KLUWER LAW INTERNATIONAL

EUROPEAN REVIEW OF PRIVATE LAW

Wolters Kluwer
Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

Published by *Kluwer Law International*
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Sold and distributed in North, Central and South America by *Aspen Publishers, Inc.*
7201 McKinney Circle
Frederick, MD 21704
United States of America

Sold and distributed in all other countries by *Turpin Distribution*
Pegasus Drive
Stratton Business Park, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

ISSN 0928-9801

This journal should be cited as (2010) 18 *ERPL* 3

The *European review of Private Law* is published six times per year.
Subscription prices for 2010 [Volume 18, Numbers 1 through 6] including postage and handling:
EUR568/USD758/GBP418 (print)

This journal is also available online at www.kluwerlawonline.com.
Sample copies and other information are available at www.kluwerlaw.com.
For further information at please contact our sales department at +31 (0) 172 641562 or at sales@kluwerlaw.com.

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The *European review of Private Law* is indexed/abstracted in the *European Legal Journals Index.*

Printed on acid-free paper

EUROPEAN REVIEW OF PRIVATE LAW
REVUE EUROPÉENNE DE DROIT PRIVÉ
EUROPÄISCHE ZEITSCHRIFT FÜR PRIVATRECHT

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Founded in 1992 by Ewoud Hondius and Marcel Storme

ISSN 0928-9801

Typeface ITC Bodoni Twelve
Design Dingoj | Peter Oosterhout, Diemen-Amsterdam
Printed in Great Britain

European Review of Private Law 3-2010[631-647] © Kluwer Law International BV | Printed in the Great Britain

Dutch Case Note: Employer's Liability for an Injured Employee's Suicide in Dutch Law

ANNE KEIRSE & MARTIEN SCHAUB*

1. Introduction

Behind court decisions often lie tragic tales and personal dramas. In this case, the underlying facts amount to a nearby fatal accident at the workplace of Thomas Corr, as a result of which Mr Corr had to undergo painful surgery, which left him disfigured and suffering from a loss of balance, tinnitus and severe headaches. On top of this, the accident resulted in him suffering from depression, which worsened over time and eventually led to his suicide when he jumped off a multi-storey car park, leaving behind a young family.

The facts of this case eventually led to court proceedings in three instances, in which lawyers and judges pondered over the question whether the widow should be able to recover from the employer the financial losses attributable to the suicide of her husband. As is their task, the lawyers qualified this tragedy in terms of technical legal qualifications and discussed questions such as the ground for liability, the extent of any liability, causal links and contributory negligence. In the following, these issues will be discussed from a perspective of Dutch law.

2. Grounds for Liability

In the case of Thomas Corr, two claims were brought: Mr Corr's own claim, which survived after his death for the benefit of his estate and the claim by his widow under the Fatal Accidents Act 1976. It is important to note that in court it was not disputed that the employer owed a duty of reasonable care towards his employee Mr Corr so as to avoid causing him personal injury and that this duty had been breached, thereby causing the accident. The accident, in turn, caused both physical and mental injuries, for which Mr Corr was entitled to recover damages. Also undisputed was the fact that it was as a direct result of the mental illness caused by the accident that Mr Corr committed suicide. The debate revolved around the question whether or not the damages claimed by his widow were too remote from the negligent act, considering that it was Mr Corr who had taken his own life.

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Under Dutch law, the ground for the employer's liability for the damages suffered by Mr Corr can be found in Article 7:658 of the Dutch Civil Code. According to this article, an employer owes his employees a duty of care in organizing and equipping the workplace in such a manner that damage or harm to employees is prevented. An employer, who does not comply with this duty, is liable for any damage suffered by employees in the course of their work. As it is uncontested that the employer had breached his duty of care towards his employee, the grounds for liability do not amount to any problem in this case. Article 7:658 of the Dutch Civil Code provides an injured employee with a valid claim, which, in the case of the death of the employee, is transferred to his heir(s).

As to the claim by the widow, a more or less comparable equivalent to the Fatal Accidents Act 1976, which grants claims to the dependants of deceased persons who have died as a result of fatal accidents, can be found in Article 6:108 of the Dutch Civil Code. In principle, the relatives of deceased persons have no ground for a personal claim based on the negligent behaviour of the tortfeasor.[1] However, if the death of the injured party has been caused by a wrongful act for which the tortfeasor is held liable, then the dependents of the deceased have a claim deriving from this liability under Article 6:108 of the Dutch Civil Code for their loss of maintenance.

At first sight, the case of Mr Corr seems clear enough: a duty of care was breached, this caused the accident, which in turn caused the depression which led to Mr Corr's suicide. Nevertheless, six grounds of defence were raised on the employer's behalf, all related to the impact of the behaviour of the victim on the (extent of) the liability. To what extent would these grounds of defence be successful under Dutch law?

