XVIII. The Netherlands

A. Legislation

Anne LM Keirse and Ivo Giesen[1]

1. Increase of Liability Limits in Passenger Transport – *Verhoging aansprakelijkheidslimieten personenvervoer*[2]

1 In March 2009 the legislative liability limits for Dutch passenger transport were raised. As a result agents in passenger transport can be held liable for a higher maximum amount of money than previously. It was implemented after some judges found ways to evade the existing limits, which also aroused a growing call in the literature for the legislator to increase or even abolish the liability limits.[3] The existing legislation provided for an equal maximum amount of money for all transport sectors, namely € 137,000.

2 The new – differentiating – legislation provides for a maximum of € 1 million per victim, and € 15 million per accident. Train passengers, however, can only obtain a maximum amount of 175,000 SDR (approximately € 200,000) because of Regulation (EC) No 1371/2007 which adheres to the COTIF Treaty, where this amount is prescribed. However, according to some, this European regulation does not exclude the possibility for national legislators to opt for a higher limit.[4] This is relevant since it is difficult to find a justification for the differentiation between transport by train and other means of passenger transport. Another critical point is (for

1 The authors wish to thank Jaco van den Brink, Marije Louisse, Stephan Sattler, Thijs Vroegop and Annebel Weghorst for their invaluable contributions to this chapter.

2 Royal Decree, 24 November 2008, Staatsblad van het Koninkrijk der Nederlanden (Stb) 2008, 505.

3 See eg *J Emaus/I Giesen*, Limitering van aansprakelijkheid in het personenvervoer in het licht van artikel 1 Eerste protocol EVRM, Verkeersrecht (VR) 55 (2007) 369 ff.

4 *KF Haak*, Aanpassing aansprakelijkheidslimieten in het (openbaar) personenvervoer: van harmonisatie naar differentiatie, Nederlands Juristenblad (NJB) 84 (2009) 160 ff.

the same reason) that the liability limits concerning passengers transported by ships have not been increased.

2. 'Partial trials'[5] – *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)*[6]

A legislative proposal concerning so-called 'partial trials' was discussed in the Dutch Parliament last year and will come into force as of 1 July 2010. It provides for the possibility in civil proceedings concerning personal injury and wrongful death that parties can bring only one particular aspect of their dispute before the court, whilst negotiating for an agreement on all other aspects. This could lead to a substantial reduction in 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. 3

3. Health Care Consumers Act – *Wet Cliëntenrechten Zorg (Zorgconsumentenwet)*[7]

Because of complaints concerning the uncertainty of the legal position of health care patients, the Dutch government drafted what is called the 'Health Care Consumers Act', in which all the patients' rights in relation to health care institutions are laid down. Next to the existing contractual liability (art 7:453 Dutch Civil Code (CC)), the legislative proposal aims to provide for a non-contractual way for the patient to effectuate his rights. According to the proposed Act, the patient will always be able to hold the health care institution liable for an alleged violation of his rights as laid down in the legislative proposal regardless of who acted wrongfully. 4

A critical remark concerning this proposal is that it does not really improve the patient's legal position, apart from the fact that he knows who to sue; he can always simply reproach the health care institution 5

5 See *I Giesen/LM Coenraad*, 'Kroniek van de rechtspleging', Toegang tot de rechtspleging in Nederland anno 2008, NJB 84 (2009) 876.

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

7 Documents of the Second Chamber of Parliament (2007–2008/2008–2009) 31 476.

(regardless of the cause of the error).[8] However, the patient still has to establish the tort conditions and prove that his rights have been imputably violated.

4. 'Affection damage'[9] – *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*

6 An Act has been proposed to the Dutch Parliament to make possible the reimbursement of 'affection damage'. This legislative proposal (which had only been ratified by one of the two Chambers of the Dutch Parliament in 2005) is to provide for the possibility to claim bereavement damages for the death or permanent serious injury of relatives. It concerns non-pecuniary loss as a result of sorrow that is caused by the death or permanent injury of a beloved one, suffered by a third party. Affection damages are not awarded to the direct victim, the primary victim, but to third parties, the so-called secondary victims, who are relatives who stand in a close family or in a comparable relationship to the primary victim. In 2006 the further parliamentary debates concerning the proposal were postponed, in anticipation of research results concerning the specific needs of victims of accidents. In 2008 the research outcomes were published.[10] They determine, in essence, that people feel a need to be able to claim affection damages and that obtaining such damages would help them to deal with their grief. In Parliament, some doubts concerning the reliability of these findings were expressed. Another question which was more or less left open by the findings of the research is whether there should be one fixed amount for affection damages (which was provided for in the legislative proposal) or distinct amounts to retain the possibility to take the circumstances of each case into account. Given these research results, the discussion on the proposal in the First Chamber of Parliament was taken up once again with the government proposing to create a (modest) distinction between the amounts of damages granted to certain types of claimants in cases of death or severe injuries. The vote on the proposal was to be held in the first

8 Basically art 7:462 of the Dutch Civil Code already established this same improvement for the victim of medical negligence.

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

10 *AJ Akkermans et al*, Slachtoffers en aansprakelijkheid. Een onderzoek naar behoeften en ervaringen van slachtoffers en hun naasten met betrekking tot het civiele aansprakelijkheidsrecht. Deel II Affectieschade, Wetenschappelijk Onderzoek- en Documentatiecentrum (WODC) 2008. The report can be downloaded from http://dare.ubvu.vu.nl/handle/1871/15332.

months of 2010. During the preceding debates, the Senate raised various objections, among others: compensation of affection damage will bolster a culture of claiming and commercialise pain. It would not fit into the Dutch legal system. And is there really a need next to loss of support damage? Terms used in the proposal are alleged to be too vague. And reason some: immeasurable suffering and pain cannot be compensated in money. Thus: in March 2010, the Senate voted against the bill; 36 nos against 30 ayes.

B. Cases

1. Hoge Raad (HR, Supreme Court) 19 December 2008, NJ 2009, 28 (*Smeets v Heerlen*)

a) Brief Summary of the Facts

In the case of *Smeets v Heerlen* the municipal authorities of the town of 7
Heerlen (hereafter: Heerlen) were sued by a plaintiff who had suffered severe brain damage from falling off his bicycle. The unfortunate accident was allegedly caused by – in brief – a failure on the part of Heerlen to provide sufficient warning of a dangerous ridge on the road (caused by maintenance activities), amounting to a breach of a safety norm for which Heerlen was to be held responsible on the basis of art 6:174 of the Civil Code. In order for liability for such a breach to arise, it is required that a causal link is established between the unlawful act and the damage suffered. Which party had to bear the burden of (dis)proving this causality was disputed.

b) Judgment of the Court

Overturning the decision of the court of appeal of 's Hertogenbosch, the 8
Hoge Raad ruled that the burden of proof as to the causal link between Heerlen's unlawful behaviour and the damage suffered by Smeets was to lie with Heerlen, basing its decision on the applicability of the so-called *omkeringsregel* (rule of reversal). This rule, which has been established in earlier decisions of the *Hoge Raad*, contains a (rebuttable) presumption that, whenever a (traffic or safety)[11] norm that aims to prevent a specific danger concerning the emergence of damage from occurring has been

11 Whether the scope of the *omkeringsregel* reaches beyond the domain of road traffic and safety norms has been disputed. See below no 9 ff.

breached, and the risk of this danger occurring is generally significantly enlarged by the violation of that norm, the causal link between the breach and the damage suffered is, in principle, provided.[12] As such it forms an exception to the rule that he who sues for damages must prove the causal connection (a rule laid down in art 150 Code of Civil Procedure (CCP)).[13] Whereas the court of appeal had refused to apply the *omkeringsregel* because there had remained some uncertainty as to the exact facts surrounding the accident, the *Hoge Raad* ruled that a plaintiff who, in the given circumstances, purports to invoke the *omkeringsregel* will only need to establish that the specific danger which the safety norm aims to prevent has occurred, without it being necessary to prove the exact facts involved in the accident. In order for the courts to determine what specific dangers people are protected from, it will be necessary to consider – from case to case – the content and purpose of the norm that has been violated. In the present case the relevant safety norm aims to protect people from sustaining injuries resulting from accidents caused by dangerous flaws in a road, so that the plaintiff was not required to establish the exact facts of the accident, but could suffice by establishing that the specific danger which the safety norm aims to prevent had occurred. The *omkeringsregel* was therefore applicable.

c) Commentary

9 In this case the *Hoge Raad* at first sight seems to have loosened its demands for the (successful) invocation of the *omkeringsregel*, not requiring from the plaintiff – as it had done in previous cases – that the exact facts surrounding the accident were credibly established. The main reason for this decision was that the very purpose of the *omkeringsregel* is precisely to lighten the burden of proof that rests on victims in cases like the present one. Two points are to be made on this decision.

