

This article is published in a peer-reviewed section of the Utrecht Law Review

What Is It All About? An Overview of the Dutch Research and a Plea for Change

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1. Introduction

What the reader can expect in this article

This article is a translation and a slight elaboration of my inaugural speech.¹ Consequently this article takes on a much more narrative form than is usually the case in an academic publication. A central research question, a description of the methodology in finding the answers to this question and the outcome of the research: they are all missing.

What can the reader expect instead?

In this article I describe what has recently been published in Dutch research on the behaviour and actions of judges during civil oral hearings in Dutch courtrooms in relation to experienced procedural justice and with regard to reaching settlements. I will try to distil what we know and to provide an insight into what we do not know as yet.

Then I will pay attention to a new way of handling cases during oral hearings: the search for the underlying conflict. What is this exactly? Do we know, or can we predict what this way of handling oral hearings will do in terms of perceived procedural justice and in terms of settling the case?

I will conclude as a legal scientist that we do not know enough to be sure that this approach has a positive effect, although we do have clues pointing in that direction, and that more research is needed. I will advocate, based on my professional experience as a judge, that it is better to move forward and to begin to really train the judiciary in communication techniques and in the management of conflict resolution, because there is much to be gained in these fields and the goal of the judiciary should be to remain connected with what the parties need and want from a modern judge.

It is already clear that I am aiming this article at other researchers, especially when I provide a survey of what has already been done and what is still unclear and needs to be unveiled. But I am also aiming this article towards other judges, especially when I stress that their skills are probably not good enough to explore the approach to conflict solving to the fullest, while this approach could be advantageous in terms of procedural justice and in terms of settling the case.

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1 R.J. Verschoof, *Waar gaat het over?*, inaugural speech of 6 June 2013, on the occasion of the acceptance of the Chair on Administration of Justice at Utrecht University. The chair was instigated by the District Court of Midden-Nederland in Utrecht, with financial aid from the Council for the Judiciary (*Raad voor de rechtspraak*).

To compensate for the narrative approach I have used a significant number of footnotes, sometimes rather lengthy ones. I have tried to replicate the whole picture, so in order to keep up with it, the reader will probably not be in need of these notes.

Explanation of the title of this article

It was in the mid-1990s that I followed a course on presiding over an oral hearing in civil lawsuits.² I had just began my career as a (civil) judge. We practised a great deal during those two training days, playing different roles at would-be hearings. What I most remember after almost twenty years is the key question to the parties, which we had to repeat time and time again: ‘what is it *really* about?’

This question aimed to reach another level: the one of the underlying conflict.³

2. The oral hearing in Dutch civil law

What proceedings am I writing about?

For the reader who is not conversant with the judicial organization in the Netherlands I will provide a very brief overview. For civil cases there are no special courts. Each case must be submitted at one of the eleven district courts. There are four courts of appeal and one Supreme Court. Private law is divided within the courts into family law and other aspects of private law. The oral hearings that I am describing have their place in non-family law cases⁴ and I focus on the district courts.

The majority of civil cases commence with a subpoena, in which the view of the plaintiff is laid down. I will concentrate on this majority.⁵

Changes to the Civil Procedural Code (CPC) in the Netherlands: goals and effects

The practice of an oral hearing in civil cases has changed since 2002. The oral hearing had and has two goals: gaining information about the case and trying to reach a settlement.⁶ The day-to-day practice changed with an amendment to the law (Civil Procedural Law Revision Act (*Herzieningswet procesrecht burgerlijke zaken*)) in 2002. Remarkably, the two articles on the goals of the oral hearing did not change. Other rules, new rules, were adopted and they made reform possible.

The first rule is that in principle an oral hearing takes place after one round of written statements (the plaintiff’s subpoena and the response by the defendant).⁷ The judge can decide to hold a second round of written statements, instead of an oral hearing. Over the years following the change in the law less and less cases were excluded from the standard method of dealing with a civil lawsuit. Nowadays in all district courts about 90% of all cases in which the defendant actually appears are conducted in conformity with this standard method.

Secondly, a new rule was introduced to the effect that after an oral hearing there is no opportunity for a second round of written statements nor for a session for an oral plea by the lawyers, unless the judge determines otherwise.⁸

2 The course, now obligatory, still exists and has taken its place in the line of courses designed for trainee judges in the Netherlands.

3 There are many definitions of ‘conflict’. I have chosen for a combination of the definitions by Prein and by Giebels & Euwema. When two or more parties feel dependable on each other, there is a conflict if these parties have aims, aspirations, interests or values that cannot be unified. See H.C.M. Prein, ‘Conflicten’, in A.F.M. Brenninkmeijer et al., *Handboek Mediation*, 2013, p. 69 and see also E. Giebels & M. Euwema, ‘Conflict, belangen, (de-)escalatie en partijen in de rechtzaal: een psychologisch perspectief’, in M. Pel & J.H. Emaus (eds.), *Het belang van belangen*, 2007, p. 22. A shorter definition is the following: there is a conflict when someone feels obstructed or frustrated by another, see M. Pel, ‘Belangen in de strijd en in de tijd, belangenhantering in de dagelijkse praktijk’, in M. Pel & J.H. Emaus (eds.), *Het belang van belangen*, 2007, p. 96. In her definition of ‘conflict’ personal and/or affectional aspects play a role, besides aspects of content and cognition.

4 Therefore my article is not necessarily applicable to other judicial cases, but – leaving criminal law aside – much of it is.

5 A minority commence with a written request. The law prescribes the way in which a court procedure is introduced.

6 Both goals are laid down in the CPC (*Wetboek van Burgelijke Rechtsvordering*) in Arts. 87 and 88. Although it is theoretically possible to order a hearing for the purpose of only gaining information or only to try and reach a settlement, since time immemorial the two have been combined.

7 See Art. 131 CPC.

8 See Arts. 132 and 134 CPC. Before 2002 the law stated that a second written round was the norm and a request by one of the parties for an oral session to enter a plea by the lawyers was always granted.

Thirdly, rules were incorporated to ensure that the (only) written round was well used. That is, both parties are obliged to give complete and detailed information about the facts of the case and to do so truthfully, and furthermore to provide all their legal arguments and grounds in their first and only written case file.⁹ In order to be as complete as possible the plaintiff in his subpoena has to counter or contradict all the arguments put forward by the defendant in as far as the defendant has already adduced these arguments in an earlier, pre-trial stage of the dispute. Finally, there is an obligation for each party to hand over all written exhibits with his case file and to mention all the witnesses that this party may call, if necessary.¹⁰

All these rules have led to a substantiated first written round and an oral hearing that in most cases completes the factual information and legal argumentation provided by the parties and their lawyers.

The primary goal of this amendment to the law in 2002 was to shorten the civil procedure in the district courts.¹¹ This objective was attained. In general civil proceedings were shortened by around 40%.¹²

Although not actually intended by the legislator, the change in the law had a second effect: direct contact between the judge and the parties.¹³ This contact appeared to be so important that there is a wide belief both within and outside the judiciary that a party must have his day in court.¹⁴ This adage, by the way, is not embraced in every Western European country on the continent. Our neighbours in Belgium, for instance, have no oral hearing as a norm in their civil court proceedings. There are court sessions in which the lawyers enter their plea and make their statements, but the parties themselves are most often absent and, if present, are not allowed to speak and are not asked any questions.¹⁵

9 See Arts. 21 and 111(3) CPC. Before 2002 there were two written rounds and therefore two written case files for each party. It was allowed to withhold information and legal arguments in the first round. An oral hearing – already possible in those days – after this first round was often a leap in the dark for the judge. He did not really know what the dispute in the case exactly entailed, he did not know all the facts, he did not know all the arguments, and he had no knowledge of all the written exhibits. I have to point out that the system for dealing with civil cases in the Netherlands at that time was and still is continental European: not everything has to take place at the hearing, and not everything has to be oral in order to be part of the file. Instead a large part of the file is built up before the oral session and every part can be taken into consideration in order to reach a decision. In this context it is understandable that there is only one court session (the oral hearing) and that these sessions are seldom adjourned and recommenced on another day, and are mostly completed in one to three hours. Very rarely is more time needed.

10 See for all this once again Art. 111(3) CPC.

11 The changes to the law were preceded by experiences in practice from 1996 onwards with the ‘*versneld regime*’ (speeded-up regime), based on the ‘*Handleiding versneld regime*’ (‘Guidance for the speeded-up regime’), written by the Punt Committee, named after its chairman Punt, in those days a Dutch judge. The report by this committee, entitled ‘More efficiency in civil procedures’ was presented to the Minister of Justice of the Netherlands on 5 July 1995 and published in a special issue of 1995 *Trema*, no. 7a (the journal for the Dutch judiciary) and in an appendix of 1995 *Advocatenblad*, no. 6 (the journal for Dutch lawyers). This assignment to the committee was given by the Netherlands Bar Association (*Nederlandse Orde van Advocaten*) and the The Dutch Association for the Judiciary (*Nederlandse Vereniging voor Rechtspraak*, NVvR) and contained the designing of proposals to streamline civil procedure and make it more efficient.

