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XIX. The Netherlands

A. Legislation

1. Unfair Trade Practices in Business-to-Business Relationships in the Agricultural and Food Supply Chain: Wet van 3 maart 2021, houdende regels strekkende tot implementatie van Richtlijn (EU) 2019/633 van het Europees Parlement en de Raad van 17 april 2019 inzake oneerlijke handelspraktijken in de relaties tussen ondernemingen in de landbouw- en voedselvoorzieningsketen (Wet oneerlijke handelspraktijken landbouw- en voedselvoorzieningsketen), Staatsblad (Stb) 2021, 178

1 This Act sets rules for the implementation of Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair commercial practices in business-to-business relationships in the agriculture and food supply chain. Prohibiting unfair commercial practices in the agriculture and food chain, this Act entered into force on 1 November 2021. It focuses on actors in the agriculture and food supply chain, including suppliers, such as farmers and market gardeners, on the one hand, and buyers, such as supermarkets, on the other hand. It is only applicable in B2B relationships between farmers, growers, fishermen and other small and medium-sized enterprises, on the one hand, and larger retailers, consortiums and purchasing alliances, on the other. The Act does not work with a general ban, but specifically prescribes prohibited actions. A grey and black list are part of the Act. Actions on the grey list are, in principle, not unlawful provided unambiguous and clear agreements have been concluded between suppliers and buyers. Blacklisted acts are unlawful by definition.

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2. Rules on Franchise Agreements: Besluit van 25 november 2020 tot vaststelling van het tijdstip van inwerkingtreding van de Wet franchise, Stb 2020, 493 and Wet van 1 juli 2020 tot wijziging van Boek 7 van het Burgerlijk Wetboek in verband met de invoering van regels omtrent de franchiseovereenkomst (Wet franchise), Stb 2020, 251

This legislative proposal entered into force on 1 January 2021. Since that date, new franchise agreements must fully comply with the Franchise Act. For existing franchise agreements, the Franchise Act also has direct consequences, but, regarding certain new rules, parties will have two years to adjust their franchise agreement. The Franchise Act introduces specific regulations of a mandatory character in arts 7:911–922 *Burgerlijk Wetboek* (Dutch Civil Code, DCC), regarding the franchise agreement content, information obligations, standards of conduct, consent in case of interim changes, goodwill and post-contractual non-competition clauses. Inter alia, the franchisor must provide certain and timely information to the franchisee at the start of negotiating a new franchise agreement. **2**

B. Cases

1. Hoge Raad (Supreme Court, HR) 11 December 2020, ECLI:NL:HR:2020:2004: Liability for Wrongfully Provoking Bankruptcy Filing (*HSK BV*/*defendants*)

a) Brief Summary of the Facts

A creditor delivered construction products to HSK, a fashion retailer (hereinafter: debtor), in 2013. Despite several reminders and summons, the invoices remained unpaid. Upon the creditor's request, the debtor was declared bankrupt in 2014, by default. The debtor then lodged an objection to this default judgment. The day prior to the oral hearing, the debtor had paid the creditor's outstanding invoice, though under protest. The court of first instance and the Court of Appeal (*Gerechtshof*) upheld the bankruptcy order. Upon cassation appeal, the *Hoge Raad* reversed the judgment of the Court of Appeal and referred the case to a Court of Appeal, different from the Court that upheld the bankruptcy order. It ruled that the creditor's claim no longer existed at the time of the opposition against the judgment, and thus the creditor no longer had the right to file for bankruptcy. The bankruptcy ruling was set aside and the petition for bankruptcy rejected. The **3**

debtor then started proceedings to recover bankruptcy costs and fees paid to the bankruptcy trustee from the creditor. He asked the court for a declaratory judgment that the creditor acted unlawfully and could be held liable on the grounds of a tort. The court of first instance granted his claim, but the Court of Appeal rejected it. The Court ruled that claims such as these at the expense of the losing party are only allowed in the case of an abuse of procedural law or an abuse of a right, within the meaning of art 3:13 DCC. Depending on the concrete circumstances at hand, this may be the case if the application for bankruptcy should not have been filed considering the debtor's apparent and substantial interests, because the claim is apparently unsubstantiated and the lack of any basis for such an action is obvious. Think of a situation where the creditor invokes statements and propositions while knowing that they are untrue or should have known from the beginning that the request for bankruptcy had no chance of success.[1] However, such tortious behaviour was not substantiated in this case.

b) Judgment of the Court

4 The debtor challenged the decision of the Court of Appeal, arguing that the bankruptcy petitioner in principle acts unlawfully and is liable for damages if the bankruptcy judgment is set aside upon appeal and is annulled. He argued that an analogy existed between liability for an annulled bankruptcy order and liability for the unlawful seizure of goods and awards. However, the *Hoge Raad* did not follow this line of reasoning and declared the submitted cassation appeal unfounded. The bankruptcy ruling is not a legal act by the applicant but a decision by the court, for the benefit of all those who have interests in the assets of the debtor, which is given if the court is convinced the debtor ceased to pay his debts (art 1 para 1 of the Dutch Bankruptcy Law – *Faillissementswet*). The applicant for bankruptcy may, under certain circumstances, be liable for damages resulting from a bankruptcy declared upon his application and subsequently annulled upon a legal appeal. However, this would only be the case if (i) the applicant knew or should have known there were no grounds to declare bankruptcy, or (ii) has otherwise abused his powers or rights by applying for the bankruptcy.

1 The Court of Appeal referred to HR 29 June 2007, Nederlandse Jurisprudentie (NJ) 2007/353.

c) Commentary

The annulment of a bankruptcy does not resolve all adverse consequences of an unjustified bankruptcy order for the person concerned. After all, various costs are incurred, such as the compensation of the bankruptcy costs as well as the trustee/curator's costs, several financial losses in the period of inactivity and reputational damage. Any attempt to be compensated for this damage is therefore not surprising. Therefore the question arises as to whether a creditor who provokes the bankruptcy can be held liable. Filing for bankruptcy when a debtor ceased to pay is a (often effective) legal instrument at the service of creditors. Although a creditor using this legal remedy at the costs of one of his debtors could have a reasonable interest, the bankruptcy order may subsequently be annulled. **5**

Previous case law has shown that a person who starts any form of attachment, garnishment or execution is liable for any damage suffered or incurred as a result thereof when the claim for which the garnishment or execution was made is ultimately not fully adjudicated. This means that the person who executes, acts at his own risk. The present ruling makes clear that this is different, however, in the case of a request for bankruptcy. The exercise of this legal instrument at the creditor's disposal is not unlawful in itself. Only under particular circumstances will this qualify as an abuse of a right and therefore as tortious. This approach of the *Hoge Raad* seems to be inspired particularly by the nature of bankruptcy, namely it concerns a decision of the court and has a general character. **6**

This leads to the question under which circumstances a bankruptcy applicant is considered to have abused his powers or rights. To establish if any abuse of right has taken place, usually the three grounds mentioned in art 3:13 in conjunction with art 3:15 DCC apply. Article 3:13 reads that a holder of a right may not exercise this right to the extent that its exercise constitutes an abuse and further stipulates that a right is abused where it is exercised for the sole purpose of harming someone else or for a purpose other than for which the right was granted or where its exercise is unreasonable given the disproportion between the interest in its exercise and the harm caused thereby. Nevertheless, in the case of potential abuse of legal procedures, a cautious approach is appropriate, since the right to access to justice must be guaranteed, pursuant to art 6 of the European Convention on Human Rights (ECHR). **7**

2. HR 29 January 2021, ECLI:NL:HR:2021:149: Accountant's Duty of Care towards Third Parties (*Company in Luxury Motorboats*)

a) Brief Summary of the Facts

8 In 2002, two sellers sold a company for the production and sale of luxury motorboats to two buyers. The purchase took place in January 2002 and the shares were delivered to the buyers in July 2002. The intellectual property rights were sold to the two buyers by a third party and were placed in a company under Maltese law. Subsequently, in December 2002, one-third of the company's capital and one-third of the Maltese company's capital was sold to two new buyers. The company was declared bankrupt in 2008.

