gravity of the consequences of such accidents and (iv) the burden posed by the requirement to take adequate precautions.<sup>53</sup> Consequently, hazardous behaviour is wrongful if the probability of another person sustaining injury as a result of that behaviour is so great that the wrongdoer should have refrained himself or herself from such conduct in accordance with due standards of care.<sup>54</sup>

In the past it might not have been foreseeable that one's smoking behaviour could cause damage. The full extent of the adverse effects of tobacco smoke have only recently been mapped and public awareness has not dawned abruptly. However, in the light of current scientific insights and the clear indication on tobacco products of the health risks for all those who are exposed to tobacco smoke,<sup>55</sup> it is defensible to argue that the adverse effects of smoking are generally known and that they can be seen as foreseeable damage by the smoker.<sup>56</sup> Smokers can expect their smoking behaviour to have possible adverse effects on the health and safety of themselves and those around them.

In sum, it is not possible to say with absolute certainty whether the judge will regard the forced exposure to secondhand smoke of other persons as a violation of the general duty of care. This will depend on the concrete circumstances. It is, therefore, more interesting to be able to build a tort suit on the violation of a specific legal norm, where a fault by the wrongdoer is automatically withheld.

<sup>50</sup> M. Van Quickenborne & H. Vandenberghe, 'Overzicht van rechtspraak. Aansprakelijkheid uit onrechtmatige daad (2000–2008) - deel 2', (2010) *TPR*, p. 1849, para. 37; Stijns, *supra* note 4, p. 42, para. 52.

<sup>51</sup> Cass. 12 November 1951, *Pas*. 1952, I, p. 128; Cass. 5 May 1971, *Arr.Cass.* 1971, p. 869. See also G. Jocqué, 'Bewustzijn en subjectieve verwijtbaarheid', in Gandiaus (ed.), *Aansprakelijkheid, aansprakelijkheidsverzekering en andere schadevergoedingssystemen. XXXI-IIste postuniversitaire cyclus Willy Delva 2006–2007* (2007), pp. 32–38, para. 32–36; Dubuisson et al., *supra* note 11, p. 39, para. 26; Van Quickenborne & Vandenberghe, *supra* note 50, p. 1848, para. 37; Stijns, *supra* note 4, p. 42, para. 52; Van Ommeslaghe, *supra* note 11, p. 1220, para. 830.

<sup>52</sup> Dubuisson et al., *ibid.*, p. 39, para. 26; Stijns, *ibid.*

<sup>53</sup> HR 5 November 1965, *NJ* 1966, p. 136.

<sup>54</sup> HR 9 December 1994, *NJ* 1996, p. 403; HR 12 mei 2000, *NJ* 2001, p. 300.

<sup>55</sup> One of the mandatory health warnings for tobacco products in the European Union is 'Your smoke harms your children, family and friends', which warns smokers that they harm others by exposing them to secondhand smoke, see Annex 1 to Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, *OJ L* 127, 29 April 2014, pp. 1–38.

<sup>56</sup> The reasoning of the French Court of Cassation in *Gourlain* can serve as an example. In this case the court recognised that the adverse effects of smoking have been scientifically known since the 1950s. From about the 1960s to 1970s onwards this knowledge was communicated to the general population, thus becoming general knowledge. See Cass.fr.civ. 20 November 2003, *Gourlain t SEITA*, n°01-17.977, *JCP* 2004, II, 10004, annotation B. Daille-Duclos; A.L.M. Keirse & P.A.J. van den Berg, 'Waar rook is, is vuur. Franse lessen inzake aansprakelijkheid en eigen schuld bij schade als gevolg van het roken', (2002) 33 *Njb*, pp. 1654–1655.

## 2.4. Breach of contractual obligation

### 2.4.1. Contractual relativity

Because of the relativity of contracts, the relation between persons who have not mutually concluded a contract is not subject to the rules on contractual liability, but to those on extra-contractual liability.<sup>57</sup> This principle needs to be nuanced as the existence of a contract can have certain external effects on third-parties in their relation with the contracting parties. The question arises whether a third-party can rely on the breach of a contractual obligation to prove an extra-contractual fault. This could considerably reduce the burden of proof for that third-party.

### 2.4.2. Latent defect or non-conformity

A first line of research in this contribution is whether the legal relation between the buyer and seller of tobacco products can provide a tool for the victim of secondhand tobacco smoke to prove a tortious fault. In this hypothesis it is assumed that the victim wishes to claim damages from the seller, relying on the latter's contractual obligation to indemnify the buyer for latent defects and to deliver a good which is in conformity with the sales agreement. A breach of contractual obligations can constitute a tortious fault on the part of a third-party to the contract, if that failure of fulfilment is also a breach of the general duty of care.<sup>58</sup> Article 1641 of the BCC obliges the seller of a good to indemnify the buyer for all latent defects of the sold good. Pursuant to Article 7:17 of the DCC the delivered good has to be in conformity with what contractual parties have agreed upon, which is not the case if the good does not possess the characteristics that the buyer was entitled to expect on the basis of the agreement, in view of the nature of the good and the information provided by the seller. The seller's obligation extends to all defects that have a hidden character, which means they could not have been discovered by a reasonably thorough inspection before the sale, making them unknown to the buyer, that are serious, and that are present (at least in the bud) at the time of purchase.<sup>59</sup> The claim for indemnification can not only be filed against the direct seller, but also against every link in the preceding sales chain on the basis of the doctrine of qualitative rights.<sup>60</sup> According to this doctrine the right of redress that a first buyer (e.g. a wholesaler) is entitled to against the initial seller (e.g. the manufacturer) is to be considered as an 'accessory' of the sold good. Consequently, when the good travels from the first buyer to a second buyer the accessory right follows in its wake, granting the second buyer a direct right of redress against the initial seller without having to address the first buyer. In the US case law exists that holds tobacco manufacturers liable for the death of a smoker on the basis of a breach of the so-called implied warranty of merchantability.<sup>61</sup> The reasoning behind the liability is that the sold cigarettes were unreasonably dangerous (resulting in a 'design defect') and that the manufacturer neglected to warn buyers about the health risks and the addictive nature of cigarettes in the period prior to 1970 ('warning defect').

Today, the chances of a court ruling that tobacco products contain a latent defect are slim. Absent a definition in the Civil Code, Belgian law knows two interpretations of the notion 'defect'. First of all, a conceptual view holds that a defect is each 'deviant characteristic of a good that makes the normal use of the good impossible or seriously hampers this usage because of its composition or structure'.<sup>62</sup> In turn, a functional view holds that a good is defective if it is 'unfit for the use that the buyer intended, provided that the seller was aware of that specific intended use'.<sup>63</sup> In the Netherlands Article 7:17 of the DCC speaks of non-conformity with the contract if the bought good does not have the characteristics which the buyer was entitled to expect under the contract, taking into account the nature of the thing and the statements made by the seller about it. The buyer may expect that the thing has the characteristics necessary for a normal use and on the presence of which he/she did not need to doubt, and also that it has the characteristics necessary for a particular use which was foreseen in the contract. As it is nowadays generally known that tobacco products are harmful and addictive and that, moreover, warning labels are affixed to the packaging, there can be no

<sup>57</sup> In Belgium this relativity is enshrined in Art. 1165 BCC. Dutch law is also familiar with the principle.

<sup>58</sup> See for Belgian law Cass. 22 June 2009, *RW* 2011–12, p. 1003 and for Dutch law HR 24 September 2004, ECLI:NL:HR:2004:AO9069, *NJ* 2008, 587; HR 20 January 2012, ECLI:NL:HR:2012:BT7496, *NJ* 2012, 59; HR 14 July 2017, ECLI:NL:HR:2017:1355, *Jurisprudentie Aansprakelijkheid* (JA) 2017, 140.

