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Damages in Wrongful Death Cases in the Light of European Human Rights Law: Towards a Rights-Based Approach to the Law of Damages

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1. Introduction

1.1. European human rights law and national laws of damages: an example of a clash

To the great dissatisfaction of many personal injury lawyers, in 2010 the Dutch Upper Chamber (*Eerste Kamer*) rejected a legislative proposal on non-pecuniary loss caused by the death of a loved one, i.e. bereavement damage (so-called *affectieschade* or *Angehörigenschmerzengeld*).¹ The proposal aimed to introduce a legal basis for compensating bereavement damage, i.e. damages for the next of kin's non-pecuniary loss: (mere) grief. Until now, the close relatives of victims have no basis for claiming compensation for bereavement damage in the Dutch Civil Code (*Burgerlijk Wetboek*).

A few months after the rejection of the proposal Wijnakker stated that a limited group of next of kin can already find a legal basis in the European Convention on Human Rights (hereinafter: ECHR). She thereby drew attention to judgements of the European Court of Human Rights (hereinafter: ECtHR or the Court) in Dutch private law literature.² Close relatives, under certain circumstances, find protection in Article 2 in conjunction with Article 13 ECHR as the Court has decided that compensation for non-pecuniary damage should be available as part of the range of redress in the case of a breach of Article 2 ECHR.³ Under Dutch law, according to Article 94 of the Constitution of the Kingdom of the Netherlands (*Grondwet*), statutory provisions should not be applied if those provisions conflict with provisions of treaties by international institutions that are binding on all persons.⁴ When confronted with a claim for compensation for bereavement damage, and the defendant is a government body, a judge should not apply the law of damages as far as this law excludes the awarding of damages for mere grief. The judgements of the European Court of Human Rights thus shed new light on the discussion regarding bereavement damage in the Netherlands.

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1 *Wetsvoorstel Affectieschade* (Bill on Affectionate Damage), *Kamerstukken II* 2002-03/2004-05, 28781, no. 1-12; *Kamerstukken I* 2004-05/2009-10, no. A-H. See <<http://www.overheid.nl>> (last visited 9 December 2013). On this subject matter (critically) see S.D. Lindenbergh, 'Het wetsvoorstel affectieschade: een treurige dood(?)', 2010 *Nederlands Juristenblad*, pp. 1530-1532; R. Rijnhout, 'Wetsvoorstel affectieschade verworpen door de Eerste Kamer', 2010 *Tijdschrift voor Vergoeding Personenschade*, no. 2, pp. 37-41.

2 C.P.J. Wijnakker, 'Vergoeding van affectieschade: via het EVRM ook in Nederland mogelijk', 2010 *Verkeersrecht*, no. 1, pp. 313-315.

3 ECtHR 17 March 2005, Application no. 50196/99, *Bubbins v United Kingdom*, Para. 171.

4 See <<http://www.rijksoverheid.nl>> for an English translation of the Constitution of the Kingdom of the Netherlands.

1.2. The key question and the aim of this contribution

Considering the above, the interpretation of the European Convention on Human Rights by the European Court of Human Rights affects the (originally: private) law of damages. Additionally, the Court does not restrict itself to awarding damages for non-pecuniary loss in cases concerning bereavement damage. The Court awards damages for non-pecuniary loss in other cases as well, after having ruled that a Convention right has been infringed. It does not however affect the whole range of the law of damages, as the working sphere of the ECHR is restricted and only deals with the protection of the core values that are protected by the rights in the Convention. The Court is furthermore more reluctant to rule on the tenability of private law provisions than on the tenability of acts and regulations in the public law domain.⁵ On a national level judges are thus confronted with the case law of the Court that concerns acts or omissions by public authorities. In other words, the judgements of the ECtHR are not rendered between private parties, and the national law of damages, as far as it is applied between private parties, is therefore not affected. National courts, as a consequence, are confronted with two different concepts of damage. An illustration of this difference is the position of next of kin in wrongful death cases.

In light of this, the main question to be answered is how the national law of damages could and should be adjusted to remain durable and consistent when confronted with judgements of the ECtHR. We illustrate the need for adjustment by focussing on the next of kin's non-pecuniary loss under Dutch law, because this topic is, at least in Dutch literature, the most controversial and is still under discussion. A distinction will be made between the traditional discussion on awarding damages for bereavement damage in Dutch literature, on the one hand, and the Court's decisions on the enforcement of the next of kin's right to life under Article 2 ECHR, on the other, thereby explaining the different approaches of both sets of regulations, and additionally questioning the current reluctance to interweave both the law of damages and the idea of the enforcement of fundamental rights.

We thereby also pay attention to German law to *illustrate* that the clash between the national law of damages and European human rights law is not solely a 'Dutch' problem, but that other Member States deal with the same issue as well. Additionally, German law in particular is interesting because it is also one of the few European systems in which bereavement damage is not a legally relevant damage. Furthermore, the idea of compensation for infringements of the general right of personality (*allgemeine Persönlichkeitsrecht*) in German law is a legal concept that seems interesting to analyse in the context of the idea of the vindication or enforcement of fundamental rights on the level of the ECHR.

1.3. Structure

Since the main question derives from the clash between national private law and European human rights law, we start with explicating the hierarchy in supranational and national sets of regulations as set out in current national constitutional law and as is derived from supranational law (Section 2). These rules constitute the contextual framework for the discussion on the interaction between European human rights law and national law of damages. The contextual framework makes clear that it is the national lawmakers who should take action to avoid unjustifiable differences and inconsistencies that derive from clashes between both levels of regulation. In Section 3, we explicate the Court's case law as regards non-pecuniary damages, in particular in wrongful death cases. In Section 4 we introduce the national law of damages in wrongful death cases and explain the traditional concept of 'damage'. In Section 5 we conclude that it is time to depart from the traditional concept of damage in wrongful death cases and to introduce a rights-based approach to the law of damages in general.

2. The dominance of European human rights law over national law

The aim of this section is to explain the interaction between Dutch and German law on the one hand, and European human rights law on the other. On an abstract level, the interaction between national legal systems and European human rights law is on the one hand regulated on the European level by the High Contracting Parties, which, by signing the European Convention on Human Rights, agreed 'to secure to

⁵ See e.g. ECtHR 7 July 2009, Application no. 58447/00, *Zavoloka v Latvia*. See Section 3.3.3 *infra*.

everyone within their jurisdiction the rights and freedoms defined in section I of this Convention.’⁶ By signing the Convention the Parties also agreed with the foundations of the Court and its task to interpret and apply Convention rights at the request of an individual. On the national level, the interaction is regulated by the national legal orders, mostly by the national constitutions that contain a rule on the effect of treaties in the national legal order. We will now describe how the Dutch and German legal systems deal with the obligations stemming from the Convention.

The Dutch Constitution, first, prescribes that treaty provisions become binding directly after they have been published and that statutory regulations shall not be applied if their application would be in conflict with treaty provisions that are binding on all persons.⁷ In other words, the Netherlands has a monist legal order.

Although this might explain the fact that the Dutch do not have to deal with ‘constitutional headaches’ like those facing the Germans,⁸ international treaty obligations *do* confront us with difficult questions – like the question of compensating third parties in wrongful death cases. The compatibility of national laws with the provisions of international law is thus being discussed in a different setting and later in time, i.e. not necessarily at the moment following the ratification of a treaty. One can also state that the provisions of international law are already discussed at the time of ratification, when one realises that treaties are discussed in Parliament and the consent of Parliament is required for accession to a treaty.⁹ After the publication of the treaty, its provisions are superior to all national laws, including the Dutch Constitution.

According to German federal constitutional law, second, treaties need ‘the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law.’¹⁰ As a consequence, Convention rights have the status of *einfachen Bundesgesetz* and are therefore hierarchically inferior to the basic rights in the German Constitution (*Grundgesetz*), *die Grundrechte*. The supremacy of the basic rights is also expressed in the duties of the German Federal Constitutional Court (*Bundesverfassungsgericht*; hereinafter: FCC) that are founded on the idea of protecting and enforcing the German Constitution.

In the context of judicial review the Convention rights come into play when it comes to the interpretation of the basic rights. In the case of *Görgülü* the FCC further elaborated on the status of Convention rights in the German legal system.¹¹ The FCC started from the basic principle that the Convention rights are inferior to the basic rights and the Federal Constitutional Court explained that a German court, while interpreting the basic rights, must take the Convention rights into account.¹² This being the case, some say that Convention rights constitute a new method of constitutional interpretation.¹³

Although national constitutions have adopted different approaches to the regulation of the interaction between national laws and European human rights law, the High Contracting Parties, as said, are obliged to secure ‘to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention’, which includes the right to life.¹⁴

6 Art. 1 ECHR.

7 Arts. 93 and 94 Constitution. See on Dutch constitutional law (in English): C.A.J.M. Kortmann & P.P.T. Bovend’Eert, *Constitutional Law of the Netherlands*, 2012; L.F.M. Besselink, *Constitutional Law of the Netherlands*, 2004. See on Dutch constitutional law (in Dutch): P.P.T. Bovend’Eert et al. (eds.), *Constitutioneel recht*, 2012.

