Anne LM Keirse and Tom Bouwman

XIX. The Netherlands

A. Legislation

1. Affection Damage: 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, *Kamerstukken I* 2016/17, 34257, A

1 The legislative proposal on affection damage, outlined in the 2015 report, was adopted by the House of Representatives on 9 May 2017 and is currently still on the agenda of the Senate. The proposal, in brief, provides a legal basis for the compensation of so-called affection damage or bereavement damage.[1]

2. Redress of Mass Damage in a Collective Action: Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken, *Kamerstukken II* 2016/2017, 34 608

2 The most important change this legislative proposal, which was outlined in more detail in the 2014 and 2016 reports, proposes is to make it possible to claim damages in a collective action.[2] Currently, it is prohibited to claim monetary compensation through a collective action. This proposal allows the redress of

1 *JM Emaus*/*ALM Keirse*, The Netherlands, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2015 (2016) 401, nos 1–3. See also *JM Emaus*/*ALM Keirse*, The Netherlands, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2016 (2017) 393, no 2; *JM Emaus*/*ALM Keirse*, The Netherlands, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2014 (2015) 411, no 1; *I Giesen*/*ALM Keirse*, The Netherlands, in: H Koziol/BC Steininger (eds), European Tort Law (ETL) 2009 (2010) 426, no 6.

2 *Emaus*/*Keirse*, ETL 2014 (fn 1) nos 3–6; *Emaus*/*Keirse*, ETL 2016 (fn 1) no 3.

https://doi.org/10.1515/tortlaw-2018-0019

mass damage in a collective action by providing a legal basis for a collective damages action. The legislative proposal is still pending in the House of Representatives. In December 2016, the Standing Committee on Security and Justice published a report in which they identified a number of problems with the legislative proposal. In response to this report, in January 2018 the Minister for Legal Protection issued an official reply in which he proposed some changes to the proposal. The three most important changes are: that all courts become competent to hear collective actions for compensation of mass damage and not only the Court of Amsterdam, that it becomes possible to also opt-out at the end of the collective proceedings instead of only at the beginning, and that the opt-out mechanism only applies to Dutch (legal) persons and not to non-Dutch aggrieved parties – they will have to opt-in.

B. Cases

1. Hoge Raad (Supreme Court, HR) 13 January 2017, Nederlandse Jurisprudentie (NJ) 2017/48: National Standard for Putting a Product in Circulation (*Daf Trucks v Achmea*)

a) Brief Summary of the Facts

In 2003, Daf produced a truck and delivered it to a German subsidiary, Daf Trucks Deutschland BmbH (hereinafter: BmbH). Thereupon, BmbH sold the truck and the ownership passed on to *Bemo Bedrijfswagens* (hereinafter: Bemo). Bemo rented the truck to a third party, who used the truck for the transport of straw and compost. In 2008, the truck caught fire because the exhaust made the dirt that had accumulated underneath the truck too warm. Achmea – Bemo's insurer – paid Bemo's damages. 3

In the present proceedings, Achmea attempted to recover the damages from Daf. Both the court of first instance and the court of appeal awarded the claim. In first instance, Daf argued that they were not liable for the damage suffered by Bemo because Daf was not the one who had put the truck into circulation. In Daf's opinion, they only sold the truck to BmbH in order to let BmbH distribute the truck, not to use it. Therefore, the selling process commenced when BmbH sold the truck to Bemo and not when Daf sold the truck to BmbH. The court of first instance argued that, although art 6:185 *Burgerlijk Wetboek* (Dutch Civil Code, DCC), the Dutch implementation of the product liability directive (Direc- 4

tive 85/374/EEC), did not apply to this case, one can still – despite the fact that the claim is based on art 6:162 DCC, the general tort article – use the standard the Court of Justice of the European Union (CJEU) introduced for answering the question of whether a product has been put into circulation. In CJEU 9 February 2006, NJ 2006/401 (*O'Byrne v Sanofi*), the CJEU ruled that a product has been put into circulation when it leaves the production process operated by the producer and enters a marketing process in the form in which it is offered to the public in order to be used or consumed. Generally, it is not important in that regard that the product is sold directly by the producer to the user or to the consumer, or that that sale is carried out as part of a distribution process involving one or more operators. Because Daf produced the truck and BmbH only distributed the truck, the court of first instance judged that the fact that it was not Daf who distributed the truck but BmbH does not lead to the conclusion that Daf did not put the product into circulation. On appeal, the court of appeal upheld this judgment.

b) Judgment of the Court

5 In cassation, Daf challenged the decisions of the court of appeal by arguing that the standard that the CJEU introduced in *O'Bryne* does not apply in this case because the claim is based on art 6:162 DCC and not on art 6:185 DCC. After reproducing the line of argumentation of the court of first instance, the *Hoge Raad* ruled that the court of appeal did not err in law by using the standard that was formulated in *O'Bryne* for answering the question of whether a producer has put a product into circulation.

c) Commentary

6 Achmea's claim did not fall within the scope of the product liability regime as laid down in the European Directive and as has been implemented in art 6:185 ff DCC. After all, when it comes to damage to the product itself, no compensation is granted to the user or consumer under this product liability regime. Besides, damage to another asset will only be compensated under this regime if the asset in question is ordinarily intended for private use, which was not the case. It is acknowledged in Dutch case law and generally accepted amongst academics that the general tort clause, art 6:162 DCC, legitimately offers an opening where the strict product liability regime offers none, for instance for products brought into circulation before 1990, to avoid the limitation period of the strict product

liability regime, or in the current case of damage falling outside its scope.[3] After all, the maximum harmonisation the Directive aims for does not imply that the product liability regime is exclusive.[4]

In the *Koolhaas v Rockwool* case, the *Hoge Raad* ruled that it is wrongful to put into circulation a product that, when used in a normal fashion and for the intended purpose, causes damage.[5] In this respect, the criterion used to determine the defectiveness of a product under art 6:185 ff DCC is also used to determine unlawfulness under art 6:162 DCC.[6] As a rule, the act of putting a defective product on the market will be attributable to the producer because generally accepted standards justify such attribution. This follows from the case law of the *Hoge Raad* and especially from the *Koolhaas* case. In this case the *Hoge Raad* established a general duty of care for producers to implement safety measures in order to prevent the supply of defective products as well as to keep end-users/consumers informed about potential applications of the product.[7] **7**

In this case, *Daf Trucks v Achmea*, the Dutch courts ruled that, in case a tort claim based on art 6:162 DCC is filed, the question of whether or not the defendant put the defective product into circulation and can therefore be held liable as producer of the product needs to be answered in accordance with the standard for putting a product into circulation formulated by the CJEU. In other words, the criterion used to determine who put the product into circulation under art 6:185 ff DCC is also used under art 6:162 DCC. This further equates liability under art 6:162 DCC with liability under art 6:185 DCC. **8**

Another implication of this case is that not only the seller, but also the producer is liable for damage caused to the sold product itself on the basis of art 6:162 DCC if this product does not provide the safety that a person is entitled to expect, taking into account all the circumstances of the case at hand. **9**

---

3 See *ALM Keirse*, The Netherlands, in: P Machnikowski, European Product Liability (2016) 349 f, nos 100–102.

4 *Keirse* (fn 3) 314 f, no 7.

5 HR 22.10.1999, NJ 2000, 159 (*Koolhaas v Rockwool*); see also: HR 6.12.1996, NJ 1997, 219 (*DuPont v Hermans*).

6 *J Spier/T Hartlief/ALM Keirse et al*, Verbintenissen uit de wet en schadevergoeding (7th edn 2015) no 149.

7 HR 22.10.1999, NJ 2000, 159 (*Koolhaas v Rockwool*).

2. HR 24 February 2017, Rechtspraak van de Week (RvdW) 2017/298: Land Grabbing as a Tort (*Municipality Heusden v M*)

a) Brief Summary of the Facts

10 In 1973, a Dutch family bought a house and a parcel of land in the countryside of Drunen. This parcel bordered woodland, which was owned by the municipality of Heusden. A couple of years later the family fenced off and gated part of this forest, located directly behind their parcel of land. So they grabbed land, knowing of course that this land did not belong to them but was communal property. The land covered an area of about four hundred square metres. They made sure that they were the only people using this part of the forest and kept it in good repair. Within the fence they made an access point that only they could open. They built two tree houses, a *jeu de boule* playing area and a storage place for wood. In 2003, the municipality – which was the owner of the forest – notified the family that it wanted to terminate the agreement that allowed the family to use the forest. The family responded by claiming that there was no agreement between them and the municipality and that, through acquisitive prescription, they had become the owners of the part of the forest that they had fenced. After all, they had taken this land into possession and the twenty-year prescription period of the right of action of the owner to terminate this possession had expired, while they had kept it in their possession. And therefore, they claimed, the municipality had lost its ability to reclaim the fenced forest and its ownership thereof. The municipality informed the family that it did not agree with its view.

