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2010/02

Tetty Havinga

The Influence of Liability Law on
Food Safety
On Preventive Effects of Liability
Claims and Liability Insurance

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ISSN 2212-7844

Nijmegen Sociology of Law Working Papers Series 2010/02

Faculty of Law
Radboud University Nijmegen
P.O. Box 9049
6500 KK Nijmegen
The Netherlands

Editors Dr. Tetty Havinga, t.havinga@jur.ru.nl
 Friso Kulk MA LLM
 Dr. Anita Böcker

Lay-out Hannie van de Put

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THE INFLUENCE OF LIABILITY LAW ON FOOD SAFETY ON PREVENTIVE EFFECTS OF LIABILITY CLAIMS AND LIABILITY INSURANCE

Tetty Havinga

Abstract

Most research on food safety has focused on direct forms of food safety regulation. This paper explores product liability law as a driver of food safety measures in firms. Its purpose is to widen the debate on liability law to include discussion of the actual impact on firm behaviour. Liability law is assumed to promote food safety. The author distinguishes three ways in which liability law could act as an incentive for firms to implement enhanced food safety controls: liability claims, liability insurance and direct effects of liability law on management strategy. The paper concludes that the assumption that liability laws make firms sensitive to the prevention of food safety risks is too optimistic. However, liability law could stimulate a culture within firms to take responsibility for food safety. Existing economic and legal analysis would gain from a sociological analysis of the actual impact of liability on company decisions.

Key words

Liability law, food safety, food industry

INTRODUCTION

The food supply in countries such as the US, the UK and the Netherlands is considered safe. Nevertheless, each year millions of people become ill after eating contaminated food. It is estimated that 5 000 Americans, 687 people in England and Wales and 80 people in the Netherlands die from food-born illnesses each year.¹ Food-born diseases are much more common. Significant

1 Estimates for the United States are from the Centers for Disease Control and Prevention, available on the internet at <<http://www.cdc.gov/ncidod/EID/vol5no5/mead.htm>> (last accessed on 4 April 2010), based on Paul S. Mead et al., Food-Related Illness and Death in the United States, 5 *Emerging Infectious Diseases* (1999) 5, at p. 607; for England and Wales: Goutam K. Adak, G.K., Sallyanne M. Meakins, Hopi Yip et al., Disease Risks from Foods, England and Wales, 1996-2000, 11 *Emerging Infectious Diseases* (2005) 3, pp. 365-372, available on the internet at <www.cdc.gov/eid> (last accessed on 4 April 2010); for The Netherlands from the RIVM, A.H. Havelaar, Y.T.H.P. Van Duynhoven & W. Van Pelt, *Microbiologische ziekteverwekkers in voedsel, Omvang van het probleem*, Nationaal Kompas Volksgezondheid, available on the internet at <http://www.rivm.nl/vtv/object_document/o3617n22451.html> (last accessed on 18 November 2009). However, an EFSA document mentions just 32 deaths in the European Union in 2008, available at <<http://www.efsa.europa.eu/en/scdocs/doc/s1496.pdf>> (last accessed on 1 September 2010).

sources of food infections include bacteria (e.g., Salmonella, Escherichia coli, Clostridium, Campylobacter, Listeria), parasites and viruses (e.g., Norovirus). Other causes of food-borne illness include toxins (e.g., nitrate, acrylamide), metals, prions (variant Creutzfeldt-Jacob disease) and allergens. Most illness is attributed to the consumption of poultry, processed foods and red meat.

Consumers are able to prevent some of these risks. An unhealthy diet (too much sugar, trans-fat, alcohol and too little fruit and vegetables) is considered a more significant risk to public health than unsafe food. Moreover, problems related to the food security in developing countries and sustainable food production are socially more important than safe food. Nevertheless, food safety should receive the continuing attention of governments, food producers, retailers, cooks and consumers. Safe food is food without micro-organisms, chemicals or other substances in quantities that are harmful to human health.

The traditional methods of regulating food have come under pressure as a result of food safety incidents, the BSE crisis, the development of 'new' foods such as GM food and functional foods, and growing concerns for animal welfare, sustainability and unhealthy food consumption in many EU countries. Trust in traditional regulation and regulators has decreased. In addition, command-and-control regulation in general has been criticised as being ineffective, too expensive and leaving too much responsibility for the government.² The increasing internationalisation of food production chains has resulted in a growing need for global and transnational regulation.³

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- 2 Christopher Ansell & David Vogel, 'The Contested Governance of European Food Safety Regulation', in: Christopher Ansell and David Vogel (eds) *What's the beef? The contested governance of European Food Safety* (Cambridge MA : MIT Press 2006), pp. 3-32; Neil Gunningham and Darren Sinclair, 'Regulatory pluralism: Designing policy mixes for environmental protection', 21 *Law and Policy* (1999) 1, pp. 49-76; M.A. Hajer, J.P.M. Van Tatenhove & C. Laurent, *Nieuwe vormen van Governance. Een essay over nieuwe vormen van bestuur met een empirische uitwerking naar de domeinen van voedselveiligheid en gebiedsgericht beleid*, RIVM rapport 500013004/2004, available at the internet at <<http://www.maartenhajer.nl/upload/RIVM.pdf>> (last accessed on 21 September 2010); Steve Jaffee and Oliver Masakure, 'Strategic use of private standards to enhance international competitiveness: Vegetable exports from Kenya and elsewhere', 30 *Food Policy* (2005), pp. 316-333.
 - 3 Doris Fuchs, Agni Kalfagianni & Tetty Havinga, 'Actors in Private Food Governance: The Legitimacy of Retail Standards and Multistakeholder Initiatives with Civil Society Participation', *Agriculture and Human Values* (in press 2010, available on the internet from August 2009 at <<http://www.springerlink.com/content/m237228605223463/full-text.pdf>> (last accessed at 21 September 2010); Peter Oosterveer, *Global Food governance*. (PhD-Thesis Wageningen University, Wageningen 2005); Jacques Trienekens & Peter Zuurbier, 'Quality and safety standards in the food industry, developments and challenges', 113 *International journal of production economics* (2008), pp. 107-122.