9 Both the original buyers and the subsequent buyers sued an accountant who, on behalf of the company's financial statements referring to 2000 and 2001, prepared a 2002 compilation statement (*samenstellingsverklaring*), and semi-annual financial statements for 2002 during the acquisition period. This information was decisive for the investment decision of the new buyers. The Administrative Court of Appeal for Trade and Industry (*College van Beroep voor het Bedrijfsleven*) ruled upon appeal that the accountant made a professional error when preparing the documents and imposed the penalty of a reprimand in writing.

10 Subsequently, the buyers started a civil procedure and claimed damages from the accountant for losses caused by his professional misconduct. The court of first instance and the Court of Appeal rejected this claim. As far as the original buyers are concerned, their claim was denied because of the lack of a causal connection between the professional misconduct and the loss. After all, they had already decided to invest before the publication of the financial figures and documents concerned and had already partially acted on that decision. With regard to the new buyers, their claim was rejected on the ground that the accountant was not liable towards them given the fact that they were not his clients. For non-statutory tasks, accountants, in principle, have a duty of care to their clients only, not to third parties. A duty of care towards third parties may only arise under certain circumstances, namely if an accountant knows or should have known that his report will be made available to a third party – according to the Court of Appeal this was not the case – and that probably the third party involved would rely on the report when making the investment decision.

b) Judgment of the Court

In cassation, the buyers argued that if the accountant knew or should have known that his report would become available to third parties, it would have made no difference if he knew exactly which third party would (very likely) rely on his report when making the investment decision, since the duty of care applies to any third party. **11**

The *Hoge Raad* ruled that the answer to the question of whether an accountant, in the performance of a non-statutory duty, acted towards a third party as befits a reasonably competent and reasonably acting professional must be based on the circumstances of the case. Also the role of accountants in society must be taken into account. In case an accountant, in view of the importance that third parties attach to his report, should consider that any third party will determine his actions, to a greater or lesser degree, according to the content of his report, his failure to take precautions in order to prevent this third party from attributing an incorrect or improper meaning to his report may constitute a tortious act, being contrary to how, according to unwritten law, an accountant ought to act in society. **12**

According to the Court of Appeal, in mid-August 2002, the accountant had no obligation to consider that his report would become available to new buyers at a later date after the sale of the shares to the first buyers and that these could be influenced by the figures in his report. In light of these established facts, the *Hoge Raad* ruled that the judgment of the Court of Appeal does not constitute an incorrect interpretation of the law and is not incomprehensible. **13**

c) Commentary

When judging whether an accountant is liable for flaws in his reports, it is important to distinguish between statutory and non-statutory duties. Although negative publicity about accountants often concerns errors in financial statement audits and thus in their statutory duties, the bulk of case law over the last years concerns non-statutory duties. The *Hoge Raad* ruled in 2006 already that the external auditor of financial statements must not only take into account the interests of his own client but also the interests of third parties involved.[2] This means that the duty of care of accountants may, under certain circumstances, extend to third parties. **14**

2 HR 13 October 2006, ECLI:NL:HR:2006:AW2080.

This duty of care and any infringement is based on the doctrine of unlawful acts (art 6:162 DCC).

15 The question to what extent accountants have a duty of care towards third parties in the performance of their non-statutory duties does not have a clear-cut answer. The current ruling provides some clarity and stipulates that the scope of this duty depends on all circumstances of the case. In the current case, no duty of care was assumed for the non-statutory obligation to compile the company's financial statements. For non-statutory duties, it cannot be excluded that accountants, given the importance third parties may attach to their reports, commit a tort against such a third party by failing to take measures in order to prevent third parties from attributing an incorrect meaning to their reports. Under certain circumstances, this omission breaches a rule of unwritten law pertaining to proper social and professional conduct by accountants. According to the *Hoge Raad*, the crucial moment for assessment is the time of delivery. At that moment it must be assessed which third parties and which interests the accountant must take into account.

16 It is somewhat unclear, however, whether accountants, by taking measures, prevent a duty of care towards a third party from arising, or actually fulfil an existing duty of care by doing so. The Court of Appeal opted for the first path. The *Hoge Raad* however, considering that the omission of taking measures may be in conflict with a rule of unwritten law pertaining to proper social conduct, seems to have chosen the second path.

17 Another approach was proposed by Advocate General Hartlief in his advisory opinion to the present judgment. He proposed to define as the decisive characteristic not time, but the purpose for which accountants prepare the given documents and hand them to their client. That can make quite a difference, since in the current case the accountant prepared the figures with a view to a possible takeover by third parties. However, the *Hoge Raad* attributes a crucial role to the foreseeability of the damage – foreseeability, which presupposes familiarity with the intended decision of the third party affected and his interests involved.

3. HR 26 March 2021, ECLI:NL:HR:2021:461: Loss of a Chance and Contributory Conduct (*International Strategies Group Ltd/Natwest Markets NV*)

a) Brief Summary of the Facts

18 International Strategies Group Ltd (ISG) participated in an investment programme of the Corporation of the Bankhouse Inc (COB) in 1998. For this investment, COB

held a bank account at NatWest Markets NV (NatWest; previously called The Royal Bank of Scotland NV, legal predecessor of ABN AMRO Bank NV) into which ISG had deposited significant sums of money. After a COB employee secretly embezzled these sums, through a number of transactions, the bank's Security Affairs Department launched an investigation into this employee around July 1998 and the bank subsequently terminated their banking relationship with COB. In 2008, the employee was sentenced to two years in prison for (complicity in) fraud.

ISG sued the bank and claimed $14 million in damages, based on the fact that **19**
it was the victim of fraud committed by the COB employee and thus by COB. The fraud could have been prevented by the bank, so argued ISG. After all, COB failed to take measures in order to protect ISG's interests – eg by informing ISG about the unusual transactions – although this could be expected, according to ISG, since the bank knew of funds being diverted from ISG. The court of first instance denied COB's claim.

The Court of Appeal resolved the uncertainty about ISG's possible actions in **20**
case she had been warned in time by the bank, by applying the doctrine of loss of a chance. The chance that ISG would not have acted differently after having received a statement or warning from the bank about the investigation into the activities of COB and an announcement that the accounts would be closed was estimated by the Court of Appeal at 75 %, given the great confidence ISG apparently had shown in the employee and/or COB. As a result, the bank NatWest had to bear 25 % of the damage.

b) Judgment of the Court

According to the bank, the Court of Appeal's judgment implied that the required **21**
conditio sine qua non relationship was missing, since the probability that ISG would have acted differently was less than 50 % and even significantly smaller than the probability that ISG would have acted exactly in the same way, in which case the omissions of the bank had no impact whatsoever on the financial situation of ISG. For the application of the doctrine of loss of a chance, a *conditio sine qua non* relationship between the unlawful act or omission and the loss of a chance is required. The bank stated that the Court of Appeal did not establish such relationship before its probability estimate in its damage assessment, nor did the Court establish that ISG was deprived of a chance due to the violation of the norm. Moreover, according to the bank, the applicability of the doctrine of loss of a chance (*kansschade*) is limited to cases in which the (occurrence of the) chance is independent from the behaviour or choices of (one of) the parties.

