W.H. van Boom, Compensation for personal injury in the Netherlands, in: Bernhard A. Koch and Helmut Koziol, (eds.), Compensation for Personal Injury in a Comparative Perspective, Wien/New York: Springer 2003, p. 211-237

Part I. General Questions

1) Interplay between Tort Law and Social Security Law

a) General Remarks on the Relationship between Tort law and Social Security Law

1. As far as compensation for personal injury is concerned, tort law differs from Dutch social security law in many respects. First, we can observe that tort law is primarily aimed at correcting wrongs. In contrast, social security law is aimed first and foremost at protecting the financial interests of insured citizens against personal injury, sickness, disability, and unemployment. In effect, tort law is based on basic notions of retribution or corrective justice, whereas social security law is based on distributive justice. What both systems seem to have in common is the effect of compensating the injured party. However, the levels of compensation differ considerably. In tort law, the doctrine of *full* compensation is paramount, whereas, in most social security schemes, the level of compensation is quite *low*.[1] Moreover, as a rule, social security schemes only cover certain heads of pecuniary loss, notably the loss of income and - as far as public health insurance is concerned - the cost of medical care. There is no social security scheme that offers compensation for non-pecuniary loss.

2. The basic requirements for a claim in tort constitute relatively *high* thresholds: not only can wrongfulness, fault, and causation constitute major obstacles to a successful claim, but, in principle, the injured party has the burden of proof as well. Pursuing a tort claim in court can consume large amounts of time and financial resources, and it might well prove to be psychologically burdensome for the injured party. In stark contrast to tort law, social security law serves as a source of compensation with relatively *low* thresholds. Most schemes operate fast and (relatively) efficiently, without the intervention of lawyers, they provide *adequate* compensation, and are less burdensome for the injured party to call upon.

3. Dutch social security schemes offer protection against medical expenses, and against loss of income through sickness or disability, whatever the cause of the injuries might be. Therefore, injuries caused by tortfeasors are covered under the same conditions. On the other hand, social security law does not replace Dutch tort law. So, for example, employers can be held liable for industrial accidents and occupational hazards as far as damages are concerned that are not covered by a social security scheme. However, social security benefits received by the injured person are deducted from a claim in tort.[2]

b) Rights of Recourse against Tortfeasors

[1] Perhaps with the exception of the public health insurance scheme.
[2] See W.H. van Boom, *Verhaalsrechten van verzekeraars en risicodragers* (2000), p. 17, pp. 24-25.

4. Most social security agencies have a right of recourse against the tortfeasor.[3] In general, the conditions under which these recourse rights can be exercised are the same as the conditions that would apply to a claim in tort of the injured party himself. Although these special statutory rights of recourse have a somewhat different appearance than the right of *subrogation (cessio legis)* of private insurers, their effect is generally the same: if an actionable tort was committed *vis-à-vis* the injured party, rights of recourse accrue. And, likewise, if the injured party was contributorily negligent, the recourse claim is reduced in proportion to the contribution of the injured party to the accident or his subsequent injuries.[4]

5. Certain social security schemes exclude recourse on employers and colleagues, except when they injured the victim with intent to cause harm or consciously and with gross negligence.[5] No statutory exclusion exists as far as family members are concerned. Nevertheless, in a number of cases the *Hoge Raad* (Dutch Supreme Civil Court, HR) has ruled that recourse against family members is not permitted, arguing that allowing recourse would in effect be allowing a restitution of benefits, because family members usually share income and benefits as substitute income. [6]

6. In Dutch law, there is one important deviation from the principle that the recourse claim reflects the injured party's claim. When the new Civil Code, *Nieuw Burgerlijk Wetboek* (hence: BW) was enacted in 1992, the legislature felt that the strict liabilities introduced with this enactment should be preserved for the benefit of the injured victims themselves. The legislature therefore introduced the *Tijdelijke Regeling Verhaalsrechten* (*TRV*), the Provisional rights of recourse scheme (Art. 6:197 BW). This *TRV* states that recourse claims cannot be based on strict liability. Effectively, when an employee is on his way to work by bicycle, and he is hit by a falling tile from a defective building, the employee himself can claim on the basis of strict liability (Art. 6:174 BW). However, if his injuries lead to lasting incapacity to work, part of his loss of income will be covered by a specific social security scheme. The social security agency in turn has a right of recourse, but it cannot be based on Art. 6:174 BW. The agency can only claim on the basis of tortious liability (Art. 6:162 BW), *viz.* if there is sufficient proof of negligence of the owner (*e.g.*, in maintenance or warning). One might say that the *TRV* has introduced a *split* in Dutch tort law: victims may well claim on the basis of strict liability, but their (social) insurers can only claim on the basis of negli-

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[3] Art. 52a Zw (Sickness Benefits Act); Art. 6:107a BW (Civil Code); Art. 90 WAO (Disablement Insurance Act); Art. 83b ZfW (Public Health Insurance Act); Art. 61 ANW (General Surviving Dependants Act); Art. 69 WAZ (Disablement Insurance (Self-Employed Persons) Act); Art. 61 WAjong (Disablement Insurance (Young Disabled Persons) Act); Art. 65b AWBZ (General Exceptional Medical Expenses Act); Art. 2 VOA (Accidents to Public Servants (Recovery of Compensation) Act); Art. 49 (1) Wet REA (Disablement Reintegration Act).

[4] W.H. van Boom (supra note 2), pp. 36-37.

[5] Art. 91 (1) WAO; Art. 52b (1) Zw, Art. 83c (1) ZfW, Art. 62 (1) ANW; Art. 49 (3) Wet REA; cf. Art. 6:107a (3) BW.

[6] A right of recourse would thus somehow affect the injured party as well, and that would not be in accordance with the essence of social security, i.e., providing compensation. On this topic, see W.H. van Boom (supra note 2), p. 75 et seq.

gence vis-à-vis the injured party. Although this split has been fiercely criticised in legal literature, it is likely that it will continue to exist.[7]

7. There is no general statutory provision on the question of whether the recourse action has priority over the victim's own claim.[8] On the contrary, in both legal doctrine and practice, there seems to be consensus that the opposite solution is to be preferred: the victim's claim has priority over the agency's recourse claim.[9] The victim's priority is also codified in the bill on private insurance contract law currently pending before parliament.[10]

2) Principles of Liability and Statutory Basis

a) Overview

8. Dutch law distinguishes between fault-based liability for wrongful acts on the one hand (Art. 6:162 BW), and strict liability on the other. Generally speaking, two main categories of strict liability can be distinguished: strict liability for wrongful acts of other individuals, and strict liability for objects and substances. The former category includes strict liability for employees (*viz. respondeat superior*) and for agents, while the latter includes liability for defective moveable objects, buildings and structures, products liability and liability for the inherent risks of hazardous and noxious substances.[11] Although the imposition of strict liability is considered to be a prerogative of the legislature, on specific occasions the *Hoge Raad* has assumed the position of 'legislature substitute': through case law, some forms of tortious liability have been stretched to match 'semi-strict liability'. This is true for, *e.g.*, employer liability for industrial accidents and liability of motor vehicle owners for traffic accidents involving pedestrians and bicyclists.

9. Whenever liability has been established, the tortfeasor is obliged, in principle, to compensate the injured party for both the loss sustained and the loss of profits (Art. 6: 96 BW). In fact, however, the actual limits to this obligation are determined by the rules on *causation*. According to Dutch law, a *two-stage* test must be applied.[12] First, the well-known *condicio sine qua non* ('but for') test is applied.[13] If this test is met, the *imputation* test is applied. The latter test is set out in Art. 6: 98 BW:

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[7] See W.H. van Boom (supra note 2), p. 122 et seq.
[8] However, Art. 2 VOA explicitly gives the victim priority over the administrative body.
[9] See W.H. van Boom (supra note 2), pp. 98-100.
[10] Art. 7.17.2.25 paragraph 2, bill no. 19 529.
[11] See Jaap Spier, The Netherlands - Wrongfulness in the Dutch Context, in: H. Koziol (ed.), *Unification of Tort Law: Wrongfulness* (1998), pp. 95-96.
[12] See A.S. Hartkamp, *Verbintenissenrecht; deel I - de Verbintenis in het algemeen* [Mr. C. Asser's handleiding tot de beoefening van het Nederlands Burgerlijk recht], 11th edition Zwolle 2000 (hence: *Asser-Hartkamp I*), no. 424 *et seq.*
[13] In exceptional cases, the test is not applied. See, *e.g.*, Art. 6: 99 BW (alternative causation) and Art. 6: 166 BW (i.e., group liability).

