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XIX. The Netherlands

A. Legislation

1. Affection Damage: Wet van 11 april 2018 tot wijziging van het Burgerlijk Wetboek, het Wetboek van Strafvordering en het Wetboek van Strafrecht teneinde de vergoeding van affectieschade mogelijk te maken en het verhaal daarvan alsmede het verhaal van verplaatste schade door derden in het strafproces te bevorderen, Staatsblad (Stb) 2018, 132

The legislative proposal on affection damage, outlined in the 2015 report, was adopted by the House of Representatives on 9 May 2017, was accepted by the Senate on 10 April 2018, and entered into force on 1 January 2019. This legislative amendment, in brief, provides a legal basis for the compensation of so-called affection damage or bereavement damage for relatives of the victims of an unlawful act. The bereaved or relatives have an independent claim, provided that all requirements for an unlawful act are fulfilled and the victims sustained severe and permanent injuries or died because of this unlawful act. In a decree of 20 April 2018, the amounts of damages applicable to certain groups of relatives are fixed, varying from € 12,500 to € 20,000, depending on the type of damage that occurred (either serious and permanent damage or death) and whether the damage was caused by a crime.[1] **1**

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1 Besluit van 20 april 2018 tot vaststelling van bedragen voor nadeel van naasten dat niet in vermogensschade bestaat.

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2. Redress of Mass Damage in a Collective Action: Wet van 20 maart 2019 tot wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken, Stb 2019, 130

2 The most important change this legislative proposal, which was outlined in more detail in the 2014 and 2016 reports and adopted in 2019, proposed is to make it possible to claim damages in a collective action.[2] It entered into force on 1 January 2020. This legislative renewal (art 3:305a Dutch Civil Code, DCC) allows the redress of mass damage in a collective action by providing a legal basis for a collective damages action. If more representative organisations (or vehicles) wish to institute a claim, the judge will designate the most suitable organisation from among them as the 'exclusive representative vehicle'. The victims can then withdraw from the collective representation of interests by making use of an opt-out. If the parties resolve the matter through a settlement, there is a second possibility for the injured parties to use an opt-out. If no negotiated settlement is reached, the court will make a binding decision about the settlement of the damage.

B. Cases

1. Hoge Raad (Supreme Court, HR) 22 February 2019, ECLI:NL:HR:2019:272: Professional Error of an Attorney due to Failure to Bring an Appeal to the Supreme Court on Time (*X*/*Groenendijk*)

a) Brief Summary of the Facts

3 In the years 2009–2012, a suspect of multiple crimes was assisted by a lawyer in criminal proceedings. He was sentenced both in the first instance as well as on appeal to unconditional imprisonment; on appeal he was also condemned to

2 *JM Emaus*/*Anne LM Keirse*, The Netherlands, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2014 (2015) 411, nos 3–6; *JM Emaus*/*Anne LM Keirse* in: E Karner/BC Steininger (eds), ETL 2016 (2017) 393, no 3.

pay financial compensation to three victims. The convicted man instructed his attorney to submit an appeal on his behalf, but his lawyer failed to do so. This professional error was considered well founded by the *Raad van Discipline* (Disciplinary Council) on 27 January 2014. The applicant stated that he suffered damage as a result of this professional error. The attorney, however, disputed this causal relationship. She argued that the chance that a timely appeal in cassation would have led to a more favourable outcome in the criminal case was nil, or at least negligible.

4 The applicant requested an expert report, both at first instance, on appeal and in cassation. The basis for this request was that it must be assessed how the appeal in cassation would have been decided if it had been brought in time, or at least that the damage should be assessed on the basis of the chances that he would have had in that case. The applicant had proposed the appointment of a cassation attorney specialised in criminal matters as an expert. The request was rejected by the court of first instance. On appeal, the judgment of the court of first instance was upheld. In its judgment, the Court of Appeal (*Gerechtshof*) referred to earlier case law of the *Hoge Raad* and the loss of chance doctrine *(kansschade)*. The Court of Appeal cited the *Baijings* case[3] in which the *Hoge Raad* ruled that the question of whether, and to what extent, an attorney's professional error of neglecting to file a claim or an appeal in time caused damage to the (former) client should be answered by judging the possible outcome in the original case and determining the damages based on that outcome leading to an all-or-nothing result, or, at least by a hypothetical evaluation of the chance of success in the original case, whereby damages are awarded on that evaluated chance of probable success. The Court of Appeal stated that this judgment as to whether the claim or appeal would have succeeded is up to the judge and that the applicant's request, on the contrary, was related to a legal assessment by an expert and not about the facts that can be proven by an expert's assessment.

b) Judgment of the Court

5 In cassation, the applicant challenged the decision of the court of appeal by stating that the judge only assesses the probability of damage (*kansschade*) if that chance is not nil or negligible, and that this is a fact that can be proven. The

3 HR 24 October 1997, Nederlandse Jurisprudentie (NJ) 1998, 257.

Hoge Raad in its decision (*beschikking*) first and foremost replicated its previous ruling as cited above and added – with reference to HR 21 December 2012[4] – that there is only room for an assessment of the damage, based on the chances that the client would have had in a situation in which the claim or appeal had been filed in time if it concerns a realistic possibility, ie not a very small possibility of success. A provisional expert report (art 220 *Wetboek van Rechtsvordering*, Dutch Code of Civil Procedure, Rv), as requested by the applicant, may serve to enable a party to provide clarity on the basis of the expert report issued to obtain certainty about the facts and circumstances relevant to the decision, and thus to decide whether or not to continue or initiate legal proceedings. The judge does not have discretionary power in this respect and should order such an expert report, provided that the request is relevant and sufficiently specific, and that it concerns facts that can be proven with this expert report. The *Hoge Raad* ruled that, in a case such as the one at hand, the question is whether, in the appeal that should have been filed, it would have been decided that the court had applied the law properly and had sufficiently substantiated the judgment that should have been challenged by the appeal. This is a legal assessment that the court itself can and must perform, and not a fact that lends itself to a furnishing of proof (*bewijsvoering*). Such assessment must be made by the court in a legal procedure that may be brought by the applicant against the defendant, in a so-called trial within a trial. A provisional expert report is only appropriate when it relates to facts that, when proven, lead to evidence (*bewijslevering*).

c) Commentary

6 The case deals with a situation where damage may or may not have occurred due to the professional negligence of an attorney. To answer the questions of whether or not, and if so to what extent, the fault caused damage and therefore whether or not liability for this damage should be established, it must be determined whether benefits would have been gained had the error not been committed. In a trial within a trial, the parties (the attorney that made the error as the defendant and his former client as claimant) should argue what the outcome would have been had the appeal been correctly filed in time and the judge

4 ECLI: NL: HR: 2012: BX7491.

should decide the issue after hearing these arguments. In general, the court will be able to decide the issue leading to an all-or-nothing result: the appeal, had it been filed correctly, would have been successful and therefore liability is established or, on the contrary, the appeal had no chance of success and would have been dismissed. In case the outcome of the hypothetical appeal is not certain, but the client did lose a realistic chance of winning his case, liability for the loss of a chance should be established and an assessment of the damages should be made on the basis of the chances that the client would have had if the claim or appeal had been filed in time. Damages will then be awarded in proportion to the probability of obtaining a benefit or avoiding a loss. In any case, regardless of whether an all-or-nothing or proportional approach is taken, this concerns a legal assessment, considered to be the core business of judges. Therefore, it is for the parties to put forward their arguments, but for the judge to decide the case.