Such developments have led to changes in the regulation of food. Food safety is on the political agenda in the European Union and many countries.⁴ In response to real or perceived food safety risks, food regulation became stricter. New forms of regulation have achieved prominence (such as retailer-led food standards and transnational food certification schemes) and national government agencies are changing their ways. Many of these new forms of governance are characterised by a mix of public and private organisations involved in rule-making, compliance monitoring and enforcement. The central role of state institutions has declined and more is expected from the food industry itself. Food regulation is increasingly becoming a transnational affair. Many private food standards are used throughout the world and the European Union has enlarged its competences and increased its activities.⁵

Food regulation includes not only national and international government regulation, but also such non-government regulation as private certification schemes (MSC or GlobalGap), and public-private partnerships. We can distinguish between direct and indirect forms of food safety and quality regulation (see figure 1).⁶ Direct regulation entails prescriptions and requirements for the production and handling of food to assure the production of safe food. Even though indirect regulation does not provide prescriptions for the production process and the product, it is nevertheless expected to act as an incentive for implementing food safety controls. An example of indirect regulation is the setting of skill requirements for persons who prepare food so that food is prepared hygienically. Product liability law is another example of indirect regulation.

4 Ansell & Vogel, 'Contested Governance', supra note 2; Michelle Everson & Ellen Vos, 'European Risk Governance in a Global Context', in: Ellen Vos (ed.), *European Risk Governance. Its Science, its Inclusiveness and its Effectiveness* (Connex Report Series, Nr. 06 2008), pp. 7-36, , available on the internet at <http://www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/BookSeries/Volume_Six/CONNEX%20Report%20Series%20Book%206.pdf> (last accessed on 13 September 2010); Katharina T. Paul, *Food safety: a matter of taste? Food safety policy in England, Germany, the Netherlands, and at the level of the European Union* (PhD University of Amsterdam 2009); Henry Rothstein, *Precautionary Bans or Sacrificial Lambs? Participative Risk Regulation and the Reform of the UK Food Safety Regime* (LSE Discussion paper 15, London 2003); John Spriggs and Grant Isaac, *Food safety and International Competitiveness: The case of Beef* (Oxford/New York :Cabi publishing 2001).

5 Ansell & Vogel, 'Contested Governance', supra note 2; Everson & Vos, 'European Risk Governance in a Global Context', supra note 4; Fuchs, Kalfagianni & Havinga, 'Actors in Private Food Governance', supra note 3.

6 Compare the distinction between direct regulation and product liability as forms of public systems of food quality control in Spencer Henson and Julie Caswell, 'Food safety regulation: An overview of contemporary issues', 24 *Food Policy* (1999), pp. 589-603, at p. 593.

Figure 1: Types of regulation of food safety

Source of the rules	Nature of the rules	
	<i>Direct</i>	<i>Indirect</i>
<i>Public</i>	Food laws, e.g. Food Safety Act 1990 (UK) and General Food Law ⁷ (EU)	Product liability laws TBT-GATT agreement ⁸
<i>Public-private</i>	Industrial hygiene codes	Insurance policies
<i>Private</i>	Private food safety certification schemes (e.g. GlobalGap, MSC)	Consumer complaint proceedings

Most research has focused on direct forms of food safety regulation. Studies have been published on reforming food laws and their implementation and enforcement.⁹ Recently, both public regulatory arrangements as well as the rise, legitimacy and working of non-government, direct food safety regulation has received attention.¹⁰ As Roe points out, though, the influence of liability law has received less attention.¹¹

7 Commission Regulation (EC) No 178/2002 laying down the General Principles and Requirements of Food Law, Establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ 2002 L31/1-24.

8 GATT Agreement on Technical Barriers to Trade (TBT).

9 E.g. Peter Mascini & Eelco Van Wijk, 'Responsive regulation at the Dutch Food and Consumer Product Safety Authority: An empirical assessment of assumptions underlying the theory', 3 *Regulation & Governance* (2009) 3, pp. 27-47 (doi:10.1111/j.1748-5991.2009.01047.x); Paul, *Food safety: a matter of taste?*, supra note 4; Rothstein 'Precautionary bans', supra note 4; Spriggs & Isaac, *Food Safety and international competitiveness*, supra note 4.

10 Linda Fulponi, 'Private voluntary standards in the food system: The perspective of major food retailers in OECD countries', 31 *Food Policy* (2006), pp. 1-13, available on the internet at <www.elsevier.com/locate/foodpol. science direct>; Tety Havinga, 'Private regulation of food safety by supermarkets', 28 *Law and Policy* (2006) 4, pp. 515-533; Spencer Henson & Thomas Reardon, 'Private Agri-food standards: Implications for food policy and the agri-food system', 30 *Food Policy* (2005) 3, pp. 241-370; Terry Marsden, Andrew Flynn & Michelle Harrison, *Consuming interests. The social provision of foods* (London: UCL press 2000); Marian Garcia Martinez, Andrew Fearn, Julie A. Caswell et al., 'Co-regulation as a possible model for food safety governance: Opportunities for public-private partnerships', 32 *Food Policy* (2007), pp. 299-314; Henry Rothstein, 'Escaping the Regulatory Net: Why Regulatory Reform Can Fail Consumers', 27 *Law and Policy* (2005) 4, pp. 520-548; Frans Van Waarden, 'Taste, Tradition, Transactions, and Trust: The public and private regulation of food', in: Christopher Ansell & David Vogel (eds), *What's the beef? The contested governance of European Food Safety*

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This paper explores the opportunities available for product liability to encourage food safety measures within firms. Its aim is to contribute to the discussion of the role public and private actors may play in providing an effective food safety system. The paper starts with a brief introduction to product liability law. The next section discusses the assumed influence of liability law on food safety based on the legal and economic literature. I distinguish three ways in which liability law could act as an incentive for firms to implement enhanced food safety controls: liability claims, liability insurance and direct effects of liability law on management strategy. The subsequent sections present available empirical evidence on the actual impact of liability law related to these three incentives. The paper concludes with a summary of the findings and a discussion of the role of liability law in food safety regulation.

PRODUCT LIABILITY LAW

Liability for defective products was introduced in European Community Law in 1985.¹² This Directive is based on the principle of liability without fault. Every producer must compensate any damage caused by a defect in his product to the physical well-being or property of individuals, independently of whether or not there is negligence on the part of the producer. The burden of proof lies with the victim, who has to prove the damage, the defect and the causal relationship between the defect and the damage. A product is defective when it does not provide the safety which a person may expect. In 1999 the scope of product liability was extended to include unprocessed primary agricultural products.¹³ Since that time, the Directive has applied to both industrial products and agricultural products. Suppliers are not liable under this Directive. This Directive is subsequently implemented in national legislation of the Member States.¹⁴

(Cambridge MA: MIT Press 2006), pp. 35-59; Frans Van Waarden, 'Governing global commons: Public-private-protection of fish and forests', in: Jo Swinnen, Jan Wouters et al. (eds.) *Private standards and global governance. Legal and economic perspectives* (Cheltenham: Edgar Elgar 2010 in press).

