Tortious and Contractual Liability from a Dutch Perspective

Thijs Beumers / Willem van Boom[*]

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Part I – General Part

I. General Introduction

1 **[223]** In Dutch law, the differences and demarcation between the law of contract and the law of tort are not a matter of much controversy in legal literature and case law, and neither is the protection of the interests of third parties to a contract. In our opinion there are three reasons for the absence of extensive debate on these matters.

2 **[224]** Firstly, the law of damages for breach of contract and tort were to a large extent harmonised with the enactment of the New Dutch Civil Code (DCC) in 1992. For example, the same rules of recoverability of losses apply in cases of tort liability and contract liability. Also, the rules of prescription for tort and contract claims are largely similar nowadays. As a result, it will in many situations be immaterial whether liability is based on tort or contract, as both grounds will yield the same outcomes for an innocent party.[1] Furthermore, it seems that over the last twenty years, the substance of tort law and contract law have been creeping ever closer to one another. For instance, in both contract and tort law, the more or less identical concepts of 'duty of care' have been developed as bases for liability. Also, the categories of legal interests protected by contract and tort are similar. For instance, Dutch tort law is quite lenient as far as the protection of pure economic interests in tort law is concerned (although this naturally does not mean that any claim for pure economic loss will be sustained, it does mean that such claims are not categorically barred as seems to be the case in some other legal systems). As a result, pure economic interests are protected in contract law as well as in tort law.

3 Secondly, in Dutch law, a claimant may freely elect between basing his claim on tortious liability or basing it on contractual liability, when both can be applied to his case. Dutch law adheres to the principle of concurrence and does not apply the principle of *non-cumul*. The principle of concurrence of actions gives the claimant the possibility to choose whatever legal basis is the most favourable in order to hold the respondent liable. In other words, the claimant is not restricted by law to invoke either tortious or contractual liability in

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[1] *CA Boukema*, Samenloop (1992); *AG Castermans & HB Krans*, Samenloop (2019).

certain situations.[2] In exceptional cases, however, the Supreme Court has held that rules concerning contractual liability are to be applied even when the obligee, the innocent party, based his claim on tortious liability.[3] By giving the innocent party the freedom to elect the ground of liability, but subsequently applying legal rules, either contractual or specific extra-contractual rules, regardless of the chosen legal ground, the differences **[225]** between the law of contract and the law of tort are diminished even further. As a consequence, the differences and demarcation between tort and contract also becomes less problematic.

4 Thirdly, the interests of third parties in a contract between others and the possibility to hold contracting parties liable to third parties are well-settled in Dutch law, both in the Civil Code and in case law.

5 As a result, the issues addressed in this contribution, as well as the answers to the two cases, are fairly uncontroversial in Dutch law. Nevertheless, we hope that our paper contributes to the comparative debate. In the first part of this article, we discuss *culpa in contrahendo* (sec II). Then, we discuss the *scope of protection* offered by contractual and extra-contractual norms in Dutch law, in particular as regards third parties (sec III). Subsequently, we discuss the requirement of *fault*, both in tort and in contract law. In this section, we also explicitly discuss the role of agents (sec IV). Finally, we discuss the Dutch law of *damages*, which applies to both contract and to tort (sec V). In the second part we solve the two cases.

II. Culpa in contrahendo

6 The Dutch Civil Code does not have a specific provision governing pre-contractual obligations.[4] This means that negotiations are governed by the common principles of the law of obligations and the specific duties of care developed in case law.

7 The pre-contractual stage can be said to begin when a party addresses the other party with the intent of negotiating a deal.[5] In principle, a party in a negotiation has the freedom to break off the negotiations at any time and for any reason. However, there are some exceptions to this general rule.[6] This was first acknowledged by the Supreme Court in the 1957 case of *Baris v Riezenkamp*.[7] In this judgment the Supreme Court held that parties to a negotiation enter into a legal relationship that is **[226]** governed by the principle of good faith. This is to be understood as a test based on the principles of reasonableness and fairness (*redelijkheid en billijkheid*), now codified in art 6:2 (1) DCC. Furthermore, parties entering into negotiations should conduct themselves in accordance with the 'norms of proper societal conduct' (art 6:162 DCC refers to liability for 'conduct contrary to the unwritten standard of conduct seemly in society', the so-called *maatschappelijke betamelijkheid*); failing to conduct oneself in a manner in accordance with these norms may expose individuals to tortious liability.

8 Given the norms of reasonableness and fairness on the one hand and the norms of proper societal conduct on the other, parties involved in contract negotiations are required to have their behaviour guided in part by each other's legitimate interests and expectations.[8] This is the closest Dutch law comes to a proper doctrine of *culpa in contrahendo*.

9 In the 1982 seminal judgment *Plas v Gemeente Valburg,*[9] the Supreme Court seemingly divided the negotiating process into three distinct stages. In the first stage, parties are free to break off the negotiations and, as such, that termination cannot lead to a claim of damages. In the second stage, each party is still free

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2 *R de Graaff*, Concurrent Claims in Contract and Tort: A Comparative Perspective, European Review of Private Law (ERPL) 2017, 25/(4) 701–726.

3 See recently: Hoge Raad (Supreme Court, HR) 17 November 2017, Nederlandse Jurisprudentie (NJ) 2017/438.

4 Such a rule was proposed in 1986 (art 6.5.2.8a) but was never introduced. The Supreme Court later adopted the text of the draft article in HR 23 October 1987, NJ 1988/1017 (*VSH v Shell*).