Compensation can only be claimed insofar as the damage is related to the event giving rise to liability in such a fashion that the damage, also taking into account its nature and that of the liability, can be imputed to the debtor as a result of this event.[14]

10. Art. 6: 98 BW identifies only two of many factors that decide imputation: the nature of the damage and the nature of the liability. Although *foreseeability* of the damage is not mentioned in Art. 6:98 BW, it surely is an important factor as well. As far as the nature of the damage suffered is concerned, both case law and doctrinal writing are inclined[15] to stretch the limits of causal connection *very far* whenever bodily harm is involved,[16] somewhat *less far* when damage to property is involved, and the *least far* in the case of loss related to neither of the former two categories (*i.e.*, pure economic loss).[17]

11. On this point, a final general remark on the Dutch law of damages must be made. After ascertaining the liability of the injurer and the extent of his obligation to pay damages, the new Dutch Civil Code allows for *reduction of the amount due* by the tortfeasor to the injured party. Art. 6: 109 BW reads:

1. The judge may reduce the obligation to repair damage if awarding full reparation would lead to clearly unacceptable results in the given circumstances, including the nature of the liability, the legal relationship between the parties, and their respective financial capacities.
2. The reduction may not exceed the amount for which the debtor has covered his liability by insurance or was obliged to maintain such a cover.
3. Any stipulation derogating from paragraph 1 is null and void.[18]

12. So far, this new[19] instrument has not been widely used to mitigate the far-reaching financial consequences of liability; the discretionary authority to reduce the amount due should only be used if the consequences of full liability would, from a socio-economic point of view, be clearly unacceptable. It is assumed that the decision to reduce the amount due is based not only on the concrete financial consequences of full liability, but also on the degree of blameworthiness, the nature of the liability (fault-based or strict liability?), and the possibility of a cascade of claims.[20]

b) Fault-Based Liability for Wrongful Acts

13. In Dutch law, fault-based liability for wrongful acts is codified in Art. 6: 162 BW:

1. A person who commits a wrongful act vis-à-vis another person, which can be imputed to him, is obliged to repair the damage suffered by the other person as a consequence of the act.

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[14] See *infra* note 21.
[15] It must, however, be stressed that no general principles have yet been formulated. As J. Spier, How to Keep Liability within Reasonable Limits? A Brief Outline of Dutch law, in: J. Spier (ed.), *The Limits of Liability - Keeping the Floodgates Shut* (1996), p. 103, puts it: neither doctrine nor case law is explicit on this point.
[16] See J. Spier (supra note 15), p. 101, *Asser-Hartkamp I*, no. 433 *et seq.*
[17] See, *e.g.*, C.J.H. Brunner, Causaliteit en toerekening van schade, *Verkeersrecht* 1981, p. 210 *et seq.*
[18] See *infra* note 21.
[19] The 'old' Civil Code did provide for a similar reduction in cases of personal injury and defamation (Art. 1406 - 1408 BW 1838).
[20] See *Asser-Hartkamp I*, no. 494.

2. Save grounds for justification, the following acts are deemed to be wrongful: the infringement of a subjective right, an act or omission violating a statutory duty, or conduct contrary to the standard of conduct seemly in society.
3. A wrongful act can be imputed to its author if it results from his fault or from a cause for which he is answerable according to law or common opinion.[21]

14. As the first parargraph of Art. 6:162 BW suggests, fault-based liability consists of two main elements: the wrongfulness of the act itself, and imputability of the act to the person acting. According to the second paragraph of Art. 6:162 BW, there are three categories of wrongful acts: infringement of subjective rights (*e.g.*, property and physical inviolability), acts contrary to a statutory duty, and acts contrary to 'maatschappelijke betamelijkheid' (*i.e.*, the standard of conduct seemly in society). The category of acts contrary to the standard of conduct seemly in society is by far the most important, especially when the injured party cannot make a claim on the basis of a direct infringement of his property right or physical inviolability. According to case law, a great many factors determine impropriety in a concrete case, *e.g.*, foreseeability of the loss (also described as the chance of a loss occurring as a result of the act), the degree of blameworthiness, the costs of avoiding the loss, the nature of the damage, and the relationship between the injured party and the injurer.[22] A *prima facie* wrongful act is considered not to be wrongful whenever *force majeure*, self-defence, or a statutory provision justified it.[23]

15. The second element, that of imputability, is divided into three alternative grounds for imputation, the first of which is currently the most important: the person can be blamed for his act ('schuld', *i.e.*, fault), or (the cause of) his act must be imputed to him, either on a statutory basis, or plainly because the 'verkeersopvattingen' (*i.e.*, an unwritten source of legal and moral opinion, as it is expressed in case law) demand so.[24] So, according to the third paragraph, tortious liability is incurred not only in case of subjective fault, but also in case of objective 'answerability'. The scope of this 'answerability', as an alternative for a 'fault', remains unclear. Although some authors suggest that Art. 6:162 par. 3 renders it possible to impose liability notwithstanding the absence of blameworthiness and wrongfulness,[25] there is no case law that supports this conclusion. Having said that, it must be admitted that there *is* case law that partially supports this conclusion for specific areas of law. This is undoubtedly a step away from the old Civil Code, which was repealed in 1992. According to Art. 1401 (more or less a translation of Art. 1382 of the French Civil Code), liability was only incurred whenever the damage suffered was caused by a 'fault' of the person act-

[21] Translation based in part upon P.P.C. Haanappel/E. Mackaay, *New Netherlands Civil Code: Patrimonial Law (Property, Obligations and Special Contracts)* (1990). See also Spier (supra note 11), p. 87.
[22] Most of these criteria originate from the landmark decision HR November 5, 1965, *NJ* 1966, no. 136. See further on the subject: Spier (supra note 11), pp. 94-95.
[23] See A.S. Hartkamp, *Verbintenissenrecht; deel III - de verbintenis uit de wet [Mr. C. Asser's handleiding tot de beoefening van het Nederlands Burgerlijk recht]* (10th edn. 1998), nos. 58 et seq.
[24] See further on the relationship between 'verkeersopvattingen' as a ground for imputation of wrongful acts and wrongfulness as such: B.G.P. Rogmans, *Verkeersopvattingen* (1995), pp. 9 et seq.
[25] See further on the subject: E. Bauw, Een onberekenbare bepaling; over de toerekening krachtens verkeersopvattingen in het derde lid van Art. 6:162 BW, *Te Pas (Stein-bundel)* (1992), p. 51 et seq.

ing. In case law however, the fault requirement was stretched considerably. Since the enactment of Art. 6:162 BW, stretching the fault requirement has, in a sense, become unnecessary because liability for wrongful acts can also be based on 'answerability' (Art. 6:162 par. 3).[26] However, the alternative grounds for imputation offered in Art. 6:162 par. 3 BW are to this day of marginal importance. This can be explained quite easily: the fault requirement has already been stretched so far as to cover a wide variety of more or less faultless types of behaviour. One might even say that the fault requirement has been stretched beyond recognition.[27]

16. A well-known example of this 'trend' is offered by the 1983 Supreme Court *Meppelse ree* decision. In this decision, the Court openly substituted *moral* blameworthiness with *objective, legal* blameworthiness. The driver of a motor vehicle was legally blamed for causing a head-on collision with another motor vehicle, although, from a moral perspective, there was clearly no cause for blameworthiness: in a split-second, the driver was confronted with a deer that suddenly emerged from dense woods and crossed the road, and the driver decided to avoid collision with the deer by steering to the left. Unfortunately, this resulted in a collision with the oncoming vehicle. The Dutch Supreme Court decided in favour of liability on the basis of *legal* blameworthiness (*i.c., error in extremis*), although any reasonable human being might have had the same reaction.[28] Although in accordance with the new Civil Code, one might want to file the *Meppelse ree* decision under the heading of imputation on the grounds of 'verkeersopvattingen', it still demonstrates the wide ambit of the fault concept.[29]

c) Strict Liability and Vicarious Liability; An Overview

17. There are a number of strict liabilities in the Dutch Civil Code; only the most important are mentioned here.[30] As stated supra, marginal no. 8, a distinction is made between strict liability for wrongful acts of other persons, and strict liability for defective or dangerous objects. Strict liability for the unlawful acts of other persons is mainly dealt with in Art. 6:170-171 BW.[31] According to Art. 6:170 BW, the employer in whose service an employee fulfils his duties is liable for tortious acts committed by the employee if the risk of commission of such an act was increased by the occupational activities of the employee, and the employer had - on the basis of his legal relationship

[26] See further on the subject Asser-Hartkamp (supra note 23), no. 70 et seq.
[27] Cf. G.H.A. Schut, *Onrechtmatige daad*, 5th Ed. (1997), p. 95 et seq.
[28] HR November 11, 1983, *NJ* 1984, no. 331; cf. G.H.A. Schut (supra note 27), p. 95 et seq.
[29] On this topic, see C.H. Sieburgh, *Toerekening van een onrechtmatige daad*, (2000), p. 142 et seq.
[30] Therefore, the following strict liabilities are not dealt with extensively: Art. 6:169 BW (strict liability of parents for wrongful acts of their children under 14), Art. 6:172 BW (strict liability for legal representatives (agents)), Art. 6:176-177 (strict liability for dumping-grounds and drilling-holes). For a further discussion, I refer to the Dutch report on the 'Questionnaire on Strict Liability', presented by Prof. C.E. du Perron and dr. W.H. van Boom to the European Group on Tort Law (March 2001).
[31] I will not discuss Art. 6:169 BW (strict liability of parents for unlawful acts of their children under 14), and Art. 6:172 BW (strict liability for legal representatives (agents)).

with the employee - control over these activities. This *respondeat superior* strict liability is applied in a broad sense.[32] For example, the concept of 'employment' in Art. 6:170 BW is not restricted to contractual employment. So, if A has an employment agreement with B, and B instructs A to follow orders from C, for the purposes of Art. 67:170 BW, C might well be considered to be A's 'employer' as well.