<sup>59</sup> B. Tilleman, *Overeenkomsten. Deel 2. Bijzondere overeenkomsten. A. Verkoop. Deel 2. Gevolgen van de koop* (2012), p. 300 ff.

<sup>60</sup> Cass. 5 December 1980, *RW* 1981–82, p. 866; E. Dirix, *Obligatoire verhoudingen tussen contractanten en derden* (1984), p. 29.

<sup>61</sup> *Evans v Lorillard Tobacco Co.*, SJC-11179, Supreme Judicial Court of Massachusetts Suffolk, 3 December 2012 and 11 June 2013, <https://www.tobaccocontrol.org/litigation/decisions/us-20130611-evans-v-lorillard-tobacco-co> (last accessed on 19 September 2019).

<sup>62</sup> Tilleman, *supra* note 59, p. 300 ff.

<sup>63</sup> V. Sagaert et al., *Vermogensrecht in kort bestek. Goederen- en bijzondere overeenkomsten* (2010), p. 139.

question of a hidden defect under the conceptual view nor under the functional view.<sup>64</sup> Nevertheless, tort law could still come in play as the custodian or the manufacturer of a defective good can incur strict liability (see section 3).

#### 2.4.3. Tenancy agreement as a tool against secondhand smoke

A second line of thought is the hypothesis where inhabitants of an apartment building suffer from the smoking behaviour of another tenant who smokes inside the premises. Although there exists, in principle, no contractual relation between the tenants, the question arises whether the contractual relation between one tenant and the landlord can influence the legal position of the other tenants. After all, it is imaginable that the victim of secondhand smoke could bring an action against the landlord for breach of his/her contractual obligation to secure the quiet enjoyment of his/her tenants.

An interesting judicial decision in this sense comes from the US. A tenant of a residential unit suffered from tobacco smoke entering his home from a lower-lying unit. The landlord tried to resolve this problem, but without success. The tenant suspended his rental payments and left the unit after the owner denied his request for relocation to a different unit. The owner sued the tenant for breach of their rental agreement. The tenant brought a counterclaim based on the landlord's breach of the 'warranty of habitability', as the tobacco smoke drove him from his unit, and based on the landlord's breach of the obligation to secure the quiet enjoyment of the tenants. The rental agreement specified that 'causing secondhand smoke to infiltrate other apartments may constitute a nuisance, a health hazard, and may infringe on the quiet enjoyment of other tenants'. The court ruled in favour of the tenant, judging that the landlord did not fulfil his contractual obligations and that the tenant rightly abandoned the residential unit. The court ordered the landlord to lower the monthly rental price.<sup>65</sup>

In a similar Australian case a landlord was ordered to pay compensation to a tenant for breaching the rental agreement between them. The tenant moved out because of an ongoing issue of tobacco smoke drifting into his apartment from a lower-lying unit. Smoking in the apartment building was allowed. The appeals panel that heard the case agreed with the tenant that there was a structural ventilation problem with the building which allowed smoke to flow into the apartment, making it unfit for habitation. Although the landlord was not responsible for the drifting smoke, the panel found that the landlord was, nevertheless, responsible for providing an apartment fit for habitation and dismissed the landlord's appeal.<sup>66</sup>

In Germany it was recently confirmed that a (non-smoking) tenant can bring a claim against another tenant for the nuisance caused by his smoking behaviour. *In casu*, two residential units were located above one another and the upstairs neighbours suffered from tobacco smoke when their downstairs neighbour smoked on the lower balcony. The tenants applied for an injunction and argued that their quiet enjoyment is disturbed. The German Federal Court of Justice (*Bundesgerichtshof*) considered that a tenant has the right to act against disturbances by another tenant. The fact that smoking is not in conflict with the 'customs' of the rented good (unlike the American case mentioned, in which the rental agreement prohibited smoking) does not call into question that tenants can bring a claim against one another. Contractual arrangements between the landlord and the tenant do not stand in the way of a claim against that tenant by another tenant or third-party who experiences nuisance.<sup>67</sup>

### 2.5. Assumption of risk and contributory negligence

#### 2.5.1. Assumption of risk as a contributory negligence by the wronged party

The assumption of risk doctrine is no stranger to tobacco litigation. In the US, for example, the tobacco industry, plagued by a long history<sup>68</sup> of tobacco litigation, was able to deflect claims for damages by smokers for a considerable time by successfully relying on the personal responsibility of smokers.<sup>69</sup> The fact that

<sup>64</sup> B. Daille-Duclos, 'Le rejet général des actions en responsabilité engagées contre les fabricants de tabac par les juridictions européennes (annotation under Cass.fr.civ. 20 November 2003)', (2005) 67 *Petites affiches*, p.3.

<sup>65</sup> *Upper East Lease Associates, LLC v Cannon*, 2011 NY Slip Op 50054, District Court of the State of New York Nassau County, 20 January 2011. See also *Poyck v Bryant*, 820 N.Y.S.2d 774 (2006), Civil Court of the City of New York, New York County, 24 August 2006.

<sup>66</sup> *Bhandari v Laming*, NSWCAIAP 224 (2015), New South Wales Civil and Administrative Tribunal, 16 October 2015.

<sup>67</sup> BGH 16 January 2015, V ZR 110/14.

<sup>68</sup> As early as the 1950s smokers suffering from lung cancer sued tobacco companies. The tobacco litigation is divided dogmatically in three waves of litigation claims, based on the invoked grounds, the nature of the actions and the parties.

<sup>69</sup> L. Mather, 'Theorizing about Trial Courts: Lawyers, Policymaking, and Tobacco Litigation', (1998) 23 *Law and Social Inquiry* 1998, p. 904; R.L. Jr. Cupp, 'A Morality Play's Third Act: Revisiting Addiction, Fraud and Consumer Choice in Third Wave Tobacco Litigation', (1998) 46 *University of Kansas Law Review* 1998, p. 471. See also L. Friedman et al., 'Tobacco Industry Use of Personal Responsibility

the American Surgeon General's warning of the health risks associated with smoking was stamped on every package of cigarettes after 1965 served to reinforce the assumption of risk argument. Do smokers, however, truly assume all risks associated with their smoking behaviour? An even more interesting question is whether this doctrine could fit in the framework of secondhand smoke. It is imaginable that persons, who do not necessarily smoke themselves, voluntarily and consciously enter a smoke-filled environment. This is the case if one enters a bar in which the pubgoers smoke in breach of a smoking ban. To what extent will this assumption of risk play a role in the liability of the smoking wrongdoer?

The doctrine of the assumption of risk deals with the extent to which a voluntary and conscious assumption of risk bars the wronged party of recovering damages for the losses that stem from that risk.<sup>70</sup> Under Belgian tort law this doctrine is, essentially, part of the broader theory on the contributory negligence by the wronged party.<sup>71</sup> In 1986 the Court of Cassation held that 'the circumstance of entering a vehicle of which one knows that its driver is in a state of alcohol intoxication can constitute a fault [committed by the wronged party]'.<sup>72</sup> In a judgment of 1 February 2008 the court confirmed and explained this view by stating that 'the assumption of the risk by the wronged party can only justify apportionment of liability if it is faulty'.<sup>73</sup> As far as Dutch law is concerned, the Supreme Court considered in its 'Kicking While Down' judgment (*Natrappen-arrest*) that there is no need for risk assumption to be a separate legal concept in the sense of a ground of justification of its own nature which removes the wrongful nature of certain conduct and, consequently, liability.<sup>74</sup> Earlier, the court had hinted in that direction in several other judgments.<sup>75</sup> According to the Supreme Court, depending on the nature and the circumstances of the case, what the doctrine of risk acceptance is intended to achieve is fully absorbed in the question whether the conduct towards the wronged party can be regarded as lawful on the one end and the question whether certain circumstances are attributable to the wronged party itself, which must lead to a reduction or total lapse of the obligation to compensate damage by the wrongdoer on the basis of contributory negligence (codified in Article 6:101 of the DCC). This evolution from non-liability of the wrongdoer because of an assumption of risk to a partial liability of the wronged party on the basis of contributory negligence has also manifested itself in the neighbouring countries of Belgium and the Netherlands as well as in the US.