5 *YG Blei Weissman*, GS Verbintenissenrecht, art 6:217 BW, note 1.32 (online).

6 *A Pitlo/JLP Cahen*, Verbintenissenrecht (2002) no 225.

7 HR 15 November 1957, NJ 1958/67.

8 See eg HR 23 October 1987, NJ 1988/1017 (*VSH v Shell*); HR 14 June 1996, NJ 1997/ 481 (*De Ruiterij v MBO*); HR 12 August 2005, NJ 2005/ 467 (*CBB v JPO*).

9 HR 18 June 1982, NJ 1983/ 723.

to break off negotiations but in doing so must compensate so-called reliance cost (ie expenses incurred in reliance of the contract ultimately being concluded) of the other party.[10] In the third and final stage, breaking off the negotiations is contrary to the principle of reasonableness and fairness, and the party doing so will be under an obligation to pay compensation for reliance damage and – in some cases – expectation damage of the other party. Since 1982, the rule of *Plas v Gemeente Valburg* has been further refined in case law. Some have argued that the separation of the pre-contractual phase in different stages is artificial and that expectation damages are only to be awarded in the case of the conclusion of a contract. The Supreme Court has insisted, however, that the different stages of negotiations are more fluid than fixed in nature; yet, it has seldom awarded expectation damages.

III. Scope of Protection

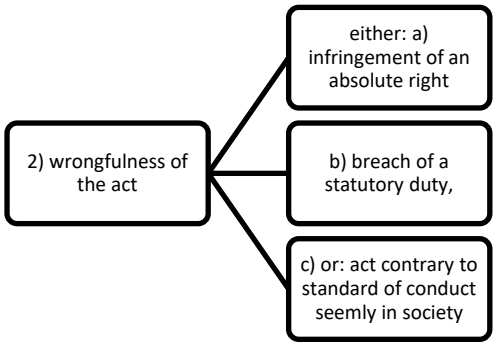
A. Introduction

10 **[227]** In this section, we discuss the scope of protection of Dutch tort and contract law. Our focus lies on the protection of third parties in a contractual relationship. It will be demonstrated that Dutch tort law, especially the general tort of art 6:162 BW, has potentially a very broad scope of protection and provides a thorough protection for third parties. Dutch law knows the principle of privity of contract, which entails that only the contracting parties are bound by a contract and, subsequently, that only they are able to successfully claim damages for breach of contract. However, there are some exceptions to this general rule.

B. Tort: 'purpose of the rule'

11 Article 6:162 DCC, the core provision on tortious liability for wrongful behaviour, defines three types of wrongful act: the infringement of a subjective right, an act or omission violating a statutory duty (eg, importing a banned product), or 'conduct contrary to the unwritten standard of conduct seemly in society', the so-called *maatschappelijke betamelijkheid*. This latter category is arguably the most important one. It can be seen as a residual category: whenever the injured party cannot base his claim on either of the first two categories, this third category forms a comfortable fall-back option. Because of its open formulation, many claims are based on it. According to case law, a great many factors determine wrongfulness in a concrete case, eg foreseeability of the occurrence of a loss (also described as the chance of a loss occurring as a result of the act), the costs of avoiding the loss, the nature of the damage, and the relationship between the injured party and the injurer. A prima facie wrongful act is considered not to be wrongful whenever force majeure, self-defence, or a statutory provision justified it.

12 Note that art 6:162 BW allows three alternative grounds for a claim for wrongful imputable acts (torts). See the following diagram:



13 **[228]** From the third subsection of art 6:162 *Burgerlijk Weboek* (BW) it follows that a wrongful act also needs to be imputable to the tortfeasor. Dutch law distinguishes three alternative grounds for imputation. First

[10] Cf *Sjef van Erp* in: AS Hartkamp/MW Hesselink et al (eds), Towards a European Civil Code (4th edn 2011) 506.

and most importantly, a wrongful act is imputed to the tortfeasor when he can be blamed for his act (*schuld* [fault, blameworthiness]) Secondly, his wrongful act may also be imputed to him by law, regardless of whether he is actually at fault. For instance, wrongful acts caused by mental or physical handicaps of the tortfeasor are imputed to him, even when he cannot be blamed for them (art 6:165 BW). Thirdly, wrongful acts can be imputed when *verkeersopvattingen* (literally 'societal opinions', that is to say an unwritten source of legal and moral opinion, as expressed through judicial opinion) so demand. Thus, tortious liability is incurred not only in the case of subjective fault, but also in the case of objective *toerekenbaarheid* ('attribution of responsibility').

14 Finally, the scope of protection of the violated duty needs to be examined in each tort claim. Especially in the case of breach of a statutory duty and in the case of failure to act in accordance with the unwritten standard of conduct seemly in society (the so-called *maatschappelijke betamelijkheid*), the question arises whether the violated norm purports to protect against the type of damage suffered and the way in which it was suffered. If not, then there is no tortious liability vis-à-vis the specific claimant. This follows from art 6:163 BW, which stipulates:

'No obligation to compensate damage arises if the failed duty does not purport to protect against the damage as suffered by the injured party'.