- 11 Brian Roe, 'Optimal sharing of foodborne illness prevention between consumers and industry: the effect of regulation and liability', 86 *American Journal of Agricultural Economy* (2004) 2, pp. 359-374, at p. 360.
- 12 Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ 1985 L 210/29.
- 13 Council Directive 99/34/EC amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ 1999 L 141/20.
- 14 An overview of the national provisions concerning Directive 1999/34/EC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products is available on the internet at <<http://eur->
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The European Commission stresses that the Directive must maintain a balance between the concerns of consumers and producers.¹⁵ Research into the product liability systems in the Member States revealed that the prevailing view among consumer representatives was that the Directive does not adequately protect the interests of consumers.¹⁶

The Directive has two goals. Existing disparities in liability regimes may distort competition and affect the free movement of goods in the community. The Directive also seeks to protect consumers from damage caused by defective products. The Commission explains: 'The Directive helps to increase the level of protection against defective products for two reasons: first, it encourages producers to do their best to produce safe products by complementing the regulatory measures of a given product group or those following the Directive on General Product Safety 92/59 and second, once these preventive measures have failed and accidents have happened, it allows the victims to obtain redress from the producers.'¹⁷

ASSUMED IMPACT OF LIABILITY LAW ON FOOD SAFETY MEASURES

Liability law has two aims: compensation for damages and the prevention of accidents caused by unsafe products. Liability law establishes the right of a person harmed by an unreasonably dangerous product to seek compensation in court for damages from the other party. The primary function of liability law is to compensate the victim and achieve corrective justice between the parties. However, a preventive function is also generally attributed to liability law.¹⁸ Dewees, Duff and Trebilcock distinguish between three goals: deterrence, compensation, and corrective justice.¹⁹

lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:71999L0034:EN:NOT #FIELD_NL> (last accessed on 20 September 2010).

- 15 Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee, Third report on the application of the Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products (85/374/EEC of 25 July 1985, amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999), Com (2006) 496 final.
- 16 Lovells, *Product liability in the European Union. A report for the European Commission* (London : Lovells, Markt/2001/11/D 2003).
- 17 Report from the Commission on the application of Directive 85/374 on Liability for Defective Products, COM (2000) 893 final, p. 10.
- 18 Matteo Ferrari, *Risk Perception, Culture, and Legal Change. A Comparative Study on Food Safety in the Wake of the Mad Cow Crisis* (Framham/Burlington: Ashgate 2009), p. 89.
- 19 Louis Visscher, 'De preventieve werking van het onrechtmatige-daadsrecht. Empirisch onderzoek naar de werking van aansprakelijkheidsregels', 17 *Recht der Werkelijkheid* (2002) 1, pp. 59-74.

Legal writers tend to concentrate on claims for compensation; they discuss liability doctrines, case law and the interpretation of legal provisions: What is a product? Who is a producer? What counts as proof of a causal connection between product and damage? What defences can be presented? and so on. Legal authors generally merely assume that firms will try to avoid being held liable. The assumption is that the enforceable duty to pay damages in case of negligence will cause the actor to take avoiding action.²⁰ The deterrent effect of sanctions will prevent hazardous acts.

Writers in the field of economics, on the other hand, tend to focus on the impact of liability laws on firms' preferences and costs and on the effects of these shifting preferences and costs. Potential liability is considered as anticipated costs and firms will optimise their food safety precautions to minimise the total costs of production.²¹ Faure and Hartlief argue that the basic presumption of liability laws is that they contribute to the prevention of accidents.²² It is assumed that prospective liability deters a company from neglecting the harms and risks their product may cause. An offender, who will subsequently have to pay damages, will act with care beforehand. The fear of future expensive lawsuits is believed to encourage food producers to make food safer. In the food economics literature, product liability law is seen as one of three factors that together encourage food firms to adopt food safety measures, along with market forces and food safety laws and regulations (figure 2).²³

20 Ivo Giesen, 'Attributie, juridische causaliteit en preventieve werking. Over causaliteitstoe-rekening vanuit psychologisch perspectief en de mogelijke gevolgen daarvan voor (de preventieve werking van) het aansprakelijkheidsrecht', in: Willem Hendrik Van Boom, Ivo Giesen & Albert J. Verheij (eds), *Gedrag en privaatrecht. Over gedragspresumpties en gedragseffecten bij privaatrechtelijke leerstukken* (Den Haag: Boom Juridische Uitgevers 2008), at p. 187.

21 Jean C. Buzby, Paul D. Frenzen & B. Rasco, *Product liability and microbial foodborne illness* (Washington DC: Food and Economics Division, Economic Research Service, U.S. Department of Agriculture, Agriculture Economic Report, no. 799 2001) at p. 9; Spencer Henson & Neil H. Hooker, 'Private sector management of food safety: Public regulation and the role of private controls', 4 *The International Food and Agribusiness Management Review* 4 (2001) 1, pp. 7-17; Louis T. Visscher, *Een rechtseconomische analyse van het Nederlandse onrechtmatiggedaadsrecht* (Den Haag: Boom juridische uitgevers 2006).

22 Michael G. Faure & Ton Hartlief, *Verzekeraarbaarheid van nieuwe gezondheidsrisico's: achtergrondstudie* (Zoetermeer: Raad voor volksgezondheid en zorg 2001), available on the internet at <www.rvw.net> (last accessed on 19 March 2007) at p. 16; Michael Baram, 'Liability and its influence on designing for product and process safety', 45 *Safety Science* (2007) 1-2, pp. 11-30.

23 Buzby, Frenzen & Rasco, 'Product liability and microbial foodborne illness', supra note 21; Henson & Hooker, 'Private sector management of food safety', supra note 21.

Figure 2: Factors that encourage food safety measures in firms

Market	Firms that produce unsafe food risk losing their reputation, markets share and sales.
Food safety laws and regulations	Firms that violate food laws risk penalties imposed by courts or inspectorates, such as fines, product recalls or plant closure
Product liability law	Firms that are legally responsible for a product that has made people ill risk having to pay compensation to the victims as well as court costs and legal fees

Source: Buzby, Frenzen & Rasco, *Product liability and microbial foodborne illness*, 2001, supra note 20.

In analysing the economic determinants of food safety controls by supermarkets, Henson and Northen consider the legal distribution of liability between different actors in the value chain as one of the key variables.²⁴ Marsden et al. argue that establishing legal liability for food safety might improve safety by providing incentives for producers to follow such practices as minimise risks.²⁵

Both economics and legal authors agree that liability law provides economic incentives for firms to avoid actions that may violate the law or pose food safety risks.

