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The implied duty of a service provider to warn about a risk of construction defects resulting from a contract with a third party, with emphasis on defects resulting from design failures: A case study on the precontractual and contractual duty to warn in English, German and Dutch law and in the Draft Common Frame of Reference

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Chapter 7. Duty to warn breached: liability and its scope.

This chapter focuses on the consequences of the breach of the duty to warn. In situations as discussed in this book, when a professional party has a duty to warn the client about the risk coming from another professional party, two parties might have breached their contractual duties: the party whose actions led to the risk and the party who did not warn about that risk. That raises lots of interesting questions as regards liability.

Firstly, the matter of causality will be considered in the following sections. What actually caused the damage to the client: the default in the performance of contractual obligations by one professional party or the lack of warning about that default from another contractual party? In the legal systems discussed in this book the damages can be claimed only from a party whose non-performance or improper performance of the contractual obligations is linked to the damage, therefore, it is important to consider whether the breach of the duty to warn would be in causal link to the damage of the client. If not, then by breaching the duty to warn the professional party would not have to be afraid of having to pay damages to the client when the latter suffers some damage as a result of the default.

Upon elaborating on the matters of causality, various systems of liability will be considered. Causality influences which party could be held liable towards the client, but in case both parties may be seen as having contributed to the damage, there are still a few possibilities open: the parties may be held solidary, divided or jointly liable, and either be held liable in full or in part.

Finally, the defence of contributory negligence will be discussed. Even if, according to the given liability system, a professional party should be liable in full for the breach of the duty to warn, there are still certain defences available to him, of which the defence of contributory negligence is the most important. When a professional party did not warn the client about a default of another professional party, whose actions could be attributed to the client, or in case when the client employed or should have employed other specialists who might have also discovered that default, one might consider the 'own fault' of the client in the emergence of the default. If the court would recognise such 'own fault' of the client, then on the basis of the contributory negligence defence the scope of the liability of the professional party who breached his duty to warn would be limited.

Taking into account that there are no significantly different rules between claiming liability for the breach of the precontractual and contractual duty to warn, this chapter does not differentiate between the contractual and precontractual liability. Moreover, as it has already been mentioned, in most cases the liability is being claimed for the breach of the contractual duty to warn. Where the rules on liability could differ, it has been mentioned in the following sections.

7.1. Causality.

Nowadays, the client whose building had been constructed negligently usually institutes proceedings against both the builder and the designer. If any other party – e.g. an engineer or a sub-contractor – was involved in the construction process, he would usually also be sued. There are several reasons for this. Firstly, for the client it is often extremely difficult to assess what caused the damage: a defective design

(domain of the designer) or defective workmanship (for which the builder would be liable). To avoid instituting proceedings against the wrong party, the client usually plays it safe and sues any party involved in the construction process. Furthermore, even if it is the defective design, which caused the damage, the builder could still be held liable if he had breached his duty to warn the client thereof⁶⁰⁷. Conversely, if the default was caused by the builder by a negligent performance of his duties, it might have been possible for the designer to discover it during his visits at the construction site, in which case the designer may be held liable for not warning the client thereof⁶⁰⁸. An additional reason for suing both the builder and the designer is that contractual provisions may limit their liability and thus by suing both of them the client has a higher chance of recovering his damage in whole.

Within the scope of this book we can distinguish a case of non-performance by the builder of his duty to warn the client in case of a default in the design plans. It is the designer who should be liable for the original default in the construction. However, in case the default was such that the builder should have recognised it, we may wonder whether and in what scope the builder should be liable for it, possibly next to the designer. It can be argued that if the client had delivered to the builder a faultless construction plan, the builder would have built a perfect construction and would have performed his duties to the letter. He would not have infringed his duty to warn because there would not have been anything to warn the client about. Thus, the primary source of the default in the construction can be found in the faulty design plans delivered by the client. However, if the default was such that the builder recognised it or should have recognised it, then the damage that is going to originate from the faulty construction could have been prevented if the builder would have fulfilled his duty to warn. This does not alter the fact that the designer has made a mistake in his design plans and might be held liable for that. However, one could argue that the damage was caused, at least partially, also by the builder's non-performance of his duty to warn and that there is a causal link between the damage that occurs and the builder's non-performance of a contractual duty, which is necessary to hold the builder liable for the damage⁶⁰⁹.

The question then is: whom shall the client hold liable for his damage? The client could potentially claim damages (1) in full from the designer as a professional party who originally caused the default, (2) in full from the builder since if the builder would have warned the client the damage would not have occurred, (3) partially from the builder and partially from the designer thus recognising that both parties were responsible for the damage, (4) in full from both the designer and the builder.

⁶⁰⁷ D. L. Cornes, *Design liability in the construction industry*, London: Blackwell, 1994, p. 114

⁶⁰⁸ *Hart Investments Ltd v. Terence Maurice Charles Fidler and Larchpark Ltd.* (2007) 1 BLR 526; S. Furst, V. Ramsey, *Keating on construction contracts*, London: Sweet & Maxwell, 2006, p. 229; C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 157; I. N. D. Wallace, *Hudson's Building and Engineering Contracts*, London: Sweet and Maxwell, 1995, v. 1, p. 185; *Clayton v. Woodman & Sons (Builders) Ltd* [1962] QB 533; [1962] 1 WLR 585; [1962] 2 All ER 33; 106 Sol. J 242

⁶⁰⁹ Asser-van den Berg, 5-IIIC, 2007, nr. 102; C. E. C. Jansen, 'Waarschuwingsplicht en 'eigen schuld', BR 2000/565, p. 570; M. A. B. Chao-Duivis, 'Aspecten van de waarschuwingsplicht van de aannemer', BR 2007/46, p. 236; W. G. Huijgen, 'Aanvulling Boek 7 nieuw BW met koop en huurkoop van onroerende zaken en aanneming van werk', BR 2002/1003, p. 1016; M. A. M. C. van den Berg, 'Bouwcontractenrecht in beweging' in: *40 Jaar Instituut voor Bouwrecht*, ed. M. A. B. Chao-Duivis, M. A. M. C. van den Berg, B. P. M. van Ravels, Stichting Instituut voor Bouwrecht, 2009, p. 74-78; C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 484-486

This paragraph focuses only on matters of causality, explaining whether the designer or the builder could be seen as parties that should be liable to the client. How the liability is attributed in England, Germany and the Netherlands, i.e. in what percentage these parties are liable towards the client is discussed in the next paragraph. Let us take a look how the matter of causality is dealt with in the three countries that are being analysed in this book.

7.1.1. English law.

As has been discussed in the previous chapters on English law, the duty to warn, although mentioned from time to time in case law and literature, did not really receive proper attention and has not been sufficiently established in England. That explains why in a few cases that have dealt with the duty to warn and its breach the English courts did not give a clear ruling on who should be seen as having caused the damage to the client and who should bear liability for that.

As far as causality is concerned, the question whether the designer or the builder should be responsible for the client's damages in case one party made a default and the other breached its duty to warn about it, has been barely considered. It is worth noticing that although the designer has been said to have the duty to inspect how his design is being carried out, he has no duty to actually instruct the builder on his work or any other duty in respect of the builder⁶¹⁰. The designer performs his inspection only in the interest of the client. In clause 1.5 of the JCT 1998 it has been established that, notwithstanding any obligation of the designer to the client, irrespective of inspections or valuation in certificates, the builder is wholly responsible for carrying out and completing the construction in accordance with the terms of his contract. This means that even if the client may hold the designer liable for not carrying out inspections in the appropriate way, this does not release the builder from his liability. In *Oldschool v. Gleeson*⁶¹¹, the court put it as follows:

“Not only has he [the designer - JL] no duty to instruct the builder how to do work, or what safety precautions to take, but he has no right to do so; nor is he under any duty to the builder to detect faults during the progress of the work. The architect, in that respect, may be in breach of his duty to the client, the building owner, but this does not excuse the builder for faulty work”.

This points out that the builder's obligation to perform construction should be seen as a result obligation. That means that in case the builder does not deliver a perfect end result, he is seen as a party responsible for that. Does it mean, however that the builder is then seen as the only party who caused the damage even if the default could be attributed to another professional party, as well?

⁶¹⁰ Hart Investments Ltd v. Terence Maurice Charles Fidler and Larchpark Ltd. (2007) 1 BLR 526; S. Furst, V. Ramsey, *Keating on construction contracts*, London: Sweet & Maxwell, 2006, p. 229; C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 157; I. N. D. Wallace, *Hudson's Building and Engineering Contracts*, London: Sweet and Maxwell, 1995, v. 1, p. 185; Clayton v. Woodman & Sons (Builders) Ltd [1962] QB 533; [1962] 1 WLR 585; [1962] 2 All ER 33; 106 Sol. J 242

⁶¹¹ The act provides that a person who is liable to a claimant for a loss may recover a just and equitable contribution from another person who is liable in respect of the same damage. However, the defendant remains liable for the whole amount of the loss even though there may be overlapping responsibility; *Oldschool and another v. Gleeson (Construction) Ltd and others* (1976) 4 BLR 103

In the Canadian case of *Nowlan v. Brunswick Construction Ltd.*⁶¹², the builder tried to defend himself by claiming that if not for the defect in the architectural plans the quality problem associated with the construction would not have appeared. The court was clear, however, stating that:

“The defendant is a concurrent wrongdoer and the fact that the damage might not have occurred but for the poor design of the building does not excuse him from the liability (...).”

The first case discussed above concerned a situation in which the builder made a default, which should have been recognised and warned about by the designer. The second case concerned the default of the designer about which the builder should have warned the client. Therefore, it seems that regardless which professional party made a mistake and which one breached its duty to warn, they both remain to be seen as liable for the client’s damage⁶¹³. Neither the builder⁶¹⁴ nor the designer⁶¹⁵ will in such a situation be automatically released from his liability for the default in the design plans in case the other professional party breached his duty to warn.

However, there have been some arguments raised that in case the builder could have noticed the default in the design plans during his inspection and should have warned the client about that, this should release the designer from his original responsibility for the design, since there would be no causal link between the default in the design and the damage that occurred⁶¹⁶. In *Baxall Securities v. Sheard Walshaw*⁶¹⁷ the court decided that:

“The claimants had an opportunity to discover the absence of overflows by means of a reasonable inspection by their surveyors, their professional advisers. Because of this reasonable opportunity to inspect, the architects were not in a sufficiently proximate relationship to the claimants in respect of defects that could have been discovered by that inspection.”

This seems to suggest that the English courts might in exceptional circumstances consider the causal link between the party who originally caused the default and the damage as severed and proclaim only the party who breached his duty to warn as liable. In my opinion, the breach of the causal link will not happen that often in cases falling within the scope of this book, since the ‘reasonable opportunity’ to inspect suggests existence of the duty to inspect on the side of the party that breached his duty to warn. When the professional party has a duty to inspect, he has also an explicit duty to warn about the defaults he had discovered or should have discovered, which does not fall within the scope of this book.

⁶¹² *Nowlan v. Brunswick Construction Ltd.*, [1975] 2 S.C.R. 523, 8 N.B.R. (2d) 76, 2 N.R. 164, 49 D.L.R. (3d) 93

⁶¹³ C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 502

⁶¹⁴ *Oldschool and another v. Gleeson (Construction) Ltd and others* (1976) 4 BLR 103

⁶¹⁵ *Pearson Education Ltd v. The Charter Partnership Ltd* (2007) 1 BLR 324

⁶¹⁶ *Baxall Securities Ltd and Norbain SDC Ltd v. Sheard Walshaw Partnership* (2001) 1 BLR 36; C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 367-369; I. N. D. Wallace, *Hudson’s Building and Engineering Contracts*, London: Sweet and Maxwell, 1995, v. 1, p. 185, 528-529

⁶¹⁷ *Baxall Securities Ltd and Norbain SDC Ltd v. Sheard Walshaw Partnership* (2001) 1 BLR 36

7.1.2. German law.

In case the damage of the client could be attributed to more than one professional party, the problem arises whom the client should hold liable. Again, let us look at the complicated situation of the builder not fulfilling his duty to warn about the default in the designer's design. The builder has an obligation to fulfil his contractual duties, which includes a duty to warn when he recognised or should have recognised the default. Improper performance of the builder's duty to warn automatically leads to the full liability of the builder for any damage on the side of the client. At the same time, the designer is obligated to perform his services properly, which means that in case the default is to be found in the design plans, the designer bears responsibility for that. In German case law and literature it has been consequently stated that since both professional parties had a possibility to prevent the client's damage from happening, they have both contributed to the damage and the causal link between the damage and the breach of contractual obligations is there for both of them⁶¹⁸.

How that liability will be divided between the parties and whether the builder has a possibility to demand the diminishment of his liability based on the defence of the contributory negligence will be discussed in the following paragraphs.

