

vide ad hoc redress in cases where denial of compensation for 'danno esistenziale' may amount to a violation of a human right.

#### 4. *Mariella Scerri, The Product Liability Directive: A Balance between Different Interests (University of Malta, Dissertation 2013)*

56 The writer asks whether the Product Liability Directive achieves a good balance between the interests of consumers and those of producers. The first chapter gives a brief look at consumer law and an introduction to the Product Liability Directive. It analyses the nature of product liability and refers to the thalidomide drug tragedy. It also deals with strict liability in the Product Liability Directive. The second chapter deals with certain issues regarding the producer, the product, the defect, the extent of the damage and other issues regarding the injured party. Finally, the writer compares the Product Liability Directive and the General Product Safety Directive. This comparison is important to establish to what extent the Product Liability Directive and the General Product Safety Directive safeguard certain interests such as the health and safety of consumers. The third chapter concentrates on cases involving the Product Liability Directive covering also the reports regarding the Directive. These can reveal whether in practice the Directive truly achieves the desired balance.

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**XIX. The Netherlands**

#### A. Legislation

##### 1. Prejudgment Attachment of the Assets of the Accused for the Benefit of a Victim: *Aanpassing van het Wetboek van Strafvordering, het Wetboek van Strafrecht en de Uitvoeringswet Internationaal Strafhof in verband met de introductie van de mogelijkheid conservatoir beslag te leggen op het vermogen van de verdachte ten behoeve van het slachtoffer*<sup>1</sup>

This proposal offers the possibility for prejudgment attachment by the state in an early stage of the criminal proceedings. A victim of a criminal act can claim compensation during the criminal proceedings on the basis of art 36f Dutch Criminal Code. An order for damages can be imposed if the accused can be held liable for the victim's damage on the basis of art 6:162 of the Dutch Civil Code (CC) (ie the general tort law clause). This proposal is aimed at preventing the accused from siphoning off his properties and thus at protecting the victim.

The Act was adopted on 25 June 2013 and entered into force on 1 January 2014.

<sup>1</sup> Documents of the Lower House (2011-2012/2012-2013) 33 295; Documents of the Upper House (2012-2013/2013-2014) 33 295.

## 2. Extending the Age Limit for Liability for Minors: *Voorstel van wet van het lid Oskam tot wijziging van Boek 6 van het Burgerlijk Wetboek in verband met verruiming van de aansprakelijkheid van ouders voor gedragingen van minderjarigen vanaf de leeftijd van veertien jaar*<sup>2</sup>

<sup>3</sup> As was outlined in the 2010 report, this amendment was proposed to extend the rules on civil liability regarding minors and their parents.<sup>3</sup>

<sup>4</sup> Due to critical remarks that were made during the debate in the Upper House, initiator Oskam, in a letter from 6 February 2014, decided to submit a proposal to amend this bill in the Lower Chamber of Parliament. Therefore, the debate in the Upper Chamber has been deferred. The content of the proposal is not yet known.

## B. Cases

### 1. Hoge Raad (Supreme Court, HR) 11 January 2013, Nederlandse Jurisprudentie (NJ) 2013, 99: Immigration Procedure; Length of Proceedings

#### a) Brief Summary of the Facts

<sup>5</sup> The claimant is an Egyptian citizen who applied for a residence permit in autumn 2001 to be able to become employed in the Netherlands. The then Minister of Alien Affairs and Integration (the Minister) rejected the application on 10 June 2003, as the claimant had no authorisation for temporary stay (*machtiging voorlopig verblijf*, MVV). The claimant lodged an objection on unspecified grounds to this decision on 7 July 2003. The Immigration and Naturalisation Service (*Immigratie- en Naturalisatiedienst*, IND) gave the claimant the opportunity to put forward his arguments for objection by letter of 26 No-

<sup>2</sup> Documents of the Lower House (2009-2010/2011-2012) 30 519. Documents of the Upper House (2011-2012/2013-2014) 30 519.

<sup>3</sup> See *J. Giesen/ALM Keirse*, *The Netherlands*, ETL 2010, 403, no 4.f. See also *BM Pajjmans*, *Weisvoorstel ter verruiming van de aansprakelijkheid van ouders voor kinderen*, *Aansprakelijkheid, Verzekering & Schade (AV&S)* 2007, 54-62.

vember 2004. The Minister, in a decision on 17 December 2004, declared the objection inadmissible as the claimant had not put forward his arguments for objection. The claimant lodged an appeal on 31 December 2004, but withdrew the appeal after the Minister's decision of 17 December 2004 had been withdrawn on 7 June 2005. The Minister had withdrawn its decision after it had become clear that the claimant had put forward his arguments. This document was not added to the claimant's file. Nevertheless, the objection, in the decision on 10 August 2005, was dismissed. The claimant did not appeal against this decision.

The claimant applied for a residence permit again on 20 March 2006, this time, however, for reasons of medical treatment. The application was rejected in a decision on 2 February 2007. The claimant's objection against this decision was dismissed on 5 February 2008. The appeal against this 5 February 2008 decision was dismissed by a decision of the administrative court on 12 June 2008.

The claimant in this case filed for a declaratory judgment that the state is liable for having acted unlawfully, as the state had not decided on the claimant's objections within a reasonable time (ie the state had decided on the objections after over two years and nearly one year respectively). The claimant argued that he, as a consequence, has suffered non-pecuniary damage that should be compensated by the state and grounded his claim on art 6 of the European Convention on Human Rights (ECHR).

#### b) Judgment of the Court

The district court rejected the claim. The judgment was upheld on appeal. The appeal in cassation challenged the conclusion of the court of appeal that art 6 ECHR does not apply if no judicial authority was involved in the alleged proceedings concerned. The claimant argued that art 6 ECHR is applicable during the objection stage as well, also when the reasonable time-requirement is only exceeded in the objection stage.

The *Hoge Raad*, referring to the European Court of Human Rights' (ECtHR) case law, eg *Maaouia v France*, first stated that art 6 ECHR is not applicable with regard to procedures that concern the entry, residence and expulsion of aliens.<sup>4</sup>

<sup>4</sup> ECtHR *Maaouia v France* [GC], 5.10.2000, no 39652/98.