12 See R.J.J. Eshuis, *Het recht in betere tijden, Over de werking van interventies ter versnelling van civiele procedures*, 2007, pp. 157-177. Schedule 7 on p. 161 shows that 17 of the 19 district courts (there were then still 19 of them in the Netherlands) had a faster average time, a faster middle time and a faster 90-percent time in which civil cases were rounded up in 2003 compared with 1996-1996. This only concerns cases in which the defendant appeared. Cases in which the defendant was absent were not included. In Utrecht, my court, for instance, the average time decreased from 753 days to 520 days and the middle time from 588 to 329 days. The figures in 2005 were again better than in 2003, see A.H. van Delden, ‘Wat is de rechter waard?, Rechtspraaklezing 2006’ available at: <<http://www.rechtspraak.nl/Organisatie/Raad-Voor-De-Rechtspraak/publicaties/Pages/Rechtspraaklezingen.aspx#TOCHeadingRichHtmlField19>>, (last visited 9 October 2014), p. 10.

13 In former times there was less contact. Although figures are no longer available, an appropriate view can be gained by the fact that in the early 1990s in the district court in Utrecht oral hearings after the first written round in a civil procedure were only presided over by judges with at least 4 years’ experience. See H.F.M. Hofhuis, ‘De zittingsrechter in civiele zaken’, 2012 *Trema*, no. 6, p. 184. That indicates a rather small amount of these hearings. From my own experience, starting in 1994 as a judge in this court, I can add that the number of these hearings per judge was no more than two a month. Nowadays two or more is the figure per week.

14 R.C. Hartendorp, *Praktisch gesproken, Alledaagse civiele rechtspleging als praktische oordeelsvorming*, dissertation Erasmus University Rotterdam, 2008, p. 43 states that the mentioned change to the law has caused a changed – and I add: still changing – view among judges as to what their attitude in a case should be: responsive interaction with the parties, with a great deal of attention being given to the right way to engage, has gained increasing focus since 2002. Before 2002 the civil judge was used to working most of the time behind his desk in his office and not in the courtroom, see also T.R. Hidma, ‘Over geduld, creativiteit, lef en incasseringvermogen’, in J.G. Brouwer, *Wat maakt een goed jurist*, 2005.

15 An actual oral hearing is only held if both parties request it, which is rarely the case. The terms court settlement and settlement session do not belong to Belgian judicial jargon. And no wonder, a settlement will seldom be reached if the parties are absent.

3. The relevance of the oral hearing in terms of procedural justice

The day in court and procedural justice

Why is this day in court so important? It is because of the relation with procedural justice.¹⁶ Let us return to our day in court. Research in the Netherlands has shown a convincing positive relationship between the use of an oral hearing in civil court proceedings and the level of experienced procedural justice.¹⁷ Eshuis organised a written survey and interviewed parties in civil proceedings, both winners and losers, three years after the verdict. One of the distinctions he made was between proceedings with and those without an oral hearing. He concluded that an oral hearing positively influenced all of the researched elements of procedural justice, i.e. informational justice, relational justice and having a voice. This was the experience of both winners and losers in civil court proceedings.

What we do not really know

There is firm proof¹⁸ that procedural justice makes a difference. And yet, much is still to be researched and needs to be clarified.

Is there, for instance, a difference between the effect of procedural justice on the appreciation of the individual case and the appreciation of the judiciary in general? Can the element of respect be more important for the parties involved and the element of consistency for the general trust of the public in the judiciary? Respect is experienced in the actual meeting with the judge and no one among the public at large can exclude the possibility of being involved in a case in the future and a predictable way of handling that hypothetical case is important to everyone.¹⁹

There are also different views about the importance of procedural justice for compliance with final decisions in civil cases. There are authors who believe that there is no effect: if the defendant who has lost the case cannot pay, then he will not pay. If he can pay, he will end up paying, either voluntarily or not. Procedural justice does not come into play. But the opposite is contended as well.²⁰

16 I refer to the articles on procedural justice in general elsewhere in this special issue of the *Utrecht Law Review* (2014 *Utrecht Law Review* 10, no. 4) for more information on and an explanation of the concept of procedural justice and its subcategories like voice, due consideration and respect.

17 R.J.J. Eshuis, 'De daad bij het woord. Het naleven van rechterlijke uitspraken en schikkingsafspraken', 2009 *Research Memoranda* 5, no. 1, <<http://www.rechtspraak.nl/Organisatie/Publicaties-En-Brochures/Researchmemoranda/Pages/Research-Memoranda-2009.aspx>>, (last visited 9 October 2014), pp. 83-95. This research can no longer be replicated in civil cases in the Netherlands, because there are not enough comparable civil proceedings both with and without an oral hearing.

18 The words 'stevig bewijs' ('firm evidence') are used by A.F.M. Brenninkmeijer et al., 'Het grote belang van procedurele rechtvaardigheid in Nederland en daarbuiten', 2012 *Rechtsgeleerd Magazijn Themis*, no. 4, pp. 178-181, see p.180 with further literature and see also B.C.J. van Velthoven, 'Over het relatieve belang van een eerlijke procedure: procedurele en distributieve rechtvaardigheid in Nederland', 2011 *Rechtsgeleerd Magazijn Themis*, no. 1, pp. 7-16, who writes on p. 9, with further literature references, that the great deal of research in this field does not leave room for doubt about the answer on the question of 'Does a fair process matter?'. Also earlier J.M. Barendrecht & A. Klijn (eds.), *Balanceren en vernieuwen. Een kaart van sociaal-wetenschappelijke kennis voor de Fundamentele Herbezinning Procesrecht*, 2004, pp. 14-15 and M.T.A.B. Laemers et al., *Awb-procedures vanuit het gezichtspunt van de burger, stand van zaken in theorie en eerder onderzoek*, 2007 and K. van den Bos, 'What is responsible for the fair process effect?', in J. Gerald & J.A. Colquitt (eds.), *Handbook of Organizational Justice: Fundamental questions about fairness in the workplace*, 2005, pp. 273-300.

19 Some of the writers in the note above have different opinions about how procedural justice works and what it affects. Van Velthoven (p. 14) concludes, after having given, among other things, an overview of several researchers, that procedural justice first and foremost has an influence on the general opinion on the judicial system and further on the acceptance of authority, while Brenninkmeijer et al., referring to other literature, conclude that procedural justice is (also?) specifically relevant for the acceptance of the outcome of an individual case. See also the postsript by B.C.J. van Velthoven, 'Empirische kennis over de effecten van procedurele rechtvaardigheid geeft vooralsnog weinig houvast voor justitiële beleidsvorming', 2012 *Rechtsgeleerd Magazijn Themis*, no. 4, pp. 182-184. See further, for instance, M. de Hoon & S. Verberk, *Zutphen.COM, Een onderzoek naar de pilot 'Conflictoplossing Op Maat' bij de sector civiel van de rechtbank Zutphen*, 2009, p. 21, with still further literature references.

20 See Eshuis, supra note 17, p. 95: 'Het blijkt dat de sterke bijdrage die *cna* [de comparitie na antwoord, RV] levert aan de procedurale justice niet resulteert in een hoge mate van naleving.' ('It appears that the strong contribution of the oral hearing to procedural justice does not result in a high level of compliance.') The same line of reasoning can be found in T.R. Tyler & Y.J. Huo, *Trust in the law. Encouraging public cooperation with the police and the courts*, 2002, p. 44. In contrast see A.Z. Huq et al., 'Why does the public cooperate with the law enforcement? The influences of the purposes and targets of policing', Public Law and Legal Theory Working Paper, no. 339, The Law School of the University of Chicago, 2011: 'Procedural justice mechanisms provide a robust and broadly applicable framework for predicting public cooperation with law enforcement. (...) Neutrality, trust and respect should play central roles in the policing function regardless of whether the police are dealing with everyday crime or with terrorism.' Likewise Brenninkmeijer et al., supra note 18, pp. 178-181, who at p. 180 point to older field research outside of the Netherlands (see their notes 18 and 19) resulting in the conclusions 'dat mensen meer geneigd zijn om vrijwillig beslissingen te accepteren en te gehoorzamen wanneer zij het gevoel hebben dat de procedure eerlijk is verlopen'. ('that people are more inclined to willingly accept decisions and to comply with them when they have the feeling that the

Furthermore, I am not aware of any research in the Netherlands focusing on the question of which of the elements of procedural justice are the most relevant in day to day practice in the courtrooms²¹ or in what setting the procedure weighs heavier than the outcome.²²

For the Dutch judiciary it is nevertheless clear that the outcome is more important than the procedure leading to that outcome. The last national research on ‘customer satisfaction’ showed that 81% of the ‘customers’ of the judiciary were (very) satisfied. This result changed to 89% when it was limited to ‘customers’ who received or expected to receive a favourable outcome and decreased to 55% in the opposite case.²³

So why focus on procedural justice? Because it is also clear that experienced procedural justice has an effect on experienced distributive justice. Parties, particularly losing parties, experience a higher level of distributive justice if the level of experienced procedural justice was higher. The winner’s level of experienced distributive justice is nonetheless always higher than that of the loser of the case, regardless of the level of experienced procedural justice, so that the outcome is more important than the procedure if one compares the appreciation of the winners with that of the losers.²⁴

But leaving all these uncertainties and restrictions aside, the objective conclusion is that procedural justice is more than relevant for focusing upon, as long as one does not forget the importance of experienced distributive justice.