11 As a result, the family took the matter to court and claimed that they had become the owner of the part of the forest that they had fenced. The municipality filed a counterclaim for the eviction of the family and a prohibition against them using or entering this part of the forest again. The court of first instance allowed the claim of the municipality. Contrariwise, the court of appeal allowed the claim of the family. The court of appeal argued that at the time the municipality reclaimed the forest, the family had already possessed it for more than twenty years and therefore, although they acted in bad faith, had become the owners of the land according to the Dutch provision on acquisitive prescription. Article 3:105 subsec 1 DCC – the article on acquisitive prescription in case a possessor acts in bath faith – states that the person who holds property in possession at the moment when the prescription period of the right of action of the owner to terminate this possession expires acquires the property even if his possession was not in good faith.

b) Judgment of the Court

In cassation, the *Hoge Raad* – briefly put – concurred with the judgment of the court of appeal. But then more importantly, it added in an obiter dictum that although the family had become the owners of the forest through acquisitive prescription, it remains an option for the municipality to initiate an action against the family based on the general tort clause (art 6:162 DCC), in which it can claim, as a form of compensation, the transfer of ownership of the parcel of land from the family to the municipality (art 6:103 DCC). Taking something into possession while knowing that someone else actually owns it establishes a tort. According to the *Hoge Raad*, the legal system allows such a tort claim because the ratio behind art 3:105 subsec 1 DCC is that, at some point, the legal situation must be in line with the factual situation, which improves legal certainty. Unlike the article on acquisitive prescription that applies in case the possessor acts in good faith (art 3:99 DCC), art 3:105 DCC is not the result of a balancing act between the possessor's interest and the interests of the original owner. Moreover, according to the *Hoge Raad,* this interpretation of art 3:105 subsec 1 DCC is also in line with a remark of the Minister of Justice on the scope of application of the article. 12

In addition to these remarks, the *Hoge Raad,* also mentioned that vis-à-vis the bad faith of the family, the behaviour of the municipality does not constitute contributory negligence. According to the *Hoge Raad*, it is unreasonable to expect from owners of immovable property that they regularly check, even without a concrete cause, whether their property is taken into possession by another person. Lastly, the *Hoge Raad* also mentioned that in this case the five-year prescription period of a claim based on art 6:162 DCC commences the moment the original owner is aware of the loss of its ownership, and that the claim prescribes in any case twenty years after the possessor acquired ownership through acquisitive prescription (art 3:310 subsec 1 DCC). 13

c) Commentary

When legal certainty and justice are struggling for supremacy, as is the case in prescription law, the question is whether the one predominates over the other. The *Hoge Raad* balanced legal certainty with justice by prolonging the prescription period of a right of action in the case of land grabbing. 14

It turns out that, after losing ownership of property, a new claim emerges, a tort claim. Since Dutch law acknowledges compensation in kind (art 6:103 DCC), the municipality can claim, as a form of damages, the transfer of ownership of 15

the parcel of land from the family back to the municipality. This means that the ownership is lost but can be returned, if and when the court decides to award compensation in a form other than payment of a sum of money. Thus the municipality gets a second chance. The prescription of the right of action to terminate possession may have expired, but the same is not true for the prescription of the right of action to claim damages for losing ownership.

16 This direction of the *Hoge Raad* was quite unexpected. The literature and former case law saw no possibility for such an equitable solution. They learned that a claim for damages prescribed no later than the reclaim of ownership itself, being the principal obligation.[8] It is remarkable that the *Hoge Raad* came up with this new insight in an obitur dictum. The parties came to court with the question of whether or not the grabbing of the land qualified as unambiguous and outwardly apparent possession required for acquisitive prescription. The *Hoge Raad* answered this question affirmatively, and could have stopped there, but it did not. It should be mentioned that there have been other opportunities to do so, but for one reason or another the *Hoge Raad* has not given this ruling before; it has, however, chosen to do so now. It is of course a decision based on legal policy. One could say it is more about politics than law. For sure, it caused many to reach for their pens.[9] The ruling has been applauded but also severely criticised.

3. HR 24 March 2017, NJ 2017/313: Prescription of Asbestos Claims (*Heijnen v Maersk)*

a) Brief Summary of the Facts

17 Between 1953 and 1969, Van Otterloo worked at *Vereeniging Nederlandsche Scheepvaartsmaatschappij* (hereinafter: VMS). In August 2010, he was diagnosed with mesothelioma – a type of cancer whose only known cause is breath-

8 See amongst many others *JE Jansen*, Schadevergoeding uit onrechtmatige daad na verkrijging door artikel 3:105 BW, RM Themis 2018-1, 8–9.

9 See *SE Bartels/V Tweehuysen*, Jurisprudentie Onderneming & Recht (JOR) 2017/186; *AG Castermans*, Ars Aequi (AA) 2017, 516–522; *HJF Clifford*, Tijdschrift voor Agrarisch Recht 2017, 279–283; *B Hoops/LCA Verstappen*, Weekblad voor Privaatrecht, Notariaat en Registratie (WPNR) 2017 (7143) 255–257; *B Hoops*, WPNR 2017 (7174) 983–989; *R Fabritius*, Vastgoedrecht 201703, 69–73; *JE Jansen*, RM Themis 2018-1, 3–11; *W Lever*, Gemeentestem (Gst) 2017/77, 419–421; *K Meijering/MHWCM Theunisse*, BR 2017/80, 535–542; *ML Tuil*, Maandblad voor Vermogensrecht (MvV) 2017-4, 143–150; *FJ Vonck*, Tijdschrift voor Bouwrecht (TBR) 2017-6, 668–670.

ing in asbestos dust. The incubation period for mesothelioma is between 10 to 60 years after breathing in the asbestos dust. In October 2010, Van Otterloo died because of this disease. Thereupon, Van Heijnen – Van Otterloo's beneficiary – filed a claim for damages against Maersk, the legal successor of VMS in Van Otterloo's name. During his employment at VMS, Van Otterloo had come into contact with asbestos.

Both the court of first instance and court of appeal rejected Van Heijnen's claim because of the prescription defence that Maersk raised. 18

b) Judgment of the Court

In cassation, Van Heijnen's ground for cassation challenged the decision of the court of appeal by arguing that the Dutch rule on the prescription of tort claims is, considering the *Howald Moor v Switzerland* case[10], in breach of art 6 subsec 1 European Convention on Human Rights (ECHR). In response to this argument, the *Hoge Raad* first considered that the current art 3:310 subsec 5 DCC states that there is no longer a prescription period for undiscovered damage that is the result of injury or death. However, according to the transitional Act, this rule does not apply to damaging events that occurred before 1 February 2004, the day when this amendment entered into force. According to art 3:310 subsecs 1 and 2 DCC, claims that are based on damaging events that occurred before that date prescribe in any case after twenty years or, if the damage is the result of the effects of hazardous materials or pollution, after thirty years – even when the injured party did not know that he had a claim. Because a claim for damages due to mesothelioma can thus prescribe before the injured party knew he had a claim, the *Hoge Raad* decided in 2000 that if there is uncertainty over a long period of time as to whether an event that can cause damage will actually do so and therefore the damage has remained 'hidden' until after the expiry of the prescription period, the principles of reasonableness and fairness (art 6:2 DCC) can lead to an extension of the thirty-year prescription period.[11] In order to decide whether, in view of all the circumstances of the case the prescription period should be prolonged, a court must at least consider the following seven aspects: a. whether the case concerns the compensation of financial loss or harm that is not a financial loss, and – in connection therewith – whether the claimed compensation is for the benefit of the victim himself/herself, his/her survivor or a 19

10 European Court of Human Rights (ECtHR) 11.3.2014, no 52067/10, NJ 2016/88.

11 HR 28 April 2000, NJ 2000/430 (*Van Hese v De Schelde*).

third party; b. to what extent the victim, or his/her survivors, are eligible for compensation on any other ground; c. to what extent the occurrence of the harm can be attributed to the defendant; d. to what extent the defendant took into account or should have taken into account before the expiry of the prescription period that there was a possibility that he/she would be liable for the damage; e. whether the defendant reasonably has the possibility to defend himself/herself against the claim; f. whether the liability is (still) covered by an insurance; g. whether the liability claim and claim for damages was filed within a reasonable period of time after the discovery of the damage.