18. In addition to Art. 6:170 BW, Art. 6:171 BW provides that a principal is liable for the imputable wrongful acts of his *independent contractor*, provided that the damaging act was performed in the course of the principal's business.[33] Effectively, the principal is liable for damage wrongfully caused by any contractor that supplies the principal with services that might - from an external perspective - be considered as part of the principal's core business.

19. Under Art. 6:174 BW, the possessor[34] of an immovable *construction* is liable if that construction is defective in the sense that it poses a (serious) danger to persons or goods, and this danger subsequently materialises. In accordance with the nature of strict liability, this liability is independent of the actual knowledge of the possessor of the defect.[35] The notion of 'construction' includes building structures (*e.g.*, houses, factories, but also: conduits, and immovable storage silos), and public infrastructure (*e.g.*, bridges, tunnels, public roads *et cetera*).

20. A similar strict liability for defective *moveable* objects is codified in Art. 6:173 BW. The possessor of a moveable object which is known to constitute a special danger for persons or things if it does not meet the safety standard which, in the given circumstances, is set for such an object is liable when this danger materialises. The scope of Art. 6:173 BW is limited in two respects. First, paragraph 3 excludes specific objects, *viz.* motor vehicles, vessels, aircraft and animals. Second, in paragraph 2, the instrument of 'canalisation' is used to direct claims for defective products to the manufacturer. As a result, the possessor of a defective product is in principle immune from claims that should be directed to the responsible manufacturer.

21. In 1995, a strict liability for the risks inherent to *dangerous substances* was introduced in Art. 6:175 BW,[36] which was substantially inspired by the HNS and CRTD treaties and the Lugano treaty.[37] Art. 6:175 BW imposes strict liability for dangerous substances used or kept in the course of

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[32] See C.J. van Zeben et al., *Parlementaire geschiedenis van het nieuwe burgerlijk wetboek, boek 6 algemeen gedeelte van het verbintenissenrecht*, Deventer 1981; continued in: W.H.M. Reehuis, E.E. Slob, *Parlementaire geschiedenis van het nieuwe burgerlijk wetboek, invoering boeken 3, 5 en 6: boek 6 algemeen gedeelte van het verbintenissenrecht*, Deventer 1990 (hereinafter: C.J. van Zeben), p. 719.

[33] See the comparative remarks by Christian von Bar, Vicarious Liability, in: Arthur Hartkamp *et al.* (eds.), *Towards a European Civil Code* (2d ed. 1998), p. 440 et seq.

[34] Alternatively, the liable subject is the person or legal entity that uses the object in the course of its business (Art. 6:181 BW).

[35] *Cf.* C.C. van Dam, *Aansprakelijkheidsrecht* (2000) no. 1003.

[36] Art. 6:175 BW was introduced together with Art. 6:176-177 (strict liability for dumping-grounds and drilling-holes).

[37] International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, May 3, 1996 (HNS); Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels, October 10,

business or trade. The article defines a dangerous substance as a substance of which it is known that it has such properties as to pose a specific danger of a serious nature to persons or things (*e.g.*, explosive, oxidative, flammable, or poisonous substances). As Art. 6:175 BW is restricted to dangers to persons or things, compensation of pure economic loss can in principle not be based on this article.[38] Strict liability for dangerous substances is imposed upon the professional user (*i.e.*, the user in the course of his business or profession) of the dangerous substance. Alternatively, strict liability can also attach to the professional bailee of the substance.[39]

22. As follows from the criteria of Art. 6:175, no strict liability is imposed upon non-professional possessors or users of dangerous substances. As a result, liability of consumers in possession of dangerous substances has to be decided according to the general criteria of fault-based liability for wrongful acts. In case law, it has been decided that the possessor of dangerous substances owes the utmost care vis-à-vis potential victims of the dangers inherent to these substances. On this basis, the possessor is obliged to inform himself of the possible dangers, to carefully handle, and to warn others about (the possibility of) these dangers.[40]

23. Art. 6:173, 6:174, and 175 BW apply if a serious danger to *persons* or *tangible objects* has materialised. Therefore, compensation of pure economic loss cannot be based on these provisions.[41] However, the costs of reasonable measures to prevent or limit damage in case of imminent danger of damage to persons of things (including damage and loss as a result of these measures) are considered to be compensatable damage (Art. 6:184), even if the measures are instigated by a third person (on the basis of 'verplaatste schade', *dommage par ricochet*).

d) Some Specific Topics: Traffic Accidents

24. Traffic accidents are covered by two separate regimes: motorised victims of traffic accidents and non-motorised victims. The latter category consists mainly of bicyclists and pedestrians; they receive special legal protection against the dangers of motorised vehicles[42] from Art. 185 *Wegenverkeerswet 1994*, the 1994 Road Traffic Act.[43] The main rule of Art. 185 is that, if a motorised vehicle is involved in an accident which causes damage to a bicyclist or pedestrian, the owner of

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1989 (CRTD); Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993 (Lugano Treaty).

[38] See, however, the remarks made in note 41.

[39] See Arnhem District Court January 18, 2001, *NJ-kort* 2001, no. 26. Note that the liability of a professional 'bailee' can also apply to carriers, stevedores, etc., who have taken possession of the substance in relation to a contract of carriage. However, the special transport liability rules prevail if these apply.

[40] HR January 8, 1982, *NJ* 1982, no. 614; C.C. van Dam, supra note 35, no. 1304.

[41] Note, however, that on a related subject, the legislature has in fact not ruled out the possibility that a consequential, pure economic loss suffered by a third party as a result of an event that falls within the ambit of strict liability should be compensated as well. See the explanatory Memorandum on the act implementing strict liability for the use of hazardous and noxious substances, *Kamerstukken II* 21 202, no. 3, pp. 18-19, discussed by J. Spier (supra note 15), p. 102.

[42] A term comprising cars, mopeds, motorbikes, busses and lorries but not railway cars.

the vehicle is liable for this damage, unless there is substantial evidence that the accident was caused by *force majeure* (which includes acts of a person or persons for whom the owner or holder is not liable).[44] It is hardly possible to establish *force majeure*. Defects of the vehicle,[45] or sudden physical inability of the driver[46] are not considered to be *force majeure*. Furthermore, with regard to *force majeure* and contributory negligence, the case law of the Dutch Supreme Court distinguishes between victims under 14 years of age and older victims.

25. According to a number of decisions of the *Hoge Raad*, victims of particularly young age have a special status in compensatory respect. If the victim is younger than 14 years, both the defences of force majeure and contributory negligence can only succeed if there was, taking into account the age of the victim, intent or recklessness bordering on intent on the part of the victim.[47] In practice, this means that young pedestrians or bikers who are hit by a motor vehicle are nearly always fully compensated.

26. The *Hoge Raad* has also created specific rules on liability for personal injury of pedestrians and bicyclists of 14 years and up. If the victim is 14 years of age or older, there can only be *force majeure* if the driver of the motor vehicle can in no respect be reproached for the occurrence of the accident. One of the main rules in this respect is that motor vehicle drivers must *anticipate* errors from other traffic participants (including pedestrians and bikers).[48] So, only *extremely unlikely* behaviour of the victim or a third person can justify invoking the *force majeure* defence.[49] If no *force majeure* is established, the driver is liable, on the basis of equity, for at least 50% of the damage of the victim, unless there was intent or recklessness bordering on intent on the part of the victim. Whether the driver has to pay more than 50% of the damage has to be established according to the 'normal rules' regarding contributory negligence.[50]

27. The Supreme Court has ruled that subrogated insurers[51] are excluded from the benefits of the case law regarding the protection of non-motorised victims of traffic accidents.[52]

28. There is no specific statutory provision dealing with *motorised victims* (*i.e.*, drivers and passengers of motor vehicles). Consequently, the general rules on fault liability for wrongful acts (Art. 6:162 BW) apply. Therefore, in cases of collision of two motor vehicles, it has to be decided which

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[43] It should be borne in mind that the Netherlands is a 'bikers country': the Dutch population consists of some 16 million souls, riding some 13 million bicycles and driving only some 6 million motor vehicles!

[44] If the holder or owner does not drive the vehicle himself, he is liable for the acts of the person whom he allows to use it. The term "to allow" includes cases in which the owner or holder negligently gives someone the opportunity to take possession of the car (a thief or joy-rider).

[45] HR April 16, 1942, *NJ* 1942, no. 394.

[46] Art. 6:165 BW.

[47] HR May 31, 1991, *NJ* 1992, no. 721; HR June 1, 1990, *NJ* 1991, no. 720; *see* C.C. van Dam, *supra* note 35, no. 1308.

[48] See recently HR July 14, 2000, *RvdW* 2000, no. 177.

[49] HR February 16, 1996, *NJ* 1996, no. 393; C.C. van Dam, *supra* note 35, no. 1308.

[50] HR February 28, 1992, *NJ* 1993, no. 566; HR December 24, 1993, *NJ* 1995, no. 236; on Art. 6:101 (contributory negligence), see *infra*, marginal no. 53 et seq.