2. HR 22 February 2019, ECLI:NL:HR:2019:269: Liability of an Estate Agent; Provision of Incorrect Information (*NVM-meetinstructie II*)

a) Brief Summary of the Facts

The appellant in cassation, an estate agent, is a partner in a general partnership (*vennootschap onder firma*). The respondents in cassation viewed two properties in Apeldoorn on 12 August 2014, and bought one of them. The estate agent had acted as selling agent. The website *Funda* and a sales brochure, provided to the buyer by the estate agent and two partners (also appellants in cassation), stated that the property had a living area of approx 150 m^2. After signing the purchase contract for the house on 18 August 2014, the buyers received two sets of drawings of the house, which had been used in the past for the building permit, on which the same size of the living area was mentioned. After the sale, an expert measured the property in accordance with the measurement instructions applicable to brokers of the *Nederlandse Vereniging voor Makelaars en Taxateurs* (Dutch Organisation of Real Estate Agents and Appraisers, NVM) – an organisation to which the appellant is also affiliated. According to the report, the total surface of the living area was only 124 m^2. 7

The buyers demanded a declaration in law that the appellants acted unlawfully towards them (*verklaring voor recht*), and argued for a finding of joint and several liability, claiming compensation of € 32,847. The Court of Appeal ruled 8

that the estate agent acted unlawful by not complying with the measuring instructions provided by the NVM. With regard to the amount of damages to be paid, the Court of Appeal ruled that a comparison has to be made between the situation in which the buyers would have been if they had been correctly informed (hypothetical situation) and the actual (current) situation. The buyers stated that they would not have bought the house if they had been aware of the actual situation (ie the true size of the total living area). Therefore, the Court of Appeal ruled that the amount of damages has to be decided based on the value-reducing aspect, assessed at the time of the purchase, due to the fact that the living area was 124 m² and not 150 m². The Court had intended to order an expert report to assess the value of the property at the time of the sale with its true area of 124 m². However, before it actually came to an appointment of an expert, an appeal in cassation against the interlocutory judgment was brought by the estate agent.

b) Judgment of the Court

9 In cassation, the estate agent challenged the (interlocutory) judgment of the Court of Appeal because, as the estate agent argued, the unlawful act consisting of providing incorrect information with regard to the living area did not cause a reduction in the value of the property; furthermore, the estate agent objected to the way in which the damages had been calculated by the court. According to the estate agent, damages have to be calculated by making a comparison between the real situation and the hypothetical situation, meaning the situation in which no unlawful act happened. This hypothetical situation would lead neither to a different total living area nor to a different value of the house. According to the *Hoge Raad*, if the estate agents had complied with the NVM instructions, the area would have been noted as 124 m², but the house would still not have had an area of 150 m² – in summary, providing an incorrect figure did not affect the value of the property. Therefore, according to the *Hoge Raad*, the argumentation of the Court of Appeal is incorrect.

10 The buyer stated that he would not have concluded the agreement if he had known the true living area. This statement was not contested by the estate agent. According to the *Hoge Raad*, after the case is referred back to a Court of Appeal, the amount of damages has to be calculated by comparing the actual situation and the hypothetical situation in which NVM's instruction would have been complied with. Important in that respect, according to the *Hoge Raad*, is also that the court estimates the extent of the damage in a way most consistent with the nature of the damage caused. Further, when the extent of the damage

cannot be assessed exactly, it has to be estimated (art 6:97 DCC). The judge has a certain amount of freedom in this.

c) Commentary

The scope of duties of care towards third parties is a hot issue in Dutch tort law. **11**
In this case, the *Hoge Raad* confirms its previous ruling (HR 13 July 2018[5]) that estate agents do not exercise proper care when they provide incorrect information regarding the area of living space in the sales information of a house. Third parties, ie a buyer of a house, may suffer damage due to the breach of the duty of care. However, it is not always easy to correctly assess whether or not, and if so to what extent, damage is suffered. What would the buyer have done if the measurement had not been incorrect? Would the buyer have bought the house in any case, or would he have lost interest in buying the house had he known the true size of the gross floor space? Would the buyer have lowered his offer and would the seller have accepted that lower offer? In practice it turns out to be rather complicated to settle these cases and case law concerning the assessment of damage on the basis of art 6:97 DCC in cases such as these is now awaited.

3. HR 15 March 2019, ECLI:NL:HR:2019:376: Unlawful Detention; Harm Otherwise 'as a Person'

a) Brief Summary of the Facts

The plaintiff in this procedure was sentenced to life imprisonment and was de- **12**
tained in the most high security prison in the Netherlands, the Extra Secured Establishment (EBI) in Vught. He was detained there for 350 days, however wrongly, instead of a less severe detention regime. Unlawfulness of the State's actions towards the claimant was established in these proceedings. The former prisoner claimed damages for the fact that he was improperly detained in the EBI.

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5 ECLI:NL:HR:2018:1176, as discussed by *JM Emaus/Anne LM Keirse*, The Netherlands, in: E Karner/BC Steininger (eds), ETL 2018 (2019) 415, nos 50–54.

13 Based on art 6:106 (b) DCC (in conjunction with art 6:95 DCC), an individual has a right to immaterial damages if the person suffering the loss sustained physical injury by unlawful acts, was harmed in his honour or good name or if his person has been otherwise afflicted. The first two grounds do not apply in the present case. The former prisoner argued that he was, by the detention, harmed 'otherwise as a person', in the sense of art 6:106 (1) under b DCC. Both the court of first instance and the court of appeal assumed that this was not the case and rejected his claim. In cassation, the former prisoner argued that the Court of Appeal set the bar too high when considering claims for compensation of pain and suffering. In the present case, the *Hoge Raad* was asked to redefine the concept of being harmed 'otherwise as a person' or, in any case, to explain it further.

b) Judgment of the Court

14 The *Hoge Raad* started by stating that it was already established that the State had committed an unlawful act. In addition, it was not contested that the former prisoner did not suffer any mental injury according to objective standards. The *Hoge Raad* ruled that an entitlement to compensation for pain and suffering pursuant to art 6:106 (1) subpara b DCC exists in the event of personal injury, violation of honour or good name or if someone is harmed otherwise in person. The third category includes mental injuries (which is the case if the injury is recognised by psychiatry[6]) if they are sufficiently substantiated on the basis of objective standards.[7] Furthermore, according to the *Hoge Raad*, the nature and severity of the violation of the norm and the consequences thereof for the injured party can also entail that someone is 'otherwise harmed as a person' (with reference to the Parliamentary History (Book 6, 279 f) and to HR 29 June 2012[8]). In order to prove the existence of such infringement, the injured party will – in principle – have to substantiate the infringement of being harmed otherwise as a person with concrete data.