20 The *Hoge Raad* then continued by stating that, according to art 6 subsec 1 ECHR, the ability to institute proceedings is not absolute and can be restricted. A restriction may, however, not impair the very essence of the right of access to a court; it must pursue a legitimate aim, and it must be proportionate. The fact that it depends on the circumstances of the case whether the thirty-year prescription period can be prolonged does not, according to the *Hoge Raad*, mean that the Dutch rule on the prescription of tort claims, also in view of the *Howald Moor cs v Switzerland* case, is in breach of art 6 subsec 1 ECHR. The right of access to a court is not insufficiently effective solely because it depends on the circumstances of a case whether a claim can be instituted. This restriction exists because it is necessary, in cases similar to this one, to create a balance between the interests of the injured party and the defendant in terms of legal protection and legal certainty. The injured party can request this balancing of interests even after the expiry of the prescription period, and the aspects that a judge must include in the balancing act allow the injured party to argue why the prescription period in this specific case should be set aside. Therefore, the restriction of the right of access to a court does not impair the essence of the right. Moreover, the restriction is also legitimate and proportionate.

21 Remarkably, the *Hoge Raad* then settled the case, arguing that the court of first instance was correct in considering that the above-mentioned aspect a. (the type of damages claimed) in this case does plead for a prolonged prescription period. Another aspect that supports an extension of the prescription period is, according to the *Hoge Raad*, aspect g. However, because aspects b. and e. plead against an extension of the prescription period, the other aspects carry almost no weight, and aspects b. and e. outweigh aspects a. and g., art 6:2 DCC cannot be invoked and therefore the prescription period cannot be extended in this case.

c) Commentary

This case clarifies formerly established case law. Dutch prescription law shaped by the *Hoge Raad* in accordance with the requirements of reasonableness and fairness was unsuccessfully challenged. Losing an alleged right through no fault of their own was again the matter at hand (as was the case in the aforementioned case regarding prescription discussed under nos 10–16) After all, the case concerned an asbestos claim for damages, which was prescribed before the injured party knew he had a claim. More than forty years had passed between the event that caused the damage – the exposure to asbestos – and the discovery of the damage – the diagnosis with mesothelioma. Under these circumstances, the Dutch objective prescription period of thirty years is applicable, but the principles of reasonableness and fairness can, in exceptional circumstances, prolong this prescription period. After giving due weight to the specific circumstances of the case, the *Hoge Raad* decided that in this case the claim was prescribed. The Dutch rules on the prescription of tort claims were found to be *ex aequo et bono* and not in breach of fundamental rights, since they allow for a balancing act and a prolonging of the prescription period based on a weighing of the circumstances of the case and interests involved. **22**

These two cases regarding prescription (cases 2 and 3) illustrate once again that we should not strive to end the conflict between legal certainty and justice in individual cases. That would not be feasible. Neither goal can replace the other. Legal certainty refers to the public interest in clear, foreseeable and equal rules of law. They are supposed to enable those who are subject to these rules of law to adjust their behaviour in such a manner as to avoid legal conflict or to make lucid predictions of their chances in litigation. Justice in individual cases concerns the need for deciding current, concrete disputes adequately. On the one hand, it cannot be maintained that the sole purpose of justice is to guarantee the certainty of the law. On the other hand, there is no merit to the assertion that real legal certainty is the certainty that justice will prevail. No, quite the contrary, both aspects of the law deserve acknowledgment. It comes down to a balancing act. This balancing act endeavours to strengthen the trust and credibility of the legal system and its fairness. **23**

4. HR 16 June 2017, NJ 2017/265: Benchmark for Determining Actual Olfactory Nuisance (*Van Deurzen cs v De Booij cs*)

a) Brief Summary of the Facts

24 On 14 November 2002, Van Deurzen started operating a poultry farm in Groesbeek. The municipality of Groesbeek issued a permit for the operation of a poultry farm on 6 November 2001. However, because no environmental impact report was handed in with the permit's application, the *Afdeling Bestuursrechtspraak van de Raad van State* (Administrative Jurisdiction Division of the Council of State, *De Afdeling*) annulled the permit on 20 November 2002. The poultry farm continued to operate until 1 March 2006 on the basis of a temporary exemption order that was issued by the municipality. On 1 March 2006, the municipality issued a new permit, which *De Afdeling* annulled on 22 November 2006. On 3 April 2007 the municipality – once again – issued a new permit, which *De Afdeling* – once again – annulled on 27 February 2008. On 1 September 2008, the poultry farm closed down under the threat of enforcement.

25 In this legal action, De Booij and other owners of holiday homes that are located near the poultry farm claimed damages for the olfactory nuisance that the poultry farm caused between 14 November 2002 and 1 September 2008. The court of first instance rejected the claim because of prescription for the olfactory nuisance until 1 April 2003 and allowed the claim for the remaining period. In order to determine whether there was actual olfactory nuisance between 1 May 2003 and 1 September 2008, the court of first instance consulted a professional report that referred to the *Wet Geurhinder en Veehouderij* (Odour Nuisance and Livestock Farming Act, Wgv), which came into force on 1 January 2007, as a benchmark. That report established that the olfactory nuisance of the poultry farm was somewhere between 'unpleasant' and 'highly unpleasant.' On appeal, the judgment of the court of first instance was upheld.

b) Judgment of the Court

26 In cassation, Van Deurzen challenged the decision of the court of appeal by arguing that an Act that was not yet into force during – most of the time of – the nuisance cannot be used as a benchmark for assessing the level of nuisance. Instead, according to Van Deurzen, the public law rules that were in force at the time of the nuisance should have been used as the benchmark to determine the level of olfactory nuisance.

In response to this ground of cassation, the *Hoge Raad* first pointed out that 27
it is established case law that the question of whether nuisance is wrongful has to be addressed by looking at the nature, seriousness and duration of the nuisance and the thereby caused damage in connection with the circumstances of the case, including the local circumstances. It is also established case law that the absence or the presence of a public law permit is in itself not decisive for the answer to the question of whether or not the nuisance is wrongful. According to the *Hoge Raad*, this leads to the conclusion that for the answer to the question whether the olfactory nuisance of the poultry farm was wrongful, it is not decisive whether the poultry farm complied with the public law regulations that were applicable at that time. Therefore, according to the *Hoge Raad*, the court of appeal acted correctly in its decision by 'drawing inspiration from' a report that used the Wgv as a benchmark for establishing whether the olfactory nuisance was wrongful. The court of appeal used this benchmark because the previous – applicable at the time of the olfactory nuisance – public law regulations did not offer a practicable benchmark for establishing the actual olfactory nuisance. The approach of the court of appeal was, according to the *Hoge Raad*, in line with the Explanatory Memorandum of the Wgv, in which it is mentioned that, already in 2001, the public law regulations that then applied were identified as insufficient to determine actual olfactory nuisance. Therefore, according to the *Hoge Raad*, the court of appeal did not err in law by determining the level of actual olfactory nuisance by 'drawing inspiration from' a report that used objective criteria, that were based on recent insights.

c) Commentary

One has to tolerate a certain degree of nuisance. However, there are limits and 28
nuisance can establish a tort. Public law norms are not decisive in drawing the limits for private law liability, but that does not detract from the fact that those norms can influence the decision as to whether or not a nuisance is wrongful and establishes liability in the given circumstances. The same goes for newly enacted public law norms that had not yet entered into force at the time of the alleged nuisance. These norms may serve as a source of inspiration for drawing the boundaries of private law liability. The fact that norms were not yet formally adopted does not rule out the fact that these norms can help define proper social conduct.

5. HR 14 July 2017, NJ 2017/467: Liability in a Chain and Concurrence of Actions (*Zurich Insurance v JMV Spoorwegveiligheid*)

a) Brief Summary of the Facts

29 ProRail – a railway manager – hired BAM Rail (hereinafter: BAM) for the maintenance of railways. BAM hired JMV Spoorwegveiligheid (hereinafter: JMV) for ensuring safety during the maintenance work. One of the tasks of one of JMV's employees was to ensure that the railroad switches were in the right position during the maintenance work. Despite this, during the night of 19 February 2008, one of the railroad switches was not in the right position. As a result, a passing train damaged the switch and Zurich Insurance – BAM's insurer – had to compensate the damage suffered by ProRail.