4. Actions and behaviour of the judge at the oral hearing

The effect in terms of procedural justice

When we know that an oral hearing is relevant for perceived procedural justice, the question comes to mind of what, exactly, would be the right way for a judge to preside over this hearing. What behaviour influences the experienced procedural justice in a negative or positive way?

From the field research by Van der Linden on 150 hearings we know that a wide variety of elements play a role.²⁵ Factors which were included in that field research are related to the person of the judge

procedure was fair’). See also T.R. Tyler, *Why People Obey the Law*, 2006 and C.A. McEwan & R.J. Maiman, ‘Mediation in Small Court: Achieving Compliance through Consent’, 1984 *Law and Society Review* 18, part 1, pp. 11-49. See the same conclusion in the articles mentioned in note 18, supra.

21 In a speech in The Hague on 18 January 2012 Lind referred to the most important elements of procedural justice: voice, respect and explanation. Tyler, in a speech in Leiden on 7 March 2012 summed up the following as the most important elements of procedural justice: voice, neutrality, respect and consistency. The element ‘neutrality’ comprises, according to Tyler, openness and accountability, which seems to me to be a somewhat different approach to the element. See also T.R. Tyler, ‘Procedural Justice and the Courts’, 2007 *Court Review: The journal of the American Judges Association* 44, no. 1/2, pp. 26-31, who mentions on p. 31 ‘trust’ – as well as voice, neutrality and respect – within a broad array of elements of procedural justice like ‘caring’, due consideration, sincerity and impartiality. Elsewhere in this special issue of the *Utrecht Law Review* Grootelaar, Waterbolk and Winkels state in their student paper (the outcome of a small-scale research project which I was happy to lead) that the impartiality of the judge seems to be understood by the parties (H. Grootelaar et al., ‘The Relationship between Role Conception, Judicial Behaviour and Perceived Procedural Justice: Some Exploratory Remarks in the Context of Dutch Post-Defence Hearings’, 2014 *Utrecht Law Review* 10, no. 4, pp. 147-161). In a broader qualitative field research that I am carrying out this year as well as next year this conclusion is confirmed (at this point in time during the research). The question concerning impartiality gives rise to a slight degree of astonishment: ‘but of course the judge was impartial, he is the judge, isn’t he?’

22 There is foreign research on this subject. K. Murphy, ‘Public Satisfaction With Police: The Importance of Procedural Justice and Police Performance in Police-Citizen Encounters’, 2009 *Australian & New Zealand Journal of Criminology* 42, no. 2, pp. 159-178, proves that for an assessment of satisfaction the police performance (the outcome) is the most important when the citizen had approached the police, while procedural justice was the most important when the police had approached the citizen.

23 Regioplan Beleidsonderzoek & Synovate, ‘Klantwaardering rechtspraak 2011, Onderzoek onder professionals en justitiabelen bij gerechten’, Amsterdam, 19 September 2011, available at <<http://www.rechtspraak.nl/Organisatie/Publicaties-En-Brochures/Pages/Kwaliteit-van-de-Rechtspraak.aspx>> (last visited 9 October 2014), pp. 20 and 21. Note that perceived procedural justice and being satisfied about the procedure are not quite the same.

24 Both parties evaluate the outcome more positively if they have experienced procedural justice, but the evaluation of the losers increases more than that of the winners. The effects are thus asymmetric. This should lead to a stronger increase in the 55% of satisfied losers than the 89% of satisfied winners when the perceived procedural justice increases. The difference between the winners and losers will nevertheless be substantial.

25 This was a field research (mostly quantitative) held in 2006/2007 at two district courts, comprising 75 oral hearings in civil cases at each court. Much of what actually took place was registered. On this research three publications appeared: J. van der Linden, ‘Zitten, luisteren en schikken, Rechtvaardigheid en doelbereik bij de comparitie na antwoord’, 2008 *Research Memoranda* 4, no. 5, J. van der Linden et al., *Meesterlijk gedrag: leren van compareren*, 2009 and J. van der Linden, *De civiele zitting centraal: informeren, afstemmen en schikken*, dissertation Tilburg University, 2010.

in terms of his or her view on how to carry out his or her profession,²⁶ his or her years of experience, self-estimated negotiation skills,²⁷ professional knowledge,²⁸ but also – of course – his or her behaviour and actions at the oral hearing.²⁹ And then it gets even more complicated, because other factors are of influence too, especially the features of the case, the behaviour of the parties and their lawyers included, and the context ('culture') of the specific court.

Van der Linden, Van Tulder and Klijn have analysed all this material.³⁰ Their conclusion is the following: factors that influence perceived procedural justice in a positive way especially correlate with the behaviour of the judge. They mention: the judge introducing himself/herself and the court clerk by name,³¹ the explanation at the beginning of the hearing of what will occur,³² providing a summary of the case,³³ and not interrupting the parties.³⁴ On the basis of other Dutch research I would like to add to his list the summarizing (concerning content or intention) of what the parties are saying,³⁵ thus the judge showing that he or she has listened to and understood what was said. Furthermore, the authors mention as a relevant factor the competence of the judge and his expertise as perceived by the lawyers. Here there seems to be an effect of authority that led to the outcome that lawyers are more positive in terms of procedural justice than the parties themselves.³⁶

Very remarkable is the fact that other factors were of no influence or only had a minor influence on the perceived procedural justice, according to this analysis. This specifically holds true for the features of the specific case, such as: how far apart the opinions of the parties were in terms of money, how

26 In the research by Van der Linden the view on how to perform as a judge was mentioned as a factor, but which views she had actually found, the research does not reveal, nor is it clear in what way she detected these views. I suspect that she had done this by lining up and categorising the answers which the judges gave to the following written question before the oral hearing: 'What do you hope to achieve with this hearing? So: what are your personal aims at this hearing?' A maximum of three goals could be given as an answer. See Van der Linden 2010, supra note 25, p. 267. The number of judges who were involved in this field research cannot be found in the three publications thereon. It is to be nonetheless noted that at the time of the research 44 judges were working at the civil divisions of the two courts involved, see p. 8 note 5 of the dissertation.

27 These negotiation skills were not observed at the oral hearing, certainly not with an eye on the research. Therefore no objective criteria were formulated to measure negotiation skills. We only have the estimate as reported by the judges themselves, based on the question 'How do you estimate your negotiation skills in general?' which could be answered on a 7-point scale.

28 This is about the professional knowledge of the judge as perceived by the lawyers.

29 The style of the judges was not identified in the research. But this was done in another research, see Grootelaar et al., supra note 21. Earlier the individual approach of judges was researched in a 'laboratory setting'. See S. Praagman, 'Comparatierechters in eenzelfde zaak vergeleken: de individuele aanpak van rechters', 2011 *Recht der Werkelijkheid* 32, no. 2, pp. 6-28. She compares three style aspects: Factual or business-like versus personal, advising versus telling, social-emotional versus judicial. Well known in the Netherlands is furthermore J.F. Bruinsma, *Korte gedingen, Een rechtssociologisch verslag*, 1995, in which the author classified three styles (typologies): the sphinx, the active judge and the wise philosopher (kadi). This typology is to the point and is still valid.

30 See Van der Linden et al., supra note 25. On p. 15 of the report one can find the analysed relations in one figure. The authors could only partly explain the influence of 'context' – that is the separate context of the two courts involved in this research – although this influence was unmistakably detected, see for instance pp. 25, 28 and 38. The authors assumed organizational, social and cultural differences between the two courts. In an appendix to the report the application of the statistical method used is demonstrated (available at: <<http://www.rechtspraak.nl/Organisatie/Publicaties-En-Brochures/rechtstreeks/Documents/Rechtstreeks%202009-3%20bijlage.pdf>>, last visited 9 October 2014).