The *Afdeling bestuursrechtspraak van de Raad van State* (Administrative Jurisdiction Division of the Dutch Council of State, ABRvS), however, has decided that the principle of legal certainty as expressed in art 6 ECHR also must be applied beyond the reach of art 6 ECHR. This legal principle obliges cases concerning the entry, residence and expulsion of aliens to be conducted within reasonable time. Following the case law of the ECtHR, the ABRvS has decided that, when the reasonable time-requirement is not met, non-pecuniary damage arising from feelings of distress and frustration can be presumed to flow from the failure to act within a reasonable time.

<sup>10</sup> The *Hoge Raad* stated that the court of appeal thus has concluded correctly that the breach of the duty to act within a reasonable time may be unlawful pursuant to the principle of legal certainty. On the basis of the principle of legal certainty, according to the court of appeal, endorsed by the *Hoge Raad*, a claim for non-pecuniary damages may be allowed when the reasonable time has been grossly exceeded.

<sup>11</sup> The *Hoge Raad* further explicated that the ABRvS in its case law concerning the application of the principle of legal certainty seeks harmonisation with the case law of the ECtHR concerning art 6 ECHR. Article 6 ECHR guarantees the right to a 'fair and public hearing within a reasonable time by an independent and impartial judge (emphasis added)'. The *Hoge Raad* ultimately reached the conclusion that the application *mutatis mutandis* of art 6 ECHR does not mean that it also includes a reasonable time complaint that only relates to the objection stage, without the objection stage having been followed by a court hearing. The *Hoge Raad* thus dismissed the appeal in cassation.

<sup>12</sup> The *Hoge Raad* added two more considerations to its decision. First, a lengthy objection stage does not stop the party concerned from going to court. The party concerned can go to court when his case is not conducted within a reasonable time (see art 6:2 sub sec b General Administrative Law Act; *Algemene Wet Bestuursrecht*). Article 6:2 sub sec b General Administrative Law Act says that a failure to make an order in time shall be equated with an order for the purposes of statutory regulations regarding objections and appeals. As a consequence, one can enter an objection against this failure.

<sup>13</sup> Second, the *Hoge Raad* stated that excessively long proceedings in the objection stage might give rise to a compensation claim under certain circumstances. It is only said that the presumption of feelings of distress and frustration that flows from the failure to act within a reasonable time does not hold. The party concerned, who invokes the legal effects of a particular legal rule (ie art 6:162 CC, the general tort clause), thus must prove the facts that are necessary to apply the legal rule (including the fact that he did suffer damage).

### c) Commentary

This case concerns the application of the length of proceedings doctrine of the ECtHR in Dutch civil law. As follows from arts 93 and 94 of the Dutch Constitution, art 6 ECHR as such is part of the Dutch (monist) legal order. The ABRvS, as stated, has decided that the principles as developed by the ECtHR under art 6 ECHR also apply to cases that, on the basis of the ECtHR case law, are not covered by art 6 ECHR. The ABRvS therefore based its decision on the universally accepted principle of legal certainty that underlies art 6 ECHR.

It had become clear in earlier cases that the application of the length of proceedings doctrine is not restricted to administrative law. For reasons of unity of law it is important that the highest Dutch courts take into account the decisions of one another. The *Hoge Raad* in this case clearly did.

On the same day the *Hoge Raad* decided a similar decision and explicated that the application *mutatis mutandis* of art 6 ECHR does not mean that it also includes a reasonable time complaint that only relates to the objection stage, the objection stage *having been followed by a court hearing* (cf para 10).<sup>5</sup>

It is noteworthy that Advocate General of the ABRvS<sup>6</sup> Widdershoven has recently published an opinion in which he elaborates on the application of the length of proceedings doctrine by the highest courts in the Netherlands (ie the ABRvS, the *Hoge Raad*, the *Centrale Raad van Beroep* (Central Appeals Tribunal for the public service and for social security matters, CRvB), the *College van Beroep voor het bedrijfsleven* (Trade and Industry Appeals Tribunal, CBb)) in cases with a non-punitive character.<sup>7</sup>

The Advocate General was asked to give an opinion on what length of proceedings still complies with the case law of the ECtHR. The Advocate General first concluded that the highest courts at this moment do not apply equal standards to determine the length of proceedings claims. This difference in standards, however, cannot be justified. Therefore, the Advocate General in conclusion stated that the standard needs to be set at four years in total. He presented two options as regards the maximum length of different stages in legal proceedings.

The Advocate General secondly concluded that, in calculating the length of proceedings, the courts can ignore the duration of proceedings before the Court

<sup>5</sup> HR 11 January 2013, *Rechtspraak van de Week* (RvdW) 2013, 203.

<sup>6</sup> The Advocate General is a new institution in the ABRvS. The opinion referred to hereinafter was the first opinion of the Advocate General of the ABRvS in history.

<sup>7</sup> See the opinion by Advocate General *R/GM Widdershoven*, 23 October 2013, ECLI:NL:RVS:2013:1586.

of Justice of the European Union (CJEU). This rule, according to the Advocate General, applies to cases in which a court referred a question to the CJEU itself. The rule also applies in cases that are deferred due to a preliminary reference to the CJEU by another court on condition that the stay of proceedings is reasonable.

## 2. District Court of The Hague 30 January 2013, *Nederlandse Jurisprudentie Feitenrechtspraak (NJF) 2013, 99: Foreign Direct Liability: Private International Law (Akpan ea v Shell)*

### a) Brief Summary of the Facts

<sup>20</sup> One of the claimants, Friday Alfred Akpan, works as a farmer and fisherman in Ikot Ada Udo, a village in Nigeria. In 1959, the legal predecessor of defendant Shell Petroleum Development Company of Nigeria Ltd (SPDC) had constructed an oil installation in Ikot Ada Udo. In 2006 and 2007 the oil installation leaked oil twice. On 10 August 2007, SPDC was informed about the leak. On 3 and 4 September a Joint Investigation Team, including SPDC workers, tried to get access to the installation to investigate the cause of the leak and to stop it. However, members of the community of Ikot Ada Udo barred the Joint Investigation Team from entering the installation. On 7 November 2007 a SPDC worker finally gained access to the installation and stopped the leak. At the expense of SPDC, soil cover reclamation had taken place from August 2008 to March 2009.