8 G. van der Schyff & A. Meuwese, ‘Dutch Constitutional Law in a Globalizing World’, 2013 *Utrecht Law Review* 9, no. 2, p. 1.

9 Art. 91 Dutch Constitution. See on accession to the ECHR the following parliamentary documents (in Dutch): *Kamerstukken II* 1952-53/1953-54, 3043, no. 1-8; *Kamerstukken I* 1953-54, 3043, no. 162-167, <<http://www.statengeneraaldigitaal.nl>> (last visited 29 January 2014).

10 Art. 59 Sec. 2 German Constitution. See: <http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0274> (last visited 28 January 2014).

11 BVerfGE 111, 307 (*Görgülü*).

12 *Görgülü*, supra note 11, pp. 318-319.

13 M. Herdegen, in *Maunz-Dürig Grundgesetz Kommentar*, Teil B, Kommentar zum Grundgesetz, I. Die Grundrechte, Art. 1, 2013, Rn 67.

14 Art. 1 ECHR.

3. Wrongful death cases from a European human rights law perspective

3.1. Introduction

In this section we will explain several judgements of the European Court of Human Rights regarding infringements of the right to life in conjunction with the right to an effective remedy. We explain those judgements in the light of European human rights law. The European Court of Human Rights in those judgements uses compensation as a remedy that must in principle be part of the range of redress mechanisms in cases of infringements to the right to life. In order to be able to understand this rule, it is first necessary to briefly pay attention to the topic of compensation for non-pecuniary loss in general to show that the case law of the ECtHR not only concerns the compensation of bereavement damage. Bereavement damages, instead, forms part of a more comprehensive doctrine.

We will start by describing the Court's approach towards compensating non-pecuniary damage (Section 3.2) in order to then focus on compensation for non-pecuniary loss in cases of infringements of the right to life (Section 3.3). In Section 3.3 we will first explain the character of the right to life (Section 3.3.1) and then introduce and explain the rule that the Court accepted in *Keenan v United Kingdom* (Section 3.3.2). This rule says that compensation for non-pecuniary loss must in principle be part of the range of redress mechanisms in cases of infringements to the right to life.

3.2. Compensation for non-pecuniary damage under the ECHR

The case law of the ECtHR containing considerations on non-pecuniary damage shows a range of cases with complaints concerning a whole gamut of different situations. Non-pecuniary damages have been awarded by the Court not only for the infringement of the right to life, which is at the forefront in this contribution, but, for example, also for violations of the substantive rights in Articles 3, 5, 6, 8 (alone or in conjunction with Article 14, the prohibition of discrimination) of the Convention. These violations concern, for example, the failure to provide a hearing within a reasonable time, the failure to enforce a judgement within a reasonable time, and the lack of an accessible procedure for a biological father to establish his legal paternity.¹⁵ The compensation awards have in common that they all contribute to the enforcement of the substantive Convention rights and must thus be considered in light of the aims and goals of the Convention.¹⁶

The case law of the Court as regards compensation for non-pecuniary damage resulting from the breach of a substantive right has basically developed under two ECHR provisions in particular. First, the European Court of Human Rights has decided under Article 13 ECHR that compensation for non-pecuniary damage should, under certain circumstances, be available when fundamental rights infringements have occurred. This case law is based on Article 13 ECHR and must thus be examined in the context of effectively remedying fundamental rights infringements. Article 13 ECHR does not apply in isolation, as follows from the rationale of the article. Article 13 states that everyone 'shall have an effective remedy before a national authority notwithstanding that *the violation* has been committed by persons acting in an official capacity' (emphasis added). The violation refers to the violation of one of the substantive provisions in the ECHR, for example the right to life (Article 2 ECHR).

A second provision that is relevant in the context of compensation for non-pecuniary damage is Article 41 ECHR. The Court, after having concluded that one or more Convention rights have been infringed, 'shall, if necessary, afford just satisfaction to the injured party'. From the case law of the Court under this provision, it follows that the Court now and then finds it necessary to award compensation for non-pecuniary loss. The Court in *Kudla v Poland*, for example, decided, after having concluded that the right to a 'hearing within a reasonable time' as guaranteed by Article 6 ECHR had been violated, that the applicant 'has certainly suffered non-pecuniary damage – such as distress and frustration resulting from

15 ECtHR 18 May 2006, Application no. 55339/00, *Róžański v Poland*. See C. Kissling & D. Kelliher, 'Compensation for pecuniary and non-pecuniary loss', in A. Fenyves et al. (eds.), *Tort Law in the Jurisprudence of the European Convention on Human Rights* (Tort and Insurance Law 30), 2011, pp. 579 et seq.

16 See J.M. Emaus, *Handhaving van EVRM-rechten via het aansprakelijkheidsrecht. Over de inpassing van de fundamentele rechtsschending in het Nederlandse burgerlijk recht*, 2013, pp. 102 et seq.

the protracted length of his detention and trial – which is not sufficiently compensated by the findings of violation of the Convention.¹⁷

3.3. Compensation of non-pecuniary damage in case of a breach of the right to life

3.3.1. The right to life

We now turn to the compensation for ‘bereavement damage’ under the Convention as a species of the compensation of non-pecuniary damage. In order to be able to understand the rule that the Court has formulated in *Keenan v United Kingdom*, it is first necessary to briefly pay attention to the character of the right to life. Article 2 ECHR imposes an obligation on the High Contracting Parties to protect everyone’s life by law.¹⁸ Although the provision might seem to only impose an obligation on the legislator, it is generally accepted that law is null and void if it is not applied.¹⁹ Therefore, the Commission in one of its early decisions accepted that ‘according to the first sentence of this paragraph, states are obliged to take adequate measures to protect life.’²⁰ The European Court of Human Rights later acknowledged that the High Contracting Parties owe several positive obligations to secure the right to life. A perfect example of a positive obligation under Article 2 is the obligation to protect an individual against life-threatening actions by other individuals.²¹

Besides the obligation to protect everyone’s life by law, Paragraph 2 of Article 2 ECHR explains that states should refrain from interfering with the right to life of individuals and forbids the deprivation of life except for specific situations laid down in this provision. Paragraph 2 thus mentions the states’ negative obligation under Article 2 ECHR.

To conclude, as stated by Jacobs, White and Ovey, the obligation of states under the right to life consists of three main aspects, namely (1) the duty to refrain from unlawful killing, (2) the duty to investigate suspicious deaths, and (3) under certain circumstances the positive obligations to take steps to prevent the loss of life.²²

The right to life, together with the prohibition of torture (Article 3 ECHR), is one of the most fundamental provisions in the European Convention on Human Rights.²³ This fundamental character of the right to life is self-evident, indeed: ‘if one could be arbitrarily deprived of one’s right to life, all other rights would become illusory.’²⁴ The fundamental character of the right to life also stems from the fact that no derogation from article 2 is permitted, ‘except in respect of deaths resulting from lawful acts of war.’²⁵

Finally, it is worth mentioning that in order to construe a breach of Article 2 ECHR it is in principle necessary that the victim has died, but under certain circumstances a life-threatening situation will suffice.²⁶

3.3.2. The *Keenan v United Kingdom* rule

As stated, the ECtHR in its judgements has explicated that in case of an infringement of the right to life by a government body, compensation for non-pecuniary damage must in principle be part of the range of redress mechanisms. The ECtHR adopted this rule in *Keenan v United Kingdom*.²⁷ In *Keenan v United Kingdom* the mother of Mark Keenan brought an action against the United Kingdom before the European Court of Human Rights for breaching Articles 2, 3 and 13 of the Convention. She stated that

17 ECtHR (Grand Chamber) 26 October 2000, Application no. 30210/96, *Kudla v Poland*.

18 Art. 2 ECHR.

19 P. van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights*, 2006, pp. 352-353.

20 European Commission of Human Rights 12 July 1978, Application no. 7154/75, *Association X. v United Kingdom*. See Van Dijk, *supra* note 19, p. 353.

21 Van Dijk, *supra* note 19, pp. 353-386.

22 R.C.A. White & C. Ovey, *Jacobs, White and Ovey. The European Convention on Human Rights*, 2010, p. 143. See ECtHR 27 September 1995, Application no. 18984/91, *McCann and Others v United Kingdom*.