30 Within the proceedings, Zurich Insurance – as a subrogate of BAM – tried to recover the damage from JMV. The court of first instance rejected the claim, but the court of appeal awarded the claim. The court of appeal considered that JMV was liable for its employee's conduct on the basis of art 6:170 DCC – ie the article on non-contractual strict liability for subordinates. Article 6:170 DCC inter alia requires that the subordinate did in fact commit an attributable wrongful act. The court of appeal judged that in this case this requirement was met because JMV's employee knew that he was unable to see from the train whether the railroad switch was in the right position. Therefore, he should have asked the driver to stop the train and to get out of the train for an inspection. According to the court of appeal, given inter alia the weather conditions on the night of 19 February 2008 – it was foggy – the employee should have disembarked from the train but, because he did not do so, he committed an attributable wrongful act for which JMV is liable.

b) Judgment of the Court

31 In cassation, JMV challenged the decision of the court of appeal because, as JMV argued, its employee did not act wrongfully and, furthermore, because the subordination requirement of art 6:170 DCC was not met. As regards the wrongfulness of the employee's behaviour, the *Hoge Raad* stated that the court of appeal should have used the doctrine of hazardous negligence in order to assess the wrongfulness of the employee's conduct. With reference to earlier cases (HR 9 December 1994, NJ 1996/403 and HR 7 April 2006, NJ 2006/244), the *Hoge Raad* mentioned that an act is not wrongful if there is just a possibility that a

risk will create damage. Instead, an act that creates a hazard is wrongful if the probability of the realisation of the hazard as a consequence of that behaviour is so high that the offender, according to normal standards of care, should have abstained from the behaviour. When making this assessment, one must not only take into account the chances of damage occurring, but also the nature of the behaviour, the nature and seriousness of the possible damage, and the degree of onerousness and usualness of taking precautionary measures.

32 In its judgment, the *Hoge Raad* then continued by mentioning that a few points should be stated first and foremost. First of all, that in a case like this the claimant can – except when otherwise provided by the agreement – claim damages on the basis of breach of contract (art 6:74 DCC). In such case, the employer can only recover the compensation from its employee when the damage was caused by the intentional or deliberately recklessness behaviour of the employee. However, the claimant can also decide – again, except when otherwise provided by the agreement – to claim damages from the employer on the basis of art 6:170 subsec 1 DCC. This ground inter alia requires that the employee involved committed a wrongful act vis-à-vis the claimant. Additionally, the claimant can also decide to claim damages from the employee on the basis of art 6:162 DCC, the general tort clause. According to art 6:170 subsec 3 DCC, the employer then has the obligation to compensate its employee for the entire damages paid unless the damage was caused by the intentional or deliberately reckless behaviour of the employee. According to the *Hoge Raad*, claiming damages from the employee can be disadvantageous for the employee because the employee then has to bear the insolvency risk of its employer. Finally, the *Hoge Raad* mentioned that, in a procedure that is based on art 6:170 DCC, the wrongfulness of the employee's conduct should not be judged differently than when the employee himself is held liable based on art 6:162 DCC.

33 Taking into consideration the foregoing, the *Hoge Raad* decided that the judgment of the court of appeal about the wrongfulness of the employee's conduct was incomprehensible. The court of appeal should have taken into account that JMV claimed that the visibility was 50–100 metres, that therefore the employee was able to see the railroad switch, that the two train drivers said that they thought that they had seen that the railroad switch was in the right position and that, at that time, it was common practice to judge whether the railroad switch was in the correct position while standing on the train.

34 With regard to the subordination requirement of art 6:170 subsec 1 DCC, the *Hoge Raad* stated that the court of appeal was correct in considering that it is sufficient for the subordination requirement that the employer had control over when the employee who acted wrongfully worked for a third party – ie in this case BAM.

c) Commentary

35 This case illustrates that if a contracting party suffers damage due to the performance of a contract by the co-contracting party, damages can be claimed on the basis of breach of contract – except when otherwise provided by the agreement and provided that the breach of contract is attributable to the co-contracting party – even if the damage is caused by a tortious act of an employee or an auxiliary person of the co-contracting party. Furthermore, the *Hoge Raad* clarified that the claimant in such a case can also choose – again, except when otherwise provided by the agreement – to claim damages on the basis of non-contractual tortious liability; provided that the employee involved committed a tortious act towards the claimant, the claimant can either claim damages from the employer on the basis of vicarious liability or from the employee itself on the basis of the general tort clause.

6. HR 14 July 2017, NJ 2017/364: Contracting Parties and their Liability towards Third Parties (*Vissers v Compaen*)

a) Brief Summary of the Facts

36 In March 2007, De Molen Bunders (hereinafter: DMB) entered into a purchase agreement with Compaen for the sale of 70 apartment rights. The purchase agreement stipulated that Compaen would be allowed to terminate the contract if DMB did not sell 20 – different – apartment rights before 1 February 2008. In December 2007, DMB entered into an agreement with Vissers. In that agreement it was stipulated that at DMB's call Vissers would buy no more than 20 apartment rights from Compaen at a price of € 15,000 each. Furthermore, the agreement stipulated that if the purchase agreement between Compaen and DMB was terminated, the agreement between DMB and Vissers would also automatically be terminated. Compaen did not invoke the termination provision and DMB did not oblige Vissers to buy the apartment rights. Instead, in July 2009, Compaen and DMB entered into a settlement agreement in which they stipulated that their purchase agreement was terminated. On that same day, DMB informed Vissers that the purchase agreement between DMB and Compaen was terminated and that therefore the agreement between DMB and Vissers was automatically also terminated.

37 Because DMB was declared bankrupt in 2010, in the present procedure Vissers claimed damages from Compaen due to the fact that it was unable to

buy apartment rights from DMB at a price of € 15,000 each. The court of first instance allowed the claim. The court of appeal rejected the claim because, according to the court, the standard that states that a party to an agreement can – under certain circumstances – act wrongfully towards a third party only applied if the party to the agreement breached the agreement. Because in this case, the purchase agreement between Compaen and Vissers was terminated by mutual consent, the standard did not apply, according to the court of appeal, and therefore Compaen did not act wrongfully towards Vissers.

b) Judgment of the Court

In cassation, Vissers argued that the court of appeal was wrong in not applying the standard according to which a party to an agreement can – under certain circumstances – act wrongfully towards a third party. In response to this ground for cassation, the *Hoge Raad* first considered that it was decided in HR 24 September 2004, NJ 2008/587 and HR 20 January 2012, NJ 2012/59 that when someone enters into a contract and thereby becomes – in legal matters – a chain in a network of contracts, the party is not under all circumstances free to ignore the interests third parties have in the proper performance of the contract. If the interests of a third party are so closely connected with the proper performance of the contract that the third party can suffer damage or other disadvantages if a party to the contract fails to perform the contract correctly, the norms of what is generally accepted according to unwritten law pertaining to proper social conduct may imply that the party to the contract should take into account the interests of that third party by guiding his conduct – partly – by these interests. In order to determine whether these norms imply this, one has to look at the particular circumstances of the case, such as the capacity of all parties that are involved, the nature and purpose of the agreement involved, the way in which the interests of the third party are involved, the question whether the contracting party knew about the involvement of the third party, the question whether the third party was allowed to trust that his interests would be taken into consideration, the question to what extent it would be inconvenient for the contracting parties to take into account the third party's interests, the nature and the extent of the disadvantages the third party could be faced with, the question whether the third party could reasonably be required to have covered himself against these disadvantages, and the reasonableness of the – where applicable – compensation offered to the third party. **38**

According to the *Hoge Raad*, the court of appeal interpreted these standards incorrectly by considering that a breach of agreement is required. In order for **39**

the doctrine to be applied, it is required, according to the *Hoge Raad*, that the defendant should have – partly – guided his statements and behaviour that is related to performance of his contract by the interests of the involved third party. It is not required that the defendant breached the agreement.

c) Commentary

40 This case concerns the borderlines of tort law and interactions with contract law. An act or omission may constitute both a failure in the performance of an obligation and a ground for liability in tort provided the tortious liability exists independently of the breach of the contractual obligation. Furthermore, the behaviour of a contractual party can be regarded as tortious vis-à-vis a third party. After all, when one enters into a contract, one is not entirely free to ignore the interests third parties have in the proper performance of the contract. Under certain conditions, these interests should be taken into account and a failure to do so may be regarded as a breach of the norms of proper social conduct and therefore as a tort establishing liability towards the third person. The *Hoge Raad* held that a breach of contract is not required in order to invoke this assessment framework. Decisive for tortious liability towards the third party is whether or not the contracting party should have guided his behaviour related to the performance of the contract by the interest of this third party. Thus, for the establishment of tortious liability towards a third person, it is not required that the contracting party breached the contract and can also be held liable towards his contractual party on a contractual basis. For concurrence of these actions, this is of course required.

7. HR 15 September 2017, RvdW 2017/949: Full Payment of Legal Costs Because of Abuse of Procedural Law (*Van Eendenburg cs v De Alternatieve & Van Zanten*)

a) Brief Summary of the Facts

41 In 1996, Van Eendenburg entered into a brokerage agreement with Van Zanten. As his broker, Van Zanten advised Van Eendenburg to sell his two parcels of land to De Alternatieve. In 1997, Van Zanten therefore entered into an oral purchase agreement with De Alternative for the sale of his land. No date for payment or transfer of title were set out in that agreement. What Van Zanten, however, did not tell Van Eendenburg at the time of the agreement was that he was

an indirect shareholder of De Alternatieve. Later, in 2001, when the municipality tried to expropriate the land, Van Eendenburg contacted De Alternatieve in order to – again – negotiate the terms of the sale. De Alternative argued that there already was a purchase agreement and therefore started legal proceedings in which he tried to enforce it. Van Eendenburg defended himself against the enforcement claim by arguing that he would not have entered into the purchase agreement if he had known that Van Zanten was involved in De Alternative. The court of appeal – after the case was sent back from the *Hoge Raad* – ruled that the purchase agreement was subject to annulment because of deception (art 3:44 subsec 4 DCC).