<sup>21</sup> Friday Alfred Akpan and *Milieudefensie* (Friends of the Earth Netherlands) applied for a declaration that Shell cs (ie Royal Dutch Shell Plc, The Hague and SPDC, a foreign based subsidiary of Royal Dutch Shell Plc) had committed a wrongful act against Akpan and *Milieudefensie*, and that Shell cs are therefore liable for Akpan's damage as well as for the environmental damage. The claimants also applied for several injunctions, eg that Shell implement an adequate strategy for handling oil leaks in Nigeria.

### b) Judgment of the Court

In a decision from 24 February 2010 the District Court of The Hague declared itself competent to judge this case.<sup>8</sup> The court in the decision at issue refused to re-open this jurisdiction matter.

<sup>22</sup> As to the applicable law, the District Court of The Hague, on the basis of the Dutch Unlawful (Conflict of Laws) Act, ruled that Nigerian law applies in this case. The fact that the alleged unlawful act of SPDC had occurred in Nigeria and the fact that the alleged unlawful act of Royal Dutch Shell Plc had had its harmful effects in Nigeria are decisive in this regard.

<sup>24</sup> The District Court of The Hague explicated that the Nigerian law regarding non-contractual liability for unlawful acts finds its basis in English common law. The common law system in Nigeria is part of the federal law of Nigeria and applies in all states. Decisions of the UK Supreme Court (before 1 October 2009 House of Lords) that were decided after Nigeria had become independent do not bind Nigerian judges, although these decisions do have persuasive authority.

<sup>25</sup> Like the English common law, non-contractual liability for unlawful acts in the Nigerian legal system is based on several torts. When deciding the claims based on negligence, the District Court of The Hague applied the criteria as explained by the (UK) House of Lords in *Donoghue v Stevenson* to test whether Shell owed a duty of care, ie the criteria of *foreseeability*, *proximity*, and the *fair, just and reasonable* criterion.

<sup>26</sup> The District Court of The Hague discussed eight claims based on torts (nuisance, negligence, trespass) and concluded that SPDC had acted negligently as regards the protection of the oil installation to prevent leaks. The District Court of The Hague dismissed the other claims.

<sup>27</sup> Considering the aforementioned allowed claim, to start with, the District Court of The Hague stated that there is no precedent to follow under Nigerian law. As regards the first criterion of foreseeability, the District Court of The Hague argued that one can know in advance that an oil leak damages the people who live in the vicinity of the oil installation and who hold farms and fisheries there. The criterion of proximity is also met, as the District Court of The Hague held that, given that acts of sabotage occur frequently in Nigeria and the specific installation could be sabotaged easily, SPDC had created a dangerous situation and did not take suitable measures to end this dangerous situation. The people living in the vicinity of the oil installation in particular ran a risk of

<sup>8</sup> The Hague District Court 24 February 2010, ECLI:RBSGR:2010:BM1469, ECLI:RBSGR:2010:BM1470.

suffering harm due to an oil leak. Therefore, the criterion of proximity is met as well. The *fair, just and reasonable* criterion, lastly, is met as the District Court of The Hague concluded that the damage risk could have been reduced easily by SPDC at little cost. SPDC did not have a sufficient interest in taking adequate security measures prior to 2006. The District Court of The Hague thus concluded that SPDC had acted negligently as regards the protection of the oil installation to prevent leaks. The extent of the compensation has to be calculated in follow-up proceedings for the determination of damages (*schadestaatprocedure*).

### c) Commentary

28 Nigerian citizens in conjunction with *Milieudefensie* brought three cases before court.<sup>9</sup> In only one case the District Court of The Hague held SPDC liable for negligence for damage arising from oil leaks.<sup>10</sup> The rejection of the other claims was a result of the fact that the court had decided that the leaks in these cases were caused by sabotage. Under Nigerian law, operators cannot be held liable for such leaks. Nevertheless, the judgments of the District Court of The Hague attracted much attention amongst legal scholars (as well as amongst national and foreign press)<sup>11</sup> for its unique outcome in one case and its supposed potential impact on the development of law.<sup>12</sup>

9 See The Hague District Court 30 January 2013, ECLI:NL:RBDHA:2013:BY9845 (*Barizaa Manson Tete Doooh ea v Shell*); The Hague District Court 30 January 2013, ECLI:NL:RBDHA:2013:BY9850 (*Fidelis Ayoro Oguru ea v Shell*).

10 Claimants announced they would lodge an appeal.

11 *L. Boon*, Shell Nigeria aansprakelijk voor olieschade – moederbedrijf niet verantwoordelijk, *Nieuwe Rotterdamsche Courant* (NRC) 2013; *J. Fortein*, Shell deels veroordeeld voor olieschade in Nigerdelta, *Volkskrant* 2013; Eén veroordeling in Shellproces, *Nederlandse Omroep Stichting* (NOS) 2013; *F. Harvey/A. Hirsch*, Shell Acquitted of Nigeria Pollution Charges, *The Guardian* 2013; *J. Bithrey*, Will Shell Nigeria Ruling make Multinationals Tremble? BBC 2013.

12 *LFH Enneking*, *Zorgplichten van multinationals in Nederland*, *Nederlands Juristenblad* (NJB) 88 (2013) 744, 744. See *DJA van den Berg/IE Reimert*, *Aansprakelijkheid van Shell voor olielekkage(s) in Nigeria*, *Bedrijfsjuridische berichten* (Bb) 2013, 23; *AJP Schiff*, *Aansprakelijkheid van multinationals*, *Weekblad voor Privaatrecht Notariaat en Registratie* (WPNR) 2013, 1071; *MJC van der Heijden*, *De Shell Nigeria-zaak: de eerste Nederlandse foreign direct liability-zaak voor de civiele rechter*. Over internationale rechtmacht, toepasselijk recht, ontvankelijkheid, aansprakelijkheid en public interest litigation, *Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur* (TvOB) 2013, 71; *ME Coenraads*, *Falend toezicht in internationaal concernverband*, *Tijdschrift voor de Ondernemingsrecht-praktijk* (TOP) 2013, 129.