In practice, German courts did not always consider matters of causality. In most case law it is not taken into account whether the lack of a warning given by the builder to the client caused the damage to the construction, e.g. when the default was caused by a faulty design. Therefore, it might happen that the German court will hold the builder liable for breach of the duty to warn even if there is no direct link between it and the damage that occurred – simply applying the view, which is widely accepted in the doctrine, that the builder should in such a case be held liable⁶¹⁹. The justification for that might be that the builder is under an obligation to deliver a particular result to the client: a default-free, fully functional construction⁶²⁰. However, in the past few years the German courts gave a few decisive rulings on the matters of causality which leave us to hope, that in the coming years the liability for breach of the duty to warn will never be established without first considering whether that party's mistake contributed to the damage.

In its judgment of 8 November 2007⁶²¹, where the BGH referred the case back to the appellate court, asking it to recheck certain findings in light of its new judgment, the BGH suggested that the appellate court should consider also the matter

⁶¹⁸ Ch. Grüneberg, in: *Palandt. BGB*, München: C.H. Beck, 2010, § 421, Rdnr. 6, Rdnr. 12; T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 104-109; C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 491-492; H. Locher, U. Locher, *Das private Baurecht*, München: C.H. Beck, 2005, p. 240-241; H. Locher, W. Koeble, W. Frik, *Kommentar zur HOAI. Mit einer Einführung in das Recht der Architekten und der Ingenieure*, Düsseldorf: Werner, 2002, Einleitung, Rdnr. 111; G. Kaiser, *Das Mängelhaftungsrecht in Baupraxis und Bauprozess*, Heidelberg: Müller, 1992, Rdnr. 331; BGH, 04.03.1971, VII ZR 204/69, BauR 1971, 265 (270); OLG Karlsruhe, 13.06.2002, 9 U 153/01, BauR 2003, 6, p. 917

⁶¹⁹ T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 53-54

⁶²⁰ J. Busche, in: *Münchener Kommentar BGB*, 2009, § 631, 9, p. 1555; C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 260-261

⁶²¹ BGH, 08.11.2007, VII ZR 183/05, BauR 2008, 344

of causality. In the opinion of the BGH the builder had a duty to warn, but that still left open the question whether, if that warning had been given, it would have convinced the client to change the power station that he intended to install in the forester's lodge into a more suitable one. The BGH stated that if that were not the case, then the appellate court should not recognise the liability of the builder, just as the builder would be released of his liability if he had actually granted a warning to the client and the client nevertheless chose to still install the same power station.

Also in the case of 27 May 2008⁶²² OLG München considered the question of causality. In this case the court stated that the builder had no duty to warn about the fact that the heating system that he was employed to install was insufficiently powerful. The builder did not have the knowledge necessary to assess the power of the electrical components of this system, the court decided. What was also relevant in this case, was the fact that the heating system that the builder was to install at the construction site had been chosen by the client together with a company that specialised in these heating systems. It had been proven during the court proceedings that an employee of that company had warned the client about the limited power of the heating system, to which the client then replied that he could use an extra space heater to achieve the level of the warmth he required. The court stated that especially in such a case the builder should not be held obligated to give a warning to the client, because the client not only had already been warned by a specialist but also obviously did not intend to change his opinion on the construction materials that were chosen. If he did not even change his opinion after having been warned by a specialist, he was certainly not likely to have changed his opinion after a warning by the builder. As a result, the damage would have occurred even if the builder would have warned the client. This implies that even if the builder would have been under a duty to warn, there would not be a causal link between the occurrence of the damage and the builder's breach of the duty to warn.

Due to a lack of a causal link the OLG Celle did not find the builder liable for breach of the duty to warn in the case of 19 November 2009⁶²³. Under the circumstances of this case, the client ordered a 'low energy pre-fabricated house' to be built by the first builder, and then he had another builder install heating and electric systems in it. The first builder did not fulfil all necessary requirements to lower the energy use for the client, which was a default that should have been easily noticeable by the second builder. However, the court decided that the second builder could not be held liable for client's losses (i.e. mainly the cost of the repair of the house), since even if the builder had warned the client in this situation, the warning would not have prevented that damage to the client. In the end, the client would have to pay for the repair of the house and whether it had happened during the construction process or after the heating systems were installed, was irrelevant from the point of view of costs that the client would have to bear⁶²⁴.

Recently the OLG Hamburg in the case of 3 February 2010⁶²⁵ took the question of causality into account while considering the duty to warn of a builder who was employed by the client to fill in and close a working space at the client's property. Previously, another builder had excavated that ground, upon which yet another builder created a cellar for the client. Upon completion of all these works, it

⁶²² OLG München, 27.05.2008, 28 U 4500/04, IBR 2009, 325; IBR 2009, 326; IBR 2009, 1213

⁶²³ OLG Celle, 19.11.2009, 6 U 96/09, IBR2010, 1369

⁶²⁴ See chapter 2 for a further discussion of this case.

⁶²⁵ OLG Hamburg, 03.02.2010, 4 U 17/09, IBR 2010/323; see also: T. Steiger, 'Schaden durch Arbeitsraumverfüllung: Grenzen der Prüfungs- und Hinweispflicht', IBR 2010/323

turned out that the construction of the cellar had not been properly supported, and when the last builder closed the ground around it, the walls of the cellar partially caved in. The question was whether this last builder could be held liable for the client's loss as a result of not conducting tests to check the supports of the cellar and as a result of not warning the client that the supports already installed were insufficient. The court decided that there was no causal link between a lack of warning and the client's loss. Namely, if the builder had warned the client, the scope of his duty to warn obliged him only to pointing out to the client that he should use a support system in the cellar. The scope of the duty to warn does not reach as far as to oblige the builder to advise the client, who already receives professional advice about this from another expert, as to the method of support system that should be used. Since the client in this case was aware of the risk and the need for the support system (the designer instructed another builder to install some supports), the warning of the builder would not have changed the client's position. Therefore, the court did not find the causal link between the lack of a warning and the client's loss and declared that the client under such circumstances could not hold the builder liable. This judgment seems a bit harsh, since upon having been warned also by the builder about the risk to the construction if support system is not used, the client might have reconsidered and reinforced the support system in place.

In the cases where the requirement of causality is mentioned, the German courts are rather clear that the professional party should not be held liable for the breach of the duty to warn if there was no direct link between the lack of warning and the damage. The lack of this link can be shown by proving that the client did not intend to change his mind regardless what opinion he would have gotten as to his plans.

In the case of 8 November 2007⁶²⁶ the BGH considered also the matter of the burden of proof in the case of a potential breach of the duty to warn. In general, the matter of the burden of proof consists of three elements: (1) who bears the burden to prove that the duty to warn exists, (2) who must prove whether or not the warning had been given and (3) who bears the burden of proof that the lack of a warning has led to the damage, i.e. that there was causality between the breach of the duty to warn and the damage. In the given case the German Supreme Court considered the second and the third of these questions. It stated that contrary to the views expressed so far in the literature and certain judgments, the breach of the duty to warn is not a factor in the evaluation whether the builder should be held liable for the faulty construction. The liability for the default can be established only by looking at the factual or legal defect in the work performed by the builder. It is rather that the proper performance of the duty to warn might free the builder from his liability for the factual or legal defect. § 4 No. 3 and § 13 No. 3 VOB/B state clearly in which cases there is a default in the construction and consider it to be the builder's default even if the default originates in the design plans or materials delivered to the builder or work of a previous builder on the site. The client does not need to prove a causal link between the damage and the breach of the builder's duty to warn. The builder may free himself of this liability by proving that he performed his duty to warn. It is for the builder, therefore, to prove that the warning was given to the client, in order to free himself from the liability⁶²⁷.

⁶²⁶ BGH, 08.11.2007, VII ZR 183/05, BauR 2008, 344

⁶²⁷ See also: OLG Brandenburg, 25.05.2011, 13 U 83/10, (full text found on <<www.ibr-online.de>>, lastly checked on 15.07.2011)

The view of the BGH is clear: the builder should be held liable already on the basis of the non-performance of a perfect end result, and the performance of the builder's duty to warn might be used by him as a defence to escape that liability. In such a case, the builder has a burden of proof either that he had given the warning or that there was no causality between the lack of warning and the damage that followed. At the same time, the client does not need to prove that the builder had a duty to warn him in a given case, since the builder already bears liability for the improper performance of the construction. Surprisingly, this judgment of the BGH is *not* perceived in literature as taking away from the client the burden of proof that the builder had a duty to warn him in a given scope – the first of the three elements regarding the burden of proof⁶²⁸. The judgment is interpreted restrictively, on the facts of the given case, as the builder having the burden of proof either that he had given the warning or that there was no causality between the lack of warning and the damage that followed. Therefore, it is the client who needs to prove that the builder had the duty to warn him. If the client succeeds, the builder might then still escape liability by proving that either he had given the warning to the client or that even if he had warned the client, the client would not have listened to his warning and the damage would arise in any case. While the BGH mentioned in its judgment that its view is contrary to some of the previous case law and the opinions expressed in the literature, it seems that the doctrine decided to disregard this judgment and continue with its previous view.

This contrary view was also expressed in the judgment of 4 March 2008⁶²⁹ of OLG Rostock. The court decided here that the burden of proof that the builder had a duty to warn the client about the default in the design plans rests on the client. The client could claim damages for the breach of the duty to warn about the default in the design plans only upon having proven that the builder had that duty, in the first place. The court does not assume here that any default in the design plans could be attributed also to the builder unless he warned the client about it. The court decided that in case the construction is faulty and the client claims damages from the builder, the client needs to prove that there is a default within the construction for which the builder should be liable. In case the client proves that the damage was caused because of an underlying default in the design plans, there is no general co-liability of the builder, together with the designer, for that default. Therefore, it is not that the builder would have to prove that he warned the client in order not to be held liable. Upon proving that there was a default in the design plans, the client still needs to prove that this was a default that the builder knew or should have known about. Only in this case the damage could be attributed to the negligent performance of his duties by the builder, taking into account that the builder fully performs his contractual duties not only by building without any defaults of his own but also by protecting the client from defaults caused by other professionals involved in the construction process, if he knew or should have known about these defaults. Under the circumstances of the given case, the client did not prove that the builder knew or should have known about the default in the design plans.

In case the professional party had a precontractual duty to warn the client, as a result of what the client would have decided not to conclude the agreement, the damages for the breach of that duty to warn might lead to restoring the client into the

⁶²⁸ T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 85

⁶²⁹ OLG Rostock, 04.03.2008, 4 U 79/05, IBR 2008, 383

position he would have been if the agreement had not been concluded⁶³⁰. The BGH in the case of 8 November 2007⁶³¹ decided that in case the court would establish that the client would not have concluded a contract upon having been warned, the breach of that duty to warn should lead to the contract being seen as not having been concluded. That means that the client would be put in the position in which he would have been if the warning had been given and had been heeded.

However, the situation presented above is exceptional because in most cases the liability of the service provider for the breach of the duty to warn, in case the contract had been concluded, would most likely be assessed as a contractual one. It has even been argued in the literature that a client would not have a right to claiming a breach of the precontractual duty to warn, if subsequently the contract had been concluded and during performance of that contract a default appeared⁶³². It has been claimed that there is sufficient contractual protection given to the client in such a situation, i.e. § 635 BGB⁶³³ and § 13 No. 7 VOB/B⁶³⁴.

7.1.3. Dutch law.

In Dutch law the matter of causality in cases described in this book has been considered both in literature and in case law. As has been mentioned in the introduction, the matter of causality raises the question which party should be held liable for the damage of the client: (1) the one who originally caused the default, or

⁶³⁰ F. Weyer, 'Mängelhaftung: Auftraggeber muss für geeignete Vorunternehmerleistung sorgen!', IBR 2008, 79

⁶³¹ BGH, 08.11.2007, VII ZR 183/05, NJW 2008, 511; this a case that concerned a breach of a contractual duty to warn, however, its reasoning could be applicable also to the breach of a precontractual duty to warn.

⁶³² F. Nicklisch, G. Weick, *Verdingungsordnung für Bauleistungen: VOB Teil B*, München: C.H. Beck, 2001, Rdn. 19-31

⁶³³ "(1) Verlangt der Besteller Nacherfüllung, so kann der Unternehmer nach seiner Wahl den Mangel beseitigen oder ein neues Werk herstellen.

(2) Der Unternehmer hat die zum Zwecke der Nacherfüllung erforderlichen Aufwendungen, insbesondere Transport-, Wege-, Arbeits- und Materialkosten zu tragen.

(3) Der Unternehmer kann die Nacherfüllung unbeschadet des § 275 Abs. 2 und 3 verweigern, wenn sie nur mit unverhältnismäßigen Kosten möglich ist.