42 In the present legal proceedings, Van Eendenburg claimed damages from De Alternatieve and Van Zanten for the full legal costs he had to incur because De Alternatieve tried to enforce the purchase agreement. Both the court of first instance and court of appeal allowed the claim. The court of appeal argued that De Alternative acted wrongfully and violated procedural law by trying to enforce an agreement which De Alternative knew that Van Eendenburg had entered into under the influence of deception. Van Zanten also acted wrongfully according to the court of appeal because, as a professional broker, he should have told Van Eendenburg that he was involved in De Alternative. The court of appeal argued that, under these circumstances, it was justified to make an exception to the legal system of payment of costs of the proceeding (arts 237–240 *Wetboek van Burgerlijke Rechtsvordering* (Dutch Code of Civil Procedure, DCCP)), and to award Van Eendenburg's claim – ie the full compensation of his legal costs.

b) Judgment of the Court

43 In cassation, the *Hoge Raad* – after ruling that the court of appeal was correct in arguing that Van Zanten acted wrongfully towards Van Eendenburg – dealt with the ground for cassation that challenged the decision of the court of appeal that in this case full compensation for the costs of legal proceedings could be awarded. De Alternatieve and Van Zanten argued that because their enforcement claim was not 'futile from the very start or evidently unfounded', one could not speak of a violation of procedural law or wrongful behaviour. In order to support their claim, they pointed to the fact that, in the enforcement procedure, the court of appeal allowed their claim. Therefore, according to De Alternatieve and Van Zanten, their claim was not futile from the very start or evidently unfounded. In response to this, the *Hoge Raad* argued that, as judged in an earlier case, it follows from art 241 DCCP that arts 237–240 DCCP, apart from exceptions, provide rules about the costs that a party has to bear if a claim was

unsuccessful which are both limitative and exclusive. These rules suspend art 6:96 subsec 2 DCC, as well as the starting point in compensation law that an aggrieved party has a right to full compensation of damage if that damage was caused by a wrongful act. Full compensation of legal costs – a deviation from the rules of arts 237–240 DCCP – is only possible in exceptional circumstances. Such circumstances exist if someone breached procedural law or acted wrongfully. As considered in an earlier case (HR 6 April 2012, NJ 2012/233 (*Duka v Achmea*)), one can speak of a violation of procedural law or a wrongful act when the claim, considering the evidently unfounded nature of it, should not have been filed due to the interests of the opposing party. This can be the case when the claimant knew or should have known that his/her claim was futile from the start, or when he/she knew or should have known about the incorrectness of the claim. According to the *Hoge Raad*, one should exercise caution in acknowledging a violation of procedural law due to the right of access to a court as laid down in art 6 ECHR. According to the *Hoge Raad*, the court of appeal in this procedure applied these standards correctly because the court of appeal that allowed the claim in the enforcement procedure also acknowledged that De Alternatieve had intentionally deceived Van Zanten. The court of appeal in the enforcement procedure only rejected the enforcement claim on a different ground, which was irrelevant for the deception aspect and which was subsequently overturned by the *Hoge Raad*.

44 With regard to the standards that the court of appeal used to examine whether Van Eedenburg was to be held liable for the full legal costs that Van Zanten incurred, the *Hoge Raad* argued – with reference to the parliamentary history of the old art 241 DCCP – that the question as to what extent a third party (Van Zanten was not a party to the enforcement proceedings) can be held liable for the full legal costs should not be addressed by using the standard that was set out in *Duke v Achmea*. The reason for this is that arts 237–240 DCCP only apply to the parties of a proceeding. Instead, the normal rules of liability and compensation should be applied in order to determine whether a third party should pay compensation for the legal costs. The general rules about the causal relationship (art 6:98 DCC) and the double reasonableness test of art 6:96 subsec 2 DCC are especially relevant within such a context. Although the court of appeal thus applied the wrong standard, the *Hoge Raad* argued that, in this case, Van Zanten could be held liable for the full legal costs because of three things: he did not tell Van Eedenburg that he was involved in De Alternatieve, despite his involvement he still tried to ensure that Van Eedenburg entered into the purchase agreement, and he urged De Alternatieve to enforce the purchase agreement. Therefore, Van Eedenburg's full legal costs can, according to reasonableness, be attributed to Van Zanten (art 6:98 DCC).

c) Commentary

In *K v Rabobank* the *Hoge Raad* ruled that the rules about the legal costs that a party has to compensate if the claim is unsuccessful (arts 237–240 DCCP) are in principle both limitative and exclusive.[12] In this case, *Van Eendenburg cs v De Alternative & Van Zanten*, the *Hoge Raad* explains that the ratio behind this limitation is to not discourage people to bring a case to court.[13] In addition, this case is also interesting because the *Hoge Raad* explains that the rules of arts 237–240 DCCP only apply between the parties of a legal procedure. This means that the case law in which the *Hoge Raad* decided that full compensation of legal costs is only possible in case someone abused procedural law or acted wrongfully[14] only applies to the parties of legal proceedings. The question whether a third party – such as, in this case, Van Zanten – should compensate a party's legal costs must be decided based on the normal rules of liability (eg art 6:162 DCC) and compensation (art 6:95 ff DCC). 45

8. HR 22 September 2017, RvdW 2017/1011: Substantiation Requirement for Differentiating from Disciplinary Judgment (*A v B*)

a) Brief Summary of the Facts

In 2009, A, the owner of a company that imported flowers from Kenya, had trouble financing his company. In the same year, A met X, who said that he could put A in touch with potential investors. In return, X asked for a monthly management fee of € 10,000. X did put different potential investors forward, but none of the investors entered into an agreement with A. Therefore, in 2011, A's company was declared bankrupt. Because A was of the opinion that B – his accountant – should have warned him about X since X used various artful tricks to sugar-coat the truth, he filed a complaint with the *Accountantskamer van de Rechtbank Zwolle* (Accountacy Division of the District Court Zwolle, *Accountantskamer)*. The *Accountantskamer* gave B an official warning. 46

12 HR 12 June 2015, NJ 2016/380 (*K v Rabobank*).

13 Cf *SD Lindenbergh*, NJ 2018/165, 2497.

14 Eg HR 6 April 2012, NJ 2012/233 (*Duka v Achmea)*.

47 In the legal proceedings, A sued B for damages because – in A's opinion – B had not acted as a reasonably acting accountant should have. Both the court of first instance and the court of appeal rejected the claim. The court of appeal considered that, although the *Accountantskamer* ruled that B could be reproached for not questioning X's conduct and being insufficiently critical of X and the potential investors he put forward, B could not be held liable for the damage A suffered because it cannot be attributed to him according to reasonableness (art 6:98 DCC). The court of appeal came to this judgment by taking the following into account: (i) it was not B who introduced X to A; (ii) X earned a management fee of € 10,000; (iii) nobody – also not A, who was an experienced businessman – was suspicious of X; (iv) X apparently came across as convincing; (v) – as appeared later – X used artful tricks to sugar-coat the truth; (vi) it was not clear whether the investors that were put forward by X were all fake, and (vii) B was not an expert in assessing the trustworthiness of potential investors.

b) Judgment of the Court

48 In cassation, A complained that the judgment of the court of appeal was incomprehensible in the light of the judgment of the *Accountantskamer*. In response to this complaint, the *Hoge Raad* first mentioned – with reference to earlier cases – as a starting point that it cannot automatically be inferred from a judgment of a disciplinary court in which it is decided that someone acted contrary to the norms and rules applicable to his profession, that that person is liable under civil law because he breached a standard of care. If a court does not follow the judgment of a disciplinary court, its judgment should explain the reasons for the decision in such a way that it, also in light of the judgment of the disciplinary court, is sufficiently comprehensible.