Enneking, in reaction to this case, places the judgment of the District Court of The Hague in the context of a more global trend of going to court in developed countries to claim compensation for damage that has allegedly been committed by multinational corporations in developing countries.<sup>13</sup> In particular she pays attention to legal cases in the United States that have been brought on the basis of the *Alien Tort Statute*.<sup>14</sup> Since the Alien Tort Statute seems to be interpreted more strictly lately, according to Enneking, foreign direct liability claims based on general principles of tort law and in particular the tort of negligence might prove a second best alternative.<sup>15</sup> In conclusion, Enneking raises several questions that still remain unanswered after the judgment of the District Court of The Hague. One of these questions might be answered soon, i.e. shall The Hague Court of Appeal or the *Hoge Raad* draw a line at a different point?<sup>16</sup>

### 3. HR 7 June 2013, Rechtspraak van de Week (RvdW) 2013, 762: Employers' Liability; Causal Link; Proportional Liability (*Lansink v Ritsma*)

#### a) Brief Summary of the Facts

Mr Ritsma worked as a painter for Lansink since 1976. Previous to this employment, Ritsma had worked as a painter for two other employers (since 1968) and as a lorry driver. Ritsma was diagnosed with two malign tumours in 2000 and became disabled. Ritsma held Lansink liable for any damage caused, including possible future damage, on 17 October 2000. Mr Ritsma died from the effects of his disease on 18 February 2001.

Mr Ritsma's claim was continued by his widow, Mrs Veenstra, and their daughter Ms Ritsma (hereinafter: Ritsma or the claimant). Mrs Veenstra died during the legal proceedings.

Ritsma thus claimed damages on behalf of Mr Ritsma's estate on the basis of art 6:107 CC (transferred loss) and independently of the estate on the basis of art 6:108 CC (loss of dependency). Ritsma argued that her father, working as a

13 Enneking, NJB 88 (2013) 744 f. See *LFH Enneking*, *Foreign Direct Liability and Beyond* (2012).

14 See the late US Supreme Court judgment: *Kiobel v Royal Dutch Petroleum Co*, 569 United States Supreme Court Reports (US) (2013).

15 Enneking, NJB 88 (2013) 750.

16 *Ibid.*

painter for Lansink, had been exposed to harmful substances that contain amines that might cause urothelial carcinoma (one of the diagnosed tumours). In addition, Ritsma's father had been exposed to substances that cause an increased risk of developing lung cancer. Lansink, according to Ritsma, breached his duty to provide adequate protection and is thus to be held liable on the basis of art 7:658 CC. Article 7:658 CC obliges the employer to provide a safe working environment in order to prevent any damage to his or her employees in the course of their employment.

#### b) Judgment of the Court

<sup>33</sup> The district court dismissed Ritsma's claim. In its judgment the court first explained that a causal link between Mr Ritsma's exposure to the harmful substances and the malign tumours is proven once it appears from the facts that the level of exposure during working hours could possibly have caused these tumours. According to the district court, this is to be interpreted as a *real* chance. The probability that the risk of the disease will materialise was determined at 17% for an average painter. In the case of Mr Ritsma this chance was less than 17% as Mr Ritsma, before he was employed at Lansink, already ran an increased risk of developing cancer.

<sup>34</sup> The court of appeal allowed Ritsma's claims. The court of appeal stated that a three-step approach should be taken to decide whether an employer is to be held liable. First, the employee has to prove the asserted fact that he was exposed to the harmful substances and that the employee's health problems might have been caused by the exposure. Second, the employer must prove that he has met his duty of care. If the employer fails to prove that he acted in conformity with his duty arising from art 7:658 CC, the criterion concerning the causal link is fulfilled. Third, the employer can still escape liability by proving that there is no causal link between the exposure and the health problems. In conclusion, the court stated that to take the first step no lower limit is set.

<sup>35</sup> Since it had become clear that the urothelial carcinoma was the primary tumour, it was only relevant to determine if Ritsma had been exposed to harmful substances that might have caused this type of cancer. According to the court of appeal, Lansink had not explained how he had met the requirements to comply with his duty of care under art 7:658 CC, despite the fact that he could have been aware of the risks. The court of appeal thus concluded that the causality criterion was met.

<sup>36</sup> Lastly, the court of appeal stated that the rule of proportional liability cannot be applied in this case, as the other potential causes of the health problems

(ie the exposure to harmful substances during Ritsma's previous employment by other employers) cannot be imputed to Ritsma.

The appeal to the *Hoge Raad* challenged the aforementioned interpretation of the employers' liability rule that derives from art 7:658 CC by the court of appeal. The court of appeal, in the first place, has shown an incorrect interpretation of the law as the court, in taking the first step, concluded that there is no lower limit. According to the *Hoge Raad*, the court's conclusion that Ritsma's health problems were due to his working conditions was based on a presumption. This presumption is justified by what is generally known about the disease and its causes, and by the fact that the employer breached its duty to create a safe working environment to prevent illness. Therefore, no such conclusion can be drawn if the presumption is very weak.

The court of appeal furthermore failed to recognise that circumstances out of the control of employers are to be attributed to the employee. This conclusion is relevant to the application of the rule of proportional liability.<sup>17</sup>

The *Hoge Raad* referred the case to the Den Bosch Court of Appeal.

#### c) Commentary

Article 7:658 CC, as said, provides the legal basis for employers' liability due to a breach of the employer's duty to create a safe working environment to prevent harm and illness. Under this provision, the *Hoge Raad* in a series of judgments, has developed rules concerning proof of causation. From *Unitiever v Dikmans* it became clear that the criterion of a causal connection between illness and exposure to harmful substances in the working environment is presumably met if the employer breached its duty to take reasonable precautionary measures.<sup>18</sup> Later this rule was clarified as the *Hoge Raad* ruled that an employee must prove (1) the asserted fact that the working conditions might have caused health problems, as well as (2) the asserted fact that the disease might have arisen in the course of the employment.<sup>19</sup>

Sahtie, after an analysis of the case at issue by the *Hoge Raad* in *Maandblad voor Vermogensrecht*, concludes that the explanation by the *Hoge Raad* of the

<sup>17</sup> See *Emaus/Keirse*, ETL 2010, 403, nos 80–85.

<sup>18</sup> HR 17 November 2000, NJ 2001, 596 (*Unitiever v Dikmans*).

<sup>19</sup> HR 23 June 2006, NJ 2006, 354 (*Havermans v Luyckx*); HR 9 January 2009, NJ 2011, 252 (*Landstroom v BAM*).

rule under art 7:658 CC makes clear that we have reached the end of the line.<sup>20</sup> This is, according to Sathie, a welcome decision for reasons of legal certainty. This does not alter the fact that employees, as a consequence, might be left with the damage if they are unable to meet the standard of proof.