(4) Stellt der Unternehmer ein neues Werk her, so kann er vom Besteller Rückgewähr des mangelhaften Werkes nach Maßgabe der §§ 346 bis 348 verlangen."

⁶³⁴ "(1) Der Auftragnehmer haftet bei schuldhaft verursachten Mängeln für Schäden aus der Verletzung des Lebens, des Körpers oder der Gesundheit.

(2) Bei vorsätzlich oder grob fahrlässig verursachten Mängeln haftet er für alle Schäden.

(3) Im Übrigen ist dem Auftraggeber der Schaden an der baulichen Anlage zu ersetzen, zu deren Herstellung, Instandhaltung oder Änderung die Leistung dient, wenn ein wesentlicher Mangel vorliegt, der die Gebrauchsfähigkeit erheblich beeinträchtigt und auf ein Verschulden des Auftragnehmers zurückzuführen ist. Einen darüber hinausgehenden Schaden hat der Auftragnehmer nur dann zu ersetzen,

a) wenn der Mangel auf einem Verstoß gegen die anerkannten Regeln der Technik beruht,

b) wenn der Mangel in dem Fehlen einer vertraglich vereinbarten Beschaffenheit besteht oder

c) soweit der Auftragnehmer den Schaden durch Versicherung seiner gesetzlichen Haftpflicht gedeckt hat oder durch eine solche zu tarifmäßigen, nicht auf außergewöhnliche Verhältnisse abgestellten Prämien und Prämienzuschlägen bei einem im Inland zum Geschäftsbetrieb zugelassenen Versicherer hätte decken können.

(4) Abweichend von Nummer 4 gelten die gesetzlichen Verjährungsfristen, soweit sich der Auftragnehmer nach Absatz 3 durch Versicherung geschützt hat oder hätte schützen können oder soweit ein besonderer Versicherungsschutz vereinbart ist.

(5) Eine Einschränkung oder Erweiterung der Haftung kann in begründeten Sonderfällen vereinbart werden."

(2) the party who might have prevented the default from causing damage by giving a warning about it to the client or another party representing the client. It has been made clear in Dutch law that if the default was such that the builder recognised it or should have recognised it, then the damage that originates from the faulty construction could have been prevented if the builder would have fulfilled his duty to warn. That means that the damage was caused by the non-performance of the builder's duty to warn and there is a causal link between the damage that occurs and the builder's non-performance of a contractual duty, which is necessary to hold the builder liable for the damage⁶³⁵. Specifically, pursuant to Article 7:760 Paragraph 2 and 3⁶³⁶, in case the builder fails in his duty to warn about the default that he should have noticed within the construction materials or design plans that have been provided by a third party, he bears liability for the damage resulting from his lack of warning. Therefore, the causal link between the damage to the client and the lack of warning from the professional party, who recognised or should have recognised the default, is recognised in Dutch law. That is the reason why in Dutch law the builder is generally considered to be fully liable for the client's damage in case he did not perform his duty to warn about the default caused by another party to the construction process⁶³⁷.

In the case of 16 November 2005⁶³⁸, the builder was held to have breached his duty to warn about the need to provide for extra ventilation measures in the construction and the fact that if the design would not be adjusted, then the humidity from the ground would lead to the corrosion of the construction. The builder recognised that he was liable but claimed that he should not be held fully liable, pursuant to Paragraph 6 Sec. 14 of the UAV, for the damage that the client had suffered since in the process of repairing the damage the client introduced many improvements in respect to the original design plans. The builder did not feel he should be obligated to pay for these improvements. The arbitral court adjudicated, however, that in case the builder had warned the client in time, the client would most likely manage not only to adjust but also to improve the design plans within the originally agreed upon price. While estimating the scope of damages that the builder had to pay, the court thus took into account not only the damage suffered by the client as a direct result of the lack of warning, but also the fact that if the warning had been given the client would have been able to improve the construction within the estimated price. The court decided that the client had the right to these improvements. Thus, the builder was held fully liable for the client's damage.

⁶³⁵ Asser-van den Berg, 5-IIIC, 2007, nr. 102; C. E. C. Jansen, 'Waarschuwingsplicht en 'eigen schuld', BR 2000/565, p. 570; M. A. B. Chao-Duivis, 'Aspecten van de waarschuwingsplicht van de aannemer', BR 2007/46, p. 236; W. G. Huijgen, 'Aanvulling Boek 7 nieuw BW met koop en huurkoop van onroerende zaken en aanneming van werk', BR 2002/1003, p. 1016; M. A. M. C. van den Berg, 'Bouwcontractenrecht in beweging' in: *40 Jaar Instituut voor Bouwrecht*, ed. M. A. B. Chao-Duivis, M. A. M. C. van den Berg, B. P. M. van Ravels, Stichting Instituut voor Bouwrecht, 2009, p. 74-78; M. A. B. Chao-Duivis, 'Informatie en mededelingsplichten: een causaliteitsprobleem', BR 1991/2, p. 91-93

⁶³⁶ '7:760 BW: (...)

2. *Is de ondeugdelijke uitvoering echter te wijten aan gebreken of ongeschiktheid van zaken afkomstig van de opdrachtgever, daaronder begrepen de grond waarop hij een werk laat uitvoeren, dan komen de gevolgen voor zijn rekening, voor zover de aannemer niet zijn in artikel 754 bedoelde waarschuwingsplicht heeft geschonden of anderszins met betrekking tot deze gebreken in deskundigheid of zorgvuldigheid tekort is geschoten.*

3. *Lid 2 is van overeenkomstige toepassing in geval van fouten of gebreken in door de opdrachtgever verstrekte plannen, tekeningen, berekeningen, bestekken of uitvoeringsvoorschriften.'*

⁶³⁷ On attribution of liability see the next paragraph.

⁶³⁸ RvA 16.11.2005, nr. 27.016, BR 2007, p. 140

When the court in such situations declares only the builder liable, one might wonder whether the court considers that the causal link between the mistake of the designer and the damage has been severed. There have been many voices raised in the doctrine⁶³⁹ questioning the disappearance of the causal link between the professional party who caused the original default in the construction and the client's damage. If the existence of the original default in the construction contributes to the damage, the professional party who caused the default should still be held at least partially liable for the client's damage. Namely, the fact that the builder then breaches his duty to warn does not annul the earlier cause for the damage – the existence of the default itself. As it will be shown in the following paragraph, that does not always lead the Dutch courts to apportioning the liability to both professional parties, but can lead to the diminishing of the full liability of the builder on the basis of the defence of contributory negligence. Unfortunately, the courts and arbiters do not always consistently make use of the rules on causality and attribution of damages.

For example, in the case of 4 April 2004⁶⁴⁰, the designer made a mistake in his design plans by not providing for a sufficient insulation of walls between two apartments, which led to the significant amount of noise. The designer claimed that he should not be held liable for the resulting damage, since the chain of causality between the mistake and the damage has been broken by the builder who should have recognised the mistake and warn the client about it. In that case, the damage could have been avoided. The arbiter in this case was of a different opinion. He stated that regardless the possibility of the breach of the builder's duty to warn in this case, the designer still made the original mistake. The builder's breach of the duty to warn should not diminish the designer's liability, in such circumstances. The arbiter made it clear that the designer may claim from the builder his own damage, i.e. the damages that the designer needs to pay to the client, in case the designer believes that the builder's own mistake, i.e. the breach of the duty to warn the client, was to the detriment of the designer. However, the breach of the builder's duty to warn could, according to the arbiter, *never* lead to the severing of the chain of causality.

According to Chao-Duivis who wrote a note to this case⁶⁴¹, the reasoning of the arbiter is insufficiently nuanced. Indeed, it seems that the arbiter should know better than to use the word 'never' in his justification. Chao-Duivis rightly says that the arbiter should have found out whether and how the builder breached his duty to warn in this case. The breach of the builder's duty to warn might have brought the arbiter to a conclusion that the mistake of the designer had fewer consequences for the client than he originally had thought. Only upon establishing that, the arbiter could

⁶³⁹ M. A. M. C. van den Berg, *Samenwerkingsvormen in de bouw*, Deventer: Kluwer, 1990, nr. 103-11; casenote by H.O. Thunnissen to RvA 25.03.1991, nr. 70.014, BR 1993, p. 547; casenote by H.O. Thunnissen to RvA 14.10.1993, nr. 15.272, BR 1994, p. 784; C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 519-524; Asser-van den Berg, 5-IIIC, 2007, nr. 102; M. A. M. C. van den Berg in: M. A. M. C. van den Berg, A. G. Bregman, M. A. B. Chao-Duivis (eds.), *Bouwrecht in kort bestek*, 's-Gravenhage: IBR, 2010, p. 311; M. A. B. Chao-Duivis, 'Aspecten van de waarschuwingsplicht van de aannemer', BR 2007/46, p. 236; W. G. Huijgen, 'Aanvulling Boek 7 nieuw BW met koop en huurkoop van onroerende zaken en aanneming van werk', BR 2002/1003, p. 1016; M. A. M. C. van den Berg, 'Bouwcontractenrecht in beweging' in: *40 Jaar Instituut voor Bouwrecht*, ed. M. A. B. Chao-Duivis, M. A. M. C. van den Berg, B. P. M. van Ravels, Stichting Instituut voor Bouwrecht, 2009, p. 74-78; about the necessity to apply this rule exceptionally only see: M. A. M. C. van den Berg, *Ondanks nauwlettend toezicht*, Deventer: Kluwer, 1993, p. 1-28

⁶⁴⁰ AIB 04.10.2004, nr. 1200-0311, BR 2006/102

⁶⁴¹ Case note by M. A. B. Chao-Duivis, AIB 04.10.2004, nr. 1200-0311, BR 2006/102

have properly estimated the exact scope of the liability of the designer, since the builder's breach of the duty to warn would have been attributed to the client⁶⁴².

The burden of proof that the service provider had a duty to warn lies on the client⁶⁴³. Pursuant to the judgment of 13 April 2005⁶⁴⁴ the client has to point out in his claim what exactly the builder was supposed to warn him about and why. For example, the client cannot just state that the design was faulty because the construction was not in accordance with the legal requirements thereof. The court deemed that kind of statement to be insufficient to recognise a duty to warn of the builder⁶⁴⁵.

Upon having proven that the builder had a duty to warn and that he had breached this duty, the client may be released from having to prove the causal link between the breach of the duty to warn and the damage he had suffered on the basis of the so-called '*omkeringsregel*'. The '*omkeringsregel*' establishes an exception to the evidence rule of Article 150 RV⁶⁴⁶, pursuant to which a party that makes a claim has to prove the existence of facts on which this claim is based. According to this provision, only if another legal rule or the fairness and good faith required it, the party making a claim would not need to sustain it by evidence, but it would be left for the other party to disprove it. The '*omkeringsregel*' has been applied by the Dutch courts⁶⁴⁷ in case of the non-performance of a contractual duty that is intended to prevent or diminish certain risks, and in case such risks have materialized upon breach of that contractual duty. As a result of the '*omkeringsregel*', the causal link between that non-performance and the damages would be assumed. The duty to warn in the construction process could be seen as intended to prevent specific risks from materializing. Therefore, if the duty to warn is breached and the client suffers certain damage as a result of the materialization of the risk that he did not receive a warning about, the causal link between the breach of the duty to warn and the damage could be assumed on the basis of the '*omkeringsregel*'⁶⁴⁸.

In case of a precontractual duty to warn a specific situation may happen, namely that the default that should have been discovered before the construction has started, would be found out during the construction works only and would then be

⁶⁴² The designer might have used the defence of the contributory negligence that would be discussed in the following paragraphs.

⁶⁴³ If the client does not claim breach of the duty to warn, the court or arbiter will not consider it, see e.g. RvA 5.10.2009, nr. 30.024, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

⁶⁴⁴ RvA 13.04.2005, no. 24.753, not published; after: M. A. van Wijngaarden, M. A. B. Chao-Duivis, *Serie Bouw- en Aanbestedingsrecht, deel 14*, 's-Gravenhage: Uitgeverij Paris, 2010, p. 47 (No. 777). It should be reiterated that in this book I refer to the RvA as a 'court', even if it is, in fact, an arbitral court.

⁶⁴⁵ To be discussed in the following chapters.

⁶⁴⁶ '*De partij die zich beroept op rechtsgevolgen van door haar gestelde feiten of rechten, draagt de bewijslast van die feiten of rechten, tenzij uit enige bijzondere regel of uit de eisen van redelijkheid en billijkheid een andere verdeling van de bewijslast voortvloeit.*'

⁶⁴⁷ The main Dutch Supreme Court cases establishing the '*omkeringsregel*' are not construction cases, but the rules contained in them could be applicable also to them, e.g. HR 02.03.2001, NJ 2001, 649 (Medisch Protocol Leeuwarden). It has been argued that the '*omkeringsregel*' applies in particular in case a safety or security obligation, intended to prevent certain material risks from occurring, is breached. The duty to warn could be seen as such an obligation.

