

XVIII. The Netherlands

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A. Legislation

1. Fixed Collection-Costs in Obtaining Extra-Judicial Payments *Wijziging van Boek 6 van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering in verband met de normering van de vergoeding voor kosten ter verkrijging van voldoening buiten rechte*¹

A legislative amendment has been proposed to protect consumers and small- to medium-sized companies, such as one-man businesses, against unreasonable collection-costs incurred in obtaining extra-judicial payments. Art 6:96 Civil Code contains three types of loss that can be claimed as patrimonial damages, amongst which are those regarding reasonable costs in obtaining extra-judicial payments (para 2, subsec C). This proposal is put forward to amend the latter subsection, by means of adopting a ground for a governmental decree, in which the maximum allowed collection-cost can be fixed. **1**

Based on established case law, the current regime dictates a twofold reasonableness inquiry: both the claim for extra-judicial collection-costs as well as the amount of these costs must be deemed reasonable. Contractual agreements on extra-judicial costs (negotiating a fixed rate or a particular percentage of the principal due sum) are common. A judge may reduce such rates on the grounds of art 242 Code of Civil Procedure. Nevertheless, the reasonableness norm has offered insufficient guidance to determine the amount of reimbursement in the extra-judicial phase, as debtors who are confronted with collection-costs are already mired in a state of uncertainty. Furthermore, it is unlikely that debtors will initiate litigation proceedings for claims relating to relatively small amounts. **2**

* We are greatly indebted to our student-assistant F Merab Samii for all the magnificent work he did in preparing this contribution.

1 Documents of the Second Chamber of Parliament (2009–2010) 32 418.

Additional legislative clarification of the rule is therefore deemed to be necessary for the removal of such legal uncertainties, potentially benefiting both debtor and creditor.

- 3 In the governmental decree, the maximum collection-cost shall be fixed for contractual obligations for the payment of a principle amount of € 25,000 or less. The maximum allowed reimbursement is calculated as a percentage of the principal amount, incrementally decreasing as the principle amount increases: reimbursement for an initial principal amount of up to € 2,500 may not exceed 15 % of that sum, decreased by a maximum of 5 % above the subsequent € 2,500 of the principal amount. Reimbursement for a further € 5,000 of the principal amount may not exceed 5 %, whilst the collection-cost reimbursement is decreased by a maximum of 1 % over the final principal amount of € 15,000. The minimum amount for reimbursement of collection-costs is fixed at € 40. The provision is of a mandatory nature.

2. Extending the Age Limit for Liability for Minors

Voorstel van wet van het lid Çörüz 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 jaar²

- 4 A legislative amendment was proposed some time ago and revitalised last year on extending the liability rules regarding minors and their parents. The issue of the liability of minors has been subject to lengthy debate in the Dutch parliament, particularly concerning damage caused by juvenile criminals and vandalism by minors. The current regime assumes liability of the parent and guardian for children under the age of fourteen, as a form of strict liability. Children in this age category are not liable themselves for damage arising out of their misconduct. A system of fault-based liability with a reversal of the burden of proof governs the liability of children aged fourteen and fifteen. The parents and guardians of these children can, in addition to the child itself, be held responsible, although they are permitted to exculpate themselves from liability provided that they cannot be blamed for not preventing the conduct of their child (art 6:169 para 2 Civil Code). Thus parents or guardians may in certain cases be exonerated for the behaviour of their child, thereby leaving the affected party with little or no means for redress. The proposed amend-

2 Documents of the Second Chamber of Parliament (2009–2010) 30 519.

ment is set to remedy this by extending the current strict liability rule of parents and guardians with regard to children under the age of fourteen, to also cover damage caused by minors aged fourteen and fifteen.³

With regard to this proposal, concerns have been voiced regarding its adequacy in relation to its objective of combating juvenile criminality and vandalism by way of expanding the age range for strict liability of the parent or guardian: to what degree would a minor experience the financial repercussions of his unlawful conduct, knowing that the parent or guardian will be held liable as well? 5

3. 'Affection Damage'⁴

Aanpassing van het Burgerlijk Wetboek en andere wetten in verband met de vergoedbaarheid van schade als gevolg van overlijden of ernstig en blijvend letsel van naasten

As was outlined in our 2009 report,⁵ the Dutch Parliament was set to adopt an Act to make the reimbursement of 'affection damage' (bereavement damages) possible. Much to our regret, the proposal failed to pass the senate vote, with 36 nos against 30 ayes, resulting in an unfortunate end to an over seven year ongoing parliamentary debate on the desirability of awarding compensation for suffering and grief of relatives and survivors in the event a loved one is seriously injured or died as a result of an event for which another is liable. 6

It is noteworthy to mention that insurance companies may, in a rather surprising development, decide to grant affection damage claims anyway, even without new legislation, at least in cases of death.⁶ 7

3 See *BM Paijmans*, Wetsvoorstel ter verruiming van de aansprakelijkheid van ouders voor kinderen, *Aansprakelijkheid, Verzekering & Schade (AV&S)* 2007, 54–62.

4 See *SD Lindenbergh*, *Smartengeld*, 10 jaar later (2008).

5 See *ALM Keirse/I Giesen*, The Netherlands, in: H Koziol/BC Steininger (eds), *European Tort law 2009* (2010) 426, no 6.

6 *SD Lindenbergh*, Het wetsvoorstel affectieschade: een treurige dood(?), *Nederlands Juristenblad (NJB)* 24 (2010) 1532; *R Rijnhout*, Wetsvoorstel affectieschade verworpen door de Eerste Kamer, *Tijdschrift voor Vergoeding Personenschade (TVP)* 2010, 37–41.

4. Alteration of the Criminal Injuries Compensation Fund Act
*Aanpassing van de Wet schadefonds geweldsmisdrijven in verband met uitbreiding van de categorieën van personen die recht hebben op een uitkering uit het fonds en verruiming van de gevallen waarin men aanspraak kan maken op een dergelijke uitkering, aanpassing van de Kaderwet zelfstandige bestuursorganen en enkele aanpassingen*⁷

- 8 A legislative amendment has been proposed to extend the categories of persons entitled to a payment from the Criminal Injuries Compensation Fund, whilst also expanding the scope of instances in which one is able to claim damages. The Criminal Injuries Compensation Fund was created to provide financial support for persons suffering from severe physical and/or mental harm, resulting from a violent crime.
- 9 The proposed expansion of the scope of damages is quite remarkable in that compensation of bereavement damages is explicitly made possible, effectively giving way to reimbursement of affection damages.⁸ The Minister has justified this expansion by referring to the principle of equal treatment of victims and survivors that lies at the heart of the Law on the Strengthening of the Position of Victims in Criminal Proceedings.⁹ Thus, the present proposal may indeed open doors for the reimbursement of affection damages in some violent crime instances where under the regular regime of the Dutch law on damages such claims would not be achievable. Of course, a critical remark can be made with regard to the justifiability of this circumvention to the denial of the reimbursement of affection damages in view of the consistency of the Dutch legal system.¹⁰

7 Documents of the Second Chamber of Parliament (2009–2010) 32 363.

8 Documents of the Second Chamber of Parliament (2009–2010) 32 363, no 8, p 1.

9 Documents of the Second Chamber of Parliament (2009–2010) 32 363, no 7, p 1.

10 R *Rijnhout/I Giesen*, Rechtelijke ‘onachtzaamheid’ en wetgevende zijpaden: gaat de wal het schip van de schok- en affectieschade keren? Weekblad voor privaatrecht, notariaat en registratie (WPNR) 6870 (2011) 35 ff.