3. Scope of the Duty of Care

It should be noted that, in Dutch tort law, the extent of the tortfeasor's liability depends on the relative weight given to the maxims 'the loss should lie where it falls' (*casum sentit dominus*), on the one hand, and 'one must not injure one's neighbour' *(alterum non laedere*), on the other. Moreover, in respect of the responsibility of the injured party, the maxim 'what anyone suffers as damage through his own fault is not regarded as damage which has been suffered' (*quod quis ex culpa sua damnum sentit, non intellegitur damnum sentire*) is valid. This means that the damage that someone suffers, which occurs purely accidentally or due to his own

[1] An exception to this main rule is the claim recognized in HR 22 Feb. 2002, NJ 2002, 240 (*Taxibus case*), in which the mother of a child that was run over by a taxi was granted her own claim. The special circumstances in this case were that the mother herself suffered shock (mental injury) when she was confronted with the terrible consequences of the accident just after it had occurred, when she tried to pick up her daughter and was faced with the severe head injuries which had been suffered by the child.

fault, lies where it falls. Wrongfully inflicted damage however, should be compensated.

The regime of contributory negligence, found in Article 6:101 of the Dutch Civil Code, encompasses the balance that should be found in the tension between these viewpoints.[2] This rule is concerned with the question whether the amount of damages that must be paid can be reduced based on the fault of the victim after the liability of the offender has been established. But also in the first phase, that is establishing liability, the circumstances related to the victim and the behaviour of the victim are relevant.

To establish liability, a norm or a rule of conduct must have been breached. In determining the extent of such norms or rules of conduct, it is important to note that one must take the actions and reactions of others into account. For example, if a person puts himself in a situation where certain risks are involved, such as sporting activities or pastimes involving a degree of danger, less stringent demands are imposed on the level of care which must be observed towards this person. Moreover, in some cases, the conduct of victims who contributed to the occurrence of the damage can demonstrate such an extreme lack of care or be so unlikely that others need not take such behaviour into consideration. As a consequence, in such cases, the behaviour of the person who caused the damage cannot be seen as a breach of his duty of care towards the victim. For example, if someone sneaks into the cargo space of a van, without the driver noticing, the stowaway cannot hold the driver responsible if the latter is responsible for a traffic accident that inflicts damage on the stowaway. The driver does not need to take into account the possibility that any persons are present in the back of the van, and therefore, in his behaviour in road traffic, he does not need to take into consideration that this could constitute a risk for such persons.[3] In other words, any road traffic violations by the driver do not constitute a breach of the duty of care towards a stowaway.

Applied to the facts of the case of Mr Corr, it cannot be said that at the time of establishing liability, that is, at the time when the accident occurred, Mr Corr chose to put himself in a situation of heightened risk, nor that he demonstrated an extreme lack of care or indulged in highly unlikely behaviour. At the time when he was injured at his workplace, he was simply doing his job and the duty of care owed by the employer concerns the prevention of personal injury, which means both physical and mental damage to his employees. The ratio for the atypical regime to be discussed underneath with regard to contributory negligence in case of employer's liability, only incorporates the possibility for the employer to be relieved from that liability if the employee has acted either purposefully or foolhardy.

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[2] A.L.M. Keirse, *Schadebeperkingsplicht; over eigen schuld aan de omvang van de schade*, diss. Groningen (Deventer: Kluwer, 2003), 17 and 69.

[3] HR 27 Jan. 1984, NJ 1984, 536 (*Stowaway*). See also HR 10 Apr. 1970, NJ 1970, 292 (*Van Adrichem v. Rotterdam*).

4. Justification of the Breach

Another possibility to escape liability based on the behaviour of the victim is when the victim's behaviour justifies the behaviour by the tortfeasor which, under different circumstances, would normally have been unlawful. Such was the case in *Taams v. Boudeling*.[4] The events that led to this case read like a comic tragedy, ending in a scuffle between a restaurant owner, who had been awarded two Michelin stars, and two of his guests. The guests, both doctors, were the only customers that afternoon, but they turned out to be fairly ill-mannered. During their midday meal, they ordered a bottle of Chablis. As the Chablis did not live up to the guests' very high standards, the restaurant owner replaced it with a bottle of champagne at the request of the guests. After disapproving of an oyster, which was subsequently replaced, a bottle of white Burgundy, partly empty, was returned by the customers. After this, they ordered a bottle of Meursault 1978, which suffered the same fate after about two-thirds of the content had been drunk.

Fortunately, the champagne, the coffee and the cognac stood the test of criticism. However, when the bill, totalling Dfl. 750 (about EUR 340) was presented, the guests objected to being charged for the bottle of Burgundy and the Meursault. They got up and headed towards the door. The antagonized restaurant owner was under the impression that they had not paid the bill and grabbed one of the guests by the collar. The guest turned round and, in doing so, his arm made contact with the restaurant owner's face. The restaurant owner, in reaction to this, struck his guest, who fell against the door. The guest suffered serious injury necessitating surgery. In retrospect, it turned out that none of this would have been necessary as the bill had been settled in full, inclusive of an additional tip, and left on the table. According to the restaurant owner, the money had been placed under the saucer on which the bill had been presented and was therefore not visible.

The injured guest commenced proceedings, but the judge was of the opinion that, considering their conduct during their meal, the restaurant owner had been right to assume that the guests were apparently leaving without paying. Under those circumstances, he could not be blamed for trying to apprehend one of the guests. The guest's subsequent movement of his arm could correctly be understood as a threat, in reaction to which the punch by the restaurant owner was not considered to be out of proportion. It was decided that although punching someone is a wrongful act, the restaurant owner had been provoked in such a manner by the behaviour of the guests that in this case the punch was not deemed to be unlawful.