42 Sathie highlights the tension in the field of employers' liability between, on the one hand, the desire to protect the weaker party (ie the employee) and, on the other hand, to prevent employers' liability from spreading. It is hard to find a proper solution though. Sathie mentions the often-heard solutions of first-party insurance and compensation funds, but comes to the conclusion that the problem of causal uncertainty will continue to exist.

43 It is worthwhile mentioning that the *Hoge Raad* on the same day passed a similar judgment in a case concerning Repetitive Strain Injury (RSI) caused by working conditions. See: HR 7 June 2013, RvdW 2013, 761 (*Sociale Verzekeringsbank v Van de Wege*).

#### 4. HR 28 June 2013, NJ 2013, 366: Negligence; Cellar Hatch Criteria (*Martina v the Country of Curaçao*)

##### a) Brief Summary of the Facts

44 Martina (the claimant) was detained in the *Bon Futuro* prison on the island of Curaçao when he became seriously injured. While playing football in the prison courtyard of cellblock 7a where he was detained, Martina's head hit one of the concrete walls. Martina as a consequence sustained paraplegia.

45 At that time, the prisoners frequently played football in the prison courtyard. In fact, football goals were made available to that purpose. The prison's gym, however, was not in use.

46 Martina applied for a declaratory judgment that the Country of Curaçao is liable for Martina's damage caused by providing a playing field that was not appropriate for playing football. The Country of Curaçao had allegedly created a danger and had failed to recognise and cover the danger.

20 S Sathie, *De aansprakelijkheid van werkgevers voor beroepsziekten krachtens 7:658 BW: zijn de grenzen bereikt?* Maandblad voor Vermogensrecht (MvV) 2013, 325.

##### b) Judgment of the Court

The Curaçao court of first instance (*Gerecht in eerste aanleg*) dismissed Martina's claim. The court of appeal (*Gemeenschappelijk Hof van Justitie van Aruba, Curaçao, Sint Maarten en van Bonaire, Sint Eustasius en Saba*) upheld the judgment of the court of first instance. Martina, before the *Hoge Raad*, argued that the court of appeal had shown an incorrect interpretation of the law, and that it had arrived at this conclusion without sufficiently comprehensible grounds, as the Country of Curaçao was to be held liable for failing to take adequate safety measures.

The question thus arose if the Country of Curaçao owed a duty of care toward Martina and whether the Country of Curaçao breached this duty. The so-called 'Cellar hatch (*Kelderluik*) criteria' was used by the court to decide whether a duty of care had existed.<sup>21</sup> These criteria indicate the probability of the negligent behaviour for the victim, the chances that damage would result from this, the gravity of damage that might occur, and the costs of taking precautionary measures.<sup>22</sup>

According to the *Hoge Raad*, the court of appeal had indeed incorrectly interpreted the law if the rejection of Martina's application was grounded on the arguments that the prisoners had made a conscious choice to play football in the courtyard, that the prisoners placed the goals immediately in front of the concrete wall, and that it is common knowledge that playing football is not without risk. These facts do not alter the fact that a risky situation had arisen in the prison, while the Country of Curaçao bore the responsibility for safe conditions in the prison. In conclusion, the *Hoge Raad* stated that the court of appeal should have decided (1) whether the Country of Curaçao could have been expected to take into account that the required care would not be exercised, and (2) subsequently could have been expected to take precautionary measures. If the court of appeal *did* consider these two aspects, the court of appeal had at least failed to state sufficient grounds for its judgment.

The *Hoge Raad* referred the case back to the court of appeal for further judgment.

21 HR 5 November 1965, NJ 1966, 136 (*Coca Cola v Duchateau, Cellar hatch, Kelderluik*).

22 See E Engelhard// Giesen, *The Netherlands*, in: P Mitchell (ed), *The Impact of Institutions and Professions on Legal Development* (2012) 155 ff.

### c) Commentary

51 As mentioned by Van Wechem, this case shows that the Chellar hatch criteria have borne the test of time and are still useful in determining these types of claims.<sup>23</sup>

## 5. HR 6 September 2013, RvdW 2013, 1037: Srebrenica Massacre, State Liability (*Netherlands State v Nuhanović*)

### a) Brief Summary of the Facts

52 Hasan Nuhanović, in 1995, was employed by the United Nations and acted as an interpreter at the compound in Potočari where the Dutch United Nations troops (the so-called Dutchbat) were camped. Nuhanović, being a UN employee, had a UN pass and was on a staff list so that he was allowed to be evacuated with the Dutchbat to a safer place after the enclave had fallen to the Bosnian-Serbian army. Nuhanović's father, mother and brother, after the enclave had fallen, had taken refuge with the Dutchbat as well. His family, however, were not on the staff list and thus had to leave the compound. The Bosnian-Serbian army killed them shortly afterwards.

53 Nuhanović held the Dutch state responsible for the damage caused by the death of his family members. Nuhanović claimed that the Dutch state had acted unlawfully as the Dutchbat had not evacuated his father, mother and brother, but sent them away.

### b) Judgment of the Court

54 The main legal questions at hand concern the attributability of the Dutchbat action to the state and the unlawfulness of the Dutchbat action.

55 The first question must be determined by rules of international law. This derives from the decision by the court of appeal that was not contested before the *Hoge Raad*. Two instruments of international law are referred to by the *Hoge Raad* to determine whether the Dutchbat action can be attributed to the state, ie the Draft Articles on Responsibility of States for Internationally

<sup>23</sup> THM van Wechem, *Kroniek vermogensrecht*, NJB 88 (2013) 2378 ff.

Wrongful Acts (DARS, 2001) and the Draft Articles on the Responsibility of International Organisations (DARIO, 2011). In short, the *Hoge Raad* upheld the judgment of the court of appeal on appeal in cassation as regards the first question.

The considerations of the court of appeal, as far as contested in cassation, 56 read as follows. The question regarding the attributability is governed by art 7 DARIO. Article 7 DARIO states: 'The conduct of an organ of a State or an organ or agent of an international organisation shall be considered under international law an act of the latter organisation if the organisation exercises effective control over that conduct (emphasis added).' Effective control must be interpreted as meaning factual control and must be determined in the light of all circumstances of the case. In the case at hand, the Dutch state did exercise effective control over the Dutchbat action. This decision, however, does not preclude the United Nations also exercising effective control.