23 See for example: ECtHR (Grand Chamber) 7 July 2011, Application no. 55721/07, *Al-Skeini and Others v United Kingdom*, Para. 162; *McCann and Others v United Kingdom*, *supra* note 22, Para. 147.

24 D. Korff, *The right to life. A Guide to the implementation of article two of the European Convention on Human Rights* (Human rights handbooks, no. 8), 2006, p. 6.

25 Art. 15 ECHR.

26 ECtHR 23 March 2010, Application no. 4864/05, *Oyal v Turkey*.

27 ECtHR 3 April 2001, Application no. 27229/95, *Keenan v United Kingdom*, Para. 130.

her son had suffered inhuman and degrading treatment in detention and that no effective remedy was available to her in respect of her complaints.²⁸ Her adult son, Mark Keenan, had died in detention from suicide.

Keenan himself and Keenan's mother had no effective remedy available under domestic law for determining liability or for claiming compensation.²⁹ Although a person who suffers physical or psychiatric injury as a consequence of negligent behaviour by another can claim damages on the basis of negligence, in *Keenan v United Kingdom* Keenan's mother could not prove that her son had suffered injury apart from the fact of his death. Keenan's mother could not herself claim any damages as the Fatal Accidents Act 1976 (hereinafter: FAA) only offers a limited group of persons a legal basis for claiming compensation and there was no other legal basis to provide her with a ground of action (section 1A FAA).

The Court, in answering the question whether Article 13 ECHR requires that compensation be made available, started to explain its own approach and stated that the Court itself:

‘(...) will in appropriate cases award just satisfaction, recognising pain, stress, anxiety and frustration as rendering appropriate compensation for non-pecuniary damage.’³⁰

That having been said, the Court went on to state that, given the fundamental character of Articles 2 and 3 ECHR, in cases of a breach of one of those provisions ‘compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of possible remedies.’³¹ The Court concluded that in this case Keenan's mother:

‘(...) should have been able to apply for compensation for her non-pecuniary damage and that suffered by her son before his death.’³² (emphasis added)

Now, it is therefore clear that the Court in *Keenan v United Kingdom* explicated a rule under Articles 2 and 13 ECHR which states that compensation for non-pecuniary loss must in principle be part of the range of redress mechanisms in cases of infringements to the right to life.³³ This rule is grounded on the fundamental character of the right to life. According to Varuhas, one might think of the vindicatory function of European human rights law as an explanation for this different approach to compensation for non-pecuniary loss in wrongful death cases under European human rights law.³⁴

3.3.3. *The application of the Keenan v United Kingdom rule in proceedings between private parties*

The Court reiterated its rule in *Bubbins v United Kingdom* and *Kontrová v Slovakia* (although the underlying facts and the Court's judgements were substantially different)³⁵ and was faced with a new question regarding the scope of applicability of its rule in *Zavoloka v Latvia*.³⁶ Zavoloka's 12-year-old daughter had died in a car accident after a car that was driven by a private person had hit her. The wrongdoer had paid € 2,600 to compensate the costs of the child's funeral. Zavoloka stated, before the European Court of Human Rights, that according to domestic law she could claim no compensation for

28 *Keenan v United Kingdom*, supra note 27, Para. 2.

29 *Keenan v United Kingdom*, supra note 27, Para. 128.

30 *Keenan v United Kingdom*, supra note 27, Para. 130.

31 *Keenan v United Kingdom*, supra note 27, Para. 130.

32 *Keenan v United Kingdom*, supra note 27, Para. 131.

33 See also e.g. ECtHR (Grand Chamber) 10 May 2001, Application no. 29392/95, *Z and Others v United Kingdom*; ECtHR 14 March 2002, Application no. 46477/99, *Paul and Audrey Edwards v The United Kingdom*; ECtHR 31 May 2007, Application no. 7510/04, *Kontrová v Slovakia*; ECtHR 17 December 2009, Application no. 4762/05, *Mikayil Mammadov v Azerbaijan*; ECtHR 30 October 2012, Application no. 32520/09, *Ghimp and others v The Republic of Moldova*; ECtHR 18 December 2012, Application no. 13904/07, *Kudra v Croatia*.

34 J.N.E. Varuhas, ‘Liability under the Human Rights Act 1998: the duty to protect life, indirect victims and damages’, 2012 *The Cambridge Law Journal*, 71, no. 2, p. 265.

35 See Wijnakker, supra note 2; R. Rijnhout, *Schadevergoeding voor derden in personenschadezaken. Een rechtsvergelijkende studie naar de artikelen 6:107 en 6:108 BW in relatie tot het onrechtmatige daadsrecht en schadevergoedingsrecht*, 2012, pp. 304-312; Emaus & Rijnhout, supra note *.

36 *Zavoloka v Latvia*, supra note 5. *Bubbins v United Kingdom*, supra note 3, Para 171; *Kontrová v Slovakia*, supra note 33, Para. 64. See also ECtHR 13 March 2012, Application no. 2694/08, *Reynolds v United Kingdom*.

non-pecuniary damage and stated that this fact constituted a breach of the right to life in conjunction with the right to an effective remedy.³⁷

The Court thus had to decide whether the *Keenan v United Kingdom* rule also applies in private law relationships. The Court stated that no absolute and general obligation exists for states to provide victims with a legal basis for claiming compensation for non-pecuniary loss.³⁸ The Court argued that there is no consensus on this point amongst the High Contracting Parties.³⁹ The Court also took into consideration that Zavoloka did not join as a party to the criminal proceedings and noted that in the near future the Latvian Civil Code will include a legal basis for claiming compensation for non-pecuniary damage.⁴⁰ From this case it thus became clear that the ECHR does not oblige countries to apply the *Keenan v United Kingdom* rule in private law relationships. In other words, compensation for non-pecuniary loss must be part of the range of redress mechanisms when the right to life is infringed by an act or omission of a *government body* only.

3.3.4. A right to compensation: from a functional to a moral argument

The aforementioned *Keenan v United Kingdom* rule must be considered in the context of European human rights law, as well as its aims and goals. As to the aims of European human rights law, it is not controversial to state that the Convention rights make up the very foundations of European human rights law. Those rights involve core values (for example, life, family life, private life, freedom of expression, freedom of thought) and thereby aim at the protection of those core values. The rights have been adopted by the High Contracting Parties as encapsulating the most essential values in life and can all be traced to human dignity and fundamental freedom.⁴¹

Article 34 ECHR grants an individual a right to bring his case before the European Court of Human Rights if he considers himself to be a victim of a violation of a Convention right by a High Contracting Party. If confronted with an individual complaint under Article 34 ECHR, the Court thus has to rule on the question whether the respondent state had infringed one or more Convention rights. This fact colours the judgements of the ECtHR in the sense that one should realize that the approach by the Court is driven by the protection of fundamental rights.

The *Keenan v United Kingdom* rule marks the idea that the ECtHR takes as a starting point the protection of Convention rights. In this case: the right to life and the right to an effective remedy for everyone whose Convention rights are violated by a Contracting Party. Starting from the right to life and the right to an effective remedy, the ECtHR has tested the applicants' situation in the national legal order against the ECHR. The Court thereby leaves the respondent state a certain margin of appreciation, for example if the issue at hand is highly controversial, e.g. euthanasia. In *Zavoloka v Latvia*, it is perfectly possible that the Court took into account that the primary dispute was a private law dispute and that the Latvian law was about to be changed.

As already mentioned, the Court in *Keenan v United Kingdom* stated that the conclusion that compensation should be part of the range of redress mechanisms is based on the fundamental character of the right to life.⁴² This is a functional argument in the sense that the range of redress mechanisms is at the service of the right to life. If the right to compensation must be part of the range of redress mechanisms, the right to compensation is thus at the service of the right to life.

The functional argument itself can be reduced to a moral argument if one takes into account the moral aspect of the decision to award damages for reasons of *remedying* a breach of the right to life.⁴³ Additionally, because a breach should be *remedied*, in principle *full compensation* for the non-pecuniary loss is awarded.

37 *Zavoloka v Latvia*, supra note 5, Para. 23.

38 *Zavoloka v Latvia*, supra note 5, Para. 40.

39 *Zavoloka v Latvia*, supra note 5, Para. 40.

40 *Zavoloka v Latvia*, supra note 5, Para. 41.

41 See Emaus, supra note 16, pp. 105-106.

42 *Keenan v United Kingdom*, supra note 27, Para. 130.