10 First, the norm that had been violated by Heerlen was a safety norm. It is not entirely clear whether the *omkeringsregel* is also available to victims of violations of types of norms other than those concerning road traffic or

12 The development of the *omkeringsregel* first started in the case of HR 1 November 1974, Nederlandse Jurisprudentie (NJ) 1975, 454 but really gained importance in the 1990s and the early years of this century; for an overview, see *I Giesen*, De aantrekkingskracht van Loreley, in: T Hartlief/SD Lindenberg (eds), Tien pennenstreken over persoonenschade (2009) ch 5.

13 For details, see *I Giesen*, The Burden of Proof and Other Procedural Devices, in: H Koziol/BC Steininger (eds), European Tort Law 2008 (2009) 50 ff.

safety. Giesen has submitted that it is not, referring to the case law of the *Hoge Raad*.[14] Klaassen, in her case note in *Jurisprudentie Burgerlijk Procesrecht*, warns that one should be hesitant in jumping to that conclusion before the *Hoge Raad* has explicitly accepted such a restriction.[15]

Second, it is put forward (in that same case note) by Klaassen that the **11** present decision should not be interpreted as a radical return from earlier decisions in which the *omkeringsregel* was not rendered applicable because of uncertainty as to the exact facts of the case.[16] Rather, the decision should be read as one for which – as was not the case in those earlier rulings – knowledge of the exact facts of the accident was simply unnecessary for applicability of the *omkeringsregel*, because even without the understanding of those facts it could be established that the specific danger, which the (safety) norm aims to prevent from occurring, had in fact occurred. Although some uncertainty still remains as to the exact scope of the *omkeringsregel*, the *Hoge Raad* in its present decision has thus offered at least some clarity, ensuring at the same time that the protection it grants to victims like Smeets does not become illusionary.

2. HR 9 January 2009, Landelijk Jurisprudentie Nummer (LJN): BG4014 (*Riphagen v Isala*)

a) Brief Summary of the Facts

This case considered the duty of care of an employer regarding exposure to **12** passive smoking. The claimant in this case had to stop working due to severe asthma attacks which she claimed were caused by exposure to passive smoking at the workplace. This case was of particular interest considering the fact that the employee already suffered from chronic asthma before her employment. Due to the increased intensity of her asthma attacks during her employment, she had to stop working entirely. Doctors deemed her to be unsuitable for any further employment in the future. She sought damages for loss of income. But the question was, of course, whether or to what extent her damage had been caused by being exposed to passive smoking at work. The defendant (her employer Isala

14 See *Giesen* (fn 12) ch 5. See also *B Winiger et al* (eds), Digest of European Tort Law. Volume 1. Essential Cases on Natural Causation (2007) 119–121 and 215 f with further references.

15 *CJM Klaassen*, Case note, Jurisprudentie Burgerlijk Procesrecht (JBPr) 2009, 14.

16 See, for example, HR 19 January 2001, NJ 2001, 524; HR 29 November 2002, NJ 2004, 304; HR 19 March 2004, NJ 2004, 307.

Clinics, where she had worked as a medical secretary) stated that the increased intensity could also have been caused by factors other than exposure to passive smoking.

13 In court Riphagen claimed that her former employer had breached its duty of care under art 7:658 Civil Code. This article imposes – alongside the general duty of care of art 6:162 of the Civil Code – a specific duty of care on the employer towards its employees. The relevant passage of art 7:658 of the Civil Code reads: 'The employer is obliged to (...) provide those conditions or instructions that are reasonably necessary to prevent the employee from suffering any damage during, and in the course of his employment.' The action was granted by the District Court.

b) Judgment of the Court

14 Subsequently Isala appealed to the Court of Appeal. This court based its decision on the report delivered by an expert witness, an independent doctor appointed by the court. The report stated that there was no objective medical evidence as to the cause of the increased attacks, which ultimately led to her hospitalisation. However, it was estimated that the chance that her health issues were caused by exposure to cigarette smoke was around 80–100 %. The report further stated that the chance that the increase in the severity of her disease could have occurred at any time as an effect of other factors was also 80–100 %. The Court of Appeal assessed that the chance of her disease having been caused by exposure to smoke was as great as the chance that it was caused by other external factors. The court therefore held that Isala was liable for 50 % of the damages.

15 Isala appealed to the *Hoge Raad*. The *Hoge Raad* approved the reasoning of the Court of Appeal as to the apportionment of the damage. The *Hoge Raad* decided that since the chances that the worsening of the disease – ie the increased intensity of the symptoms of asthma – had been caused by exposure to cigarette smoke, or as an effect of the disease itself, are both estimated at 80–100 %, the chances that the disease could have been caused by either of the possible causes are therefore the same. In such a case the damage ought to be apportioned in proportion to the chance that the damage might have been caused by the defendant. Thus Isala was liable for 50 % of the damages.

c) Commentary

In earlier case law the *Hoge Raad* had accepted so-called proportional liability.[17] The principle case in this matter dealt with a smoker and former employee, named Karamus, who had been exposed to asbestos during his employment and who had contracted lung cancer. Scientifically, it was not possible to establish which of the various causes (exposure to asbestos, smoking, a natural physical condition or background risks) led to the lung cancer in this particular case. However, there was a fair chance that exposure to asbestos had been the cause of the disease. The *Hoge Raad* rejected an all-or-nothing approach, because this would mean that the effects of causal uncertainty were either shifted to the employer or to the employee: 16

> 'Generally, it is unacceptable, also regarding the scope of the protected interest – preventing health damage of employees – and the violation of the particular norm by the employer as well as taking into account considerations of fairness and equity, that uncertainty concerning the degree to which the wrongfulness of the employer contributed to the damage of the employee would completely be shifted to the employee. It is equally unacceptable, but in that case for the employer, that even when the latter has violated his duty of care towards the employee, that the result of causal uncertainty would be completely shifted to the employer notwithstanding the not very small likelihood that either circumstances that are attributable to the employee (like smoking, genetic constitution or ageing) or external causes have caused the damage (as well).'

As most Dutch authors, we advocate proportional liability.[18] Thinking merely in terms of 'all-or-nothing' should be abandoned as being something from the past. However, one could argue that in the case presented here, *Riphagen v Isala*, the dogma of hypothetical causality should have been better applied.[19] One speaks of hypothetical causality when the damage is in fact caused by the tortfeasor, but it is also established that 17

17 HR 31 March 2006, Rechtspraak van de Week (RvdW) 2006, 328. See *MG Faure/T Hartlief*, The Netherlands, in: H Koziol/BC Steininger (eds), European Tort Law 2006 (2008) 347–350.