The relevant circumstances in this case include the fact that the Dutch government was closely associated with the evacuation of the Dutchbat troops and the refugees, and also with the preparation for the evacuation. Another relevant circumstance concerns the fact that the UN Force Commander and the Dutch government, on 11 July 1995 by mutual agreement decided to evacuate the refugees.

The second question was determined by the court of appeal on the basis of 58 both the law of obligations of Bosnia and Herzegovina, and principles underlying arts 2 and 3 European Convention on Human Rights and art 6 and 7 of the International Covenant on Civil and Political Rights. This decision was not contested in cassation. The *Hoge Raad* also upheld the judgment of the court of appeal on appeal in cassation regarding the second question. According to art 79 sec 1 sub b of the Dutch Code of Civil Procedure, the *Hoge Raad* is not competent to review the interpretation of foreign national laws by the lower courts.

In short, the court of appeal stated that, on the basis of the applicable 59 norms, the Dutchbat troops were not allowed to hand the refugees over to Serbian soldiers since there was a real and foreseeable probability that these soldiers would kill the refugees or subject the refugees to inhuman and degrading treatment.<sup>24</sup>

<sup>24</sup> The Hague Court of Appeal 5 July 2011, ECLI:NL:GHSGR:2011:BR0133.



## c) Commentary

60 This case marks a significant development in the field of Dutch state liability for the *Hoge Raad* has contributed to a significant expansion of the boundaries of state liability. The Dutch state can be held liable for acting unlawfully during peace operations. This conclusion is said to have put a time bomb under peace operations, as it is now clear that the Dutch state's involvement in military operations might result in claims being brought.<sup>25</sup>

61 Parliamentary questions have been raised concerning the civil law liability of the Dutch state as a result of military operations. In response, the Minister of Foreign Affairs and the Minister of Defence in the first place stated that they could not consider the question on civil liability in future cases, as the facts and circumstance in these cases will differ from the facts and circumstances in *Netherlands State v Nuhanović*. The Ministers did not feel forced to revise their policy on employing local civilian personnel in military operations. The judgment was also not a reason to change the assessment framework for discussing the participation of Dutch troops in international military operations in Parliament. The division of responsibility is already incorporated in this framework.

62 Like *Akpan ea v Shell*, this judgment gained much attention in national and foreign press.<sup>26</sup> However, few observations of legal scholars have been published.

63 Zegveld, the claimant's lawyer (note: another case was decided on the same day, see no 64), has reported that the matter of the amount of the compensation is currently under negotiation.

64 Worthy of note is the fact that the *Hoge Raad* on the same day passed a judgment in the case *Netherlands State v Mustafić*. Mustafić, working as an electrician, shared Nuhanović's family members' lot. Surviving relatives hold the Dutch state responsible for his death.<sup>27</sup>

<sup>25</sup> *R van Rijkkevorsel*, Uitspraak Hof is bom onder vredesmissies, Elsevier 2013.

<sup>26</sup> Staat verliest 'Srebrenica', NRC 2013; NL aansprakelijk in zaak-Srebrenica, NOS 2013; Nederland aansprakelijk voor doden Srebrenica, De Volkskrant 2013; *M Price*, Dutch State Liable for Three Srebrenica Deaths – Court, BBC 2013; *M Simons*, Dutch Peacekeepers Are Found Responsible for Deaths, NY Times 2013; *M Corder*, Srebrenica Massacre: Netherlands Liable For Deaths of Three Bosnian Muslim Men, Court Rules, Huffington Post 2013.

<sup>27</sup> See HR 6 September 2013, NJ 2013, 1036 (*Netherlands State v Mustafić* cs).

## 6. Personal Injury

Over the years legal academics have repeatedly observed the fact that the amount of non-pecuniary damages has stagnated. It is notable that much attention has been paid to the determination of non-pecuniary damages this year. First, the contributions to the 2012 annual Groningen Personal Injury Conference have been published and concern the value of non-pecuniary damages. Second, Karapanou published a dissertation on the method of Quality Adjusted Life Years for improving the assessment framework for damages for pain and suffering. Thirdly, *Verkeersrecht* (Traffic Law, Dutch journal) published a special issue on non-pecuniary damages.<sup>28</sup> Finally, two decisions by lower courts illustrate the fact that the doctrine of non-pecuniary damages is under debate.<sup>29</sup>

In *Aegon v X* the Amsterdam Court of Appeal dismissed an appeal by a claimant who argued that the method of Quality Adjusted Life Years be applied to determine non-pecuniary damages.<sup>30</sup> The court of appeal briefly stated that this method does not fit within the determination of non-pecuniary loss.

The District Court Central Netherlands in *Zürich Lebensversicherungs-Gesellschaft v X* decided that a person in a coma who is barely conscious can claim non-pecuniary damages. The court based its decision on the aims, goals and functions of tort law. These aims, goals and functions include full compensation for a loss that was caused by an unlawful act, protection of victims, and redress for one's shocked sense of justice. The court awarded a considerable amount of non-pecuniary damages (€100,000), after having elaborated on the amount of damages for non-pecuniary loss in similar cases in England and Germany. It did, however, not rise above the maximum that has been previously awarded in the Netherlands (€150,000).<sup>31</sup>

<sup>28</sup> *Verkeersrecht Special smartengeld* (2013) 7/8.

<sup>29</sup> See *R Rijnhout*, Een juridische werkelijkheid (?): de vertaalslag van leed naar geld, *Letseel & Schade* 2013, 3.

<sup>30</sup> Amsterdam Court of Appeal 2 July 2013, ECLI:NL:GHAMS:2013:2216 (*Aegon v X*).

<sup>31</sup> *SD Lindenbergh* in reaction to: De Uitspraak: Heb je recht op smartengeld als je in coma ligt en niets voelt? NRC 2013.

## C. Literature

### 1. *AJ Akkermans et al, Ontwikkelingen rond medische aansprakelijkheid. Pre-Advies 2013 van de Vereniging voor Gezondheidsrecht [Medical liability: developments] (Sdu uitgevers, 2013)*

<sup>68</sup> This volume contains the contributions to the annual conference of the Dutch Health Law Association. The theme of the 2013 annual conference of the association was medical liability. The contributions published in this volume deal with developments in the field of Dutch medical liability (*JL Smeethuizen/AJ Akkermans*) respectively the introduction of a no-fault system in Belgium (*T Van sweevel*).