Thus, wronged parties can commit a fault themselves, when they knowingly and voluntarily enter a smoke-filled environment. The judge must ascertain whether a normal, reasonably prudent and forethoughtful person, when placed in the same circumstances, would have taken the risk in the same manner. If the fault of the wrongdoer is accompanied by a contributory negligence by the wronged party, the judge must order an apportionment of the liability.<sup>76</sup> This means that the wronged party is not indemnified to the extent that the contributory negligence has caused the damage.<sup>77</sup> A contributory negligence of the wronged party does, however, not erase the wrongful behaviour of the wrongdoer. Furthermore, an important exception to the principle of apportionment is the concurrence of a non-intentional fault by the wronged party and

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Rhetoric in Public Relations and Litigation: Disguising Freedom to Blame as Freedom of Choice', (2015) 105 *Am J Public Health*, pp. 250–260.

<sup>70</sup> Van Quickenborne & Vandenberghe, *supra* note 50, p. 2099, para. 106; B. Weyts, *De fout van het slachtoffer in het buitencontractueel aansprakelijkheidsrecht* (2003), p. 171.

<sup>71</sup> Dubuisson et al., *supra* note 11, p. 355, para. 421; Vansweevelt & Vandenberghe, *supra* note 5, p. 171, para. 236; Stijns, *supra* note 4, p. 45, para. 60; Van Ommeslaghe, *supra* note 11, p. 1639, para. 1113.

<sup>72</sup> Cass. 16 September 1986, *Arr.Cass.* 1986–87, p. 56. See also for a similar set of facts concerning a person taking place on the carrier of a bicycle ridden by a person with whom he had been drinking alcohol at a party, Cass. 26 September 2012, P.12.0377.F.

<sup>73</sup> Cass. 1 February 2008, *NJW* 2008, p. 685, annotation I. Boone.

<sup>74</sup> HR 28 June 1991, *NJ* 1992, p. 622 (*Natrappen*). See also HR 24 January 1992, *NJ* 1992, p. 302 ('Fighting dogs'/*Vechtende honden*); HR 11 December 1992, *NJ* 1993, p. 175 ('Deliberate recklessness'/*Bewuste roekeloosheid*).

<sup>75</sup> HR 21 October 1988, *NJ* 1989, p. 729 ('Circus Donkey'/*Circusezel*); HR 28 September 1990, *NJ* 1992, p. 619 ('Passenger of a Drunk Driver I'/*Meerijden met een dronken chauffeur I*); HR 12 October 1990, *NJ* 1992, p. 620 ('Passenger of a Drunk Driver II'/*Meerijden met een dronken chauffeur II*).

<sup>76</sup> Cass. 2 April 1936, *Pas* 1936, I, 209; Cass. 28 September 1989, *Arr.Cass.* 1989–90, no. 63, 130; Cass. 18 September 1967, *Pas* 1968, p. 829; Cass. 29 June 1995, *Arr.Cass.* 1995, no. 340, 690; Cass. 23 May 2007, P.07.0405.F; Cass. 30 September 2015, P.14.0474.F; Cass. 16 November 2016, P.16.0401.F.

<sup>77</sup> H. Bocken & I. Boone, 'Causaliteit in het Belgische recht', (2002) *TPR*, p. 1638; Dubuisson et al., *supra* note 11, p. 358, para. 425; Vansweevelt & Weyts, *supra* note 5, p. 825, para. 1297; J.-L. Fagnart, *La causalité* (2009), p. 267, para. 531; Van Quickenborne & Vandenberghe, *supra* note 50, p. 330; Van Ommeslaghe, *supra* note 11, p. 1639, para. 1113; Bocken et al., *supra* note 4, pp. 76–77.

an intentional fault of the wrongdoer. In that case the axiom *fraus omnia corrumpit* comes into play, which prevents the wrongdoer from passing on part of the damage to the wronged party.<sup>78</sup>

### 2.5.2. Assumption of risk by the active smoker

It is obvious to argue that an active smoker commits a contributory negligence by continuing to use tobacco products even though their adverse effects are not only well-known but are also affixed to their packaging. However, this statement might just be jumping to conclusions a little too easily. The apparent freedom of choice might not at all be so self-evident. After all, tobacco products are highly addictive, easily luring a smoker into physical and mental dependence.<sup>79</sup> A study by the American Center for Disease Control shows that 68% of all adult smokers wish to quit smoking, whilst the actual number of those who succeed is much lower.<sup>80</sup> Moreover, studies show that genetic predisposition accounts for 50%–70% of the risk of addiction.<sup>81</sup> Regularly people start smoking at a young age, when they cannot truly oversee and grasp the dangers of smoking. Furthermore, the circumstances in which smokers picked up their habit must be taken in consideration. Often times those who smoke today, started with their smoking behaviour in a time period when little to nothing was communicated about the adverse effects of smoking and, arguably even worse, the 'cool' character of smoking was propagated through advertisement – in times past the rugged Marlboro Man was iconic. The contributory negligence must be assessed in the light of the concrete circumstances. Thus, the context of time and place, age and available information at the time the smoker started smoking and the attempts that since have been made to quit must all be taken in to account.<sup>82</sup>

In the French case *Gourlain v SEITA* the judge of first instance takes the youthful age at which Gourlain started smoking into account. The judge considered that from the age of 14 to 20 years old, Gourlain cannot be reproached for committing a fault himself. Later, the tobacco manufacturer is acquitted after an appeal in cassation.<sup>83</sup>

### 2.5.3. Assumption of risk by the secondhand smoker

Whilst it can be argued that the active smoker does not possess true free will because of the addictive nature of tobacco products, the argument of addiction is of avail to the victim of secondhand smoke. Hence, in such a case the wronged party could commit a contributory negligence when exposing itself to a smoke-filled environment. However, voluntarily exposing oneself to a smoke-filled environment does not automatically lead to an apportionment of liability because of an assumption of risk. As mentioned, the judge always has to assess whether a normal, reasonably prudent and forethoughtful person, when placed in the same circumstances, would have taken the same risk. Consequently, the outcome of similar cases can differ because of the individual circumstances of the wronged party. One could, for example, defend the view that an adult takes an irresponsible risk when riding as a passenger alongside someone who is known to smoke while driving his or her car. The same cannot be said about children, who unlike their articulate adult counterparts, are not always able to stand up to smokers in their surroundings.