18 *ALM Keirse*, Het 'alles of niets'-denken naar de geschiedenis verbannen, Aansprakelijkheid, Verzekering & Schade (AV&S) 1 (2005) 3–16; *ALM Keirse*, Proportionele aansprakelijkheid bij blootstelling aan asbestvezels en tabaksrook, Tijdschrift voor Vergoeding Personenschade (TVP) 3 (2006) 66–75; *I Giesen/TFE Tjong Tjin Tai*, Proportionele tendensen in het verbintenissenrecht; een rechtsgeleerde dialoog (2008).

19 *ALM Keirse*, Case note, Jurisprudentie Aansprakelijkheid (JA) 2007, 60.

the damage would have occurred anyway at a later stage as well. And that is in fact what the report of the expert stated: it is very likely that the deterioration in Riphagen's illness was caused by passive smoke inhalation, but it is also very likely that this deterioration would also have occurred due to other causes, maybe somewhat later. In this case this approach would probably have led to the liability of Isala until the moment that the loss of income due to Riphagen's illnesses would probably have occurred anyway. From then on, one could argue, the loss should lie where it falls.

3. *Rechtbank* (District Court)'s-Hertogenbosch, 21 January 2009, JA 2009/52: Co-owner's Liability

a) Brief Summary of the Facts

18 An interesting development in the field of strict liability at the lower court level is the strict liability of the owner for damage caused by the condition of his property. Art 6:174 of the Civil Code states that the occupier of a structure is liable for the damage caused by the defects of that structure to persons or property. In this case the claimant was a young mother who was playing with her child in a hammock which was attached to an old concrete pillar that was located in her backyard. For some reason the pillar broke in half and part of the concrete pillar fell on the claimant. Fortunately she was able to save her child by pushing him out of the hammock. The claimant, however, was everything but lucky; she suffered severe injuries to her face and became a paraplegic due to the accident. The claimant was married to X, with whom she was the co-owner of the concrete structure. She sued X for damages. The real issue in this case was of course whether she could obtain damages not from her husband, but from their insurance company.

b) Judgment of the Court

19 The District Court of 's-Hertogenbosch determined that the owner of a structure could be held liable for the damage caused by the structure to the co-owner of that structure. The court admitted that at first hand art 6:174 of the Civil Code looks like it is written for third parties, ie persons other than the owner(s) of the structure. But, according to the court, such an interpretation is not supported by the parliamentary history of the article. The court stated that the legislature created strict

liability for damage caused by structures because insurance for this particular kind of liability is relatively cheap. Furthermore, the court considered that strict liability first aims to protect the injured. The fact that one is the co-owner of the structure is irrelevant to that question. However, the damages have to be apportioned according to art 6:180 of the Civil Code. This article stipulates that co-owners are proportionately liable for the damages. This means that in the case of two co-owners, every owner is liable for 50 % of the damages. The court ruled accordingly that X was liable for 50 % of the damages.

c) Commentary

At first hand, this looks like an extraordinary case. How is it possible that 20
one receives damages for strict liability when one is the (co-)owner of the structure? Does it make any sense to seek damages for an injury caused by a structure that is your own? But of course it is also difficult to feel anything but sympathy for the injured party. It is interesting to see whether this case will hold in the higher courts.

4. HR 20 February 2009, LJN: BF0003: Slippery Steps

a) Brief Summary of the Facts

The claimant in this case concerning employer's liability was a truck 21
driver who slipped on the steps of his truck and broke his wrist. The claimant sued his employer under art 7:658 of the Civil Code which imposes a duty of care on the employer towards his employee. The article obliges the employer to provide a safe working environment in order to prevent any damage to his employee in the course of his employment. The claimant in this case was obliged by his employer to refuel his truck at a petrol station that was particularly dirty. The claimant stepped in some oil at the petrol station and, according to him, this was the main reason for the accident, ie, the oil on the soles of his shoes caused the steps of his truck to be extra slippery, which resulted in him slipping.

b) Judgment of the Court

The *Hoge Raad* had ruled earlier that the duty of care under art 7:658 of the 22
Civil Code extends to places other than merely the places where the

employer has a sufficient degree of control as to be able to influence the particular state of the terrain. Therefore the duty extends beyond the immediate working place, or the property of the employer. This is confirmed in this case, but the *Hoge Raad* ruled that (as the District Court and the Court of Appeal had also done) – put briefly – the employee knew of the dirty situation and the dangers which this implied and that the accident was mainly caused by his own inattentiveness. The employer had not obliged him to go to that particular petrol station (although this was the employer's preference); it would be going too far to require from employers on the basis of art 7:658 that they keep their employees away from dirty petrol stations.

c) Commentary

23 This case illustrates the fact that, in Dutch law, employers' liability is not self-evident.[20] When the employer has not breached his duty of care under art 7:658, he is not liable and only in certain circumstances will art 7:611 (which contains the general provision that employers have to act as good employers) offer some degree of solace. Therefore, it can happen that the employee has to bear his own loss.

24 In this case it could have been argued that this accident had to be considered a traffic accident. As discussed in the previous Yearbook report, the *Hoge Raad* established an obligation for employers on the basis of art 7:611 to have an adequate insurance cover for their employees' damage due to work-related traffic accidents. An employer's liability based on art 7:658 is in general not established in case of a work-related traffic accident because such an accident usually does not occur within the sphere of influence of the employer. However, in the case discussed here, the employee did not rely on art 7:611, so the *Hoge Raad* did not have to decide on this. In addition, the Advocate-General used this occupational situation to advocate an extension of the insurance obligation on the basis of art 7:611 to all work-related accidents. Indeed, as Hartlief[21] also states in his case note under (inter alia) this judgment, it is difficult to find any justification for the difference between work-related traffic accidents and non-traffic accidents.

20 See *T Hartlief et al*, Goed werkgeverschap, AV&S 5 (2009) 207 ff; *MG Faure/T Hartlief*, The Netherlands, in: Koziol/Steininger (fn 13) 467 f.

21 *T Hartlief*, Case note, NJ 2009, 335.

5. HR 10 April 2009, LJN: BG8781 (*Philip Morris v Bolink*)

a) Brief Summary of the Facts

The claimant (at first instance) in this case, Mrs Bolink, was the spouse of **25** an employee of Philip Morris who had died in a work-related accident. Because the deceased had also done some household work (including taking care of their two-year-old child), the claimant chose to spend less time working outside the home. Philip Morris recognised that it was liable for this accident, but it disagreed as to the extent of the damages.

If a person dies as a result of an event for which another person is liable – **26** as was the case here – the dependents of the deceased have a claim deriving from this liability under art 6:108 of the Civil Code for their loss of maintenance. The article protects, among others, the spouse, registered partner and children of the deceased. The most important parts of the article are art 6:108 al.1 sub a, which provides that a surviving spouse, registered partner or minor child can claim damages for the deprivation of support by the deceased spouse, and art 6:108 al.1 sub d, which provides that a surviving family member who lived together with the deceased can claim damages for the costs incurred in hiring someone to do household work which is needed due to the death of the other spouse.

The claimant in this case claimed that, under art 6:108 of the Civil Code, **27** she was not only entitled to compensation for the loss from deprivation of support of the deceased who had contributed to her maintenance by attending to their common household 'to the extent other arrangements must be paid for, but that the article also covers the loss of income she suffered due to working less herself' which was also caused by her husband's death. Philip Morris contended, however, that working less, instead of, for example hiring professional help, was her own choice for which the tortfeasor does not have to pay. The *Hoge Raad* rendered an important decision in this case, also providing more clarity concerning its decision of 11 July 2008 (*Bakkum v Achmea*), which in particular dealt with the extent to which the damage assessment within the framework of art 6:108 should be done *in abstracto*.[22]

22 HR 11 July 2008, RvdW 2008, 724. See *Faure/Hartlief* (fn 20) 347–350.

b) Judgment of the Court

28 The District Court decided in favour of Philip Morris. However, the Court of Appeal set this aside and stated that it had to be assessed whether, all circumstances taken into account, the single mother's choice was reasonable (which was the case, according to the Court). The Advocate-General in his advisory opinion said, in essence, the same.