49 In this case, according to the *Hoge Raad*, the judgment of the court of appeal was insufficiently comprehensible in light of the judgment of the *Accountantskamer*. The grounds that the court of appeal put forward do not sufficiently support the conclusion that the damage cannot be attributed to B, according to reasonableness. What the court of appeal should have considered, according to the *Hoge Raad*, was whether, in view of the circumstances of the case, B should have warned A about the conduct of X and what the effects of such a warning – probably – would have been. The court of appeal did not consider this, despite the fact that A's arguments did raise these questions. According to the *Hoge Raad*, it is important to consider within this context that B told the *Accountantskamer* that he knew that X had a questionable past, and that the court of appeal

had considered that the damage would have been prevented if A had discovered that X could not be trusted at an earlier stage. The findings the court of appeal used to give reasons for its judgment – finding (iii) and (vii) – are therefore insufficient to make it sufficiently comprehensible in light of the judgment of the *Accountantskamer*.

c) Commentary

In civil proceedings, a judgment of a disciplinary court does not have the status of an irrevocable judgment because it does not meet the requirements of art 236 DCCP.[15] Does that mean that a civil court – in its own judgment – does not have to take into account the judgment of a disciplinary court? The answer to this question is both 'yes' and 'no'. It is established case law of the *Hoge Raad* that in civil proceedings it cannot automatically be inferred from a judgment of a disciplinary court that an act was wrongful.[16] One reason for this is that the goal of disciplinary law differs from the goal of tort law. Disciplinary law aims at ensuring good professional conduct, while tort law – roughly speaking – aims at compensating the claimant. Another reason is that the rules of evidence in disciplinary proceedings are different than the rules of evidence in civil proceedings.[17] A civil court must therefore make its own assessment of the wrongfulness of an act and cannot just 'copy' the judgment of the disciplinary court. However, it is also established case law that a civil judgment must be explained with reasons in such a way that it is sufficiently comprehensible in light of a judgment of a disciplinary court.[18] This doctrine is also referred to as the 'strengthened obligation to state reasons'. This judgment of the *Hoge Raad*, *A v B*, confirms that this 'strengthened obligation to state reasons' also applies to accountants' disciplinary law. Moreover, it illustrates that the 'strengthened obligation to state reasons' can not only affect the court's statement of reasons with regard to the wrongfulness of an action, but also – as this case, for instance, shows – the statement of reasons concerning the causality requirement. **50**

15 *AC van Schaick*, Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Procesrecht. Procesrecht. 2.Eerste Aaanleg (2nd edn 2016) no 158.

16 Ibid.

17 Eg HR 7 February 1986, NJ 1986/378 (*Van Liere v Spruijt*); HR 10 January 2003, NJ 2003/537 (*Notaris v Portielje*); HR 13 Oktober 2006, NJ 2008/528 (*Accountant Vie d'Or)*.

18 Eg HR 12 July 2002, NJ 2003/151 (*A v E*); HR 3 April 2015, NJ 2015/479.

9. HR 27 Oktober 2017, NJ 2017/422: Liability for a Delayed Medical Operation (*C v Academisch Ziekenhuis Maastricht*)

a) Brief Summary of the Facts

51 On 12 January 2012, C was medically examined in the emergency ward of the *Academisch Ziekenhuis Maastricht* (Maastricht University Medical Centre, azM) because of an acute hernia. On that same day, C was sent home. On 13 January 2012, C returned to the hospital because of persistent complaints. On that day, C was medically examined by a different doctor than the day before. The doctor who examined C on 13 January 2012 decided that an operation was required, and therefore C underwent surgery on the same evening in the azM. After the operation, C experienced sensory impairment in her pubic area and on her posterior as a side effect of the operation.

52 In this legal action, C claimed damages from the azM for the sensory impairment. According to C, if the, so-called, *cauda equina* syndrome had been discovered in time – on 12 January 2012 – then C would not have suffered the sensory impairment. The court of first instance ruled that azM was liable for 70% of C's damage. The court of appeal reversed the judgment and rejected C's claim because it could not establish a causal relationship between the error and the damage. According to the court of appeal, there was, indeed, a causal relationship between the professional error and the delay – because the doctor did not discover the *cauda equine* syndrome on 12 January 2012, C underwent surgery on 13 January 2012 instead of 12 January 2012 – but there was no causal link between the delay and the chance of a better result of the operation. The court of appeal came to this conclusion on the basis of the court-ordered expert opinion of Prof Bartels. In his expert opinion, Prof Bartels told the court of appeal that he was unable to estimate what the chances were that C would not have suffered from the sensory impairment if C had undergone surgery on 12 January 2012 instead of 13 January 2012, the reason being is that there is no research available on the differences in side-effects between a prompt operation and a delayed operation in the case of an acute hernia.

b) Judgment of the Court

53 In his expert opinion, Prof Bartels also informed the court of appeal that there is a chance that an acute hernia irreparably damages the nerves immediately, but that there is also a chance that this does not happen and that in such a case prolonged pressure can possibly lead to a worse recovery. Moreover, Prof Bartels

also mentioned in his expert opinion that the advice given in medical guidelines is to operate as soon as possible in a case such as this. C therefore challenged the decision of the court of appeal in cassation.

The *Hoge Raad* ruled that the judgment of the court of appeal that there was no causal relationship between the professional error and the chance of a better result of the operation was insufficiently motivated. Because Prof Bartels was unable to estimate the chances that C would not have suffered from sensory impairment if the operation had been performed earlier but his opinion did not preclude the existence of a real chance of a better result of the operation if it had been performed earlier, the court of appeal should have conducted more research about whether a real chance of a better result had been lost by the professional error. In case such a real chance exists, the court of appeal should have made its own estimation of the chances. According to the *Hoge Raad*, further questioning of the expert could, for instance, have helped the court in making such an estimation. 54

c) Commentary

As mentioned in previous yearbooks, Dutch law recognises proportional liability and the doctrine of loss of a chance as more just solutions than the rigorous all-or-nothing approach.[19] A distinction can and must be made between the rule of proportional liability and the rule of loss of a chance, according to the *Hoge Raad*.[20] The latter rule requires a causal link between the tortious conduct and the loss of a chance. Once it becomes clear that a causal link exists, the tortfeasor is liable for the chance that no damage would have arisen if he had taken due care. The fact that this chance has not been estimated does not imply that the chance does not exist or that the loss thereof should not be compensated. On the contrary, it should be investigated whether the chance of a better treatment result has been lost and, if so, this chance should be quantified as well as possible, based on a well-reasoned assessment. 55

19 *JM Emaus/ALM Keirse*, The Netherlands, in: H Koziol/BC Steininger (eds), European Tort Law (ETL) 2012 (2013) 469, nos 80–85; *Emaus/Keirse*, ETL 2016 (fn 1) no 56 ff. See also: *ALM Keirse*, Going Dutch: How to Address Cases of Causal Uncertainty, in: I Gilead/MD Green/BA Koch, Proportional Liability: Analytical and Comparative Perspectives (2013) 227 ff.

20 See *Emaus/Keirse*, ETL 2012 (fn 19) nos 83–85; *Emaus/Keirse*, ETL 2016 (fn 1) no 59.

56 Last year the *Hoge Raad* accepted that the loss of a chance doctrine also applies in medical liability cases.[21] This current case illustrates that the court may not turn away from assessing the lost chance as damage incurred. This should be done on the basis of art 6:97 DCC, where it is stated that if the amount of damage cannot be determined precisely, it will be estimated.

10. HR 27 Oktober 2017, RvdW 2017/1169: State Liability for Lawful Criminal Law Enforcement (*Vrolijk v The State of the Netherlands*)

a) Brief Summary of the Facts

57 Vrolijk, the owner of a business building, rented his building to X inter alia under the condition that X would not use the building to produce or distribute drugs. In 2011, on the suspicion of the presence of drugs, the police entered the building and confiscated 325kg of heroin. While entering the building, the police caused damage to the front of the building. Because Vrolijk used X's deposit to settle X's unpaid rent, in this legal action Vrolijk claimed compensation for the damage to the front of the building from the State of the Netherlands.