43 Cf. I. Giesen, 'Of wrongful birth, wrongful life, comparative law and the politics of tort law systems', 2009 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 72, pp. 265 et seq.

4. Awarding non-pecuniary damages under Dutch and German law

4.1. An introduction

After having elaborated on the approach of the ECtHR concerning remedying a breach of the right to life, the aim of this section is to bring together different national perspectives on the concept of non-pecuniary damage. We will start by describing the traditional damage/injury-based approach (Section 4.2). Next, the ‘movement’ towards a more rights-based approach will be dealt with in Section 4.3. Lastly, we will shed some light on the impossibility of compensation for bereavement damage, and the criticism of this impossibility in the light of a rights-based approach (Section 4.4).

4.2. Compensation for non-pecuniary damage: a damage/injury-based approach

Both the Dutch and German legislators have chosen to introduce an enumeration of losses that can be qualified as legally relevant non-pecuniary loss.⁴⁴ According to Dutch law, damages can be awarded when (a) the tortfeasor aimed to cause non-pecuniary loss to the claimant, when (b) the claimant is physically injured, robbed of his honour and reputation, or by other means suffers a violation of his personality, and when (c) a next of kin’s memory is sullied (Article 6:106(1) Dutch Civil Code). In practice, the second category is most important: damages awarded when the claimant is physically injured or when his personality is violated.⁴⁵

The category ‘violation of one’s personality’ is most controversial, because it is unclear under which circumstances one suffers this violation. The Dutch Supreme Court (*Hoge Raad*) has ruled that *in principle* a plaintiff should be psychiatrically injured, and therefore a (from a clinical perspective acknowledged) mental disorder must be proven.⁴⁶ However, notwithstanding the fact that the aggrieved party is not (physically or psychiatrically) injured, compensation for non-pecuniary loss can also be awarded when someone’s (private law) personality right or a fundamental right has been infringed. The Dutch Supreme Court held that this compensation has to be justified in the light of the exceptional seriousness of the breach of the norm and the consequences thereof for the victim.⁴⁷ Considering these criteria it has to be concluded that an open category for awarding damages for non-pecuniary loss has been introduced in Dutch law. It should be emphasized that the Dutch Supreme Court is reluctant to allow this exception to the basic principle that the aggrieved party, for damages for non-pecuniary loss to be awarded, should be either physically or psychiatrically injured.

The German legislator has chosen a similar damage/injury approach with respect to non-pecuniary damage. In § 253 II German Civil Code (*Bürgerliches Gesetzbuch*) it is stated that compensation for non-pecuniary damage is awarded when the plaintiff is physically injured, or when his personal health, freedom or sexual self-determination is infringed. Considering this enumeration compensation should not be granted when a personality right is infringed.⁴⁸ The German Federal Court of Justice (*Bundesgerichtshof*; hereinafter FCJ) has decided, however, that non-pecuniary damages should nevertheless be awarded, because the general right of personality would be void if no remedy would be available (see also Section 4.3).

4.3. Compensation for non-pecuniary damage: a rights-based approach in Dutch and German law

In both the Dutch and German law of damages a more rights-based approach can be found. The Dutch Supreme Court has delivered several judgements in which the idea of the vindication or enforcement of personality rights can be found, i.e. awarding damages for non-pecuniary loss whilst the plaintiff did not suffer from any physical or psychiatric injury and additionally emphasizing the breach of the

44 For Dutch law see Art. 6:95 in conjunction with 6:106 Dutch Civil Code. For German law see § 253 II German Civil Code.

45 A.J. Verheij, *Vergoeding van immateriële schade wegens aantasting in de persoon*, 2002; S.D. Lindenbergh, *Smartengeld tien jaar later*, 2008, pp. 13-16.

46 HR 22 February 2002, NJ (*Nederlandse Jurisprudentie*) 2002, 240, Para 4.3 (*Taxibus*). See on this subject Lindenbergh, *supra* note 45, pp. 32-34.

47 HR 29 June 2012, NJ 2012, 410, Para. 3.5.

48 G. Schiemann, in J. von Staudingers *Kommentar zum Bürgerlichen Gesetzbuch mit Einföhrungsgesetz und Nebengesetzen* Buch 2, *Recht der Schuldverhältnisse* §§ 249-254 (Schadensersatzrecht), 2005, Rn 51; H. Kötz & G. Wagner, *Deliktsrecht*, 2010, pp. 169-170.

personality right. These examples include: the infringement of the right to self-determination in medical negligence cases (the birth of a handicapped child because of wrongfully neglecting to carry out a prenatal examination),⁴⁹ a severe infringement of the law restricting the publishing rights of the creators of personal likenesses (the publication of a nude picture in a holiday leaflet)⁵⁰ and negligently failing to offer police assistance in a threatening situation with regard to the safety of property as well as the person (riots on New Year's Eve).⁵¹ Additionally, the Court of Appeal of Arnhem awarded compensation for non-pecuniary loss in response to the mere fact that someone's right to informed consent had been breached (medical malpractice). In Dutch academic literature this type of claim is often linked with the term 'damage to integrity' (*integriteitsschade*).⁵²

The Dutch Supreme Court has not allowed the awarding of damages for non-pecuniary loss caused by an infringement of personality rights in all instances. The question has therefore arisen: under which circumstances could damages for an infringement of a (private law) personality right be awarded?⁵³ Answering this question is important since, according to some, every negative consequence could be translated into the infringement of a right, e.g. an infringement of the right to property, health, private life and self-determination.⁵⁴ As stated, the Dutch Supreme Court has ruled that in order to award non-pecuniary damages – when the victim is not physically injured – in principle the rule is that the victim should have suffered a *psychiatric injury*; however, an exception could be made in the light of the exceptional seriousness of the breach of the norm and the consequences thereof for the victim respectively.⁵⁵

Again, the reasoning of the Dutch Supreme Court does not dictate under which circumstances both the infringement and its consequences are sufficiently severe.⁵⁶ Next, as Lindenbergh states, it could be questioned to what extent this idea of enforcing a right by awarding non-pecuniary damages influences other cases in which the more strict criterion of a 'psychiatric injury' was already laid down, e.g. nervous shock cases.⁵⁷

Under German law a rights-based approach for compensation for non-pecuniary damage derives from a breach of the general right of personality and is grounded on Articles 1 and 2 of the German Constitution and Article 823 of the German Civil Code.⁵⁸ The general right of personality is not incorporated in the German Civil Code as such. In 1954, the German Federal Court of Justice in the *Krankenpapiere* decision explicated that the general right of personality is a *sonstiges Recht* under Article 823 of the German Civil Code.⁵⁹ The finding of a breach of the general right of personality would be void if no remedy would be available. Therefore, the FCJ in *Herrenreiter* reasoned that by the analogy of Article 847 of the German Civil Code, compensation for non-pecuniary damage arising from a breach

49 HR 18 March 2005, NJ 2006, 606 (*Baby Kelly*).

50 HR 30 October 1987, NJ 1988, 277 (*Naaktfoto*). The Dutch Supreme Court justified this outcome by stating that the non-pecuniary damages had been awarded in the light of the idea of satisfaction.

51 HR 9 July 2004, NJ 2005, 391 (*Oosterparkrellen*).

52 Gerechtshof Arnhem 25 April 2006, ECLI:NL:GHARN:2006:BM5194, Para. 4.4.3. The Dutch Supreme Court did not deal with the question whether awarding these damages was justified, HR 23 April 2010, JA (*Jurisprudentie Aansprakelijkheidsrecht*) 2010, 97. See: L.J.J. Hendrix & A.J. Akkermans, 'Causaliteitonzekerheid bij informed consent. Beschouwingen naar aanleiding van *Chester v. Asfhar*', 2007 *Tijdschrift voor Gezondheidsrecht*, pp. 498-515. In the UK a similar reasoning can be found in the House of Lords decision *Chester v Asfhar* [2005] 1 A.C. 134.

53 T.B.H. Nguyen, 'Voorwaarden voor smartengeld bij schending fundamentele rechten zonder letsel', 2009 *Nederlands Juristenblad*, pp. 1812-1818; S.D. Lindenbergh, 'Vermogensrechtelijke remedies bij schending van fundamentele rechten', in G.E. van Maanen & S.D. Lindenbergh, *EVRM en privaatrecht: is alles van waarde weerloos? Preadviezen 2011 Uitgebracht voor de Vereniging voor Burgerlijk Recht*, 2011, pp. 91-93.

54 See for a possible limitation: A.J. Verheij, 'Een pleidooi voor de vergoeding van geringe immateriële schade', 1998 *RM Themis*, pp. 343-350.