29 The *Hoge Raad* also came to the same conclusion. It stated that the extent of damages under art 6:108 in the first place covers the income which her husband would have contributed to their shared household had he not been killed in the unfortunate accident. On the other hand, the *Hoge Raad* considered that the obligation to pay damages has the characteristics of an alimony payment. One only has an entitlement to compensation under the article if there is a need for supplementary income (as had already been determined in the aforementioned decision in *Bakkum v Achmea*). Furthermore, the court held that the contribution to the household does not necessarily entail a mere pecuniary contribution. One also has to look at the factual contributions to the household by the deceased and his/her spouse, ie caring for the children and his help in maintaining the household. This more factual contribution to the household may entail that the surviving spouse cuts back on his or her working hours, which can result in a decrease in salary. This loss should also be compensated.

c) Commentary

30 In the literature this decision has been quite positively received. It is even held that another outcome would hardly have been acceptable and not in accordance with earlier case law. However, there are distinct views on the reasoning and, related to this, the standards which should be used to assess which costs fall under art 6:108.[23]

31 In his note under this case in *Nederlandse Jurisprudentie* Vranken[24] advocates a 'reasonableness test'. This means that it should be assessed whether a surviving spouse who claims damages on the basis of art 6:108 has taken 'reasonable' measures to substitute assistance in the household. In the mentioned decision in *Bakkum v Achmea* the *Hoge Raad* had used this criterion, adding the requirement that some 'reasonable' effort can be

23 See on this topic *R Rijnhout*, Vergoeding voor huishoudelijke hulp door naasten: een overkoepelende analyse van art 6:107 en 108 BW, AV&S 4 (2009) 179–188.

24 *JBM Vranken*, Case note, NJ 2009, 386.

expected from the claimant himself. Vranken holds that this criterion should again have been used by the *Hoge Raad* in this case, also because the court could then have argued on the basis of the 'reasonableness' of the mother's choice and did not have to use the argument of restricting the damage.

32 Here a brief excursus is opportune concerning the criterion of the extent to which the involvement of professional help would be 'normal and customary', which is used by the *Hoge Raad* in personal injury cases (and which, according to Vranken, should also be substituted by the reasonableness test). In order to illustrate this we provide a short description of the decision of the *Hoge Raad* of 5 December 2008, NJ 2009, 387 (*Rijnstate v Reuvers*). The claimant in this case was a woman who underwent treatment in a hospital, as a result of which she received a permanent injury to her arm and was no longer able to do as much of the housekeeping as before. In court she claimed damages for substituting household help. Although she had not actually incurred any costs because her husband did more of the housework in his spare time, both the Court of Appeal and the *Hoge Raad* allowed her claim, thereby following the previous case law and abstracting from the fact that in fact no costs were incurred. As a criterion and also an upper limit for the allocation of damages, the *Hoge Raad* stated that the damages should be as high as the costs of professional help which would have been 'normal and customary' in these circumstances.

33 In case compensation for loss of maintenance is claimed, this criterion is not used in the case law and whether there exists an upper limit to the level of damages for substituting household help is still unclear. There is a debate as to whether there should be such a difference between loss of dependency damages and personal injury damages. Someone with a rather high income who cuts back on his working hours to help his injured wife may not receive compensation for all his loss of income, because this is more than professional help would cost, while someone else with a lower income who does the same may receive compensation for all his loss of income. Vranken holds, in his note under *Philip Morris v Bolink* that, in loss of dependency damage cases where children are at stake, every (reasonable) income loss should always be compensated because we should not assess such a choice of the surviving spouse in such sad circumstances with just a calculation.

6. HR 17 April 2009, LJN: BH1996: Rollerblading

a) Brief Summary of the Facts

34 In this case the *Hoge Raad* had to rule on the duty of care of an employer with regard to after-work activities, in this case rollerblading. Every couple of months this particular company organised fun activities for its employees. On this occasion it hired a company that organised rollerblading dances. The company did not provide any safety pads. The claimant fell and broke her wrist. She sued her employer for breaching his duty under art 7:658 of the Civil Code and/or his duty 'to act as a good employer' under art 7:611 of the Civil Code based on reasonability and fairness (good faith).

b) Judgment of the Court

35 The duty of care under art 7:611 entails, according to the *Hoge Raad*, that an employer, when he organises an activity that carries the risk of serious injury, ought to take the necessary actions so as to prevent damage that might occur as a result of the activities. The duty of care thus extends beyond mere work-related activities. In this case, it was not enough for the employer to trust that the company it had hired would provide the necessary safety pads. The employer had a personal duty of care that extends beyond hiring competent companies to take care of his employees.

36 Actually, one of the most important questions in this case was whether liability should be based on the said legal basis of art 7:611, or on art 7:658 of the Civil Code, which is applicable in cases where the damage has occurred during work, and where the employers' duties are more thoroughly defined. Unlike the *Hoge Raad*, which regarded the outing as an outside-work situation, the Advocate-General preferred the latter provision. He found support in the literature to extend the working sphere of the article, of which he was also in favour, to restrict the use of the rather vague provision of art 7:611. Moreover, many employers are insured against liability on the basis of art 7:658, but not (yet) against liability on the basis of art 7:611.

c) Commentary

37 This case provides more clarity as to art 7:611 CC and to the relationship between both articles on employers' liability in the Civil Code (see also *Hoge Raad* 20 February 2009).[25] The *Hoge Raad* does not seem to favour the option of making the requirement for application of art 7:658 less strict; art 7:658 is applied in working situations, in other words, in case a work-related accident occurs within the sphere of influence of the employer.

7. HR 5 June 2009, JA 2009/116–118: Security Leasing

a) Brief Summary of the Facts

38 In three separate (test) cases the *Hoge Raad* was asked to give a ruling on the alleged liability of sellers of financial products (not surprisingly, in all three cases the sellers happened to be banks) for losses resulting from a failure to enquire into the financial capabilities of buyers and to provide sufficient warning of the risks that were attached to those products. The poorly informed buyers sought compensation for the losses that they had suffered as a result of the realisation of the financial risks inherent in their entering into contracts concerning the lease of securities.

b) Judgment of the Court

39 Although cautious not to overly abstract from the circumstances of the present cases, the *Hoge Raad* was eager, besides deciding these cases, to formulate general guidelines for settling numerous similar disputes (there were thousands of cases on contracts involving the lease of securities pending a decision or waiting to be taken to court). After finding that in cases like the present there is no room for the doctrines of mistake or misrepresentation (of which nullity of the contract would be the result), the *Hoge Raad* went on to rule that there is, however, a special duty of care to warn which rests on sellers of financial products like security leasing contracts, the breach of which can amount to liability on the basis of the general provision of art 6:162 of the Civil Code.

25 *CJM Klaassen*, De aansprakelijkheid van de werkgever voor bedrijfsuitjes en personeelsactiviteiten, AV&S 5 (2009) 225–235.