15 However, in some cases, the nature and severity of the breach of the norm and the consequences thereof can lead to the conclusion that the relevant negative consequences for the injured party are so obvious that it can be assumed that his person has been 'otherwise afflicted'. According to the *Hoge Raad*, this

6 See HR 22 February 2002, ECLI:NL:HR:2002:AD5356.

7 HR 23 January 1998, ECLI:NL:HR:1998:ZC2551.

8 ECLI:NL:HR:2012:BW1519, NJ 2012/410.

was the case in the cases on the New Year's riots (HR 9 July 2004[9]) and on wrongful life (HR 25 March 2005[10]). The *Hoge Raad* ruled, however, that an infringement of fundamental rights does not immediately lead to the assumption of being harmed 'otherwise as a person' (art 6:106 (1) subpara b DCC). According to the *Hoge Raad*, the former prisoner insufficiently substantiated why his detention in the EBI led to a right to compensation of immaterial damage and the Court of Appeal was not wrong in deciding that it was not established that his person was otherwise afflicted. The *Hoge Raad* therefore considered the appeal unfounded.

c) Commentary

Whether or not the mere infringement of a fundamental right constitutes a basis for awarding compensation for immaterial damage has been debated in literature. The *Hoge Raad* has given a clear, negative answer to this concrete question, but the judgment raises other questions concerning the scope of the right to immaterial damages. Although 'the nature and severity of the violation of the norm and the consequences thereof' is quite broadly formulated, an intention to create such a broad field of application does not appear from the ruling. It is also unclear how the different types of infringement of the person may influence the amount of compensation for pain and suffering to be paid. **16**

An important clarification made by this ruling is that the category of cases under art 6:106 (1) subpara b DCC, as outlined by this ruling (ie where, due to the nature and severity of the breach of the norm and the consequences thereof, an infringement 'as a person' can be assumed), are put on an equal footing with those falling under the category of mental injuries that are recognised by psychiatry. Required for such violations of the norm is that they must be somehow related to the interest of the person, have a certain seriousness and have the aim of protecting fundamental personal interests. Also the consequences of the breach of the norm must have a certain seriousness, whereby the consequences (of a certain seriousness) are plausible. It will be the future tasks of judges to give further concretisation of the mentioned seriousness of these elements. **17**

9 ECLI:NL:HR:2004:AO772.

10 ECLI:NL:HR:2005:AR5213.

4. HR 22 March 2019, ECLI:NL:HR:2019:412: Starting Moment of Limitation Period

a) Brief Summary of the Facts

18 In 1966 a multi-storey car park was built in Zandvoort. A four-metre-high wall bordered on one side with an external staircase of the car park and provided access to a parking deck of the car park. On the other side, in 1974, a driveway was built to the parking spaces, belonging to the adjacent apartment building (which was also built in 1974). In April 2015, an expert determined that this driveway was built without a retaining structure to compensate for the difference in height in the ground surface. As a result, over a period of forty years, the wall was not able to withstand the ground pressure and the weight of crossing vehicles. As a result, the wall became instable and this gave rise to a dangerous situation. The municipality had the wall demolished, and instead, had a lower wall built.

19 The association of owners of the car park demanded a declarative judgment (*verklaring voor recht*) that the association of owners of the apartment building, in its capacity as building owner on the basis of art 6:174 (1) DCC, should be liable for the reimbursement of the demolition and repair costs of the partition wall, as the wall had to be demolished on behalf of the municipality. The association of owners of the apartment building defended itself against this by arguing that the prescription period had lapsed as the defect that caused the wall to become instable existed since 1974. Based on art 3:310 (1) DCC, a right of action to claim damages or a contractual penalty becomes prescribed on the expiry of five years from the day following the one on which the injured person has become aware of both the inflicted damage or the fact that the contractual penalty has become due and demandable and the identity of the person who is liable for this damage or contractual penalty, and in any event twenty years from the day on which the event that caused the damage or that made the contractual penalty become due and demandable occurred. At least after the limitation period of twenty years after the event that caused the damage, the claim of the association of owners of the parking garage would have been time-barred. When did the event that caused the damage occur? According to the Court of Appeal, the event cannot be pinpointed to 1974 taking into account the subsequent continued absence of a land restraint, and the ground pressure that the weight of the driveway, whether or not in combination with vehicles on the driveway, continued to exert on the wall. The Court of Appeal therefore used a so-called *pro rata* approach, according to which, the prescription period had lapsed for a part of

the legal claim. The limitation started the day after the event that caused the damage, which is partly by the weight of the driveway, partly due to the use of the driveway between 1974 and 1995. This has to be calculated based on an expert report.

b) Judgment of the Court

20 The question to be addressed by the *Hoge Raad* is at what time the event that caused the damage (in the sense of art 3:310 (1) DCC) occurred. The *Hoge Raad* ruled that the event that caused the damage in the present case cannot be pinpointed at one moment, because the wall was skewed for years due to the constant pressure. Furthermore, in art 6:174 DCC the act or behaviour that caused the damage is not the central element, but the defective and dangerous condition that caused the damage (*schadeveroorzakende toestand*). The limitation period of twenty years is based on legal certainty[11] and should be based on a fixed starting point in time to be determined based on objective criteria. In order to prevent uncertainty about the starting point in time of the twenty-year limitation period, the *Hoge Raad* introduced the new legal rule that (in analogy with art 3: 310 (3) DCC) in a case 'such as this', ie where the event that caused the damage cannot be traced to one moment, this period begins to run as soon as the defective and dangerous condition that caused the damage has ceased to exist. With its judgment, the *Hoge Raad* provided a nuance to HR 25 June 1999[12], where art 3:310 (3) DCC was ruled to be only applicable to claims based on art 3:310 (2) DCC. The *Hoge Raad* refers to the Parliamentary History to a Law of 24 December 1992 (Stb 691), and states that it is plausible that the rule of art 3:310 (3) DCC was in accordance with already applicable law before the introduction of this legal provision.

c) Commentary

21 In this ruling, the central question is whether the claim in any case will expire twenty years after 'the event that caused the damage' (art 3:310 DCC), and whether the construction of the driveway can be regarded as an 'event'. According to the *Hoge Raad*, this is not the case, because art 6:174 DCC is linked to the

11 See HR 31 October 2003, NJ 2006/112.

12 ECLI:NL:HR:1999:ZC2934.

situation that caused the damage, not to the act that caused the damage. One can conclude that a situation can also be regarded as an event that caused the damage, even if there is no underlying act that caused the situation.