22 According to the *Hoge Raad*, the Court of Appeal did not leave the question as to whether a *conditio sine qua non* relationship exists between the bank's breach of its duty of care and the loss of a change unanswered. Although the Court of Appeal considered that it remains uncertain whether ISG would have acted differently, it subsequently ruled, after having considered a number of circumstances put forward by the parties, that these circumstances are insufficient to lead to the conclusion that ISG would not have acted differently after a notification from the bank. The Court of Appeal estimated the probability that ISG would not have acted differently as a result of the bank's statement at 75 %. This ruling held that the Court of Appeal estimated the probability that ISG would have acted differently as a result of the bank's notification at 25 % and that this chance was lost for ISG as a result of the failure to provide this notification. The Court of Appeal thus applied the doctrine of loss of a chance and established a *conditio sine qua non* relationship between the violation of the norm and the loss of that chance.

23 The *Hoge Raad* ruled that the doctrine of loss of a chance is apt to provide a solution to specific situations in which it is uncertain whether an inherent shortcoming or unlawful act caused damage and the uncertainty is caused by the fact that it is impossible to determine whether and to what extent, in the hypothetical situation that the shortcoming or wrongful act had not been committed, the chance of a better outcome would have actually materialised. Contrary to the plea of the bank, the *Hoge Raad* considers it possible to determine the loss of a chance if it depends on the behaviour of the harmed party whether the chance of a better outcome would have materialised in the hypothetical situation that the liable party had not withheld that chance.

c) Commentary

24 In this case, the *Hoge Raad* affirms, with reference to a previous ruling,[3] how the doctrine of the loss of a chance must be understood. The doctrine of loss of a chance involves a determination of the extent of the damage. In these cases, the *conditio sine qua non* relationship between the unlawful conduct and the loss of a chance is established. It only remains uncertain whether and, if so, to what extent, the loss of a chance constitutes any loss. In line with this doctrine, the damage that must be compensated is understood as the loss of the opportunity to obtain a particular benefit or to avoid suffering a particular loss.

3 HR 21 December 2012, ECLI:NL:HR:2012:BX7491 (*Deloitte/Hassink*).

Originally, the loss of a chance doctrine was introduced in cases of malpractice where a doctor failed to timely perform an essential medical procedure. In such cases, the shortcoming is clear and certain, but it is uncertain whether the medical procedure would have resulted in a better outcome for the patient. No doubt exists that the patient was deprived of the chance of a better outcome, as a result of the shortcoming. The lost opportunity must be related to the actual situation of the injured party given the malpractice, compared to their position in the hypothetical situation that there had been no violation of the duty of care. A loss of a chance may arise when the claimant, as a result of a breach of a norm, has been deprived of a real, ie not insignificant, chance of a better outcome.[4] Case law has made it clear that the doctrine of loss of a chance is also applicable to professional liability and governmental liability. Although the *Hoge Raad* confirmed that the doctrine of loss of a chance is an appropriate solution in *some* situations, its exact scope is not entirely clear. Some legal scholars unjustifiedly assumed that the scope of the doctrine was restricted and would not be applicable in case a duty to inform was breached. For others, it was unexpected that the *Hoge Raad* not only sees room for the doctrine of loss of a chance in solving liability issues in unequal relationships but also in more equal relationships between commercial parties. **25**

The importance of this ruling may be found in the fact that the *Hoge Raad* answered the question of whether this doctrine is applicable if the materialisation of the chance of a better outcome depends (in part) on the behaviour of the injured party. In the past, there was great doubt in the relevant literature as to whether the doctrine of loss of a chance also applies when the question of whether the chance would have materialised depended on the harmed party's conduct. The *Hoge Raad* however, referring to earlier case law concerning inadequate advice of a professional advisory, confirmed its path of ruling. **26**

Decisions made by the harmed party are undeniably part of the chain of events. In fact, research is required to determine the most plausible reaction of a harmed party in a hypothetical situation without a norm violation. It is not easy for the court to assess all this and not easy for the harmed party to present a plausible case. A prudent attitude, as presented by the Court of Appeal in this case, is apt and does justice to the difficult position of the burden of proof of the harmed party. **27**

4 HR 19 June 2015, ECLI:NL:HR:2015:1683.

4. HR 21 May 2021, ECLI:NL:HR:2021:753: Duty of Care of Legal Advisors

a) Brief Summary of the Facts

28 Due to a zoning plan, the lease of operators of a catering establishment had to be terminated as the premises were sold. The municipality made a final offer to buy out the lease rights for € 180,000 and was prepared to pay € 5,000 in expert fees. A legal advisor accepted the final offer on behalf of the tenants, but asked three times the amount of the expert's fees. The municipality regarded this reaction as a rejection of the offer. After legal proceedings, the parties renegotiated again and the tenants received a much lower compensation amount for their loss (€ 75,000).

29 The operators asked the court of first instance to declare that the legal advisor did not act as may be expected from a reasonable and competent advisor and to hold the legal advisor liable for the damage they suffered. The court of first instance rejected this claim. The Court of Appeal upheld the court's decision, stating that it must have been reasonably clear to the operators that not accepting the proposal of the municipality unconditionally entailed the risk that ultimately a worse outcome would be the result. They should also have understood that the municipality's proposal would lapse. The operators did not need a specific warning from their legal advisor, so the question to what extent the legal advisor did warn them after receiving the final offer about the risk of not fully accepting it can remain unanswered.

b) Judgment of the Court

30 According to the *Hoge Raad*, the Court of Appeal did not sufficiently motivate its ruling that the legal advisor did not have a duty to warn, because the following circumstances were not taken into account: (a) the operators only had catering experience and a limited level of education, (b) they had no experience with business-related conflict situations, (c) they hired an advisor for that very reason, (d) the legal advisor knew that the final offer should not be rejected because the financial situation of the operators was worrisome, (e) in case the acceptance of the offer was not unconditional, there was a great risk that negotiations would be broken off, (f) the expert costs were of minor importance in the overall deal, (g) the operators were given too little time to make a proper assessment, (h) the legal advisor made it appear that the final offer could still be accepted after the counter-proposal, and (i) the legal advisor himself was convinced that an agreement had

been reached on the final offer, with his request to only increase the fee for expert costs. The circumstances put forward by the operators may have an influence on the scope of the duty of care of the legal advisor and may be important in answering the question whether the advisor should have warned the operators specifically that not accepting the proposal carried the risk of a worse outcome.

c) Commentary

In this case, the *Hoge Raad* considers the duty of care of legal advisors in business negotiations. This case gives insight into the way in which the duty of care of legal advisors should be interpreted. It shows that the scope of the duty of care of legal advisors ultimately depends on the factual circumstances of the case. Since the *Hoge Raad* referred the case to another Court of Appeal, the latter, in its assessment, will have to take into account several circumstances, such as the level of experience and education of the operators. 31

The question remains whether the approach taken in this case can also be extended to the duty of care incumbent on attorneys. Attorneys also assist their clients during negotiations. They must always ask themselves to what extent their clients – in view of their capacity and expertise – must be informed about certain issues. Failure to comply with this duty of care may lead to liability. 32