In the aforementioned judgment of the court in Zwolle of 17 June 2003 in the Dutch case *Riphagen/Isala* this question is addressed. The medical secretary, whose asthmatic condition deteriorated because of exposure to tobacco smoke, was reproached for consciously making the decision to join others in the smoking area of the cafeteria during her breaks, knowing that the smoke could be of nuisance to her. A smoking ban was in place in the entire cafeteria, excluding certain, specifically designated smoking areas. She also allegedly voluntarily joined others on social occasions in smoke-filled rooms such as the working office of the doctor and a catering establishment during a dinner with colleagues. The judge ruled that the establishment

<sup>78</sup> Cass. 6 November 2002, P.01.1108.F; Cass. 30 November 2015, P.14.0474.F; Dubuisson et al., *ibid.*, pp. 360–361, para. 427; Van Quickenborne & Vandenberghe, *ibid.*, p. 336; A. Lenaerts, *Fraus omnia corrumpit in het privaatrecht* (2013), p. 202 ff; Van Ommeslaghe, *supra* note 11, p. 1642, para. 1115; P. Wéry, *Droit des obligations. Les sources des obligations extracontractuelles – Le régime général des obligations* (2016), II, p. 86–87, para. 83; Keirse, *supra* note 2, p. 229 ff.

<sup>79</sup> US Department of Health and Human Services, *The health consequences of smoking: nicotine addiction: a report of the Surgeon General* (1988), p. 639.

<sup>80</sup> <[www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/cessation/quitting](http://www.cdc.gov/tobacco/data_statistics/fact_sheets/cessation/quitting)> (last accessed on 19 September 2019).

<sup>81</sup> See the mentioned studies in N.L. Benowitz, 'Nicotine Addiction', (2010) 361 *N Engl J Med*, p. 2300; I. McLaughlin et al., 'Nicotine Withdrawal' in D. Balfour & M. Munafò (eds.), *The Neuropharmacology of Nicotine Dependence* (2015), pp. 100–101.

<sup>82</sup> A.L.M. Keirse, 'Rokers hebben er tabak van! Over schadeclaims tegen de tabaksindustrie in de Verenigde Staten, Frankrijk en Nederland', (2000) *Ars Aequi*, pp. 431–433.

<sup>83</sup> *Supra* note 56.

of these facts does not impair the claim, but could be involved in the procedure on the basis of Article 6:101 of the DCC, which contains the apportionment of liability in the case of a contributory fault by the victim.<sup>84</sup>

In the case *Husain v Olympic Airways* the US courts had to consider this question too. The courts ruled that the passenger who died of an asthmatic attack on international flight was in part to be blamed for his death, by not taking any initiative himself to relocate to another seat in the airplane. The awarded damages were reduced by 50% as liability was apportioned over the passenger and the aviation company.<sup>85</sup>

Because of the bringing of the theory of assumption of risk under the issue of contributory negligence of the wronged party, attention must be paid to the freedom of choice of the latter. A contributory negligence can only be established if the wronged party can be held accountable at the moment of committing a wrongful act or omission.<sup>86</sup> It is more difficult to accept that a child, for example, has committed a contributory negligence. After all, because of their young age children often have no choice but to passively undergo the behaviour of others such as their parents, who smoke in their car.<sup>87</sup> Another example is that of employees who are forced into an economically precarious position because of their subordinate relation to the employer and who run the risk of losing their job and being replaced by another person, who does not mind working in a smoke-filled environment. Psychiatric patients, sick persons and detainees, who are all in one way or another restricted in their freedom, all illustrate that it is not always easy to speak of free will.

Also, on the side of the wronged party, its predisposition comes into play. The predisposition of a wronged party relates to a hypersensitivity or a particular vulnerability for the damage caused.<sup>88</sup> The predisposition does not rupture the causal link between fault and damage, nor does it necessarily influence the amount of damages. As wrongdoers must take the victim as they find them,<sup>89</sup> they have to bear the consequences of a potential susceptibility of the wronged party for the damage caused.

The predisposition of the wronged party concerns the situation in which the victim of a wrongful act did not yet show any signs of a fragile body or mind, but is affected by a peculiar potential to sustain (greater) damage. Therefore, it differs from the aggravation or acceleration of damage that pre-existed when the damage occurs. In those cases, wrongdoers are only held liable for the aggravation or acceleration of the damage that is a direct consequence of their wrongful behaviour.<sup>90</sup> In comparison to adults, children are much more susceptible to certain illnesses caused by exposure to tobacco smoke because their immune systems are not as developed yet. This peculiar vulnerability does not affect the liability of wrongdoers nor the amount of damages they owe.

The already mentioned Dutch case *Riphagen/Isala* offers an illustration of what would be considered aggravation of damage, and not predisposition of the victim *sensu stricto*.<sup>91</sup> The cantonal judge considered that the fact that the asthmatic condition of the victim of secondhand smoke could also be worsened by other factors than tobacco smoke, such as physical triggers like stress or emotions, obesity or a bad physique in general, is not relevant. The respondent (i.e. the hospital employing the secretary) did not bring any evi-

<sup>84</sup> Supra note 25.

<sup>85</sup> *Husain v Olympic Airways*, 116 F.Supp.2d 1121, US District Court (California) 3 October 2000; 316 F.3d 829, US court of appeals (ninth circuit) 12 February 2002. Not contested on this point in *Olympic Airways v Husain*, 540 U.S. 644, Supreme Court of US, 24 February 2004.

<sup>86</sup> L. Cornelis, *Beginselen van het Belgische buitencontractuele aansprakelijkheidsrecht. De onrechtmatige daad* (1989), p. 175; G.L. Ballon, 'Over risico-aanvaarding en de aansprakelijkheid van de ouders voor handelingen van hun minderjarige kinderen', (1995) 96 *AJT*, p. 96.

<sup>87</sup> For this reason Belgian congress members have submitted several times a proposition of law that prohibits the smoking in vehicles in which minors younger than sixteen years old are present, see Wetsvoorstel tot invoering van een rookverbod in een voertuig waarin minderjarigen jonger dan 16 jaar aanwezig zijn, in het kader van de strijd tegen passief meerooken, *Parl. St. Senaat* 2008–2009, nr. 4 – 1348/1, p. 5 (legislative proposal introducing a ban on smoking in a vehicle in which minors under the age of 16 are present, as part of the fight against passive smoking); Wetsvoorstel tot wijziging van de wet van 22 december 2009 betreffende een algemene regeling voor rookvrije gesloten plaatsen toegankelijk voor het publiek en ter bescherming van werknemers tegen tabaksrook, teneinde een rookverbod in te voeren in gesloten personenvoertuigen in de aanwezigheid van kinderen jonger dan 16 jaar, *Parl. St. Kamer* 2015–2016, 1633/001, p. 9 (legislative proposal amending [the act of 22 December 2009, see supra], in order to introduce a ban on smoking in closed passenger cars in the presence of minors under the age of 16).

<sup>88</sup> Vansweevelt & Weyts, supra note 5, pp. 671–672, para. 1063; Stijns, supra note 4, p. 133, para. 146; Van Ommeslaghe, supra note 11, p. 1635, para. 1111.

<sup>89</sup> Dubuisson et al., supra note 11, p. 354, para. 420; A.L.M. Keirse, 'The tortfeasor takes his victim as he finds him', in T. Hartlief & S.D. Lindenbergh (eds.), *Tien pennenstreken over personenschade* (2009), pp. 107–126; Vansweevelt & Weyts, *ibid.*, p. 671, para. 1063; Van Quickenborne & Vandenberghe, supra note 50, p. 336; Stijns, supra note 4, p. 133, para. 146; Van Ommeslaghe, supra note 11, p. 1636–1638, para. 1112.

<sup>90</sup> Dubuisson et al., *ibid.*, pp. 354–355, para. 421; Vansweevelt & Weyts, *ibid.*, p. 672 *ff*; Stijns, supra note 4, pp. 113–115, para. 146; Bocken et al., supra note 4, p. 77.