5. ‘Partial Trials’¹¹

Aanpassing van het Wetboek van Burgerlijke Rechtsvordering tot invoering van een procedure voor deelgeschillen ter bevordering van de buitengerechtelijke afhandeling van letsel- en overlijdensschade (Wet deelgeschilprocedure voor letsel- en overlijdensschade)¹²

As was mentioned in our 2009 report,¹³ a legislative proposal concerning so-called ‘partial trials’ came into force as of 1 July 2010. This legislation offers parties in civil proceedings concerning personal injury and wrongful death the possibility to only bring one particular aspect of their dispute before the court, whilst negotiating for a settlement on all other aspects. The legislation aims to reduce litigation costs in cases where parties would be able to reach a settlement except for the fact that they disagree on one specific aspect of their dispute. **10**

The first instances of partial trials on the basis of the present legislation indicate a favourable stance of the courts with regard to the admissibility of such proceedings. Resolution of the partial dispute is by and large found to contribute to the establishment of a settlement agreement.¹⁴ However, given the still limited number of court decisions, it remains too early to provide any definite findings in this regard.¹⁵ **11**

B. Cases

1. Hoge Raad (HR, Supreme Court) 11 June 2010, Nederlandse Jurisprudentie (NJ) 2010, 332: Whiplash

a) Brief Summary of the Facts

This case concerns the issue of determining the extent of damage incurred due to loss of present and future income, and the duty of the injured party to take adequate measures to reduce his own damage. In the year 2000, the claimant was the victim of a traffic accident, as a result of which he reported to suffer from whiplash-like complaints. He claimed to be unable to **12**

11 See *I Giesen/LM Coenraad*, Toegang tot de rechtspleging in Nederland anno 2008, NJB 84 (2009) 876, and the special issue of the Dutch journal *Verkeersrecht* 2010, vol 6.

12 Documents of the First Chamber of Parliament (2008–2009) 31 518, A.

13 See *Keirse/Giesen* (fn 5) no 3.

14 See *SJ de Groot*, De nieuwe deelgeschilprocedure: de eerste oogst, *Letsel & Schade (L&S)* 4 (2010) 179.

15 See *S Ikiz*, De nieuwe deelgeschilprocedure voor letsel- en overlijdensschade (2010).

work and was therefore entitled to compensation for the loss of his present and future income. He submitted his claim to the WAM (Motor Insurance Liability Act) insurer Winterthur. The insurer admitted liability.

b) Judgment of the Court

- 13** The District Court (the Dutch court of first instance) largely allowed the claim for damages due to loss of income and ruled, on the basis of an expert report, that the employee was to be considered disabled until 2006. Winterthur subsequently lodged an appeal. The Court of Appeal judged that the claimant was only disabled until 1 March 2004. Subsequently the Court judged that Winterthur's obligation to pay compensation did not end until after 1 July 2004 because, as a result of the period of disablement after the accident, the claimant had lost his job and was unable to find work. Thus, the ruling of the Court of Appeal was that the compensation due to loss of income should end four months after the date on which the injured party is deemed fit for work. It maintained the judgment of the District Court that the victim had made sufficient efforts to find work. The claimant then continued proceedings in cassation with regard to the extent of the period for compensation.
- 14** The *Hoge Raad* stated that, in case of an infringement of a duty or rule pertaining to proper social conduct, the resulting damage of the victim, incurred due to loss of income, should be attributable to (the insurer of the) liable party. The risk that the injured party is then unable to find work and as a result suffers additional loss of income should fall on the liability party. In the present circumstances, the Court could not rightly have found sufficient ground to limit the liability to only four months after the date that the claimant was declared unfit to work.

c) Commentary

- 15** This case relates to the assessment of the duration of damage as a result of loss of earning capacity. The extent of the damage due to the loss of earning capacity is to be determined by comparing the actual situation after the accident with the hypothetical situation without the accident. With regard to the burden of proof concerning a claim for loss of income, the *Hoge Raad* (implicitly) followed its previous line of judgments: the burden of proof rests on the injured party. This same rule was held to also apply in cases where the claim covers both present and future loss of

income (*B v Oliffers*).¹⁶ Proof of loss of future income must be based on a reasonable expectation of future circumstances (*Verhof v Helvetia*).¹⁷ In the assessment of damages incurred due to future loss of income, both the positive as well as the negative chances of future circumstances must be considered (*Van Sas v Interpolis*).¹⁸ Moreover, based on art 6:101 of the Civil Code, the injured party is required to take adequate measures to reduce his own damage. Applied to the present case, this means that the employee had a duty to seek and accept alternative work, insofar as this could reasonably be expected of him. This reasonability test depends on the circumstances of the case.

From this case it can also be deduced – again – that the injured party is **16** obliged to keep his claim within reasonable limits. It is part of the established doctrine of contributory negligence that each injured party who wants to safeguard his entitlement to full compensation for damage incurred has an obligation to take reasonable steps to mitigate this damage. It is, however, up to the person who caused the damage to explain and substantiate the facts and to ultimately prove that the injured party had not complied with his duty to mitigate the loss. In this case a failure on the plaintiff's side was not established, but the lower courts' ruling that Winterthur had not substantiated its pleading on this aspect of the case was dismissed for lack of proper motivation.

2. HR 18 June 2010, Landelijk Jurisprudentie Nummer (LJN): BL9690: *Koeman v Sijm Agro*

a) Brief Summary of the Facts

In the case of *Koeman v Sijm Agro* the bulb-cultivation firm Koeman engaged **17** the services of De Wit to spray its crops with the pesticide 'Round-Up'. The required spraying work was subsequently carried out by an employee of De Wit. A co-owner of Koeman bought the pesticide Round-Up and decided that it needed to be sprayed and in which quantities. Adjacent to the sprayed parcel was the horticultural parcel of the firm Sijm Agro. Sijm Agro utilises its land to cultivate carrots. After the harvest Sijm Agro was confronted with the fact that its carrots were unsuitable for consumption, due to contamination by the pesticide Round-Up, as was later revealed by

16 See HR 13 December 2002, NJ 2003, 212.

17 HR 15 May 1998, NJ 1998, 624.

18 HR 14 January 2000, NJ 2000, 437.

an expert report. Sijm Agro could therefore not sell its crops, whilst a buyer who had already agreed to buy from Sijm Agro refused to accept delivery. Sijm Agro sued, aside from De Wit, Koeman for damages, on the grounds of art 6:171 of the Civil Code.

b) Judgment of the Court

- 18** The District Court ruled that Koeman and De Wit were jointly and severally liable. This ruling was later upheld on appeal. In both instances Koeman argued that it was known to Sijm Agro that Koeman and De Wit were two independent firms engaging in completely different commercial activities. Thereby the claim of Sijm Agro lacked a necessary requirement for the applicability of art 6:171 Civil Code, as was put forward by Koeman, because the Court of Appeal had insufficiently justified the existence of the requirement of unity between Koeman and De Wit.
- 19** The *Hoge Raad* found that the Court of Appeal had in fact provided sufficient justification with regard to the said requirement. The activities of Koeman as a bulb-cultivator was never contested and the remaining contention was whether the involvement of Koeman during the spraying work could constitute a typical commercial activity in the operation of a cultivation firm. The *Hoge Raad* answered this question in the positive, given the circumstance that a co-owner of Koeman was a licensed pesticide applicator. The judgment of the Court of Appeal was upheld.

c) Commentary

- 20** In the case of *Koeman v Sijm Agro* the *Hoge Raad* further refined the criteria of liability on the grounds of art 6:171 of the Civil Code. This article provides that if a non-subordinate (or: independent contractor) who performs activities on the instruction of another person in relation to the other person's business, is liable towards a third person for a fault committed in the course of these activities, that other person is also liable to the third person.
- 21** In a previous ruling (*Delfland v De Stoeterij*),¹⁹ the *Hoge Raad* had given a restricted interpretation of art 6:171 of the Civil Code. Specifically with regard to the element of activities 'in relation to the other person's busi-

¹⁹ HR 21 December 2001, NJ 2002, 75.

ness', the court 'added' the additional requirement that there should exist a 'unity of enterprise' between the non-subordinate and the 'other person'. In that case, the key consideration was that art 6:171 Civil Code is based in particular on the idea that a third party cannot identify whether damage is due to an error of a subordinate or that of someone else working 'in relation to the other person's business'.