Again, it was not Mr Corr who provoked the accident; therefore, this type of defence will not assist his employer. The suicide that took place six years after the accident does not alter the fact that the employer had breached his duty of care. The arguments considered here in sections 3 and 4 are concerned with the

[4] HR 31 Mar. 1995, NJ 1997, 592 (*Taams v. Boudelling*).

behaviour of the victim before or at the moment of the accident, his behaviour after the accident is considered below.

5. The Causal Link between the Damage and the Employer's Negligence

The employer who is held liable as a result of his breach of the duty of care under Article 7:658 of the Dutch Civil Code is liable for the damage suffered by the employee, including any loss of maintenance by his/her dependents if he or she dies. A necessary condition is that there must be a causal link between the negligent behaviour and the damage suffered. The minimal condition for this is a *condicio sine qua non*, that is, that without the wrongful act of the tortfeasor, the damage would not have occurred. However, the *sine qua non* test is a necessary but not sufficient test; not all damage retraceable to the negligent behaviour by an endless chain of causal links can be claimed. At some point, the damage becomes too remote or something could occur during the course of time that breaks the causal chain. According to Dutch law, a sufficient link of causation between the action of the tortfeasor and the damage is not determined by a single criterion, but is based on a weighing of all relevant factors considered within their overall context.

This follows from Article 6:98 of the Dutch Civil Code after liability has been established. This article specifies that reparation of damage can only be claimed for damage which is related to the event giving rise to the liability of the obligator, which also having regard the nature of the liability and of the damage, can be attributed to him as a result of such event. This rule is referred to as the *leer van de toerekening naar redelijkheid*, which can be translated as 'the doctrine of attribution according to reasonableness'.

According to this doctrine, various factors can play a role in determining which losses should be compensated. The nature of the liability and the nature of the damage are important factors, but also the likelihood of the consequences which occurred, the forseeability of the damage, the type of breach and how much the tortfeasor was to blame for the breach. A far-reaching attribution of damages is accepted in cases of physical injury caused by breaches of safety norms. In such cases, all damages for the whole period needed for recovery by the victim are attributed, even if this exceeds normal expectations.

Moreover, in cases of personal injury, the maxim 'the tortfeasor takes the victim as he finds him' is applied. Leaving aside a few exceptional critical voices,[5] this maxim is generally accepted by Dutch legal scholars and the Dutch Supreme Court in cases of wrongfully inflicted injury.[6] The recipient of a wrongful action need not be compared with a sturdy fit person with no shortcomings. An unusually

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[5] J.M.M. Maeijer, *Matiging van schadevergoeding*, diss. Nijmegen (Breda: Louis Vermijs, 1962), 181–188. H.R. Ribbius, *De omvang van de te vergoeden schade bij niet-nakoming van verbintenissen en bij onrechtmatige daad*, diss. Leiden (Leiden: Eduard Ijdo, 1906), 218–224.

[6] A.L.M. Keirse, 'The Tortfeasor Takes His Victim as He Finds Him', in *Tien pennenstreken over personenschade*, ed. T. Hartlief & S.D. Lindenbergh (The Hague: SDU Uitgevers, 2009), 112–116.

long period of recovery or consequences as a result of a certain predisposition of the victim that could not be foreseen by the tortfeasor do not break the chain of causation, nor do they give rise to a diminution of the amount of damages paid based on Article 6:101 of the Dutch Civil Code (contributory negligence).

This does not mean that the tortfeasor is left at the mercy of the whims of the victim. The maxim that the tortfeasor takes his victim as he finds him finds its limits in two ways. The first is the concrete manner in which the damage is calculated; the personal disposition of the victim is taken into account when an estimate is made of the possibilities if the negligent act had not taken place. If someone, due to his or her physical or mental state, cannot be expected to live for long and/or to have a brilliant career, this is taken into account and this can limit the amount of damages which must be paid by the tortfeasor.

The second limit can be applied when it is found that the victim, within his or her own possibilities, does not make sufficient efforts to contribute to the process of recovery. After all, an injured party who wishes to safeguard his entitlement to full compensation for any damage incurred has a duty to take reasonable steps to mitigate such damage. Individual circumstances can indeed affect what can reasonably be expected from an injured party in terms of mitigating loss. However, they cannot absolve an injured party from all duties of care; there is always a minimum that can be expected from any victim. If the victim does not do what can be reasonably expected, taking into account his or her predisposition, this amounts to contributory negligence.[7] This means, when it has been established, that the victim could and should have acted differently, the liability of the tortfeasor is reduced by dividing the damage between both parties (see in more detail on the doctrine of contributory negligence section 7 *infra*).

Hence, under Dutch law, the foreseeability issue could not have been successfully raised as defence in a case such as the one discussed here. According to Dutch law, it would not have been necessary to establish reasonable foreseeability, on the part of the employer, concerning the suicide. The foreseeability of the damage is just one of the factors to be judged when applying Article 6:98 of the Dutch Civil Code; nowadays, it is by no means a decisive factor. On the contrary, as mentioned above, in cases of personal injury even damage that is not foreseeable must be compensated, as a result of the maxim that one has to take one's victim as one finds him.

What could be an issue is the question whether Mr Corr has contributed to the damage as a result of an unreasonable act; this question falls under the doctrine of contributory negligence, which is discussed in sections 7 and 8 *infra*.