40 The guidelines that were set can be summarised as follows.[26] 1) The duty to provide sufficient warning and to enquire into the financial capabilities of potential buyers is general in nature, and does in no way depend on the specific circumstances of each individual buyer. 2) This duty of care is independent of the question whether the buyer could reasonably have been expected to be able to bear the financial risks attached to the transaction; even if a buyer was in fact able to do so, that does not mean he would still have chosen to, had he received sufficient warning. 3) If the financial situation of the buyer was such that he could not reasonably have been expected to meet his obligations under the contract, the duty of care entails an obligation to advise the potential buyer not to enter into the contract. 4) A violation of the duty of care will generally mean that the seller must compensate the damage that is suffered. However, the buyer will, as follows from art 150 CCP, still need to establish the causal link between the violation of this duty and the damage suffered by him. 5) A violation will generally lead to an obligation for the seller to compensate all losses that are in a *condicio sine qua non* relation to it. If the buyer puts forward that the contract would have been entered into anyway, even if the duty of care had been observed, two situations should be distinguished: a) if the buyer's financial situation was such that the seller, when enquiring into the former's capability to bear the heavy financial burden, should have understood that the contract would not be entered into in full awareness of the financial risks, it can in principle be assumed that the contract would not have been formed had the duty of care been observed; b) if the buyer was able to bear the financial risks, the defence of the seller that the contract would have been entered into anyway should be sufficiently founded. If not, it may also be assumed that it would not have come into existence in absence of the violation of the duty of care. 6) If the duty of care has been violated, not only the outstanding debt but also the interest and repayments that are already paid are eligible for compensation. 7) Subsequently the degree to which the buyer himself is to be held accountable for his own losses should be examined (contributory negligence, art 6:101 of the Civil Code). It should be taken into account that it was clear for the buyers that the transaction concerned an investment with loaned money, that money was loaned, that interest should be paid, and that the money should be repaid regardless of the value of the securities at the time of the sale thereof. Besides, it may be expected from a buyer that he makes a reasonable effort to understand the contract before entering into it. 8) Concerning the distribution of fault, it should be noted

26 This summary is derived from *WH Van Boom*, Case note, JA 2009, 118.

that in principle less weight should be attached to the rashness and the lack of understanding on the side of the buyer, when comparing this to the seller's violation of his duty of care. The *Hoge Raad* makes another distinction here. The outstanding debt will always be eligible for (partial) compensation. The same only holds for the interest and repayments if, had sufficient enquiry into the buyer's capability to bear the financial risks taken place, it would not have reasonably appeared that the latter would be able to do so. If such an enquiry had led to the conclusion that the buyer was able to bear those risks, losses concerning interest and repayments would not be compensated. 9) The contributory negligence of the buyer should, as a starting point, be estimated at 40 %. Thus, in the present cases a breach of art 6:162 CC could be found.

a) Commentary

41 Most significant about the security leasing cases is that the *Hoge Raad* proved willing to formulate general guidelines for similar disputes in order to make the settlement of all those cases as efficient and uniform as possible. Particularly noteworthy is the fact that, in one of the cases, the plaintiff was a foundation that acted on behalf of many victims of the reckless sale of risky financial products. Although it is not possible to claim damages in such a 'collective action', based on art 3:305 of the Civil Code,[27] the *Hoge Raad* decided that it is, however, possible to seek a declaration on many salient points concerning liability (duty of care, *condicio sine qua non*, damage, contributory negligence), as a result of which guidance is given as to how similar cases should be handled by courts. Practically this opens the possibility for the *Hoge Raad* of 'craftmanship at a macro level'.[28] A development that is to be highly applauded in the light of the need for smooth, efficient, and uniform decision making in situations of mass damage claims.[29]

27 HR 13 October 2006, JA 2007, 2; NJ 2008, 528 (*Vie d'Or*).
28 *IN Tzankova*, Toegang tot het recht bij massaschade (diss 2007) 182.
29 *Van Boom*, Case note, JA 2009, 118.

8. HR 12 June 2009, LJN: BH 6553: Domestic Help

a) Brief Summary of the Facts

42 This case is another important decision on loss of dependency damages. The proceedings here concentrated on the interpretation of art 6:108 of the Civil Code and the condition of 'need' which the *Hoge Raad* had concluded to exist under this article. For the content of this provision and the condition of need, see our description of the *Philip Morris v Bolink* case above. The facts here were as follows. Due to an accident for which the defendant (at first instance) was liable, the claimant's wife died. Up until then she had done all the household work for herself and her husband. He now involved the help of others to do the housekeeping, for which he had to incur costs. Before the court he claimed (inter alia) compensation for these costs, on the basis of art 6:108 al 1 sub d.

b) Judgment of the Court

43 Both the District Court and the Court of Appeal allowed the claimant's claim. Put briefly, the latter reasoned that the claimant had, due to his wife's death, a need to substitute (professional) household help, and that only the extent to which the claimant had this need should be taken into account for the damage assessment. Opposing this, the defendant argued that the claimant received more financial benefits due to the death of his wife (in the form of insurance payments) than the losses he suffered as a result of his need for household help. Therefore, according to the defendant, the condition of need was not fulfilled.

44 The *Hoge Raad* (thereby following the Advocate-General) agreed with this and ruled that, whilst assessing whether the condition of need is fulfilled (which is required in order to obtain damages on the basis of art 6:108), all circumstances should be taken into account, including the possible benefits due to the spouse's death. Therefore, in this case the *Hoge Raad* concluded that the claimant was not in need due to the deprivation of his wife's household work, because he received enough financial benefits to finance the substitution of (professional) help.

c) Commentary

This decision provides more clarity on damage assessment in cases of loss 45
of dependency damages.[30] The distinction between this case and the decision in *Philip Morris v Bolink* (see supra case 5) was that in this case the claimant claimed costs for substitute household help which he had actually incurred. The question at stake here was whether he was in need due to the deprivation of his wife's household work, and whether the financial benefits he earned had to be taken into account. The *Hoge Raad*'s answer seems to be a nuance on the objective approach which had been used in the cases *Bakkum v Achmea* and *Rijnstate v Reuvers*. To recapitulate, to assess whether one has a financial need, all concrete financial circumstances have to be taken into account, but while assessing the damage, one should abstract from some concrete circumstances, such as whether or not the costs have in fact actually been incurred.

9. *Gerechtshof* (Court of Appeal of) Amsterdam 15 July 2009, LJN: BJ2691 (*Randstad v Vedior*)

a) Brief Summary of the Facts

The Court of Appeal of Amsterdam declared the financial settlement 46
between the Randstad temporary employment agency and the Association of Shareholders (VEB) of 26 September 2008 binding upon these parties. In this way the Court of Appeal complied with the request of Randstad and the VEB based on art 7:907 of the Civil Code, part of the *Wet collectieve afwikkeling massaschade* (Collective Handling of Mass Claims Act).[31] The settlement relates to the meeting between Randstad and Vedior concerning the acquisition of Vedior by Randstad on 30 November 2007. During the morning of that day different media reported on the possible acquisition of Vedior. As a consequence the Dutch Authority for the Financial Markets shut down all transactions in Vedior shares on the Euronext Stock Exchange in Amsterdam. Shortly thereafter, Vedior announced that it was involved in meetings with Randstad to discuss a possible acquisition of Vedior by Randstad. The acquisition was successfully realised after this

30 See *Rijnhout*, AV&S 4 (2009) 179–188.

31 See *MG Faure/T Hartlief*, The Netherlands, in: H Koziol/BC Steininger (eds), European Tort Law 2005 (2006) 41; *MG Faure/T Hartlief*, The Netherlands, in: H Koziol/BC Steininger (eds), European Tort Law 2007 (2008) 428 f; *T Hartlief et al*, Mass tort claims, NJB 2007, no 41.

announcement and the trade in the shares of Vedior on the Stock Exchange was reopened.