<sup>91</sup> Supra note 25.

dence that the worsening of the asthma can in fact be explained by other triggers. In appeal, the respondent procured an expert opinion to substantiate this claim. The expert estimated that the chance that the health problems would have worsened in any event, even when working in a smoke-free environment, to be a certain percentage (50%). According to the Dutch ruling this 'share' of the damage must be borne definitively by the claimant.<sup>92</sup>

### 3. Grounds of strict liability

#### 3.1. *Strict liability for defective, movable goods*

Belgian and Dutch law provide for a strict liability for damage caused to third-parties by defective goods. This liability rests in Belgium on the custodian of the good, pursuant to Article 1384, paragraph 1 of the BCC and in the Netherlands on the possessor of the good, pursuant to Article 6:173 of the DCC (or commercial user, see Article 6:181 of the DCC).

Even absent explicit case law, it is likely that a cigarette falls under the notion 'good' as it is a movable good, capable of being held in custody.<sup>93</sup> However, the good must be afflicted with an abnormal characteristic in order to give rise to liability. The comparison of a cigarette with a good of the same kind for the evaluation of its potential abnormality forms a real snag. The harmful and addictive nature of tobacco products is in no way an abnormal characteristic when compared to the ideal tobacco product. It is generally known that smoking causes negative health effects. Not only have awareness-raising campaigns educated the public in this respect, warning labels on the packaging of tobacco products also make this abundantly clear. The sale of tobacco products is moreover still legal in Belgium. All of this means that it is difficult to label the adverse effects of cigarettes as an abnormal characteristic.

A trend is emerging in doctrine and jurisprudence to pay more attention to the question whether the good, all circumstances considered, meets the normal societal (safety) expectations.<sup>94</sup> For example, when a stone lies on the pavement of a road, neither stone nor road show any abnormal characteristics. Nevertheless, it can be argued that the road does not meet the normal safety requirements that the general public expects from public roads, because of the presence of the stone on its surface. Even in the light of this evolution it is hard to substantiate a claim that the adverse and addictive nature of cigarettes breach general safety expectations, leading them to be defective good. Once again it must be stressed that it is normally expected from tobacco products that their inhalation is harmful.

The French case *Gourlain v SEITA* demonstrates how hard it is to qualify a cigarette as a defective good. The facts of the case were as follows. Gourlain picked up the habit of smoking at a young age. This eventually led to the development of terminal lung cancer. His legal successors claimed damages from SEITA, the manufacturer of Gourlain's preferred brand of cigarettes. The claim was primarily based on Article 1382 of the French Civil Code which provides for personal liability, but Article 1384, which corresponds with the Belgian version, is invoked in secondary order. Before the appellate court, later on affirmed by the French Court of Cassation, the manufacturer is not held liable. The Court of Cassation considered: 'The cigarette is not endowed with its own regime. It is not influenced by an internal defect as it is not proven that SEITA has manufactured its cigarettes in an abnormal way, taking into account current knowledge.'<sup>95</sup>

The next question that arises is who is to be regarded as the custodian of the cigarette. This will be the smoker, not the manufacturer. This makes a claim in tort of victims of secondhand smoke against the tobacco industry as the manufacturers of the tobacco products difficult under this ground of strict liability.

<sup>92</sup> *Supra* note 29.

<sup>93</sup> The same cannot be said for tobacco smoke, which cannot be classified as a movable or immovable good. Moreover, it is defendable to state that smoke is a *res derelicta* seeing how it is unlikely that a smoker shows intent to appropriate smoke by exhaling it into the air. It is also worth mentioning that the air is a common good which cannot be viewed as private property. See V. Sagarat, 'Volume-eigendom. Een verkenning van de verticale begrenzing van onroerende eigendom', (2009) *TPR*, p. 31.

<sup>94</sup> Cass. 4 January 2016, C.15.0191.F; Dubuisson et al., *supra* note 11, p. 196 *ff*; Van Quickenborne & Vandenberghe, *supra* note 50, p. 396; Stijns, *supra* note 4, pp. 89–90, para. 109; Bocken et al., *supra* note 4, p. 186. In the past jurisprudence ruled more conservatively in this regard. For example, remnants of vegetables on the floor of a greengrocers were not regarded as an abnormal characteristic, see Cass. 6 March 1981, *Arr.Cass.* 1980–81, p. 753. A more lenient approach has come up and is gradually evolving since Cass. 11 March 2010, *Pas.* 2010, 1, p. 777.

<sup>95</sup> *Supra* note 56. 'La cigarette n'est pas une chose dotée d'un dynamisme propre. Elle n'est pas davantage affectée d'un vice interne puisqu'il n'est pas démontré que la SEITA ait fabriqué ses cigarettes de manière anormale compte tenu des connaissances actuelles.' ('Cigarettes are not goods with their own dynamism. They are not affected by an internal defect since it has not been proven that SEITA manufactured its cigarettes abnormally in the light of current knowledge').



The French case *Gourlain* demonstrates that pinpointing the manufacturer of tobacco products as the custodian is not self-evident. The French Court of Cassation considers that the manufacturer cannot be seen as the custodian '(...) because that assumes that the manufacturer of even a dangerous product would have the power of surveilling, of controlling the elements of the good and of preventing the damage', which is not the case.<sup>96</sup> In short, the court ruled that only the smoker can be regarded as the custodian of the good.

However, should tobacco products be considered to be defective, they are already affected by this defect at the time when they were put into circulation by their manufacturer. In such a case it is not the owner of a good but its manufacturer who is held liable under Dutch law for the damage suffered because of the defect. The Dutch legislature deems it to be undesirable to hold the owner liable. Therefore, Article 6:173(2) of the DCC imposes liability on the manufacturer if the product has a defect covered by the product liability regime for all damage to which that legislative regime relates. Section 3.2 deals with this liability scheme. In Belgium too the producer can be held liable for defective goods that were defective when put into circulation.

### 3.2. Product liability

The next question is whether a tobacco manufacturer can be held liable for damage caused by tobacco smoke. In Europe, the European Directive on liability for defective products of 25 July 1985 is an important body of legislation regulating product liability in the Member States.<sup>97</sup> The directive governs the liability of producers for damage caused by a defect in their products. It had to be incorporated into national legislation by 30 July 1988 at the latest. Both the Netherlands and Belgium complied with this requirement in 1990 and 1991 respectively, albeit somewhat too late.<sup>98</sup> The directive imposes a strict liability on the producer for damage to persons, including moral damages, and, under certain conditions, for damage to goods, caused by a defect in a product. This strict liability is not grounded in a fault by the manufacturer but in the defectiveness of a good. The following conditions have to be met for the manufacturer to incur liability: (i) there is a good; (ii) this good has a defect; (iii) damage has been caused; (4) there exist a link of causality between the defective good and the occurred damage and (5) the person whose liability is invoked is the manufacturer of the good. According to the Product Liability Directive a product is defective if 'all circumstances considered, it cannot offer the safety that one is entitled to expect'.

The timing of the product release is important. The time of entry into circulation of the product determines which safety expectations may be taken into account. Scientific or technical discoveries made after that point in time may not be taken into consideration by a judge to assess the defective nature of a product. In the past, the adverse effects of smoking were mostly unknown and they were hardly communicated to the general public. It is, thus, not inconceivable that a tobacco manufacturer could have been held liable in the past for putting a defective good into circulation. Nowadays, this is not as evident. Clear and explicit warning labels are affixed to tobacco products and many awareness campaigns educate the general public on the harmful effects of smoking behaviour. Today, it would seem to be impossible to hold a manufacturer of tobacco products liable for these harmful effects by branding them the result of a 'defect'.<sup>99</sup> Tobacco products do exactly what they are expected to do. It is not expected for them to be 'safe'.