⁶⁴⁸ However, from a few judgments of the Dutch Supreme Court follows that the '*omkeringsregel*' will not always be applied to a breach of a duty to warn, e.g.: HR 29.09.2006, RvdW 206, 909; HR 2.02.2007, NJ 2007, 93

corrected by the builder. In this case the builder often claims that he has a right to extra remuneration from the client since he prepared his original price estimation on the basis of the design, which was faulty and did not take into account that extra time and effort would be necessary to provide a construction which is fit for purpose after the correction of the design. In such a situation the client may claim, however, that in case the default was so obvious that it should have been recognised by the builder already during the precontractual phase and the builder would have warned the client about that default, the design plans would have been adjusted before the construction had started and the client would not have to bear extra costs. Therefore, the client's defence against the claim for additional remuneration would be that the builder had breached his precontractual duty to warn and therefore was the only direct cause of the damage. This, according to the client, should be the reason why the builder should bear the costs of this extra work⁶⁴⁹.

This reasoning has been accepted, for example, in the case of 8 March 2001⁶⁵⁰. In the appeal, the appellate arbitral court had overturned the ruling of the arbitral court of first instance because the default in the construction was not so obvious, that the builder should have discovered it in the precontractual phase. However, it is likely that had the default been seen by the appellate arbitral court as so obvious that it should have been noticed even upon a marginal check of the design by the builder, needed for the builder for his price calculation, the verdict in the first instance would have been upheld and the builder would have been liable for the resulting damage, i.e. would not be paid for the extra work that he needed to perform in order to deliver a proper construction.

Opinions can be found, however, that in this situation the builder should be held liable only for part of the damage, since the default originated in the design, for which the client bears responsibility. The causality then is attributed to both parties: the one who caused the default and the one that did not warn about it. Only in case the builder was actually aware, and not also when he should have been aware, of the default before the contract was concluded, the full liability of the builder was argued for⁶⁵¹. The distinction seems to be that in case the builder actually knew about that default and did not warn the breach of his obligation should be considered as gross negligence. In such a situation the builder is more clearly the last party who could have prevented the damage from happening and therefore could be seen as causing the damage more directly.

This narrowing of the liability of the builder does not seem to be justified since the precontractual duty to warn of the builder is already narrowly defined and the builder would only have to warn of the obvious defaults in the design plans. That suggests that in case the default was obvious enough that the builder should have recognised it, even though he did not, this could still be attributed to the negligence of the builder. In such a situation, the builder should bear full liability for the damage that the client had suffered as a result of him negligently not granting the client the warning.

⁶⁴⁹ Asser-van den Berg, 5-IIIC, 2007, nr. 107; M. A. M. C. van den Berg, 'Bouwcontractenrecht in beweging' in: *40 Jaar Instituut voor Bouwrecht*, ed. M. A. B. Chao-Duivis, M. A. M. C. van den Berg, B. P. M. van Ravels, Stichting Instituut voor Bouwrecht, 2009, p. 63; W. G. Huijgen, 'Aanvulling Boek 7 nieuw BW met koop en huurkoop van onroerende zaken en aanneming van werk', BR 2002/1003, p. 1016; C. E. C. Jansen, H. W. R. A. M. Janssen, 'De precontractuele waarschuwingsplicht van de aannemer', BR 2004/363, p. 370-371

⁶⁵⁰ RvA 8.03.2001, no. 21.407, BR 2001, p. 534

⁶⁵¹ W. G. Huijgen, 'Aanvulling Boek 7 nieuw BW met koop en huurkoop van onroerende zaken en aanneming van werk', BR 2002/1003, p. 1016

One other argument that speaks against narrowing of the liability of the builder is that if a difference is made in the liability for cases when the builder knew or should have known about the default, this will lead to a burden of proof for the client that the builder *had noticed* the default. To prove someone's actual knowledge of a fact is difficult and that puts the client in an unfavourable position, which means that the builder could escape liability for even careless work, e.g. when he did not examine the design plans at all before concluding the contract with the client, as the client would, by definition, then not be able to prove the actual discovery of the default.

7.2. Sole liability, solidary liability, or apportionment of liability?

As it has been mentioned in the previous paragraph, theoretically there are four possibilities of granting damages to the client in case the damage was caused by the default in the design plans about which the builder did not warn the client: (1) by declaring sole liability, in full, of the builder, (2) by declaring sole liability, in full, of the designer, (3) by attributing liability to both the designer and the builder, (4) by attributing liability, in full, to both the designer and the builder. The causal link between the original default and the damage is considered to be weaker than the causal link between the lack of warning and the damage, as a result of the chain of causality and the warning being the last step that, if taken, could have prevented the damage from appearing, which suggests that it was the direct cause of the damage. That might be the reason why in none of the countries discussed in this book the second option, the sole liability, in full, of the designer (without the client being able to hold the builder liable), in case the default originated in the design plans but the builder had a duty to warn about it, is considered.

This paragraph shows how England, Germany and the Netherlands attribute liability between the professional parties involved in the construction process who might both been seen as having contributed to the damage that the client had suffered. It is important to assess whether if the client sues all professional parties involved in the process who share responsibility for the default in the construction, one of the professional parties would be declared to be fully liable or whether the client would need to get damages in parts from different parties involved in the construction process.

7.2.1. English law.

As it has been mentioned in the previous paragraph, it is difficult to estimate the exact division of liability between the professional parties who both contributed to the client's damage due to the lack of established authority on that matter. It is important to note, however, that, generally, it has been accepted by English courts that the sole fact that e.g. the designer breached his duty to warn about the builder's mistake does not mean that the builder should not still be liable for the default he caused⁶⁵². The client could claim his damages in full from the builder in such a case.

⁶⁵² *Oldschool and another v. Gleeson (Construction) Ltd and others* (1976) 4 BLR 103. With the exception of a situation mentioned in the previous paragraph when there was a reasonable opportunity to inspect and discover the default in the construction for the designer, which leads to the exclusion of the builder's causal link to the damage.

Other case law⁶⁵³ points out that the professional party who breached its duty to warn could be held liable for the whole damage, as well, despite the fact that the default in the construction would not have arisen if not for a mistake of another professional party. This seems to suggest that in English law both parties in such a case, i.e. the one who failed to deliver faultless work and the one who failed to fulfil his duty to warn, could be held liable for the whole damage of the client⁶⁵⁴. The client might pick which party he will claim damages from⁶⁵⁵. However, while the client may choose which professional party to sue, the Civil Liability (Contribution) Act 1978 gives a possibility to the defendant to bring another professional party who might also be liable into an action as a third party⁶⁵⁶. This leads, in practice, to the apportionment of liability between all professional parties that contributed to the damage. Furthermore, while the client might choose a professional party that he will hold liable for his damage in full, this does not exclude the possibility of the defence of contributory negligence being used by that professional party to diminish his liability⁶⁵⁷. Moreover, the contractual parties may agree to limit their liability contractually by adding so-called ‘net contribution clauses’ to the contract, according to which the parties would bear liability only for their ‘fair share of the loss suffered’ which excludes the application of the solidary liability⁶⁵⁸.

In the case of *London Borough of Merton v. Lowe and Pickford*⁶⁵⁹, one of the defences that the designer brought forward was that he should not be held liable for damage caused by the sub-contractor, because unlike the builder, the sub-contractor was solvent and the damage could have been recovered from him in tort. The client nevertheless decided to institute proceedings against the designer. The court decided that both the designer and the sub-contractor were liable for the same damage and in such case, irrespectively of the fact whether the liability was contractual or tortious, the court could apportion such liability between the liable parties – pursuant to the provisions of the Civil Liability (Contribution) Act 1978⁶⁶⁰. However, since the sub-contractors were not a party to this case, the court diminished the designer’s liability on the basis of the contributory negligence defence, thus forcing the client to instigate a second procedure against the sub-contractors in case he wanted to recover the full damage.

⁶⁵³ Nowlan v. Brunswick Construction Ltd., [1975] 2 S.C.R. 523, 8 N.B.R. (2d) 76, 2 N.R. 164, 49 D.L.R. (3d) 93

⁶⁵⁴ C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 502-510; J. Uff, *Construction law: law and practice relating to the construction industry*, London: Sweet & Maxwell, 1985, 4th ed., p. 88-89

⁶⁵⁵ As a side note it is interesting to note that if the client chooses to claim damages fully from the designer, it might be difficult for the designer to recover part of his loss from the builder on the basis of the builder’s breach of the duty to warn. That is because the designer’s loss is a pure economic loss in this case and English law rarely admits claims in negligence when the only damage to the claimant is an economic one. See e.g. O. Hayford, ‘Did you know... A “Construct Only” Contractor Can Be Liable For Design Defects?’, Mondaq, 07/07/2009, 2009 WLNR 12902774.

⁶⁵⁶ J. Uff, *Construction law: law and practice relating to the construction industry*, London: Sweet & Maxwell, 1985, 4th ed., p. 88-89

⁶⁵⁷ This will be further discussed in the following paragraph.

⁶⁵⁸ M. A. B. Chao-Duivis, ‘Hoofdelijkheid in het bouwcontractrecht (deel 1)’, TBR 2008/2, par. 4

⁶⁵⁹ *London Borough of Merton v. George Charles Lowe & Stuart Geoffrey Pickford*, C of A, (1982) 18 BLR 130

⁶⁶⁰ D. L. Cornes, *Design liability in the construction industry*, London: Blackwell, 1994, p. 116

7.2.2. German law.

Under German law the courts hold the builder and the designer solidary liable in case one professional party made a mistake and the other party, who should have noticed it if he had acted with due diligence, did not warn the client about that mistake. This means that when the builder had in practice not recognised the default in the design plans, although he should have done so as a professional party and therefore subsequently should have warned the client, and when the non-fulfilment of the builder's contractual duties was the result of his negligent performance, the court decides both the builder and the designer should be liable in full⁶⁶¹. The legal basis for this liability may be found in § 421 BGB⁶⁶².

This liability had been recognised in German practice as of the judgment of the BGH of 1 February 1965⁶⁶³. In this case the BGH clearly stated that the designer and the builder are solidary liable towards the client when they both are responsible for the default in the construction and are obliged to remedy it pursuant to § 635 BGB⁶⁶⁴. The BGH makes it clear that both the designer and the builder in their own way contributed to the damage, by non-performance or improper performance of their contractual obligations, and are responsible for remedying it in their own way. The client is free to choose whom he will hold liable for his damage. If one of the parties pays damages to the client, that releases the other party from its liability. They can in turn then seek recourse against each other for return of a certain percentage or the whole amount of what they had to pay to the client⁶⁶⁵. However, in case the liability of e.g. the designer would be contractually limited, then the solidary liability of both contractual parties extends only to the amount that both professional parties are liable for to the client⁶⁶⁶.

⁶⁶¹ BGH, 04.03.1971, VII ZR 204/69, BauR 1971, 265 (270); G. Kaiser, *Das Mängelhaftungsrecht in Baupraxis und Bauprozess*, Heidelberg: Müller, 1992; BauR 1984, 38; OLG Oldenburg, 09.09.2003, 2 U 270/00, IBR 2004, 706; B. Kimmich, 'Prüfungs- und Hinweispflicht auch bei fachkundig beratenem Auftraggeber?', IBR 2006, 1445; T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 104-106; Ch. Grüneberg, in: *Palandt. BGB*, München: C.H. Beck, 2010, § 421, Rdnr. 6, Rdnr. 12; P. Bydliński, in: *Münchener Kommentar BGB*, 2007, § 421, 25, p. 2606

⁶⁶² "Schulden mehrere eine Leistung in der Weise, dass jeder die ganze Leistung zu bewirken verpflichtet, der Gläubiger aber die Leistung nur einmal zu fordern berechtigt ist (Gesamtschuldner), so kann der Gläubiger die Leistung nach seinem Belieben von jedem der Schuldner ganz oder zu einem Teil fordern. Bis zur Bewirkung der ganzen Leistung bleiben sämtliche Schuldner verpflichtet."

⁶⁶³ BGH, 01.02.1965, GSZ 1/64, NJW 1965, 1175

⁶⁶⁴ '(1) Verlangt der Besteller Nacherfüllung, so kann der Unternehmer nach seiner Wahl den Mangel beseitigen oder ein neues Werk herstellen.

(2) Der Unternehmer hat die zum Zwecke der Nacherfüllung erforderlichen Aufwendungen, insbesondere Transport-, Wege-, Arbeits- und Materialkosten zu tragen.