THREE TYPES OF PREVENTIVE EFFECT

We have seen that product liability law is thought to have a potential impact on how food firms manage food safety and food hygiene. Most authors pay attention only to the deterrence effect of prospective claims for damages. Meidinger identifies tort liability on the public side and the insurance industry on the private side as powerful drivers of private safety regulation, giving manufacturers an interest in showing due care and the insurance industry an interest in controlling the risks.²⁶

24 Spencer Henson & James Northen, 'Economic Determinants of Food Safety Controls in Supply of Retailer Own-Branded Products in United Kingdom', 14 *Agribusiness* (1998) 2, pp. 113-126, at p. 117.

25 Terry Marsden, Robert Lee, Andrew Flynn et al., *The New Regulation and Governance of Food. Beyond the Food Crisis?* (New York/London : Routledge New York/London 2010), at p. 263.

26 Errol Meidinger, 'Private Import Safety Regulation and Transnational New Governance', in: Cary Coglianese, Adam Finkel & David Zaring (eds) *Import Safety: Regulatory Governance in the Global Economy*, (Philadelphia: University of Pennsylvania Press 2009), pp. 233-253, at p. 234.

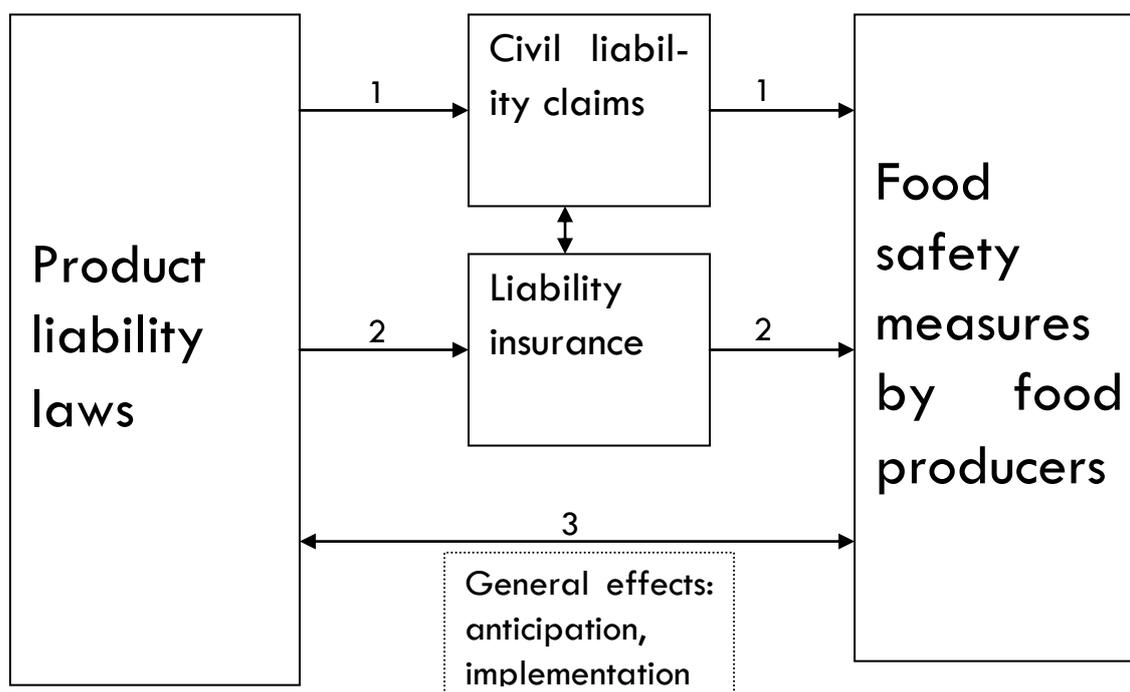
Theoretically, there are three ways in which liability law could induce preventive measures (see figure 3).

1. Claims from injured consumers or damaged business relations may influence firms' preferences and costs, inducing them to assure food safety and thus forestall liability claims. The threat of lawsuits serves as a stimulus to the industry to improve its practices. This is a special effect of liability law.
2. A second route is through insurance. Firms may cover the risks of liability claims by insuring the risk. The effect of insurance is not obvious. Insurance companies may induce food safety controls through the terms of an insurance policy or by calibrating premiums according to the level of precaution taken. However, insurance could also limit the economic incentives for firms to produce safe food by taking over the financial risk. The impact of insurance companies can either be related to a particular claim or not.
3. Finally, liability law may influence business management strategies directly (i.e. not through claims or insurance), inducing businesses to assure food safety. We might call this the general effects of product liability law.

Quite often, the preventive effects of liability law are linked to claim litigation. However, in studying the effects of legislation, it is important not to study the effects in particular conflict situations only, because the social effects of legislation are not confined to those situations. Effective legislation induces people to comply with rules in everyday life without discussion and conflicts. Actors then change their routines and behaviour and apply legal rules without intervention from the judicial system, in the form of enforcement agencies, judges or lawyers. Griffiths points out the importance of these general effects, which are also included in this paper, viz., the influence of legislation in everyday practice in organisations subject to the law.²⁷ General effects are the opposite of special effects – effects in particular conflicts, where people refer to the law, and rules are applied by legal institutions, such as a court.

27 John Griffiths, 'The social working of anti-discrimination law', in: Titia Loenen & Peter R. Rodrigues (eds), *Non-discrimination law: Comparative perspectives*, (The Hague/London/Boston: Kluwer Law International 1999), pp. 313-330.

Figure 3: Three ways liability laws could influence food safety measures in firms



In the following sections I discuss the available empirical evidence on each of these three possible influences of product liability law on food safety measures in the food industry. To supplement the literature consulted I have used information from interviews conducted in the Netherlands with the food safety managers of six large supermarket chains and a dairy, an officer of the Dutch Food Safety Authority (VWA), two directors of food certification bodies, an officer of the Association of Dutch Supermarkets (CBL) and two insurance officers.