5. HR 16 July 2021, ECLI:NL:HR:2021:1172: Limitation Period for Product Liability for Hip Replacement (*Zimmer c.s./patient*)

a) Brief Summary of the Facts

On 24 September 2004, a patient underwent an operation in hospital in which an orthopaedic surgeon inserted a so-called Durom/Metasul hip prosthesis. This hip prosthesis has a metal head and a metal socket and is therefore also referred to as a MoM hip prosthesis (metal on metal). The hip prosthesis was first marketed by Zimmer c.s. in October 2003. The hip prosthesis used on the patient consists of four parts, which were produced on different dates by (the predecessor in law of) Zimmer GmbH and delivered on different dates to the importer, (the predecessor in title of) Zimmer Biomet, who supplied the parts to the hospital. On 27 February 2012, the patient was diagnosed with increased levels of cobalt and chromium in his blood. On 20 July 2012, a revision surgery was performed and two parts (the head and the socket) of the hip prosthesis were removed, as a result of which the cobalt and chromium levels decreased. 33

34 The patient sought, inter alia, a declaratory judgment that Zimmer c.s. are jointly and severally liable for the damage suffered and to be suffered by him as a result of the implantation of the hip prosthesis. Zimmer c.s. argued that the right to claim damages under product liability as referred to in art 6:185 DCC in view of the limitation/expiry period of art 6:191 para 2 DCC had expired because the head of the hip prosthesis was put on the market more than ten years prior to the date of the summons.

35 The court of first instance ruled that it was only possible to speak of a product that may have caused damage when the various parts – the head, adapter housing, stem and socket – have been combined into a whole, namely the hip prosthesis, during the operation. Therefore, according to the court of first instance, the patient's right to claim financial compensation has not yet expired, although ten years had passed since the head was put on the market, because the operation took place less than ten years before the claim for damages was filed. The Court of Appeal did not accept the above defence of Zimmer c.s. either. According to the Court of Appeal, the hip prosthesis is a 'finished product' within the meaning of art 6:187 para 1 DCC because the separate parts have been functionally combined. In this case – in which the alleged defect was caused by a combination of the head and the socket – this period did not start when the head, but when the 'youngest' part, ie the socket, was put on the market (7 August 2004, the date the importer received the socket), according to the Court of Appeal.

b) Judgment of the Court

36 In the appeal in cassation, Zimmer c.s. argued that the prescription period starts to run earlier in time than when the socket was put on the market, namely, insofar as the patient's claim also relates to the head, when the head was put on the market. They also argued that the judgment of the Court of Appeal that the hip prosthesis is an end product that consists of more parts is incorrect, for which reason the qualification of the hip prosthesis as an (end) product cannot form the grounds for its judgment that the prescription period started to run when the bowl was put on the market.

37 According to art 6:191 para 2 DCC, the injured party's right of action for damages against the producer pursuant to art 6:185 para 1 DCC is extinguished on the expiry of ten years from the beginning of the day following that on which the producer put the item that caused the damage on the market. With regard to the phrase 'putting on the market' as stipulated in the European Directive on Product Liability, the Court of Justice of the European Union ruled on 9 February 2006 that the determination of the time within which the injured party's claim must be

brought must satisfy objective criteria and that the product must be considered to have been put on the market within the meaning of art 11 Directive 85/374/EEG when it left the producer's production process and entered the sales process in a form in which it is offered to the public for use or consumption.[5]

38 According to the *Hoge Raad*, the Court of Appeal erred in law by ruling that the hip prosthesis, consisting of, among other things, a head and a socket, is an (end) product within the meaning of art 6:187 DCC and that the prescription period of that end product does not start until the socket is put on the market on the ground that the alleged defect is caused by a combination of the head and the socket and the socket was the last part put on the market. The *Hoge Raad* ruled that the four different parts of the prosthesis are separate products. In case, after referral (to the court of first instance), the socket is judged to be defective pursuant to art 6:186 DCC, for example on the ground that it causes damage if it comes into contact with the head, the prescription period ex art 6:191 para 2 DCC commenced on the date on which the socket was put on the market. The producer's liability for damage resulting from the defective socket coming into contact with the head is not reduced by the fact that the producer, pursuant to art 6:191 para 2 DCC, is not (any longer) liable for the head.

c) Commentary

39 This case concerns the starting moment of the ten-year prescription period in the context of the statutory regulation of product liability (art 6:191 DCC). When damage occurs as a result of a defective product consisting of several parts that have been put on the market (in this case, by the same manufacturer) on different dates and one or more of these parts are at that time older than ten years, what does this mean for the liability of the manufacturer? The *Hoge Raad* ruled that it is not in accordance with the regulations – which aim at ending the manufacturer's liability after a reasonable period of time – to consider the hip prosthesis made of four separate parts, assembled by the surgeon during the operation, as one product produced by a manufacturer, in accordance with art 6:187 paras 1 and 2 DCC. That would have the unwanted effect that, at the time of the assembly of the hip prosthesis, a new prescription period would start. The question of defectiveness should therefore be determined for each individual product, also consider-

5 Court of Justice of the European Union (CJEU) 9.2.2006, C-127/04, *Declan O'Byrne v Sanofi Pasteur MSD Ltd and Sanofi Pasteur SA*, ECLI:EU:C:2006:93.

ing the expected use of the product (art 6:186 DCC). A product can also be defective if it causes damage because it comes into contact with another (older) product. In this way, the manufacturer does not escape liability merely because the prescription date of the older product has expired.

40 It is important that the running of the prescription period should be determined on the basis of objective criteria. In his advisory opinion, prior to the current ruling, Advocate General Valk considers that by introducing the prescription period of ten years, the EU legislator wished to create a balance between the interests of consumers and producers, but that this wish however does not mean that it is also permissible for the court to determine the starting point of the prescription period in specific cases on the basis of a balance of interests. After all, the prescription period is intended to provide legal certainty.

41 The lapse of liability of one part (the head) is not a reason to reduce liability for damage caused by another part (the socket). This is self-evident: consider the possibility that the products had been made by other producers. The lapse of the liability of one part does not affect the liability of the other parts. This is in line with the provision in art 6:185 para 3 DCC: the contributory conduct of a third person does not lead to a reduction of liability. Regarding the four different parts of the prosthesis as four separate products is in line with art 6:187 para 1 DCC, which states that a once movable thing is still a product even after its incorporation into another movable or immovable thing.

6. HR 15 October 2021, ECLI:NL:HR:2021:1534: Settlement of Immaterial Damage Resulting from Earthquakes (*Nederlandse Aardolie Maatschappij BV/defendants*)

a) Brief Summary of the Facts

42 This case concerns the settlement of earthquake damage, consisting in financial loss of living enjoyment and intangible damage, caused by gas extraction in the province of Groningen. 65 persons (in cassation, the case was originally brought by 127 claimants) claimed compensation from the Dutch Petroleum Company (*Nederlandse Aardolie Maatschappij*, NAM), all residents whose houses had suffered physical damage caused or exacerbated by earthquakes. The question for the *Hoge Raad* was whether any significance can be attributed to that circumstance of physical damage when assessing the unlawfulness of the inconvenience and the nuisance experienced by the claimants as well as the liability for financial losses due to the loss of enjoyment of living and the liability for immaterial damage.