### 2. *N Elbers, Empowerment of injured claimants. Investigating claim factors, procedural justice and e-health, 2013* (available online)

<sup>69</sup> The aim of Elbers' research that underlies this dissertation was threefold, i.e. 'to (1) learn more about the effect of the compensation process on health, (2) investigate the causes of the negative effect on claimants' health and (3) examine whether claimants' well-being can be improved' (*ibid*, 197). In conclusion, Elbers states that more attention must be paid to the negative effect of the compensation process on claimants' health, as the compensation process, which is actually aimed at the recovery of a claimant, should not frustrate claimants.

### 3. *JM Emaus, Handhaving van EVRM-rechten via het aansprakelijkheidsrecht [Enforcing ECHR rights by means of liability law] (Boom Juridische uitgevers, 2013)*

<sup>70</sup> This dissertation focuses on how Dutch liability and damages law can contribute to the enforcement of ECHR rights, assuming as a starting point that liability and damages law should be constitutionalised. After analysis of the characteristics of the Dutch general tort clause (art 6:162 CC) and the characteristics of

ECHR law, Emaus comes to the conclusion that there are at least two fundamental differences. These differences refer to the basic principles that contain the basis for the legal rules (ie art 6:162 and the substantive provisions in the ECHR).

The first difference relates to the core elements that derive from the basic principles underlying the general tort clause and the ECHR. One of the core elements that derive from the basic principles underlying art 6:162 CC ('each shall bear his own damage' and 'not to injure another') is *harm*. Harm, however, is not found in the basic principles underlying the ECHR. These principles are human dignity and fundamental freedom. The second difference stems from the first and says that the general tort clause is thus aimed at answering the question under what circumstances a person is obliged to remedy the disadvantage caused by their act or omission. The criteria in art 6:162 CC aim to answer this question. To conclude, Emaus states that the nature of fundamental rights justifies a new basis in Dutch liability law in addition to the unlawful act, creating a specific approach to enforce fundamental rights: *the breach of a fundamental right*.

### 4. *W Eshuis, Werknemerscompensatie in de steigers [Workers' compensation under construction] (BigBusinessPublishers, 2013)*

This thesis is the result of a theoretical and empirical study of the effects of five different compensation schemes regarding workers' compensation. Two central questions underlie this study. First, Eshuis explores the relationship between workers' compensation and the prevention of work-related injuries and illness. The second question concerns the design of a workers' compensation scheme. Eshuis poses the question how workers' compensation can contribute to optimal prevention of work-related injury and illness.

Eshuis concludes that two organisational characteristics influence the prevention of work-related injury and illness, being the responsibility of a workers' organisation towards its environment and the communicative relationship in a workers' organisation. The existing compensation schemes that are based on four paradigms (ie the paradigm of reflexive law, the rational-academic paradigm, the protection paradigm and the incentive paradigm) have little influence on these two organisational characteristics. Therefore, Eshuis proposes to add two new paradigms: the so-called intervention paradigm and the pragmatic prevention paradigm.

**5. V Karapanou, Towards a Better Assessment of Damages for Pain and Suffering for Personal Injuries. A Proposal based on Quality Adjusted Life Years (Erasmus MC, University Medical Center Rotterdam, 2013)**

74 The concept of Quality Adjusted Life Years (QALYs) is a method to assess the correctness of damages for pain and suffering. Karapanou advocates that this concept should be used as a framework to improve the framework to assess damages for pain and suffering.

75 Karapanou first investigates the goals of tort law as regards damages for pain and suffering and the requirements that must be met in order to achieve those goals. Karapanou explains how damages for pain and suffering for personal injuries are approached in England, Germany, Greece, Italy and the Netherlands. None of these approaches meet the aforementioned criteria. After also elaborating on the goals and criteria of the economic approach to tort law in relation to damages for pain and suffering, Karapanou concludes that criteria that are currently missing must be added to the framework in order to assess damages for pain and suffering.

**6. ALM Keirse/RHC Jongeneel, Eigen schuld en medeaansprakelijkheid [Contributory negligence and joint liability] (Kluwer, 2013)**

76 This monograph provides an up-to-date and in-depth analysis of the doctrines of contributory negligence and joint liability. It is written for both legal practitioners and legal scholars.

**7. E de Kezel, Asbest, gezondheid en veiligheid. Ontwikkelingen in het aansprakelijkheidsrecht [Asbestos, health and safety. A comparative analysis of tort law applied to asbestos cases] (Intersentia, 2013)**

77 This dissertation is based on a comprehensive comparative law study of tort law in asbestos cases. De Kezel has studied four questions in particular: 'What is asbestos health damage and what is (has been) the social relevance of the pres-

ence of asbestos in society? Why has asbestos all of a sudden become an important social issue? How have the legislator and the courts dealt with the regulation and the enforcement of asbestos health risks and what developments have resulted from this? How have the legislator and the courts dealt with asbestos health damage and what developments have resulted from this?' De Kezel dived into Belgium, French and Dutch law and came up with an extensive elaboration on asbestos, health and safety.

**8. CJM Klaassen (ed), In de schaduw van het slachtoffer: Inleidingen gehouden op het symposium van de Vereniging van Letselschade Advocaten 2013 [In the shadow of the victim: contributions to the Annual Conference of the Dutch Association of Personal Injury Lawyers] (Sdu uitgevers, 2013)**

This volume contains the contributions to the annual conference of the Dutch Association of Personal Injury Lawyers (*Vereniging van Letselschade Advocaten*, LSA). The contributions deal with third party damage in personal injury cases (Rijnhout), loss of dependency (Meijjet), nervous shock and affectionate damage in the light of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) (Koerselman), the Class Action (Financial Settlement) Act (Tzankova), and the impact of the ECHR on Dutch personal injury law (Van Maanen).

**9. WJJ Los et al, Collectieve acties in het algemeen en de WCAM in het bijzonder [Class actions and the Dutch Class Actions (Financial Settlement) Act] (Boom Juridische uitgevers, 2013)**

This volume contains the contributions to the 2012 annual conference of the Dutch Association for Procedural Law (*Nederlandse Vereniging voor Procesrecht*, NVvP).