47 The VEB claimed that Vedior did not report the meetings with Randstad in good time. Consequently, the shareholders of Vedior who had sold their shares before the Dutch Authority for the Financial Markets shut down the market suffered a loss. They sold their shares below market price, because the price did not yet reflect the fact that Vedior and Randstad were talking about a possible acquisition. Randstad settled the damage with the VEB for an amount of € 4.25 million. By declaring this settlement binding, the Court of Appeal of Amsterdam opened the door to all shareholders who sold their Vedior shares on the morning of 30 November 2007 to get compensation.

b) Judgment of the Court

48 The Court of Appeal of Amsterdam held that the settlement contract for the compensation of damage fulfils all the conditions as laid down in art 7:907 of the Civil Code. This means that everyone who has suffered damage by the act in question (the act that the agreement covers) is bound by the terms of the settlement unless they opt out in time (the minimal time is three months, see art 7:908 para 2 CC).

c) Commentary

49 The Netherlands is a trendsetter in Europe in the collective settlement of damage for instance caused by misrepresentation on the Stock Exchange. Further measures to promote collective settlement – such as the possibility to ask preliminary questions to the *Hoge Raad* – are in preparation.

50 Remarkable here was that the Court of Appeal did not refrain from declaring the settlement binding because of the spread of shareholders over several countries. The Court of Appeal did not even examine its international judicial authority with regard to the foreign shareholders. An important question is, however, whether foreign judges are obliged to acknowledge the binding force of the decision of the Dutch court.

51 With regard to the representativeness of the interest groups, the Court of Appeal held that interest groups are sufficiently representative if each of them is sufficiently representative for a sufficient part of the prejudiced shareholders. The geographic spread of shareholders can be a barrier to

accepting the representativeness of interest groups. If the shareholders are spread over multiple countries, the presence of foreign declarations of support seems to become a necessary condition for sufficient representativeness of the interest groups.[32]

10. HR 9 October 2009, LJN: BI8583: Car Chase

a) Brief Summary of the Facts

52 After an alleged collision between two cars (a Honda and an Opel), the Opel driver forced the Honda driver to stop his car at the side of the road. The Opel driver demanded that the Honda driver follow him to his caravan camp 'to settle the damage'. The Opel driver summoned his wife to drive the car. After passing an exit, it turned out that the Honda driver was no longer following the Opel. At that moment the Opel started to chase the Honda driver, which eventually led to the situation where the Honda driver left the road and hit a tree. As a consequence, three passengers in the Honda were killed and one suffered serious injury.

53 The co-driver of the Opel, who had instructed his wife during the chase, was prosecuted and convicted of joint manslaughter. The insurance company of the co-driver of the Opel reimbursed the costs that were not covered by the health insurance of the relatives of the deceased passengers, such as the costs related to psychological aid. The relatives were not satisfied with this reimbursement and claimed material and immaterial damages. This claim was based on three grounds. First, they stated that a wrong had been directly committed against them. The legal basis of the claim was therefore art 6:162, the general article with regard to wrongful acts. They argued that the Opel driver committed a wrong not only towards the deceased passengers, but also directly towards them. Alternatively, if this was not accepted, they argued that the way in which they had been confronted with the consequences of the incident had to be considered as a shocking event that caused physical injury to them, and therefore their damage (both material and immaterial) should be compensated in full. Lastly, they based their claim on an infringement of the right to family life under art 8 of the European Convention on Human Rights.

32 *BJ de Jong*, Noot bij Hof Amsterdam 15 July 2009, LJN: BJ2691; Ondernemingsrecht 2009 (162) paras 3.1, 3.3, 3.4.

b) Judgment of the Court

54 More information on 'nervous shock' claims in the Netherlands is needed in order to assess this case. The leading case with regard to nervous shock is the *Taxibus* case from 2002.[33] The *Hoge Raad* accepted that the next-of-kin can claim damages from the tortfeasor based on art 6:162 of the Dutch Civil Code when the following (strict) conditions are fulfilled:

> 'When someone through the violation of a specific norm causes a serious accident, he acts in such a case not only unlawfully against the one who dies or is injured as a result of this, but also against the one who, by observing the accident or through a direct confrontation with the serious consequences thereof, experiences a serious emotional shock which results in psychological damage. This will more specifically be the case when someone is in a close affectionate relationship with the person who is injured or killed in an accident.'[34]

55 By expressly demanding a causal link between the direct confrontation with the accident, or the severe consequences thereof, the *Hoge Raad* sidesteps the rather rigid Dutch system of compensation for third party damage in personal injury cases: the damage (psychiatric injury) is not a consequence of the injury or the death of the direct victim, but of the direct confrontation. Therefore, if the conditions as set out in the *Taxibus* case are fulfilled, an autonomous and a direct wrongful act is committed against the third party, in this case the mother of the deceased, and therefore full compensation will be granted.

56 In the case decided by the *Hoge Raad* on 9 October 2009 the relatives of the deceased argued that the bad intention of the tortfeasor while acting criminally reduced the requirements with regard to the direct nature of the confrontation. In other words, a distinction should be made between *culpa* and *dolus*. Nevertheless, both the District Court and the Court of Appeal dismissed this claim and emphasised that the conditions as set out by the *Hoge Raad* in the *Taxibus* case should be strictly applied.[35]

57 The decision of the *Hoge Raad* in this case was threefold. Firstly, it stated that a direct claim by third parties in personal injury cases based on the general article with regard to a wrongful act (art 6:162) should, in view of the legal system (arts 6:107, 107a and 108), be dismissed. Secondly, an autonomous and direct claim is nevertheless allowed when the conditions as set out in the *Taxibus* case are fulfilled. The *Hoge Raad* did not accept an extension of the criteria set out in *Taxibus* as argued by the plaintiffs. Therefore the basic assumptions in the *Taxibus* case still apply, even when the tortfeasor had the intention of injuring or even killing the direct victim. Judges should not act beyond their legal capacity by deviating from the restrictive legal framework. Lastly, art 8 of the Convention on the Protection of Human Rights and Fundamental Freedoms does not oblige the Dutch legislator to provide for a right to compensation for the damage (both material and immaterial) of a parent who has lost a child as a consequence of a committed wrong. According to the *Hoge Raad* this assumption does not change in the situation of an intentional traffic offence with fatal consequences.

33 Hoge Raad 22 February 2002, LJN: AD5356, NJ 2002, 240 (*Taxibus*). See *MG Faure/T Hartlief*, The Netherlands, in: H Koziol/BC Steininger (eds), European Tort Law 2002 (2003) 317 ff.

34 Hoge Raad 22 February 2002, LJN; AD5356, NJ 2002, 240 (*Taxibus*) paras 4.9–4.9.4.

35 See *R Rijnhout*, Case note, JA 2008, 76.

c) Commentary

58 The judgment emphasises that the system of arts 6:107, 107a and 108 of the Dutch Civil Code is restrictive and exclusive.[36] A third party can only claim compensation for damage mentioned in these articles. In fatal accident cases this leads to the conclusion that only certain types of material damage can be compensated. The *Hoge Raad* repeated the possibility of nervous shock claims and therefore the possibility of full compensation for the damage of (in fact) third parties, including the compensation of immaterial damage.[37] However, the criterion of direct confrontation cannot be loosened in the light of the seriousness of the norm violation, eg an intended norm violation. According to the *Hoge Raad* the mere confrontation with the damage or death of the victim is not sufficient. In lower case law the condition of direct confrontation has sometimes been loosened if the norm violation was more severe. The conclusion which can be derived from this case is that the *Hoge Raad* does not agree with this development.[38]

59 The question left for legal practice is, under which circumstances (time and place) the criterion of 'direct confrontation' is sufficiently met. The *Hoge Raad* stated that there should be a direct link between the dangerous

36 See *EFD Engelhard* in: C van Dam/EFD Engelhard/I Giesen, Third party losses in a comparative perspective. Three short lectures in honour of WHV Rogers, Utrecht Law Review vol 3, issue 2 (December) 2007.

37 *M de Tombe-Grootenhuis*, Case note, Letsel & Schade (L&S) 4 (2009) 40.