The court of first instance ruled that the NAM acted unlawfully towards the claimants and that NAM acted as referred to in art 6:177 para 1, under b, DCC and art 6:162 DCC. The court awarded a large part of the claims. The Court of Appeal ruled that NAM's liability under art 6:177 DCC does not imply that NAM is also liable pursuant to art 6:162 DCC. Besides damage, art 6:162 DCC also requires an unlawful act attributable to NAM and a sufficient causal link between that act and the damage suffered. The Court of Appeal had to answer the question whether the severity of the inconvenience or nuisance exceeded the level above which they become unlawful for residents whose buildings suffered damage caused or exacerbated by earthquakes and whose repair costs were reimbursed by NAM in accordance with its own damage protocol (*Schadeprotocol*). In its ruling, the Court of Appeal took into account the circumstance that physical damage to a house clearly causes inconvenience, present until the damage is repaired and that also the settlement of the damages causes inconvenience. Research in that respect has shown that residents whose houses were damaged as a result of an earthquake experience a greater degree of inconvenience than residents whose residences remained intact. Among other things, this manifests itself in both psychosomatic and physical complaints. **43**

The courts attempt to determine when compensation must be granted. The loss of residential enjoyment is eligible for compensation if the nuisance or annoyance exceeds a certain level in severity and therefore is considered to be a tort. A first aspect for demarcation was to determine if the houses are positioned in 'the area above the Groningen field', but this turned out to provide insufficient guidance. The Court of Appeal considered that there were large differences in damage within various areas. According to the Court of Appeal, in view of the nature of the physical damage, a distinction between those whose residences were damaged more than once (as determined and defined by experts) and those whose residences were unharmed was more obvious. This damage is to be understood as concrete damage to their homes and thus to their personal lives. Therefore, the court checks if the parties involved 'experienced physical damage to the residence more than once'. If that is the case, they are entitled to a compensation for their loss of enjoyment of residence, which is considered to be material damage. In the event the parties do not reach a settlement agreement for the compensation of this material loss, the assessment of the extent of the existing obligation towards residents to compensate this loss of living enjoyment will take place in separate loss assessment proceedings. The court further argued that it is likely that, in many cases, physical damage to one's home, to a certain extent, is also frightening, affecting the sense of security of the residents in their own home, causing stress and worry. When houses suffered damage more than twice (as determined by the experts), according to the Court of Appeal, it can be assumed **44**

that these occupants have been 'otherwise afflicted in their person' as understood in terms of art 6:106 DCC and for that reason are entitled to compensation for immaterial damage. The basic principle for the compensation for damage for residents that suffered physical damage to their homes on at least two occasions is that every resident is entitled to a minimum of € 2,500 for immaterial damage, plus € 1,250 for each additional occurrence of physical damage to their residence.

b) Judgment of the Court

45 At the appeal trial in cassation, NAM, in essence, argued that the Court of Appeal should have assessed the seriousness of the physical and immaterial damage for each separate claimant, and the Court of Appeal's approach – according to which the residents were classified into categories of admissibility of claims depending on how many times they suffered damage to their residence – was thus incorrect. In its preliminary ruling of 19 July 2019,[6] the *Hoge Raad* ruled that everyone has a right to the undisturbed enjoyment of living. Affecting another's enjoyment by inconvenience or nuisance is regarded as unlawful if it exceeds a certain level in terms of severity. The determination of that level depends on all the circumstances of the case, including the nature, severity and duration of the inconvenience or nuisance. If the enjoyment of living is affected by (the risk of) soil movement, the loss of enjoyment of living as a result can be qualified as financial loss, for which financial compensation can be claimed. In addition, a right to the compensation of immaterial damage may arise.

46 According to the *Hoge Raad*, the Court of Appeal examined whether each claimant can be regarded as a resident who suffered physical damage to their home, caused or exacerbated by the earthquakes, at least once. Based on circumstances relating to the nature, seriousness and duration of the inconvenience or nuisance, the Court of Appeal ruled that the inconvenience and nuisance caused by NAM for those residents were such that they are unlawful and that NAM was liable for the loss. Applying the criterion formulated by the *Hoge Raad* on 19 July 2019, the Court of Appeal thus took into account circumstances that generally occur when such damage occurs, irrespective of the varying extent of physical damage to the residence as a result of earthquakes. It considered these circumstances in mutual relation and coherence. The Court of Appeal examined whether each claimant can be regarded as a resident who has suffered physical damage to their residence, caused or exacerbated by the earthquakes at least once and

6 ECLI:NL:HR:2019:1278 (*Groningenveld*).

rightfully ruled that if this characteristic is met, the level of nuisance and inconvenience justifies compensation of the loss of enjoyment of residence. Subsequently it ruled, on the basis of circumstances that generally arise when such damage occurs, that, with regard to residents who suffered physical damage to their residence, caused or exacerbated by the earthquakes at least twice, the relevant adverse consequences of the unlawful inconvenience and nuisance are so obvious that they justify the assumption of being otherwise afflicted in person as stipulated in art 6:106 BCC as a requirement for the compensation of immaterial damage. The Court of Appeal thus made use of the scope of the criterion in a sufficiently substantiated manner for cases such as this one, with regard to residents who meet relevant conditions – in this case, residents who suffered physical damage to their residences, caused or exacerbated by the earthquakes, at least twice – ruling that the relevant adverse effects of the unlawful inconvenience and nuisance are so obvious that the person is harmed 'otherwise as a person', in the sense of art 6:106 under b DCC can be assumed. To determine the extent of the obligation to pay compensation for immaterial damage, the *Hoge Raad* ruled, judges have much discretion.[7]

c) Commentary

47 The issue at hand is of great social importance. Over 5,000 cases on the compensation of (intangible) earthquake damage are pending at the court of first instance. A framework for the efficient and uniform handling of the numerous cases had already been provided by the *Hoge Raad* in 2019.[8] If, in line with the previous ruling of the *Hoge Raad* in 2019, certain common features occur, liability can be established and individual circumstances do not require much further investigation.

48 The present ruling follows the line set out by the *Hoge Raad*: loss of residential enjoyment is eligible for compensation if the nuisance or annoyance exceeds a certain level in severity. The *Hoge Raad* provides little further direction for this path, leaving this for the courts to develop in more detail. When it comes to the question of whether there is a right to compensation for immaterial damage in cases such as these, where there is no physical injury, it should be established that the person suffering has been otherwise afflicted as understood in terms of

7 Parliamentary History Book 6, 380.

8 HR 19 July 2019, ECLI:NL:HR:2019:1278. See also *Emanuel GD van Dongen/Anne LM Keirse*, Netherlands, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2019 (2020) 409, nos 28–37.

art 6:106 sub b DCC. In addition to the demarcation already made in the preliminary ruling ('a certain area above the Groningen field'), another demarcation is now chosen: 'experiencing physical damage to the residence more than twice', regardless of the extent of that damage. If this characteristic is met, then the adverse effects of the unlawful nuisance and inconvenience are so obvious that 'affliction to the person' can be assumed. If the NAM confirms physical damage to houses at least twice, then NAM must pay at least € 2,500 to the residents concerned as compensation for the immaterial harm, to be increased by € 1,250 for each additional instance of physical damage to the house as a result of a following earthquake.