(3) Der Unternehmer kann die Nacherfüllung unbeschadet des § 275 Abs. 2 und 3 verweigern, wenn sie nur mit unverhältnismäßigen Kosten möglich ist.

(4) Stellt der Unternehmer ein neues Werk her, so kann er vom Besteller Rückgewähr des mangelhaften Werkes nach Maßgabe der §§ 346 bis 348 verlangen'.

⁶⁶⁵ B. Rauch, *Architektenrecht und privates Baurecht für Architekten*, Köln: Rudolf Müller, 1995, p. 188; B. Kimmich, 'Prüfungs- und Hinweispflicht auch bei fachkundig beratenem Auftraggeber?', IBR 2006, 1445; Ch. Grüneberg, in: *Palandt. BGB*, München: C.H. Beck, 2010, § 421, Rdnr. 12; T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 121-129

⁶⁶⁶ P. Bydliński, in: *Münchener Kommentar BGB*, 2007, § 421, 50, p. 2614

In the case of 24 April 2008⁶⁶⁷ the OLG Oldenburg considered a case of solidary liability of the designer, the builder and a specialist planner. In the given case the OLG Oldenburg decided that the planner was partially responsible for the damage because he delivered construction plans that were faulty and he did not correct these defaults during the construction process. The designer had a duty to inspect the plans prepared by the planner and should have recognised the default in them and warn the client about it. The builder should have also recognised the default in the plans and warn the client about it on the basis of § 4 No. 3 VOB/B. The court had no doubts here that all three parties should be held solidary liable to the client and it was for the client to decide from which party he would like to receive damages. That does not mean, that in case the client decided to claim damages from the builder, the builder would have to pay the client for the whole damage that the client had suffered. The builder might use a defence of the contributory negligence from § 254 BGB, i.e. claim that his improper performance of contractual duties was to be attributed to the improper performance of his client's contractual obligations⁶⁶⁸.

7.2.3. Dutch law.

The Dutch Civil Code is clear on the subject of solidary liability, establishing it in article 6:102 BW⁶⁶⁹. Pursuant to this article, if two or more parties are liable for the same damage, any of them is liable to pay damages in full and may then have recourse on the other party. In practice, as a principle, it is the builder who would be held fully and solely liable for the damage of the client caused by the designer's mistake and the non-performance of the builder's duty to warn. The reason for choosing this system of liability, instead of attributing parts of it to the other professional party who made a mistake, has not been made explicit in case law. The simple statement that since the builder did not perform his duty to warn he caused the occurrence of the default which means he should be liable for the whole damage that resulted from it seems to serve as a sufficient explanation. The lack of proper justification for choosing this liability system has been criticized in the literature⁶⁷⁰. One of the arguments against attributing the liability to both parties might have been the fact that then it would be for the client (the victim) to prove the extent of the liability of both parties, which would be quite a task to do.

This system of liability has been partially based on Paragraph 6 Sec. 14 of the UAV, which says that the builder should warn the client in case of explicit defaults within the design. This paragraph has been interpreted in the judgments of the RvA⁶⁷¹

⁶⁶⁷ OLG Oldenburg, 24.04.2008, 8 U 4/08 (full text found on <<www.ibr-online.de>> lastly checked on 04.12.2009)

⁶⁶⁸ This will be discussed further in the following paragraph.

⁶⁶⁹ *'Rust op ieder van twee of meer personen een verplichting tot vergoeding van dezelfde schade, dan zijn zij hoofdelijk verbonden. Voor de bepaling van hetgeen zij krachtens artikel 10 in hun onderlinge verhouding jegens elkaar moeten bijdragen, wordt de schade over hen verdeeld met overeenkomstige toepassing van artikel 101, tenzij uit wet of rechtshandeling een andere verdeling voortvloeit.'*

⁶⁷⁰ C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 488-490; for an overview of literature and case law in which it has been argued for other division of liability than solidary liability see: M. A. B. Chao-Duivis, 'Hoofdelijkheid in het bouwcontractrecht (deel 1)', TBR 2008/2, par. 1-4; M. A. B. Chao-Duivis, 'Hoofdelijkheid in het bouwcontractrecht (deel 2)', TBR 2008/24, par. 5-6

⁶⁷¹ RvA 7.10.1983, nr. 11.380, BR 1984, p. 166; RvA 24.04.1987, nr. 11.755, BR 1987, p. 687; RvA 29.03.1988, nr. 13.049, BR 1988, p. 532; RvA 2.05.1990, nr. 14.048, BR 1990, p. 634; RvA 25.03.1991, nr. 70.014, BR 1993, p. 547; RvA 9.06.1992, nr. 15.276, BR 1993, p. 316; RvA 14.10.1993, nr. 15.272, BR 1994, p. 784; RvA 15.05.1995, nr. 16.610, BR 1995, p. 1021; RvA

as excluding the possibility to hold the builder liable only in part. Pursuant to these judgments, the builder should be held liable for the whole damage in the construction, because if not for his non-performance of the duty to warn, the damage could have been avoided wholly. The fact that the default originates in the faulty design plans is not being seen here as a factor contributing to the emergence of damage. In this system, the non-performance of the builder's duty to warn is seen as the only cause of damage, since the designer's mistake in delivering proper design plans does not influence in any way the builder's performance of his duty to warn⁶⁷². Let us take a closer look of two of the judgments in which this view has been expressed.

For example, in the case of 25 March 1991⁶⁷³, the builder was employed to perform some plastering and painting works in the basement of the client. The designer insisted that the works should be performed as soon as possible and as a result, they were not moisture proof. The court decided that although the client, upon the recommendation of the designer, commissioned the works too early in the construction process, the builder should have warned the client thereabout and not just perform his works upon the insistence of the designer. Because the builder had failed in his duty to warn, the court considered him liable in full for the damage that the client suffered.

In the case of 14 October 1993⁶⁷⁴ the builder did not warn the client that leaving out a specific foil while constructing the heated marble floor might lead to the cracking of that floor. The court decided that the builder had the duty to warn the client thereabout; that he failed to perform this duty and that he thus was liable for the whole damage suffered by the client.

In both these judgments the court decided on the full, sole liability of the builder, disregarding even the possibility of its diminishment as a result of application of the defence of contributory negligence. Thunnissen has criticized this in the commentary of these judgments⁶⁷⁵.

The point of view that the builder should be fully liable for the client's damage is dominant in the Dutch case law.

For example, in the case of 12 January 1996⁶⁷⁶ the client's garage was built smaller than it was supposed to be. The builder had performed the construction based on the design he received from the main construction contractor of the client. That design was faulty. The court recognised the main liability of the main construction contractor who prepared the faulty design. However, the court adjudicated the co-liability of the builder in that case. Upon discovering the default in the design, the builder should have warned the main construction contractor thereabout. As he had

24.01.1996, nr. 18.499, BR 1996, p. 251; RvA 9.06.2000, nr. 21.436, BR 2001, p. 901; RvA 16.11.2005, nr. 27.016, BR 2007, p. 140. It should be mentioned, though, that this reasoning has been criticized by H.O. Thunnissen in his commentary of some of these judgments and by M. A. M. C. van den Berg, 'Bouwcontractenrecht in beweging' in: *40 Jaar Instituut voor Bouwrecht*, ed. M. A. B. Chao-Duivis, M. A. M. C. van den Berg, B. P. M. van Ravels, Stichting Instituut voor Bouwrecht, 2009, p. 77-78

⁶⁷² See also: C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 522; C. E. C. Jansen, 'Waarschuwingsplicht en 'eigen schuld', BR 2000/565, p. 570; supported also by M. A. B. Chao-Duivis, 'Informatie en mededelingsplichten: een causaliteitsprobleem', BR 1991/2, p. 92-93

⁶⁷³ RvA 25.03.1991, nr. 70.014, BR 1993, p. 547 with casenote by H.O. Thunnissen

⁶⁷⁴ RvA 14.10.1993, nr. 15.272, BR 1994, p. 784 with casenote by H.O. Thunnissen

⁶⁷⁵ The possibility of having the builder's liability diminished due to contributory negligence of the client will be discussed in the following paragraph.

⁶⁷⁶ RvA 12.01.1996, nr. 17.348, BR 1996, p. 353

not performed his duty to warn, he was found liable as well. While the main construction contractor was obliged to pay damages in full to the client, the court estimated that he could seek recourse of 50% of damages on the builder. In this case, the court held the main constructor fully liable towards the client; however, the main constructor was allowed to seek recourse for part of the damages he was obliged to pay, on another professional party that had contributed to the damage of the client.

As it has been briefly mentioned in this chapter the other way in which the liability for the client's damage could be attributed between the parties is due to the contributory negligence. However, in this case, the builder remains fully liable, in general, and only due to the 'own fault' of the client the damages that he needs to pay are diminished. If the client wants to recover the whole amount of damages he needs to sue the other professional party, whose default had been attributed to the client, separately. The possibility of diminishing the liability of the builder in case the default comes from the default in the design, for which the client bears responsibility, has been widely accepted in the case law and in the doctrine⁶⁷⁷. It will be further discussed in the next paragraph.

7.3. Contributory negligence as a defence.

The defence of the contributory negligence allows the defendant to demand that the amount of damages that he needs to pay to the client is reduced in a case where the loss suffered by the client was only partially the result of the defendant's breach of contract, whereas, the other part depended on the behaviour of the client or of another party for whom the client bears responsibility. If this behaviour was not reasonable, negligent or even faulty, then a reduction of damages would be granted to the defendant.

Both in the case where, on the basis of the rules discussed in the previous paragraph, the courts hold a professional party liable in full, solely or solidary, and where they attribute liability to both parties that contributed to the damage of the client, the liability of the professional parties might be diminished on the basis of the contributory negligence defence. Let us see when a professional party may make use of this defence in England, Germany and in the Netherlands.

⁶⁷⁷ RvA 11.03.1993, nr. 15.134, BR 1993, p. 644; RvA 12.01.1996, nr. 17.348, BR 1996, p. 353; RvA 11.08.1997, nr. 18.504, BR 1999, p. 143; RvA 20.12.2001, nr. 22.983, BR 2002, p. 894; see further: M. A. M. C. van den Berg, *Samenwerkingsvormen in de bouw*, Deventer: Kluwer, 1990, nr. 103-11; C. E. C. Jansen, 'Waarschuwingsplicht en 'eigen schuld', BR 2000/565, p. 570; Asser-van den Berg, 5-IIIC, 2007, nr. 102; M. A. M. C. van den Berg in: M. A. M. C. van den Berg, A. G. Bregman, M. A. B. Chao-Duivis (eds.), *Bouwrecht in kort bestek*, 's-Gravenhage: IBR, 2010, p. 311; C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 493-498; M. A. B. Chao-Duivis, 'Aspecten van de waarschuwingplicht van de aannemer', BR 2007/46, p. 236; W. G. Huijgen, 'Aanvulling Boek 7 nieuw BW met koop en huurkoop van onroerende zaken en aanneming van werk', BR 2002/1003, p. 1016; M. A. M. C. van den Berg, 'Bouwcontractenrecht in beweging' in: *40 Jaar Instituut voor Bouwrecht*, ed. M. A. B. Chao-Duivis, M. A. M. C. van den Berg, B. P. M. van Ravels, Stichting Instituut voor Bouwrecht, 2009, p. 74-78; about the necessity to apply this rule exceptionally only see: M. A. M. C. van den Berg, *Ondanks nauwlettend toezicht*, Deventer: Kluwer, 1993, p. 1-28

7.3.1. English law.

Since the defence of the contributory negligence has only recently started to be applied in contractual relationships, it is uncertain whether the builder might successfully use it in order to diminish his liability. The English case law on that varies⁶⁷⁸. Unfortunately, there have not yet been sufficient cases within the construction sector to make it clear whether that defence could be applied in case of a breach of a contractual duty to warn. As has been already described in the introductory chapter to English law and in the chapter on the emergence and source of the duty to warn in English law, English courts recognised both contractual and tortious duties to warn. If the client cannot claim one, he would claim the other. This often gives the impression that the contributory negligence applied in a particular case was applied based on contract law when in reality the claim was dealt with under tort law.

Initially the damages could be reduced on the grounds of this defence only when the defendant was liable in tort or simultaneously in tort and contract⁶⁷⁹. Such possibility was not allowed on the grounds of contract law, due to the fact that the parties to the contract have had an opportunity to regulate their obligations as they wanted to and apparently chose not to include a provision to this extent. To nevertheless grant such defence in contract law would enable the court to shift the risk, which would have changed the contract made by its parties. The same reasoning has been used by English courts to deny the existence of the contractual duty to warn in case the parties concluded a detailed contract without a provision on the duty to warn therein⁶⁸⁰. However, for many years it has been widely argued that this defence should be available also to defendants liable exclusively in contract in respect of breaches of all contractual obligations unless expressly or impliedly excluded in the contract⁶⁸¹. If the contractual provisions explicitly allocated the risk otherwise, the defendant would not be able to make use of the defence of contributory negligence⁶⁸².