LIABILITY CLAIMS

Civil liability claims may promote food safety. The assumption is that the food industry will try to avoid liability claims because such claims cost a lot of money, including the compensation awarded, the court costs, fees for attorneys and experts, and so on, all of which can be significant. Van Erp concludes that, when discussing the preventive effects of claims for damages, most authors refer only to the direct costs of compensation.²⁸ In addition to the financial costs, a liability claim could result in bad publicity, loss of reputation and possibly

²⁸ Judith Van Erp, 'Naming en shaming in het contractenrecht? Het reputatie-effect van schadevergoedingen tussen ondernemingen', in: Van Boom, Giesen & Verheij (Eds), *Gedrag en privaatrecht*, pp. 153-180, supra note 20, at p. 153.

even loss of sales. Firms often do place a great value on their good reputation and try to settle disputes with other firms outside the courts for fear litigation may harm their reputation, with a great risk of losing their business partner.²⁹

Companies are assumed to be (broadly speaking) rational actors, seeking the optimum level of precaution in relation to the expected costs of liability claims. The greater the expected transaction costs of defending against liability claims, the more powerful will be the deterrent effect of liability.³⁰

It is difficult to assess the number of liability claims with which food producers are confronted. There are hardly any published court decisions in the Netherlands on product liability in relation to food products. Very few product liability cases actually come to court. Van Dam, in a survey up to the end of 2002, found only six cases related to the European Product Liability Directive, two of which involved food.³¹ Product liability case law reviews and searches of case-law databases resulted in only three other cases involving liability for food products.³² In other words, I have only discovered five cases: three cases involving consumer claims and two cases involving a business-to-business dispute.

In a legal dispute, the injured person has to prove the defect, the damage and the causal relationship between defect and damage. This can be difficult, as is illustrated in the following Dutch cases.

The first case involves plasma powder used as a binder for meat balls in soup.³³ The court did not consider an abnormal smell and taste to be damage, and the product was found not to be defective or unsafe. The supplier of the plasma powder was not held to be liable because the company did not produce the plasma.

The second case concerns a woman who contracted paratyphoid fever after eating an ice-cream.³⁴ Experts concluded that a number of ice-creams sold by the defendant were contaminated with salmonella. The court found it be-

29 Alex Jettinghoff, *Het komt zelden voor. Beheersing van klachten en geschillen in relaties tussen bedrijven*. (Maastricht: Metajuridica publications 2001); Stewart Macaulay, 'Non-contractual relations in business: A preliminary study', 28 *American Sociological Review* (1963), pp. 55-67; Van Erp, 'Naming en shaming in het contractenrecht?', supra note 28.

30 Baram, 'Liability and its influence', supra note 22, at p. 17.

31 Cees Van Dam, 'Dutch case law on the EU Product Liability Directive', in: Duncan Fairgrieve (ed.), *Product liability in comparative perspective* (Cambridge: Cambridge University Press 2005), pp. 126-137.

32 C.J.M. Van Doorn & W.H. Van Boom, 'Productaansprakelijkheid en productveiligheid', *Tijdschrift voor Consumentenrecht* (2004) 3, pp. 100-106; C.J.M. Van Doorn & S.B. Pape, 'Kroniek productaansprakelijkheid en productveiligheid 2005-2008', *Tijdschrift voor Consumentenrecht en handelspraktijken* (2009) 2, pp. 50-59.

33 HR 22 September 2000, *Vladeko vs VSCI* (LJN: AA 7239).

34 *Boerman vs Alberto*, Ktg. Zwolle 4 July and 5 December 2000. Van Dam, 'Dutch case law on the EU Product Liability Directive', supra note 31, at p. 131-132.

yond reasonable doubt that the woman had bought one of the contaminated ice-creams. Paratyphoid can be caused by salmonella. The hospital found that the woman was infected by a salmonella microbe but did not make a more specific diagnosis. It was likely she contracted paratyphoid from eating the ice-cream, but this was not beyond doubt. The court decided that the defendant had to prove that the woman would have suffered the same damage if she had not eaten the ice-cream. Under certain conditions the burden of proof is reversed; the defendant has to prove that there is no causality between the damage and the product. After this ruling the parties requested the court to drop the case. It is presumed that the parties reached a negotiated resolution.

The third case deals with an eye injury caused by an exploding plastic bottle containing fresh orange juice.³⁵ The bottle had no label and best-before date and was left in an open kitchen without refrigeration for five warm days in summer. The claim did not succeed because the judge ruled that a label and best-before date were not mandatory, the producer might ignore this type of storage and might expect the consumer to be aware of the risk that freshly squeezed orange juice will ferment in warm conditions.

Case 4 relates to poisonous (Japanese) star-anise in an herbal tea, which caused health problems for people who drank the tea.³⁶ The trading company that sold the star-anise was not considered to be the producer. However, the trading company should have taken more care and was ordered to pay 40% of the costs.

This case law illustrates that it can be difficult for a victim to pursue a successful liability claim because the defect and the causal relation between defect and damage is hard to prove, the consumer is expected to have considerable knowledge of commodities, and because some products are bought from someone who is not considered to be the producer. Based on the limited number of court cases and the poor success rate of claimants in these cases, it would seem to be rather implausible that liability claims give business much incentive to take precautionary measures to prevent food safety incidents.

In interviews, the Dutch food safety managers of supermarket chains and the food industry did not regard the fear of liability claims as an important incentive to adopt food safety measures.

35 Rb Maastricht 21 March 2002 (zaaknummer 67354, TvC 2003/1, p. 65). Van Doorn & Van Boom, 'Productaansprakelijkheid en productveiligheid', supra note 32, at p. 100. Another case involves an injury from the top of a lemonade bottle, which broke off (*Leebeek vs Vrumona*, HR 24 December 1993; *NJ* 1994 nr 214). This case has been omitted because it relates more to packaging than food.

36 Rb Zwolle 26 July 2006 (*LJN*: AZ0545) Sterrenmix.

In the UK, Hutter and Jones studied the external influences on risk management in food firms.³⁷ The influence attributed to lawyers is low. When interviewed, managers of food firms rarely mention the possibility of compensation claims or civil actions. Hutter and Jones expected a greater impact, given the debate about the compensation culture. This finding suggests that liability law claims do not have a strong, direct influence on food safety measurements in firms in the UK either.

In the United States there is more case law on product liability in relation to food products. Recently, law suits against the fast-food industry and its responsibility for obesity have attracted attention.³⁸ Even in the United States, though, most cases of food-borne illness do not result in legal action. Buzby and Frenzen estimated that in the United States far fewer than 0.01% of cases are brought to court.³⁹ Buzby and Frenzen studied 294 food-borne illness lawsuits between 1988 and 1997. Not all of these lawsuits resulted in a court decision; nearly 40% were settled, mediated or arbitrated out of court. Many settlements include an agreement that the monetary payment and other details shall remain confidential. In 32% of the cases that did result in a court decision, financial compensation was awarded (median award \$25 000).

The actual costs of liability claims are unknown because out-of-court settlements are common in the United States, the United Kingdom and the Netherlands. The amount of financial compensation in such settlements is not disclosed.