With the case of *Koeman v Sijm Agro* the *Hoge Raad* clarifies that art 6:171 Civil Code can remain applicable even if the injured party is aware of the fact that the tortious conduct is the fault of a non-subordinate or independent contractor performing on the instruction of another person. The previously held rule of outward appearance of unity – that is, whether it is not identifiable to the injured party that the damage was caused by a non-subordinate – is thus loosened.²⁰ Although it is required that the work is undertaken 'in relation to the other person's business', neither the identification of the independent contractor and the person in whose business activities are performed is needed nor the association of the two. Even circumstances that were not known to the injured – such as the extent to which the person in whose business activities are performed was involved in organising and carrying out the work – can play a (decisive) role. This constitutes a new standard in practice, as a company who engages the work of a non-subordinate must thus realise that it may be liable for errors of the non-subordinate, even when the injured party is aware that the tortious conduct was caused by the non-subordinate. It is therefore of particular importance for parties engaging in such work agreements to be aware of the full scope of art 6:171 Civil Code, and to take adequate contractual measures with regard to their liability. **22**

3. HR 18 June 2010, LJN: BL9662: *Setel v AVR* and HR 18 June 2010, LJN: BM0893: *X v Ymere*

a) Brief Summary of the Facts

In the summer of 2010, the *Hoge Raad* provided two similar rulings on the scope of art 6:104 Civil Code. These cases will be discussed consecutively. **23**

The first case revolved around the application of art 6:104 Civil Code of the Dutch Antilles (BONA). Because this article is comparable to the Dutch statutory provision, and since the *Hoge Raad* endeavours to come to **24**

²⁰ See *T Hartlief*, Waar ligt de toekomst van artikel 6:170: in Wenen of in Brussel? *Ars Aequi* (AA) 2011, 53.

comparable rulings as regards cases involving the Dutch Antilles or involving the Netherlands as much as possible, it can be assumed that this verdict has significance with regard to Dutch law. The case in question involved a rather complicated telecommunications dispute, which arose because a telecom company (Setel) overcharged another company (AVR) for the legally mandatory admittance to each other's network (interconnection). The *Hoge Raad*, upon appeal, calculated damages as a part of Setel's profit.

- 25** The second case concerned the subletting of property by a private tenant. The terms of the rental agreement determined that the tenant could under no circumstances sublet the accommodation without written permission. Despite this the tenant had sublet the entire property to a group of students. In addition to demanding the eviction of the tenants, the housing foundation Ymere claimed remittance of the profits made as a result of subletting the property. This claim was based on art 6:104 Civil Code. Remittance of profit had been declined by the District Court, but was later granted on appeal. The Court of Appeal placed particular emphasis on the undesirable consequences of subletting with regard to the policy and the objectives of Ymere, as well as the associated costs.

b) Judgment of the Court

- 26** In the first case, Setel pled for annulment of the judgment by the Court of Appeal. This was not honoured. The *Hoge Raad* felt it necessary to devote extensive considerations to the background and interpretation of art 6:104 BWNA. It began by stipulating that said article does not allow a claim for a return of profit, but rather an autonomous ground for the court to assess the damage in line with the extent of the profit. It considered that there is no need to prove any actual damage, but rather that proof of the presence of harm is sufficient. Furthermore, given that the issue here is the assessment of damages, the punitive nature of this provision means that the application of art 6:104 BWNA must remain restrictive. The *Hoge Raad* further considered that, in order to assess the damages in line with the amount of the profit or a part of it, no additional requirements, such as a special degree of culpability, are required. However, in determining the applicability and the extent of art 6:104, the court may place particular importance on culpability.
- 27** With regard to the assessment of profit, the *Hoge Raad* interpreted the term 'profit' as including any financial benefit gained by a debtor due to his wrongful act or failure since a narrower view would, without good reason,

potentially result in the inapplicability of the provision, particularly in cases in which the debtor is a non-profit making company. In assessing profit, one must therefore consider the net benefit.

In the second case, the *Hoge Raad* began by repeating the same general considerations as in the first case regarding the nature of art 6:104 Civil Code. Applied to the present case, the *Hoge Raad* affirmed the ruling by the Court of Appeal. With regard to certain substantial complaints, the court further ruled that profit does not need to be a profit that the injured party could or could not have obtained himself. Moreover, it was held that the court is not obliged to assess profit remittance in proportion to the harm suffered, given that the provision is particularly relevant for cases where the extent of the damage is difficult to prove. The court should, however, guard against substantial imbalances between the extent of the harm suffered and the volume of the claim awarded. **28**

c) **Commentary**

The general considerations of the *Hoge Raad* in these cases provide several points of consideration in applying art 6:104 Civil Code to a specific case. As such, refinements in the application of this measuring mechanism can be made on the basis of culpability and in particular, due consideration is to be given to a possible substantial divergence between benefit and harm. These cases are of interest as both rulings provide a broader scope for the possibility of profit assessment on the basis of art 6:104 Civil Code.²¹ **29**

A claim for the remittance of profit should be considered as a type of compensation. As a result, such claims can only exist if some form of damage has been established.²² However, the exact relationship between compensation and profit remittance is not yet clear-cut. In case of a large discrepancy between (a minor) damage and (a large) advantage, the *Hoge Raad* makes clear that remittance of the profit can only be granted in part. Moreover, the *Hoge Raad* stresses that art 6:104 Civil Code does not have a punitive character. Therefore, the provision can be applied without any further requirement of culpability. Nonetheless, art 6:104 Civil Code can be said to have a preventive function as it reduces the lucrative advantages of violating a norm.²³ A broad application of art 6:104 Civil Code therefore **30**

21 See *TFE Tjong Tjin Tai*, *Winstafdracht*, *Nieuwsbrief Bedrijfsjuridische berichten* (Bb) 2010, 18.

22 See also HR 24 December 1993, NJ 1995, 421; HR 16 June 2006, NJ 2006, 585.

23 *WH van Boom*, *Twee arresten over 'winstafoming' ex artikel 6:104 BW*, AA 2011, 124.

deserves applause precisely due to its preventative nature. After all, the law of obligations not only aims to compensate but also – and more importantly – to prevent damage.

4. HR 9 July 2010, LJN: BL4088: Licotec

a) Brief Summary of the Facts

- 31** This case is a sequel to the ruling of the *Hoge Raad* in *Van der Hoeven v Vonk*.²⁴ Van der Hoeven had been contracted out by his employer Vonk to Vink Daklicht BV (now: Licotec). Every day he drove with a colleague and two employees of Licotec from Didam, where Licotec was based, to Amsterdam and back. For this purpose a van, made available by Licotec, was used. At the end of one working day, on which the maximum permitted working hours had already been exceeded, Van der Hoeven was involved in a traffic accident. The damage suffered by Van der Hoeven was not covered by the WAM insurance (Motor Insurance Liability Act) of the van. Van der Hoeven sued not only Vonk as his formal employer, but also Licotec as his material employer. In the case against Licotec the court ordered Licotec to pay 50 % of the damages. The Court of Appeal confirmed this judgment.

b) Judgment of the Court

- 32** The Court of Appeal found that Van der Hoeven must have based its claim on art 6:162 Civil Code, since the accident occurred before 1 January 1997 (the date of entry into force of Title 7.10 of the Civil Code). The question whether this is a matter of unlawful action, said the Court, must still be answered in the light of the standard laid down in art 7A:1638x Civil Code (old).
- 33** The rules concerning the obligation to furnish facts and on the division of the burden of proof that apply in a procedure based on art 7A:1638x of the Civil Code (old) must be applied in such a case. Subsequently the Court of Appeal ascertained that now that Licotec expected Van der Hoeven to drive to Didam with his colleagues in the vehicle that had been made available by Licotec, after termination of a working day on which the maximum permitted working hours had already been exceeded, with all

²⁴ HR 12 January 2001, NJ 2001, 253.

risks involved, Licotec had failed in its duty of care. This applies all the more because Licotec failed to take out a proper insurance for the benefit of Van der Hoeven as a driver. Licotec, as a hiring employer, had failed in the duty of care resting on it and had acted in a manner which contravened that duty of care. On the other hand, Vonk can also be blamed. He knew that Van der Hoeven had to commute every day and, as a formal employer, he should have made an inquiry into whether proper insurance had been taken out for him, with the intention that agreements could have been made about this with Licotec. The liability of Licotec must not weigh more or less heavily than that of Vonk. This meant, said the *Hoge Raad*, that the Court of Appeal had ordered Licotec to pay 50 % of the compensation due to Van der Hoeven with good reason. In cassation the *Hoge Raad* left the ruling of the Court in force.

c) Commentary

With the present case we see that yet again a gap is filled in the field of employers' liability in the broadest sense of the word: the contractor may also be liable due to negligence in obtaining insurance for hired employees relating to transport from and to work. This had already been accepted for the employer based on art 7:611 of the Civil Code.²⁵ With the present case the *Hoge Raad* confirms that the same obligation applies for the contractor, based on art 6:162 Civil Code. However, this form of liability based on unlawful conduct cannot be purely established on the failure to take out proper insurance. Besides the fact that Licotec had not taken out insurance, it had also failed in its duty of care with respect to exceeding the maximum working hours and having Van der Hoeven undertake a long car drive in heavy traffic. This combination led to an infringement of the duty of care and the establishment of liability because of an unlawful act. **34**