[51] Including social security agencies; see *supra*, marginal no. 4.

[52] HR February 28, 1992, *NJ* 1993, no. 566 and HR June 2, 1995, *NJ* 1997, nos. 700-702.

driver was at fault. The concept of 'fault' in motor vehicle collisions is set at a high, objective standard: 'fault' is absent only when the driver of the motor vehicle cannot be reproached in any way with respect to the accident. This basically means - as I already observed[53] - that drivers should not only observe traffic regulations, but should also anticipate errors of other traffic participants.

29. A major difference between collisions involving two vehicles, on the one hand, and collisions involving a vehicle and a pedestrian or bicyclist, on the other hand, is the burden of proof. In the former case, the injured party has the burden of proof of the facts that support the conclusion that the other party was at fault.[54] Judging from various decisions of the *Hoge Raad*, this burden of proof should not be taken lightly.[55] For example, the mere fact that a vehicle was driving on the wrong side of the road and subsequently collided with an oncoming vehicle as such is inconclusive evidence that an imputable wrongful act was committed.[56]

30. There are legislative plans to recodify the law on this subject. It is expected that this recodification will result in strict liability for accidents involving motor vehicles, in favour of injured pedestrians, bicyclists, and passengers. It is expected that the defences against liability will be restricted to *intent or recklessness*, but it is still under political debate whether the defence of 'recklessness' should imply simple recklessness or recklessness bordering on intent.[57]

e) Some Specific Topics: Health Care

31. As far as *medical malpractice liability* is concerned, no specific strict liabilities apply. The medical expert performing the (contract of) medical treatment is obliged to perform according to the professional standard (Art. 7:453 BW). If the patient is injured or the treatment fails due to the substandard performance of the medical expert, fault-based liability is incurred.

32. If the treatment was executed within a hospital, the hospital is vicariously liable together with the expert (Art. 7:462 BW). Neither the expert nor the hospital are allowed to exclude or limit liability by contract (Art. 7:463 BW).

33. Medical *experiments* on humans are subject to a specific statutory liability regime, which provides an absolute liability for personal injury resulting from the experiment. In accordance with the nature of medical experiments, the 'state of the art' defence cannot be raised.[58]

f) Some Specific Topics: Products Liability

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[53] See *supra*, marginal no. 16.
[54] Art. 177 Code of Civil Procedure.
[55] I. Giesen, *Bewijs en aansprakelijkheid* (2001), p. 147 et seq.
[56] HR September 24, 1993, *NJ* 1994, no. 226, HR October 9, 1999, *NJ* 1999, no. 195.
[57] See *Brief van Minister van Justitie betreffende de vaststelling en invoering van afd. 8.14.1 (verkeersongevallen) van het Burgerlijk wetboek, Kamerstukken 1998/99, 25759, nr. 5.*
[58] *Wet Medisch-wetenschappelijk onderzoek met mensen* (Medical Research (Human Subjects) Act), *Stb.* 1998, no. 161, Art. 7.

34. With regard to products liability, it hardly needs mentioning that the Dutch Civil Code has fully implemented the European Directive on products liability.[59] The general contents and ambit of this Directive need not be discussed here. However, it should be noted that the Dutch legislature has chosen to allow the 'state of the art' defence, and not to exclude non-pecuniary loss from the ambit of recoverable damages.

35. Apart from the strict liability on the basis of the European Directive, manufacturers' liability for defective or unreasonably unsafe products can in most cases also be based on the general fault liability for wrongful acts. The *Hoge Raad* has stipulated some 'hard and fast rules' in this respect. First, there is the very general rule that a manufacturer acts wrongfully if he markets a product that causes damage when used in a normal fashion and in accordance with its purpose. Second, there is the rule that a manufacturer is at fault if he does not assure himself of the absence of possible characteristics and flaws in his product.[60] These two rules combined provide a strong basis for fault-based liability in most of the actual products liability cases, where lack of inspection or lack of utmost care in production methods provide the main sources of danger.

g) Liability in Case of Uncertain Causation

36. In a substantial number of cases, proof of causation is decisive for the outcome of the litigation.[61] For example, where medical science has not yet supplied us with empirical evidence of a causal connection between a certain type of cancer and the exposure to certain chemicals, there is no proof of causation in a civil case either. And where there is no proof of causation, no liability can ensue.

37. On another level, where there is medical evidence - *e.g.*, supported by epidemiological statistics - of a causative link between a chemical and a certain type of cancer, this in itself does not provide sufficient evidence of causation in a specific case.[62] In these instances of difficulty of proving causation in the *concrete* case, case law has been struggling to balance the interests of the injured party and the party held liable. For example, although there is firm medical evidence of a causative link between exposure to asbestos and the occurrence of lethal mesothelioma, there can be an insurmountable difficulty in proving in what timeframe a specific employee contracted the mesothelioma. Considering that mesothelioma can be caused by the inhalation of a single asbestos crystal, certainty on the date of contraction may be of great importance: if employee C was employed by A for ten years and by B for fourteen years, and he was exposed to similar levels of asbestos dust in both periods, then the likelihood of contraction is not equal for both periods.

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[59] Including the recent Directive 99/34/EC, which brings primary products of agriculture and fishery under the umbrella of the Products Liability Directive 85/374/EEC.
[60] HR December 6, 1996, *NJ* 1997, no. 219, and HR October 22, 1999, *NJ* 2000, no. 159.
[61] See Giesen, *supra* note 55, p. 3 et seq.
[62] See Giesen, *supra* note 55, p. 347.

38. In theory, Dutch tort law might respond in three different ways. First, according to the procedural rule that the claimant has to prove the facts that serve as the foundation of his claim (Art. 177 Code of Civil Procedure), the employee is burdened with the proof of the date of inhalation of the fatal asbestos crystal. This would always result in a dismissal of the employee's claim, because the exact date is impossible to prove.

39. Second, as an exception to the rule, the court may reverse the burden of proof in order to alleviate the injured party.[63] This would result in joint and several liability of A and B, because neither employer would succeed in proving absence of causation. For the specific case at hand, this option has actually been chosen in Art. 6:99 BW. According to this provision on 'alternative causation', if the damage incurred may have resulted from two or more wrongful acts for each of which a different person is liable and if it has been determined that at least one of these acts did in fact cause the damage, each of these persons is obliged to compensate in full, unless he proves that the damage is *not* the result of his act.

40. In a landmark 1992 decision, the *Hoge Raad* ruled that there is no exception to the rule in Art. 6:99 BW in cases of mass tort. [64] This decision has opened the possibility of *full liability* of any one of a number of pharmaceutical companies that negligently produced a dangerous medicine. Because of the very long incubation period, none of the individual victims could prove which of these companies had produced the single medicine that they had used. The *Hoge Raad* decided that Art. 6:99 BW should be applied to this case, and it held that each and every victim could claim from any of several companies that had produced and marketed the medicine. This decision has provoked serious criticism from both industry and legal scholarship (as well as adherence from the more consumer-oriented lawyers), because the consequence of this decision is that a single manufacturer can be held liable for a *total* number of personal injuries although he could not possibly have caused them *all*.

41. The *Hoge Raad* has also developed other rules to allocate the burden of proof in cases of causative uncertainty. The most important of these rules is the *omkeringsregel*, which will be dealt with below.[65]

42. Third, the court might consider that, even if proof of causation cannot be established, the injured party should still be allowed to claim an amount from A and B that reflects *the probability of causation*. There are a growing number of proponents to this 'third way' solution, especially as a means of compensating damage that would otherwise not be compensated for lack of proof of *condicio sine qua non*. This solution is advocated very strongly under the heading of the theory of 'loss of a chance'.[66] Although there is, as yet, hardly any case law that firmly supports the possibility of

[63] This stance was taken in HR June 25, 1993, NJ 1993, no. 686. On that topic, with special regard to employers' liability for occupational disease, see Giesen, *supra* note 55, pp. 174-184.
[64] HR October 9, 1992, *NJ* 1994, no. 535.
[65] See marginal no. 50.
[66] See A.J. Akkermans, *Proportionele aansprakelijkheid bij onzeker causaal verband* (1996), p. 107 et seq.

sustaining claims for 'loss of a chance', a number of *Hoge Raad* decisions do seem to support the possibility of compensating the loss of a chance rather than dismissing a claim for insufficient evidence of causality.[67]

h) SPECIAL PROVISIONS IN THE AREA OF TRANSPORT LAW

43. Carriers' liability vis-à-vis passengers is generally considered to be of a contractual nature. As a rule, liability for personal injury is based on a presumption of fault. Consequently, the carrier is relieved from liability only if he can deliver proof of *force majeure*.[68] Liability for death and personal injury of passengers is limited to NLG 300,000 *per passenger* (approximately EUR 130,000).[69]

44. Transport operators' liability for personal injury of other persons than passengers (*e.g.*, resulting from collisions with trains, trams, subway trains), is not dealt with in special statutes. Therefore, the general rules on fault liability for wrongful behaviour apply.[70] Moreover, liability is not limited by any statutory caps. From case law, it follows that a public transport operator is vicariously liable for the driver's faults and, furthermore, that the driver's beahviour is judged according to a high standard of care vis-à-vis other traffic participants; one of the main rules in this respect is that the driver must *anticipate* errors from other traffic participants (including the victim).[71] In case of liability, the public transport authority is liable, on the basis of equity, for at least 50% of the damage of the victim, unless there was intent or recklessness bordering on intent on the part of the victim. Whether the driver has to pay more than 50% of the damage has to be established according to the normal rules regarding contributory negligence.[72]

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[67] See HR October 24, 1997, *NJ* 1998, 257 (ordering the calculation of the chances of success of a claim in an appeal procedure, that would have taken place if the barrister had not forgotten to promptly file the appeal). Further on that topic, see I. Giesen, *Bewijslastverdeling bij beroepsaansprakelijkheid* (1999), p. 72 et seq., p. 122 et seq.