15 This means that the scope of protection principle can be used to hold that someone owes a duty to act diligently vis-à-vis multiple parties who each have a different interest worthy of equal protection. So-called cable cases offer a case in point. Whenever a digger or dragline operator negligently conducts an excavation and thus damages vital underground conduits, pipes or mains, there may be multiple parties who suffer a loss. The owner of the damaged object may claim that his absolute right (property, ownership) was infringed. A company dependent on the supply of energy or water by means of this conduit, pipe, etc can claim that the digging operation was negligently executed and therefore failed to comply with the unwritten standard of conduct seemly in society and owed to (among others) the dependent company. The protective scope of the rule that one should excavate cautiously and diligently **[229]** serves to protect also these 'secondary victims'. Accordingly, in a 1977 decision, the operator of a dragline was found liable for the pure economic loss of a brick factory that had been cut off from the local public utility's gas mains as a result of the operator's negligence in excavating the gas mains.[11] The Supreme Court decided that the duty to excavate with proper caution was not only owed towards the owner of the gas mains (a public utility) but also to those third?? parties who have an *obvious and foreseeable interest* in an uninterrupted gas supply.

C. Privity of contract

16 Under Dutch law, the general principle of privity of contract applies, meaning that a contract can only create obligations between the contracting parties.[12] This entails that only the contracting parties are endowed with contractual rights, for example the right to performance or an award of damages for breach of contract. Conversely, a third party cannot derive any rights from a contract as he is not one of the contracting parties. He, for example, cannot claim damages for breach of contract. The obligor only has *contractual* obligations towards the contracting party or parties, but not to any third parties.

17 However, there are exceptions to this principle. Article 6:253 (1) DCC (third-party benefit clause) gives the third party a right to invoke a contract to which he is not a contracting party if (a) the contract contains a stipulation that creates this right for the third party and (b) the third party has accepted this stipulation.[13] Acceptance does not have to be explicit, and can occur without any offer to the third party. Once the stipulation is accepted, the third party is deemed a party to the contract.[14] This gives both the stipulator and the third party the right to claim performance if the promisor fails in his obligation toward the third party.[15]

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11 HR 1 July 1977, NJ 1978/84.
12 Asser/Hartkamp & Sieburgh 6-III 2014, no 514, 518 (online, last edited 1 February 2014).
13 *JR Beversluis*, GS Verbintenissenrecht, art 6:253 BW, note 2 (online, last edited 8 February 2017).
14 Asser/Hartkamp & Sieburgh 6-III 2014, no 572 (online, last edited 2 February 2014).
15 Terminology derived from *AS Hartkamp/MM Tillema/EB Ter Heide*, Contract Law in the Netherlands (2011) 110.

Furthermore, a breach of contract by one of the contracting parties may, **[230]** in certain circumstance, also constitute a tort toward a third party. The Supreme Court decided that a contract between two parties may form an 'important link' within the economy (or a branch the economy), with which the interests of third parties are connected. In such cases, the contracting parties are not always free to completely ignore the interests of third parties in the performance of that contract. If the interests of a third party are so closely related to the contract that, in cases of breach of contract, such third party also suffers losses, the standards of conduct seemly in society may require that the contracting parties take these interests into account. Whether or not a contracting party is obliged to take the interests of third parties into account depends on the circumstance of the case, more specifically the quality of all the parties involved, the nature of the contract, the interests of the third parties and to what extent their interests are connected to the contract, the foreseeability of a third party having an interest in the contract, whether the third party could reasonably assume that his interests would have been taken into account by the contracting party, how burdensome it is to take the interests of a third party into account and the expected losses for the third party. [16]

18 In short, parties to a contract generally do not need to take the interests of third parties into account, but in specific and exceptional circumstances they are obliged to do so.

IV. Fault in Tort and Contract

A. Introduction

19 In both Dutch contract law and tort law, *fault* plays a role in establishing liability. In the past, the concept of fault was frequently discussed in legal doctrine – for instance, whether fault required subjective reproach or whether, instead an objective assumption of risk sufficed. However, nowadays this role is quite modest and should not be overstated. In many cases it is tacitly assumed or accepted that an obligor is liable to pay damages, regardless of whether or not he is actually at fault. Both in tort and contract, the risk of certain losses is often simply put on the **[231]** party in breach or the tortfeasor. These forms of 'risk liability' greatly diminish the importance of fault in the law of contract and tort law.

20 In this section, we firstly discuss fault and risk within tort law and subsequently fault and risk within the remedy of damages for breach of contract. Special attention is given to liability for agents.

B. Tort

21 As discussed earlier, tortious liability for one's own act (or omission) requires that the act was wrongful and that the wrongful act is 'imputable' to the actor. The concept of 'imputation' (*toerekenbaarheid*) in 'imputable wrongful acts' may perhaps also be translated as *attribution* or even accountability or 'being answerable'.

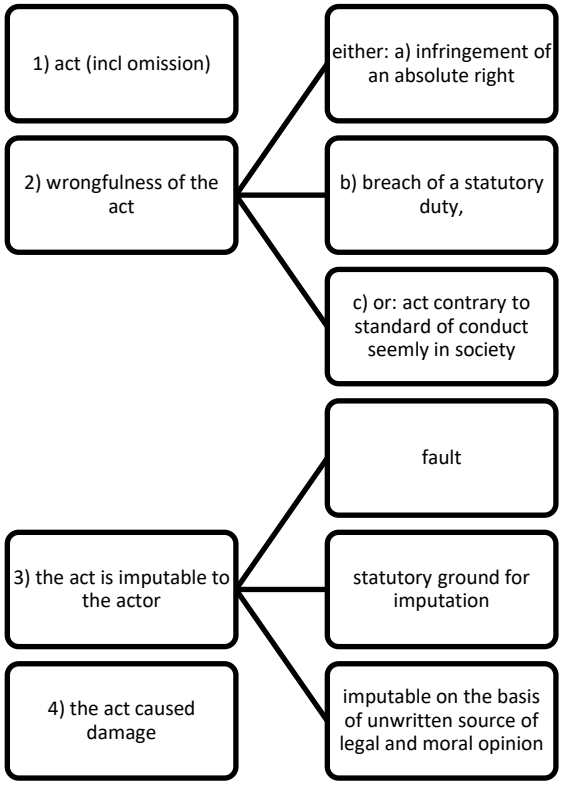
22 Imputability can be based on one of three alternative grounds, the first of which is currently the most important: the person can be blamed for his act (*schuld* [fault, blameworthiness]). Alternatively, his act or its cause must be imputed to him either on a statutory basis (2), or plainly because the *verkeersopvattingen* (an unwritten source of legal and moral opinion, as expressed in case law) demand it (3). Thus, tortious liability can be incurred not only in the case of subjective fault, but also in the case of objective 'attribution of responsibility'.