It can be said that the ruling that Vonk and Licotec are each 50 % liable has been clearly motivated by the court and is certainly justifiable. Yet the question arises as to whether each party should only pay 50 % of the damages awarded to Van der Hoeven or whether they are jointly and severally liable for the whole amount and may take a recourse action for the remaining 50 %. In our opinion, a commitment of compensation of the same damage (the damage of Van der Hoeven) rests on both employers **35**

25 *SD Lindenbergh/PLM Schneider*, Over de grenzen van... artikel 7:658 lid 4 BW, Tijdschrift voor de arbeidsrechtpraktijk (TAP) 2010, 17.

and, pursuant to art 6:102 of the Civil Code, they are therefore jointly and severally liable. This means that Vonk and Licotec can each be called upon for 100 % and they may have recourse among themselves on the basis of this 50 % liability. This is in accordance with the situation in which the liability of the formal and material employer is based on art 7:658 paras 1 and 4 Civil Code. Pursuant to this article, both types of employers are jointly and severally liable, but can take recourse against each other. In our view, it is not defensible that this joint and several liability exists if the employee has an accident at the workplace and not if the case concerns a traffic accident. Furthermore, it is clear that an employer who lends out his employee is advised to establish whether proper insurance has been taken out for the hired employee and to take necessary contractual measures by concluding agreements regarding the liability of such workers.

5. HR 9 July 2010, LJN: BL4088: Enschede Fireworks Disaster I

a) Brief Summary of the Facts

- 36** On 13 May 2000, a mass explosion occurred at the repository of SE Fireworks (SEF) in Enschede. The explosions caused severe damage to neighbouring buildings, including to the business park of Grolsche Bierbrouwerij Nederland (Grolsch). XL Insurance Company Ltd, the plaintiff, compensated the damage of Grolsch to the amount of € 60,469,137.
- 37** In this case, the State was sued by the insurance company – which acts by subrogation – because the State had allegedly acted unlawfully towards the insured (Grolsch). They claim that the State should pay for the damage Grolsch has suffered since it was ultimately the State which was responsible for the fireworks disaster. The State allegedly failed to take the measures necessary in order to prevent a disaster from happening (for example, prohibiting the location of fireworks factories in residential areas). The claim of the insurance company was rejected by the District Court and the Court of Appeal confirmed the decision of the lower court.

b) Judgment of the Court

- 38** The *Hoge Raad* ruled that the State's policy with respect to the manufacturing and storage of fireworks does not lead to an entire exclusion of the chance that a disastrous accident such as a mass explosion might occur. No

legal ground can be found for the insurance company's claim that the State, with regard to the explosions and in the light of the severity of the possible effects, should have excluded any potential danger of a mass explosion causing damage of an unacceptable gravity to the surrounding buildings.

The established rule with regard to State liability, due to an infringement of one's obligation to take appropriate and effective safety measures, holds that the State is liable if it could have prevented the danger by taking the appropriate safety measures against dangers that were already known. This also applies if the danger actually occurs in a way or with effects that were unknown. The Court of Appeal decided that the State had not failed in its obligation to take the said required safety measures. **39**

In order to determine whether State liability can be established, the so-called *Kelderluik* factors²⁶ (cellar door factors) are of significance. These *Kelderluik* factors are named after the so-called *Kelderluik* case and are concerned with the foreseeability of damage, the amount of loss if damage occurs, the nature of the damage, the possibilities of taking preventive measures, etc. The insurance company's opinion that the State, following the fireworks disaster in Culemborg, was required – on the basis of these *Kelderluik* factors – to take appropriate measures and that no measure other than a prohibition on firework factories being located in a residential area would have been necessary, has been rejected by the Court of Appeal in a comprehensible way. **40**

According to the Court, the State could not and should not have been familiar with the dangers mentioned by the insurance company. Furthermore, in light of what the State did know, it was not obliged to take any different measures than it had already taken. **41**

The Court of Appeal justified its judgment sufficiently, particularly when taking into consideration that the State was to be held responsible only for the alleged failure to fulfill its obligation to take safety measures against a danger that was caused by someone else. **42**

c) Commentary

The *Hoge Raad* handled this case mainly by interpreting and explaining what the Court of Appeal (supposedly) had ruled and by dismissing the **43**

26 Cf HR 5 November 1965, NJ 1966, 136 (*Kelderluik*).

complaints by ruling that Grolsch misinterpreted that decision. On other points, the Court of Appeal was supported by the *Hoge Raad* as regards the motivation given for its decision. As to the development of the law, this case is thus less interesting. It is still an important case however, because its outcome means that the State cannot be held liable for the disaster that occurred in May 2000, a ruling that was confirmed by the Court of Appeal, The Hague in a case that was started by some of the personal injury victims of that same disaster, as can be learned from the next case.

6. Court of Appeal The Hague 24 August 2010, LJN: BN4316: Enschede Fireworks Disaster II

a) Brief Summary of the Facts

- 44** In the case of Enschede fireworks disaster II, both the State and the municipal authorities of the town Enschede (hereafter: Enschede) were sued by 178 plaintiffs who had suffered severe damage, both materially and physically. The damage was caused by mass explosions at the repository of the SE Fireworks factory in Enschede (hereafter SEF) on Saturday 13 May 2000.
- 45** After the disaster, an investigation was carried out by the ‘Oosting Commission’ in order to determine the cause of the mass explosions. The investigation proved that most of the stored fireworks at SEF were wrongly classified, for most of them were far more dangerous and far more likely to cause mass explosions than the classification suggested. Furthermore, the investigation proved that very dangerous, mass explosive fireworks were stored together with other fireworks.
- 46** With regard to the State, the plaintiffs argue that the State knew or should have known that the fireworks at SEF were wrongly classified and thus far more dangerous than the classification suggested. The State failed to take effective measures in order to prevent a mass explosion, and thus failed to fulfill its legal obligation to take appropriate safety measures. In the light of the results of the investigation of the previous (1991) Culemborg fireworks disaster, SEF should not have been given a licence allowing it to store fireworks near a residential area. Therefore, the State is liable for the damage caused by the mass explosions.
- 47** With regard to the city of Enschede, the plaintiffs argue that Enschede exposed them to great risks that were in principle avoidable. Enschede knew about the risks, but failed to take appropriate action. Therefore,

Enschede acted contrary to the *standard of care* (its due diligence obligation), the *prohibition of arbitrary action* and the principle of legal certainty. These actions amount to an unlawful act, for which Enschede can be held responsible on – inter alia – the basis of art 6:162 Civil Code.

b) Judgment of the Court

Confirming the decision of the District Court, the Court of Appeal rules **48** that the State's policy is aimed at minimising the potential danger that explosive materials cause serious and extensive damage. In order to realise this objective, the State has enacted specific regulations – on the basis of the 'Wet Milieubeheer' (Environmental Management Act) – and a licence system. According to the Court of Appeal, the State had taken adequate steps in order to fulfill the aims of its policy, especially since it regularly checked whether SEF still acted in accordance with licence obligations.

The results of the investigation of the Culemborg disaster did not amount **49** to an obligation for the State to refuse SEF its license, since SEF was – quite different from the Culemborg factory – not allowed to manufacture fireworks, nor was SEF allowed to store fireworks with a potential for mass explosion. The statements of the witnesses did not lead to the conclusion that the State knew or should have known that the fireworks at SEF were wrongly classified and, other than the classification suggested, likely to cause a mass explosion. The State was unaware of the potential risks. Therefore, the State did not fail to take appropriate measures, nor did it fail to carry out its regular checks at SEF. Thus, the State cannot be held liable for the damage the plaintiffs suffered.