[68] See Art. 8:81-82 BW (contract of transport of passengers in general); Art. 8:84 BW stipulates that these liability rules and the allocation of the burden of proof is mandatory. Similar rules apply to the contract of public transportation (Art. 8:105 BW), the contract of carriage of passengers by sea (Art. 8:504 BW), the contract of carriage of passengers by inland waters (Art. 8:974 BW), the contract of carriage of passengers by road (Art. 8:1150 BW). See also, but rather outdated and superfluous: Art. 1 *Spoorwegwet 1875* (Railways Act) and Art. 5 *Locaalspoor- en Tramwegwet 1900* (Local Railways and Tramways Act).

[69] See Art. 8:85, 110, 518, 983, 1157 BW, and the relevant Statutory Regulations (*Stb.* 1991, 105 et seq.).

[70] For a general outline thereof, see *supra*, marginal no. 24 et seq.

[71] See recently HR July 14, 2000, *RvdW* 2000, no. 177.

[72] HR July 14, 2000, RvdW 2000, 177. Note, however, that this decision concerned a tram (which operated among city traffic), and it is uncertain whether the same rule applies to trainservices (which are isolated from other traffic). Also note that it is unclear whether the same applies for accidents involving children younger than 15 years. It is likely that children are protected by the '100 percent' rule. On that subject, see *supra*, marginal no. 25.

45. Special provisions on strict liability of carriers of dangerous substances have been codified in the Civil Code,[73] simultaneously with the general strict liability that was dealt with above, marginal no. 21. The characteristics of this carriers' strict liability are as follows.

46. The strict liability is restricted to those dangerous substances that are listed in special Regulations. Liability cannot be invoked by a party to any contract of carriage, but merely by 'third parties'. Effectively, the contract of carriage has priority over strict liability for dangerous substances. Furthermore, liability is excluded completely if the damage:

- is the result of armed conflict, hostilities, civil war, insurgence, or natural events of a exceptional, unavoidable, and irresistible nature,
- was caused exclusively by an act or omission of a third person, not being a servant, representative or agent of the carrier, either with the intent to cause that damage or recklessly and with the knowledge that damage would probably result therefrom,
- was caused by the fact that the shipper or any other person did not comply with his obligation to inform the carrier with regard to the dangerous nature of the substance and if neither the carrier nor his servants, representatives, or agents knew or ought to have known that the substance was dangerous.

47. The strict liability for the carriage of dangerous substances is limited in accordance with the generally accepted concept of limitation of carrier liability. As far as limitation of sea and inland water carriers is concerned, the general national rules and international conventions on limitation apply.[74] Specific limitations have been put into force for road and railway carriers. For death and personal injury, the relevant limitation amounts are 7.2 million SDR (road carriers) and 18 million SDR (railway carriers) *per occurrence*.[75]

3) Burden of Proof

48. In general, the injured party has to prove a) the facts that give rise to liability,[76] and b) the causal connection between these facts and the damage incurred (*condicio sine qua non*).[77] Accord-

[73] See Art. 8:620-627 and 1030-1037 (strict liability for dangerous substances carried by sea or water), 8:1210-1220 (dangerous substances carried by road) and 8:1670-1680 (dangerous substances carried by railway).
[74] Both regimes are based on the 1988 Strassbourg CLNI Treaty.
[75] See Art. 6-7 *Uitvoeringsbesluit aansprakelijkheid gevaarlijke stoffen en milieuverontreiniging* (Liability for Dangerous Substances and Environmental Pollution Implementation Decree, *Stb.* 1994, no. 888). As the SDR (i.e., the IMF Special Drawing Rights; see www.imf.org) are currently valued at EUR 1.47, the equivalent in Euros would therefore be approximately EUR 10,617,000 and 26,544,000.
[76] Effectively, the legal qualifications of 'wrongful', 'imputatable', etcetera, do not need proof in the strict sense. See Giesen, *supra* note 55, pp. 14-15.
[77] See *supra*, marginal no. 36; compare Giesen, *supra* note 55, p. 112 et seq.

ing to Art. 177 of the Dutch Code of Civil Procedure, the burden of proof may be reversed by the court, if a special (statutory) rule so requires or ifreasonableness and fairness demand a reversal.[78]

49. As far as the proof of causation is concerned, the onus of proof introduces an element of risk allocation.[79] For example, if an employee suffers personal injury in the working place, the employer is liable unless he can prove that he provided adequate working place safety.[80] Consequently, if an employee suffers personal injury on the working place, the risk of there being an *unknown* cause of the injuries (and therefore of the cause of the accident as such) is thus placed on the employer. A similar risk allocation mechanism is used in traffic accidents involving bicyclists and pedestrians. According to Art. 185 Road Traffic Act, [81] the owner of the motor vehicle has the onus of proving *force majeure*, which implies that he should also prove the actual cause and events leading to the collision. If the exact facts cannot be established, the motor vehicle owner is liable by default.[82]

50. A different method of 'risk allocation' applied by the *Hoge Raad* is the *omkeringsregel*, the 'reversal rule'. In recent decisions, the *Hoge Raad* has stated as a general rule, that, if an act which constitutes an imputable non-performance of a contract or a wrongful act, is known to create the risk that a specific damage will occur, and if this risk subsequently materialises (so the damage occurs), the causal link between the damage and the act is *presumed* present, unless the liable party proves otherwise.[83] This rule has been applied, for instance, in traffic accident cases. A bicyclist who entered a one-way street in the wrong direction and subsequently collided with an on-coming bicyclist, alleged that his wrongful act (riding a bicycle in the wrong direction) did not cause the accident because there was enough space for the on-coming bicyclist to avoid collision. The court decided that the bicyclist at fault should prove absence of causation. In another case, a pedestrian was hit and severely injured by a motor vehicle, which had been driving at a speed well above the speed limit. The driver alleged that there was no causal connection between the speeding and the severity of the injuries, in the sense that the injuries would have been similar if the driver would not have been at fault. The court decided that the driver should prove his allegations.[84]

51. If this reversal rule is indeed as general a rule as it seems to be, the risk of unknown causes of damage might rest with any defendant who could have caused the damage.[85] However, the exact scope and effect of the reversal rule are still unclear. What the reversal rule does seem to achieve, however, is that a liable party cannot suffice by simply raising the defence of absence of causation

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[78] Giesen, *supra* note 55, p. 98 et seq. Note that exact proof of the *calculation* of the amount in damages is not required.
[79] Extensively on that topic, see Giesen, *supra* note 55, p. 443 et seq.
[80] Art. 7:658 BW; a possible exception to this rule is the proof that the accident was caused by reckless or gross negligent behaviour of the employee.
[81] On that topic, see *supra*, marginal no. 24 et seq.
[82] See HR November 17, 2000, *RvdW* 2000, no. 234.
[83] HR June 16, 2000, *NJ* 2000, no. 584 and HR January 26, 1996, *NJ* 1996, no. 607.
[84] HR November 16, 1990, NJ 1991, no. 55. Compare Giesen, *supra* note 55, p. 139 et seq.
[85] On this topic, see C. Drion, Naar Haagse toestanden in het aansprakelijkheidsrecht?, 2000 *NJB* 1956-1959, Giesen, *supra* note 55, p. 116 et seq. See also HR January 19, 2001, *RvdW* 2001, no. 34.

and thus leaving the injured party without compensation. If the effect of the reversal rule is that, whenever the nature of the injuries strongly points towards a causal connection with the wrongful act, it is up to the injurer to prove the absence, then there is a lot to be said in favour of this rule.

52. A special rule on the proof of causation is concerned with alternative causes (Art. 6:99 BW). See *supra*, marginal no. 39.