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[7] A plaintiff's failure to mitigate damages is sometimes thought of as a different affair from contributory negligence, but the better view is that the two are in essence the same. An unreasonable failure to mitigate damages is a kind of contributory negligence, the only special feature being that it relates not to the whole of the plaintiff's loss, but only to a proportion thereof.

6. *Causa Interveniens* and Hypothetical Causality

The examples cited in the previous sections illustrate how the behaviour of the claimant under circumstances prevents the behaviour of the offender from being characterized as wrongful. It is also possible that the offender does commit a wrongful act (or unjustly fails to perform a contract) but where the damage cannot be attributed to the acts of the wrongdoer due to certain conduct by the victim.[8]

The influence of the circumstances related to the victim could be of such magnitude that the causal link between the act of the wrongdoer and the damage is broken. An example of behaviour by the victim that is of such an influence that it obscures the act of the wrongdoer can be found in *Alpuro v. Dijkhuizen*.[9] A cattle breeder had made a serious mistake in the administration of inaccurately prescribed medication to his cattle. He gave such a dramatic overdose that the death of the cattle could not be attributed to the inaccurate behaviour of the veterinarian. In this example, the wrongdoer is not held liable, so that the damage is left where it fell. No liability is established, thus the question whether the behaviour of the victim could constitute contributory negligence giving rise to a diminution of the damages is then irrelevant.

Furthermore, it is possible that damage is the result of multiple causes, or two or more successive causes could have led to the same damage. If damage is a result of both an act of the tortfeasor and a third party, this generally amounts to *medeschuld* (joint liability), which means that both parties can be blamed and therefore both parties are liable for the whole amount of the damage, based on Article 6:102 of the Dutch Civil Code. The fact that someone else also caused the damage does not break the chain of causation for either of the inflictors of the damage. This is an exception to the rule that, in order to establish liability, the tortious act should be a *condicio sine qua non* for the occurrence of the damage. The victim should not be left empty-handed because both tortfeasors can excuse themselves by stating that the damage would have occurred anyway due to the behaviour of the other wrongdoer.

What is referred to as '*überholende Kausalität*' in Germany or 'additional causality' under common law can be referred to as 'hypothetical' or 'alternative causality' in Dutch legal doctrine. Hypothetical causality refers to the situation where a certain act has caused damage, but if the act had not taken place, the same damage would have occurred anyway due to a different, later event. In Dutch legal doctrine and case law, it is generally assumed that the hypothetical second cause of the damage does not break the causal chain between the first event and the

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[8] Another example of this can be found in the Hof Amsterdam 3 Jan. 1940, NJ 1940, 778 (*Dauma v. Müller*). The owners of an amount of wood had carelessly waited until the last minute before a public sale to claim the bulk as their property. The bailiff responsible for the auction could not be blamed for auctioning the wood.

[9] HR 25 Sep. 1992, NJ 1992, 751 (*Alpuro v. Dijkhuizen*). See also HR 2 Nov. 1979, NJ 1980, 77 (*Vader Versluis*) en HR 27 Apr. 1990, NJ 1990, 528 (*Gielen v. Grathem II*).

damage.[10] The fact that a later event could have caused the same damage, had the damage not already been caused by someone else, does not change anything concerning the liability for the damage based on the first event. This exception to the *condicio sine qua non* principle is justified because it prevents a victim of multiple tortfeasors from being left without compensation. This is the same for damage that sets in instantly and for damage suffered over a period of time.[11]

This type of *causa interveniens* for which a third party can be held liable must be distinguished from *causa interveniens* for which the victim bears the risk. The question then rises if the exception to the *condicio sine qua non* principle is acceptable when the second – hypothetical – cause of the damage is attributable to the victim himself. Three solutions can be distinguished. The first solution is to hold the original tortfeasor responsible for the whole amount of the damage, even after the second event. The idea behind this solution is that the later event did not cause the damage, because the damage had already been caused by an earlier event. The second solution is exactly the opposite to this idea, namely ending the liability based on the first event, because the same damage would have occurred anyway if the first event had not taken place. A third solution is to find a compromise between these two opposites, the liability of the tortfeasor that first caused the damage can be diminished by half, because the second event, which is attributable to the victim, was a cause of the damage to the same extent as the first event.

The highest court in the Netherlands, the *Hoge Raad* (the Supreme Court), adopted the second solution in its ruling *Staat v. Vermaat*.[12] The victim in this case had been severely injured in a car crash, rendering him unfit to work. Seven years after the accident, the victim suffered a heart attack. The person responsible for the car accident claimed that as of the moment of the heart attack, the victim would have been unfit to work, even without the car accident, ending his obligation to pay damages for the loss of income. The *Hoge Raad* decided that the obligation to pay damages does not extend to the damages that would have occurred in any event without the tortious act. In other words, as opposed to the situation where the *causa interveniens* was attributable to a third party, if it is attributable to the victim there is no reason to apply the exception to the *condicio sine qua non* principle.[13]

A rather different point of view can be found in a decision by the *Hoge Raad* on 9 January 2009 with regard to passive smoking.[14] The facts behind this case feature an asthmatic employee suffering from chronic bronchitis, who was exposed

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[10] ASSER/HARTKAMP 4-I (2004), nr. 440c; W.H. Van Boom, 'Meervoudige oorzaken, hoofdelijke aansprakelijkheid en toerekening', in *Causaliteit, inleidingen gehouden op het symposium van de Vereniging voor Letselschade Advocaten* (2003), 94 e.v.; Schadevergoeding (LINDENBERGH), Art. 6:98, aant. 20; HR 7 Dec. 2001, NJ 2002, 576; HR 19 Dec. 2003, NJ 2004, 348.