According to the Court of Appeal, State liability for damage caused by the **50** mass explosions at SEF, can only be established if the State knew or should have known about the danger of a mass explosion and that this danger actually occurred. This begs the question whether the danger was such as to establish an obligation for either the State or Enschede to take appropriate steps in order to diminish the danger at hand. Whether the presence of such a danger amounts to an obligation for the authorities to take action depends upon the severity of the potential effects and the chance that these effects will actually occur. This unwritten norm of *standard of care* therefore merely aims to protect interests that are actually known to the authorities. Neither the State nor Enschede knew or could have known about the potential dangers caused by the mass storage of fireworks.

c) Commentary

- 51** It is established case law that liability of public authorities cannot be established – even if these authorities refrained from taking appropriate measures – if they did not know or could not have known about the concrete danger to which the public was exposed. On the other hand, liability of the authorities can be established if, although a certain danger occurred in a way or with effects that were unknown to the authorities, the occurrence of that danger could have been prevented by taking appropriate safety measures against the dangers that were known.
- 52** As was the case in the claim launched by the insurers of the Grolsch beer factory, dealt with above, the liability of the State and the city of Enschede was denied. Ultimately, the fireworks disaster thus has not lead to any civil liability resting on anyone (the company that owned the factory went bankrupt of course) which has amazed commentators,²⁷ given that several things went wrong in the governmental supervision of the factory and its dealings, as was concluded for instance by the Oosting Commission. This amazement was also due to the fact that administrative law rules and their relationship to Dutch tort law prevented victims from successfully pursuing a liability claim. In short, if a citizen did not lodge an administrative complaint against the renewal of a permit at the time that this permit is in fact up for renewal, a tort claim at a later stage will be denied on the ground that the issuing of the permit was in accordance with the law.²⁸

7. HR 1 October 2010, BM7808: *Verhaeg v Jenniskens*

a) Brief Summary of the Facts

- 53** This case concerns the possibility of mandatory deduction of collateral benefits as provided by art 6:100 Civil Code. This article states that a benefit is to be taken into account in assessing the reparation of the damage in cases where one and the same event result in both loss and benefit for the injured party.

²⁷ See eg *CLGFH Albers/PCM Heinen*, Een (verkapte) civielrechtelijke immuniteit voor toezichts- en handhavingsfalen van overheidsorganen? *De Gemeentestem (Gst)* 2010, 101; *EM van Orsouw*, Vuurwerkramp Enschede: de staat gaat vrijuit, *Maandblad voor Vermogensrecht (MvV)* 2010, 10.

²⁸ See eg *I Giesen*, Toezicht en aansprakelijkheid (2005) 83–85.

Verhaeg, the claimant in this case, was an employee of Jenniskens, a horticulture and soil decontamination company. In 2000, Verhaeg became trapped in a shredder during the fulfilment of his duties in the service of Jenniskens and as a result, the amputation of his arm just above the elbow was inevitable. Jenniskens acknowledged liability. As an employer, he had duly taken out a liability insurance policy (AEGON life insurance and Fortis Corporate Insurance NV). In addition, the employer was covered for work-related accidents of his employees (AMEV NV). Jenniskens paid the premiums for this insurance. 54

With regard to the damage suffered by Verhaeg, the accident insurer AMEV paid a sum of € 54,076 to the employee, with an addition of the basic rate of interest. In light of this payment, the liability insurers AEGON and Fortis took the view that the said payment should be deducted from the amount they were held to pay. They based their stance on art 6:100 Civil Code. Verhaeg contested this and initiated litigation. He sought a declaration that the payment by the accident insurance should not be regarded as a benefit and that under the given circumstances, any deduction of the payment to be remunerated by the liability insurers should be deemed unreasonable. 55

b) Judgment of the Court

Both the District Court and the Court of Appeal dismissed this claim, as they did not find sufficient ground for not holding the mandatory deduction of collateral benefits, as conferred by art 6:100, applicable. The Court of Appeal regarded the accident insurance as an ‘insurance providing for the payment of a capital sum’. With this, the Court of Appeal went on to accept the remunerated sum by the accident insurer as a benefit, and considered it reasonable to reduce the sum to be paid by the liability insurer with the already remunerated sum by the said accident insurer. 56

In cassation the *Hoge Raad* overturned the previous rulings of the lower instances and decided that the deduction of collateral benefits was unreasonable given the circumstances of the case. The court first put forward that if the same event has resulted in both injury and benefit for the injured party, then this benefit must – in accordance with art 6:100 Civil Code – be taken into account in assessing the reparation of the damage, to the extent that this is reasonable. Moreover, it stated that in view of the parliamentary history, the court has a wide margin of discretion in applying this reasonability test, for which the factual circumstances of the cases are determinant. 57

- 58** The *Hoge Raad* then provides six points of consideration for the purpose of assessing how this reasonability test should be conducted: a) Mandatory deduction of collateral benefits for insurance remuneration is generally only possible if the insurance is intended to compensate the same damage as the damage for which the defendant is liable.²⁹ This can particularly be of importance since insurance sometimes covers damage which by law or in practice is not fully covered, or they may grant additional compensation following the same damage, such as for example personal injury compensation. As a consequence of this, the court should remain restrictive in applying the mandatory deduction of collateral benefits in cases where for example the injured party is also insured against immaterial loss. The court should assess the reasonability test separately for each head of damage.³⁰ b) In case remuneration occurs through damage insurance, which is intended to compensate precisely the same damage as that which is claimed, then the mandatory deduction of collateral benefits should, in principle, be compensated through subrogation in order to guarantee that the liable party does not benefit. c) With regard to insurance providing for the payment of a capital sum, which is taken by a party other than the liable party (the injured or a third party), a deduction should in general not be granted. The existence of such insurance does not concern the liable party. Should the court find that granting a deduction is nevertheless reasonable, such a deduction should be limited in view of the costs that have been paid for such cover. d) On the other hand, if an insurance policy providing for the payment of capital is taken out by the liable party for which the liable party has also paid premiums, then there can still be grounds to allow a deduction, especially when the insurance was entered into voluntarily. Here once more, the same consideration regarding the purpose of the insurance, as mentioned in the first viewpoint, must be taken into account. Finally the *Hoge Raad* provides two more general rules: e) When the liability is covered by insurance, a deduction from insurance providing for the payment of capital should in general not be considered reasonable. f) A deduction is increasingly more reasonable if the liability is a strict liability, or under a regime of fault liability, when the behaviour of the liable party is less blameworthy.
- 59** The *Hoge Raad* ruled that the Court of Appeal had insufficiently justified its judgment, in which it only took into consideration the circumstance that the liable party, the employer Jenniskens, had concluded and paid premiums for a work-related accident insurance policy on its own initiative.

29 HR 11 February 2000, NJ 2000, 275; HR 29 September 2000, NJ 2001, 105.

30 See also HR 17 December 1976, NJ 1977, 351.

c) **Commentary**

In the present case, the *Hoge Raad* provides a set of variables – which we need not repeat here – that should be taken into account when assessing whether it is reasonable to apply a mandatory deduction of collateral benefits.³¹ With regard to insurance providing for the payment of a capital sum, we see that, whereas the application of a deduction concerning such insurance had previously been rejected, it has now become possible, albeit in exceptionally rare circumstances. For example, a deduction is possible in a case concerning strict liability under the circumstance that (i) an injured party claims compensation for pecuniary damage, (ii) the party which is held liable has taken out the insurance on a voluntary basis and has paid the premium himself, and (iii) there is no coverage under liability insurance. When, on the other hand, liability is covered by insurance the general position of the *Hoge Raad* seems to be that there should be no deduction, as this would not be in line with the reasonability test. Perhaps a better solution could have been chosen by adopting the last mentioned as the principle rule. **60**

The question of whether and, if so, to what extent compensation on the basis of art 6:100 of the Civil Code is to be deducted is of great importance for the injured party. As such, often rather large sums are at stake. For that reason, a higher degree of guidance and more clarification by the *Hoge Raad* may have been prudent. The *Hoge Raad* indeed grants the lower courts some leeway and it further emphasises the possibility of exceptions, nevertheless, it does so without providing a clear understanding of these exceptions.³² **61**

8. HR 8 October 2010, LJN: BM6095: *Hammock* Case

a) Brief Summary of the Facts

In the *Hammock* case, the attention is focused on a young woman, who one summer day, hung up a hammock in her garden, attaching one end of it to a brickwork post on a gateway. While she was lying in the hammock, the post broke off and fell on top of her. The result was a high spinal cord **62**

31 See *SD Lindenberg, A, V en S, wie komt het voordeel toe?* AV&S 2010, 27.

32 See *T Hartlief, Gezichtspunten, vingerwijzingen en vuistregels. Kan dat anders?* Nederlands Tijdschrift voor Burgerlijk Recht (NTBR) 2011, 29 ff.

lesion, due to which she became bound to a wheelchair for the rest of her life and is now fully dependent on the help of third parties.