23 The exact scope of this 'attribution of responsibility', as an alternative to 'fault', remains unclear. What is clear, however, is that 'fault' is no longer a subjective standard but a predominantly objective standard, leaving little room for excuses. Fault is generally seen as a moral or legal evaluation of the *actor*, while the requirement of wrongfulness (ie, the unlawfulness requirement) is supposed to be directed at the *act* itself. One should first judge an act and, possibly, conclude that it is – as such – an unlawful act, and only then should one judge the actor and decide whether *he* was *at fault* by committing the unlawful act. When one judges blameworthiness, one decides whether the person acting *could* and *should* have acted in a different

16 HR 24 September 2004, ECLI:NL:HR:2004:AO9069, NJ 2008/587.

fashion.[17] Generally speaking, a reasonableness-test is performed: would a reasonable acting person have behaved in a similar fashion? This might lead in context to the following definition of 'fault': *the legal blameworthiness of a person committing an* **[232]** *unlawful act that could and should have been avoided.*[18] In practice, the judiciary weighs both the act and the actor in the first stage. In most cases, it is unnecessary (and sometimes even impossible) to isolate the actor from his act. In nine out of ten cases, 'condemning' the act implies condemnation of the actor. Whenever unlawfulness has been established, the fault requirement will usually present no difficulties.[19] In the few cases it does (ie, blameworthiness of young children and disabled individuals), the legislature has provided a solution.[20]

24 In short, this is the basic structure of tortious liability for one's own wrongful acts (we ignore strict liability and vicarious liability):



C. Contract

25 Fault of the obligor also plays a role within the remedy of damages for breach of contract, which is found in art 6:74 DCC. Fault of the obligor **[233]** is generally considered to be relevant for two of the requirements of this legal provision, which states that:

> *'Any failure to perform an obligation burdens the obligor to compensate the damage thus caused to the obligee, unless the failure is not imputable to the obligor'.*

26 Firstly, fault can be relevant to determine whether there is a failure in the performance of an obligation by the obligor. Obviously, damages for breach of contract are only available to the innocent party if his obligor fails to perform one of his contractual obligations. In Dutch law, a rough distinction can be made between two kinds of obligations: obligations of result and obligations to perform at one's ability. The former obligations

17 See, eg, HR 9 December 1966, NJ 1967/69.
18 Note, however, that neither a statutory definition nor a generally accepted doctrinal definition of 'fault' exists.
19 In a number of cases, the judgment rendered does not even mention the fault requirement (let alone whether it has been met).
20 Art 6:164 and 165 BW.

are formed by the obligations to achieve a certain result, for example to deliver a good, to build a house or to pay a sum of money. If the party in breach does not perform this obligation at all (he does not deliver the good), or does so untimely (he delivers it too late) or unduly (the delivered good is broken), he is deemed to have failed to perform his obligation, regardless of whether he is actually at fault for that failure. In other words, fault is not relevant for determining whether the party in breach failed to perform an obligation of result.

27 This is different for the latter obligations: the obligations to perform at one's ability (obligations of means). Such obligations do not demand that a person actually achieves a certain result, but merely that he does what can reasonably be expected from him to try to obtain a result. In order to determine whether he failed to perform such an obligation to perform at his ability, it is irrelevant whether this result is actually achieved. There is merely a failure to perform such an obligation when it can be proven by the innocent party that the other party did not perform at his ability. Good examples of such obligations are the duty of a lawyer to defend his client in court or the duty of a medical professional to do his best to cure a patient. Lawyers and doctors do not breach their contractual obligations towards their clients when the case is lost or the patient does not recover from his injuries. Only when the lawyer or the medical professional do not perform at their ability – the former did not prepare the case properly or the latter did not perform an operation on the patient with reasonable care – do they breach their contractual obligations. Fault plays an important role in establishing whether an obligor breached his obligation to perform at his ability. Only when it can be proven by the innocent party that he **[234]** did not do what could be expected of him to achieve a certain result is he in breach.[21]

28 Secondly, art 6:74 DCC requires that the failure to perform is imputable to the party in breach. Fault is also of importance for this requirement. In art 6:75 DCC it is described when a failure to perform is *not* attributable to an obligor:

> *'A failure in performance cannot be imputed to the obligor if it is neither due to his fault nor for his account pursuant to the law, a juridical act or generally accepted principles.'*

29 The article is formulated negatively: it describes when a breach *cannot* be imputed to an obligor. This means that the onus of proof is on the party in breach: he must prove that the failure in performance is *not* imputable to him. The law confers to him a legal defence that provides him with an opportunity to escape liability.[22] In general, the rules of attribution are considered to be quite strict in Dutch law: it is not easily accepted that a failure to perform an obligation is not imputable to an obligor.