22 Moreover, the *Hoge Raad* discusses the continuing nature of the event and rules that this implies that the event cannot be reduced to one single moment. The twenty-year period should therefore be considered to start to run as soon as the event causing the damage has ceased to exist (end of the continuous unlawful act). The question that existed previously in doctrine, namely whether the rule of art 3:310 lid 3 DCC could be applied analogously to cases other than environmental pollution, has been answered positively, at least for liability pursuant to art 6:174 DCC. This is remarkable considering the earlier judgment of the *Hoge Raad* in which this question was answered in the negative (HR 25 June 1999[13]). Although the wording used ('in a case like this') seems to indicate a limitation of the scope of application of the decision of the *Hoge Raad*, it would not be inconceivable to extend the reasoning behind the decision to all cases of continuous unlawful acts.

5. HR 12 April 2019, ECLI:NL:HR:2019:590: Extra-Judicial Costs without Demonstrable Damage

a) Brief Summary of the Facts

23 A securities lease was concluded between (the predecessor of) Dexia and a buyer, whose securities lease ended with a negative balance. The buyer did not want to be bound by the so-called Duisenberg settlement, and had chosen for the opt-out declaration. In 2012, Dexia wanted to settle this securities leasing case in accordance with earlier cases decided by the *Hoge Raad* (in 2008 and 2009)[14] and the further interpretation thereof by the Amsterdam Court of Appeal (of 2011;[15] the so-called *Hofmodel*). Only the residual debt was paid. Dexia's authorised representative offered the buyer the opportunity to prove that he would also be entitled to compensation of damage. If not, the buyer could sign and return a waiver. The buyer of the securities lease product refused to follow

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13 ECLI:NL:HR:1999:ZC2934.

14 HR 28 March 2008, ECLI:NL:HR:2008:BC2837 and HR 5 June 2009, ECLI:NL:HR:2009:BH 2815.

15 Gerechtshof Amsterdam 1 December 2009, ECLI:NL:GHAMS:2009:BK4978, BK4981, BK4982 and BK4983.

this procedure and did not sign. Dexia therefore asked the court for a negative declarative judgment (*negatieve verklaring voor recht*), stating that it had met all its obligations to the buyer and had no further obligations towards him. After rejection of the claim by the court of first instance, his claim was granted by the Court of Appeal (as the buyer's claims were unfounded). In cassation, the customer/buyer argued that this was wrong.

b) Judgment of the Court

According to art 3:303 DCC, sufficient interest is needed to start a legal action. **24**
According to the customer, Dexia did not have sufficient interest in its claim. He stated that compared to the gains of Dexia by receiving the requested negative declarative judgment, ie closing its books, his interest in awaiting the developments in case law in the area of security lease contracts was more important and deserved more weight in the balancing of interests. The *Hoge Raad* ruled that the Court of Appeal, in its assessment, had not committed a legal error. The obligation to state and prove the proposition that forms the basis of a declarative judgment rests on the party that demands it. Dexia had adequately substantiated its sufficient interest. Ending the uncertainty of both the liability question and the outcome of pending dossiers is in principle a sufficient interest as postulated by art 3:303 DCC. The fact that the customer had an adverse interest should not prevent Dexia from exercising its right of action.

In the event of private investors who turn to an independent estate advisor, **25**
the latter has a special duty of care. In the current situation, however, namely where an investor has shown interest in the provider of the securities lease for these agreements (in this case after being approached by Dexia by means of cold calling), a case which is not essentially different from an earlier case decided by the *Hoge Raad* (HR 5 June 2009[16]), the investor needs to indulge himself more into possible risks of the securities lease product.

c) Commentary

The ruling of the *Hoge Raad* that a sufficient interest for a negative declarative **26**
judgement is needed, and that the plaintiff has an interest in such a negative

16 ECLI:NL:HR:2009:BH2815.

declarative judgment, is understandable considering the wish of the claimant not to be sued in court for claims in the future. An explicit statement on this matter, however, by the *Hoge Raad*, which referred to the idea of legal certainty as regards the legal relationship between parties within a reasonable period of time, had been lacking until this case. In the event of a negative declarative judgment, the obligation to substantiate and prove the existence of claims lies on the defendant. The person requesting the negative declarative judgment, however, only has to state that claims are non-existent. If the defendant denies this, and states that claims do exist, the burden of proof for this defence rests on him.

27 Parties in court cannot demand that their procedures are postponed to await answers to legal issues in similar cases in the hope that this will strengthen their legal position. This would be an infringement of the right of the opposite party as laid down in art 6 of the European Convention on Human Rights (ECHR) to legal certainty with a decision of the court within a reasonable time. Besides, the legal issues at stake can also be answered in the procedure itself.

6. HR 19 July 2019, ECLI:NL:HR:2019:1278: No Abstract Damage Estimation for Houses in Groningenveld (*Earthquake Damage Groningen*)

a) Brief Summary of the Facts

28 Since the 1960s, gas has been extracted from the Groningen field. This gas extraction takes place pursuant to a concession granted by the Dutch State to the *Nederlandse Aardolie Maatschappij NV* (NAM), but is exploited by Shell, Esso and EBN together. On 27 March 1963, the (legal predecessor of) EBN, (the legal predecessor of) NAM and (now) Shell and Exxon (in their capacity as shareholders of NAM), concluded an agreement of cooperation, in which EBN and NAM concluded a partnership (the Groningen Partnership). As a result of gas extraction from the Groningen field, earthquakes occurred in Groningen and caused damage to immovable property. In the present proceedings, claimants (inhabitants of immovable property above the Groningen field from 26 July 1999 onwards) sought a declarative judgement that NAM, EBN, the Partnership and the State are jointly and fully liable for damage they have suffered as a result of earthquakes caused by gas extraction from the Groningen field, and claim financial compensation from these parties for the damage they suffered.

On 10 October 2018, the Court of Appeal of Northern-Netherlands by interlocutory judgment, on the basis of art 32 Rv, requested a preliminary ruling from the *Hoge Raad*[17]. The questions, amongst others, concerned the grounds on which the liability of NAM, EBN and the State could rest; the (causal) connection between the grounds for liability and the amount of damages to be paid; and the (heads of) damage that could be compensated. Important questions are: whether the decrease in value due to the risk of earthquakes, as the result of gas extraction, can be regarded as damage for which the operator is liable, even if the damage has not yet manifested itself at the time of the sale of the house; and if so, what is the reference date for the damage assessment (Q7a); whether there may be reimbursement for missing out on living enjoyment (Q8); and whether mental distress resulting from the earthquakes caused by the exploitation of mining activities may be qualified as non-material damage which is eligible for compensation (Q9a). 29

b) Judgment of the Court

In its decision of 19 July 2019, the *Hoge Raad* discussed two grounds for liability: strict liability of art 6:177 DCC and the general tort clause of art 6:162 DCC. It postulated that art 6:177 (1), introduction and under b, DCC, holds the operator of a mining work strictly liable. It reads that the operator of mining works shall be liable for a loss arising from soil movement caused by the installation or operation of the works. The nature of the liability is one of the points of view that are to be considered in determining the extent of the compensation to be paid (as part of the multifactor approach and according to art 6:98 DCC, EvD/AK). However, it cannot be inferred from this that the scope of the financial obligation to compensate damage based on strict liability is generally less or, on the contrary, more extensive than that of an obligation to compensate damage based on art 6:162 DCC. What the consequences of strict liability are for the scope of the compensation to provide financial compensation depends on the nature and scope of the relevant strict liability. Despite the wide allocation of the damage that takes place in the event of liability on the basis of art 6:177 DCC, cases may arise in which the injured party may be in a more favourable position if his claim is not (or not only) based on art 6:177 DCC, but (also) assessed on the basis of art 6:162 DCC. 30