- 63** At the District Court, the woman sued for a declaration that her husband is to be held liable towards her for the consequences of the accident and she claimed damages from her husband and, not unimportantly, his insurer (Achmea) holding them jointly and severally liable. She based her claim on art 6:174 Civil Code, concerning the strict liability of the owner of a constructed immovable. With regard to the question as to whether art 6:174 Civil Code also applies in the relationship between co-owners such as the husband and wife in this case, the District Court ruled that neither in the wording of the Act nor in parliamentary history, can any reference be found that this should not be the case. Conversely, no reference could be found that this is the case: the legislator has not expressed its opinion about this possibility. In the opinion of the District Court, it subsequently fits best with the rationale of art 6:174 Civil Code, in correlation with art 6:180 Civil Code (joint and several liability of co-owners) to assume that co-owners can indeed sue each other based on this article. According to the District Court, the rationale of this strict liability is that an injured party must be allowed to claim damages from the person to whom the defective building belongs, so that he does not need to consider whether the defect is a result of a fault in the construction or of overdue maintenance, and to whom this must be attributed for this will often no longer be a realistic possibility. In this respect the fact that this form of strict liability can be insured against at a small premium is also of importance. The capacity of co-owner also plays a role in ascertaining the extent of the damage. In the present case the wife was co-owner together with her husband, so that 50 % of the damage remains at her own expenses. Liability of the man as co-owner – and therefore his insurance company – is assumed for 50 % of the damage.³³

b) Judgment of the Court

- 64** In the proceedings before the *Hoge Raad* the starting point by way of supposition was the fact that the brickwork post on the gateway was indeed faulty and therefore generated risks for persons or objects as referred to in art 6:174 Civil Code. Furthermore, it was also assumed that the insurance policy did not exclude mutual claims within the family relations of the co-owners from coverage in case of personal injury. The

³³ See also *Keirse/Giesen* (fn 5) nos 18–20.

Hoge Raad then largely considered the case in accordance with the District Court.

With regard to the question whether art 6:174 Civil Code exclusively establishes a strict liability towards third parties (and not co-owners), the answer was found in the doctrine of relativity. Whether the relativity requirement as laid down in art 6:163 Civil Code has been met depends, according to established case law,³⁴ on the purpose and the essence of the liability standard by which it must be investigated to which persons, to which damage and which manners of arising of damage the intended protection extends itself. According to the *Hoge Raad* (as well as the District Court), the wording and the legal system do not preclude art 6:174 Civil Code from also applying to co-owners. The decision here ultimately amounts to a choice, considering societal opinions and the interests of the victim, the liable party and the insurer, as to what is the most reasonable judgment, which leads to a conclusion in favour of the woman in the present case. As a justification, both instances put the ‘ambit of protection’ of art 6:174 Civil Code first. This protection applies as much for co-owners as for randomly injured third parties. Otherwise an injured co-owner would have to bear the full damage alone, while the other co-owners ‘although they also stand in the same relation to the defective immovable object’ would not have to contribute anything in compensation of damage caused by the common defective thing. In this respect, the *Hoge Raad* also gives some weight to the easy insurability of legal liability. **65**

c) Commentary

The *Hammock* case concerns a relatively simple set of facts that give rise to a legal judgment with far-reaching consequences. For instance, for liability insurers an essential question arose: can co-owners of a defective building sue each other and is there an insurance coverage for this in the liability insurance for private persons? The *Hoge Raad* took the affirmative view. According to the ruling, the wording and the legal system do not preclude the argument that art 6:174 Civil Code also applies between co-owners. **66**

This is a legal-political point of view that will not be shared by everybody. Apparently the *Hoge Raad* wanted to prevent the law from leaving the wife empty-handed. A sympathetic standpoint, in particular with a view to the serious consequences of the accident in this case. One can well imagine **67**

34 HR 7 May 2004, NJ 2006, 281.

that an attempt was made to grant her compensation for (part of) the damage in some way or another. Moreover, the lawsuit is actually aimed at the liability insurer and not so much against the spouse as such. Nevertheless, in questions concerning liability it is often the case that those who are met with fate find that their claims fall short, owing to the high thresholds of our system of liability law. Seen from this perspective, it can be contended that the present expansion of the scope of strict liability has the potential to convert liability law into a form of social certainty and naturally the question arises whether this should be considered desirable.³⁵

- 68** In the second place a critical remark could be made as regards the question whether the recognition of the co-owner liability in this case in part reduces the (useful) insurability of this form of strict liability. This position, as taken by the insurers in this case, was held to be insufficiently plausible by the *Hoge Raad*. The same applies for the argument that this provokes an ‘uncontrollable increase of claims’. These rulings are to be applauded because the insurers did not back up their statements on these points with facts and figures as they should have done.

9. HR 22 October 2010, NJ 2010, 623: City of Eindhoven

a) Brief Summary of the Facts

- 69** This case pertains to government liability for damage suffered as a consequence of the fact that the administrative board of the city of Eindhoven did not take a decision on time in a case in which objections were filed against the granting of a building permit.
- 70** This case – in short – concerned the following. Pending the decision on the objections raised by two affected parties against a building permit, the construction firm to whom the permit had been granted started the building activities. When after half a year still no decision had been taken concerning the objection, the interim relief court stayed the primary decision, so that construction could not be continued. After this, the objection was declared groundless and eventually the primary decision became irrevocable. The permit holder then sued the municipality for the damage he has suffered because the decision period was unlawfully exceeded by the municipality. The permit holder argues that the municipi-

35 See *F Oldenhuis*, *De Hangmatzaak*, NJB 2010, 38; *T Hartlief*, *In afwachting van de Franse slag*, NJB 2011, 17–19.

pality had not decided on time concerning the objection, and that therefore he had to stop his building activities because the primary decision had been suspended. The District Court allowed the claim of € 126,033. The Court of Appeal later confirmed this judgment. After the construction firm went bankrupt, the procedure was continued in an appeal by the liquidators of the construction firm.

b) Judgment of the Court

In this case the municipality invoked the so-called formal legal force of the decision on the objection. This means that the civil court must basically hold an administrative decision that has received legal force as legitimate, even if it was not taken in accordance with the applicable legal regulations.³⁶ Also the *Hoge Raad* put first that, if the exceeding of the term falls under the formal legal force of the decision, the civil court is not free to judge that the decision is unlawful. In line with the case of the highest administrative court, the *Hoge Raad* decides that the exceeding of the term does not fall under the formal legal force of the decision. **71**

Furthermore, the *Hoge Raad* ruled that the mere circumstance that an administrative body had taken a decision after exceeding the legally defined period in which to make a decision is insufficient for a successful action in the sense of art 6:162 Civil Code. Additional circumstances are required. Some other relevant aspects are the extent to which the decision period is exceeded, the cause or causes of exceeding the period, and the interests of the affected parties that are known to the administrative body. Exceeding the decision period may also be unlawful towards affected parties other than those who submitted the letter of objection. In this case the *Hoge Raad* dismissed the appeal of the municipality. The decision of the Court of Appeal that the municipality, had in the given circumstances of the case, breached its duty of care was upheld. **72**

c) Commentary

The doctrine of formal legal force has led to an abundant case law by the *Hoge Raad* over the last decades and to a system of governmental liability for administrative decisions that is in this respect hardly comprehensible anymore. This decision introduces a new element to this case law. Since **73**

36 HR 16 May 1986, NJ 1986, 723.

the outcome here is that the doctrine of formal legal force is not applicable in cases such as this, this incomprehensible system of liability is avoided and the civil court can fall back on art 6:162 Civil Code to decide the case itself in accordance with private law rules. Many will welcome this.

- 74 The private law rule that then comes into operation (art 6:162 Civil Code) demands that more circumstances be present in order to arrive at the conclusion that an unlawful act was committed; the mere fact that the decision was not handed down on time is by itself not enough. This is understandable since any other decision would make the work of state organs such as municipalities much harder since every delay would lead to liability of the state organ and thus to the duty to bear the costs thereof, costs that would then be covered by raising city taxes and similar taxes.