30 To escape liability in contract, the obligor must prove that he could not reasonably have prevented the circumstances that caused the failure in performance *and* that he could not reasonably have mitigated the consequences of these circumstances. In other words, he must prove that he is not at fault for the failure in performance. Whether the obligor is at fault depends on his personal traits and circumstances surrounding the failure to perform. For example, an obligor might be unable to perform an obligation due to a sudden flu and cannot find another way to ensure that the obligation is fulfilled. In that case, he might not be at fault for the failure.[23] In cases of a failure of a contractual obligation to perform at one's ability, fault of the obligor is usually given, as it was already established that the obligor did not do what could reasonably be expected from him to achieve a certain result.[24] However, when an obligor fails to achieve an obligation of result, he might be able to prove **[235]** that he was not at fault for that failure due to circumstances beyond his control. In this way, fault plays a role in the attribution of a failure to perform to the obligor.

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21 *BJ Broekema-Engelen*, GS Verbintenissenrecht, artikel 74 Boek 6 BW, nr 8.

22 This follows from the word '*tenzij'* (unless) and the negative formulation of the requirement: '[…] *tenzij* de tekortkoming hem [de schuldenaar] *niet* kan worden toegerekend' (*unless* the failure is *not* imputable to him [the debtor]). See also Asser/Hartkamp & Sieburgh 2012/370.

23 Asser/Hartkamp & Sieburgh 2012/334–344.

24 *Broekema-Engelen* (fn 21) artikel 74 Boek 6 BW, nr 8.

31 However, this role of fault is modest and should not be overstated, as in many cases the failure to perform is attributed to the obligor, regardless of whether or not he is actually at fault for the failure. It is then simply decided that obligor bears the risk for certain failures to perform. Article 6:75 BW states that imputation of a risk to an obligor can follow from 'the law, a juridical act or unwritten legal and moral principles of society'.[25] Many risks are imputed to an obligor based on the 'unwritten legal and moral principles of society'. For example, sudden sickness of the obligor, even when he is not at fault for his sickness, is usually attributed to him. He has to bear the risk of his sickness that caused his failure to perform and not the innocent party. In the case of *Oerlemans v Driessen,* the Supreme Court formulated another famous rule of attribution based on the 'unwritten legal and moral principles of society'. It decided that a seller bears the risk of defects in the goods or products he sold to the buyer, regardless of whether the seller knew or could have known these defects. He simply bears the risk for such defects.[26] It may also follow from the contract itself (a juridical act) that a failure to perform is attributable to an obligor. For example, by giving a warranty in which a party in breach guarantees the performance of a certain obligation, the obligor takes on the risk for the failure in performance of that obligation. If he subsequently fails to perform such a warranted obligation, the failure to perform that obligation is always attributable to him, regardless of whether the obligor is at fault or not.[27] Finally, a legal provision sometimes explicitly states that the obligor bears the risk for certain circumstances. For instance, the law states that an obligor bears the risk for the tools he used to perform a contract, but which turn out to be unsuitable, and cause a failure of the performance (art 6:77 BW).[28]

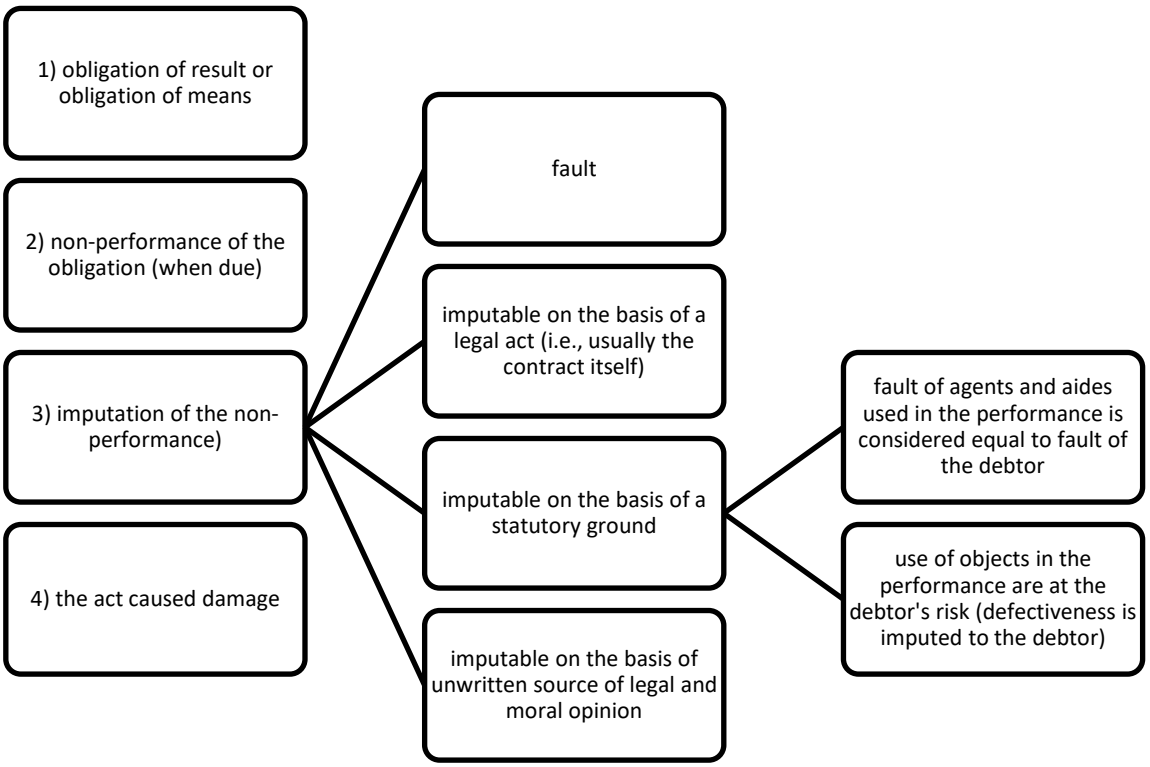
[236]