The *Hoge Raad* ruled that the (Dutch) State acted unlawfully based on art 6:162 DCC if it was aware or must have been aware (i) that gas extraction in 31

17 Rechtbank Noord-Nederland 10 October 2018, ECLI:NL:RBNNE:2018:4009.

Groningen involved hazards/dangers related to soil movement; (ii) that the chance of these hazards materialising were real; and (iii) that the materialisation of these dangers could lead to serious or widespread losses, but nevertheless failed to take timely and appropriate measures in view of the circumstances of the case to prevent damage caused by gas extraction. Against the background of the circumstances of the case, no other conclusion is possible – according to the *Hoge Raad* – than that the State knew, at least from 1 January 2005, or should have been familiar with (i) the dangers associated with gas extraction in Groningen; (ii) the real(istic) chance of these hazards materialising and (iii) the fact that the realisation of these hazards could lead to serious or widespread loss. The answer to the question of whether the State acted unlawfully by failing to take appropriate and reasonably necessary measures does not lend itself to an answer by the *Hoge Raad* in these preliminary ruling proceedings, since that answer is partly factual in nature. In general, the *Hoge Raad* ruled, the question as to whether an act or omission of the State is unlawful must, where appropriate, be answered in accordance with the minimum requirements that the relevant provisions of the ECHR and the relevant case law of the ECHR impose on the act or omission of the State.

32 If physical damage to buildings or works occurs, which by its nature could reasonably have been the result of the movement of the soil as a result of the construction or operation of a mining work for the extraction of gas from the Groningen field, this damage is presumed to be caused by the construction or operation of that mining work. The *Hoge Raad* ruled that if these requirements for applying the assumption of proof of art 6:177a para 1 DCC (which entered into force in 2017) are met, the operator of the mining work can only successfully rebut this assumption if it succeeds in proving – which includes making it sufficiently plausible – that the damage was not caused by the construction or operation of the mining work.

33 According to the *Hoge Raad*, the extent of the operator's obligation to compensate for the damage that consists in the depreciation of a home that is the result of the risk of future soil movement above the Groningen field – in a way as considered by potential buyers – and that has not yet manifested itself by means of a (serious attempt to) sell the property, cannot yet be assessed and calculated. The extent of the damage can only be estimated when there is a geophysical sufficiently stable condition. This does not affect the fact that the judge has the possibility of granting an advance payment to the injured party in cases such as the present if this is reasonable given the circumstances of the case, which is the case if it is sufficiently plausible that the injured party ultimately will suffer losses. The *Hoge Raad* ruled that, for loss of enjoyment of life, financial compensation can be claimed. If facts are established from which the damage suffered can generally be deduced, but the extent thereof cannot be accu-

rately determined, this damage must be estimated (art 6:97 DCC). For cases in which the living enjoyment of a resident above the Groningen field is affected by the movement of the soil as a result of the construction or operation of mining work, the estimation of the resulting living enjoyment must in principle be made by calculating the difference between (i) the market-based rent that a tenant would have paid for the home over the months in which the living enjoyment was lost if he had rented the property in the current situation in which land movements have taken place and can still take place, which means that the rent is adjusted based on the fact that land movements have occurred and can still occur, and ii) the market-based rent that a tenant would have paid for the house if there were no ground movements. The financial loss of a tenant can be established for the months for which enjoyment of living has been reduced by looking at the difference between i) the market-based rent for the house in the current situation in which the living situation is lost because soil movements have taken place and can still take place, and ii) the rent actually paid by the tenant over those months.

Compensation for damage that does not consist of material loss can, 34
amongst others, be claimed if the injured person sustained physical injuries or if his honour or reputation is injured or if his person has been otherwise afflicted (art 6:106, subpara b, DCC). The *Hoge Raad* ruled that moral damage (such as anxiety) caused by the movement of the soil as a result of the construction or operation of a mining work may consist in harm to a person that falls under the category of being 'otherwise afflicted as a person'. For the application of this category, the general standards developed by the *Hoge Raad* apply, although one has to take into consideration the fact that the claim for financial compensation for damage caused by the movement of soil as a result of the construction or operation of a mining work is based on art 6:177 DCC. Therefore, whether someone is 'otherwise afflicted as a person' is assessed on the basis of the nature and seriousness of the event that was at the basis for liability, and the nature and seriousness of the consequences of that event for the injured party. According to the *Hoge Raad*, in order to claim that the injured party has been 'otherwise harmed as a person' (art 6:106, introduction and subpara b, DCC), he has to substantiate this infringement with concrete data. It is insufficient that the injured person lives in the area where earthquakes are often felt and damage is suffered, in combination with a personal statement from that injured person about the influence that the earthquakes have on him. The extent of an obligation to compensate for the harm of being 'otherwise afflicted as a person' cannot be determined 'more or less in a lump sum' (*forfaitair*). That does not prevent the court from deciding that it is given with the severe nature and seriousness of the event that gave rise to liability that the relevant negative consequences for

residents of a certain area above the Groningen field are so obvious that it can be assumed that the residents are harmed otherwise as a person and are therefore entitled to at least a certain (financial) amount of damages.

c) Commentary

35 In addressing the nine preliminary questions (with sub-questions), various topics from the law of damages are dealt with. The applicability of the general law of damages has been clarified; it will be a useful tool for the judge to decide on liability claims in the Groningen area. With regard to the liability of the State, it is interesting to see that in deciding the question of whether the State's (lack of) action violates arts 2, 3 or 8 ECHR, similar criteria as those in the famous *Cellar Hatch* case are applied. The failure to act can be regarded as failure in supervision in a broad sense, namely in conducting research and in implementing policy and regulations.

36 What the consequences of strict liability are for the scope of the duty to provide financial compensation depends on the nature and scope of the relevant strict liability. Apparently, this can vary depending on the type of (strict) liability. For now, unfortunately, this means that it is unclear what weight each of the strict liabilities has in the calculation of damages based on art 6:98 DCC.

37 Although the amount of damages covering the claimed loss of value can only be estimated if a sufficiently stable situation in geophysical terms is reached, it is possible to make an anticipatory assessment of the damage that has not yet occurred, after an evaluation of the favourable and unfavourable probabilities, and payment of financial advances, but only if it is sufficiently certain that the loss of value will be suffered. The *Hoge Raad* therefore requires a (geophysically sufficiently) stable condition to establish the existence of damage; without such a stable condition, it cannot yet be determined that damage existing in the loss of value has or will be suffered.