31 This correlates with 'respect' as an element of procedural (interpersonal) justice.

32 This correlates with 'explanation' as an element of procedural (informational) justice.

33 Here several correlations can be made with elements of procedural (informational) justice, i.e. 'accuracy', 'openness', 'fairness' and 'accountability'. An accountable judge asks, after summarizing the case, if he or she has said something wrong.

34 Here is a clear correlation with the element 'respect' of procedural (interpersonal) justice, but also with 'accuracy' and in this way the parties perceive the judge as unbiased. Interrupting can indeed be perceived as a sign that the judge thinks that he is informed too soon (i.e. he is 'inaccurate') or has formed his opinion too soon (i.e. he is 'biased').

35 This correlates with 'accuracy' and 'voice' as elements of procedural justice. The statistical analysis in the report by Van der Linden et al., supra note 25 does not separate the summarizing of content and the summarizing of intention, i.e. the judge expresses the underlying meaning of what was just said by one of the parties. The source material does separate these two ways of summarizing, see Van der Linden 2010, supra note 25, pp. 53 and 54. There one can read that the summarizing of content takes place 11 times on average per court session and the summarizing of intention only once. It is remarkable that the statistical analysis show that interrupting has a negative influence on perceived procedural justice, whereas the opposite – giving the parties an opportunity to speak out and summarizing what they have just said – has no measurable positive influence. In an ongoing qualitative field research of my own this is very clearly contradicted concerning speaking out by the parties. 'Voice' appears to be the most relevant element of procedural justice, although I am convinced that no element can be really missed, as is stated by Van den Bos, supra note 18, pp. 273-300. There are other Dutch publications stating that the parties appreciate that the judge summarizes the situation. See P. Ippel & S. Heeger-Hertter, *Sprekend de rechtbank, Alledaagse communicatie in de Utrechtse zittingszaal*, 2007, p. 100. But this is slightly different than summarizing what was said by the parties. Summarizing the situation comprises almost per definition an interpretation and appreciation of what was said by both parties. See Grootelaar et al., supra note 21, showing that summarizing what was said leads to a high level of perceived procedural justice.

36 Van der Linden et al, supra note 25, p. 38.

cooperative the parties and their lawyers behaved, the personal relationship between the parties and the balance of power between them. All these and other elements combined to form a rich pallet of the specific features of the case at hand. But these features did not influence – at least not in a statistically significant way – the procedural justice as perceived by the parties. Only the behaviour and the actions of the judge did this. The recipe is simple: judges behaving in the way described will result in high levels of perceived procedural justice – everybody is therefore happy!³⁷

Effect in terms of reaching a settlement

Unfortunately reality is not that simple. It is not only about procedural justice. Oral hearings are also about trying to reach a settlement. And it shows that – if a settlement will actually be reached – other things are important than only the behaviour and actions of the judge.

Important in this respect is in particular the cooperative attitude of the parties and, even more so, of their lawyers. And, furthermore, it is relevant when the parties take the initiative to ask the judge to provide an informal view of the case (as a kind of provisional opinion). It seems that in doing so that they are demonstrating their willingness to set the negotiations in motion.

Is the behaviour of the judge of no importance then, in terms of reaching a settlement? On the contrary, it certainly is! Indeed, the judge's presumption that a settlement is within reach or should be reached is important. The judge then invests more time and effort in order to have the parties settle the case.³⁸

Recapitulating the statements of the parties³⁹ also works, as well as giving an opinion about the amount of money that should be involved in a settlement.⁴⁰ The judge's (provisional) opinions about matters other than the amount of money involved do not influence (in a statistically significant way) the chances of reaching a settlement.⁴¹ This is confirmed by the statistical analysis of Van der Linden, Van Tulder and Klijn.

So an oral hearing can be very sound in terms of procedural justice without any extra possibility of reaching a settlement, or vice versa: a settlement is reached in a way which the parties perceive as being very unjust. What works rather well for both is summarizing and having a voice.

But a cooperative attitude by the parties also has an influence. So how should a judge act in order to attain this attitude? The research material of Van der Linden is from 2006-2007.⁴² And this is relevant, because since then the focus on conflict solving versus dispute resolution has grown.

5. An extra line of action which a judge could explore: conflict solving

Conflict solving: the new goal to strive for

Giving attention to the conflict means that the judge not only informs himself about the facts which he needs in order to evaluate the legal dispute, but also looks for a deeper layer. Is there an underlying conflict and what are the interests, needs and wishes of the parties in relation thereto? And, if so, what

37 There is other research indicating that a person who receives information ('the citizen') is indeed of influence. Perceived procedural justice has a positive influence on the trust of the 'citizen' who is not already certain whether he can confide in the authorities. See thereon K. van den Bos, 'Procedurele rechtvaardigheid; beleving en implicaties', in *Werken aan behoorlijkheid. De nationale ombudsman in zijn context*, 2007; K. van den Bos, 'Rechtvaardigheid en onzekerheid', in W.L. Tielmeijer et al. (eds.), *De menselijke beslisser*, 2009, pp. 89-114 and K. van den Bos & A.F.M. Brenninkmeijer, 'Vertrouwen in wetgeving, de overheid en de rechtspraak. De mens als informatieverwerkend individu', 2012 *Nederlands Juristenblad*, no. 21, pp. 1451-1457.

38 This factor has only been registered before the hearing. There was a relation between the judge's estimation of the willingness of the parties to reach a settlement and the time and effort he or she invested to actually reach this settlement during the court session. The relation between the efforts of the judge and the willingness actually shown by the parties to reach a settlement was not measured. There is, however, a strong implication that such a relation exists, because judges subsequently report that a general cooperative attitude by the parties and their lawyers during the court session resulted in them putting more effort into reaching a settlement. See Van der Linden 2015, supra note 25, pp. 62-69, especially table 34.

39 It seems that even summarizing only on content is relevant, see further note 35, supra.

40 This can be a specific amount or a range of amounts the parties can find each other at.

41 Van der Linden et al., supra note 25, p. 25. This is also, in my opinion, a remarkable conclusion, because my evidence-based professional experience as a judge tends to persuade me that giving a (provisional) opinion about the judicial positions of the parties should indeed have a major effect on reaching a settlement. The first results of my still ongoing qualitative field research also point in that direction.

42 Van der Linden 2010, supra note 25, p. 8.

would be the proper outcome?⁴³ Thus, a conflict is broader than a legal dispute. When two or more parties feel dependable on each other, there is a conflict if these parties have aims, aspirations, interests or values that cannot be unified.⁴⁴ A legal dispute also fits this definition of a conflict, but I will use the term 'dispute' only for the battle in court based upon the claim made by the plaintiff. A 'dispute' is then a judicial conflict.

As the outcome of a dispute, in day-to-day court practice we really only have three options: a verdict, a settlement or a referral to mediation.⁴⁵ The outcome that the parties seek must be one of these three options, or a combination thereof. Solving an underlying conflict does not mean that there are further options available, but that there is a greater possibility that the parties will reach an optimal solution.

Let us give an example to point out the difference between a dispute and a conflict in the same case.

In a case between a taxi association and its former chairman of the board the dispute was about a claim by the former chairman for around € 30,000. He stated that he was entitled to this sum because he had incurred expenses and had worked for many billable hours for the association. During the court session it became clear that the chairman had devoted his best efforts to the association during the previous few years. That did not play a role in the claim or the dispute, however. The new chairman and his board – all four of whom were present at the court session – had recently set out a new direction for and within the taxi association. But the former chairman, a dominant personality, was not willing to give in without a fight. This also did not play a role in the dispute. The former chairman mobilised the members of the association, the taxi drivers, and two camps therefore emerged. Ultimately the former chairman lost the battle and he was forced to leave a now divided association. This also did not play any role in the dispute.

The dispute was indeed merely about money and came down to details about the activities undertaken, the necessity of those activities, the reasonable amount of time needed for the necessary activities and evidence as to the expenses incurred.

The underlying conflict, on the other hand, together with the related interests, needs and wishes, was about something entirely different. The former chairman had an interest in seeing a sign of recognition, which would serve his need to leave the association with his head held high (a rebuilt positive image). The board had an interest in demonstrating leadership by handling the dispute in a reasonable way, which would serve its need to end the existence of the two camps in its divided association (a rebuilt unity). The dispute was settled by means of addressing the needs in the conflict. One wish served both parties' needs remarkably well: paying an amount of money, any amount. After this conclusion was reached the discussion over the hours expended and the receipts for expenses stopped immediately. The parties were able to agree on a figure of about 10% of the original claim.