D. Liability for agents

32 Moreover, an obligor bears the risk for the mistakes made by persons whom he engaged to perform the contract. The attribution of this risk follows from the law. Article 6:76 DCC states that: 'Where, in the performance of an obligation, the obligor uses the services of other persons, he is responsible for their conduct as if it was his own'. It is irrelevant whether the third person is employed by the obligor: the obligor can be held liable for actions of independent subcontractors in the same way as for actions of his own employees.[29] The obligor may even be held liable for actions of third parties that did not aid him in execution of the contract (*hulppersonen*) on the basis of art 6:76 DCC. This is the case when the obligor is liable for actions of these persons according to unwritten legal and moral opinion (*verkeersopvattingen*). For example, the obligor is liable for a labour strike by workers of a company not under his control, when that strike causes a halt in the supply to the innocent party.[30]

33 In short, the basic structure of Dutch contractual liability is as follows:

25 Asser/Hartkamp & Sieburgh 2012/353-362.
26 HR 27 April 2001, ECLI:NL:HR:2001:AB1338, NJ 2002/213 (Oerlemans/Driessen).
27 Asser/Hartkamp & Sieburgh 2012/362–369.
28 Asser/Hartkamp & Sieburgh 2012/346–352.
29 Asser/Hartkamp-Sieburgh 6-I 2016/347.
30 Parl Gesch Boek 6, 269.



[237]

V. The law of Damages

A. Introduction

34 The Dutch rules on damages for tort and for breach of contract were harmonised with the enactment of the New Civil Code in 1992 and can nowadays be found in chapter 6.1.10. DCC. This, for example, means that in current Dutch law the same kind of pecuniary or non-pecuniary losses are recoverable in contract and in tort cases. Also, the same rules of adequacy, mitigation and contributory negligence apply to cases of tort and contract. For that reason, it is usually irrelevant whether liability is established under contract or tort law. Furthermore, it is unnecessary to discuss damages for torts and for contracts separately. This section addresses some topics within the general law of damages, which thus apply to tort and contract similarly.

B. Recoverable losses

35 The first article of chapter 6.1.10 DCC states which losses are recoverable in Dutch (contract and tort) law:

> *'Damage to be repaired pursuant to a legal obligation to pay damages consists of loss to property, rights and interests and any other prejudice, to the extent that the law confers a right to damages therefor.'*

36 To put it differently, in the Dutch law of damages, pecuniary losses are generally recoverable. Damages for non-pecuniary losses can only be awarded to the innocent party if the law explicitly confers such a right to him. Pecuniary losses are assessed in more detail in art 6:96 section 1 DCC:

> *'Loss to property, rights and interests comprises both the loss incurred and the profit deprived.'*

37 Accordingly, both losses suffered by the innocent party and his lost profits are recoverable as damages. Notably, this means that both in contract law and in tort law damages may be awarded for pure economic losses. Neither in contract nor in tort are there any restrictions to the recovery of such losses.

38 **[238]** The aim of the law of damages is namely *full* compensation for all losses, both pecuniary and non-pecuniary, suffered by the innocent party as a result of the breach of contract or tort. This means that the actual losses must be compensated, no more and no less. 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. In personal injury cases this, for example, means that effectively all *pecuniary* losses are to be compensated, including the costs of medical treatment, reasonable costs of supplemental care, increased expenses due to the physical impairment, actual loss of income, loss of future increase of income (eg, if the injuries impair possible career prospects), and other (future) losses. However, the innocent party is not entitled to punitive damages. He is 'merely' compensated for his losses.

39 Article 6:96 DCC expressly states that pecuniary loss also includes (a) the reasonable costs incurred in order to prevent or limit losses which may reasonably be expected to result from a tort or breach for which the obligor is liable, (b) the reasonable costs incurred to establish liability and to assess the damages, and (c) the reasonable costs incurred to receive voluntary payment by the liable party.[31] However, legal fees and judicial costs incurred in the course of civil proceedings are not compensated in full in every respect, because a specific statutory regime with fixed amounts applies.

40 As a general rule, art 6:97 DCC states that damages should be assessed in accordance with the nature of the loss. The courts therefore enjoy freedom in choosing the best method of calculating the quantum of damages. A judge may choose the method that is the most appropriate in the case at hand. However, certain differences exist according to the type of loss. Generally, the quantum of damages is calculated on the basis of objective factors. If an accurate calculation of the quantum of damages is impossible, the court may estimate such. Article 6:97 DCC gives the court the freedom to determine whether the damages must be calculated concretely or whether some abstractions have to be made. In principle, damages are calculated concretely, which means that all facts and circumstances concerning the suffered losses are taken into account when assessing the damages. However, sometimes the damages are calculated more abstractly. Just one or two circumstances are **[239]** taken into account and all the other facts and circumstances are simply ignored when assessing the quantum of damages. For example, in the case of breach of contract with respect to goods with a market value (arts 7:36–38 DCC) and in the case of damage to property, the damage will be equal to loss of value of the property. This, in turn, will in principle equal the normal costs of repair.