Explaining the small number of court cases

The small number of court cases can be explained by obstacles placed before victims who seek redress and the incentives for defendants to settle claims out of court. Buzby and Frenzen point to the high information and transaction costs of pursuing a food poisoning lawsuit, and the expected poor monetary compensation in their explanation of the small number of litigants.⁴⁰

Potential plaintiffs face several obstacles in seeking to mobilise liability law. Some legal provisions prohibit them making a successful legal claim. They

37 Bridget M. Hutter & Clive J. Jones, 'From government to governance: External influences on business risk management', 1 *Regulation and Governance* (2007), pp. 27-45.

38 Ronald Adams, 'Fast Food, Obesity, and Tort Reform: An Examination of Industry Responsibility for Public Health', 110 *Business and Society Review* (2005) 3, pp. 297-320 (doi: 10.1111/j.00453609.2005.00017.x).

39 Jean C. Buzby & Paul D. Frenzen, 'Food safety and product liability', 24 *Food Policy* (1999) 6, pp. 637-651.

40 Buzby & Frenzen, 'Food safety and product liability', supra note 40, at p. 648.

also have to face the general obstacles that (individual) complainants experience when seeking to mobilize the law.⁴¹

Claims related to food-borne diseases are limited because:

- The consumer must be able to attribute the illness or damage to a specific product and producer;
- Proving causality between product and illness is often difficult;
- In many cases there will not be substantial damage or injury, whereas this is required to make a legal liability claim;
- European Union law does not allow for claims after ten years.

Faure and Hartlief set out a fictive case of someone who contracts variant Creutzfeldt-Jacob disease (mad cow disease) to illustrate some of these problems.⁴² In this case there is severe damage, but is this a case of product liability? Until recently, EU product liability law only applied to agricultural produce after processing, while in the case under consideration the cause of the disease may date back to before these product liability rules came into force. Is this a knowable risk? Causality will be hard to prove (variant CJ disease is caused by eating veal, but which veal from which producer? And maybe one can contract vCJ disease from some other source?). vCJ disease has a long incubation period (i.e., the time between consumption and the appearance of disease symptoms), while a claim is no longer possible ten years after the product was put on the market.

Liability claims are hampered because people often fail to notice the defect in food. Moreover, it turns out to be difficult to make a case. In an interview, a chief executive officer for food safety and consumer health in an international food retail company, who used to handle consumer complaints, gives the example of a consumer complaining about eating a drawing pin that was in a packet of potato crisps. The defence is simple: drawing pins are often kept in a cup in the kitchen and the crisps fall into the cup. The defence is that this is how the pin ended up in the crisps. It could have been in the crisps, but that is not likely, especially if the producer has got a metal detector at the end of the crisp production line, in conformity with the supermarket's requirements for

41 Erhard Blankenburg, *Mobilisierung des Rechts. Eine Einführung in die Rechtssoziologie*, (Berlin etc: Springer 1995); Richard E. Miller & Austin Sarat, 'Grievances, claims and disputes: assessing the adversary culture', 15 *Law and Society Review* (1981), pp. 525-566; Bert Niemeijer & Carolien Klein Haarhuis, 'Hoeveel recht kunt u betalen? Over verklaringen van geschilgedrag en het gebruik van procedures', in: Van Boom, Giesen & Verheij, *Gedrag en privaatrecht*, pp. 537-559, supra note 20.

42 Faure & Hartlief, *Verzekerbaarheid van nieuwe gezondheidsrisico's*, supra note 22, at pp. 53-55. See also Matteo Ferrari, *Risk Perception, Culture, and Legal Change* (Ashgate 2009), at pp. 159-161.

suppliers. In that case, the consumer will have to prove the pin was in the crisps and this is almost impossible. This illustrates how hard it can be to bring a successful lawsuit to court in cases of unsafe food. However, it also shows an incentive for food producers and retailers to take measures that could eventually be used in a court defence (in the above case the requirement to have a metal detector at the end of the production line). Another strategy often used to preclude liability is to warn the consumer on the label (e.g. this product may contain nuts; this product should be properly cooked before consumption).

A consumer will notice a defect like a pin in the crisps. Other defects are relatively invisible. Imagine someone with cancer: it is unclear whether this is caused by carcinogens in food (and which foods? Peanut butter? Deep-frying?). And most likely cancer is not caused by just one type of product but the sum of many foods consumed during a life-time. The same holds for eating veal and risking variant Creutzfeldt-Jacob disease. A consumer cannot distinguish a defect or risky product from a healthy one. In situations like these, liability law does little to help the consumer.

An individual consumer is a one-shotter without experience in making a liability claim. On the other hand, the defendant is more likely to be a repeat player that has had, and anticipates having, repeated litigation and can afford specialised legal assistance and a strategic handling of the case.⁴³ In general, individual people do not go to court very readily because they lack the resources and motives to do so. A so-called individual rights strategy, where legal rights are granted but have to be mobilized by the action of the victim, is known to generate only a relatively small number of legal claims. Most victims just leave it at that.

Claims from business to business (a shop versus a trading company, a trading company versus an industry or an insurer versus a producer) are more likely to be brought, but even in these cases there are many incentives to settle out of court.

Besides the obstacles to victims asking for redress, the small number of court cases may be explained in terms of the incentives for defendant firms to settle claims out of court. Most retail shops and manufacturers will deal with customer claims by offering a new product and some extras (like a box carrying a broad selection of crisps and snacks or some other gift) to make up for the damage and inconvenience, regardless of the legal merits of the claim. This keeps customers satisfied and prevents the complaint from developing into a legal claim. Claims from supplier and customer firms are usually settled be-

43 Marc Galanter, 'Why the "haves" come out ahead: Speculations on the limits of legal change', 9 *Law and Society Review* (1974) 1, pp. 96-160.

cause litigation will disrupt the ongoing business relationship.⁴⁴ By choosing to settle a claim outside the courtroom the defendant firm avoids litigation costs and reputational damage.

Van Dam assumes that producers, importers and their liability insurers in the Netherlands are inclined to settle liability claims out of court in order to prevent the development of case law by the courts.⁴⁵ According to Dutch and German insurers, 90% of the claims are settled out of court.⁴⁶ Apart from a small number of liability court cases, the impact of a court case seems to exert only a minor degree of deterrence. Van Erp finds no signs that the loss of a good reputation reflects on third parties (in other words, the relationship with other firms is not endangered).⁴⁷ Information about damages is usually unknown to third parties, in part the parties agree to observe confidentiality in respect of the deal.