It has been said that the defence of the contributory negligence is:

“A man’s carelessness in looking after his own safety. He is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonably prudent man, he might hurt himself”⁶⁸³.

Section I (1) of the Law Reform (Contributory Negligence) Act 1945 gave courts the authority to reduce the plaintiff’s damages:

⁶⁷⁸ Forsikringsaktieselskapet Vesta v. Butcher [1989] 1 Lloyd’s Rep 331; Barclays Bank v. Fairclough Building Ltd. (1994) 10 Const. L.J. 48

⁶⁷⁹ C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 370; J. Uff, *Construction law: law and practice relating to the construction industry*, London: Sweet & Maxwell, 1985, 4th ed., p. 89

⁶⁸⁰ Further discussed in the chapter on the emergence of the duty to warn in England.

⁶⁸¹ C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 505-510; I. N. D. Wallace, *Hudson’s Building and Engineering Contracts*, London: Sweet and Maxwell, 1995, v. 1, p. 229-230

⁶⁸² The Law Commission, *Contributory Negligence as a defence in contract*, Law Com. No. 219, London: HMSO, 1993, p. 1-2

⁶⁸³ *Froom v. Butcher* [1976] Q.B. 286 *per* Lord Denning M.R.

“To such extent as [it] thinks just and equitable having regard to the [plaintiff’s] share in the responsibility for the damage”⁶⁸⁴.

The court has to take into account the causation and blameworthiness when he decides, which party and in what scope is responsible for the damage. Still, the court has a discretionary power to decide how to apportion the damages – the only indication is that the apportionment should be just and equitable. However, it has to be pointed out that in practice, for a long time the law reform did not broaden the scope of the notion of contributory negligence to encompass breaches of a contractual duty to warn. For example, in the case *Basildon v. Lesser*⁶⁸⁵ the House of Lords held explicitly that the Contributory Negligence Act did not apply to a claim in contract, so that the client could recover his damages in full as was provided for under common law.

When the defence of contributory negligence finally started being accepted in contract law, it was always done exceptionally and depended on the fulfilment of many conditions, like the one expressed in *Raflatac v. Eade and Ors* case⁶⁸⁶:

“Once it was established that the main contractor in this case did not owe a duty of care in effect to secure careful performance by the sub-contractor, there could be no question of a defence of contributory negligence on the part of the plaintiff’s employers. The well-known *Vesta*⁶⁸⁷ case confirms that this defence is available <<...where the defendant’s liability in contract is the same as his liability in the tort of negligence independent of the existence of any contract>>”.

Application of this defence in contractual actions based on the Law Reform (Contributory Negligence) Act has been seen as difficult, although not impossible by Palmer and Davies. They compared the English authority with many Australian decisions on this matter and claimed that application of the Act to contractual claims was deemed to be unjustified and without practical value since it cannot be shown that at common law contributory negligence was ever a defence to an action for breach of contract. They argued that the interpretation of the Act, which leads to application of this defence in contract law cases, is artificial and meaningless and that English case law, which applied this interpretation in practice, is vague and contradictory⁶⁸⁸. However, it needs to be pointed out that even though its application is questionable this defence is applied in some contract actions and accepted by English courts. This creates for the court the possibility to diminish damages of a professional party who was not the only one who contributed to the existence of the client’s damage and who otherwise would be held liable in full.

In *Lindenberg v. Canning*⁶⁸⁹ the court stated:

⁶⁸⁴ S. Furst, V. Ramsey, *Keating on construction contracts*, London: Sweet & Maxwell, 2006, p. 268-269

⁶⁸⁵ *Basildon v. Lesser*, [1985] Q.B. 839, Judge Newey, Q.C.

⁶⁸⁶ *Raflatac Ltd v. Eade and Ors* (1999) 1 BLR 261

⁶⁸⁷ *Forsikringsaktieselskapet Vesta v. Butcher* [1989] 1 Lloyd’s Rep 331

⁶⁸⁸ N. E. Palmer, P. J. Davies, ‘Contributory Negligence and breach of contract – English and Australian attitudes compared’, *International and Comparative Law Quarterly*, April 1980, vol. 29

⁶⁸⁹ *Edward Lindenberg v. Joe Canning and Others* (1993) 9 Const LJ 43; 62 BLR 147; 29 Con LR 71

“Contributory negligence has not been clearly pleaded, but it has been the subject of submissions made to me and I think I must take it into account. In my opinion Mr Carlish [the designer – JL] when acting for Mr Lindenberg [the client - JL] failed to take care on his behalf by wrongly showing the 9” walls as non load bearing on his plan, by instructing Mr Canning [the builder - JL] orally to demolish them, and by failing to give any instructions for temporary or permanent supports. In apportioning responsibility between Mr Carlish [the designer – JL] and Mr Lindenberg’s [the client’s - JL] agent and Mr Canning [the builder - JL] I think that Mr Carlish [the designer – JL] was 75% responsible and Mr Canning [the builder - JL] 25%”.

In this case, the judge applied contributory negligence despite having found no liability in the tort of negligence, which would seem to suggest that the defence could be applicable also in cases concerning a purely contractual duty to warn⁶⁹⁰.

7.3.2. German law.

As has been mentioned in the previous paragraph, in German law there is solidary liability of all professional parties who contributed to the damage. It is for the client to choose whom he will hold liable, but either party is liable in full. However, in case the non-performance of the builder of his obligations is caused by a default that could be attributed to the client, e.g. the designer makes a mistake in the design plans which could be attributed to the client since he is seen as having a duty to deliver default-free plans to the builder, then the builder may escape liability or have his liability diminished. That means that the client could hold the builder only partially liable on the basis of § 254 BGB⁶⁹¹ and potentially claim the remaining damage from the designer in other proceedings⁶⁹². The client is then considered as not having protected his own interests sufficiently⁶⁹³.

⁶⁹⁰ C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 504-510

⁶⁹¹ “(1) Hat bei der Entstehung des Schadens ein Verschulden des Beschädigten mitgewirkt, so hängt die Verpflichtung zum Ersatz sowie der Umfang des zu leistenden Ersatzes von den Umständen, insbesondere davon ab, inwieweit der Schaden vorwiegend von dem einen oder dem anderen Teil verursacht worden ist.

(2) Dies gilt auch dann, wenn sich das Verschulden des Beschädigten darauf beschränkt, dass er unterlassen hat, den Schuldner auf die Gefahr eines ungewöhnlich hohen Schadens aufmerksam zu machen, die der Schuldner weder kannte noch kennen musste, oder dass er unterlassen hat, den Schaden abzuwenden oder zu mindern. Die Vorschrift des § 278 findet entsprechende Anwendung.”

⁶⁹² Confirmed recently by BGH, 27.11.2008, VII ZR 206/06, IBR 2009, 92; N. Glaser-Lüß, ‘Haftung des Bauüberwachers: Auftraggeber muss sich Fehler des Planers zurechnen lassen!’, IBR 2009, 402; B. Rauch, *Architektenrecht und privates Baurecht für Architekten*, Köln: Rudolf Müller, 1995, p. 189-190

⁶⁹³ OLG Hamburg, 07.06.2001, 12 U 65/98, NJW-RR 2001, 1534; OLG Karlsruhe, 19.10.2004, 17 U 107/04, BauR 2005, 879; S. Büchner, ‘Flachdach: Handwerker muss Planungsfehler erkennen un haftet voll!’, IBR 2005, 12; OLG Brandenburg, 18.01.2007, 12 U 120/06, IBR 2007, 1208; F. Krause-Allenstein, ‘Planungsfehler: Wann haftet Unternehmer voll?’, IBR 2005, 197; P. Fischer, ‘Architektenhaftung und Mitverschulden des Bauherrn’, IBR 2001, 437; H. Frank, ‘Mangel der Planung erkannt: Volle Haftung des Auftragnehmers!’, IBR 2007, 1208; this holds true especially in case the designer’s default concerned an area for which the builder had little or no contractual responsibility, e.g. the construction ground: A. Völkel, ‘Planungs-/Ausführungsfehler: Wie wird die Mitverschuldensquote ermittelt?’, IBR 2008, 1224; T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 31, 106-108

Still, in certain cases the possibility to use the defence of contributory negligence has been limited or excluded in German law. This means that in certain situations the client might hold the professional party liable in full even if he bears himself part of responsibility for the default. For example, it has been decided that if the builder had in fact recognised the default in the design plans prepared by the designer and nonetheless did not warn the client thereof, acting with gross negligence, then he would be deemed to be fully liable for the resulting damage. The same would apply in case the builder had recognised the default, but had not warned the client immediately⁶⁹⁴ about it. Namely, in such circumstances the court did not see the default in the plans as the client's fault⁶⁹⁵. When would the professional party be found fully liable then in practice without having a possibility to use the defence of contributory negligence?

In the case of 30 March 1995⁶⁹⁶ (described in one of the previous chapters) the builder was found liable for not warning the client, but he tried to defend himself by saying he should not be held fully liable for the default in the construction due to the fact that the construction plans had been negligently prepared by the designer employed by the client. This default should be, according to the builder, attributed to the client. OLG Hamm stressed, however, that the construction plans given to the builder were so obviously negligently made that it should have been obvious to the builder that they did not correspond with the technological requirements of a proper construction. It was stated that if the builder was positively aware of the faults in the construction plans and at the same time refrained from warning his client of these faults and followed these plans to the letter, he should be fully liable for the resulting damage. The court decided that if in that case the builder would be released from part of his liability due to the fact that the client was to be held responsible for the designer's defective plans, such solution would be inconsistent with the rule of good faith. Therefore, the defence of contributory negligence might be limited by the rule of good faith⁶⁹⁷.

In the case of 12 November 1999⁶⁹⁸, the builder tried to defend himself claiming that it was not only his own, but also the client's obligation to inspect the work performed by the builder's sub-contractor and that if the client also neglected to perform such inspection, the builder's liability should be diminished. However, OLG Düsseldorf stressed that the builder had a contractual obligation to inspect the work of his sub-contractor and to warn the client of any defects therein. He showed gross negligence by forfeiting to perform these contractual duties, as it was undisputable that the builder neglected to perform the inspection and did not issue any warning to

⁶⁹⁴ § 4 No. 3 of VOB/B requires the professional party to warn immediately (*unverzüglich*) upon noticing the default

⁶⁹⁵ BGH, 11.10.1990, VII ZR 228/89, NJW-RR 1991, 276, BauR 1991, 79; OLG Karlsruhe, 19.10.2004, 17 U 107/04, BauR 2005, 879; OLG Brandenburg, 18.01.2007, 12 U 120/06, IBR 2007, 1208; B. Rauch, *Architektenrecht und privates Baurecht für Architekten*, Köln: Rudolf Müller, 1995, p. 192; H. Locher, U. Locher, *Das private Baurecht*, München: C.H. Beck, 2005, p. 102; S. Büchner, 'Flachdach: Handwerker muss Planungsfehler erkennen und haftet voll!', IBR 2005, 12; F. Krause-Allenstein, 'Planungsfehler: Wann haftet Unternehmer voll?', IBR 2005, 197; B. Kimmich, 'Prüfungs- und Hinweispflicht auch bei fachkundig beratenem Auftraggeber?', IBR 2006, 1445; H. Frank, 'Mangel der Planung erkannt: Volle Haftung des Auftragnehmers!', IBR 2007, 1208; T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 49, 108-109

⁶⁹⁶ OLG Hamm, 30.03.1995, 17 U 205/93, BauR 1995, 6, p. 852

⁶⁹⁷ BGH, 18.01.1973, VII ZR 88/70, NJW 1973, 518

⁶⁹⁸ OLG Düsseldorf, 12.11.1999, 22 U 71/98, BauR 2000, 3, p. 421

the client – not even an oral one. The court concluded that if the builder acted with such gross negligence it would obstruct the rule of good faith to allow him to benefit from the defence of contributory negligence (the existing doctrinal interpretation was cited⁶⁹⁹).

In the case of 18 January 2007 OLG Brandenburg⁷⁰⁰ reiterated the view that if it is proven that the builder had actual knowledge of the default and negligently did not warn the client about that, the builder could be held fully liable. The OLG Brandenburg decided over a case where the builder built a cellar in accordance with the designer's instructions. The design plans turned out to be faulty, however, and the cellar was not waterproof. The liability of the builder encompassed, according to the court, also the builder's liability for not having warned the client about the designer's mistake. The default in the design plans should have been clearly visible to the builder. However, since it had not been proven that the builder actually knew of the default and proceeded with the construction without having warned the client of a default he knew about, his liability for not having warned the client was limited. The limitation of the builder's liability for the breach of his duty to warn was also a result of the client not sufficiently protecting his own interests. The client should have had certain doubts in the given case, according to the court, and it was his duty to ask the builder additional questions as to the risk associated with the construction.