55 HR 29 June 2012, NJ 2012, 410, no. 3.5.

56 See on this subject Verheij, supra note 54.

57 Lindenbergh, supra note 53, pp. 91, 93-94.

58 BGHZ 35, 363, p. 367 (*Giseng*); BGHZ 39, 124, p. 130 (*Fernsehansagerin*); BGHZ 128, 1, p. 15 (*Caroline I*); BGH NJW 1996, 984, p. 985; BGH NJW 1996, 985, p. 987 (*Caroline v Monaco III*); BGHZ 143, 214, p. 218 (*Marlene Dietrich*). See K. Vieweg, in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* Eckpfeiler des Zivilrechts, J. Schadenersatzrecht, 2012, Rn 56; Schiemann, supra note 48, Rn 51; C. Uesseler, *Einwirkungen der Grundrechte auf das Schadenersatzrecht*, 2008, p. 208; Kötz & Wagner, supra note 48, pp. 171-172.

59 BGHZ 24, 72, p. 77 (*Krankenpapiere*). See also: BGHZ 13, 334, p. 338 (*Schacht*).

of the general right of personality can be awarded. Later, the FCJ based this right to compensation on Articles 1 and 2 of the German Constitution and Article 823 of the German Civil Code.⁶⁰

The right to compensation for a breach of the general right of personality was first solely based on the idea of satisfaction (*Genugtuung*):

‘Wie der Große Zivilsenat in seinem Beschluß vom 6. Juli 1955 (BGHZ 18, 149) ausgeführt hat; kommt dem Anspruch auf “Schmerzensgeld” die Funktion zu, dem Geschädigten einen angemessenen Ausgleich für diejenigen Schäden, diejenige Lebens- (oder Persönlichkeits-) Minderung zu bieten, die nicht vermögensrechtlicher Art sind. Zugleich trägt er aber auch dem Gedanken Rechnung, daß der Schädiger dem Geschädigten Genugtuung für das schuldet, was er ihm angetan hat.’⁶¹

In the *Caroline von Monaco I and II* decisions another function, i.e. the preventive function, was placed at the forefront. The FCJ explained in *Caroline von Monaco I*:

‘Von der Höhe der Geldentschädigung muß deshalb ein echter Hemmungseffekt auch für solche Vermarktung der Persönlichkeit ausgehen.’⁶²

The FCJ thus argued that the general right to personality must be connected to a remedy in order to prevent it from becoming void. This remedy is compensation when no other remedy is available.⁶³

From a recent Federal Court of Justice decision it has become clear that the preventive function does not always prevail. In this case the FCJ held that relatives do not inherit the claim of the deceased if the claim is based on the infringement of a general personality right. On the basis of the idea of satisfaction the court reasoned that when the aggrieved party has passed away, the claim loses all importance.⁶⁴

4.4. The impossibility of awarding compensation for bereavement damage

4.4.1. The system of compensation for the next of kin's damage

It is generally accepted that Article 6:108 of the Dutch Civil Code concerning compensation for wrongful death is limited in nature, i.e. Article 6:108 offers the legal framework for deciding *who* can claim compensation for *which* damage in wrongful death cases.⁶⁵ The Dutch Supreme Court traditionally restricts the action of the next of kin in wrongful death cases even further. It has ruled that Article 6:108 Dutch Civil Code exclusively offers the legal framework for deciding upon the assessment of damages when someone's loss is caused by the death of the direct victim. Therefore full compensation could never be granted, not even when the tortfeasor acted wrongfully and directly towards the next of kin (the 'third party' in fact, but not in law).⁶⁶ In the legal doctrine this effect is characterized as the exclusiveness of Article 6:108 Dutch Civil Code.⁶⁷ The limited approach towards wrongful death claims goes back to the introduction of the former Dutch Civil Code.

Although the former Dutch Civil Code was strongly inspired by the French Civil Code (*Code civil*), the legislator had decided not to follow the French example as regards tort law in wrongful death cases,

60 Schiemann, *supra* note 48, Rn 51; Uessler, *supra* note 58, p. 210; Kötz & Wagner, *supra* note 48, p. 171.

61 BGHZ 26, 349, p. 358 (*Herrenreiter*). See Vieweg, *supra* note 58, Rn 53; Schiemann, *supra* note 48, Rn 53.

62 *Caroline von Monaco I*, *supra* note 58. See Vieweg, *supra* note 58, Rn 53-54; Schiemann, *supra* note 48, Rn 53.

63 This remedy is thus based on the principle of subsidiarity. See Vieweg, *supra* note 58, Rn 56.

64 BGH 29 April 2014, VI ZR 246/12.

65 C.J. van Zeben et al., *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek. Boek 6. Algemeen gedeelte van het verbintenissenrecht*, 1981, pp. 392-393, 396 (hereinafter: *Parl. Gesch. Boek 6*); 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*, 1990, p. 1315 (hereinafter: *Parl. Gesch. Boek 6 (Intr.)*); A.S. Hartkamp & C.H. Sieburgh, C. Asser's *handleiding tot de beoefening van Nederlandse Burgerlijk Recht. 6. Verbintenissenrecht. II De verbintenis in het algemeen, tweede gedeelte*, 2013, no. 159.

66 HR 12 December 1986, NJ 1987, 958 (*Rockwool/Poly*); *Taxibus*, *supra* note 46; HR 9 October 2009, NJ 2010, 387 (*Vilt*).

67 E.F.D. Engelhard, 'Third party losses in comparative perspective. Three short lectures in honour of W.H.V. Rogers. Part II, Third party losses in Dutch law', 2007 *Utrecht Law Review*, no. 2, p. 83. See also: E.F.D. Engelhard, *Regres*, 2003, p. 379; S.D. Lindenberg, *Smartengeld*, 1998, pp. 180-184, 204; T. Hartlief, 'Baby Joost en het verdriet van Nederland', annotation to HR 8 September 2000, 2000 AA (*Ars Aequi*), pp. 866-867; Rijnhout, *supra* note 35, pp. 8-11.

since it was decided to introduce a codified cause of action for the next of kin in wrongful death cases (the former Article 1406).⁶⁸ This next of kin's derived claim, which was based upon the liability of the tortfeasor towards the deceased, was originally limited to compensation for the loss of maintenance.⁶⁹ The rationale of this codified cause of action was to prevent arbitrary decisions by judges in individual cases, i.e. to create certainty as regards compensation in wrongful death cases.⁷⁰

The codified action for the next of kin was maintained on the occasion of the introduction of the New Civil Code in 1992. The legislator thereby expanded the possibilities for the next of kin to claim damages to both the loss of maintenance and the cost of the deceased's funeral (Article 6:108 Dutch Civil Code). However, compensation for bereavement damage is not legally recognized in Dutch law.⁷¹

The German concept of *Tatbestandprinzip* limits liability to the responsibility of the tortfeasor solely towards the person whose protected interest has been wrongfully infringed.⁷² Despite the fact that 'life' is one of the protected interests mentioned in § 823 I of the German Civil Code, neither the deceased (because of his demise) nor his next of kin (his protected interest has not been infringed) can be awarded damages directly based on this paragraph.⁷³ Nevertheless, a circle of possible next of kin can be awarded damages for the loss of maintenance and funeral expenses (see § 844 of the German Civil Code). Similar to Dutch law, these claims derive from the liability towards the direct victim. Next, according to German law, no damages are awarded as regards grief.⁷⁴

Despite the strict conditions and the limited working sphere of § 844 of the German Civil Code, it is important to mention that this article does not limit the working sphere of general tort law. A factual third party can claim damages on the basis of general tort even when his damage has been caused by the death of the direct victim.⁷⁵ When the protected interest of a factual third party is breached, e.g. the protected interest of (mental) 'health', full compensation can be granted under certain conditions. As Kötz and Wagner state: the legislator meant to protect a limited category of next of kin by granting them a derived right to damages. However, that does not mean that it thereby intended to deprive (other) third parties of their possibility to claim full compensation on the basis of tort law when their protected interest is breached.⁷⁶

68 J.C. Voorduin, *Geschiedenis en beginselen Nederlandsche Wetboeken, De beraadslagen deswege gehouden Tweede Kamer der Staten-Generaal*, 1838, p. 88.

69 J. Drion, 'Schadevergoeding wegens het veroorzaken van eens anders dood', in *Preadviezen Vereniging voor de vergelijkende studie van het recht van België en Nederland 1956*, 1956, p. 46. Compensation could only be claimed by the widow(er), the children or the parents of the deceased if they were taken care of by means of (earnings from) labour.