38 *WS Oostveen-Kouwenhoven*, Shockschade, Juridisch up to date (JutD) 20 (2009) 18–20.

behaviour of the tortfeasor, on the one hand, and the psychological loss suffered by the other as a result of the direct confrontation with the consequences of this behaviour on the other hand. This confrontation can also occur (briefly) after the event which gave rise to death or injury had occurred, as was the case in *Taxibus*.

60 Finally, we would like to point out that the case in question deals with nervous shock: a direct and autonomous wrong toward a (in fact) third party. The compensation of immaterial damage in these cases should be distinguished from affection damage (see supra no 6).

11. HR 27 November 2009, LJN: BH2162: World Online

a) Brief Summary of the Facts

61 Towards the end of the year the *Hoge Raad* delivered its decision in a case concerning a very famous – or rather infamous – internet provider called 'World Online' that went public in 2000. This was, of course, around the time of the bursting of the dotcom bubble. The company going public had been hyped in the media by World Online itself. For weeks on end it aired commercials about its shares on radio and television. So much so that weeks before the company officially went public there was almost a run on the company's shares by the general public. The company eventually even initiated a tour to raise interest among North American investors.

62 As required, the company published a prospectus containing information about the company that would enable prospective investors to make up their mind about the financial and overall health of the company. Finally, the shares went public at a price of € 50.20, and shortly thereafter their price plummeted.

63 In retrospect the shares had been highly overvalued. Many investors felt that they had been misled by information in the prospectus. A class action lawsuit was initiated by the investors against World Online and its underwriters Goldman Sachs and ABN AMRO. They claimed that they had been misled by information in the prospectus which, according to them, painted an unfair picture of the present state and future of the company.

b) Judgment of the Court

Many questions had to be answered by the *Hoge Raad*, amongst which three are relevant here. According to art 6:194 of the Civil Code, the issuer of a prospectus commits a wrongful act in the sense of art 6:162 of the Civil Code if the prospectus contains misleading statements. In determining what can be qualified as misleading, the standard is the 'average investor', who is reasonably informed and cautious. The *Hoge Raad* basically stated that for a statement to be misleading it must be misleading to the average investor. It can be expected of this normal investor that he will carry out independent research on available material, but not that he has special knowledge or experience with regard to the company. 64

Furthermore, a statement can be misleading if the information is factually wrong or incomplete. However, the mere fact that a statement in the prospectus is factually wrong or incomplete does not render it misleading. Something additional is needed. A statement can only be misleading if the factual error is material, ie the information that is wrong or incomplete must be of such a nature that it can influence the decision of the normal investor. Whether the investor has actually read the statement is not important. The statement must have a misleading nature in itself. 65

The *Hoge Raad* also answered the question with regard to statements made outside the prospectus. Again, in such a case the concept of the 'average investor' is important. In these cases the normal duty of care is applicable. The issuing company must take reasonable care with regard to the interests of prospective investors. This implies that these statements must comply with the information contained in the prospectus. Any deviation from the information in the prospectus by other forms of communication is, in others words, not allowed. Liability for wrongful statements made outside the context of the prospectus is mitigated by the fact that the prospectus itself contained the correct information. Also, an exoneration clause in the prospectus that states that prospective investors ought not to rely on statements made outside the prospectus will not be a mitigating circumstance. 66

There is, however, no duty for the issuing company to correct any misunderstandings that the public might have with regard to the shares when this misunderstanding is not caused by the prospectus or the company. There is, in other words, no duty to react to publications in the media with regard to the shares. There can be exceptions to this rule however when there is a very substantial misunderstanding amongst the public. This will especially be the case if the subject of the misunderstanding is a fact that 67

might influence the decision of prospective investors. This standard of care is also applicable to the underwriting bank.

c) Commentary

68 In the World Online case the question as to the wrongfulness of the criticised behaviour was at issue in a test trial in which an association sought a declaration on behalf of numerous victims. For such a 'collective action' to be successful it is required that the *Hoge Raad* is willing to abstract from the specific circumstances of each case. By ruling that it is irrelevant whether and to what extent each individual victim has in fact been misled, but rather that for wrongfulness to be established it is sufficient that the 'average investor' would be misled by the act, it proved willing to do so, thereby creating an informal precedent that individual victims can invoke when settling their particular cases. Considering the European Community requirement of offering effective legal protection against violations of the law and taking into account the protection that the prospective regulations aim to protect, this case should, therefore, be regarded as containing an important decision in light of mass damage claims.

12. HR 18 December 2009, LJN: BK0873 (*London v Delta Lloyd*)

a) Brief Summary of the Facts

69 On 9 June 1995, a car crashed into the rear of a second car. The driver of the second car suffered damage for which the insurer of the first car driver, Delta Lloyd, admitted liability. Two years later the same victim as in the first accident was hit by a car approaching him from the left. The driver of this car was insured by the London insurance company. London admitted liability for the damage which followed from the accident. Subsequently, Delta Lloyd settled the damage for both accidents with the victim. The total damage was estimated at € 226,890 and this amount was paid by Delta Lloyd to the victim. Delta Lloyd subsequently claimed that London should reimburse 50 % of the victim's damage caused by and after the second accident. Delta Lloyd based this contribution duty on art 6:99 and arts 6:10, 6:101 and 6:102 of the Civil Code.

b) Judgment of the Court

The District Court distinguished between a) damage that can only be the result of the first accident, b) damage that can only be the result of the second accident and c) damage that can be the result of both the first and the second accident and is at least the result of one of the accidents (mixed damage). The District Court held that both Delta Lloyd and London were jointly and severally liable for mixed damage. 70

The District Court decided that since there were no special circumstances that led to another division of the damage, the damage should be equally divided between Delta Lloyd and London (art 6:99 in relation to art 6:10 CC). The District Court also held that it cannot be established which part of the damage is only the result of the second accident, but, now that it was certain that the damage could be the result of both the first and the second accident, the total damage that was caused after the second accident should be seen as mixed damage. 71

The Court of Appeal confirmed the judgment of the District Court and stressed that it should be examined whether both accidents could have independently caused the total damage. Subsequently, the Court of Appeal assessed that the second accident could have caused the total damage independently of the first accident. This led the Court to the conclusion that Delta Lloyd and London were both jointly and severally liable for the damage to the victim based on art 6:99 in relation to art 6:102 of the Civil Code. 72

In addition, the Court of Appeal held that Delta Lloyd did not have to prove that, and for which part, the conditions imputable to London contributed to the damage. However, the party that contends that his contribution to the damage amounts to less than 50 % should prove that this is the case. 73

The *Hoge Raad* determined in line with the decisions of the District Court and the Court of Appeal, thereby using the following assumptions: 74

- The second accident caused (lasting) damage to the victim;
- The second accident could have caused the damage as appeared after the second accident;
- London and Delta Lloyd were jointly and severally liable for the damage that could have been the result of both the first and the second accident and that was at least caused by one of the accidents;
- The mixed damage should be equally divided between London and Delta Lloyd in proportion to the degree to which the circumstances imputable to them contributed to the damage.

c) Commentary

75 In this case it cannot be established which accident caused which part of the damage suffered by the victim. This leads to difficulties in establishing the damage and the causal connection between the accidents and the damage. The presented solution divides the damage equally between London and Delta Lloyd, while externally both are jointly and severally held liable.

76 The Advocate-General, Spier, had argued that the victim should have proven the occurrence of his damage and the causal connection between the accidents and his damage because the accidents occurred separately in time. It is, in his opinion, insufficient that the second accident *could have* caused the damage if the first accident had not occurred. According to the Advocate-General, this logically follows from what has been accepted in cases of 'mono-causation': the victim should prove that his damage was caused by the person he holds liable. Causation cannot be accepted on the sole ground that the victim suffered damage. In case of multiple (potential) defendants, the same argumentation should be applied to avoid arbitrariness. This led the Advocate-General to the conclusion that, if a victim cannot prove that his damage was the result of the accident(s), eg he cannot establish a causal connection, the claim of the victim should be rejected.