4) Contributory Negligence

53. Contributory negligence is dealt with in the process of assessment of the quantum of damages. The general conditions to the contributory negligence defence have been laid down in Art. 6:101 BW, which applies whenever a debtor is legally obliged to pay damages, *i.e.*, in case statutory law (notably the Civil Code itself) states that an obligation to pay damages exists. Generally speaking, the obligation to pay damages may arise in case of a breach of contract and in case of tortious liability (including strict liability[86]).[87]

54. Art. 6:101, Par. 1, BW reads:

> When the damage is partly caused by an occurrence that can be imputed to the injured party, the obligation to pay compensation is reduced by apportioning the damage between the injured party and the liable party in proportion to the degree in which the occurrences that can be imputed to the parties have contributed to the damage, provided that account is taken of the disparity in the seriousness of the respective faults, or other circumstances of the case, to decide whether fairness demands that an alternative apportionment or full recovery takes place or that the obligation to pay lapses.[88]

55. In a strict sense, contributory negligence is defined as the imputable failure of the injured party to take *reasonable care* of his own interests.[89] But the ambit of Article 6:101 BW is in fact much wider, because it merely requires that the damage is "partly caused by an occurrence that can be imputed to the injured party". Consequently, not only negligent acts of the injured party himself can constitute contributory negligence, but also the acts of persons for whom the injured party bears vicarious responsibility (*e.g.*, *respondeat superior*). Moreover, on the basis of Art. 6:101 BW, the injured party generally bears the risk of strict liabilities on his part (*e.g.*, defectiveness of a tangible object in possession of the injured party that in part caused the damage).[90]

56. The duty of the injured party to take reasonable care of his own interests implies that contributory negligence may also play a part in increasing the damage (either at the moment the event takes place, afterwards, or even beforehand). As a result, the injured party has to act reasonably, in view

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[86] See C.J. van Zeben, *supra* note 32, p. 352, and HR March 7, 1980, *NJ* 1980, no. 353.

[87] See further Mark H. Wissink, Willem H.van Boom, 'The Netherlands', in: U. Magnus (ed.), *Unification of Tort Law: Damages*, The Hague: Kluwer Law International 2001, p. 143 *et seq. Cf.* Jaap Spier (supra note 15), p. 115.

[88] Par. 2 states: "If, in the application of paragraph 1, the obligation to pay compensation concerns damage to an object that is under the control of a third party on behalf of the injured party, occurrences imputable to the third party will be imputed to the injured party."

[89] See, *e.g.*, *Asser-Hartkamp I*, no. 448 *et seq*.

[90] See A.J.O. van Wassenaer van Catwijck, R.H.C. Jongeneel, *Eigen schuld en mede-aansprakelijkheid*, (1995), pp. 8-10.

of the incident that gives rise to the tortfeasor's liability, in order to minimise his damages. If he fails to do so, generally speaking, the increase in damages cannot be claimed. The basis of this duty to minimise one's own damages is thought to be Article 6:101 BW.[91]

57. The framework of Art. 101 is quite flexible, in order to give the courts ample room for any desirable outcome. However, the primary focus of the legislature seems to be the apportionment of damages. As a rule, this primary apportionment is based on the balancing of the parties' respective *causal contribution* to the occurrence of the accident or the increase of the damage. However, the courts can give priority to the alternative of full recovery or a complete lapse of the obligation to pay damages, if fairness so demands in the specific circumstances. This alternative, equitable apportionment is called *billijkheidscorrectie*, *i.e.*, an equitable adjustment of the outcome of the primary apportionment.

58. With regard to specific categories of personal injury, the victim is thoroughly protected against the contributory negligence defence, even if his behaviour amounts to gross negligence. For example, employer liability for industrial accidents and occupational disease is not reduced if the injury was in fact caused in part by the employee's sheer *negligence*. So, if the employer is liable, he is obliged to compensate the employee in full. The employee's claim will only be dismissed if his *intentional act, or wilful reckless act substantially contributed* to his injury.[92]

59. Furthermore, as was discussed *supra*, marginal no. 25, 26, and 44, the liability of motor vehicle owners for personal injury of bicyclists and pedestrians is in principle not reduced below a fixed percentage (50% in case of an injured party over fourteen years, 100% in case of an injured party under fourteen years), even if the injured party's contributory negligence exceeded or levelled that percentage.

5) Recoverable Damages in Cases of Personal Injury

a) General Remarks

60. The Dutch Civil Code contains some general rules on the recoverable heads of damages and the assessment thereof. Generally speaking, the courts have a wide margin of discretion with respect to the award and assessment of damages. For example, the assessment of non-pecuniary loss is a matter of 'fairness' (Art. 6:106 BW). Moreover, the court is not bound by the ordinary civil procedure rules of evidence when establishing the types and amounts of damages to be awarded. So, also in this respect, a wide margin of appreciation is available.

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[91] See, *e.g.*, C.J. van Zeben, *supra* note 32, p. 351, *Asser-Hartkamp I*, no. 453.

[92] Art. 7:658 BW; HR June 20, 1996, *NJ* 1997, no. 198 shows that this exception hardly ever materialises, because - in the perception of the Supreme Court - wilfulness is only established if it is proven that the reck-

61. With regard to personal injury, the aim of the law of damages is *full* compensation of the damage suffered, both in respect of pecuniary loss and non-pecuniary loss. This implies that the actual damage must be compensated, no more and no less. Effectively, all *pecuniary* loss is to be compensated, including the cost of medical treatment, reasonable cost of supplemental care, increased expenses due to the physical impairment, actual loss of income, loss of future increase of income (*e.g.*, if the injuries cancel possible career prospects), and other (future) damage.

62. As far as future damages are concerned, the courts are allowed to award damages either as a lump sum or as a periodic allowance (Art. 6:105 BW). In personal injury legal practice, both injurer and injured party generally prefer the payment of a lump sum (partly for purposes of avoiding income tax). The payment for future damages by means of a lump sum is calculated on the basis of reasonable projections of how the future would have evolved if the injury had not occurred.[93]

63. Art. 6:96 BW expressly states that pecuniary loss also includes reasonable costs, incurred in order to prevent or limit damage which may reasonably be expected to result from an occurrence for which another person is liable, to establish liability and the amount of damage, or to receive voluntary payment by the liable party.[94] However, legal fees and judicial costs incurred in the course of civil proceedings are not in every respect compensated in full, because a specific statutory regime with fixed amounts applies. The ambit of Art. 6:96 BW is quite wide: according to case law, it is also to be applied to *any* obligation to pay a sum of money.[95]

64. According to Dutch law, the obligation to pay damages is of a compensatory nature. Punitive, exemplary, or nominal damages do not exist as a separate type of damages. However, factors such as the degree of blameworthiness on the part of the liable party may be taken into account to a certain extent within the framework of Article 6:98 (causation)[96] or 6:109 (mitigation)[97] and thus affect the amount of damages due.

b) IMPUTATION OF UNFORESEEABLE DAMAGES

65. In Art. 6:98 BW, the second stage of causation is codified (see the remarks *supra*, marginal no. 9 et seq.). The importance of Art. 6:98 BW should be emphasised here. Case law strongly suggests that 'the tortfeasor should take the victim as he finds him', which basically means that, in personal injury cases, the injurer can be held liable even for injuries of which the *extent*, *duration*, *gravity*, and *nature* are quite unexpected or unforeseeable. The victim of personal injury is not held by a

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less nature of the act, and all possible consequences that it would entail, had penetrated the conscious mind of the employee moments before the accident.

[93] The Civil Code calls this the *afweging van goede en kwade kansen* ('taking into account good and bad chances'; Art. 6:105 BW). See for this process 'in action' HR May 15, 1998, *NJ* 1998, no. 624; HR January 14, 2000, *NJ* 2000, no. 437.

[94] Note that both the *incurring* and the *amounts* of these costs must be reasonable.

[95] Effectively, it may also be invoked by third party claimants (on that topic, see *infra* marginal no. 68). See HR December 5, 1997, *NJ* 1998, no. 400.

[96] On Art. 6:98 BW, see *supra* marginal no. 9 et seq.

standard, to which he should comply. Effectively, if, in a specific case, the injuries are aggravated by a predisposition of the victim, the liable party should nevertheless compensate in full.[98]

c) NON-PECUNIARY LOSS

66. In case of physical injury, an amount in damages for *non-pecuniary* loss is awarded too (Art. 6:106 BW). Non-pecuniary loss is assessed in accordance with the principle of fairness. Relevant factors include, *inter alia*: the nature, seriousness, and permanency of the injuries; the extent and duration of necessary medical treatment; the extent to which the claimant will be able to come to terms with what happened; and the nature of the liability and the degree of fault on the part of the liable party.[99] When determining the amount in damages, the court will generally look at awards in similar cases by other Dutch courts and it may also take into account awards by foreign courts.[100] Although the courts have a wide margin of discretion in assessing the amount in damages for non-pecuniary loss, in practice a certain standardisation takes place with respect to personal injury cases on the basis of the systematic overview of case law published in the legal periodical *Verkeersrecht.*

67. The Dutch courts are not renowned for their generosity when it comes to the *amounts* in compensation for non-pecuniary loss. Although, in the recent past, the amounts in damages seem to have increased, they still fall well below the European average.[101]

d) THE CIRCLE OF THIRD-PARTY CLAIMANTS

68. Whenever personal injury is involved, one must beware of the limitations imposed by the Civil Code on claims for damage suffered by thord parties as a consequence of the injury. In essence, only the third-party claims explicitly mentioned in Art. 6:107 (third-party expenses incurred because of personal injury), 107a (employer's recourse for sickness benefits) and 108 (specific claims of dependants in case of death) are allowed.

69. In case of personal injury, Dutch law, as a rule, only allows for a claim by the injured person himself. Third-party claims are considered blocked by Art. 6:107 BW. This article states:

"If a person suffers physical or mental injury as a result of an event for which another person is liable, that other person is not only obliged to repair the damage of the injured person himself, but also to indemnify a third person for costs (...) incurred for the benefit of the injured, which the latter, had he incurred them himself, would have been able to claim from that other person."