[11] HR 7 Dec. 2001, NJ 2002, 576.

[12] HR 2 Feb. 1990, NJ 1991, 292 (*Staat v. Vermaat*).

[13] C.J.H. Brunner in his annotation to the case HR 2 Feb. 1990, NJ 1991, 292 (*Staat v. Vermaat)*.

[14] HR 9 Jan. 2009, LJN BG4014.

to cigarette smoke at her workplace. After eight months, she experienced a serious tightness of the chest that required hospitalization and eventually she was declared unable to work. The employer was held liable for 50% of the damage. It was estimated that the chance that other circumstances could have led to the deterioration of her health was equal to the chance that it was due to the smoke at her workspace.

An interesting point to note with regard to this case is that experts stated that the deterioration of her health, which rendered her unfit for work, would also have occurred even if her workspace had been completely free from smoke; it would only have taken longer. Disregarding the cigarette smoke at the workplace, the employee's condition constitutes a normal consequence of her asthma and her chronic bronchitis. If it can be held that the employee, without any breach of the duty of care by the employer, would have been unfit to work as a result of a condition that should remain at her own risk, this is an argument not to attribute the loss of income from that moment onwards to the employer. However, another outcome was found; the damage was divided between the tortfeasor and the plaintiff.

Apparently, it was held that the case of the asthmatic employee lended itself for the proportionate approach that was first adopted in *Karamus v. Nefalit*.[15] In this case, a heavy smoker, who had been exposed to asbestos at his workplace, died of lung cancer. Both his heavy smoking and the harrowing exposure to asbestos could have led to his death; therefore, there is no certainty as to the *condicio sine qua non* relation between the employer's breach of the duty of care (who had exposed him to the asbestos) and the damage suffered. Liability was accepted for the whole damage, decreased by a proportionate amount, based on a reasoned estimate of the extent to which the circumstances attributable to the victim could have contributed to the damage. In the end, Nefalit was held liable for 55% of the damage suffered.

In the legal literature, the analogous application of Article 6:101 of the Dutch Civil Code (contributory negligence) to such cases has been defended.[16] Accepting a proportionate approach in the context of contributory negligence would mean a different course than the one set out in *Staat v. Vermaat*, but as illustrated by the *Karamus v. Nefalit* case and the case of the passive smoking by an asthmatic employee, the tendency to apply the proportional approach in liability issues seems apparently irreversible.

Again, these examples cannot help Mr Corr's employer as it cannot be said that the suicide would have occurred anyway, despite the employer's breach of his duty and the subsequent accident.

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[15] HR 31 Mar. 2006, JA 2006, 81 (*Karamus v. Nefalit*).

[16] A.J.O. Baron van Wassenaer van Catwijck, *Eigen schuld en medeschuld* (Zwolle: 1985), 50; A.J. Akkermans, 'Oorzakelijk verband', in *BW-krant Jaarboek* (1996), 39 e.v.; A.L.M. Keirse, 'Werkgevers proportioneel aansprakelijk voor meeroken op de werkvloer', Jurisprudentie Aansprakelijkheid (JA) (2007): 60.

7. Contributory Negligence by the Victim

Summarizing the debate so far, there is no indication that the behaviour of Mr Corr or the damage he suffered falls outside the scope of the duty of care owed by the employer based on Article 7:658 of the Dutch Civil Code. A far-reaching attribution of personal damage (both mental and physical) based on Article 6:98 of the Dutch Civil Code is possible because of the type of duty that was breached. Article 7:658 of the Civil Code explicitly aims to prevent this type of harm. Suicide is a known result of depression and, although rare, it can be attributed to the accident. It cannot be said that circumstances which are at his own risk influenced the occurrence of the depression. There had been no sign of depression or suicidal thoughts before the accident, but even if there were, the maxim 'the tortfeasor takes the victim as he finds him' ensures that damages outside the normal scope of expectation should be compensated.

The last issue which is open for discussion is the role of contributory negligence, an issue which was only briefly touched upon in this case. Lord Scott is of the opinion that a reduction of damages based on contributory negligence is possible (see paragraphs 31–32 of the opinions). The main argument for this is found in the reasoning that had Mr Corr's jump injured others (e.g., people in the area in which he was likely to land), this would be an attributable fault giving rise to the liability of Mr Corr towards those who were injured by his jump. If jumping while disregarding the safety of others constitutes a fault for tort purposes, the same jump can be considered to constitute contributory negligence with regard to his own injuries.

In Dutch law, if liability is established, the tortfeasor can raise contributory negligence by the victim as a defence, which, on the basis of Article 6:101 of the Dutch Civil Code, can lead to a reduction in the amount of damages that must be paid to the victim. One should bear in mind that for the application of Article 6:101 of the Dutch Civil Code a tortious act resulting in damage to the victim has taken place, for which the tortfeasor can be held liable. That means that there is a legal ground for liability, a sufficient causal link between the tortious act and the damage, the act can be attributed to the culprit and the damage falls within the scope of protection of the breached duty. As is illustrated above, in many cases the issue of contributory negligence based on Article 6:101 of the Civil Code will not arise because liability cannot be established.