10. HR 17 December 2010 LJN: BN6236: *Hoogheemraadschap v De Ronde Venen*

a) Brief Summary of the Facts

- 75 In August 2003, after a ‘once in twenty years’ dry summer, a 150-year-old dyke along a canal became weaker and failed to hold back water. The canal runs through the village of Wilnis which belongs to De Ronde Venen municipality (the municipality). Like many other small dykes in the Netherlands, the complete dyke consisted of peat. Since peat has a much higher water content than clay and sand dykes, a peat dyke is more vulnerable to drought. The municipal authorities of the town sued the regional Water Board (the *Hoogheemraadschap*), who owned and maintained the dyke, for compensation of the flood damage which was caused to the nearby housing quarter of the village of Wilnis. The claim was based on the strict liability rule of art 6:174 Civil Code regarding the liability of the owner of a defective construction. The District Court and the Court of Appeal respectively rejected and then granted the claim.

b) Judgment of the Court

- 76 The first question brought forth to the *Hoge Raad* was whether a dyke can constitute a structure within the meaning of art 6:174 of the Civil Code, namely: structures which are intended to be permanently attached to the land, either directly or through a connection with other buildings or constructions. The judgment was – in short – that a peat dyke can be regarded

as a manmade structure within the meaning of art 6:174 para 4 of the Civil Code. The Court considered that the parliamentary history of the said provision supports a considerably broad interpretation of the term structure, where the term has historically often been indicated to also cover constructions. With regard to the criteria that such a structure should be manmade – this follows from the wording ‘permanently attached to land’ – the court found it sufficient that the construction of a dyke involves some form of human labour such as excavation and drainage, according to a proven method and requiring maintenance. As a general rule, the extent to which, or how this human intervention has contributed to a structure, partly depends on the type of construction and the function thereof.

The second important ruling concerned the question whether the peat dyke met the safety requirements that such a structure is required to meet. The *Hoge Raad* answered by first providing a general overview of its previously established line of reasoning: as a general rule for the assessment of defectiveness, the relevant safety standards that can be required of a structure, given its nature and purpose, as well as the generally expected standards of care of the owner, play a key role. The circumstance that a structure is generally regarded to be compliant with the relevant safety norms does not of itself preclude the possibility that it may still be found defective within the meaning of art 6:174 para 1 Civil Code since the assessment of defectiveness depends on a number of variables (such as the safety function of a structure, whether or not a structure is open to the public and the physical condition of the structure at the time of realisation of the hazards associated to that structure). Moreover, the knowledge of the likelihood that the potential hazard attributed to a given structure, in relation to the necessary safety measures for mitigating that hazard, should be taken into account. In short, the assessment of defectiveness of a structure must be answered by considering the nature and purpose of the structure with regard to its safety function, as well as the likelihood of the manifestation of the associated hazard and the degree of reasonableness in taking appropriate safety and maintenance measures to eliminate that hazard. 77

Applied to the present case, the *Hoge Raad* initially placed particular emphasis on the nature and purpose of a dyke as a means of protecting the land and its inhabitants from floods. Contrasting the Court of Appeal, the *Hoge Raad* found that the state of the art in building a peat dyke, known at the time of the construction, as well as the available financial means of the Water Board for maintaining and securing the dyke, are to be considered as relevant circumstances in addressing the question of defec- 78

tiveness. Moreover, the Court ruled that the realisation of the damage due to the specific and extraordinary circumstances of the case (for example, the long drought) and the fact that this hazard was unknown should not at all times fall on the owner of the dyke.

- 79** With this ruling the *Hoge Raad* establishes that the lack of awareness of the existence of a hazard does not necessarily fall within the risk sphere of the owner of a structure. This specifically concerns the risk of a hazard that – by objective standards – was unknown to the owner, given the then available state of the art and technology.

c) Commentary

- 80** In the case of *Hoogheemraadschap v De Ronde Venen* we see a convergence of strict and fault liability, as the same relevant circumstances are to be applied in determining the existence of both types of liability.³⁷ Art 6:174 of the Civil Code provides a clear example of strict liability: the owner of a structure is held liable for the damage incurred by a defect in the structure. Fault liability within the meaning of art 6:162 Civil Code on the other hand is answered by establishing a culpable lack of due care. However, as the present case demonstrates, both provisions are assessed according to the same lines of questioning, namely: what are the chances of the hazard occurring, are these chances known and what is reasonably required in order to eliminate these chances?
- 81** The exception to the convergence of fault and strict liability is the situation in which the defendant was unaware of the hazard or defect. If this lack of awareness – assessed by objective measures – is established, then liability can be determined on the grounds of risk, but not on culpability. However, as we have seen in the present case, the difference between these types of liability has diminished considerably.

11. HR 24 December 2010, LJN: BO1799: Fortis Bank v X

a) Brief Summary of the Facts

- 82** In late 1999, a claimant sold the shares of his company to Predictive Systems Inc. Predictive Systems paid the purchase price through its own shares.

³⁷ See on the following *T Hartlief*, *Schuld en risico: wereld van verschil of één pot nat?* NJB 2011, 285.

Predictive traded on the NASDAQ stock exchange. Based on US regulation, the claimant was not allowed to sell his shares during the so-called 'lock-up period' until August 2000. In April 2000, an agreement of asset management was made between the claimant and Fortis Bank. At the time, the Predictive shares were worth 63 million guilders, but they quickly declined in value. In April 2000, the shares were worth around USD 40. In August 2000 they were worth approximately USD 20 and in September 2001 no more than one or two dollars.

After the dramatic decline in value, the claimant sought compensation in excess of € 12 million, based on an attributable negligence due to a breach of cautionary duty. Initially, the District Court rejected the claim. An appeal followed in which – briefly summarised – the district court of appeal ruled that Fortis had not adhered to its cautionary duty and that this constituted a *conditio sine qua non* relationship, given a 50 % likelihood that the claimant would have followed explicit advice by Fortis to sell its shares as soon as possible. Thereby, Fortis was held liable to reimburse 50 % of the damages incurred. Fortis appealed against this judgment. **83**

b) Judgment of the Court

The *Hoge Raad* stated that the bank's special cautionary duty as an asset manager could imply a duty to explicitly, and in no uncertain terms, warn its client of possible risks. In answering the questions whether this cautionary duty does indeed exist in the concrete circumstances of a case, and how far these duties extend, all the relevant circumstances must be taken into account including, among others, the degree of expertise and relevant experience of the client. **84**

Furthermore, the *Hoge Raad* provided that proportional liability, as had previously been accepted in *Nefalit v Karamus*³⁸, can be applicable beyond the facts of that particular case. However, it was decided that the rule formulated in *Nefalit* should be applied with caution and that, when applied, an exceptional justification is appropriate. A justification for the application of this rule can especially be present if the breach of a duty of care has in fact been established and if there is more than a very small possibility that a *conditio sine qua non* relationship between the infringed norm and the damage exists, while the purpose of the violated norm and the nature of the norm violation also justify the application of said rule. In **85**

38 HR 31 March 2006, Rechtspraak van de Week (RvdW) 2006, 328 (*Nefalit v Karamus*).

this particular case, dealing with a breach of a duty to warn aimed at preventing pure economic loss, the use of proportional liability was rejected because it was not considered just and equitable to release the client from its burden of proof with regard to causation.

c) Commentary

- 86** After the *Nefalit v Karamus* decision, in which proportional liability was accepted, one of the remaining questions concerned the extent of this ‘proportional’ solution. Could it be applicable outside the particulars of that case? In the present case, the *Hoge Raad* made it clear that the proportional solution of *Nefalit* does indeed have a wider applicability. It stated that the idea behind art 6:99 and art 6:101 of the Dutch Civil Code provides sufficient leeway to extend the scope of proportional liability to cases where the said articles are not applicable themselves. This constitutes an important expansion of the scope of proportional liability in Dutch civil law. That *Nefalit* judgment, however, also provides for a very cautious approach toward an extension of its ruling.
- 87** Subsequently, the *Hoge Raad* rejected two contentions in the literature on pro-proportional liability. Namely, the distinction that is sometimes made between causal uncertainty with regard to past facts, and causal uncertainty with regard to the future, as well as the notion that proportional liability, as a solution to causal uncertainty, is to be restricted to cases where obtaining proof is ‘structurally problematic’ because this notion is not distinctive enough.
- 88** The *Hoge Raad* has handed down a clear judgment which is sadly not elaborated further. Our liability laws use less sharp distinctions and concepts. Even when it concerns application of proportionality, the court itself uses a rather ‘unsharp’ distinction. When is, for example, a chance ‘very small’ instead of ‘small’? Furthermore, given the ever-present structural evidential difficulties for injured parties in case of a breach of a duty to warn, and given the refusal of the *Hoge Raad* to provide a different solution – such as a reversal of the burden of proof – this decision can be said to constitute a disproportional disadvantage to the victim of a violation of a cautionary duty.