Nonetheless, an exception exists in the form of the hypothesis where manufacturers consciously tamper with their tobacco products, for example, by increasing the levels of nicotine or by adding additives that enhance the addictive nature of the products in order to improve sale numbers.<sup>100</sup> In addition, if manufacturers attempts to deceit the consumer into believing their products are less harmful than they actually are by way of false or misleading representations of its goods, they commit a misleading commercial practice,

<sup>96</sup> Ibid. '(...) car cela suppose que le fabricant d'un produit même dangereux ait le pouvoir de surveiller, de contrôler les éléments de la chose et de prévenir le dommage' ('(...) because that supposes that the manufacturer, even of a dangerous product, has the power to monitor, to control the elements of the good and prevent damage').

<sup>97</sup> Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, *OJ L* 210, 7 August 1985, pp. 29–33.

<sup>98</sup> See for the Netherlands, Art. 6:185 *ff* DCC. See for Belgium, wet van 25 februari 1991 betreffende de aansprakelijkheid voor produkten met gebreken, *BS* 22 March 1991, p. 5.884 (act of 25 February 1991 concerning the liability for defective products).

<sup>99</sup> The notification of the harmful effects of smoking through warning labels cannot be invoked by the smoker to prove a fault by tobacco manufacturers. Conversely, such a notification lays the responsibility on the smoker.

<sup>100</sup> See also Keirse, *supra* note 82, pp. 256–257 and 428.

which is forbidden under European legislation that has been transposed into national law, both in Belgium and the Netherlands.<sup>101</sup> Such a deceptive practice constitutes the violation of a specific legal norm.

Foreign case law illustrates that attempts are being made to claim damages from the manufacturers of tobacco products. These cases, however, immediately make clear that it is not easy to substantiate the claim that tobacco products can be seen as defective goods that result in the liability of the manufacturer.<sup>102</sup> An American case of 2005 concerned a man who smoked cigarettes made by ITL for many years and who developed lung cancer (which eventually resulted in his death).<sup>103</sup> He claimed damages from the tobacco manufacturer and accused the manufacturer of negligence because of the lack of warnings about the adverse effects of smoking. The judge rejected this claim. Firstly, the judge pointed out that many awareness campaigns of the government existed that highlight the harmful effects of smoking. The judge did, however, rule that the manufacturer can in fact be reproached in this regard. If an individual smokes different brands of tobacco products over several years, each of these products contributes to the development of lung cancer. Nonetheless, the judge ruled that the real stumbling block for the liability of the manufacturer is the fact that it is impossible to determine whether the person in question would not have picked up the habit of smoking if ITL had not produced cigarettes.

Another fruitless attempt to claim damages from the manufacturer of tobacco products is the Australian case of *Lindsey v Philip Morris Limited*. The claimant demanded that Philip Morris reimburse the medical costs of his lung affliction because the manufacturer did not adequately warn the consumer of their goods about the adverse effects of smoking. The court denied the claim, pointing out that since 1973, in accordance with national regulation, warning labels are affixed to tobacco products. Moreover, the government was actively taking measures to make consumers of tobacco products aware of the harmful effect of smoking.<sup>104</sup>

In a very similar case *Pou v British American Tobacco* the High Court of New Zealand stated:

The danger posed by the smoking of tobacco *does not arise as the result of any defect in the cigarette or tobacco itself*. Rather, it flows from the addictive nature of the nicotine that is a constituent of tobacco, coupled with the inherently dangerous nature of tobacco smoke that is inhaled into the lungs. The danger arises from the risk, which even now can only be expressed in statistical terms, that a person who smokes tobacco is much more likely to develop lung cancer or heart disease than a non-smoker.<sup>105</sup>

Once again, the French case *Gourlain v SEITA* is to be mentioned. In this case the court ruled that the danger of tobacco products lies not (solely) in the distribution of tobacco products, but is, conversely, accountable to the consumers of the tobacco products. The consumers expose themselves to the adverse effects of smoking. The mere fact that smoking harms health does not make tobacco products defective. Insofar as it is not proven that the cigarettes at issue contain abnormal components, independently of the reasonably expected (negative and harmful) effects of tobacco products, they cannot be viewed as being defective.<sup>106</sup>

<sup>101</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, *OJL* 149, 11 June 2005, pp. 22–39. In several cases before the Federal Court of Australia the court ruled that companies selling e-cigarettes on their websites contravened Australian Consumer Law. The companies engaged in conduct that is liable to mislead the public by representing the e-cigarettes they supplied as not containing any of the carcinogenic and toxic substances found in traditional cigarettes when that was not the case. See *Australian Competition and Consumer Commission v The Joystick Company Pty Ltd*, [2017] FCA 397, 2 May 2017; *Australian Competition and Consumer Commission v Social-Lites Pty Ltd*, [2017] FCA 398, 2 May 2017; *Australian Competition and Consumer Commission v Burden*, [2017] FCA 399, 2 May 2017.

<sup>102</sup> See also Keirse, *supra* note 82, pp. 252–259.

<sup>103</sup> *McTear v Imperial Tobacco Limited*, [2005] CSOH 69, Outer House (Court of Session), 31 May 2005.

<sup>104</sup> *Lindsey v Philip Morris Limited*, [2004] FCA 9, Federal Court of Australia, 21 January 2004; *Lindsey v Philip Morris Limited*, [2004] FCAFC 40, Federal Court of Australia, 26 February 2004.

<sup>105</sup> *Pou v British American Tobacco*, [2006] NZHC 451, High Court of New Zealand, 3 May 2006. Emphasis added. The claimant in this case began smoking under the influence of the 'glamorous depiction of cigarettes' in 1968. Only in 1974 warnings about the potential health risks were stamped on the packaging of tobacco products in New Zealand. In this case it is examined whether tobacco manufacturers knew or should have known prior to 1968 that tobacco smoke was a major cause of lung cancer and that tobacco products were addictive. Should this question be answered in the affirmative, a follow-up question that presents itself is whether manufacturers were obliged to communicate publicly about those risks. The claimant argued that the health risks must have been clear for the manufacturers and that the risks had become common knowledge by 1968. The court ruled that even if such an obligation to communicate existed, no liability could be withheld on the part of the manufacturer as the harmful effects were part of general knowledge, which the claimant herself concedes. Moreover, the court held that it is not forbidden to sell cigarettes merely because they are harmful. Tobacco products are not considered so dangerous that they must be withdrawn from circulation. The court stressed that its judgment only applies under the condition that the health risks are labelled and that there is no sale to minors.

<sup>106</sup> *Supra* note 56.

A clear-cut example of the ‘tampering argument’ is the case brought under the auspices of the Dutch initiative ‘Sick of Smoking’ against four tobacco manufacturers with commercial activities in the Netherlands.<sup>107</sup> In the criminal charges filed at the Public Prosecutor’s Office, the manufacturers were accused of falsifying documents.<sup>108</sup> The values of substances that are claimed to be inhaled, which are printed on tobacco packaging, do not correspond with the actual values inhaled. For certain chemicals the actual inhalation value can be up to twice as high. An important argument is that tobacco manufacturers influence product tests carried out by controlling bodies such as the Dutch National Institute for Public Health and the Environment by perforating the filters of their cigarettes. The machines that are used to test and measure the emissions from cigarettes do not block these minuscule holes, almost invisible to the naked eye, and so air suctioned through these holes is mixed with the cigarette emissions. However, the holes are normally blocked by the fingers or lips from a smoker. As a result, a smoker inhales much more and more dense smoke than is measured in test situations. The tests create a distorted picture of the actual inhalation of tobacco smoke. This is an issue that was already raised by the Netherlands National Institute for Public Health and the Environment in a study conducted in 2012.<sup>109</sup> It is argued that tobacco manufacturers consciously manipulate their cigarettes without informing their consumers. There is no acknowledgment or warning about these holes on the tobacco packaging. The cigarettes have become known as ‘sjoemelsigaretten’, which roughly translates to ‘cheated with cigarettes’. In February 2018 the Public Prosecutor’s Office decided to close the charges and not to prosecute. In response, the declarants announced that they will try to have the prosecution ordered by a court of justice via the procedure in Article 12 of the Dutch Code of Criminal Procedure. Should the prosecution still be initiated, the outcome of such a criminal case could prove interesting for civil litigation.