US plaintiffs are more likely to litigate, more likely to win their case and to receive generous compensation compared to plaintiffs in European countries, such as the UK and the Netherlands.⁴⁸ However, Buzby et al. conclude that even in the United States, product liability law provides only weak incentives for firms to produce safer food. Defendants have incentives to settle out of court to avoid additional attorney fees, delays, negative impact on the firm's or the product's reputation, and a poor track record.⁴⁹

Because of the obstacles victims face when they claim compensation and the factors encouraging them to deal with cases outside the courtroom, it is not to be expected that liability claims will have any major preventive effect in the near future.

DOES LIABILITY INSURANCE CONTRIBUTE TO FOOD SAFETY?

As already stated, claims for compensation are not an important incentive for food manufacturers to take preventive measures. What is the role of insurance? According to Meidinger 'the insurance industry [...] has had a powerful and sustained interest in controlling the risks that it was assuring against.' The insurance industry has propelled one of the first companies to make a business

44 Jettinghoff, *Het komt zelden voor*, supra note 29; Macaulay, 'Non-contractual relations in business', supra note 29.

45 Van Dam, 'Dutch case law on the EU Product Liability Directive', supra note 31, at p. 137.

46 Report from the Commission on the application of Directive 85/374 on Liability for Defective Products, COM (2000) 893 final, at p. 10.

47 Van Erp, 'Naming en shaming in het contractenrecht?', supra note 28.

48 Buzby & Frenzen, 'Food safety and product liability', supra note 40, at p. 647.

49 Buzby & Frenzen, 'Food safety and product liability', supra note 40; Buzby, Frenzen & Rasco, *Product liability and microbial foodborne illness*, supra note 21.

out of product safety testing and standard setting, Underwriters Laboratories (UL). Insured parties were often required to use UL certified products.⁵⁰ Skees et al. have high hopes for improving food safety: 'Under the right conditions, an insurance underwriter could be more effective than a government meat inspector in getting a processor to change their behaviour in the desired fashion.' Insurance companies are exposed to risk and will have incentives to assure that systems are in place to mitigate food safety risks. Since rate discounts will be possible, plant managers should be cooperative.⁵¹

Others expect the role of the insurance industry to be counterproductive. Hutter and Jones suggest that the influence of insurance companies could be problematic (without further explanation).⁵² Buzby et al. argue that most food firms in the United States are insured and insurers pay losses and costs of litigation and damages; this limits the immediate incentives for firms to produce safer food.⁵³

Faure and Van Boom reviewed the literature to examine what insurance companies do to prevent the moral hazard (i.e, when insured parties don't bother to control risks because the insurance covers the damage).⁵⁴ Their research did not focus on food producers. However, Faure and Van Boom conclude that insurance companies on occasion estimate the risk and establish the premiums at the start. During the course of insurance contract, however, insurance companies seldom check on the actual risks. Consequently, they do not know whether moral hazard exists. Some insurance companies do not differentiate premiums. Even after an accident premiums are not always increased. The passive attitude of insurance companies even results in an increased risk of accidents in case of medical liability and directors' liability, according to Faure and Van Boom.

Hutter and Jones explored the external pressures on risk management in the food retail sector.⁵⁵ They asked managers of food firms what food safety risks they perceive and what external pressures on risk management they experience. The most important external pressure came from local environmental health officers, followed by consumers. Although some authors expect that

50 Meidinger, 'Private Import Safety Regulation', supra note 26, at p 234.

51 Jerry R. Skees, Aleta Botts & Kimberly A. Zeuli, 'The potential for recall insurance to improve food safety', 4 *The International Food and Agribusiness Management Review* (2001) 1, pp. 99-111, at p. 100, 110.

52 Hutter & Jones, 'From government to governance', supra note 37, at p. 14.

53 Buzby, Frenzen and Rasco, Product liability and microbial foodborne illness, supra note 20, at p. 9.

54 Michael Faure & Willem Hendrik Van Boom, 'Hoe houdbaar zijn gedragsveronderstellingen in verzekeringsrecht en -economie?', in: Van Boom, Giesen, Verheij, *Gedrag en privaatrecht*, pp. 305-339, supra note 21.

55 Hutter & Jones, 'From government to governance', supra note 37, at p. 14.

insurance companies are important in encouraging food safety measures,⁵⁶ most respondents did not see insurance companies as an important incentive. Only 15% of managers in medium and large-size businesses answered that insurance companies have a 'strong influence'.

More than half of the firms in the Hutter and Jones investigation were insured against food hygiene and food safety incidents. Managers in small firms assessed the influence of insurances as smaller than managers in big companies. About 20% of the managers said they had received information on food safety from their insurance company. Only one firm reported ever having been inspected by his insurer. The experts thought it unlikely that insurance companies would figure prominently as an influence on food safety and hygiene standards. Some expected that insurers would become more important in future. Others had serious doubts as to the potential influence of insurers on measures to promote food safety, comments ranging from a view that insurance companies are not very good at quantifying risk, with others being especially concerned about moral hazard problems. A respondent said: 'Insurance is the enemy of the good as it is designed to average out loss resulting in the good not being rewarded and the bad not being punished'.⁵⁷

In my own interviews, a respondent from the Dutch Food Safety Authority and two directors of Third party food certification agencies did take the view that liability law and liability insurance had some impact. Nevertheless, they did not expect insurance companies really to review food safety measures in the firms they insure because they lack the knowledge to do so. One of the interviewed certifiers states that the insurance companies just look at ISO certification.

The application form issued by an insurance company working in the Netherlands did not contain specific questions for the food industry (although specific questions were included for high-risk economic sectors, such as construction firms and dentists). The application form contains questions on the certification of production processes and routines, quality control, recommendations, warnings or prescription by supervisory bodies, previous liability claims, input and output controls and product traceability. Many detailed questions focus on possible risks to employees.

Respondents from an insurance broker said the insurance company employs an extended questionnaire that firms must complete in order to be accepted. They said that food safety management is included in the conditions for accepting a firm. Submitting the document describing the firm's general trading conditions is also part of the application procedure and insurance agents visit the

⁵⁶ *Ibid.* at p. 32.

⁵⁷ *Ibid.* at p. 33.

firm that is applying for insurance. They check the company's premises (order, tidiness), the reputation of the entrepreneur, the impression they have of the personnel, and the risks that might be involved. If the insurance agents find the premises unhygienic or the equipment very old, they said that the application procedure is terminated. An example was provided from some snack outlets with obviously unclean oil filters.

Examination of the general conditions of liability insurance for companies in the Netherlands, obtained from four insurance companies, revealed that some insurance policies exclude liability in the United States and Canada. One company excluded liability for damage caused by or related to transmissible spongiform encephalopathy (TSE), such as BSE or variant Creutzfeldt-Jacob disease.