7. HR 20 September 2019, ECLI:NL:HR:2019:1409: Liability of the State for Unlawful Issuing a Firearm (*Alphense Shooting Case*)

a) Brief Summary of the Facts

38 In 2011, the mentally disturbed Tristan van der V shot 23 random passers-by in the *De Ridderhof* shopping centre in Alphen aan den Rijn, after which he com-

mitted suicide. Six of his victims died. Others were seriously injured. Oddly enough, an official police report had already been drawn up against the shooter in 2003 for a violation of the Weapons and Ammunition Act, for the use of an air pressure weapon. As a result, a permit application for possessing a firearm was refused by the chief of police in 2005. In 2006, Tristan van der V was admitted to a psychiatric hospital under the *Wet bijzondere opnemingen psychiatrische ziekenhuizen* (Act on Compulsory Admission to Psychiatric Hospitals), and this detention was also extended due to the serious suspicion that, as a result of the detainee's mental disorder, he was a threat to himself. In 2007, he (again) became a member of a shooting club. In 2008, the chief of police granted a permit for possession of a firearm with ammunition – the employee who handled the permit application was not aware of the earlier application from 2005 or of the incidents from 2003 that were the reason for refusing the application. This permit was extended in 2009 and 2010.

39 Fifty-one victims and surviving relatives who suffered injuries and/or death, as well as fifteen retailers whose property was damaged brought an action against the National Police, regional unit The Hague – successor of the *Politieregio Hollands Midden* (police region Centre of Holland, PHM – hereafter: the Police). Primarily they claimed damages, subsidiarily they sought a declarative judgment. The legal basis of their claim was that the Police, in taking the decision regarding the possession of the firearm (the 'permit'), did not take into account all relevant circumstances, and because of this, unjustly, did not apply the relevant legislation in a restrictive manner. The court of first instance rejected the claim due to the fact that the violation of the norm by the Police was not intended to protect the individual property interests of the victims and therefore they cannot claim compensation for that violation (art 6:163 DCC). The Court of Appeal, however, arrived at a different conclusion. According to the Court of Appeal, the violated standard/norm must be deemed to have a (specific) purpose in protecting the citizen in his individual interest against the harmful consequences of the (mis)use of a firearm.

b) Judgment of the Court

40 In cassation, the Police challenged the judgment of the Court of Appeal but also some of the victims independently appealed in cassation against the denial of claim for some heads of losses other than those resulting from injury and death. The two appeals were joined and handled together. The *Hoge Raad* ruled that the question of whether the breached standard serves to protect against damage such as that suffered by the person suffering the loss and claiming compensa-

tion (a prerequisite for liability according to art 6:163 DCC: legal causation condition or the so-called requirement of relativity) should be answered by considering the purpose and scope of the breached standard and by ascertaining which parties, what types of harm and what ways of arising of damage fall within the protective scope of the violated norm. After all, relativity is required with regard to the injured party, the harm suffered and the way the harm was caused. Furthermore, the *Wet wapens en munitie* (Weapons and Ammunition Act, WWM) serves unmistakably to protect the safety in society (with reference to the Parliamentary History of the legislation of 1919, which preceded the WWM of 1997). A permit for keeping a firearm can only be granted, extended and remain in force if it is clear that this is justified in safety terms. The reason for this stringent system, according to the *Hoge Raad*, is the severity of the risks associated with the possession of firearms. In view of this ground, it must be assumed that the rules are not only intended to promote the safety of society in general – as was the case with regard to the rules at issue in a previous case of the *Hoge Raad* (HR 7 May 2004[18]) – but also to prevent individual citizens from becoming victims of (unjustified) possession of firearms. Granting a permit in a case where it was or should have been clear that the permit was not justified is, therefore, unlawful towards victims of the firearm use, which was made possible in this way.

41 The Court of Appeal rejected the Police's argument that there was no causal link (*conditio sine qua non*) between the permit granted to the shooter to hold a firearm and the shooting incident. The reason given by the Police was that the shooter would otherwise have obtained a weapon (illegally) without the permit and, therefore, the incident would also have taken place. According to the *Hoge Raad*, the documents in the case do not allow any other conclusion other than that the Police insufficiently substantiated their argument as regards the causal connection. In light of the nature of the breached norm, it was up to the Police to concretely substantiate its claim that the shooter in fact would have obtained and used an illegal weapon and that therefore a *conditio sine qua non* was lacking. The *Hoge Raad* confirmed the establishment of an adequate causal link (without endorsing the argumentation of the Court of Appeal leading to this conclusion).

42 A final aspect regards the judgment of the Court of Appeal that some types of losses other than injury and death cannot be attributed to the Police. The Court of Appeal based this judgment solely on the fact that the nature of those

18 ECLI:NL:HR:2004:AO6012, NJ 2006/281 (*Duwbak Linda*).

other types of damage does not generally justify a broad allocation of damage as personal injury does. The *Hoge Raad* ruled that it cannot generally be considered that, if the Police acted unlawfully towards an injured person as in this case, damage caused by the shooting incident other than injury and death cannot be attributed to the Police at all. After all, the standard violated by the Police is not only intended to protect against injury and death, but also against other damage caused by the use of firearms. The mere circumstance that other damage in general is considered less serious than injury and death is not sufficient to regard the attribution of that damage altogether as unjustified. The *Hoge Raad* ruled that this does not alter the fact that it is possible to deny attribution of that damage to the event that caused the damage on another ground, for example on the ground that the connection between the damage and the event upon which the liability is based was too remote or was not or less foreseeable.

c) Commentary

This ruling is important because of the possibilities of limiting liability through relativity, causality and the doctrine of reasonable attribution. As regards relativity, the *Hoge Raad* decided that (just like in HR 7 May 2004[19]), the government, after careless investigation, wrongly granted a permit with which the government had to guarantee the safety of the public. In deviation from *Duwbak Linda*, and contrary to previous scholarly opinion, a less stringent approach is taken by the *Hoge Raad* in the current case. Possibly, the reason for the strict permit system is the risks that are connected with the possession of firearms. The *Wet wapens en munitie* is not only intended to promote the safety of society in general, but also to prevent individual citizens from becoming victim to irresponsible possession (and use) of firearms. It appears that the examination of the purpose and scope of the breached standard/norm is not only based on the parliamentary history, but also on teleological arguments and arguments based on the system of the law. **43**

From this ruling it appears that attribution of property damage or economic losses cannot be categorically excluded. However, on the basis of this case, it cannot be ruled out that in the procedure awarding damages (a so-called *schadestaatprocedure*), the non-attribution of certain parts of the material damage suffered can be based on another ground eg on the fact that the causal relation is too far removed. This seems relevant. Such non-attribution in this case **44**

19 Ibid.

might be justified also considering the fact that the liability of the government and therefore also its blameworthiness is of secondary nature.

8. HR 20 December 2019, ECLI:NL:HR:2019:2006: Judicial Order to the Dutch State to Take Measures against Climate Change (*Netherlands*/*Stichting Urgenda*)

a) Brief Summary of the Facts

45 Urgenda was initiated by the Dutch Research Institute for Transitions (Drift) at Erasmus University Rotterdam, an institute for the transition to a sustainable society. Urgenda is a citizens' platform with members from various domains in society, such as the business community, media communication, knowledge centres as well as governmental and non-governmental organisations. The platform is involved in the development of plans and measures to prevent climate change. Global warning has serious consequences and is the result of increased emissions, which have increased since the industrial revolution. As this increase is caused by humans, its decrease can also be achieved by limiting the emissions below 2° Celsius compared to the average temperature in the pre-industrial era.