In this example the case about the conflict is different from the case about the dispute. It would be a misunderstanding, however, to define every underlying conflict as a case in itself. As soon as there are interests that cannot immediately be united and these interests are not part of the dispute that the judge has to decide upon, there is already an underlying conflict. And these interests, and the needs and wishes related thereto, do not necessarily form a case as such. Examples are the need for recognition, the desire to be seen as trusted, the need for an apology, and the parties' wish to go their separate ways in an amicable manner. These needs and wishes are regularly the issue that the case in the courtroom is *really* about in the eyes of the parties.

The core of the matter is that the judge seeks ways to allow the parties to exchange their views – views that are generally seen as not negotiable – and leads them to the underlying interests, needs and

43 Already in 2000 see J.M. Barendrecht & E.J.M. van Beukering-Rosmuller, *Recht rond onderhandeling; naar verbintenissenrecht, procesrecht en rechtspraktijk die sporen met moderne geschiloplossingsmethoden*, 2000. See for the difference between a dispute and a conflict among others M. Pel, 'Belangen in de strijd en in de tijd: belangenhantering in de dagelijkse praktijk', pp. 96-98 and H. Steenberghe, 'Over de belangstellende rechter', pp. 80-81, both in H. Pel & J.H. Emaus (eds.), *Het belang van belangen*, 2007.

44 See note 3, *supra* for definitions and citations.

45 See as a sign of the new way of thinking, the agenda of the Council for the Judiciary 2011-2014, p. 23: '*De ingezette differentiatie van afdoeningswijze (schikken, beslissen, doorverwijzen naar mediation) wordt voortgezet met het oog op het snel en definitief afdoen van geschillen en het oplossen van daaronder liggende problemen.*' (The already started differentiation in ending (civil) court proceedings – by a verdict, a settlement or a referral to mediation – will be continued in order to end disputes quickly and finally and to solve the underlying problems.) The withdrawal of all complaints is of course also a way to end a court procedure. But I see that as a variation of settling.

wishes.⁴⁶ If the judge does not do so, the only way to negotiate is positional⁴⁷ and in many cases the last option will be to give a verdict. There is nothing untoward about giving a verdict, do not get me wrong. But only if another outcome is first explored in a professional way under the direction of the judge and this then appears to be impossible.

Techniques of conflict solving

There are different techniques in solving a conflict, meaning techniques to enable the underlying interests, needs and wishes to be communicated and to provide an insight into the conflict.

One of the best known is that of peeling (think of peeling an 'onion'). The outer layer is one of the points of view. The second layer is about the beliefs, interpretations and projections which one thinks that the other party is thinking. The third layer is made up of feelings and emotions, while the fourth consists of concerns and needs. The core or the heart of it all is formed by the wishes following from the needs. During this peeling process several standard questions can be used.⁴⁸ This method provides an insight into the depth of the conflict.

Somewhat less known in Dutch court practice at this point in time is conflict diagnosis by means of the 7i model, which provides an insight into the broadness of the conflict.

The 7i stand for:

Individuals – what kind of a person are you, what does your company stand for?

Issues – what exactly is going on between the two of you?

Interdependence – to what degree are you dependent on each other?

Interaction – how did you deal with one another up until now?

Implications – what does the case mean to you (and your social environment) in terms of content and escalation?

Institutions – what is the context of the conflict, who is looking over your shoulder?

Interventions – what could be done to solve the problem and what have you done so far?⁴⁹

And then there is the escalation ladder of Glasl, leading to insights into the sharpness of the conflict and the level of escalation. The ladder has three stages, each divided into three sublevels (together nine steps of the ladder). The stages are 'win-win', 'win-lose' and 'lose-lose'.⁵⁰

Polarisation may occur during the first stage (win-win), but there is still the will to solve the problem together. A judge may intervene by helping the parties to reach a solution themselves. The hardening of attitudes and points of view, no 'words' but 'action', and intellectual aggression are the features of the second stage (win-lose). Competition prevails: I want to win, the other has got to lose. According to psychological opinions identity-related interests play a stronger role at this stage. One can see

46 Emotion, of course, also plays a part. Talking about such emotions is necessary to clear the air so that the interests and needs can be discussed. Showing emotion is *the* signal during an oral hearing for changing the subject from the legal dispute to the underlying conflict.

47 Or at least not in accordance with the well-known Harvard method. Positional negotiation is often combined with the judge's provisional view about the case (so that the parties can better define their positions) and with the BATNA. This acronym stands for 'Best Alternative To the Negotiated Agreement'. The alternative to a court settlement is very often to continue the proceedings. The judge gives his opinion as to the steps that can still be expected in order to finish the case. Especially a negative alternative scenario (which is likely to be relatively costly and long) can be an incentive to settle. Highlighting that negative scenario was a much used tool by the judges in the field research by Van der Linden in 2006/2007 (in 55.3% of all cases), see Van der Linden 2010, *supra* note 25, p. 60 and the table on p. 61. See for the Harvard method R. Fisher et al., *Getting to YES: Negotiating Agreement Without Giving In*, originally published by Penguin Books in 1981.

48 A question leading from a standpoint to feelings is for instance: 'What makes you so outspoken?' A question leading to the layer of concerns is: 'Let us presume you will not get what you are claiming. What worries you the most in that case?' A question leading to the core of the issue is: 'Will everything be solved with a verdict by the court?'

49 This model has been developed by M. Euwema and has been described in, among others, M. Euwema & E. Giebels, *Conflictmanagement – Analyse, diagnostiek en interventie*, 2010. The questions used in this text are based on material from a course by the Training Institute of the Judiciary, called '*De conflictdiagnosezitting in het bestuursrecht, Theorie en praktijk*' ('The conflict diagnosis session in administrative law') by D. Allewijn, M. Pel and N. Verkleij. See also D. Allewijn, *Tussen partijen is in geschil ... De bestuursrechter als geschilbeslechter*, dissertation Leiden University, 2011, pp. 144-146.

50 F. Glasl, *Konfliktmanagement, ein Handbuch für Führungskräfte, Beraterinnen und Berater*, 2011, pp. 233-313. There are other ladders too, ranging from four to twenty-four steps. See Chapter 7 of the book by Glasl.

stereotyping, image damaging and threats. A judge may intervene by giving attention to the self-image of each party. Losing face and the need for recognition are the key words.

In the most escalated stage (lose-lose) the winning of the battle is no longer that important, as long as the other side does not win. 'I would rather jump over the edge of a cliff together than see the other side win' is a common attitude.⁵¹ If this situation cannot be de-escalated, the judge's intervention in the conflict will not be successful. The verdict remains the only way out, but it seems unlikely that the conflict will be brought to an end by the fact that a verdict is pronounced.⁵²

Is conflict solving a judge's job?

The methods and insights mentioned are much used in mediation, but to speak of mediation methods would be an unjust monopolising of what is no more than communication skills and conflict management techniques. Both belong in the toolkit of the mediator, but should also be part of what a judge can do during a court session. The techniques serve the ability of a judge to help the parties to settle their case. And that is really the core business of every judge in a civil law procedure!

Should we aspire towards this way of handling cases during oral hearings? I have no doubt: yes.

In doing so the judge does not deprive himself of his authority as an institution. If a settlement is not reached, a verdict will follow. Therefore settling the case always takes place in the shadow of the law. In this respect it makes no difference whether during the effort to settle the case the judge uses the techniques which I have described, in order to give the parties an understanding of their conflict. All this has nothing to do with the informalisation of the judiciary, as symbols and formalities remain, as does the power of the judge to decide the case. Using these skills does not turn the judge into a mediator or a semi-mediator. He is still the judge, with his constitutional powers.⁵³ But whoever wants to see his case being dealt with in a tailor-made fashion does not have to go elsewhere. Instead of wielding the axe by pronouncing a verdict the judge gives the parties the opportunity to find an optimum solution to their conflict and to reach a settlement. Of course, one can safely presume that the parties did not commence a civil court procedure in order to reach a settlement, given that the whole procedure is geared towards reaching a verdict in a fair and lawful manner. But who cares, if the parties in the actual setting of the oral hearing can be made to believe that a settlement is more favourable to them? And that is what counts.

Attitude of the judge during the settlement phase of the oral hearing

Delivering a verdict and helping the parties to reach a settlement are both the core business of a Dutch civil law judge. The attitude he needs to adopt in the settlement phase of an oral hearing differs, however, from the attitude in the phase of obtaining information which is needed for reaching a verdict in the case. In the settlement phase the judge needs to be more facilitating and the direction of the case is in the hands of the parties, assuming they have the ability to deal with that responsibility (if they do not have the services of a lawyer). In the informational phase the judge himself is the director and it is he who is obtaining the information which he thinks is required to complete the case and to make it ready for a verdict. In short: the facilitating judge versus the deciding judge.