C. Non-pecuniary losses

41 As mentioned above, damages for non-pecuniary losses can only be awarded when the law explicitly confers such a right to the innocent party. Article 6:106 DCC is the core provision on such recoverable non-pecuniary losses. It provides the innocent party with a right to an award of damages for non-pecuniary losses in a limited number of cases. Damages for non-pecuniary losses are firstly available if the liable party had the intention to inflict immaterial harm on the innocent party. A notorious example in Dutch case law is the father who killed his own son in order to psychologically hurt the mother of his child, who divorced him. Such cases are, luckily, quite exceptional.[32] Damages for non-pecuniary losses may also be awarded in cases of psychical personal injury, loss of reputation of a (deceased) person, and in cases of harm to the person 'in another way' (*aantasting van de persoon op andere wijze*). This last category primarily includes cases of non-physical personal injury, such as a psychiatric illness. It also includes cases of violations of fundamental rights of a person, such as the right of privacy and the right to family life. The courts are quite strict in recognising 'harm to the person in any other way'.

42 In cases of personal injury, damages for non-pecuniary losses are assessed in accordance with the principle of fairness. Relevant factors include, inter alia: the nature, seriousness, and permanency of the injuries; the

31 Note that both the *incurring* and the *amounts* of these costs must be reasonable.
32 HR 26 October 2001, NJ 2002/216.

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. When determining the amount of damages, the court will generally look at awards in similar cases by other Dutch courts and **[240]** it may also take into account awards by foreign courts.[33] Although the courts have a wide margin of discretion in assessing the amount in damages for non-pecuniary losses, 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.* Dutch courts are not renowned for their generosity when it comes to the *amounts* in compensation for non-pecuniary loss.

D. Adequacy

43 The Dutch equivalent of the rule of adequacy (or remoteness) can be found in art 6:98 DCC, which states that:[34]

> *'Reparation of damage can only be claimed for damage which is related to the event giving rise to the liability of the obligor, which, also having regard to the nature of the liability and of the damage, can be attributed to him as a result of such event.*

44 Under former Dutch law, a test of foreseeability was applied to determine the remoteness of losses. In contract law, the test that had to be applied was whether 'the obligor could reasonably foresee the loss and its extent at the time of the conclusion of the contract and, in the case of a deliberate breach, at the time of the breach of contract.'[35] A similar test of foreseeability was applied in tort law. The decisive factor in such cases was whether the tortfeasor could foresee the loss, and its extent at the moment he committed the tortious act.[36] However, in 1970, the Supreme Court departed from the formula of foreseeability.[37] It was replaced by the theory of 'reasonable imputation'. This new test was incorporated in art 6:98 DCC.

45 This article purports to codify leading case law and doctrinal writing on causation, although it merely identifies two of *many* factors that decide imputation: the nature of the damage and the nature of the liability. As far as the nature of the damage suffered is concerned, both **[241]** case law and doctrinal writing are inclined to stretch the limits of causal connection *very far* whenever bodily harm is involved, somewhat *more restrictively* when damage to property is involved, and the *least* in the case of loss related to neither of the former two categories (*ie*, pure economic loss). As far as the nature of the liability is concerned, it is commonly assumed that the limits of causality may be proportional to the degree of fault (blameworthiness). Sometimes, it is even stated that, as a rule, wilfully inflicted harm should lead to full imputation of all resulting damage.

46 Furthermore, a distinction is made between fault-based liability and strict liability: The Supreme Court ruled that strict liability for defective chattels (art 6:174 DCC) only implies liability for consequences that are *typical of defective chattels*. This seems to be more than just a foreseeability test. This test seems to restrict the ambit of strict liability to certain types of damage that result from the event for which one is strictly liable. To conclude, one can say that – in general – *foreseeability* is an important rather than a decisive factor that is taken into account both in ascertaining impropriety of the conduct itself and in establishing a sufficient causal connection.

E. Compensation in kind and money

47 The general rule in Dutch law is that an award of damages has to be satisfied with a sum of money. However, if the innocent party demands it, a judge may decide that compensation is offered in kind. This follows from

33 See HR 8 July 1992, NJ 1992/714.
34 Asser/Hartkamp & Sieburgh 6-II 2013/56.
35 *Hartkamp/Tillema/Ter Heide* (fn 15) 161.
36 *Hartkamp/Tillema/Ter Heide* (fn 15) 161.
37 HR 20 March 1970, NJ 1970, no 251.

art 6:103 DCC. A famous application of this exception are several court orders to transfer real property, which, as a result of a tort or a breach of contract, were not transferred to the innocent party.[38]

[242]

Part II – Cases

I. Case One

48 P had to undergo an operation in the hospital H. The surgery was carried out by surgeon S, an employee of H. S made a mistake and as a consequence P's left arm is paralysed.

A. Liability of surgeon

49 Under Dutch law, special provisions are made for liability arising in a medical context. On the basis of art 7:446 DCC, the patient enters into a contract with the natural or legal person providing the medical services (*hulpverlener*). One of the obligations arising from this contract is the obligation of the provider of care to observe the standards of a good provider of care (art 7:453 DCC). Failure to adhere to this norm constitutes a breach of the contract for medical treatment, for which the provider is liable unless the failure is not imputable to him.[39] The test to be applied is whether S performed the surgery with the care that could be expected from a reasonably able and reasonably acting peer.[40] P has to prove an imputable failure to perform according to these norms.