46 In its letter to the Prime Minister dated 12 November 2012, Urgenda requested the State take measures to reduce CO2 emissions in the Netherlands by 40% by 2020, at least by a minimum of 25%, as compared to the emissions in 1990. The Dutch State's targets are lower and thereby it implicitly acknowledges that its actions are insufficient to prevent dangerous climate change. Urgenda urged the Netherlands to do more. The response of the Dutch government was unsatisfactory. Urgenda brought a collective action (cf art 3:305a DCC) against the State. Urgenda concluded that the Netherlands is knowingly exposing its own citizens to danger and that the State committed an unlawful act (art 6:162 DCC). The Urgenda Foundation and its co-plaintiffs believe that preventing dangerous climate change is not only morally and politically the right thing to do, but that it is also a legal obligation that cannot be ignored. Urgenda asked the court to oblige the State to reduce the emissions by at least 25%.

47 The Hague court of first instance ruled that the State must take more action to ensure a reduction of greenhouse gas emissions in the Netherlands.[20] The

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20 *JM Emaus*/*Anne LM Keirse*, The Netherlands, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2015 (2016) 401, nos 42–54.

State also has to ensure that the Dutch emissions in 2020 will be at least 25% lower than those in 1990. After the Dutch State brought an appeal, the Court of Appeal upheld the decision of the court of first instance.[21] The court changed the basis for liability and applied arts 2 and 8 ECHR as the basis for its judgment, as these relate to the positive obligations of the State, based on the case law of the ECtHR. The Dutch State brought an appeal in cassation.

b) Judgment of the Court

On appeal, the *Hoge Raad* based its judgment on the UN Climate Convention (1992) and on the legal obligations of the State to protect the lives and well-being of citizens in the Netherlands. The Netherlands is included among the Annex I countries that must take the lead in combatting climate change and have committed themselves to reducing greenhouse gas emissions. These legal obligations are anchored in arts 2 and 8 ECHR. The urgent need to reduce greenhouse gas emissions by at least 25% by developed countries by the end of 2020 is based on scientific studies. In 1997, the Kyoto Protocol was agreed between a number of Annex I countries, including the Netherlands, which sets the target of reducing greenhouse gases by 25% to 40%. **48**

According to the *Hoge Raad*, the State has not explained why a lower reduction can be considered justified and can still lead in time to the reduction targets as accepted by the State. The perspective taken by the State is a constitutional one, namely that decisions on reductions of gases have to be made by politicians (cf the idea of *trias politica*). According to the *Hoge Raad*, however, the State has a constitutional duty to apply rulings from the ECtHR. Judges have to offer legal protection as an (essential) element of democracy and have to protect the limits of law. The *Hoge Raad* therefore ruled that the Court of Appeal could decide as it did, namely that the State is obliged to take measures to actualise a 25% reduction by the end of 2020, due to the risk of dangerous climate change that could also seriously affect the residents of the Netherlands in their right to life and well-being. The State also complained to the *Hoge Raad* that an obligation to reduce emissions is not based on international obligations. The *Hoge Raad* did not consider this to be the case because of European rules (ECHR), the liability under UN conventions, the fact that the Netherlands is party to various climate agreements, and an Annex I country. Therefore the *Hoge Raad* ruled in favour of Urgenda and confirmed that governments have **49**

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21 *Emaus/Keirse* (fn 5) nos 55–72.

binding legal obligations, based on international human rights law, to undertake measures leading to greater reductions in emissions of greenhouse gases.

c) Commentary

50 At the 15th Annual Conference on European Tort Law, we reported on the Dutch tort law case Urgenda versus the Dutch State that became worldwide breaking news, covered by The Guardian, the New York Times, Al Jazeera, Le Monde, BBC, The Economist and many more. Last year, at the 18th Annual Conference, we presented the participants of this conference with the sequel of this case. This year, at what would have been the 19th Annual Conference on European Tort Law, we would have discussed the final decision in this historic climate case if this conference had not been cancelled because of concern about the spreading of the new corona virus.

51 This case has put climate change at the top of everyone's agenda. Dutch citizens sued their government over inaction on climate change and they won; three times in a row! In the Urgenda case in first instance, in 2015, the Dutch district court in The Hague legally obliged the Dutch State to take better precautions against climate change. It was ruled that the State has done too little to prevent a dangerous climate change and is doing too little to catch up, at least in the short term. The court ordered the State to limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, so that this volume will have decreased by at least 25% at the end of 2020 compared to the 1990 level.

52 The significance of this Dutch case for climate change policy and litigation has been the subject of many discussions since then, in the Netherlands but also abroad. It was the world's first successful climate litigation case. Around the world, one wondered whether Urgenda would survive the appeal. The appeal – at The Hague Court of Appeal – took place in 2018 and was therefore our topic choice for last year's Conference looking back at the major developments in tort law in the previous year. Against several odds, the Court of Appeal decided to uphold the initial verdict. The appeal court rejected the appeal of the Netherlands. The Dutch State still maintained that the legal arguments raised were valid and appealed to the Dutch *Hoge Raad*. The Dutch State stated that it was committed to reducing emissions by 25% by 2020. Nevertheless, it commenced cassation proceedings to address the question of principle regarding the government's freedom of choice in relation to policy.

53 There were believers and non-believers. The rightful place of activism is not the courtroom, but the House of Parliament, so the non-believers say. It has been argued that the court did not respect the constitutional principle of separa-

tion of powers. The *Hoge Raad* was urged to put the government back in charge, and restore the balance of powers. But on the other hand, the Urgenda ruling has also been applauded. Many consider it a major victory for the climate and for future generations. States should protect their citizens and if politicians do not do this of their own accord, then the courts are there to help. The Dutch *Hoge Raad* agreed, shared Urgenda's view on this matter and Urgenda won again. The order that the Netherlands has to reduce its emissions by a minimum of 25% by the end of 2020 compared to 1990 levels was confirmed in this final decision.

The point of view of the State that decisions on reductions of gases are to be made by politicians failed. According to the *Hoge Raad*, it is a constitutional duty of the State to apply rulings from the ECHR. Judges have to offer legal protection as an (essential) element of democracy, and have to protect the limits of law. 54

The point of view of the State that an obligation to reduce emissions is not based on international obligations also failed. The *Hoge Raad* ruled to the contrary because of European rules (ECHR), the liability which arises under UN conventions, the fact that the Netherlands is party to various climate agreements, and an Annex I country. 55

This case has transformed Dutch climate change policy and inspired climate change cases in many other countries. The lesson to be learned is that courts can initiate change, provided that the other branches of government are willing to accept it. 56

9. Personal Injury

The important case law and legislative developments in the context of personal injury have been summarised above. The most important legislative development is that the legislative proposal on affection damage entered into force on 1 January 2019. This legislative amendment, in brief, provides a legal basis for the compensation of so-called affection damage or bereavement damage for relatives of the victims of an unlawful act. With this amendment, the legislator eventually met a need among family and relatives, emerging from legal research[22] and practice. 57

22 *AJ Akkermans*, Slachtoffers en aansprakelijkheid. Een onderzoek naar behoeften, verwachtingen en ervaringen van slachtoffers en hun naasten met betrekking tot het civiele aansprakelijkheidsrecht (2008).