The facilitating judge is not per se a modest judge. Facilitating can lead to a firm manifestation.⁵⁴ And sometimes it goes beyond facilitating on the mere communication process. Then facilitating means playing the part of the director of the content: the judge giving the parties a last push to settle, suggesting

51 The emotion that one would rather jump over the edge together than see the other side win is the most escalated form. It is preceded by depersonalizing the other side in enemy stereotypes, focusing on damaging the other side and systematically destroying the other side.

52 Glasl speaks of a '*Machteingriff*' – an intervention of power – as a strategy to de-escalate and solve the problem. My text is based on Giebels & Euwema, *supra* note 3, pp. 27-28. See also Allewijn, *supra* note 49, pp. 136-144.

53 Even so the reality is viewed from another angle, from another rationale: more psychological and less judicial. On this approach through different rationales see R. Westra, 'Transparantie: sturen en gestuurd worden', in D. Broeders et al. (eds.), *Speelruimte voor transparantere rechtspraak*, published in the series 'Verkenningen van de Wetenschappelijke Raad voor het Regeringsbeleid', 2013, pp. 297-371. Westra also distinguishes between the political and the economic rationale.

54 H.M.M. Steenberghe, 'De comparitie als contradictie', 2009 *Tijdschrift voor de Procespraktijk*, no. 6, pp. 204-212 is of the opinion that the facilitating judge is a modest judge. I am not sure and I think that we have a different view. Steenberghe is possibly focusing on the principle that the parties are in charge during the negotiations to reach a settlement: do they want to talk about a settlement in the first place and what would that settlement entail? These are questions that the judge cannot decide upon: he is not in charge and a modest attitude is appropriate. In that perspective I agree with Steenberghe.

his own solution and generating a commitment to that suggestion.⁵⁵ It is clear that the facilitating and the deciding judge are merely stereotypes and that the roles can be more diffuse in practice.

The facilitating judge is in any case a curious judge. He wants to know what stimulates the parties or what holds them back. He does not presume what the parties want or can do and does not act upon assumptions: he simply asks.⁵⁶

6. Conflict solving in the courtroom: what has already been done and what is known?

Dutch research is still scarce

In the previous section I ended with firm points of view or even statements of policy. But still very little is known about the use and application of these new – that is: new in the courtroom – techniques of communicating and exploring the underlying conflict so as to serve the settlement of the case and higher levels of perceived procedural justice.

What is the opinion of judges nowadays about the correct way of presiding over an oral hearing and using the mentioned techniques? What are they actually doing, do we see an exploration of the underlying conflict at the oral hearing?⁵⁷ Do judges have the necessary skills for the required ways of communicating and conflict management and, if so, can they apply different techniques and switch if necessary? What about the perceived procedural justice if the underlying conflict was explored? And how effective is this exploration in terms of attaining the aims which the judge had before and during the oral hearing? Further research is needed.⁵⁸

The judge's view of how to exercise his profession and his behaviour at the oral hearing

Some facts are already known about the relation between the judge's view of how to exercise his profession and his behaviour at the oral hearing.

Van der Linden asked the judges in her field research: 'In your opinion, how much time and effort should a judge spend in trying to reach a settlement at an oral hearing?' This question is about the judge's view of how to exercise his profession. Van der Linden found a more or less proportional correlation between the views and the actual behaviour of the judges.⁵⁹ But *how* active one may be says little to nothing about one's actual behaviour. Unfortunately an explanation as to the answer provided was not asked for. Probably those who think that spending a great deal of time and effort on reaching a settlement is favourable are of the opinion that it is their professional duty to help the parties to find a sustainable

55 Compare P.N. Wackie, 'Een proces op maat', in N. Frenk et al., *Proces op maat*, 2012, p. 25, who expects the same steering role from the mediator, if so required.

56 That judges, to an overwhelming degree, do not test their assumptions during their guidance at the settlement phase of the oral hearing was the conclusion which was reached in the first publication of J. van der Linden's research, see Van der Linden 2008, supra note 25, pp. 48-49. This also holds true for the assumption (before the hearing) of to what extent the parties are willing to settle and the assumption that the benefits of a settlement as summed up by the judge which are indeed benefits in the eyes of the parties, as well as the assumption that a provisional view about the case must be given (I am the judge and reaching a verdict is the whole purpose of this court procedure), without knowing if the parties actually want to hear that view at that particular point in the session. In the study by Grootelaar et al., supra note 21 we found more or less the same thing: in two of the eight observed court sessions the judge presumed that making an effort to settle the case would be pointless and so no initiative to settle was taken by these judges. In both cases both parties stated in the subsequent (4) interviews that they regretted the lack of any initiative by the judge. In my ongoing qualitative field research I can see the same every now and then. For instance, a judge, not knowing why the parties had not settled during a 30-minute break in the court hearing, did not enquire any further and informed the parties that the verdict was due in a few weeks; end of session. Afterwards in the interview the judge said that he presumed that there was a big financial gap (of about € 17,000) between the parties and that this had resulted in the failure to settle. In reality the 'gap' was only € 1,000.

57 We do know what judges customarily did in 2006 and 2007. I have already mentioned the dissertation by Van der Linden 2010, supra note 25. Compare also Ippel & Heeger-Hertter, supra note 35. The also already mentioned multiple case study by Grootelaar et al., supra note 21 is more recent, but only about 8 cases and 7 judges were involved.

58 The relevance of all this is underlined by M. Bokhorst & W. Witteveen, 'Als gezag verdiend moet worden...', in Broeders et al., supra note 53, pp. 155-156: '*Alleen rechters die zich begrijpelijk uitdrukken en overtuigend optreden, verdienen gezag.*' ('Only judges who express themselves in a comprehensible way and who behave convincingly earn authority.') Included in this convincing behaviour is that the judge is able to meet the basic expectations of the parties concerning procedural justice.

59 Van der Linden 2010, supra note 25, p. 69. Much earlier see J.A. Wall Jr. & D.E. Rude, 'Judicial Involvement in Settlement: How Judges and Lawyers View It', 1988 *Judicature* 72, pp. 175-178, concluding that an active judge in a settlement phase of a court session is of the opinion that this active behaviour is understood and expected, while a judge who sees his main task as providing a verdict is much less active in trying to settle the case.

solution for their conflict, but that is not certain, because this probable correlation was not the subject of the research. Nor is it known what the correlation is between the answer given and the actual behaviour of the judge at the oral hearing.

Other Dutch research emanates from 2008. That concerned a pilot project which was set up in which a (would be) oral hearing was held on six occasions about the same (real, but closed) civil law case. Six different judges presided over this hearing. The parties were actors. They were present at all six hearings as were their lawyers. A relation was found between, on the one hand, the judges' opinion as to the most favourable outcome of the case (a verdict, a settlement, referral to mediation) and their opinion that these outcomes are in general equivalent and, on the other hand, their interventions and the guidance of the parties towards this outcome.⁶⁰ Intuitively it is indeed fairly clear that judges will put more (and various forms of) energy into reaching a settlement if they think that that particular outcome is a good alternative in general and the best alternative in the specific case.⁶¹

In that research there were also indications that the judges' view of how to exercise their profession has an impact on their attitude at the oral hearing. The dispute decider differs from the conflict solver.⁶² The former is focused on the judicial aspects, the latter on the socio-emotional aspects of the case (shared interests, emotions, needs and wishes). But it was not apparent that the former had a more business-like and presuming style, while the latter had a more personal and advisory style.⁶³

Conflict solving in day-to-day practice; some field research and case studies

That some civil law judges nowadays preside over oral hearings somewhat differently from, let us say, ten years ago, is a statement that I am prepared to defend. More so than in those days, we can see a search for the underlying conflict. But how much more and how is this actually done? That is uncertain when relying on published Dutch research.⁶⁴ In my ongoing qualitative field research around 40 judges are involved. In the interview concerning their general views about the way they should conduct their profession we quite often hear the opinion that it is relevant to pay attention to the underlying conflict, but regularly we record ifs, buts and maybes.⁶⁵ What we have observed is not necessarily in line with the self-reported attention of the judge to the underlying conflict, to put it mildly. And the full-scale application of communication skills and conflict management techniques has, to date, been very rarely observed. In fact, by far not all the observed judges were able to bring demonstrated emotions into the conversation. Most of the time these emotions were mentioned, and sometimes they were also addressed, but that was that. There was no invitation to one party to react to the emotions of the other party or to

60 Praagman, *supra* note 29, p. 25.

61 See also Van der Linden, *supra* note 25, pp. 62-69, who extensively pays attention to the factors causing judges to be more active during the settlement phase of the oral hearing. She recognises 24 factors, of which the most influential are in descending order: the cooperative attitude of the parties, the not too wide gap between the standpoints, the judge's own expectation that a settlement should be possible, the claim which is not too big, the (expected) longer duration of the process after the oral hearing, the cooperative attitude of the lawyers, whether the case concerns personal relations and/or has a considerable emotional impact and, finally, the opinion of the judge that a verdict will not be a real solution to the problem.