**10. JDWE Mulder, Compensation. The Victim's Perspective (Wolf Legal Publishers, 2013)**

80 This dissertation contains five chapters on victim compensation. From the fact that Mulder has a background in economics, it is easily explained that she unfolds an economic perspective on victim compensation first. The second chapter reports on Mulder's findings of a survey that Mulder conducted with recipients of the Dutch Crime Compensation Fund. Central question in this chapter is therefore 'who receives compensation from the Dutch Crime Compensation Fund and how do these victims perceive financial compensation?' In chapter three Mulder explicates an in-depth analysis of the results she has presented in the previous chapter, ie on victims' satisfaction with compensation. After having elaborated on the symbolic value of money, Mulder reaches the conclusion that victim compensation might benefit from economic research. She introduces the *homo reciprocans* and states that she hopes to persuade economically oriented scholars from now on to prefer this *homo reciprocans* perspective instead of the *homo economicus* perspective.

**11. FT Oldenhuis/H Vorseelman (eds), De waarde van smartengeld [The value of non-pecuniary damages] (Boom Juridische uitgevers, 2013)**

81 This volume contains the contributions to the 2012 annual Groningen Personal Injury Conference. The contributions deal with the stagnating amount of compensation for non-pecuniary loss (Frenk), a rights-based approach to the law of damages (Verheij), the perspective of a judge deciding questions of fact compared to the perspective of the *Hoge Raad* on non-pecuniary damages (De Groot), the role of the representative of a party and the role of the insurer with respect to discussing the calculation of non-pecuniary damages (Van Dijk).

**12. FT Oldenhuis/H Vorseelman (eds), Werkgevers-aansprakelijkheid; een grensverleggend debat [Employers' liability; a revealing debate] (Boom Juridische uitgevers, 2013)**

82 This volume contains the contributions to the 2013 annual Groningen Personal Injury Conference. The contributions deal with difficulties in the system of em-

ployers' liability (Bolt), the carefree employee (Aarts), the Belgium regulations concerning accidents at work as an example for the Dutch (Weyts), and compensation of work-related damage in the year 2013 (Hartlief).

**13. E Onderdelinden, Schadevergoeding bij overlijden. Een onderzoek naar een alternatief systeem voor de berekening van schade door derving van levensonderhoud bij overlijden [Compensation in the case of death. In search of an alternative system for the calculation of loss of maintenance in the case of death] (Celsus Juridische uitgeverij, 2013)**

This book reflects Onderdelinden's study into compensation in the case of death. Onderdelinden studied case law, foreign legal systems and legal practice in search of an alternative system for the calculation of loss of maintenance. In conclusion, Onderdelinden unfolds this alternative to calculating loss of maintenance.

**14. BM Pajmans, De zorgplicht van scholen. De grondslag en reikwijdte van de civielrechtelijke zorgvuldigheidsnorm van scholen jegens leerlingen [The duty of care of schools. The legal basis and scope of the civil law standard of due care of schools toward their pupils] (Kluwer, 2013)**

The subject of this dissertation is the duty of care of schools toward their pupils. 84 The volume contains a general part followed by analyses of four particular situations in schools, for which the duty of care can vary.

In the first part Pajmans gives insights into the background of educational law, the history of the liability of schools, and the foundation of the duty of care of schools. In the second part Pajmans presents a comprehensive analysis of the duty of care in four particular situations in schools: accidents (*ongevallen*), physical education and sports practice (*bewegingsonderwijs en sportbeoefening*), bullying, abuse and violence (*pesten, misbruik en geweld*) and the quality of education (*kwaliteit van het onderwijs*).

In conclusion Pajmans states that the duty of care of schools is special for 86 the reason that 'it hovers between public and private interests and their transla-

tion into law.' This fact, however, does not imply that the duty of care of schools can be defined as a special duty of care, as it was defined in earlier Dutch case law.

### 15. *F Sobczak, Liability for Asbestos-Related Injuries (Universitaire Pers Maastricht, 2013)*

87 'Due to its remarkable properties, asbestos was once considered as a magical material, which has led to its use in more than 3,000 products. The past, however, is irreversible: we have to deal with the consequences of our acts and omissions', according to Sobczak. In his thesis, Sobczak presents the results of his research into Dutch non-contractual liability law and English tort law, as a means to deal with the consequences of asbestos exposure.

88 Sobczak in particular pays attention to the problem of causal uncertainty (chapter 2), as well as to the solutions that have been found to address the problem (chapter 3). Lastly, Sobczak discusses the assessment of the probability of causation as, during legal proceedings, such an assessment often comes up (chapter 4).

89 In conclusion, Sobczak emphasises that it is impossible to determine in an individual case the actual exposure to asbestos during a certain period in life. As a result, the assessment of cumulative exposure always involves a speculative element. Furthermore he notes that one should realise that epidemiology and legal decision-making are two different disciplines. Bringing these disciplines together in legal proceedings requires prudence and multi-disciplinary interaction. According to Sobczak, lastly, the doctrine of proportional liability 'seems to produce the most reasonable results in claims for lung cancer that could have been asbestos-related and should be applied in preference to the traditional principle of all-or-nothing compensation'.

### 16. *TFE Tjong Tjin Tai, De schadestaatprocedure [The follow-up proceedings for the determination of damages] (Kluwer, 2013)*

90 *De schadestaatprocedure* provides an up-to-date analysis of the proceedings for the determination of damages. Under Dutch law, after liability has been established, the determination of damages takes place in follow-up proceedings, the so-called *schadestaatprocedure*. This volume is mainly written for legal practitioners.

### 17. *RP Wijne, Aansprakelijkheid voor zorggerelateerde schade – Een onderzoek naar obstakels in het civiele aansprakelijkheidsrecht en alternatieve voor verhaal van zorggerelateerde schade [Liability for care-related harm. A study regarding obstacles in civil liability and alternatives to recover care-related harm] (Boom Juridische uitgevers, 2013)*

This in-depth study concerns two main topics: obstacles in civil liability and alternatives to recover damages in the case of care-related harm. By way of interim conclusion, Wijne states that the obstacles in civil liability might explain the small number of victims of care-related harm claiming compensation. According to Wijne, the indicated obstacles might lead to frustration and may make civil liability a time-consuming and costly matter. Although the studied alternatives also have their disadvantages, Wijne concludes that they may form a basis for a recommendation: 'The most important recommendations relate to a reallocation of the burden of proof with respect to the violation of standards and the setting-up of a medical division at one court.'