58 The court of first instance allowed the claim because, according to the court, the damage that Vrolijk suffered fell outside his normal societal risk or his normal business risk. On appeal, this was no longer a subject of debate. Instead, the debate focussed on the extent to which art 6:101 DCC can be applied in this case. Article 6:101 subsec 1 DCC states that, in case there are circumstances that can be attributed to the person who suffered the damage that contributed to damage, the obligation to compensate the damage is reduced by apportioning the damage between the person who suffered the damage and the liable person in proportion to the degree to which the circumstances which can be attributed to each of them contributed to the damage. Article 6:101 subsec 1 DCC continues by stating that fairness can require that a different apportionment has to be made, depending on the seriousness of the wrongful act or other circumstances of the case – the so-called 'fairness correction'. Article 6:101 subsec 2 DCC states that where the obligation to repair the damage relates to damage caused to a thing under the control of a third party on behalf of the person suffering the damage, circum-

21 HR 23.12.2016, ECLI:NL:HR:2016:2987 (*X v ErasmusMC*). See *Emaus/Keirse*, ETL 2016 (fn 1) nos 56–58.

stances which can be attributed to the third party are, on the application of the preceding paragraph, attributed to the person suffering the loss.[22] The court of appeal decided that in this case art 6:101 subsec 2 DCC applied so that X's conduct – the possession of heroin – could be attributed to Vrolijk. However, in this case the fairness correction of art 6:101 subsec 1 DCC, according to the court of appeal, required that the State still had to pay all of the damages.

b) Judgment of the Court

59 In cassation, the State challenged the court of appeal's decision that the fairness correction could be applied because, as it argued, the ratio behind art 6:101 subsec 2 DCC opposes the application of the fairness correction. Instead of directly answering the question whether the fairness correction of art 6:101 subsec 1 DCC can be used if art 6:101 subsec 2 DCC applies, the *Hoge Raad* first considered that the ratio behind art 6:101 subsec 2 DCC is that, first of all, it should not make a difference whether the damaged thing is in the possession of the owner or someone else and, secondly, that, as a result, an undesirable succession of recourse actions – a so-called *circuit d'actions* – is prevented. According to the *Hoge Raad*, at the time the legislator enacted art 6:101 subsec 2 DCC, it did not envisage a situation in which the State is held liable for damage that was caused by lawful criminal law enforcement. The starting point is that, if the State causes damage due to the lawful enforcement of criminal law, damage suffered by parties other than the suspect are only compensated if the damage falls outside that person's normal societal risk or normal business risk. According to the *Hoge Raad*, the application of art 6:101 subsec 2 DCC in the case of the lawful enforcement of criminal law that caused damage to someone who was not the suspect would be incompatible with this starting point, as then circumstances that can be attributed to the suspect would eventually – still – be attributed to the party that suffered the damage. According to the *Hoge Raad*, the ratio behind art 6:101 subsec 2 DCC therefore does not carry enough weight to apply in cases about damage caused by lawful criminal law enforcement.

22 *H Warendorf* (ed), Warendorf Dutch Civil and Commercial Law Legislation (2013).

c) Commentary

60 It is established case law of the *Hoge Raad* that the principle *égalité devant les charges publiques* – ie equality vis-à-vis government encumbrances – implies that the State can be held liable for damage that is caused by lawful criminal law enforcement, suffered by someone other than the suspect.[23] For a successful claim, it is required that the damage that is caused by the lawful criminal law enforcement falls, in view of all the circumstances of the case, outside someone's normal societal or business risk. Inter alia the nature of the government action, the interests involved in that action, the degree to which the governmental action and its consequences were foreseeable for the party that suffered the damage, and the nature and extent of damage should be taken into account as relevant factors. This means that people have to tolerate some inconvenience or insignificant loss of time, but that liability of the State is possible if a thing is damaged. In 2009, in the *Wherestad* case, the *Hoge Raad* ruled – with reference to the ratio of the article – that art 6:101 subsec 2 DCC also applies in cases about damage caused by lawful criminal law enforcement.[24] This meant that when assessing the contributory negligence – roughly speaking – a tenant's behaviour became the responsibility of the lessor, something which erodes the effect of the principle *égalité devant les charges publiques*. Some legal scholars therefore assumed that the legal system allowed courts to use the fairness correction of art 6:101 subsec 1 DCC in such a situation in order to still come to the conclusion that the State is liable for – some part of – the damage.[25] In cassation, the Dutch State challenged this view. The *Hoge Raad* decided – instead of confirming this view and holding fast to the course it has set – that art 6:101 subsec 2 DCC does not apply when damage is caused by lawful criminal law enforcement.

61 What is interesting about this case is that the *Hoge Raad* also could have decided that the fairness correction of art 6:101 subsec 1 DCC can be used, even if art 6:101 subsec 2 DCC applies. This option allowed the *Hoge Raad* to not allow the *égalité devant les charges publiques* principle to erode and simultaneously not to have to render art 6:101 subsec 2 DCC inoperative in cases like this. Instead, the *Hoge Raad* chose the less complex option. The *Hoge Raad* substantiated its decision by assuming that the legislator had not been able to foresee this effect of art 6:101 subsec 2 DCC and considering that – in light of that as-

---

23 Eg HR 30 March 2001, NJ 2003/615; HR 17 September 2004, NJ 2005/392.

24 HR 20 March 2009, NJ 2010/95 (*Wherestad*).

25 Eg *CE du Perron*, NJ 2010/97, no 9.

sumption – the ratio behind art 6:101 subsec 2 DCC does not carry enough weight to hold the lessor responsible for the tenant's behaviour.

11. Personal Injury

For quite some time already, the Dutch legislator has been preparing a bill on the compensation of non-pecuniary damage for close relatives of victims who sustained severe and permanent injuries or died because of a tort, such as a crime, a traffic accident or an accident at work. In this bill, a right to compensation for non-pecuniary loss is awarded to a narrowly defined circle of so-called secondary victims. Secondary victims are relatives who stand in a close family, or comparable, relationship to the primary victim. This compensation for 'affectionate damage' or bereavement damage must be paid by the liable person, although in practice payment will often be made by a private liability insurance company. The amount of damages will be laid down in an administrative order. The present intention is to set down a fixed sum, varying from € 12,500 to € 20,000. The primary goal of the proposal is to offer acknowledgement and satisfaction to relatives. Compensation is only a secondary objective. **62**

The call for bereavement damages is a loud one. The compensation of non-pecuniary loss of close relatives is common in Europe. In the Netherlands, the first official draft proposal originates from 2003. That bill passed in the House of Representatives in 2005. But in early 2006, the Ministry of Justice ordered an inquest the aim of which was to discover if this is necessary for the fulfilment of immaterial needs of relatives of severely injured persons and relatives of persons who have died. The Senate suspended the legislation, only to await the research outcome which then, a couple of years later, confirmed the necessity for compensating affection damage. Insurance companies and Victim Aid organisations pledged their support. Nothing seemed to be in the way of a smooth sailing. But no: the Senate had its various objections. It was put forward that compensation of affection damage would bolster a culture of claiming and commercialise pain. It would not fit into our legal system. And it was questioned whether there really is a need next to loss of support damage. The terms used in the proposal were alleged to be too vague. And furthermore, some reasoned that immeasurable suffering and pain cannot be compensated in money. And thus, in March 2010, the Senate voted against the bill, 36 nos against 30 ayes. **63**

Now, years later, a similar, current bill is pending. Again, the bill passed in the House of Representatives, but the decision of the Senate has been suspended and is now awaited. Expectations are running high. The Netherlands is, **64**

if not the last, at least one of the very few countries in Europe and beyond which does not yet compensate this head of loss.

C. Literature

1. *JAPM Ansems*, Aansprakelijkheid voor medische hulpmiddelen (Celsus Juridische uitgeverij, 2017)

65 The central question of this research is under what conditions and on what grounds a medical patient can get redress for damage that is the result of the wrongful use of a – defective – medical device during treatment by a health care practitioner. In order to answer this question, Ansems discusses the legal provisions that are available to an aggrieved party, which (legal) persons can be held liable, and which factual circumstances are relevant for the establishment of liability. In addition, Ansems also provides an overview of the standard of conduct the parties concerned should comply with in order to avoid liability and – ideally – to prevent damage.

2. *M Dekker*, Collectieve afwikkeling massaschade (Celsus Juridische uitgeverij, 2017)

66 In this book, Dekker answers the question whether the legislative proposal for the introduction of a collective action for damages is desirable, and if so, whether the proposal has any flaws. In order to answer this question, Dekker first discusses the increase of collective redress mechanisms and the current (lack of) possibilities of collective redress for large-scale damages. Hereinafter, she discusses the legislative proposal, its reception within the legal literature, the European developments within the area of collective redress, and the German collective redress mechanisms. She ends the book with a few recommendations for the legislative proposal that concern its admissibility requirements, the possibility to opt-out, and the way that it deals with hardship clauses and enforcement disputes.

3. *I Giesen*, Wie eist bewijst, wie stelt krijgt geld (Boom Juridische uitgevers, 2017)

67 On 27 January 2017, the *Vereniging letselschade advocaten* (Association of Personal Injury Lawyers) devoted a symposium to the law of evidence in personal injury cases. During the symposium, five different professionals shed light on this topic. This book contains the contributions of these professionals to the symposium. The lawyer, Keizer, in his contribution discusses how a lawyer has to make strategic decisions during a trial in order to gather evidence. Giesen, as a law professor, in his contribution discusses how in a trial the obligation to furnish facts, the division of the burden of proof and the judge's assessment of the evidence can be anticipated. As an insurance expert, Santen in his contribution discusses how insurers decide whether they have to reserve money and how an insurer decides how he should prepare for negotiations or a trial. In her contribution Van Dam discusses how a judge decides whether to take a passive or active attitude, how he/she deals with statements of parties and how a judge decides how to value evidence. Neervoort, as a mediator, in his contribution examines whether the mediator's role is only to facilitate or also to discuss the evidence that parties bring to the table. Lastly, Duursma in his contribution shows what personal injury lawyers can learn from Obama and Trump.