A claim in tort by smokers themselves against the producer may be likely to succeed if the producer has consciously tampered with tobacco products, has been guilty of wrongful misinformation of consumers (in older cases), or has failed to take up an active role in raising awareness about the harmful effects of smoking.<sup>110</sup> However, it remains necessary to prove a causal link between such a wrongful behaviour and the damage sustained. It is conceivable that even when sufficiently informed about the harmful effects of tobacco smoke, the wronged party kept on smoking. Moreover, it remains difficult to establish an exact causal link between smoking behaviour and the later development of health problems. This is certainly the case for diseases that develop slowly over an extended period of time and for which several distinct causes are possible. For example, lung cancer can result from exposure to asbestos, tobacco smoke and/or other factors. When this causal uncertainty exists, Dutch law applies the theory of ‘alternative liability’.<sup>111</sup> That doctrine allows claimants to shift the burden of proving causation of their injury to multiple defendants, even though only one of them could have been responsible.<sup>112</sup> Defendants can only avert the claim by demonstrating that the damage could not have been the result of their behaviour.<sup>113</sup> In contrast, under Belgian law,<sup>114</sup> no liability

<sup>107</sup> <<https://sickofsmoking.nl/>> (last accessed on 19 September 2019).

<sup>108</sup> See the declaration brought by the initiative on behalf of several parties, available at <<http://sickofsmoking.nl/wp-content/uploads/2016/09/Aangifte-.pdf>> (last accessed on 19 September 2019).

<sup>109</sup> R. Talhout & A. Opperhuizen, *Herziening EU-Tabaksproductrichtlijn 2001/37/EG, RIVM rapport 340610003/2012* (2012), available at <<http://www.rivm.nl/bibliotheek/rapporten/340610003.pdf>> (last accessed on 19 September 2019), p. 74.

<sup>110</sup> Keirse et al., *supra* note 56, pp. 1654–1655.

<sup>111</sup> C.H.M. Jansen, *Onrechtmatige daad: algemene bepalingen* (2009), pp. 44–46. See also D. Verhoeven, ‘De DES-slachtoffers en het Belgische aansprakelijkheidsrecht. Een confrontatie met verjaring, het foutbegrip, onzekere toekomstige schade en alternatieve causaliteit’, (2013–2014) *T.Gez.*, p. 164; M. Hoppenbrouwers, *Chemical liability in risk society: A comparative quest for an optimal approach of complex causation in toxic tort* (unpublished dissertation UHasselt, 2014), p. 158.

<sup>112</sup> On the basis of Art. 6:99 DCC. See Jansen, *ibid.*, pp. 44–46. See also for a Belgian perspective, Verhoeven, *ibid.*, p. 164; Hoppenbrouwers, *ibid.*, p. 158.

<sup>113</sup> Art. 6:99 DCC; E. De Kezel, ‘Schadevergoeding bij asbestschade’, (2008) *NJW*, p. 287.

<sup>114</sup> A reform of Belgian tort law has recently been proposed (see Preliminary Draft Bill of 6 August 2018, introducing the Provisions on Non-contractual Liability into the new Civil Code, drafted by the Commission for the Reform of Liability Law established by Ministerial Decree of 30 September 2017, available at <<https://justitie.belgium.be/nl/bwcc>>.) Unlike current Belgian law, as is explained further, this reformed law would allow for proportional liability. Its Art. 5:169 contains a proportional liability regarding alternative causation. It applies to cases in which there are two or more events that might have caused the damage, but it cannot be determined with absolute certainty which one actually did. The article lays down that in such a case each person that wrongfully exposed the wronged party to the risk of the damage is liable in proportion to the probability that this person caused the harm. It also reverses the burden of proof once the wronged party has proven wrongful behaviour, exposure to the risk of damage by that behaviour and the degree of probability that the behaviour caused the damage. At that moment, alleged wrongdoers can escape liability by proving themselves that their behaviour did not cause the damage. The probability can be based on the number of potential wrongdoers as well as on the market-share that the wrongdoer has.

can be withheld on the basis of the all-or-nothing approach that results from the application of the theory of equivalence of conditions.<sup>115</sup> That theory equates factual causality with judicial causality.<sup>116</sup> Only those causes that are a *condicio sine qua non* can give rise to liability. As it is impossible to prove such a but for causality in the event that multiple possible causes exist, the high burden of proof<sup>117</sup> leaves the wronged party empty-handed.

The Dutch doctrine of alternative liability applies only if it can be established with certainty that the illness was caused by one of the alleged faults and it is merely uncertain which one has effectively caused the damage.<sup>118</sup> When doubt in this respect persists, the legal doctrine in the Netherlands reverts to a proportional approach,<sup>119</sup> whereby the degree of liability is determined on the basis of the probability of causality suggested by scientific and statistical data, which allows the wronged party to recover (a percentage of) the damage from the wrongdoer in accordance with that probability.<sup>120</sup> This approach offers only partial compensation for the damage and requires a different interpretation of the causal link.<sup>121</sup> The but for condition must make way for the probabilistic understanding of the causal connection, whereby it is sufficient to show that a certain behaviour can cause the damage (general causal connection), without it being certain which individuals have actually suffered damage (specific causal connection).<sup>122</sup> The doctrine of proportional liability can also be applied in the hypothesis that there is a concurrence of a fault by the wrongdoer and contributory negligence by the wronged party.<sup>123</sup> The Dutch Supreme Court ruled in a case about an asbestos-related disease that a proportional liability can only be withheld when there is a more than a minute probability that exposure to a given substance may give rise to a disease.<sup>124</sup> If this probability is insignificant, the proportionate approach cannot be invoked.

Except in the case of deliberate manipulation of tobacco products or in the case of the wrongful withholding of information, the manufacturer will be able to invoke the wronged party's contributory negligence. After all, despite the clear warnings, the wronged party continued to smoke. This defence may be called into question if it appears that the wronged party, in light of its young age, cannot sufficiently assess the harmful consequences.<sup>125</sup>

In a Greek case brought by the descendants of a smoker who succumbed to lung cancer at the age of 61, the defence of contributory negligence relied upon by the tobacco industry held up all the way to the highest national court. Finally, the claim for damages was rejected. Although all courts in the case acknowledged the dangers associated with tobacco products as well as the fact that addictive substances are added to tobacco products, they held the tobacco industry not liable for the damage sustained by the (next of kin of the) smoker. After all, as a skilled businessman, the smoker was old and wise enough to assess and recognise the dangers of smoking when he started the unhealthy habit in 1966.<sup>126</sup>

<sup>115</sup> The classic majority view on Belgian law is that it currently strictly adheres to this theory of causality, see Cass. 4 December 1950, *Pas.* 1951, I, 201. See for doctrine merely exemplary: Dubuisson et al., supra note 11, p. 322 ff; Vansweevelt & Weyts, supra note 5, p. 775, para. 1236; Stijns, supra note 4, p. 109, para. 138; Van Ommeslaghe, supra note 11, p. 1608–1610, para. 1092; Bocken et al., supra note 4, p. 65.