49 The *Hoge Raad* referred to a study by the University of Groningen that shows that there is a relationship between nuisance and stress-related complaints on the one hand and physical damage to the residence, on the other. The *Hoge Raad* ruled that the lower courts have a large degree of freedom when determining the ultimate extent of damages. In the earlier, preliminary ruling, the *Hoge Raad* indicated that personal injury is not a matter of a mere violation of a fundamental right, and that damages cannot be fixed on a lump sum basis because it is a highly personal right for the individual. The current judgment refines this threshold. In situations in which residences suffer physical damage due to earthquakes more than twice, it can be assumed that the occupants of those homes are otherwise afflicted as a person and for that reason are entitled to compensation for immaterial damage. In such a situation, the nature (concrete and potentially frightening invasion of personal privacy) and severity (not an incident but a recurrence) of the event imply that the adverse effects are sufficiently obvious. Beyond this situation, whether there is additional harm in terms of art 6:106 sub b final part DCC, harm qualifying for a right to immaterial damage should still be considered on a case-by-case basis.

7. HR 5 November 2021, ECLI:NL:HR:2021:1647: Lawyers' Breach of Duty to Inform (*West-Friese Flora*)

a) Brief Summary of the Facts

50 In 1999, visitors to a flower exhibition (the *West-Friese Flora*) became infected with bacteria via atomized water from a whirlpool. The whirlpool was filled with water from a fire hose in which the Legionella pneumophila-bacterium had developed. The proceedings involved a law firm (A) that had initially represented one of the victims and had commissioned research into the cause of contamination with an environmental and public health consulting firm. The central ele-

ment of the litigation at hand concerned the invoice of the investigator who stipulated a 'no cure, no pay' agreement with the law firm (A), meaning that his invoice would be claimed as damages within the scope of a claim for financial compensation by this law firm (A), on behalf of the victims. The law firm (A) failed to inform a second attorney, working for another law firm (B), who, after some time, took over the representation, of the agreement. Many years later the victim won its case and the damages were settled. The investigator then filed a claim for payment against the law firm (A), his contractual party.

The court of first instance rejected the claim. The Court of Appeal of Amster- **51**
dam-Leeuwarden had already ruled in 2014 that a breach of contract occurred at the time the law firm (A) failed to communicate the agreement to the other law firm (B). But the question is: would compliance have led to the payment of the invoice and thus to any other outcome for the investigator? Although the Court of Appeal assumed a causal connection between the breach of contract and the loss of the investigator, the *Hoge Raad* quashed this ruling because the Court of Appeal had rejected the causality defence on incorrect grounds,[9] and then referred the case to the Court of Appeal of Den Bosch. That court concluded that there was not a sufficient causal link between the breach of contract and the loss suffered by the investigator. It considered what the situation would have been without breach of contract, thus in case the new lawyer had been informed of the agreement. Balancing good and bad chances led the court to conclude that, also in that case, no payment of the invoice or compensation would have been awarded to the plaintiff. The researcher then appealed in cassation.

b) Judgment of the Court

The Court of Appeal ruled that the reprehensible act or omission in question had **52**
not caused any damage, since the researcher would not have been able to receive the money even without the law firm's failure to inform. After all, the victim and/or the new law firm (B) representing him were not obliged to uphold the 'no cure, no pay' agreement concluded between the investigator and the first law firm (A), because they were not involved in any way in the formation of this agreement. There was no reason to assume that they would voluntarily have paid the investigator or would have stipulated any compensation for him in the context of the settlement agreement in the event that they were informed over the 'no cure, no pay' agreement. According to the *Hoge Raad*, the complaints could not lead to

9 HR 6 July 2018, ECLI:NL:HR:2018:1098.

cassation. To address the complaints, there was no need to answer legal questions for the benefit of unity or development of law (art 81 para 1 Judicial Organisation Act (*Wet op de Rechterlijke Organisatie*, RO). Thus, after many years of proceedings at the various courts, the plaintiff's claim that he suffered a loss that should be compensated by the law firm (A) definitely failed.

c) Commentary

53 The goal of liability law is to bring harmed parties, to the greatest extent possible, into the situation in which they would presumably have been without the violation of the norm. A comparison between the factual situation after the violation and the situation as it would have been without the violation of the norm is thus required. The first situation to compare with is not always self-evident, since it may be uncertain how the factual situation will develop over time, and the other is, by nature, a hypothetical one. In order to establish liability and to assess whether and, if so, how much reimbursable damage has arisen, firstly the presence of a *conditio sine qua non* connection must be determined, and secondly, the financial situations without and with the unlawful act must be examined.

8. HR 10 December 2021, ECLI:HR:2021:1842: Liability of Real Estate Agents for Incorrect Information about Living Space of a House

a) Brief Summary of the Facts

54 A buyer bought an apartment for a purchase price of € 312,500 in 2011. The seller's estate agent was affiliated with the NVM, the Dutch association of real estate agents. According to the sales brochure issued by the estate agent and also published on the website funda.nl, the living area of the apartment measured 125 m^2. The estate agent did not measure this surface area according to NVM's instructions for its members. On behalf of the buyer, in 2016, a different estate agent determined that the living area of the apartment, calculated according to NVM instructions, measured 114 m^2. According to the NVM Supervisory Board, the living area of the apartment, calculated according to the NVM measurement instruction, measured approximately 117.3 m^2.

55 In these proceedings, the purchaser stated that the seller's estate agent acted unlawfully by making this professional mistake and claimed € 25,000 in damages from the estate agent. The court of first instance rejected this claim. The measure-

ment fault was indeed unlawful, but the extent of the damage suffered could not be determined. The Court of Appeal upheld this judgment. According to the Court of Appeal, the buyer had consistently used an incorrect calculation of damages and, besides, had not offered any starting point to the Court of Appeal in order to determine or estimate the damage and its extent.

b) Judgment of the Court

56 The *Hoge Raad* considered the buyer's complaints well-founded. Inter alia, the buyer complained that the Court of Appeal set its evidence requirements too high by requiring from the harmed party an extensive substantiation of his damage. The *Hoge Raad* ruled that the Court of Appeal, by way of presumption, had assumed that the broker acted unlawfully towards the buyer. It rightly considered that it follows from that assumption that the broker must compensate the damage suffered by the buyer. Insofar as the subsequent considerations of the Court of Appeal would imply that the buyer did not provide plausible evidence that he suffered any damage, this judgment, in the light of what the buyer argued, is not understandable without further substantiation. Insofar as those considerations would imply the view that it is plausible that damage has been suffered, but the claim should nevertheless be dismissed because the Court had insufficient information to be able to determine the extent of the damage, that view cannot stand either. The Court of Appeal failed to acknowledge that it should have estimated the damage, whether or not after further instructions, on the basis of art 6:97 DCC if it held that the extent of the damage could not be accurately determined, or should have referred the parties to the damage assessment procedure (*schadestaat-procedure*), even without this being explicitly demanded.[10]

c) Commentary

57 This case concerns the burden of proof of the (extent of) damage suffered by a buyer who relied on an incorrect square metre statement by an NVM estate agent. It is one of three judgments handed down by the *Hoge Raad* on 10 December 2021 regarding the liability of an estate agent for providing incorrect information about the floor area (*woonoppervlakte*) of a residence.[11] These 'measurement instruction

10 The *Hoge Raad* referred to HR 7 September 2018, ECLI:NL:HR:2018:1435.

11 ECLI:NL:HR:2021:1842, 1843 and 1844.

cases' have been in the spotlight of case law and literature for some time now. In 2018, a first ruling of the *Hoge Raad* on measurement instructions introduced the liability of the estate agent for miscalculations.[12] The second measurement instruction ruling revolved around the question of how the extent of the damage should be determined.[13] In that judgment, the *Hoge Raad,* inter alia, ruled that if a selling NVM agent states a living area that has not been measured in accordance with the NVM measurement instructions, this constitutes an unlawful act towards the buyer who relied on it, unless the agent proves that the buyer was not entitled to rely on this incorrect statement. The current ruling shows that if it is impossible or difficult to determine the amount of the loss, this does not mean the damages claim can be dismissed for that reason. This is in accordance with the general rule that the court must assess the damage in a manner most appropriate to its nature and shall estimate the extent of the damage in case this cannot be determined precisely. Dismissing a claim for damages on the ground that the claimant's propositions regarding the extent of the damage are ambiguous is not easily justified.