50 In accordance with the general rule of art 150 Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering, Rv*), P has to contend and substantiate facts that support his contention that a standard of care was breached. However, the provider of care has to provide adequate facts to support its contentions (referred to in Dutch as the *verzwaarde stelplicht*).[41] The idea of this special rule is that the facts stated by the provider of care provide the claimant with points of departure to furnish proof for his claim. This means that H will have to provide facts supporting absence of liability. Still, it is P who has to then further expand on these facts to establish adequate proof of wrongdoing. **[243]** If the provider of care acted contrary to safety norms meant to prevent specific danger, a reversal of the burden of proof may apply to the proof of causal connection between the acts of the provider of care and the damage.[42]

B. Liability of the hospital

51 Article 7:462 (1) DCC states:

> *If a treatment is conducted in the performance of a contract of medical treatment in a hospital which itself is not party to the contract of medical services, the hospital is liable for the non-performance of the contract assuming it would itself have been liable had it been party to the contract.*

52 The notion underlying art 7:462 DCC is that the hospital incurs so-called centralised liability, meaning that the hospital is liable for any damage caused by the failure to perform the contract. Accordingly, if there is a failure to treat the patient in accordance with the care and diligence that was to be expected (on the basis of the obligation of means) and this failure occurred 'under its roof', the hospital is liable, even if the hospital

38 HR 17 November 1967, NJ 1968/42.
39 *R Wijne*, Aansprakelijkheid voor zorggerelateerde schade (2013) 191.
40 HR 9 November 1990, NJ 1991/26.
41 HR 20 November 1987, NJ 1988/500.
42 *Wijne* (fn 39) 437 f.

was not party to the contract of treatment. This means that S and H may be liable alongside each other for the damage suffered by P if S contracted with P in his own name. The hospital may then have a right of recourse against the doctor. In practice, however, the hospital takes out insurance against medical faults by medical professionals working in the hospital.[43]

II. Case Two

53 P, an entrepreneur, bought a machine from dealer D; the machine was produced negligently by M. As the machine's security installation failed an explosion happened which caused damage to the other goods. **[244]** P suffered further loss by stoppage as he had to wait some time for delivery of the new security installation.

54 P can claim compensation from D under the contract of sales. P is entitled to expect a proper functioning of the machine and the explosion is clearly contrary to this 'entitlement'. The failure of the security device on the machine and the resulting explosion constitute a non-performance of the contract (art 7:17 (seller's duty to deliver the object in conformity with the buyer's objective expectations on quality) in conjunction with art 6:74 (non-performance)). In principle, this non-performance is imputable to the seller unless he proves force majeure. The seller cannot exonerate himself by showing that he did not know of the defectiveness of the object of the contract of sale: a seller of industrial products is liable under the contract for non-performance due to poor quality.[44] Damages due by D include the property loss and losses due to delay (within reason: P does have a duty to mitigate damage as far as reasonably possible).

55 P can also claim compensation from manufacturer M. The common tort law doctrine (art 6:162 DCC) applies in this business-to-business tort. The special regime for consumer damage (see below) does not apply. This means that P needs to show 1) that M committed a wrongful act, 2) that this act is imputable to the tortfeasor (accountability on the basis of fault, statute or uncodified societal norms), 3) that he suffered a loss and 4) causation between the losses and the wrongful act.

56 As far as step (1) is concerned, the Dutch Supreme Court has held that the 'reasonable safety expectation' referred to in art 6 of the European Products Liability Directive can also be applied in common Dutch tort law cases involving defective products. Thus, a manufacturer is deemed to commit a wrongful act when he puts into circulation a product which does not meet the user's reasonable safety expectation. Also, a manufacturer commits a tort if he puts a product into circulation 'which causes damage when used in a proper way in accordance with its purpose'.[45] The manufacturer is accountable for his wrongful acts when he is at fault. The fault standard implies a lack of reasonable care in the specific circumstances. Generally, a manufacturer is under **[245]** a duty to take reasonable measures to prevent his products from causing damage.[46] Failing to exercise this duty results in the obligation to compensate damage. Damages due by D include the property loss and losses due to delay (within reason: P does have a duty to mitigate damage as far as reasonably possible).

57 Variation: P is a consumer and buys a washing machine. Due to a failure of the machine, P's clothes are ruined.

58 In the case of a defective product in a consumer sale, the damage to 'other property' of the consumer is either to be borne by the retailer (seller) or the manufacturer. This depends on the extent of the damage; under the Dutch product liability regime, there is a so-called 'canalisation' of liability. This effectively means that if the property loss suffered by the consumer exceeds € 500, then the manufacturer is the *exclusively* liable party. Note that the manufacturer will be held liable in accordance with the national legislation implementing the European Directive on Product Liability.[47] In exceptional cases, the retailer can be held jointly and

43 *Wijne* (fn 39) 308.
44 HR 27 April 2001, ECLI:NL:HR:2001:AB1338, NJ 2002/213.
45 HR 6 December 1996, NJ 1997/219; HR 22 October 1999, NJ 2000/159; HR 4 February 2011, NJ 2011/69.
46 HR 22 October 1999, NJ 1999/159.
47 Directive 1985/374/EC was implemented in art 6:185-194 DCC.

severally liable with the manufacturer, namely when the retailer knew or ought to have known of the existence of the defect or if he had explicitly guaranteed the absence of the defect.[48]

59 If the damage remains below the € 500 threshold, then *only* the direct contractual counterpart of the consumer (ie, the retail seller) can be held liable for the loss.[49]

48 Art 7:24 (2) (a) and (b) DCC.
49 Art 6:185 in conjunction with art 190 (1) (b) DCC; art 7:24 (2) (c) DCC.