Article 6:101 of the Dutch Civil Code deals with both the fault of the plaintiff in causing the damage and the fault of the plaintiff in failing to mitigate damages. There is no fundamental difference between these two; both depend upon taking proper care of one's own interest. One should avoid damage, and if the wrong is established the injured party must use reasonable diligence and ordinary care in attempting to minimize damages and avoid aggravating any injuries sustained. A plaintiff's failure to mitigate damages is sometimes thought of as a different affair from contributory negligence, but the better view is that the two are in essence the

same. An unreasonable failure to mitigate damages equals contributory negligence, the sole unique feature being that it does not relate to the whole of the plaintiff's loss, but only to a proportion thereof.

Contributory negligence as meant in Article 6:101 of the Dutch Civil Code means that the damage or part of the damage is also caused by circumstances that are attributable to the victim. The definition comprises an element of causality and an element of attribution. The primary question is that of causality. However, not all circumstances related to the victim with a causal link to the damage can be brought within the scope of Article 6:101 of the Civil Code. Decisive is the subsequent question, namely whether the circumstances that have contributed to the damage can be attributed to the victim. This second question does not concern the question whether the damage can be (partly) attributed to the victim as a result of his behaviour, but the issue is whether the circumstances that have contributed to the occurrence of the damage can be attributed to the victim.

If the situation was merely considered from a causal point of view, this would lead to a disproportionate outcome. The act of the tortfeasor has to comprise a wrongful element in order to be able to shift the damage suffered by the victim to the tortfeasor. Therefore, merely considering the question of causality from the point of view of circumstances concerning the victim cannot be enough to allow the damage, despite the wrongful act by the tortfeasor, in whole or in part, to lie with the victim. If one is to come to a division of the damage amongst both parties, there must be wrongful behaviour on both sides. Therefore, Article 6:101 of the Dutch Civil Code does not merely focus on a factual appreciation of the situation and of the circumstance that have contributed to the damage. There must also be grounds to attribute the circumstances to the victim, for example, because they were the result of negligent behaviour.

If the elements of causality and attribution are sufficiently demonstrated, this amounts to contributory negligence and the damages to be paid by the tortfeasor can therefore be reduced. The question then arises how the damage should be divided. Article 6:101 of the Dutch Civil Code contains a double apportionment criterion that offers sufficient scope to weigh the circumstances that pertain to a particular situation. The basic rule is a division in accordance with the extent to which each of the parties has contributed to the damage. Again, this comprises a question of causality. Both the contributory negligence and the fault of the tortfeasor are taken into account as the causes of the damage. The degree of the causality of the circumstances attributable to the victim must be measured against the degree of causality as a result of the acts of the tortfeasor. The damage will therefore be apportioned between both parties, in accordance with the degree in which they have contributed thereto.

However, in the interest of equity, any apportionment may also be governed by other factors. This equity correction contained in Article 6:101 of the Dutch Civil Code allows a different apportionment if the relative causal contributions

appear to offer an unsatisfactory result. The relative gravity of the fault is offered as the first criterion that can be used for that purpose, but the text also indicates other criteria, such as the degree of culpability, the nature of the tortfeasor's liability, and the type and gravity of the damage incurred. The age and the social, physical and psychological circumstances of both parties can be taken into account. So can economic conditions or the presence of insurance cover. The cost of mitigating the damage and the likelihood that this cost could have been recovered from the tortfeasor are also of importance. In short, the circumstances pertaining to an individual case, considered in relation to each other and in their overall context, determine the equity correction. This can result in any form of apportionment, ranging from a completely upheld to a completely extinguished duty to compensate.

In exceptional cases, this last step, the question whether a fair division is made, can lead to a division where 100% of the damages are to be paid by the tortfeasor, despite the victim's own contribution to the damage. Or vice versa, that 100% of the damage is to be borne by the victim. This is exceptional because in such a case it is more likely that liability will not be established at all and the question of contributory negligence is then never even raised.

If there is contributory negligence on the part of the victim, a 100% division is exceptional, but not impossible as was shown in the case where the police were held liable for damage as a result of unlawful acts during the capture of a drunk suspect who had herself contributed to her own damage. When closing the cell door, the suspect, who was clearly upset and resisting detention, inadvertently had her hand caught by the slamming door. In considering the seriousness of the mistakes made by the police, it was taken into account that the police officers who were trying to restrain the victim had breached a heightened duty of care concerning the suspect's safety. The reaction of the victim could be seen as a panic-stricken reaction or irrational recalcitrant behaviour for which the officers should have been prepared. The police were ordered to pay 100% of the damages, notwithstanding the contributory negligence by the victim, based on the consideration that this was a fair division of the damage.[17]

It should be noted that, according to Dutch law, the liability of an employer in the case of industrial accidents and employment related illnesses hold an altogether different contributory negligence regime. In Article 7:658 subsection 2 of the Dutch Civil Code, this exceptional regime digresses in more than one way from the general regulation concerning contributory negligence in Article 6:101 of the Code.[18] First of

[17] Hof Amsterdam 28 Nov. 1996, NJ 1999, 232 (*W v. Regiopolitie*). See also Hof Leeuwarden 10 Apr. 1996, *Verkeersrecht* 1997, 192 (*Transmarinde v. FBTO*), which concerned a traffic accident, where the damage, regardless of the contributory negligence, was to be paid in full by the tortfeasor.