4. *M Gozoglu*, Aansprakelijkheid van de mijnbouwexploitant voor materiële schade ontstaan door gaswinningsactiviteiten (Boom Juridische uitgevers, 2017)

68 This book discusses the liability of the operator of a mine on the basis of art 6:177 DCC. The central question of the study is what the implications are of the recent developments in the area of liability of mining operators for physical damage, a decrease in value and loss estimation. In view of the earthquakes in Groningen that were the result of gas extraction, Gozoglu discusses the causal links between gas extraction, earthquakes, and damage. Furthermore, Gozoglu addresses the questions of how the property damage and economic loss of the owners of homes in Groningen should be estimated, and how claims for reimbursement of these losses can be settled.

5. *ALM Keirse*, Schadeverkomingsplicht. Rapportage over de mogelijkheden van de schadevoorkomingsplicht via het aansprakelijkheidsrecht in het kader van het programma Bewust Omgaan met Veiligheid (Boom Juridische uitgevers, 2017)

69 This report analyses the applications of the duty to prevent damage through liability law. The report was commissioned by the Dutch Ministry of Infrastructure and the Environment, as part of the 'Explicitly dealing with safety' programme. The central question in this study is: what options does liability law offer to ensure that parties take up or receive appropriate safety roles and responsibilities?

70 The study concludes that the duty of private law to prevent harm should be recognised as a necessary step toward a more responsible and transparent safety policy. Different situations require different degrees of precaution, care and aftercare from different actors. The exact boundaries of the precautionary duties, care duties and aftercare duties, as based on liability law, are determined by the personality of the actor, the nature of their activity, the risk object or risk subject, the categories of those involved, and the type and extent of damage which should be prevented or controlled. A prudent actor will act according to these duties based on his/her own self-interest. The unwilling actor could be ordered to do so under art 3:296 DCC. After all, the duty to prevent damage is based on universal fundamental principles of liability law and is legally enforceable. The standards of conduct that form an intrinsic part of our public law and private law can be used as a trigger to activate the duty to prevent damage; this can result in explicit and enforceable responsibility, even when non-compliance with standards of conduct has not yet brought about any damage. This also means that internalising the duty to prevent damage into public safety policy and into the processes of private actors will work to allocate the parties involved appropriate roles and responsibilities toward ensuring safety: all this with a view to the Netherlands being livable, accessible, and safe.

6. *CJM Klaassen*, Schadevergoeding: algemeen, deel 2, Monografieën BW (Wolters Kluwer, 2nd edn 2017)

71 This book is an updated edition of a commentary on the Dutch rules on loss estimation.

7. *FT Oldenhuis*/*H Vorsselman*, Schadebegroting in letselschadezaken (Boom Juridische uitgevers, 2017)

On 3 October 2016, the law department of the University of Groningen organised a convention on loss estimation in personal injury cases. This book contains the contributions of the speakers of that day. Hartlief discusses whether liability law only aims at compensating damage, or whether it also – or maybe even primarily – aims at recovery. Loth uses a capabilities-approach in order to answer the question what – from a philosophical viewpoint – it means for an injured party to recover. Van Dort provides insights into how the amount of future losses can be calculated. Keizer and Oskam discuss the tension that exists in personal injury cases between combatting fraud and privacy. Hek examines the injured person's interest in, on the one hand, compensation and, on the other, recovery, autonomy and self-reliance. Ankers, Duarte and Samson discuss periodic payments and lump sums. Blok's contribution is the conclusion. 72

8. *M Smid*, De aansprakelijkheid van de kunstexpert. Over de zorgplicht bij het afgeven van certificaten en opinies over authenticiteit (Celsus Juridische uitgeverij, 2017)

The question this book addresses is under what conditions art experts who investigate the authenticity of art and issue authenticity assessments can be held liable. The research distinguishes between two-party relationships – the art expert is held contractually liable by his co-contracting party – and three-party relationships – the art expert is held liable in tort by a third party. In her research, Smid compares the standard of conduct of art experts with the standard of conduct of an accountant, a third party that is charged with giving a binding opinion, and a notary. In addition, Smid also examines what effect exoneration clauses can have for the liability of an art expert. Smid ends the book with a range of viewpoints that are relevant for assessing the liability of an art expert. 73

9. *U de Vries*/*J Fanning*, Law in the Risk Society (Boom Juridische uitgevers, 2017)

This collection aims to explore the capacity of law and legal processes to meet the challenges of modernity and adapt to unfamiliar and changing social paradigms. More than 30 years have passed since Ulrich Beck published Risk Soci- 74

ety: Towards a New Modernity. In it, he argued that contemporary western societies are increasingly preoccupied by, and organised around, considerations of risk. Beck's work had a transformative effect on social theory, yet its impact on law and legal scholarship remains largely unexplored. This collection of essays, collated shortly after Beck's death in 2015, explores and reconsiders the legal foundations, concepts and methodologies of the 'modern project' in light of the risk society theory. In this volume, academics and lawyers from around the world engage in one of the first comprehensive examinations of the impact of the risk society theory on law and legal scholarship. The authors critically examine topics such as law and (ir)responsibility, reflexive modernisation, and liability, responsibility and accountability through the prism of the risk society theory.

10. Special issue on extrajudicial costs, Letsel & Schade, issue 4 (2016) 3–69

75 In this special issue on extra-judicial costs in personal injury cases, Ruygvoorn and Mijnehof-Wolters provide a general introduction to this topic. Keirse, Van Dongen and Van Onna discuss the effect of contributory negligence on the compensation of extra-judicial costs. Donker provides a comparative law perspective on extra-judicial costs by comparing what the rules on extra-judicial costs in personal injury cases are in Germany, Belgium, France, Switzerland, Austria, Italy and Spain. Knijp and Bondeel, and Santen provide an insurer's perspective on extra-judicial costs. Lastly, Keizer, De Koning, Klungers and Roth discuss extra-judicial costs from the perspective of a lawyer.

11. Special issue on state liability for unlawful court decisions, Overheid & Aansprakelijkheid, issue 2 (2017) 61–118

76 The overarching question of this special issue on State liability for unlawful court decisions of *Overheid & Aanspralijkheid* (Government & Liability) is whether in the Netherlands there are good reasons to adopt a harmonised standard for State liability for unlawful court decisions, and if so, what that standard should be like. Uzman and Boogart explain why there are, from a constitutional perspective, good reasons to be cautious in allowing claims in which the State is held liable for unlawful court decisions. Giesen discusses why, in his

opinion, the Dutch standard for State liability for unlawful court decisions is less strict than some authors argue and also what, according to him, the substance of this less strict standard is. Keirse provides a comparative law perspective on the theme of this special issue and concludes on the basis of her research that the Dutch standard of State liability for unlawful court decisions should be less strict. Carton and Lierman discuss the developments that the Belgium standard for State liability for unlawful court decisions has undergone and what can be learned from this for the Dutch standard. Barkhuysen and Emmerik focus on the question of what the standard is for judicial actions that breach the ECHR and what this standard should be. Lastly, Ortlep and Widdershoven answer in their concluding observation the overarching question of this special issue by concluding that the Dutch standard for State liability for unlawful court decisions should be harmonised and that the *Köbler* standard is the best option for a harmonised standard.

12. Special issue on undesirable behaviour and private law, Maandblad voor Vermogensrecht, issue 7/8 (2017) 201–256

The contributions to this special issue of *Maandblad voor Vermogensrecht* [77] (Monthly Magazine on the Law of Obligations) focus on the questions of whether private law has enough instruments at its disposal to counteract undesirable behaviour and whether there are any gaps in the legislation. The contribution to this special issue of Tjong Tjin Tai provides a broad perspective on undesirable behaviour. He approaches the theme from a semi-philosophical viewpoint and makes the distinction between evil behaviour and bad behaviour. Keirse and Paijmans discuss the adage 'in pari delicto' and its influence on claims for damages in cases in which both parties acted improperly. Schreuder comments on the influence of undesirable behaviour on the amount of compensation. Van Kogelenberg discusses how contract law deals with an intentional breach of contract. The contribution of Banis and Den Haan provides an insurer's perspective on undesirable behaviour, and Backx and Koert discuss the topic of undesirable behaviour from the perspective of the insured person. Van Emden discusses undesirable behaviour of bankruptcy trustees and their liability position in the case of undesirable behaviour. Lastly, Merkes and Van den Berg discuss undesirable behaviour in the financial sector in relation to the oath that people in the financial sector have to take.