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[97] On Art. 6:109 BW, see *supra* marginal no. 11 et seq.
[98] On the topic of predisposition, see *infra*, marginal no. 92, and especially footnote 136.
[99] See HR November 17, 2000, *RvdW* 2000, no. 235.
[100] See HR July 8, 1992, *NJ* 1992, no. 714, and HR November 17, 2000, *RvdW* 2000, no. 235.
[101] On that topic, see W.V.H. Rogers (ed.), *Non-pecuniary loss*, forthcoming.

70. Art. 6:107 BW was basically meant to be a restatement of Art. 1407 of the 1838 Civil Code, and, according to consistent case law, the latter article only allowed for recovery by the injured party, and only for damages suffered by that person.[102] When introducing Art. 107, the legislature explicitly intended - from a socio-economic point of view - not to augment the total financial burden of those responsible for injury and their insurers in comparison to the legal situation that existed under the 'old' Civil Code. Thus, it is assumed that, for instance, consequential damages suffered by employers as a result of physical injury of their employees cannot be claimed in any way. Even if the wrongful act that led to the injury was also wrongful *vis-à-vis* the employer, any claim of the employer is blocked by Art. 6:107 BW.

71. The only novelty introduced by Art. 6: 107 BW is that damage *par ricochet* can now be claimed by third parties themselves, but only in as far as the injured party could have claimed the damage himself had he himself suffered this damage.[103] As far as a claim based on Art. 6:107 is concerned, it is sufficient that the injurer acted wrongfully *vis-à-vis* the injured party. It is irrelevant whether a duty of care existed *vis-à-vis* the third party.

72. In case of personal injury, the recently enacted Art. 6:107a BW allows an employer, who is legally obliged to continue payment of wages to his injured employee (who is unable to work), to recover these payments from the liable party.

73. In case of death, Article 6:108 allows certain persons who were dependent on the deceased to claim damages as a result of the loss of maintenance, *e.g.* spouses, non-marital partners, minor children.[104] Art. 6:108 also allows the recovery of burial expenses by any person who incurred these expenses.

74. As a rule, claims for emotional shock and loss of consortium are barred because an award for these third party damages would be inconsistent with the exhaustive nature of the regime on third party claims.[105] However, both in scholarly writing and case law (of several lower courts), there is a growing opposition against withholding bereaved family members any form of compensation for their loss.[106] This has resulted in an announcement by the Ministry of Justice that a change of the

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[102] HR April 2, 1936, *NJ* 1936, 752; HR January 10, 1958, *NJ* 1958, no. 79; HR June 16, 1972, *NJ* 1972, no. 375, HR December 12, 1986, *NJ* 1987, 958. See also *Asser-Hartkamp I*, no. 472.

[103] See HR 28 mei 1999, *NJ* 1999, no. 564.

[104] This includes a claim for the compensation for loss of services by the deceased who maintained the common household.

[105] The law in this area is as yet unsettled. HR April 8, 1983, *NJ* 1984, 717, denied a claim of a mother whose child died in a car accident. However, in this case the cause of the damage was said to have been the death of the child and therefore the claim was excluded by (the predecessor of) Art. 6:108. Although the parliamentary proceedings with regard to this subject are quite vague on the subject, they seem to allow (*i.e.*, they seem not to bar) claims for non-patrimonial damage in case of severe shock resulting from witnessing or being confronted with a casualty. See C.J. van Zeben, *supra* note 32, p. 1274.

[106] For an overview, see S.D. Lindenbergh, Schrik, onrechtmatigheid en schade, [1997] *RM Themis* 187 et seq., S.D. Lindenbergh, *Smartengeld* (1998), pp. 202-219 and A.J. Verheij, Shockschade, [1999] *NJB* 1409 et seq.

Civil Code is contemplated, in order to allow claims for a *fixed sum* in non-pecuniary damages for bereavement; the figure that was most recently mentioned is EUR 10,000.[107]

6) Recoverable Damages in Case of Death

75. As stated supra, marginal no. 73, a restrictive approach is adopted by the Dutch legislature. In effect, dependants of the deceased have a claim for loss of maintenance. Furthermore, Dutch law in principle does not sustain claims for (non-pecuniary) loss connected to bereavement or shock.[108]

7) Extent and Means of Compensation

76. As far as the law of damages in personal injury cases is concerned, there are no particular *thresholds* to compensation. 'Caps' can be found in transport law (see *supra*, marginal no. 43 et seq.), and to some extent in Art. 6:109 BW, which grants the courts the general authority to reduce the amount in damages (see *supra*, marginal no. 11 et seq.).

77. As I already mentioned *supra*, marginal no. 62, the courts are allowed to award *future damages* either as a lump sum or as a periodic allowance (Art. 6:105 BW). In personal injury legal practice, both injurer and injured party generally seem to prefer the payment of a lump sum (partly for purposes of avoiding income tax). The payment for future damages by means of a lump sum is calculated on the basis of reasonable projections of how the future would have evolved if the injury had not occurred.[109]

78. *Statutory interest* over the amount in damages is due counting from - roughly speaking - the moment of the incident that led to personal injury or death.[110] No formal requirements (*e.g.*, a formal letter to the injurer or a subpoena) are set. The current interest rate is 8 percent.[111]

8) Importance of Third Party Liability Insurance for the Victim

79. Generally speaking, there is no compulsory liability insurance in the Netherlands. However, most consumers and businesses have some form of liability insurance. The coverage is adequate for single personal injury cases: most insurers offer standard policies covering 1 to 5 million EUR per occurrence. In case of mass torts and disastrous accidents, the coverage is clearly inadequate.

80. The compulsory motor vehicle insurance scheme obliges vehicle owners to contract for an insurance coverage with a minimum of NLG 2 million (approximately EUR 900,000) per accident or occurrence.[112] The average cover amounts to NLG 5 million (approximately EUR 2.3 million).

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[107] See memorandum by the Minister of Justice, June 20, 2001, *Kamerstukken II, 27.400 VI, nr. 70*.
[108] See *supra*, marginal no. 74.
[109] The Civil Code calls this the *afweging van goede en kwade kansen* ('taking into account the good and bad chances'; Art. 6:105 BW).
[110] Art. 6:119, 120 BW in conjunction with Art. 6:83 sub b BW.
[111] See *Stb.* 2000, no. 27.

81. As a rule, the mere existence of a liability insurance contract between a potential injurer and the insurer does not confer rights upon the victim. In principle, the victim has a claim vis-à-vis the injurer, and the injurer in turn has a contractual claim vis-à-vis the insurer to indemnify him. In case of insolvency of the injurer, the proceeds of the insurance policy should be handed over to the receiver in the insolvency procedure, in order to distribute the proceeds evenly among all creditors. This would leave the victim without (full) compensation. Therefore, in Dutch law, a number of solutions to this problem have been enacted or proposed.[113]

82. First, the compulsory motor vehicle insurance scheme grants victims of motor vehicle accidents a direct claim vis-à-vis the motor vehicle insurance company. This direct claim, also referred to as the *action directe*, gives the victim paramount priority in case of insolvency of the injurer, simply because the claim is not necessarily directed against the injurer's property. Defences that the insurer might raise against his contractual counterpart (*e.g.*, set-off, suspension of coverage because of non-payment of premiums, et cetera) cannot be raised vis-à-vis the victim.[114]

83. In other personal injury cases, the victim has priority over the insurance proceeds (Art. 3:287 BW), which in theory ensures that the victim is compensated. However, in practice, this priority is not effective because it does not avoid reductions for bankruptcy trustee's fees and other insolvency costs. Effectively, the priority stipulated in Art. 3:287 BW does not provide sufficient legal protection against the injurer's insolvency.

84. Sometimes, the insurance contract itself provides that the insurance company is obliged (or allowed) to pay the proceeds directly into the hands of the victim. However, it is not clear whether such a contractual arrangement can evade the priorities set by the insolvency procedure.[115]

85. In the bill on private insurance contract law currently pending before parliament, a new form is chosen for legal protection of dependants (in case of death) and victims (in case of personal injury).[116] Under this proposal, dependants and victims can exercise the contractual claim of the injurer

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[112] See *Besluit bedragen aansprakelijkheidsverzekering motorrijtuigen*. The compulsory insurance in case of transport of dangerous substances by road is NLG 15 million (approximately EUR 6.8 million). See Art. 2-2a *Besluit bedragen aansprakelijkheidsverzekering motorrijtuigen*.

[113] See K.W. Brevet/C.W.M. Lieverse, Verzekering en faillissement: de positie van de benadeelde en de verzekeraar als de schadeveroorzaker failliet gaat, in: Chr. A. Baardman e.al. (eds.), *Verzekering en faillissement* (1996), p. 1 et seq.

[114] Art. 6 WAM (Motor Liability Insurance Act). On this topic, see, *e.g.*: C.P. Robben, *De action directe en de Wet Aansprakelijkheidsverzekering motorrijtuigen* (1993), W.H. van Boom, Hoe geprivilegieerd is het voorrecht op de verzekeringspenning?, [1994] *WPNR* 6151, 635 et seq., W.H. van Boom, Wie profiteert van het voorrecht op de vordering uit de WA-polis? Opties voor de wetgever, [2000] *WPNR* 6394, 195 et seq., C.C. van Dam, E.A Waal, De directe actie in titel 7.17 BW, in: T. Hartlief/M.M. Mendel, *Verzekering en maatschappij* (2000), p. 105 et seq.