[18] See Keirse, 2003, 57-60 with references.

all contributory negligence of the employee with regard to the employer's liability only applies if the negligence has evolved intentionally or by reckless behaviour. Unlike Article 6:101, Article 7:658 of the Dutch Civil Code sets aside less severe cases of contributory negligence. Secondly, in order to apply the atypical contributory negligence rule as meant in Article 7:658 subsection 2, the damage of the employee must be a distinct result from the employee's own actions. Aforementioned criterion is thus interpreted in jurisprudence that if reckless behaviour carried out by the employee is of such overt contribution to the accident the employer's negligence as a possible cause unswervingly pales into insignificance. In the third place, Article 7:658 holds the all-or-nothing principle. Unlike Article 6:101 of the Dutch Civil Code, Article 7:658 does not work from the premise that the damage is split between the tortfeasor and the plaintiff. If the employer is capable of proving intentional behaviour or lucid recklessness to be the cause of the damage, the obligation to compensate is obliterated in its entirety. However, if it is a question of contributory negligence without premeditation or lucid recklessness liability for the damage in its entirety pertains.

This atypical contributory negligence regime, however, does not always obstruct the application of Article 6:101 in cases in which the employer can be held liable on the grounds of Article 7:658. The ratio for Article 7:658 subsection 2 does not apply to contributory negligence to damage done away from the work floor. To hold the employer wholly responsible for the damage inflicted by the employee's negligence conduct in a personal sphere over which an employer has no say is utterly unreasonable. In such a case, Article 7:658 subsection 2 does not withhold apportioning the damage under Article 6:101. After all, Article 7:658 requires the employee to suffer the damage in the course of his or her work. Damage caused in a personal setting and therefore out of the employers influence is not covered by this provision. Therefore, Article 6:101 can be apt if the plaintiff's conduct in a personal sphere and unlinked to his or her employment is the additional source of the damage.

An example could be a work-related accident, which has occurred without the employee being its author, but subsequently this employee violates his or her duty to mitigate the loss by not seeking adequate medical treatment. Another example could be a situation in which the plaintiff actively has contributed to the onset of a disease which also has work-related origins, in sustaining an unhealthy way of living, that is, by smoking vehemently.

Taking the aforementioned cases into consideration, it can be concluded that the atypical contributory negligence regime of Article 7.658 subsection 2 is irrelevant to the case under consideration. In spite of the fact that a work-related accident has occurred, it is the general regulation as submitted in Article 6:101 which has to be enforced as Mr Corr's suicide has its roots in a personal rather than a work-related sphere.

8. Applying Article 6:101 of the Dutch Civil Code to *Corr*

From the above, it follows that four consecutive elements can be distinguished for the application of contributory negligence as meant in Article 6:101 of the Dutch Civil Code:

(1) The damage must partly be caused by circumstances concerning the victim;
(2) these circumstances must be attributable to the victim;
(3) it must be weighed to which degree these circumstances, in comparison to the circumstances attributable to the tortfeasor, have led to the occurrence of the damage; and
(4) finally, it must be determined how the damage should be divided, either by a causal division or by application of a correction according to what is considered fair and reasonable.

Applying these steps to the case of Mr Corr, in other words, fitting the tragic events leading to his death into this legal technical scheme, the first step is the question whether the damage had been partly caused by circumstances concerning the victim. The answer would be yes, because it was Mr Corr who had jumped off the roof. His deliberate jump, while he was aware of the consequences, contributed to the damage. The defence put forward on behalf of the employer resting on the argument that it constituted an unreasonable act, could therefore be raised based on Article 6:101 of the Dutch Civil Code. If the unreasonable conduct of the victim contributes to the damage, this is a breach of a duty for the victim to mitigate the damage.

An interesting point of view to explore in this respect is that in the case at hand, it can be argued that Mr Corr's jump did not increase the damage but in fact limited the damage or in any event shifted the damages. If he had not died, the employer would have been liable for his loss of income due to his inability to work as a result of his depression. Mr Corr's death ensured that Mr Corr himself no longer suffered damages. The damages shifted on to his dependents and they are possibly of a lesser amount than the amount that the employer would have paid, had Mr Corr not committed suicide.

Whichever aforementioned implies, merely looking at his jump from a factual point of view is too narrow; decisive is the second question: can the jump which contributed to the damage, be attributed to Mr Corr? It can be noted in this respect that in Dutch tort law, a mental disturbance does not preclude that a negligent act can be attributed. This means that a mentally disturbed person can be held liable for his or her actions that have caused damage to others. If negligent behaviour can lead to liability towards another person, the same behaviour can amount to contributory negligence if it contributes to the damage suffered by the victim himself.

Moreover, it is also possible that certain behaviour which does not give rise to liability towards others constitutes contributory negligence. For example, as follows

from Article 6:164 of the Dutch Civil Code, a child under 14 cannot be held liable if its behaviour causes damage to others. But if the child is the victim, Article 6:164 of the Civil Code does not preclude that its behaviour is attributed to the child as contributory negligence based on Article 6:101 of the Civil Code. This would entail that, in principle, a child that cannot be held responsible for its behaviour towards others has to face the consequences if the same behaviour causes damage to itself. However, in cases such as these, the equity correction will be applied. In various instances, the *Hoge Raad* has decided on the basis of the equity correction that damage to a child under the age of 14 shall in principle be borne in its entirety by the tortfeasor, even when the child has contributed to the damage itself.