9. Personal Injury

58 Over time, the boundaries of compensation awards for immaterial damage have shifted. A glance at history shows that old Dutch law did indeed grant the injured or mutilated the right to claim compensation for pain, suffering and disfigurement of the body, but from 1811 (the introduction of the French Civil Code) any reference to immaterial damage in legislation was absent for a very long time. The same applies to case law, in which the courts almost universally adhered to the principle that no award of immaterial damages was possible. Only in the first half of the twentieth century did a turnaround in the lower courts' case law emerge (although not unambiguously) and only in 1943 did the *Hoge Raad* recognise the right to claim for compensation of immaterial damage.

59 In 1992, this right was introduced in the New Civil Code. However, while art 6:95 DCC stipulates that material damage (consisting of loss to property, rights and interests) must be fully compensated, immaterial damage (referred to as any other prejudice) only qualifies for compensation to the extent that the law confirms a right to damages therefor. Article 6:106 DCC lists the events for which compensation for immaterial damage can be awarded. A right for immaterial

12 HR 13 July 2018, ECLI:NL:HR:2018:1176.

13 HR 22 February 2019, ECLI:NL:HR:2019:269. See *van Dongen/Keirse* (fn 8) no 7ff.

damages arises if the liable person had the intention to cause such prejudice (sub a); if the prejudice consists of the impugment of the memory of a deceased person inflicted upon the spouse, the registered partner or a blood relative up to the second degree (sub c); and if the person suffering the immaterial loss sustained physical injury, his honour or reputation was impugned or his person has been otherwise afflicted (sub b). In addition, compensation for immaterial harm is, under certain restricted circumstances and to a limited extent, possible for third parties (arts 6:107 and 108 DCC).

60 The reticent attitude with respect to the recognition of compensation for immaterial damage led to the fact that compensation of damage, other than pecuniary, in principle was only considered possible in cases in which legislation and case law already offered this entitlement under the law in force before 1992. That was the case with intentional defamation, physical injury and crimes against the person. Common opinion was that compensation for grief and pain could not be awarded in the case of grief for an injury or for the loss of a loved one, because such award could lead to the 'commercialisation of grief'.

61 This attitude has changed. The call for a relaxation and expansion of the legal limits is being heard loud and clear. Slowly but surely, the amounts granted in immaterial damages are increasing. Since 2002, the *Hoge Raad* has awarded damages for nervous shock: psychological damage caused by traumatic incidents involving loved ones.[14] With the entry into force of the Act on Compensation for Affection Damages on 1 January 2019,[15] next of kin and surviving relatives are entitled to compensation for affection damage in the event a person with whom they have an affectionate relationship suffers permanent serious injuries or died. Moreover, the limits of the scope of 'his person has been otherwise afflicted' (art 6:106 sub b final part DCC) have broadened. This not only has the attention of the civil division of the Supreme Court but also of the criminal division.[16] Criminal judgments also draw lines and define boundaries. In the Netherlands, an injured party can, of course, claim compensation in a civil suit, but in criminal proceedings initiated by the State, this can also be done within the scope of the trial. The injured party, as a victim, can request compensation for both material and immaterial damage suffered. This is referred to as 'joining in as injured party' (*voegen als benadeelde partij*) (art 51f *Wetboek van Strafvordering* (Code of Criminal Procedure)). This procedure was created for victims of criminal offences, to

14 HR 22 February 2002, ECLI:NL:HR:2002:AD5356 (*Taxibus*).

15 *Emanuel GD van Dongen/Anne LM Keirse*, Netherlands, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2018 (2019) 415, no 1.

16 See for the civil law rulings, ECLI:NL:HR:2019:376 and HR:2019:1278 – as discussed in *van Dongen/Keirse* (fn 8) nos 12ff and 28ff – and ECLI:NL:HR:2021:1534 (no 42ff above).

avoid separate tort law proceedings to recover their damages. Claims are assessed by the criminal court according to civil liability law. A further advantage for victims is that the State pays the awarded sum to the victim and later collects it from the offender.

62 Although the *Hoge Raad* at first cautiously ruled in civil cases that, under certain circumstances, there may also be an impairment of the person apart from physical or mental injury, defamation of honour and reputation, it subsequently no longer formulated this impairment as an exception but as a juxtaposition of the two 'ways' of the harm of being 'otherwise afflicted as a person'. According to the *Hoge Raad*, this harm may consist of mental injury or a violation of a fundamental personal interest. Violation of a fundamental legal interest does not by definition entitle a person to compensation for pain and suffering. However, the nature and severity of the adverse effects of the violation may lead to a different conclusion.

63 Also the criminal section of the *Hoge Raad* places the category of mental injuries next to the category of fundamental law violations in HR 28 May 2019[17] and HR 15 December 2020.[18] A recent ruling of the criminal section of the *Hoge Raad*, concerning theft with violence from a supermarket cash drawer, in which a supermarket employee claimed compensation for immaterial damage due to the robbery, provides clarity: a psychiatric illness is not required in order to establish the existence of mental injuries (HR 29 June 2021).[19] Thus with regard to the first category of mental injuries, the *Hoge Raad* ruled that a right to compensation thereof no longer requires the substantiation of a recognised psychiatric disorder diagnosed by a psychiatrist or psychologist. However, the existence of mental injuries must be substantiated with sufficient and concrete data. But even if such a mental injury cannot be assumed, it is not excluded that the nature and seriousness of the violation of the standard and its consequences for the injured party mean that he has been 'otherwise harmed as a person'. In such a case, the party who relies on this possibility must substantiate his impairment with concrete data, unless the nature and seriousness of the violation of the norm means that the relevant adverse consequences for the aggrieved party in this connection are obvious to such an extent that harm as a person can be assumed without any doubt.

64 A further step in the development was taken by the *Hoge Raad* at the end of 2021 in the case concerning the earthquake damage in the Groningen field (HR

17 ECLI:NL:HR:2019:793.

18 ECLI:NL:HR:2020:2012.

19 ECLI:NL:HR:2021:1024.

15 October 2021).[20] Although this ruling is innovative, given the standardisation applied, it should still be seen in its concrete, specific context and not be generalised to other cases. The ruling however, is of great importance since it shows that the boundaries of compensation for immaterial damage are shifting, especially where compensation of fear damage (*angstschade*: when an injured party is harmed by an earthquake twice or more) is concerned. That the inhabitants of the Groninger field experienced compensable immaterial suffering, including fear, in addition to compensable material damage, is now clear. The law is thus faced with the question of whether and under what conditions immaterial suffering may be eligible for compensation. This question is not new in legal history but it receives, depending on time and place and on social developments, different answers.