12. Personal Injury

As last year, many of the legislative developments and of the cases we dealt with above have, in one way or another, an important bearing on aspects of personal injury litigation. The proposed rules on collection-costs and especially the new rules on partial trials will have a profound effect on personal injury cases in the upcoming years. The *Wintherthur* case on how to deal with proof in whiplash situations is also important from a practical point of view, whereas the *Licotec* case lays bare new ground for personal injury litigation. The fact that personal injury was at stake did seem to influence the courts in the *Hammock* case as regards the award of compensation but injury as such is not and cannot be decisive on its own, as we saw from the fireworks disaster case in which compensation was denied, notwithstanding the abundance of personal injuries and deaths in that disaster. When the use of strict liability rules in personal injury litigation is considered, lawyers must be aware by now, certainly after the case of the dyke that failed to withhold the canal water, that a claim on the basis of fault liability or strict liability is not all that different anymore these days, not even when personal injury is involved. The fact that the *Hoge Raad* turned down the use of proportional liability in the *Fortis Bank* case does not mean that proportional liability is no longer of use in personal injury cases. The fact that the rule violated in that case was aimed at preventing economic loss was important for not stretching the more protective rule of proportional liability (instead of the regular burden of proof) to cases such as the one the court had to deal with. Thus, a more plaintiff-friendly ruling in a future case dealing with a violated rule aimed at preventing personal injury will probably stand a far better chance of leading to a proportional solution if the *conditio sine qua non* cannot be proven. **89**

A development not mentioned yet is the entry into force of the so-called ‘GOMA’, the code of conduct on openness of medical incidents, a code aimed at achieving a better way of dealing with incidents, claims and complaints related to medical treatment. The aim of GOMA is to improve openness after a medical incident and when dealing with a medical negligence claim.³⁹ Whether this will be a success will of course depend on its reception in practice in the coming years. **90**

39 See *C van Dijk/JPM Simons*, GOMA: Gedragscode Openheid medische incidenten; betere afwikkeling medische aansprakelijkheid, TVP 3 (2010) 65–74.

C. Literature

Volumes

1. **LFM Besselink/R Nehmelman (eds), De aangesproken staat (Nijmegen, WLP 2010)**

- 91** This book is a result of the 36th annual constitutional law conference on State liability held at Utrecht University on 11 December 2009. It expounds several aspects of State liability with regard to different legal disciplines. Engelhard and Emaus discuss the potential liability of the State when rights conferred by the European Court of Human Rights (ECtHR) are infringed by companies that perform tasks in the public interest. Engelhard raises three questions: To what extent should these companies be (vertically) liable on the basis of an infringement of ECtHR rights? Should the State be (horizontally) liable for such an infringement because of its responsibility to uphold ECtHR rights? Would the State be an easy target in such cases because of its ‘deep pockets’? Emaus analyses the distinction between public and private acts. She argues that the companies that perform tasks in the public interest are part of a larger group of powerful, non-state actors. The applicability of the ECtHR should depend on the powers that an actor has in relation to (other) private actors. The other contributions in this book focus on aspects of criminal law, public law and international law.

2. **T Hartlief/WR Kastelein (eds), Medische aansprakelijkheid (The Hague, Sdu Uitgevers 2009)**

- 92** The case law of the Dutch Supreme Court, the *Hoge Raad*, with regard to medical liability shows interesting developments. These developments are discussed in this book. An introductory contribution from Hartlief is followed by six other contributions that each deal with a separate issue, three of which are mentioned here. Kastelein discusses the relationship between disciplinary medical liability and civil medical liability. She argues that the material norms establishing disciplinary medical liability, based on a material rather than a formal ground, should give guidance in assessing civil medical liability. Van Dijk discusses the proportional approach to medical liability in cases where the cause of the damage cannot be determined. He argues that such an approach is more reasonable in

certain cases, especially those of employers' liability. Smeehuijzen discusses the limitation of claims based on medical liability. According to him, limitation is not only based on legal certainty, but has also a normative background which is illustrated by the cases he discusses.

3. SD Lindenbergh (ed), Een nieuwe aanpak! (The Hague, Sdu Uitgevers 2010)

In recent decades, legislation and case law have improved the position of the injured party in tort law. Yet there still remains room for progress. This book contains several contributions that investigate potential improvements. These contributions are as follows: Keirse deals with a basic fundamental principle of liability law, that is, the duty to prevent damage; Klaassen analyses the new law on partial trials for injury and death damages; Spier writes about the principles concerning proportional liability; Van Duijvendijk-Brand on the specific subject matter of death damages; and Van Dijk deals with the obligation of the injured party to mitigate his or her own loss. Lastly, Smeehuijzen analyses the possibilities of compensation as a result of the negligent handling of personal injury claims. **93**

Monographs

1. G van Dijk/CJM van Doorn/IN Tzankova, Individueel of collectief procederen bij massaschade? (The Hague, BJu 2010)

There are two mechanisms to address class actions. First, there is the opt-in procedure, in which claimants only join a class action through explicit agreement. In this procedure, the freedom of choice to litigate (or not) is central. Secondly, there is the opt-out procedure, in which claimants are considered to have joined the class action unless they explicitly state otherwise. In both cases, there can thus be a substantial number of claimants who are thus better able to 'counterbalance' the (often powerful) defendant. The authors conducted an empirical study to assess the effect of both types of procedures on the claimants' choice to join the class action, to litigate individually or not to litigate at all. This book presents the result of this empirical study. In an opt-out procedure, claimants more often participate in a class action. When involving as many claimants as **94**

possible is preferred, an opt-out procedure therefore seems preferable, along with the information coming from interest groups.

2. ALM Keirse/PM Veder, Europeanisering van vermogensrecht, Preadviezen 2010 uitgebracht voor de vereniging voor Burgerlijk Recht (Deventer, Kluwer 2010)

- 95** National law is increasingly influenced by European developments in a process termed ‘Europeanisation’. This book, a so-called preliminary advice, commissioned by the Dutch society on civil law, illustrates the ways in which this process of Europeanisation continues to shape national tort law, contract law and the law of property in the Member States. In particular, the focus is placed on the dynamic and interwoven interaction of legal scholars, legislators and the courts, on both a national and European level and hence they collectively form the driving force behind the process of Europeanisation. The authors demonstrate that employing a solely national approach is no longer a sustainable preference in the emerging European legal landscape. For this reason, the authors call for all involved to partake in further debate concerning the future of private law in the Member States.

Dissertations

1. FJ Blees, De weg naar schadevergoeding in het internationale gemotoriseerde verkeer (Deventer, Kluwer 2010)

- 96** International traffic accidents are common occurrences on the roads of Europe. This book addresses the question how an injured party can claim damages following traffic accidents where multiple legal jurisdictions are applicable. The subject matter is examined through three questions. Who can the injured party hold liable in the given circumstances? To which form of protection is he or she entitled? And, how are the damages claimed from the liable party or his insurer? Hereto Community directives and regulations, Dutch law and agreements between green card bureaus, guarantee funds and compensation bodies are investigated. A comparative study is also provided on the relevant Belgian, German and French laws.

**2. *BJ de Jong, Schade door misleiding op de effectenmarkt*
(Deventer, Kluwer 2010)**

In recent years, investors have claimed damages for the losses allegedly caused by misrepresentations of listed companies. A famous example is the claim against World Online.⁴⁰ De Jong discusses in his dissertation the legal requirements of causation and damage in Dutch law. He asks and answers three questions. First, whether or not the aforementioned losses are legally recoverable and what the extent is of such losses. Second, how causation between misrepresentation and loss may be established (by using econometrics, for example). Third, to what extent the issues of causation and damage in misrepresentation cases are suitable for a class action. The author also compares the Dutch system with the American system. Such a comparison is particularly useful, as in the American system misrepresentation cases are more abundant (because of a substantial capital market). Finally, De Jong also raises the possibility that investors are contributory negligent, but argues that there is little room for such a claim. **97**

Special Issue

1. *AChH Franken et al, Het voorzorgsbeginsel in het aansprakelijkheidsrecht, AV&S (Aansprakelijkheid, Verzekering en Schade) 5 (2010) 155–205*

In a special issue on the precautionary principle and its meaning for liability law, Franken focuses special attention on the precautionary role of liability law. Central to this contribution is the premise that the aim should better be placed on prevention, rather than cure. The question of the role of liability law is important in view of the uncertain nature of today's new risks. Franken argues that, given the knowledge and experience of asbestos in the past, it would be prudent to formulate precautionary provisions in liability law. **98**

⁴⁰ See *Keirse/Giesen* (fn 5) nos 61–68.