58 In case law, two important decisions relevant for personal injury cases deserve to be highlighted. Both in HR 15 March 2019 (Case no 3 above)[23] and in HR 19 July 2019 (Case no 6 above),[24] the *Hoge Raad* ruled that the nature and severity of the violation of the norm and the consequences thereof for the injured party can entail that his person has been 'otherwise afflicted' as meant in art 6:106 (1) subpara b DCC even though a physical or mental injury is not established and that in some cases this nature and severity can lead to the conclusion that the relevant negative consequences for the injured party are so obvious that being afflicted 'otherwise as a person' can be assumed. The *Hoge Raad* ruled, however, that an infringement of fundamental rights does not immediately lead to the assumption of such damage and therefore does not automatically lead to a successful claim for damages based on art 6:106 (1) subpara b DCC.

59 Also in literature, attention was given to questions regarding the compensation of personal injury as will be illustrated in the following section. A new monograph[25], for example, examines under which circumstances, if there is no objectifiable mental injury, but there is grief, tension, frustration, annoyance or other discomfort, grounds can exist to assume liability for such pain.

C. Literature

1. *DA van der Kooij*, Relativiteit, causaliteit en toerekening van schade: een onderzoek naar de grenzen van contractuele en buitencontractuele aansprakelijkheid [Relativity, causality and imputation of damage: a study into the limits of contractual and extra-contractual liability] (Kluwer 2019)

60 In this dissertation, Van der Kooij examines the limits of (contractual and extra-contractual) liability, and studies the role of relativity, causality and imputation of damage, with the aim of mapping out the scope of liability. Van der Kooij discusses liability issues, and also discusses debates that have taken place in recent years about the design of the causality test for determining the remoteness

23 ECLI:NL:HR:2019:376, no 10 ff.

24 ECLI:NL:HR:2019:1278, no 26 ff.

25 *SD Lindenbergh*, Psychische schade (1st edn 2019) no 60.

of damage and to determine the amount of damages to be paid. He disputes the rules of causation as formulated by Brunner in this regard. The author sets the limits of liability in an overarching way, making explicit the limits within the requirements of relativity and imputation, giving the reader insight into the latest developments in this area.

2. *I Giesen*/*SNP Wiznitzer*/*ALM Keirse*/*WS de Zange*r (eds), Assumpties annoteren: rechterlijke veronderstellingen empirisch en juridisch getoetst [Annotating assumptions: judicial assumptions empirically and legally tested] (Boom juridisch 2019)

61 The use of empirical insights into legal practice and legal science can be very valuable; this certainly also applies in the field of (criminal or civil) liability law. The link between law and empirical data potentially leads to legal rules that are (more) in line with the reality of everyday life. The fact that any (degree of) influence or direction of legal practice, and in particular the judiciary, is actually under discussion through empirical insights is underlined by the fact that judges regularly use empirically oriented assumptions in their judgments. This fact prompted the authors in this collection to mirror some of the judicial assumptions used in this way to existing empirical and legal normative insights. After all, with many of these assumptions, one can ask whether they are 'true' or whether they have a sufficient empirical basis. What does the answer to that question mean for the argumentative value of the assumption? That is the core of what the various contributions in this work aim to expose.

3. *SD Lindenbergh*, Psychische schade: civielrechtelijke aansprakelijkheid voor schade door aantasting van geestelijke gezondheid, verdriet, angst, spanning, frustratie, ergernis en (ander) onbehagen [Psychological damage: Mental injury civil liability for damage caused by affecting mental health, sadness, fear, tension, frustration, annoyance and (other) discomfort] (Boom juridisch 2019)

62 Psychiatric disorders can lead to invalidity at least as much as physical disorders. Psychological damage nevertheless raises questions of its own in liability

law, for example in relation to unlawfulness, relativity, causal connection and concept of damage. These are brought together in this book on the basis of areas in which psychological damage manifests itself: sexual abuse, overburdening oneself through work, confrontation with a shocking event. When there is no objectifiable mental injury, but sadness, tension, frustration, annoyance of other discomfort, there can be no question of assuming liability. This book also explores the circumstances under which this is the case.

4. *MR Hebly*, Schadevaststelling en tijd [Damage assessment and time] (Boom juridisch 2019)

63 In his dissertation, the author discusses the assessment of damage as well as the qualification and quantification of legally compensable losses. At some point in time, the compensation of loss requires a conclusive judgment on the question of whether and to what extent legally relevant damage has been suffered. A complicating factor is that the event giving rise to the claim can cause a variety of factual consequences that unfold over time. Until the moment of judgment, and sometimes also afterwards, facts and circumstances may arise that provide further insight into the consequences of the damage-causing event for the injured party. This dissertation investigates the role of the time factor in the assessment of legally compensable loss. The aim of this dissertation is to gain knowledge and insight, but it also strives to add a directional vision to the Dutch literature on the law of damages. It focuses on Dutch law, and includes materials from the legal systems of Belgium, France, Germany and the UK, as sources of inspiration and as sharpening stones for the analysis.

5. *FT Oldenhuis et al*, Juridische aspecten van gaswinning: Een 'Groningse' Verkenning [Legal aspects of gas extraction: A 'Groninger' Exploration] (Wolters Kluwer 2019)

64 This book explores legal aspects about gas extraction and liability. The publication discusses all existing arrangements with regard to the settlement of claims in chronological order, places them in perspective and, where necessary, comments on them. Current topics such as 'Draft Temporary Act Groningen' and the preliminary ruling of the Supreme Court were included at the last minute.

6. *AJ Verheij*/*A Vorsselman* (eds), Verkeersaansprakelijkheid [Traffic liability] (Boom juridisch 2019)

Traffic accidents are an important cause of personal injury. Road traffic li- 65
ability is therefore a major issue for people who are professionally involved in the settlement of personal injury claims. For that reason, the 12th Groningen Personal Injury Congress on 1 October 2018 was devoted to the theme of Road Traffic Liability. This book contains the updated, written elaborations of the presentations held on that occasion. Topics discussed by various experts in this book are: the flaw of art 6: 174 of the Dutch Civil Code (liability of the road manager) in relation to the layout of the road, objects on the road, warnings and road surface, the burden of proof under art 185 WVW, arts 6:162 BW and 6:174 BW, the importance of the WAM guidelines for the scope of liability from art 185 WVW, the justification of the 50% rule and the 100% rule in the case of contributory negligence, the advantages and disadvantages of first party insurance and points for attention when analysing the way a traffic accident happened.