C. Literature

1. *AG Castermans*/*G Snijders*, De gelede normstelling in het aansprakelijkheids- en schadevergoedingsrecht [Articulated standardisation in liability law and the law of damages] (Wolters Kluwer 2021)

This volume presents the two preliminary advices (*preadviezen*) presented at the annual meeting of the Dutch Association for Liability and Compensation Law (VASR), on the articulation of standards in liability law and the law of damages. Castermans discusses the way civil courts work with open standards and norms. He studies the relationship between open norms and mandatory regulation. He takes a critical view of deploying self-regulation, such as codes of conduct, to give substance to open norms. Snijders zooms in on the distinction between public law and private law. He explores the boundary between the two areas and how differences and commonalities between public law and private law affect the outcomes of cases. In doing so, he examines, inter alia, the various consequences a concurrence of both types of law can have. The central stance is that these consequences are always heavily reliant on the context and the given circumstances of the case at hand. This is illustrated by a series of different cases. 65

20 ECLI:NL:HR:2021:1534; see above no 42ff.

2. *N van der Horst*, Bestuurdersaansprakelijkheid voor het gehele boedeltekort. De omvang van de schade en het matigingsrecht [Director's liability for the entire estate deficit. The extent of the loss and the right of mitigation] (Celsus juridische uitgeverij 2021)

66 The so-called third 'anti-abuse law' resulted in the amendment of arts 2:138 and 2:248 DCC, dealing with the liability of company directors in the case of bankruptcy. If liability is established, they are liable to make good the entire bankruptcy deficit. However, often the bankruptcy also has other causes or sometimes directors only committed a relatively small error. In this book, the author uses parliamentary history, case law and comparative law to examine whether the basic principle of liability for the entire bankruptcy deficit is correct or whether, in certain cases, it places too heavy a burden on directors. An important aspect here is the right of mitigation, which allows liability to be determined more proportionately. Case law shows that the courts rarely apply this right of mitigation *ex officio*.

3. *D Mols*, In dubio pro valetudine. Het voorzorgsbeginsel en de aansprakelijkheid voor de Q-koortsepidemie [In dubio pro valetudine. The precautionary principle and liability for the Q-fever epidemic] (Celsus juridische uitgeverij 2021)

67 Between 2007 and 2011, the Netherlands was hit by the Q-fever epidemic, resulting in a large number of victims. During this epidemic, the government was partly guided by the precautionary principle of taking measures and informing the general public. In this publication, an adapted version of her master thesis, the author examines whether the precautionary principle in liability law can be applied to the government and whether, on this basis, the government can be held liable for damage suffered as a result of the Q-fever epidemic. The study starts with a description of the history, development and core elements of the precautionary principle and assesses whether it is correctly applied in Dutch law, in particular in the Q-fever case. Subsequently the liability law precautionary principle is elaborated upon and the pros and cons of its application, viewpoints and criteria are weighed. The application of the liability law precautionary principle to the government, and the freedom of policy and discretion and the link between precaution and science are discussed. The author concludes that the government acted in violation of the precautionary principle during the Q-fever epidemic.

4. *PA Fruytier*, De civielrechtelijke inbedding van het besluitenaansprakelijkheidsrecht [The civil law embedding of decision liability law] (Wolters Kluwer 2021)

68 The liability for appealable government decisions leads to much debated difficult issues both for practising lawyers and scholars. Legal practitioners often wonder how the doctrines of unlawfulness, causation, reasonable attribution and relativity should be applied in a concrete case. Legal scholars wonder how liability for government decisions can be integrated into general civil law. The author elaborates on the answers to these questions and studies how this integration can take into account the judicial context within which the government operates when taking a decision. This book takes as its starting point that government liability law is governed by the general doctrines of civil law, as is repeatedly assumed by the Dutch Supreme Court. The author presents a framework making clear which questions should be answered in a case and according to which criteria they should be answered.

5. *S Wiznitzer*, Defensieve dokters? Een juridisch-empirisch onderzoek naar de invloed van het medisch aansprakelijkheidsrecht op het professionele handelen van zorgverleners [Defensive doctors? An empirical legal study exploring the influence of medical liability law on the professional actions of healthcare providers] (Boom juridisch 2021)

69 To what extent can Dutch medical liability law be said to have the intended effect of influencing behaviour? This question is dealt with by Wiznitzer in her doctoral thesis. According to legal doctrine, medical liability law should lead healthcare providers to adhere to standards. However, social science research provides evidence that medical liability law leads to defensive actions. This tension is the starting point for her legal-empirical study. Civil medical liability law, medical disciplinary law and medical criminal law all have a preventive purpose. On the basis of primary and secondary empirical research, this book describes the extent to which this goal may be expected to be achieved in practice. An important conclusion of this legal-empirical research is that the behavioural influencing effects of medical liability law should not be overestimated. The limited legal knowledge of healthcare providers seems to play an important role in this regard.

6. *EC Gijselaar*, Positieve verplichtingen en aansprakelijkheid: De invloed van positieve verplichtingen uit het EVRM op het Nederlandse aansprakelijkheids- en strafrecht [Positive obligations and liability: the influence of positive obligations from the ECHR on Dutch liability and criminal law] (Boom juridisch 2021)

70 In the Netherlands, it has always been assumed that the ECHR is acted upon. Gijselaar, in her PhD thesis, studied whether this is true. Her book describes whether substantive criminal and civil government liability law meets the requirements arising from the positive obligations, formulated on the basis of arts 2, 3, 4, 5, 8 and 1 of the ECHR. Although the conclusion is that Dutch law largely meets the requirements of the ECHR, there are still a number of implementation problems. Some recommendations are formulated for the legislature, the executive and the courts in order to solve these problems.

7. *ER de Jong*/*L Dalhuisen*/*T Bouwman*/*I Giesen* (eds), Een verkennend juridisch-empirisch onderzoek naar het gebruik van maatschappelijke opvattingen in de Nederlandse rechtspraak [An exploratory legal-empirical study into the use of societal views in Dutch case law] (Boom juridisch 2021)

71 In making legal judgments, the judge regularly uses so-called 'social conceptions' (*maatschappelijke opvattingen*) and related legal concepts such as 'generally accepted practices' (*verkeersopvattingen*). However, it is rare for judges to make explicit how or where they deduce the basis of that social view, and whether and how they examined what that social practice/opinion is. In this volume, the question whether the societal views that are prevalent in the judiciary and utilised in court decisions correspond to the actual views in society is discussed. The volume contains several contributions, some of which directly concern liability law, namely the following: Giesen and Van Dongen discuss 'normal societal risk' or 'normal business risk' in the case of damage caused by police raids, Giesen and De Jong discuss the reasonableness of co-possessor liability, Rijnhout and Wiznitzer discuss the allocation of risk in the case of the use of unsuitable medical devices and Kuiper-Slendebroek discusses internal instructions as an interpretation of the societal standard of care.

8. *C Ruppert*, Regelingen voor collectieve schade: geef slachtoffers erkenning [Regulations on collective damages: give acknowledgment to victims] (Boom juridisch 2021)

72 In the past, the Dutch government has drawn up schemes for victims in cases of collective damage claims such as cases of Jewish war credits, of sexual abuse in youth care, of chromium-6 damage, of the tax benefits affair (*Toeslagenaffaire*) and mining damage in Groningen. According to the author, many of these schemes fail to achieve their goals. They have not been thought through and are insufficiently elaborated. They do not always give all victims sufficient acknowledgment for what happened to them. This book presents an overview and a comparison of 44 arrangements for collective damage, aiming to provide conclusions and points of attention for collective damages claims in the future. The main recommendation in the study is that judicial acknowledgment of victims should be given a central place in collective damage settlements and that victims should be much more be involved in their drafting.