As the last case shows, in practice in most cases the professional party's liability is diminished on the basis of the contributory negligence defence.

In the OLG Köln's judgment of 22 December 1993⁷⁰¹ (already described in the chapter on the scope of the builder's duty to warn) the client employed a number of builders directly to renovate his balcony. It turned out that although each of the builders diligently performed his contractual obligations, their performances were not compliant and the construction was at fault. The OLG Köln found that builders had the duty to warn the client thereof upon seeing the construction plans. In the judgment it has, however, been noticed that the BGH⁷⁰² previously stated that in case the client decided to entrust the construction to laymen without securing the preparation of construction plans by the designer, any damage that would be caused on those grounds would also be attributable to the client. As a result, the builder's liability was diminished due to the own fault of the client in that particular case.

In a case decided by the OLG Hamm on 18 July 2002⁷⁰³ the builder's liability has also been diminished on similar grounds. In that case builders employed by the client to construct the indoor tennis centre were found liable for not warning him that the material he planned for them to use was inappropriate for that construction. However, the court diminished their liability by half on the ground that half of the fault could be attributed to the client. Namely, it was the client who made the decision to use the wrong material – without even asking for an advice of his designer. The court decided that such a material change should not have been made without having consulted first with the designer or another specialist from the field of application of this new material, which meant that the client attributed to the resulting default.

⁶⁹⁹ A. Wirth in: H. Ingenstau, H. Korbion, H. Locher, K. Vygen, Ch. Döring (eds.), *VOB. Teile A und B. Kommentar*, Düsseldorf: Werner, 2001, B § 13 Nr 3 Rdnr. 200

⁷⁰⁰ OLG Brandenburg, 18.01.2007, 12 U 120/06, IBR 2007, 1208

⁷⁰¹ OLG Köln, 22.12.1993, 16 U 50/93, NJW-RR Zivilrecht 1994, 9, p. 1045

⁷⁰² BGH, 13.12.1973, VII ZR 89/71, WM 1974, 311

⁷⁰³ OLG Hamm, 18.07.2002, 21 U 82/01, BauR 2003, 1, p. 101

Also, in the previously discussed case of 16 December 2003⁷⁰⁴ OLG Düsseldorf decided to diminish the liability of the designer. The warning given by the designer in that case had not been considered as sufficient. It did not clearly indicate to the client that he should wait with making a decision to take out a certain loan for the construction and with purchasing grounds for it until the designer would finish estimating the total construction costs. However, even though the warning has been seen as insufficient since it did not convey all the risks, the client still decided to go against the risks that had been implied while he purchased the ground. Therefore, the client was seen as having taken upon himself some responsibility for that decision. This led the court to diminishing the designer's liability.

In another similar case of 13 June 2002⁷⁰⁵ the OLG Karlsruhe has decided that the client attributed to the default in the plans and the builder's liability should therefore be diminished. In that case the parties implemented the VOB/B-provisions to the contract concluded between them. Pursuant to them, the builder was obligated to warn the client that some water appeared in the cellar, which was being constructed. The builder as a professional company having a lot of experience with the construction of cellars should have been aware that the appearance of water made it impossible to proceed further with the construction pursuant to the plans that the builder was given at the beginning. The court this time had no doubt whatsoever that part of the fault was on the designer's side and that the builder should not be held liable for the whole damage. Due to the fact that the designer acted as the client's helper it was adjudicated that the damage should be partially attributed to the client; therefore, the builder's liability was diminished⁷⁰⁶.

In the case of 15 July 2010⁷⁰⁷ the designer employed by the client made a mistake in his design plans and the OLG Düsseldorf stated, just as in the above-mentioned cases, that in the relationship between the builder and the client it is the client who bears the final responsibility for the design, which means that the default could be attributed to him. However, the builder was also found as having breached his duty to warn in this case. The client took into account the designer's fault and claimed only 50% of his damages from the builder. The court still decided to lower the amount of losses for which the builder should be liable to 1/3 of the client's total loss⁷⁰⁸. The court stated that the original reason for the client's loss is the default of the designer and that in comparison with the designer's mistake the builder's fault is significantly smaller, therefore the court chose to lower the builder's liability⁷⁰⁹.

It is important to notice here that the builder may demand to have his liability diminished based on the defence of contributory negligence only when the default was made by another professional party whose actions could be attributed to the client. Not all professional parties employed by the client are seen as the client's representatives for whose actions the client bears a certain responsibility. Whereas the

⁷⁰⁴ OLG Düsseldorf, 16.12.2003, 21 U 24/03, BauR 2004, 6, p. 1024

⁷⁰⁵ OLG Karlsruhe, 13.06.2002, 9 U 153/01, BauR 2003, 6, p. 917

⁷⁰⁶ OLG Düsseldorf, 17.12.1993, 22 U 119/93; OLGR 1994, 159; R. Knychalla, 'Prüfungs- und Hinweispflicht bei Balkonbelagsarbeiten', IBR 1994, 156; H. Merl, 'Bei Planungsfehlern kann Bauunternehmer vor Mängelbeseitigung Zuschuss verlangen!', IBR 2009, 451

⁷⁰⁷ OLG Düsseldorf, 15.07.2010, 5 U 25/09, IBR 2010, 675

⁷⁰⁸ The same percentage of liability was attributed to the builder not warning about the designer's default in the case: OLG Karlsruhe, 17.03.2011, 13 U 86/10, (full text found on <<www.ibr-online.de>>, lastly checked on 15.07.2011)

⁷⁰⁹ See also: G. Hein-Röder, '2/3 Planungsverschulden bei Ausschreibung ungeeigneten Baumaterials!', last correction: 23.06.2011 (full text found on <<www.ibr-online.de>>)

designer is usually seen as a representative of the client, this rarely is the case for other builders.

In the case of 14 March 2011⁷¹⁰ the OLG Frankfurt considered a case in which the first builder incorrectly connected the house's drainage pipes to the sewer, which led to the problems with the client's cellar and further construction process. After the first builder had concluded his works, another builder continued with the construction process and he did not warn the client about the mistake of the first builder, even though it should have been visible to him. When the defect was discovered, the client claimed his losses from the first builder. That first builder tried to limit his liability by arguing that the client was negligent himself, i.e. the default could have been discovered earlier if the second builder had not breached his duty to warn. That breach of the duty to warn by the second builder should be attributed to the client, according to the first builder. The court decided, however, that the second builder could not be considered a representative of the client; therefore the client did not have to bear responsibility for his mistakes. In the commentary⁷¹¹ to this case it has been stressed that the same situation would apply if the client claimed his losses from the second builder for the breach of his duty to warn. In such a situation that second builder would also not be able to limit his liability by claiming contributory negligence of the client, due to the default being created by the first builder. Again, the first builder would not have been perceived as a representative of the client.

7.3.3. Dutch law.

In the paragraph on the causality it has been discussed who should be responsible for the damage that the client had suffered. In general, in Dutch law, it can be said that due to the lack of warning of the builder about the designer's mistake it is the builder who is seen as having caused the whole damage. However, the fact that the original problem was the default in the design, for which – in the relation between client and builder – the client is responsible, may be taken into account when assessing the scope of the liability of the builder. The builder, while at first held fully liable to the client, might on the basis of the contributory negligence diminish his liability and be held only partially liable to the client. Whether the client then may hold his other contractual counterparts liable for the rest of the damage he had suffered remains a separate question here.

The applicable provision of the Dutch civil code, art. 6:101 Sec. 1 BW⁷¹², states that in case the damage has been caused in part by circumstances for which the injured party is accountable, the obligation to compensate should be adjusted in proportion to the measure of each party's contribution to the emergence of the damage. However, the factual amount of compensation may be diminished or increased based on the "fairness" rule, e.g. due to the seriousness of each party's

⁷¹⁰ OLG Frankfurt, 14.03.2011, 1 U 55/10, (full text found on <<www.ibr-online.de>>, lastly checked on 15.07.2011)

⁷¹¹ S. Bolz, 'Mängelgewährleistung: Keine Haftung des Auftraggebers für Verschulden des Nachfolgeunternehmers', last correction: 04.04.2011, (full text found on <<www.ibr-online.de>>)

⁷¹² 'Wanneer de schade mede een gevolg is van een omstandigheid die aan de benadeelde kan worden toegerekend, wordt de vergoedingsplicht verminderd door de schade over de benadeelde en de vergoedingsplichtige te verdelen in evenredigheid met de mate waarin de aan ieder toe te rekenen omstandigheden tot de schade hebben bijgedragen, ten dien verstande dat een andere verdeling plaatsvindt of de vergoedingsplicht geheel vervalt of in stand blijft, indien de billijkheid dit wegens de uiteenlopende ernst van de gemaakte fouten of andere omstandigheden van het geval eist.'

default⁷¹³. Article 6:101 BW may be applied here if the damage is seen as resulting not only from the lack of warning given by the builder but also from the faulty design plans that have been delivered by the client. The client's underlying mistake is being seen here as precluding full liability of the builder, since if the client had delivered proper design plans the builder would not have had anything to warn about and would not non-perform his duty to warn. However, the test for attributing part of responsibility for the damage to the client is a heavy one for the builder. According to the Court of Appeal Leeuwarden in the case of 9 February 2010⁷¹⁴ he has to prove not only that a certain action, or lack thereof, that the client might have taken, could have contributed to the increase of the loss to the client, but also that the client under given circumstances did not act as any other reasonable person would have acted. Moreover, in another case of 8 April 2009⁷¹⁵ the District Court Zutphen made it clear that the mere fact that the client employed another professional party as his advisor does not automatically mean that the client could be seen as responsible for the default on the basis of Article 6:101 BW. It is for the builder to prove e.g. that the advisor should have noticed the default.

Initially there was a bit of confusion in the doctrine when the court could apply the defence of the contributory negligence. For example, in the case of 25 March 1991⁷¹⁶, discussed in the previous paragraph, the court decided that although the client, upon the recommendation of the designer, commissioned the works too early in the construction process, the builder should have warned the client thereabout and not just perform his work upon the insistence of the designer. Therefore, due to the builder's non-performance of his duty to warn, the court considered him fully liable for the client's damage. In his commentary to the judgment, Thunnissen looked for a *rationale* behind the court's judgment and explanation why the defence of contributory negligence had not been applied in this case. Thunnissen observed that the builder performed his tasks upon insistence and not upon instructions and directions from the designer, as defined in Paragraph 6 Sec. 2 of the UAV⁷¹⁷. If such instructions and directions were given to the builder, it would have put some responsibility for his work on the client in case of the default. However, the builder would still have had the duty to warn the client before starting his works. The difference lies therein, that in that case the builder would have a possibility to use the defence of the contributory negligence and have his liability diminished pursuant to the provision of Art. 6:101 BW⁷¹⁸. It seems that mere insistence to speed up work is not sufficient to claim 'own fault' of the client.

Further, in the commentary to the case of 14 October 1993⁷¹⁹ Thunnissen points out that the builder should only bear the full liability pursuant to Paragraph 6 Sec. 14 of the UAV if the provision of Art. 6:101 BW would not be applicable. In the given case, the design was faulty, so it could be said that the client partially

⁷¹³ So called '*billijkheidscorrectie*' established on the basis of the second part of the Article 6:101 lid 1 BW where the possibility of a different division of liability is mentioned on the basis of fairness rules.

⁷¹⁴ Hof Leeuwarden, 9.02.2010, 200.014.649/01, LJN: BN3873

⁷¹⁵ Rechtbank Zutphen, 8.04.2009, 96912/HA ZA 08-1149, LJN: BJ5766

⁷¹⁶ RvA 25.03.1991, nr. 70.014, BR 1993, p. 547 with casenote by H.O. Thunnissen

⁷¹⁷ "*De aannemer is verplicht het werk uit te voeren volgens de door de directie te verstrekken en de door haar goed te keuren tekeningen. Hij is verplicht de orders en aanwijzingen op te volgen, die hem door de directie worden gegeven.*"

⁷¹⁸ The possibility of having the builder's liability diminished due to contributory negligence of the client will be discussed in the following paragraph.