In sum, some factors point to a positive impact of insurance on preventive food safety measures whereas other factors indicate a negative impact, as summarised in the following figure.

Figure 4: Could liability insurance further food safety measures?

Yes	No
- by way of reduction in premium	- insufficient knowledge with insurance companies
- by conditions of insurance	- reducing financial incentive to produce safe food (moral hazard)
- by information and assistance from insurance company with reducing food safety risks	- insurance company does not interact with food safety officers at insured firm

Insurance companies do not seem to encourage prevention of food safety risks; in some cases the effect is even rather counterproductive. Insurance companies do not appear to make the fullest use of their opportunities to further prevention.

GENERAL EFFECT OF LIABILITY LAWS

What are the effects of liability laws on firms in general, apart from liability claims? Do liability rules induce firms to take preventive measures to assure the production of safe food?

In the United Kingdom, the introduction of the principle of due diligence under the Food Safety Act 1990 is said to have encouraged firms to establish

private food safety regulations.⁵⁸ British retailers have been required to take all reasonable steps to ensure that the food they sell is safe. Previously, the retailers had only to prove that the food was not compromised while under their control and the manufacturer was held liable for the rest. This shift of the legal responsibility for safe food downstream in the supply chain makes food retailers ultimately responsible for the safety of the products. This includes the verification of technical performance at sites producing retailer-branded food products. For a due diligence defence against food safety offences, a retailer has to demonstrate that all reasonable precautions have been taken. All major British supermarket chains have developed initiatives to ensure a certain quality of retail food products by committing suppliers to a specified set of standards. A quality assurance scheme was set up in the British meat industry. The British Retail Consortium developed a set of food safety standards and retailers require their suppliers to be certified under these standards. The aims of the BRC Global Standards are to improve supplier standards and consistency and avoid product failure, and to provide concise information to assist with a due diligence defence.⁵⁹

Similarly, in the Netherlands the introduction of a stricter liability regime by the European Union seems to have resulted in fear for the consequences. This new liability law encouraged the development of third-party certification schemes, such as quality assurance certification in the dairy industry and retail-led certification. The Dutch supermarkets feared possible claims and litigation and they tried to cover themselves by tightening supplier contracts. Insurance companies raised the premiums. As one respondent put it: 'Looking back I would say product liability was enlarged out of all proportion; after ten years, there have not been any serious liability cases.'

In the United States liability law plays a less significant role as an incentive for quality assurance, according to Henson and Caswell.⁶⁰

Fairman and Yapp interviewed small and medium-sized food industry enterprises (SMEs) in the UK and found that most SMEs were unable to assess their own compliance with food safety regulations (as defined by the enforce-

58 Buzby & Frenzen, 'Food safety and product liability', supra note 39, at p. 648; Julie Caswell, 'Valuing the benefits and costs of improved safety and nutrition', 42 *The Australian Journal of Agriculture and Resource Economics* (1998) 4, pp. 409-424, at p. 416; Henson & Caswell, 'Food safety regulation', supra note 6, at p. 594; Henson & Northen, 'Economic Determinants of Food Safety Controls', supra note 24; Jill E. Hobbs, Andrew Fearn and John Spriggs, 'Incentive structures for food safety and quality assurance: An international comparison', 13 *Food Control* (2002), pp. 77-81.

59 Available on the internet at <www.brc.org.uk/standards/background.htm> (last accessed on 21 June 2004); Havinga, 'Private regulation of food safety by supermarkets', supra note 10.

60 Henson & Caswell, 'Food safety regulation', supra note 6, at p. 594.

ment agencies) due to a lack of knowledge of the legal requirements.⁶¹ The compliance process proved to be highly reactive, with the businesses responding to external intervention rather than initiating action. Non-compliance was not considered an option: to comply with regulations was not a decision but rather a norm. So at least these SMEs did not act as fully rational economic actors, weighing the costs and benefits of compliance and non-compliance, as economic theory assumes. For that reason it is very unlikely that liability rules (which seem to be even more abstract, general and unknown than food safety regulations) will have a direct effect at the level of individual SMEs in the food industry.

The interviews I have conducted in the past few years with quality managers from Dutch supermarkets also suggest that liability laws have a limited impact. Two respondents from the Dutch dairy industry say that the firm takes several measures to assure the production of safe food, not because of the fear of being held liable for damages and injuries caused by unsafe food, but primarily because they fear loss of reputation and sales in case unsafe food is sold. As a quality manager of a Dutch supermarket chain said in an interview: 'Product liability is not important in product recall. My name is on the product and whenever there is something wrong with the product, I will recall it. It's just as simple as that'. However, my respondents, people responsible for food safety and compliance with the law, are not involved in matters of legal liability or insurance, which is something for the legal department to deal with.

CONCLUSIONS

This paper has identified a number of obstacles that may exist to the use of liability law to improve food safety. Much of the evidence presented in this paper is rather anecdotal. However, the assumption that liability laws make firms sensitive to preventing food safety risks has been found too optimistic. In particular, small and medium-sized firms often do not even have the necessary information about their obligations. This will be different in large firms, but the information on liability laws is available to other company personnel and departments than the food safety and quality management.

The extent to which liability law and insurance does play a role in promoting food safety and food hygiene is difficult to establish. The most promising

61 Robyn Fairman & Charlotte Yapp, 'Enforced Self-Regulation, Prescription, and Conceptions of Compliance within Small Businesses: The Impact of Enforcement', 27 *Law and Policy* (2005) 4, pp. 491-519; Charlotte Yapp & Robyn Fairman, 'Factors affecting food safety compliance within small and medium-sized enterprises: Implications for regulatory and enforcement strategies', 17 *Food Control* (2006) 1, pp. 42-51.

influence of liability law is the general effect of shifting legal responsibilities. Liability could have a positive effect on the development of a culture where firms take responsibility for food safety. And this responsibility may induce firms to take precautionary measures. Fear of reputational damage seems to be more effective here than fear of liability claims.

Each of the issues identified requires further research and empirical study. It is necessary to extend the available economic and legal perspectives on product liability to a more sociological approach by studying the actual effect of legal liability on company decisions. We should not study theoretical or perceived costs and benefits only, as in an economic calculation model. But our analysis needs to include the motives of firms and social relations. We should study empirically why food firms do adopt measures, or why they do not have a food safety management system. Can this be attributed to expected costs, perceived consumer demand, legal requirements, image and reputation building? We have to look at the impact of social relations between different actors inside the company (between the head office and local plants, between the legal experts and the food safety experts) and between the firm and suppliers, customers, policy-makers, inspectors, certification agencies and insurers.