70 Voorduin, supra note 68, pp. 85 and 88.

71 The Dutch Supreme Court allowed an exception to this principle in a case in which a father had killed his son with the intention of mentally damaging his former wife. Notwithstanding the fact that she did not suffer a psychiatric injury, she was awarded damages for her non-pecuniary loss because of her former husband's intent to mentally harm her (see Art. 6:106 Para. 1 under a Dutch Civil Code), HR 26 October 2001, NJ 2002, 216. See also S.D. Lindenbergh, 'Schrik, onrechtmatigheid en schade', 1997 *RMThemis*, p. 189; S.D. Lindenbergh, 'Smartengeld voor naasten: de rechter heeft zijn werk afgemaakt en de wetgever moet de klus afmaken', 2008 *Aansprakelijkheid Verzekering & Schade*, p. 256; Rijnhout, supra note 35, pp. 301-302. See recently Rb. 's-Hertogenbosch 3 August 2011, ECLI:NL:RBSHE:2011:BR4888.

72 G. Brüggemeier, *Haftungsrecht, Struktur, Prinzipien, Schutzbereich*, 2006, p. 547.

73 K. Larenz & C.-W. Canaris, *Lehrbuch des schuldrechts. Zweiter band besonder teil 2. Halband*, 1994, p. 587; G. Pfeifer, 'Schadensfall Tod: Zur Ersatzfähigkeit entgangenen Gewinns bei Tötungsdelikten', 2005 *AcP*, pp. 800-801, 808-809; Kötz & Wagner, supra note 48, pp. 288-289. See also Rijnhout, supra note 35, p. 151.

74 This impossibility has recently been criticized in the German literature. See e.g. G. Bischoff, 'Schmerzensgeld für Angehörigen von Verbrechensopfern', 2004 *Monatsschrift für Deutsches Recht*, pp. 557-559; R. Klinger, 'Schmerzensgeld für Hinterbliebene von Verkehrsoffern? Verfassungsrechtliche Überlegungen unter Berücksichtigung der Rechtsprechung des Bundesgerichtshofes', 2005 *Neue Zeitschrift für Verkehrsrecht*, pp. 290-293; G. Wagner, *Neue Perspektiven im Schadensersatzrecht: Kommerzialisierung, Strafschadensersatz, Kollektivschaden; Gutachten A für den 66. Deutschen Juristentag*, 2006, A61-A65; J.J. Luckey, 'He blew his mind out in a car... Ansprüche naher Angehörigen beim Unfalltod', 2012 *Straßenverkehrsrecht*, no. 1, pp. 1-6; C. Huber, 'Kein Angehörigenschmerzensgeld de lege lata – Deutschland auch künftig der letzte Mohikaner in Europa oder ein Befreiungsschlag aus der Isolation', 2012 *Neue Zeitschrift für Verkehrsrecht*, no. 1, pp. 5-11; H.-P. Schwintowski, 'Angehörigenschmerzensgeld – Überwindung eines zivilrechtlichen Dogmas', 2012 *Zeitschrift für Schadensrecht*, no. 1, pp. 6-12.

75 An example of this type of claim is the nervous shock claim (*Schockschäden*), see e.g. BGHZ 56, 163; BGH VI ZR 381/99; BGH NJW 2006, 3268; BGH NJW 2007, 2764.

76 Kötz & Wagner, supra note 48, p. 63. Compare Bischoff, supra note 74, p. 559; A. Röthel, in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* Buch 2, Recht der Schuldverhältnisse §§ 840-853 (Unerlaubte Handlungen 5), Rn 15.

4.4.2. Non-pecuniary damage suffered by the next of kin: a much debated topic

Compensation for the next of kin's non-pecuniary damage is traditionally a much debated topic. Nevertheless, in the course of the 20th century compensation for bereavement damage was accepted in most European countries.⁷⁷ Under Dutch and German law bereavement damage is not accepted as a legally relevant loss.⁷⁸ These restrictive approaches have been strongly criticized in academic literature. The reasons for denying this claim are mainly based on traditional and moral arguments.

First, it has been argued that restraint should be exercised considering the nature of the loss. As stated by the Dutch Government during the introduction of the new Civil Code, the more poignant the loss, the more difficult it is to compensate that loss by awarding damages.⁷⁹ This argument could be considered to be in line with the arguments given in the Dutch and German literature respectively. It has been argued that death cannot be translated into monetary terms or be compensated or repaired by awarding damages. It has also been argued, however, and in our opinion rightly so, that it is inherent in all non-pecuniary loss that it cannot be, as such, converted into financial loss.⁸⁰

Additionally, in the German literature it is stated that the German *status quo* could be explained by the fear of the possible arbitrariness of court decisions.⁸¹ A similar argument has been raised on the legislative level in the Netherlands on several occasions. First, at the moment of the introduction of the new Civil Code in 1992. The argument was again raised during the debate on the legislative proposal as regards bereavement damage (2003-2010). It was argued that the pressure on judges would increase both with the number of cases and in relation to the complexity of the decision that should be made.⁸² Moreover, during the debate on the legislative proposal it was argued that the circle of claimants could not be properly defined.⁸³ In our opinion, this circle of claimants can never be well defined, because of the fact that ties of love and affection cannot be laid down in universal schemes. Perhaps this can be explained by an argument mentioned before the introduction of the Dutch Civil Code in 1992, when some were afraid of commercializing grief and distasteful legal proceedings.⁸⁴

Furthermore, the argument of both the so-called 'claim culture' and 'opening the floodgates' has regularly arisen.⁸⁵ A fear exists that in general the number of tort law cases as well as the amount of damages would increase disproportionately if bereavement damage were to be legally recognized. Although by awarding damages for the next of kin's non-pecuniary loss tort law will expand, it could be questioned why, precisely, this expansion would add to the development of a 'claim culture'. Besides, if we compare the Dutch and German situation with the situation in other countries, it becomes clear that awarding these damages does not lead to an uncontrollable claim culture.⁸⁶ Additionally, as stated

77 S.D. Lindenbergh, 'The protection of secondary victims: a comparative overview', in M. Bona et al. (eds.), *Personal injury compensation in Europe series: Fatal accidents & secondary victims*, 2005, pp. 422-424; Lindenbergh, supra note 71, p. 261.

78 One exception has however been made by the Dutch Supreme Court, namely in a situation in which a father has killed his son in order to mentally damage his former wife. She was successful in claiming compensation for her non-pecuniary damage, which in essence could be qualified as compensation for affectionate damage, because she did not suffer from a psychiatric injury; she merely suffered from grief, HR 26 October 2001, NJ 2002, 216. In other situations compensation for affectionate damage has been denied by the Dutch Supreme Court: *Taxibus*, supra note 46; *Vilt*, supra note 66.

79 *Parl. Gesch. Boek 6*, supra note 65, p. 389; *Parl. Gesch. Boek 6 (Intr.)*, supra note 65, p. 1273.

80 Lindenbergh, supra note 67, p. 37. Lindenbergh argues, however, that compensation for non-pecuniary loss can be translated into monetary terms. See also A.J. Verheij, 'Contouren van het wetsvoorstel affectieschade. Enige (kritische) vragen en opmerkingen', 2001 *Nederlands Juristenblad*, p. 1569; Wagner, supra note 74, p. A 64; Luckey, supra note 74, p. 4; Huber, supra note 74, p. 7; T. Kadner, 'Schmerzensgeld für Angehörige – Angemessener Ausgleich immaterieller Beeinträchtigungen oder exzessiver Ersatz mittelbarer Schäden?', 1996 *ZEup*, p. 151. See also H. Stoll, *Haftungsfolgen im bürgerlichen Recht. Eine Darstellung auf rechtsvergleichender Grundlage*, 1993, p. 362.

81 See e.g. Wagner, supra note 74, p. A 63.

82 *Parl. Gesch. Boek 6 (Intr.)*, supra note 65, p. 1274.

83 *Kamerstukken I* 2008-09, 28781, no. 34, p. 1555; *Kamerstukken I* 2009-10, 28781, no. 21, p. 871, 878. In the legislative proposal it was suggested to also award compensation for the next of kin's non-pecuniary loss in the situation in which the direct victim would have suffered a severe injury. This suggestion was criticized because it could not be described precisely which injury was sufficiently severe to justify compensation for affectionate damage, *Kamerstukken I* 2009-10, 28781, no. 23, p. 1013; *Kamerstukken I* 2009-10, 28781, no. 21, p. 876. See on this subject in the German literature R.A. Schramm, *Haftung für Tötung*, 2010, pp. 409-416.

84 *Parl. Gesch. Boek 6*, supra note 65, p. 389; *Parl. Gesch. Boek 6 (Intr.)*, supra note 65, p. 1273. See also in the German literature on this subject e.g. Schramm, supra note 83, pp. 416-417.