[115] On that debate, see: C.P. Robben, Het voorrecht van artikel 3:287 BW als action directe in boek 7.17 BW?, [2000] *Tijdschrift voor Insolventierecht* 41-48.

[116] Art. 7.17.2.9c, bill no. 19 529.

against the insurance company, if and insofar the injurer has a claim against his insurance company.[117]

Part II. Cases

1. Paraplegic

86. D1 is liable on the basis of Art. 185 WVW.[118] D2 is liable on the basis of Art. 6:162 BW. Both liabilities (joint and several tortfeasors) are covered by D1's compulsory motor insurance.[119] P can claim the reasonable cost of medical aid, the reasonable cost of home care, the necessary adjustments to P's house.[120] The amount in damages for non-pecuniary loss will probably be within the range of EUR 55,000 (paraplegia) to 100,000 (quadriplegia).[121]

87. P can claim compensation for loss of income, including future income. As set out *supra*,[122] the court will have to make reasonable projections of how the future would have evolved if the injury had not occurred. However, it is difficult to predict the future of a 16-year-old. There is no decisive case law on the question of how P's loss should be calculated, but the generally accepted approach would be to estimate the chances of P in succeeding in his medical studies, and getting employed as a doctor.[123] This process of weighing 'goede en kwade kansen', good and bad future chances, involves research into the average development of average teenagers.[124] But if the liable party can persuade the court that P in fact was very bad at studying and has neither perseverance nor brains, the outcome might be less favourable to P.[125] According to the case law, the courts should look at the 'evidence' with some leniency towards the victim, because he has been made unable to prove the real future.[126]

88. Relatives can claim reasonable expenses for the benefit of P, such as travel expenses. If the relatives have chosen to care for P themselves instead of hiring professional help, they can claim

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[117] On this proposal, see J.G.C. Kamphuisen, De directe actie, in: J.H. Wansink et al., *Het nieuwe verzekeringsrecht* (2000), p. 159 et seq.
[118] See *supra*, marginal no. 24.
[119] See *supra*, marginal no. 80.
[120] Note that most of these heads of damage are covered (in part) by social security and private insurance. Any benefits received are deducted from a claim in tort, but the injured party can naturally still claim from the tortfeasor the heads of damage that were *not* covered by social security or the private insurance.
[121] See the case law dealt with in M. Jansen, *Smartengeld*, 14th Ed. (2000), no. 393 et seq. Note that the Dutch amounts for non-pecuniary loss are quite low, that is, from a European perspective. On that topic, see W.V.H. Rogers (supra note 101).
[122] See marginal no. 62.
[123] See J.M. Barendrecht/H.M. Storm, *Berekening van schadevergoeding* (1995), p. 177 et seq.
[124] This would lead to the conclusion that the hypothetical future income is based on the average amount mentioned in the case, and not on the top salaries of the top-ten doctors in that field.
[125] Cf. District Court Groningen April 18, 1980, *VR* 1981, no. 4 and the case law mentioned by Barendrecht/Storm, supra note 123, pp. 194-198. Note that the court should not be persuaded merely by the allegation that P was a bad student with diminished chances of success. See HR May 15, 1998, *NJ* 1998, no. 624; HR January 14, 2000, *NJ* 2000, no. 437.

the average cost of professional help (without the need of establishing actual loss of income).[127] It is debatable whether relatives can also claim loss of income due to their visiting P in hospital.[128]

2. Knee operation

89. If the doctor has not performed his obligation according to the professional standard, he can be held liable by the patient. The hospital where the operation took place is vicariously liable for the doctor's malpractice.[129] Together, they are jointly and severally liable for the personal injury.[130]

90. The patient can claim the cost of the additional operation and further necessary treatment.[131] She can also claim the reasonable cost of professional household help,[132] as well as a small amount in non-pecuniary loss, possibly EUR 1,000 to 2,000. Case law seems to indicate that the amount in non-pecuniary damages increases substantially (up to EUR 20.000) if the patient suffers permanent disability of the knee joint as a consequence of accidents or malpractice.[133]

91. The children and the husband are probably not entitled to any claim. Generally speaking, Dutch law - as it stands - does not allow such third-party claims (*e.g.*, for emotional stress, grief, et cetera caused by the injuries or disruption of family life[134]).[135]

92. If it cannot be established whether the injuries are either the result of malpractice or the consequence of the patient's disposition,[136] the following should be noted. If it is clear (or undebated, or proved) that the doctor actually *was* at fault, and that his malpractice in general is known to create the risk of injuries as were actually suffered by the patient, then the *omkeringsregel*, the 'reversal rule' applies.[137] According to this rule, the doctor has to prove the absence of *condicio sine qua non* between his malpractice and the injuries. Although it is not impossible to prove this absence, in most cases it is quite difficult.

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[126] See HR May 15, 1998, *NJ* 1998, no. 624. However, this does not force the court to automatically give the victim 'the benefit of the doubt'. See, in this sense, HR January 14, 2000, *NJ* 2000, no. 437.
[127] HR May 28, 1999, *NJ* 1999, no. 564.
[128] On that topic, see: A.R. Bloembergen, case note under *NJ* 1999, no. 564; S.C.J.J. Kortmann, case note in [1999] *Ars Aequi*, 656 et seq., S.D. Lindenbergh, case note in [1999] *NTBR* 227 et seq., W.H. van Boom, case note in [1999] *A&V* 85 et seq.
[129] See *supra*, marginal no. 31 et seq.
[130] Art. 6:102 BW.
[131] Note that the restrictions mentioned *supra*, note 120, apply here as well.
[132] But it cannot be ruled out that, if the father takes over the household work or pays for professional help, he can himself claim this amount. See Art. 6:107 BW and HR May 28, 1999, *NJ* 1999, no. 564.
[133] See the overview of case law dealt with in M. Jansen, *Smartengeld*, 14th Ed. (2000), p. 180.
[134] On that specific topic, see HR September 8, 2000, *RvdW* 2000, no. 180. The Court decided, *inter alia*, that Art. 8 of the Rome Human Rights Convention as such does not support claims for non-pecuniary loss in case of personal injury of a family member.
[135] On third party claims, see *supra*, marginal no. 68 et seq.
[136] Note that the same does not apply when the complications have been concurrently caused by both the malpractice and the mother's *predisposition* (*i.e.*, a physical state that renders the victim more prone to the specific injury than an 'average' victim). In that case, the 'tortfeasor has to take the victim as he finds it'. Consequently, the doctor would be liable in full, but in case of permanent disability, the predisposition may be taken into account in the calculation of future damages. See HR March 21, 1975, *NJ* 1975, no. 372; HR February 8, 1985, *NJ* 1986, no. 137.

3. Loss of maintenance

93. The death of a top lawyer entitles the dependents (*in casu*, the spouse and 12-year-old daughter) to compensation for the loss of maintenance.[138] In assessing the amount in damages, Dutch law follows the 'alimony' approach. This basically means that the amount in compensation should, on the one hand, reflect the amount that the deceased *used* to spend on his dependents and should, on the other hand, be assessed in accordance with the total financial resources of the dependents.[139] So, if the family was used to a holiday home on the Riviera, this expense should be compensated as well (this amount was usually spent by the deceased on his dependents). Because the total financial strength of the dependents is taken into account as well, which effectively means that the claim for loss of maintenance is not a normal claim for damages. If the dependents for instance enjoy the proceeds of a life insurance as a result of the lawyer's death, this sum is in most cases deducted from the claim for loss of maintenance. A life insurance usually ameliorates the dependents' financial strength, and should therefore be deducted.[140] This, of course, creates a windfall for the liable party,[141] and there has been a lot of criticism to this approach. However, it has recently been reaffirmed by the *Hoge Raad*.[142]

94. As far as the calculation of future loss of maintenance is concerned, the same principles apply as set out *supra*, marginal no.62. Compensation for loss of maintenance is usually covered by a lump sum.[143]

95. Neither the spouse nor the daughter can claim non-pecuniary loss for bereavement.[144] However, if the recent proposals of the Dutch Ministry of Justice had already been enacted, both the spouse and the daughter would have been entitled to the fixed amount of EUR 10,000.[145]

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[137] See *supra*, marginal no. 50.
[138] See *supra*, marginal no.73 and 75.
[139] The amount cannot fall below the statutory alimony.
[140] See, e.g., HR 19 juni 1970, *NJ* 1970, no. 380.
[141] The windfall is in fact caused by the fact that according to Dutch law, *life* insurers do not have a right of recourse against the liable party. See W.H. van Boom, *Verhaalsrechten van verzekeraars en risicodragers*, (2000), pp. 53-54.
[142] HR February 4, 2000, *NJ* 2000, no. 600.
[143] Art. 6:105 BW. On that topic, see *supra*, marginal no. 62.
[144] See *supra*, marginal no. 74.
[145] See *supra*, marginal no. 74.