The question that lies at the heart of the matter of attribution is the question whether Mr Corr could and should have acted differently. In the words of Lord Bingham (paragraph 16), it can be noted that:

> Mr Corr's suicide was not a voluntary, informed decision taken by him as an adult of sound mind making and giving effect to a personal decision about his future. It was the response of a man suffering from a severely depressive illness which impaired his capacity to make reasoned and informed judgments about his future, such illness being, as is accepted, a consequence of the employer's tort.

As a consequence, the question arises whether it can be said that Mr Corr could and should have acted differently. The answer is not immediately evident. After all, Mr Corr did make efforts to contribute to the process of his recovery. He submitted himself to treatment for his depression, even a very unpleasant electro-convulsive therapy, but unfortunately to no avail. Can it therefore be said that he used reasonable means to affect as speedy and complete a recovery as can reasonably be accomplished under all the relevant circumstances? The defendant has the burden of proving that the plaintiff failed to minimize damages.

Perhaps the situation of Mr Corr can be paralleled with the following case: the auto-mutilation of a girl is brought to court.[19] Prior to this, the girl had been a victim in a car accident. At first instance, the court ruled the girl to be culpable of contributory negligence. The Court of Appeal, however, after having consulted an expert, judged differently and concluded she was predisposed to auto-mutilation. It assessed the personality structure of the victim to be in such a condition that when she was involved in the accident, she was not to be held accountable for reacting to her damage with auto-mutilation. This reaction, the Court of Appeal argued, was the result of a latently present psychological disorder or an insufficient psychological development which manifested itself because of the accident.

[19] Hof's-Hertogenbosch 18 Jun. 1980, VR 1981, 72.

Hence, the Court of Appeal considered the auto-mutilation to be a corollary of the accident in such a way that without the accident the auto-mutilation would not have taken place and, moreover, stated that the aggravation of the damage, even though inflicted by the victim itself, was directly related to the accident. Therefore, other and disparate from the ruling of the court in first instance, the Court of Appeal decided the inflictor of the accident to be responsible for the total coverage of the medical expenses and treatment notwithstanding the fact that part of the damage was brought about by the victim. Following the line of the Court of Appeal, it can thus be stated that Mr Corr cannot be held responsible for his behaviour.

However, as was noted by the leading opinion by Lord Bingham, between one in six and one in ten sufferers from depression kill themselves. These numbers support the argument that the suicide was not too remote from the accident. But the numbers also support the argument that not all depressions lead to suicide. In mental illness, as opposed to physical injuries, the lethal consequences are a result of a decision, at some point, taken by the victim. Following this line of reasoning, the jump could be considered to constitute contributory negligence as meant in Article 6:101 of the Civil Code.

If, even if only for the sake of argument, it can be held that the suicide is attributable to Mr Corr, and thereby constituting contributory negligence, the third and fourth question deal with the issue of how the damage must be divided. The mental condition of the victim plays an important role in this last question. As was noted above, applying the equity correction could lead to a division where 100% is to be paid by the tortfeasor in exceptional cases. The seriousness of the fault and the degree of blame attributed the tortfeasor could be as such that, compared to the acts of the mentally disturbed victim, this should lead to the conclusion that the full amount of the damages should be paid by the tortfeasor. Even if Mr Corr's behaviour constitutes contributory negligence, the facts of the case give rise to an apportionment of the damage where the damage should be borne in its entirety by the employer.

9. Concluding Remarks

As follows from the previous section, Mr Corr's jump could be held to constitute contributory negligence, if it can be argued that his jump is attributable to him. It is attributable if there is, in some way or at some point, a moment where he has a choice to act differently. The result is that a case where negligent behaviour causes mental illness with fatal consequences is treated differently, legally speaking, compared to a case where physical injuries have been inflicted. Had Mr Corr been killed instantly by the accident, the question of contributory negligence would not have emerged at all, and neither if he had been exposed to a poisonous gas that caused him to die of cancer six years later.

Indeed, a mental illness with fatal consequences as a result of an accident is different compared to a physical illness with fatal consequences, such as cancer or a

simple fatal blow to the head. When considering mental illness, death need not be inevitable in all cases. If it is treated differently, legal technical analyses then lead to the (remarkable) conclusion that Mr Corr's family would have been better off, legally speaking, had the accident killed him instantly or caused cancer. The question is, if this is just towards dependents of the deceased who killed themselves as a result of a depression. Apparently in such cases, death was inevitable, because if the victims could have acted differently, would not they have done so?

The legal approach to the events can also lead to a further train of thoughts. What if the suicide had been unsuccessful? Would the additional damages, for example, because of a broken back caused by the jump, fall within the scope of the liability of the employer? What if, due to a mental state caused by his depression, he had inflicted harm on others or even killed others? Would the loss of maintenance of those others fall within the scope of the liability? At the end of the day, it all boils down to the question whether the solutions reached by the application of the legal system can be considered fair. In Dutch law, this element can be explicitly found in the last sentence of Article 6:101 of the Civil Code concerning contributory negligence: fairness determines the outcome.

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