⁷¹⁹ RvA 14.10.1993, nr. 15.272, BR 1994, p. 784 with casenote by H.O. Thunnissen

contributed in the default and that the builder's liability should be diminished⁷²⁰. Only if the builder would act with gross negligence or other circumstances of the case would justify it, should he be fully liable for the damage, Thunnissen argued. This would, for instance, be the case when the builder would be a specialist in the field within which the default was made and the designer for that reason would have no supervision duties during the construction. The court did not mention any special circumstances in this judgment that would lead us to conclude that the builder should be held fully liable for the client's damage. Still the court followed a line of reasoning based on the fact that if the duty to warn had been duly performed by the builder, the original default made by the designer could have probably been corrected and the construction would have been flawless. This allowed the arbitral court to find the builder fully liable in this case disregarding the possibility for application of the defence of contributory negligence.

In the last years the possibility for application of the defence of contributory negligence has been more commonly argued for both in case law (though not all cases concerned the construction sector) and in the Dutch literature⁷²¹. It has also been accepted by the Dutch Supreme Court in the case KPI/Leba⁷²², where the Supreme Court decided that while the builder should not be released from his duty to warn when the client had the necessary professional knowledge to recognise the default in construction himself, this circumstance could lead to diminishing of the builder's liability for the non-performance of his duty to warn.

The RvA in the case of 3 March 2006 adopted a similar line of reasoning⁷²³. In that case, while the court had recognised the builder's duty to warn, it held the builder liable for 30% of the resulting damage, in accordance also with the claim of the client. The default in the construction was clearly seen as an obvious design default for which the client was responsible. However, due to the obviousness of the default, the builder was held to have had the duty to warn towards the client and for the breach thereof he was held to be liable. The full liability of the builder had been diminished in this case due to the client's own fault. In the end, the builder was held to be liable for a certain percentage of the damage only.

⁷²⁰ The possibility of having the builder's liability diminished due to contributory negligence of the client will be discussed in the following paragraph.

⁷²¹ Asser-van den Berg, 5-IIIC, 2007, nr. 102; M. A. M. C. van den Berg, *Samenwerkingsvormen in de bouw*, Deventer: Kluwer, 1990, nr. 103-11; M. A. M. C. van den Berg in: M. A. M. C. van den Berg, A. G. Bregman, M. A. B. Chao-Duivis (eds.), *Bouwrecht in kort bestek*, 's-Gravenhage: IBR, 2010, p. 311; HR 2.06.1995, NJ 1997, 700-702 (Klaverblad Schadeverzekeringsmaatschappij/ Instituut Ziektekostenvoorziening Ambtenaren Friesland); HR 5.12.1997, NJ 1998, 400-402 (Assurantiemaatschappij Terminus/ ZAO Zorgverzekeringen UA); HR 4.05.2001, NJ 2002, 214 (Chana-Hung/Maalsté); C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 493-498; M. A. B. Chao-Duivis, 'Aspecten van de waarschuwingplicht van de aannemer', BR 2007/46, p. 236; W. G. Huijgen, 'Aanvulling Boek 7 nieuw BW met koop en huurkoop van onroerende zaken en aanneming van werk', BR 2002/1003, p. 1016; M. A. M. C. van den Berg, 'Bouwcontractenrecht in beweging' in: *40 Jaar Instituut voor Bouwrecht*, ed. M. A. B. Chao-Duivis, M. A. M. C. van den Berg, B. P. M. van Ravels, Stichting Instituut voor Bouwrecht, 2009, p. 74-78; about the necessity to apply this rule exceptionally only see: M. A. M. C. van den Berg, *Ondanks nauwlettend toezicht*, Deventer: Kluwer, 1993, p. 1-28

⁷²² HR 18.09.1998, NJ 1998, 818 (KPI/Leba). This case relates to the production of movable goods, but this does not seem relevant for the decision of the *Hoge Raad*.

⁷²³ RvA 03.03.2006, nr. 25.856, BR 2007, p. 255

In the case of 18 May 2011⁷²⁴ the RvA found that the builder had a duty to warn the client about the possibility that connecting a so-called warm roof with a cold roof openly could lead to a risk of condensation and problems with gathering of moisture. The builder was deemed to be competent enough to have been aware of this risk. Since the builder did not give a warning to the client about this default in the design of the construction, he was seen as having breached his duty to warn the client. However, due to the presence and competence of the client's advisor the RvA decided to limit the builder's liability to 60% of the client's loss based on the client's contributory negligence. The advisor had planned this way of constructing the roof and therefore had contributed to the loss of the client. Since the client is responsible for the advisors that he employs, this advisor's fault is attributable to the client and therefore the arbitration court may use the instrument of contributory negligence.

The same reasoning applies in a situation when the sub-contractor failed to warn the builder of a default that the builder had made. In this case the position of the builder is comparable to a position of a client who has some knowledge on the construction. For example, in the RvA-case of 7 May 2010⁷²⁵ the sub-contractor did not warn the builder about the necessity to apply fluid-containment foil in the construction and was held liable for the breach of his duty to warn by the RvA. However, his liability was diminished by 50% due to 'own mistake' of the builder, who was seen as having enough competence that he should have recognised the risk himself.

7.4. Comparison.

The first part of this chapter concerned the matters of causality. The research question that was answered in this part was as to the presence of the causal link between the lack of warning by a professional party in respect of the defect of another professional party involved in the construction process.

In English law it is often difficult to estimate who exactly should be held responsible for the default in the construction, since there is no established case law on a breach of the duty to warn. It seems, however, that as long as the damage could have been caused by the breach of either contractual or tortious obligations of more than one professional party, these professional parties could be seen by the client as concurrently liable.

German law recognised the causal link between the client's damage and the breach of the contractual obligations of both professional parties involved in the construction: the one that made the original mistake and the other one who did not warn about it. German courts clearly pointed out also that the burden of proof that there was a duty to warn lies with the client. It is the client who needs to prove that a professional party knew or should have known about the risk coming from a third party. The burden of proof that the duty to warn has been fulfilled or that there was no causal link between a lack of warning and the damage lies on a professional party who had the duty to warn.

In the Netherlands it has been made clear that the professional party who breached his duty to warn is liable for the client's damage. However, it is less certain whether the causal link between the damage and the breach of the duty to warn means

⁷²⁴ RvA 18.05.2011, nr. 32.198, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

⁷²⁵ RvA 7.05.2010, nr. 28.970, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

that there is no causality between the original default and the damage. In most case law, it is the professional party who breached his duty to warn that is being held liable in full for the damage. It has been still argued in the doctrine that this should not preclude the possibility of the other professional party being held liable for the mistake he had made in the construction process. The claiming of damages from the party who breached his duty to warn have been made easier since the Dutch courts started applying the so-called '*omkeringsregel*' on the basis of which it is for the professional party to raise doubts as to the legal presumption for the time being that there is a causal link between his non-performance of the duty to warn (that may be seen as a safety obligation intended to prevent certain material risks from occurring) and the damage.

As long as the substantive rules on the duty to warn allow for its recognition in England, the liability rules are as clear as in Germany: the consumer may claim damages either from the party who breached its duty to warn about a default of another professional party or directly from that professional party who created the defective product. Dutch law offers in this respect less legal certainty to the consumer, since it is sometimes questioned whether the consumer would be able to claim his losses from the party who caused a default.

Upon having an answer who might be seen as having caused the damage to the client and from whom the client might claim damages it was considered whether the client has to claim his damages from all professional parties that together caused his loss or whether he may claim the total loss from one of these professional parties.

English law has made it easy for the client to claim full damages since not only is the client able to sue more than one person but also the defendants in the proceedings may involve other professional parties in them, who they think should bear part of the liability for the damage. The most important trait in English law as to liability for non-performance or negligent performance of a duty to warn, is that it has been recognised both in contract and in tort. This has made it easier for the client to sue all parties of the construction process, regardless of whether he had concluded contracts with them all or not. Although in theory it seems that English system recognises solidary liability of professional parties who contributed to the damage, in practice the English courts apportion the damages between the parties in the proceedings. That might be the effect of the difficulty to make a recourse claim for a professional party who reimbursed the consumer's losses in full, since the damage to that professional party would be purely economical, and therefore difficult to claim under English tort law.

In German law, a professional party who breaches his duty to warn about a risk coming from a third party, in general, is solidary liable for losses with that party. This means that the client might choose which professional party he will hold liable. However, the client may claim damages only from the professional party he decides to sue. This professional party will need to pay damages in full and may later seek recourse on the other professional party that contributed to the damage, as well.

Dutch law provides for the full liability of the professional party who breached his duty to warn. In practice it seems that this would be a sole liability of that professional party. The idea behind this theory is that the non-performance by the client of his obligation to deliver proper design plans does not influence in any way the builder's performance of his duty to warn. The breach of the duty to warn is seen then as a direct cause of the losses of the client. However, in the doctrine it has been argued in favour of holding all professional parties who could have contributed to the

damage liable in the court proceedings. There have been a few recent cases in which the liability between the professional parties had been apportioned.

From all three systems analysed, Germany has the clearest rules on the liability of the professional parties for their breach of the duty to warn. In the Netherlands there seems to be a difference between the judgments of the regular courts and those of the arbitral courts on whether the builder could bear the full liability for the breach of the duty to warn. In England, the consumer enjoys less legal certainty due to the mixed liability system that is being applied to breach of the duty to warn, i.e. in contract and in tort law. This may lead to the consumer not being certain as to what requirements need to be fulfilled for a success of his claim.

Finally, this chapter focused on the possibility of the professional party who breached his obligation to warn the client to use a defence of contributory negligence, thereby limiting the scope of his liability.

There have been doubts raised in English law whether the contributory negligence defence could be applied to the contractual breach of the duty to warn since it has not been applied at common law. In practice, however, despite theoretical debates on that matter, this form of defence is sometimes being applied by English courts to such cases. If the defence of contributory negligence would not be available to a professional party by a contractual breach of the duty to warn, this would mean that the client could claim his damages in full from that party. It should be noted that making the application of the defence possible to the professional party seems to be more in accordance with other European legal systems.

German law knows a legal construction similar to the English defence of contributory negligence when a defendant, a professional party who failed to warn the client, demands he should not be held liable or that he would be held liable for part of damages only. This defence might be used when the client also contributed to the improper construction. This applies not only when it is directly the client who is co-responsible for the default, but also other specialists employed by the client, e.g. the designer. However, even if the appearance of the default might be attributed to the client or his representatives, the builder might still remain to be fully liable for the losses of the client when he actually recognised the default, but had not warned the client about it or not immediately. The gross negligence of the builder's actions prevails in this scenario over the fact that the default had been invoked by the client's or client's representatives' actions. The builder may not use the defence of contributory negligence to diminish his liability, if it were contrary to the 'good faith' rule.

The provisions of the Dutch Civil Code clearly define that in case the damage to the client has been caused partially by circumstances that he is responsible for, the amount of damages should be proportionally adjusted. Dutch law clearly recognises the possibility for the professional party to make use of the defence of contributory negligence. The fact that the client was more experienced or had more knowledge as to the area in which the default appeared might lead to diminishing the builder's liability (as has been mentioned in the chapter on the scope of the builder's duty to warn). In general, the amount of damages to be paid by the party infringing its duty to warn would then depend on all circumstances of the case and on the 'fairness' rule, just like in German law.

In general, all three legal systems provide for the possibility of diminishing of the builder's liability in case the client could be found co-responsible for the default, e.g. due to the default originating in the design plans. When a duty to warn is

recognised in England, English law is least likely to accept the defence in case of a contractual breach of a duty to warn, which puts the English consumer in a better position as far as recovering the full amount of his losses is concerned. In German and Dutch law the application of this defence might be excluded in case it would infringe the 'good faith' rule. Despite the fact that the English consumer may benefit from the non-application of the defence of contributory negligence in certain cases, German and Dutch laws create more legal certainty for the consumer since the consumer may be sure what rules and what standards will be applied to determine whether the client was partially responsible for the default. In England it is still debated from case to case whether the defence of contributory negligence could be applied in cases of breach of a duty implied in common law.

The liability for breach of the precontractual duty to warn has been elaborated on less extensively in German law. However, it has been mentioned that the damages for breach of the precontractual duty to warn might need to restore the client to the position that he would have been into if the agreement had not been concluded as a result of the warning having been given. Still, in most cases the liability for the breach of the precontractual duty to warn would be assessed as if a contractual duty to warn had been breached, since in case the contract was concluded between the parties there would have been specific and clear contractual obligations to warn that would have been also infringed and the contractual liability is more clearly regulated in German law and more easy to rely on by the client.

As far as the breach of the precontractual duty to warn in Dutch law is concerned, the rules on apportionment of damages apply, as well. The full liability of the builder had been argued in these cases only when the builder had an actual knowledge of the default prior to conclusion of the contract. This seems to extensively limit the liability for the breach of the precontractual duty to warn, since already the scope of the duty to warn in the precontractual phase is limited to warning about obvious mistakes only.