85 *Kamerstukken I* 2008-09, 28781, no. 34, p. 1555; *Kamerstukken I* 2009-10, 28781, no. 23, p. 1013.

86 See on the limitations in French law e.g. Y. Lambert-Faivre & S. Porchy-Simon, *Droit du dommage corporel. Systèmes d'indemnisation*, 2008, p. 307; G. Viney & P. Jourdain, *Les conditions de la responsabilité*, 2006, p. 160.

by Faure and Hartlief, the number of claims or possibilities to claim does not tell us anything about the justification thereof.⁸⁷

Finally, the Christian Democrats in the Dutch Upper Chamber declared that they opposed the idea of compensation for bereavement damage, because they were principally against awarding these types of damages, i.e. tort law should not be used to compensate the grief of family members of someone who has passed away.⁸⁸ More generally, after the rejection of the Dutch proposal, the religious backgrounds of the Netherlands and Germany were referred to as the ultimate reason to reject the possibility of claiming bereavement damages (i.e. the Calvinist doctrine).⁸⁹

The above-mentioned objections against bereavement damages do not withhold the fact that many legal scholars advocate awarding these damages.⁹⁰ As a first example, the comparative argument, that Dutch and German laws are exceptional in comparison to other countries in the European Union, has repeatedly been raised.⁹¹ Next to Germany and the Netherlands, compensation for bereavement damages is, as far as we can see, only dismissed in Denmark.⁹²

Furthermore, it has been shown in the Dutch literature that, as a result of allowing these damages to be awarded, family members would feel that they are being recognized as regards their *own* emotional loss.⁹³ Moreover, Huber mentions the possibility that the next of kin can use the damages to overcome the period of grief, e.g. by going on holiday.⁹⁴

Lastly, it has been argued that the law of damages as regards non-pecuniary damages is internally inconsistent.⁹⁵ For example, damages for non-pecuniary loss are awarded, according to Dutch law, to parents in a situation of wrongful birth, i.e. the *birth* of a handicapped child due to a medical mistake because of not performing a prenatal examination when this was medically indicated.⁹⁶ Additionally, in the German literature it has been argued that a lack of damages in the end means that comparable situations are treated differently. A comparison has been made between these situations and situations in which someone's general right of personality is infringed.⁹⁷

Considering these alleged inconsistencies, it has been argued in the context of bereavement damage that a change should occur in that the approach should be rights-based instead of being grief-based.⁹⁸ In the Dutch literature it has been argued that the right to self-determination in relation to the right to respect for family life is being infringed and, to enforce this 'fundamental right', damages for non-pecuniary

87 M. Faure & T. Hartlief, *Nieuwe risico's en vragen van aansprakelijkheid en verzekering*, 2002, p. 126. On the subject of a claim culture in the Dutch literature see also M. Faure & T. Hartlief, 'Enkele opmerkingen naar aanleiding van de brief van het kabinet over claimcultuur', 1999 *Aansprakelijkheid, Verzekering & Schade*, pp. 75-84; T. Hartlief, 'Leven in een claimcultuur: wie is bang voor Amerikaanse toestanden?', 2005 *Nederlands Juristenblad*, pp. 830-834; A.L.M. Keirse, 'Nieuwe risico's. Wie is bang voor de magnetron', 2007 *Nederlands Juristenblad*, pp. 2418-2425.

88 *Kamerstukken I* 2008-09, 28781, no. 34, p. 1558; *Kamerstukken I* 2009-10, 28781, no. 21, p. 878. See very critically on this moral or ethical argument Lindenbergh, *supra* note 67, pp. 195-198. Empirical research that had been carried under the authority of the Dutch legislator by the 'Interfacultair samenwerkingsverband Gezondheid en Recht' (Vrije Universiteit Amsterdam) proved that the next of kin would appreciate compensation for non-pecuniary loss when this was correctly offered, A.J. Akkermans et al., *Slachtoffers en aansprakelijkheid. Een onderzoek naar behoeftes, verwachtingen en ervaringen van slachtoffers en hun naasten met betrekking tot het civiele aansprakelijkheidsrecht. Deel II Affectieschade*, 2008. Notwithstanding this fact, the Dutch Upper Chamber rejected this legislative proposal.

89 Huber, *supra* note 74, pp. 6-7.

90 See e.g. Stoll, *supra* note 80, p. 362-363.

91 See e.g. Wagner, *supra* note 74, p. A 65; A. Janssen, 'Das Angehörigenschmerzengeld in Europa und dessen Entwicklung. Verpasst Deutschland den Anschluss?', 2003 *ZRP*, p. 159; Schramm, *supra* note 83, pp. 455-451; Luckey, *supra* note 74, pp. 1-2; Huber, *supra* note 74, p. 5; Lindenbergh, *supra* note 77, pp. 422-424.

92 Lindenbergh, *supra* note 45, p. 59.

93 Akkermans et al., *supra* note 88, pp. 69-73. Awarding damages for the next of kin's non-pecuniary loss could not, however, considering the concluding remarks by Akkermans et al., be considered as a goal as such; damages is a means to satisfy the needs of the next of kin in personal injury cases. According to the results of this research, these needs are: a recognition of the wrongful act, offering apologies, showing compassion, to realize the effects of the wrongful act as regards the life of the plaintiffs and the recognition of legal liability. See Akkermans et al., *supra* note 88, pp. 71-73, see also pp. 69-86. See also J. Mulder, 'Hoe schadevergoeding kan leiden tot gevoelens van erkenning en gerechtigheid', 2010 *Nederlands Juristenblad*, pp. 293-296; J. Mulder, *Compensation, the victim's perspective*, 2013 (on the Dutch Crime Compensation Fund).

94 Huber, *supra* note 74, p. 7.

95 See e.g. Lindenbergh, *supra* note 67, p. 197; A.J. Verheij, 'Onevenwichtig schadevergoedingsrecht m.b.t. de positie van derden', 2005 *VR*, pp. 205-211.

96 *Baby Kelly*, *supra* note 49.

97 Schramm, *supra* note 83, pp. 420-421; Luckey, *supra* note 74, p. 3; Huber, *supra* note 74, p. 11.

98 A.J. Verheij, 'Twee benaderingen van vergoeding van immateriële schade', 2013 *Verkeersrecht*, pp. 269-276.

loss should be awarded to the next of kin.⁹⁹ Comparable reasoning has been provided in the German literature on the basis of Article 6 of the German Constitution that aims to protect marriage and family life.¹⁰⁰ To summarize, the next of kin's grief or mental injury should no longer be decisive for awarding damages. The fact that *the next of kin's* constitutional, fundamental or personality right to respect for his family life is being infringed was put at the forefront.¹⁰¹

We find it highly interesting to see that in both Dutch and German literature, respectively, the infringement of a right has been employed to justify awarding damages for the next of kin's non-pecuniary loss, without requiring any injury, either psychological or psychiatric. At least in the Dutch literature this idea of the enforcement of fundamental or private law personality rights fits within a more extensive discussion on the functions of tort law. It has been argued that enforcement is a function of tort law, i.e. to prevent a civil norm being breached, or, when it is breached, to sanction the infringement (see also Section 5).¹⁰²

5. The enforcement of personality rights as a goal of the law of damages

5.1. Introduction

The Dutch law of damages is confronted with a 'system' of damages that is strongly based on the idea of the enforcement or vindication of human rights. The idea of the enforcement of rights can also be found in the current national law of damages, e.g. awarding damages for an infringement of private law personality rights (e.g. life, property, self-determination et cetera) or fundamental rights. Therefore, the ECtHR case law could find solid ground in national law systems. However, the idea of the enforcement or vindication of rights is not accepted as being the (main) function of awarding compensation for non-pecuniary damage; a damage/injury-based approach is dominant. We advocate accepting a rights-based approach, not as an exception, but as the main function of awarding damages for non-pecuniary loss.

5.2. Towards a rights-based approach: why?

As we have shown in Section 2, it is the national lawmakers that have to deal with problems arising from inconsistencies between European human rights law and national laws. According to Articles 93 and 94 of the Dutch Constitution, provisions of treaties by international institutions, e.g. ECHR provisions, need to be applied when statutory provisions conflict with treaty provisions that are binding on all persons. As a consequence the *Keenan v United Kingdom* rule that the ECtHR formulated under Articles 2 and 13 ECHR (see Section 3.3.2), which says that compensation should in principle be part of the range of possible remedies in cases of a breach of Articles 2 and 3 ECHR *by government bodies*, forces Dutch courts not to apply the law of damages when confronted with compensation claims for bereavement damage against government bodies.