62 Praagman, *supra* note 29, p. 26. See also P.K. Nihot, 'De nieuwe zaaksbehandeling', in N. Frenk et al., *Proces op maat*, 2012, p. 33, who calls the required, changed view of the administrative judge about the way he should preside over a court session 'a culture changeover'.

63 Praagman, *supra* note 29, p. 19.

64 We have certain clues, of course, beginning with the mere existence of the course for judges in civil law, family law and administrative law, called 'Director judge/Conflict diagnosis', containing various parts in which ample attention is given to the underlying conflict and, in connection therewith, the required techniques. Attention is given to these techniques in on the job training, but this is still not enough in my opinion. My impression is that the on the job trainers – all judges themselves – are mostly from the older generation and are neither trained in nor active in the field of conflict resolution. I heard of a trainer who said to his trainee, who had just learned about conflict resolution in the course I just mentioned, 'we don't do that kind of stuff over here'. See note 35, *supra* about the small number of the summarizing of intention per hearing (less than one). This kind of summarizing indicates that the judge touches upon the underlying conflict. See further Ippel & Heeger-Hertter, *supra* note 35, p. 86 who state, in line with the former clue, that judges 'mostly' sum up what they consider to be the most important points of the dispute, while they only 'sometimes' investigate the core issue of the parties. That the old techniques still work is in no way apparent on the basis of the total number of settlements in civil law cases (outside family law). From 2000 to 2010 the percentages decreased considerably. Settlements are not registered separately and fall under 'Other ways of ending a case' (that is other than with a verdict). These 'other ways' versus verdicts ending the case were in small claims cases in 2000 54% and 46%, in 2010 49% and 51%. In other civil law cases the percentages in 2000 were 61% and 39% and in 2010 46% and 54%. See the WODC report *Rechtspleging Civiel & Bestuur 2010 ontwikkelingen en samenhangen*, 2011.

65 Not if it is irrelevant to the case or if it takes too long. Only if the need for it is apparent. Yes, I pay attention to emotions, in order to go back to the legal case as soon as possible. Etc. etc.

reflect on his own emotions, and there were no questions about or addressing the exact cause of the emotions, nor about the needs and wishes connected thereto.⁶⁶

These initial observations in our research are in line with earlier recent research. I will refer to just one.⁶⁷ In 2009 pilot projects were held at several Dutch courts on various fields of law. The pilot projects focused strongly on conflict solving.⁶⁸ They give the impression that conflict solving in the courtroom in 2009 was still in its first phase of development. Judges did not know how to apply the required and trained communication techniques or could not maintain them during the whole session. Or they employed the agreed method of conflict diagnosis. That was the 7i method. Judges in this pilot project and in general have, as a result of their training and professional working experience, the persistent habit of focusing on just 1 of these 7, that is the i for 'Issues', and then only the legal components thereof.⁶⁹ Delegalisation through conflict solving needs to be trained, because judges are not conditioned in that way.⁷⁰

Also based on our own ongoing research I really doubt if judges in general are sufficiently trained and are therefore able to apply the required techniques in order to pay proper attention to the underlying conflict, let alone being able to vary their approach if necessary.⁷¹

7. Concluding recommendation

Conflict solving and perceived procedural justice

What at the same time is apparent in the results of the pilot projects from 2009 is the great satisfaction of the parties and their lawyers with the oral hearings at which the techniques were well applied and upheld by the judge. In these sessions the underlying interests were revealed and with them the related concerns,

66 This research does not leave me very optimistic in this regard. Still I observe well timed questions at the beginning of the hearing, just as is taught in the course 'Director judge/conflict diagnosis'. These questions are all variations of the so-called 'interest question'. Questions like: 'What I'd like to know is, what's your biggest concern/what do you want to talk about in any case/what's on your mind the most, apart from the legal aspects of the matter?' In my experience the answers to these questions are nevertheless often about the legal dispute: 'What I want is to discuss the case itself, because my opponent is wrong' or 'It is important that I get my money as claimed'. I sometimes ask: 'How is it for you to be here?' This question generates surprising answers, mostly about underlying worries and needs. Anyway, I do not hear these kinds of questions very often in our research.

67 Other research was conducted by A.T. Marseille, *Comparitie en regie in de bestuursrechtspraak*, 2010, who researched (in 2009) the pilot projects at four district courts as part of a national project to test new ways of handling administrative law court cases, especially during court sessions. In his report nowhere is it mentioned that the so-called 'interest question' is asked in practice, nor is conflict diagnosis mentioned as an applied technique. And more recently it is noted in the still to be published report of a research group led by H. Winter and A.T. Marseille about '*Korte en effectieve kantoncomparities*' (Short and effective oral hearings in small claims cases) that in many of the small claims cases involved the judges were not reticent in stating that they already use the techniques and the method that was the format of this research. This method comprised many elements of conflict solving. But the judges demonstrated the contrary. Many of the elements were not used at all, let alone the structural ones, the phase of exploring the underlying conflict was skipped and a great variety of working methods was shown amongst the several judges.

68 De Hoon & Verberk, supra note 19. C. Wensveen, *Maatwerk door samenspel in de rechtszaal, Een onderzoek naar de pilot 'Conflictoplossing Op Maat' bij de sector kanton van de rechtbank Amsterdam*, 2009. I. Sportel & A. Terlouw, *Rechtens in gesprek met burger en bestuur, Een onderzoek naar de pilot 'Conflictoplossing Op Maat' bij de sector bestuursrechtspraak van de rechtbank Den Bosch*, 2009. P. Vlaardingerbroek et al., *De regierechter in echtscheidingszaken, Een onderzoek naar de pilot 'Conflictoplossing Op Maat' bij de sector familie- en jeugdrecht van de rechtbank Den Haag*, 2009.

69 T. Pieters commenting on the pilot projects at the small claims division in the district court in Amsterdam and at the civil law division of the district court in Zutphen, see p. 14 in '*Conflictoplossing op maat in de handels- en de kantonsector*', in M. Pel & S. Verberk (eds.), *De pilots 'Conflictoplossing op maat', Reflectie op resultaten en ideeën voor de toekomst*, 2009, pp. 12-18.

70 D. Allewijn, writing about the pilot project in the administrative law division of the district court in Den Bosch, see p. 24 in '*Conflictdiagnose door de bestuursrechter*', in Pel & Verberk, supra note 69, pp. 20-25. See also G. de Groot, *Rechtspraak met hart voor de zaak*, inaugural speech, VU University, Amsterdam, 2012, p. 10. Only in family law cases was the method of conflict management consistently applied. The question of how the children were informed about the plan to divorce – this question was part of the method – was not asked in more than half of the cases, it being unclear why the judge did not do so. The question of how the parties themselves thought the conflict could be solved was explicitly asked in very few cases. See Vlaardingerbroek et al, supra note 68, pp. 16 and 19.

71 A lack of training means a lack of variation and that can be a problem. Trying too long and in the same manner to reach a solution can lead to perceived nagging and perceived forced settlements. Van der Linden et al, supra note 25, pp. 26-28 and Van der Linden 2010, supra note 25, pp. 81-87 and pp. 156-158. This research shows that if the judge mentions specific amounts on which a settlement could be reached or if he gives a far-reaching provisional view of the outcome of the case, the parties perceive this as considerable compulsion to settle. But also the tone and timing are of the essence: too firm, too early and too long are all perceived as being forced to settle. From Ippel & Heeger-Hertter, supra note 35, p. 100 we know that the parties nevertheless expect a 'decisive attitude' by the judge during the settlement phase of the oral hearing. M. Pel, *Verwijzen naar mediation, Praktijkgids voor een effectief mediationvoorstel*, 2008, pp. 23-24 and p. 188 points out that compulsion also can be perceived when the judge makes a proposal to refer the parties to a mediator, with a lower success rate in mediation as a result. The same holds true for administrative law cases, see Sportel & Terlouw, supra note 68, pp. 32-35 and Marseille, supra note 67, p. 177 who establishes that the limit of judicial behaviour lies where the suggestion to withdraw the appeal, which is presented as being non-binding, is in fact a 'request' that cannot be refused. A judge, says Marseille, should be careful not to cross the line here.

needs and wishes. The core of the conflict was explored and discussed, everyone felt that they had been really heard and understood, evenly treated, and they also felt that they did have an influence on the outcome.⁷² These are all elements of procedural justice, like care, voice, due consideration, neutrality and respect.