<sup>116</sup> M. Van Quickenborne, *Oorzakelijk verband tussen onrechtmatige daad en schade* (2007), p. 15, para. 17.

<sup>117</sup> Wronged parties have to prove a causal link between the wrongful behaviour of a wrongdoer and the damage they have suffered, with judicial certainty. That judicial certainty equates to such a high degree of probability that a judge must not earnestly ponder the contrary. If the link is only plausible, then the claim must be rejected. Consequently, causal uncertainty is borne by the wronged party, see Vansweevelt & Weyts, supra note 5, p. 803, para. 1271.

<sup>118</sup> Van Quickenborne, supra note 116, p. 84–86, para. 90–91.

<sup>119</sup> See also Jansen, supra note 111, pp. 48–49; De Kezel, supra note 113, pp. 330–348 and the references there; Hoppenbrouwers, supra note 111, pp. 159–160.

<sup>120</sup> De Kezel, supra note 113, p. 337 and the references there. See also Verhoeven, supra note 111, p. 165.

<sup>121</sup> Keirse et al., supra note 56, p. 1659.

<sup>122</sup> S. Lierman, *Voorzorg, preventie en aansprakelijkheid. Gezondheidsrechtelijke analyse aan de hand van het gebruik van ioniserende straling in de geneeskunde* (2004), pp. 445–450 and 468–469; A.L.M. Keirse, 'Proportionele aansprakelijkheid bij blootstelling aan asbestvezels en tabaksrook (annotation under HR 31 March 2006)', (2006) *Tijdschrift voor Vergoeding Personenschade*, pp. 67 and 69–71.

<sup>123</sup> De Kezel, supra note 113, pp. 347–348; Keirse, *ibid.*, pp. 73–75.

<sup>124</sup> HR 31 March 2006, ECLI:NL:HR:2006:AU6092.

<sup>125</sup> Keirse, supra note 82, p. 341.

<sup>126</sup> Areios Pagos (Greek Court of Cassation) 28 April 2015, no 1157, not published. See E. Dacronia, 'Greece', in E. Karner & B.C. Steininger (eds.), *European Tort Law 2015* (2016), pp. 247–248.

Thus, the reasoning of the Greek judges shows similarity with that of the Dutch judges in the case of Peter Römer against the Dutch branch of British American Tobacco.<sup>127</sup> According to the court, although the international tobacco industry acted reprehensibly by manipulating both the tobacco product and the general public, smokers also bear responsibility. The claimant should have known better than relying on the information provided by the tobacco industry. A tendency is discernible to lay all responsibility on smokers, not only in the public opinion, but also in the legal sphere. They are not separate from each other. After all, the fact that the smoking claimant meets indignation in public media influences the position in court of the international tobacco industry.

Currently, tobacco manufacturers violate no legal norm if they, driven purely by economic motivation, consciously produce and sell a product that is expected to be highly addictive to its consumer and that is known to cause illness. Consumers who use tobacco products and who are confronted with (often irreversible) damage to their health might be informed that they only have themselves to blame, for they should have known better. The hurdles outlined above for liability of the manufacturer beg the question whether legislation should be amended to provide for a more vigorous strict liability of the tobacco manufacturer, in the form of a 'risk-liability'.<sup>128</sup> The underlying rationale of risk-liability is that if someone engages in an activity to which a particular risk is linked and who benefits from this activity, that person should also indemnify the damage should that risk occur. Wronged parties no longer have to prove a causal link between their damage and the fault of the wrongdoer, which is also presumed. It suffices that the wrongdoer is connected in a certain way with the occurred damage.<sup>129</sup> This would mean that the manufacturers of tobacco products are also held liable for the consequences of the normal use of their product, because they commercially exploit a product that is harmful. The current legal system does not yet seem ready for such a strict liability, but it is not excluded that the mentality shifts over time as it has done in the past. One could argue that even today the goal of risk liability is indirectly reached through high excise duties and consumer taxes for the tobacco industry, the revenue of which subsidises in part the national healthcare.

#### 4. Conclusion

A successful claim in tort requires the victim of tobacco smoke to prove a wrongful act or omission, damage and a causal link between both. The research has revealed that the role of tort law in the legal battle against damage as a result of smoking behaviour is rather modest. A successful claim is not obvious, but is at the same time not impossible in specific circumstances.

Victims of secondhand smoke could claim damages from smokers who expose them to tobacco smoke for immediate nuisance or long-term damage to their health, based on the violation of a specific legal norm such as a smoking ban. Those victims could also claim damages from third-parties who are responsible for the enforcement of the ban. Furthermore, victims of secondhand smoke could also try to argue that such exposure by the smoker is in breach of the general duty of care. Such a breach is, however, less straightforward to argue, although the societal perspective on smoking in the presence of others is changing. Sometimes, such as in the case of a tenant agreement, it is possible to hold third-parties such as the landlord liable for the breach of a contractual obligation. When it comes to strict liability victims of secondhand smoke, they will have trouble to invoke the strict liability for defective, movable goods against the smoker, who is the custodian of tobacco products. After all, tobacco products are not strictly defective as their harmful nature is characteristic. The same holds true for the liability of the producer. Troublesome for the success of a claim in tort could be the assumption of risk by the secondhand smoker. If one voluntarily exposes oneself to a smoke-filled environment, one could commit contributory negligence if the damage caused is foreseeable, which leads to an apportionment of liability.

Smokers themselves could try to rely on the liability for defective products against the manufacturers of tobacco products. However, the same non-defectiveness of those products as explained above can throw a spanner in the works. Also, the contributory negligence of the active smoker obviously comes into play.

<sup>127</sup> Rb. Amsterdam 17 December 2008, *NJ* 2009, p. 311.

<sup>128</sup> Here the reform of Belgian tort law can be mentioned (*supra* note 114). The drafters of the Preliminary Bill introduce a general provision of strict liability for hazardous activities in Art. 5.190. They substantiate their decision by pointing out that the evolution of contemporary society no longer justifies why risks with particularly hazardous yet useful and economically viable activities should always be borne by wronged parties when no fault has been proven. The manufacturing of tobacco products could fall under that provision. A Royal Decree is required to pinpoint which activities exactly are caught by the general provision. See Explanatory Memorandum, p. 11.

<sup>129</sup> Bocken, *supra* note 5, 333, para. 7; Stijns, *supra* note 4, pp. 34–35, para. 43, Bocken et al., *supra* note 4, p. 154.

Nevertheless, a mitigation of that contributory negligence could be found in the addictive nature of tobacco products. Thus, the context of time and place, age and available information at the time the smoker started smoking and the attempts that since have been made to quit must all be taken into account. Of course when tobacco manufacturers blow smoke, by deliberately tampering with their products to make them more addictive, that deception could give rise to liability.

### **Competing Interests**

The authors declare that they have no financial and non-financial interests that could undermine the objectivity, integrity and value of this publication. They have no relationship with any of the persons, organisations or courts mentioned throughout the publication.

**How to cite this article:** Ilse Samoy, Christopher Borucki and Anne Keirse, 'The Role of Belgian and Dutch Tort Law in the Legal Battle Against Damage as a Result of Smoking Behaviour' (2019) 15(3) *Utrecht Law Review* pp. 78-98. DOI: <https://doi.org/10.36633/ulr.542>

**Published:** 13 December 2019

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