In Section 3 we have explained that the case law of the ECtHR containing considerations on non-pecuniary damage is not restricted to cases concerning a breach of the right to life. The case law also includes (alleged) violations of other substantive rights and prohibitions such as the prohibition of torture (Article 3), the right to liberty and security (Article 5), the right to a fair trial (Article 6), and the right to respect for private and family life (Article 8). Therefore, the question has arisen how the national law of damages could and should be adjusted to remain durable and consistent when confronted with judgements of the ECtHR.

99 I. Giesen, 'Baby Joost HR 8 september 2000, NJ 2000, 734 nt. ARB', in J.B.M. Vranken & I. Giesen (eds.), *De Hoge Raad binnenstebuiten*, 2003, p. 27; Verheij, supra note 98. See also on the meaning of the concept of family life for third party damages C.E. Du Perron, 'Genoegdoening in het civiele aansprakelijkheidsrecht', in A.C. Zijderfeld et al., *Het opstandige slachtoffer. Genoegdoening in het strafrecht en burgerlijk recht (Handelingen Nederlandse Juristen-Vereniging 133e Jaargang/2003-I)*, p. 27. See also A.J. Verheij, *Vergoeding van immateriële schade wegens aantasting in de persoon*, 2002, p. 508 and footnote 95.

100 Kadner, supra note 80, pp. 151-153; Klinger, supra note 74, pp. 291-293; Schramm, supra note 83, pp. 338-340, 359. See also B.M. Höke, 'Die Scherzengeld Diskussion in Deutschland: Bestandaufnahme und euroäischer Vergleich', 2014 *Neue Zeitschrift für Verkehrsrecht*, no. 1, pp. 1-4.

101 See also Rijnhout, supra note 35, pp. 379-380.

102 On the distinction between the prevention and enforcement of breached civil norms see E.F.D. Engelhard, 'Handhaving van en door privaatrecht', in E.F.D. Engelhard et al. (eds), *Handhaving van en door het privaatrecht*, 2009, pp. 12-13. See also W.H. van Boom, *Efficacious enforcement in contract and tort*, 2006.

An answer to this more general question is needed since we have to preclude that similar cases are being treated differently. The compensation in wrongful death cases illustrates the imbalance and inequality in non-pecuniary damages that results from decisions of the ECtHR between the position of, on the one hand, third parties in ‘public law cases’ and, on the other, third parties in ‘private law cases.’ All in all we think that a revision of the national law of damages is most welcome. A solution that we advocate can be found in a new concept of damage. A new concept of damage should be responsive to developments in the field of European human rights law. In our opinion, a possible way forward in this regard lies in the rights-based approach, as Verheij has advocated in Dutch academic literature. According to Verheij the enforcement of personality rights must be considered to be one of the goals of the law of damages.¹⁰³

The rights-based approach, in our opinion, meets the most important objections against damages for bereavement damage. It is not the *grief and suffering* that is *compensated*, but the *rights of private parties* that are *vindicated*.¹⁰⁴ The vindication of rights by means of compensation for non-pecuniary loss not only supports the idea that rights infringements must be sanctioned, but implies a moral dismissal.

5.3. Towards a rights-based approach: how?

Verheij, from a broad perspective, has advocated the idea of introducing the enforcement of rights as a function of awarding damages for someone’s non-pecuniary loss, more specifically the infringement of someone’s personality right.¹⁰⁵ He has argued that damages for this type of non-pecuniary loss cannot be justified by the idea of compensation, because, first, this idea cannot explain why non-pecuniary damages are (mostly) not awarded when property rights are infringed. Second, Verheij has argued that the existence of this type of non-pecuniary loss is often not objectifiable and therefore not verifiable.¹⁰⁶ However, not awarding non-pecuniary damages when someone’s personality right is infringed ends in a failure of the law of damages to respond to these types of infringements. And, as stated by Verheij:

‘It is meaningless to label an interest as being a subjective right, if subsequently civil law grants no possibilities to react when this right is infringed.’¹⁰⁷

Verheij continues by giving factors, viewpoints, to decide whether awarding non-pecuniary damages for the infringement of personality rights is justified. These factors are successively: the nature of the right infringed, the infringement of the right to self-determination, the vulnerability of the right infringed, the existence of other means to enforce the right infringed, the tortfeasor’s advantage due to his wrongful act, the degree to which the plaintiff is dependent on the tortfeasor, the likelihood of the damage and the sobriety thereof, and, in the light of the last factor, whether it is more justified when the plaintiff is unjustifiably enriched instead of a third party.¹⁰⁸

In the light of these factors, Verheij concludes that it is justifiable to award damages for bereavement damage, because the next of kin’s right to private life and right to self-determination are infringed, and additionally, it is very likely that the next of kin experience severe suffering caused by the death of the direct victim. It could be argued that non-pecuniary damages should not be awarded since the next of kin’s pecuniary damage is – under certain circumstances – compensated. However, as argued by Verheij, this compensation is not consequentially awarded and is sometimes limited to the compensation of funeral expenses.¹⁰⁹

103 Verheij, *supra* note 45, Chapter X.

104 Verheij, *supra* note 45, p. 448. See also Rijnhout, *supra* note 35, pp. 377-380.

105 Verheij, *supra* note 45, Chapter X.

106 Verheij, *supra* note 45, pp. 433-448. See also on this subject Lindenbergh, *supra* note 45, pp. 13-16; T. Hartlief, ‘Handhaving met smartengeld’, 2008 *Aansprakelijkheid Verzekering & Schade*, pp. 237-247.

107 Translated from Verheij, *supra* note 45, p. 445. See e.g. also on this subject in general Van Boom, *supra* note 102. See also A.J. Akkermans, *Proportionele aansprakelijkheid bij onzeker causal verband*, 1997 with regard to the possibilities of tort law to hold the tortfeasor proportionally liable, and Giesen with regard to the discussion on the shift of the burden of proof, I. Giesen, *Bewijs en aansprakelijkheid*, 2001, pp. 449-472.

108 Verheij, *supra* note 45, pp. 488-499.

109 Verheij, *supra* note 45, p. 503.

6. In conclusion

European human rights law is dominant over the national laws of damages, since the High Contracting Parties to the Convention have committed themselves to secure the rights and freedoms in the Convention. The case law of the European Court of Human Rights, which forms part of European human rights law, now provides a reason for national lawmakers, including the Dutch, to rethink their concept of non-pecuniary damage. The fact remains that the Court in its case law starts with the finding of a breach of a fundamental right and the remedying of that breach, whereas the national law of damages affords the possibility of awarding compensation for non-pecuniary loss if the aggrieved party is injured. A conflict results from these different approaches: on the one hand, a rights-based approach is applied, on the other hand a damage/injury-based approach prevails. In this article we advocate a change in the national law of damages to make sure that the national law of damages remains durable and consistent when confronted with judgements of the European Court of Human Rights. We advocate accepting and incorporating a rights-based approach. It could be argued that the idea of claiming on the basis of an infringement of a (personality) right would better fit in with a more 'modern' view on the law of damages; the idea of enforcing or vindicating (personality) rights. First, this modern view could provide solid ground for judgements delivered by the ECtHR on the idea of remedying European human rights by awarding damages for non-pecuniary loss. Second, a change of approach removes the imbalance and inequality with regard to awarding damages for non-pecuniary loss as a consequence of decisions of the ECtHR, e.g. between the position of, on the one hand, third parties in 'public law cases' and, on the other, third parties in 'private law cases'.

The clash between European human rights law and the national law of damages is clearly expressed in the different approaches as regards bereavement damage, i.e. loss caused by the death of a loved one. Under Dutch law a proposal aimed at introducing a legal basis for compensating this type of loss was rejected a few years ago, whereas the ECtHR – in parallel and dealing with cases with similar factual backgrounds – starting from its rights-based approach has found that compensation for non-pecuniary loss should be available as part of the range of redress when a government body has infringed a family member's right to life. A major argument in the Dutch discussion – the moral aversion towards compensating and determining grief and suffering – can be overcome by not linking up with grief and suffering but instead taking one's legal position as a starting point, e.g. the breach of the right to life. This approach not only supports the idea that rights infringed should be remedied, but also implies a moral dismissal. ¶

Epilogue

The Dutch legislator has introduced a legislative proposal on third party damages on May 28th 2014. The proposal aims at improving the legal position of victims who, due to a wrongful act or breach of contract, suffer personal injury and at improving the legal position of the victim's next of kin. As part of the proposal the legislator proposes to provide a legal basis for the next of kin to claim damages for grief and suffering. See: <http://www.internetconsultatie.nl/wetsvoorstel_zorg_en_affectieschade>.