Our own research has not yet reached the stage where hard and fast conclusions can be drawn about the effects of the opinion of the judge on the parties, but again seems to be in line with the results of the pilot projects in 2009. Note that our field of research is – of course – the following: real oral hearings in real court cases. Do the parties think that the judge has done his or her utmost to help them reach a settlement? Do they perceive that there is a case of procedural justice and, if so, in what way (which elements)? This is not yet sufficiently clear, but the first results indicate that the element of perceived voice is lower when a party has not expressed what was really important to him or her and is higher if the parties have perceived that the judge understood and gave due consideration to this which, for them, is a crucial point.⁷³ There also seems to be a relation with the expectations which the party had concerning the court session.⁷⁴ More uncertain is what would have happened in terms of reaching a settlement if the judge would have paid attention to the underlying conflict, but in fact did not do so. Other factors, as also indicated in the field research by Van der Linden, seem to be at least very relevant too, like a belief on the part of the judge that a settlement would be the optimal outcome. Maybe we can draw a (cautious) conclusion when we have observed more cases and have more figures and percentages at our disposal concerning the number of cases settled after a ‘normal’ session as opposed to a session during which the underlying conflict was explored.⁷⁵

If, in fact, one can conclude that the level of settlements increases when the underlying conflict was explored and discussed in a professional and proper manner, then conflict solving is also effective in another way: it is known that compliance with solutions reached themselves is higher than compliance with obligations imposed by a verdict.⁷⁶

As I have stated there is still little Dutch scientific research that has been carried out. So we still do not know very much on a scientific scale about the effects of the behaviour and actions of the judge during an oral hearing on perceived procedural justice and on the possibility of reaching a settlement. Especially the effects of investigating the lower layer of the conflict in the legal dispute have not yet been scientifically mapped. But we do actually have clues that suggest that these effects exist, that there is a positive connection between a conflict solving attitude, on the one hand, and procedural justice and reaching a settlement, on the other.

The pilot projects with real cases, the research on the six oral hearings and the first results of our ongoing qualitative field research tell us that the behaviour of the judge is a determining factor for key elements of procedural justice and that the effectiveness of our judges differs. In short: what you put into it, you will get out of it.

72 Pieters, *supra* note 69, p. 15 and p. 17. See also Allewijn, *supra* note 70, p. 24 and C. van Leuven, ‘De regierechter in familiezaken’, in Pel & Verberk, *supra* note 69, pp. 26-31, especially p. 29. These outcomes are in line with older research by D.L. Shapiro & J.M. Brett, ‘Comparing Three Processes Underlying Judgments of Procedural Justice: A Field Study of Mediation and Arbitration’, 1993 *Journal of Personality and Social Psychology* 65, no. 6, pp. 1167-1177. See for procedural justice – especially the elements of voice, due consideration, neutrality, respect and explanation – as one of the goals to be achieved by the new way of handling administrative law cases also Nihot, *supra* note 62, p. 30. See further M. Guiaux et al., *Mediation Monitor 2005-2008, Eindrapport*, WODC Cahier 2009-9, 2009, pp. 96-101, about the satisfaction of the parties and their legal aid concerning mediation. This is important, because in mediation the same techniques of communication and conflict solving are used as in the pilot projects which I mentioned above in this note. See Tyler 2007, *supra* note 21, pp. 26-31, who on p. 30 addresses this satisfaction concerning ‘voice’ as an element of procedural justice.

73 Note that this crucial point lies outside the legal dispute and the facts that are relevant to that dispute. So they are crucial points in the underlying conflict, for instance loss of face or perceived incomprehension or indifference.

74 What we here regularly note in our interviews is that the parties thought that it was improper, out of order, or not sufficiently relevant to mention their crucial points. These rationalisations could be an explanation for the fact that these parties still score the oral hearing rather highly with regard to having a voice, although they also inform us that they would have preferred to mention their crucial points and to discuss them.

75 The pilot projects from 2009 show that in 50% of the family law cases a settlement was reached, whereby in another 30% the case was referred to a mediator. In other civil law cases 60% were settled. These percentages are considerably higher than normal, but the absolute numbers of cases in the pilot projects were too low to be extrapolated into day to day practice.

76 Eshuis, *supra* note 17, pp. 113-116. See on compliance with settlement agreements after mediation Guiaux et al. *supra* note 72, pp. 102-103. For different opinions on the impact of perceived procedural justice on compliance with verdicts, I refer to note 20, *supra*.

One of the results I hope to obtain with this qualitative field research is whether or not this search for an underlying conflict is more effective – if there is such an underlying conflict – than adhering to the judicial case and the dispute itself, in terms of perceived procedural justice and/or in terms of reaching a settlement. In other words: are our judges putting the right effort into the handling of the hearing and are they getting the optimal results?

To me this is the pivotal question.⁷⁷ As a legal scientist and academic I do not know the answer. As a judge I think I do and it is not altogether positive.

What is it all about?

As a judge I answer this question as follows.

The civil law judge is the last resort when deciding on a legal dispute. We hear it a lot, this one-liner about the '*ultimum remedium*'. But this adage implies a choice: the choice to look upon a judge as only the wielder of the judicial axe. A choice that is not mine. A choice that is ultimately harmful for the relevance of and trust in the judiciary.

For the parties it is always about the core of their case. And this core is often hidden in the conflict, not in the legal dispute. The judge must be prepared to search for that core, thus engaging in conflict solving. The fact remains that not all judges are prepared to do this.

For the modern judge it is about the necessity of mastering techniques of communication and conflict management. These techniques are not at one's disposal only because one is more than able to solve a case in a legal way.⁷⁸

For every judge it is about the insight that there seems to be much to gain when applying the mentioned techniques, both on an individual level and for the judiciary as a whole.⁷⁹

What is needed for a judge to continually relate to what the parties see as really important? What is required for the civil law judiciary to be still relevant after 10 years in the whole field of conflict solving entities and to be still able to gain the trust of the parties in question? What does the judiciary have to do as an organization? What has to be done by the individual judge?

That is what it is *really* all about. ¶

77 That wide-scale research is not yet available does not mean that the judiciary should not move forward. Professional judicial experience provides hints as to in what way we could adapt the judiciary and pilot projects could provide evidence-based further insight into what we think is the right direction, especially if these pilot projects are combined with scientific research. Of the same opinion is De Groot, supra note 70, p. 9. Researching these questions also by means of interviewing the parties gives us an opportunity to develop a more responsive judicial approach. The judicial system is nowadays experimenting with pilot projects but otherwise without really knowing what the parties actually want. We are working from the inside out, instead of the other way around. Likewise, but in another context, see C. Eradus, 'Naar een ideaal gerecht, Rechtspraaklezing 2010' (available at: <<http://www.rechtspraak.nl/Organisatie/Raad-Voor-De-Rechtspraak/publicaties/Pages/Rechtspraaklezingen.asp>>, last visited 9 October 2014).

78 This can be used as a criterion for the selection of judges and further on during their training. Especially on the job training, a major part of the training of judges in the Netherlands, should focus much more on actually applying these techniques. See also J.D.A. den Tonkelaar, *Optimus Iudex, Over het belang van de selectie van onze rechters*, inaugural speech Radboud University Nijmegen, 2009 and very critical about the new training curriculum for judges is M.J.A.M. Ahsmann, *Over meesters in de rechten en priesters in het recht, Feit en fictie in hun opleiding*, 2012.

79 The mastering of conflict solving by de-escalating communication techniques should be found in training and good feedback. In consultation with the court where they sit, it should be possible (allowed) to draw the conclusion that not every judge is able to apply these techniques, let alone to their fullest. Deployment in other (more legally technical) cases has to be the result. I agree with Pieters, supra note 69, p. 15 that we must leave behind the idea that all judges are equally good at presiding over hearings. J.E.J. Prins et al., 'Rechters aan het woord over transparantie', in Broeders et al., supra note 53, p. 219 expressed the following opinion from interviews held with several judges: '*Hét moment om 'reclame' te maken voor ons ambt, het belang ervan, maar zeker ook de professionaliteit waarmee we dat ambt uitoefenen is wanneer we ter zitting handelen en het woord nemen. Het is de verantwoordelijkheid van ieder van ons om bij iedere zaak telkens weer die kans te benutten.*' ('The moment of advertising our profession, the importance thereof, but surely also the professionalism which we employ in that profession is when we act and speak at a hearing. It is the responsibility of each of us to use that opportunity in every case.') I would say: exactly so, but not every judge is equally skillful in that respect.