77 This can be avoided by accepting that art 6:99 CC shifts the burden of proof from the victim to the offender. If the addressed offender, who is in this view liable for the total damage, can prove that another person caused part of the damage, he can have recourse against that person. This leads to the more satisfactory situation that the victim is not left in the cold in situations such as in this case.

13. Developments concerning personal injury

78 Many of the cases described and analysed above deal with aspects of personal injury claims. These cases provide a broad overview of what is happening in the Netherlands specifically when it comes to personal injury cases. As can be noted from the foregoing, the issue of when and to what extent damages can be awarded to third parties, ie not the direct victim but for instance the relatives of the injured person or deceased, has become rather important. Several cases provide proof thereof and the legislative proposal on affection damages (or: bereavement) confirms this. We suspect this development has not yet come to a halt and will continue to lead to new cases and legislation.

79 Another more general point of interest in 2009 was the determination of the quantum of (im)material losses and the possibility of standardising such awards to some extent. In this respect, mention can be made of three important publications: First, the revised edition of the so-called *Smartengeldgids* was published.[39] This reprint of the 2006 edition provides an overview of the amounts for non-pecuniary damage (pain and suffering) which have been assessed in Dutch case law. Second, *Verburg* defended his PhD thesis[40] on the issue of quantification of non-material losses. Since it is quite difficult to determine the amount of non-pecuniary damages to compensate for pain and suffering, it is important to avoid the risk of incoherence and arbitrariness in judgments on non-pecuniary damage. This dissertation tries to address this problem by giving an outline of the dogma of non-pecuniary damage, advocating a judge-made regulation on amounts of non-pecuniary damages and actually proposing such a regulation. Third, a special issue of the Journal on Compensation for Personal Injury[41] contains several contributions on the occasion of the tenth anniversary of the Dutch National Platform for Personal Damage (NPP), which was renamed as the Dutch Council for Injury Damage (*Letselschade Raad*). This Council works on material and procedural standards to determine the quantum of damages for injuries. The issue contains distinct views on the dilemma of developing standards for the amount of pecuniary and non-pecuniary loss, or leaving more room for solutions which fit the special circumstances of each case.

C. Literature

Volumes

1. *AG Castermans et al* (eds), Ex libris Hans Nieuwenhuis (Deventer, Kluwer 2009)

80 This volume contains a large number of contributions dedicated to the retired professor at the Law Faculty of Leiden University, Hans Nieuwenhuis. Some of them concern the law of tort, discussing various aspects. Keirse, for example, discusses the question whether a failure to attempt to

39 *M Jansen* (ed), Smartengeld, The Hague, ANWB/Verkeersrecht (17th edn 2009).
40 *GJM Verburg*, Vaststelling van smartengeld (2009).
41 TVP 1 (2009).

lose weight or to stop smoking pursuant to medical advice should be assessed as contributory negligence if the weight loss or stopping smoking would have mitigated the damage.

2. *W Dijkshoorn/NJH Huls/SD Lindenbergh* (eds), Waar gehakt wordt... Acht bijdragen over beroepsaansprakelijkheid (The Hague, Boom Juridische Uitgevers 2009)

81 This volume contains papers written by students from the law faculty of the Erasmus University Rotterdam concerning professional liability: the possibility to claim damages from a professional who made a mistake whilst practising his profession. Discussed are, inter alia, the professional fields of youth care, health care, mediation, jurisdiction, and auditing.

3. *EFD Engelhard/I Giesen/CBP Mahé/MY Schaub*, Handhaving van en door het privaatrecht (The Hague, Boom Juridische Uitgevers 2009)

82 This book deals with questions concerning the possible improvement of efficacious enforcement in Dutch private law. Each of the fifteen essays concerning either or both the enforcement of private law and enforcement by private law deals with a specific topic of interest within the broad domain of private law. Since tort law is an important instrument to enforce legal rules, this area figures prominently in the book. Several distinct questions of liability law are for instance raised in the contributions by Engelhard (the introduction to the book), Hondius, Visscher, Keirse, Jurgens et al, Schaub, Mahé, Freudenthal, De Kezel, and Giesen (concluding observations on all contributions).

83 This collection comes at a time in which the issue of enforcement is gaining increasing importance, generating a series of publications from several authors. Kortmann's inaugural lecture, to name but one example, dealt with this theme previously.[42] There seems to be some sort of divide in the currently available lines of research between those who seek and

42 *JS Kortmann*, The Tort Law Industry (2009), see below no 94. See also *CH Sieburgh/JS Kortmann*, Rechtshandhaving door privaatrecht, in: A Scheltema et al, Toezicht op de financiële markt en de energiemarkt. Staatsgeheimen en het strafproces. Rechtshandhaving door het privaatrecht (Preadviezen Vereniging voor de Vergelijkende Studie van het Recht van België en Nederland) (The Hague, Boom Juridische Uitgevers 2009) 249–302.

wish to use tort law as an instrument to further specific goals related to the enforcement of legal rules (such as Engelhard & co) and those who do not opt for this instrumental vision: tort law is supposed to be aimed at granting compensation if justified, and nothing more (Kortmann). To attain other goals, other means (public law) should be used.

4. *WA Eshuis et al*, Leerzame schadeclaims. Leren van 'worst case scenarios' als opstap naar effectieve interventie en preventie rond beroepsziekten (Amsterdam, Hugo Sinzheimer Instituut 2009)[43]

This report describes the outcome of research that has been carried out on 84
the causes and processes of occupational diseases and damages claims for occupational diseases, also paying attention to possible methods for prevention.

5. *E de Kezel/CC van Dam/I Giesen/CE du Perron*, Financieel toezicht en aansprakelijkheid in international verband (Amstelveen, deLex 2009)

This book is the published version of a research report compiled for the 85
Dutch Ministry of Finance[44] regarding the question whether Dutch financial supervisors should be granted immunity from liability in tort because of their peculiar position as a national player in a highly internationalised world. The leading question was whether the growing international dimension of the financial markets contains an (extra) threat for the Dutch financial supervision authorities due to distinct rules on private law liability. One of the conclusions is that in most European countries the liability of financial supervision authorities tends to be more restricted (by legislation, mostly) than in the Netherlands. However, given the rules of Dutch private international law (Dutch courts will be competent to hear cases, and most probably will apply Dutch law) and the rather modest duty of care that the Dutch Supreme Court has laid down for supervisors, the researchers find that the extra risks of being held liable that super-

43 This report can be downloaded from http://www.beroepsziekten.nl/content/leerzame-letselschadeclaims.

44 The original report as presented to the Ministry of Finance can be downloaded from http://www.minfin.nl/Actueel/Kamerstukken/2009/07/Rapport_over_aansprakelijkheid_financiele_toezichthouders.

visors run (to a greater extent than their foreign colleagues) are rather modest.

6. *T Hartlief/SD Lindenbergh* (eds), Tien pennenstreken over personenschade (The Hague, SDU 2009)

86 On the occasion of the 20th symposium of the Dutch Association of Personal Injury Lawyers (LSA), ten contributions were published in this volume, discussing various aspects of personal injury.

Monographs

7. *Asser-Hartkamp-Sieburgh 6 II**, Verbintenissenrecht. De verbintenis in het algemeen, tweede gedeelte (Deventer, Kluwer 13th edn 2009)

87 This monograph is a revised reprint of the 2003 version and discusses, in general, the law of damages.

8. *CHM Jansen*, Onrechtmatige daad: algemene bepalingen, Monografieën BW (Deventer, Kluwer 3rd edn 2009)

88 This thoroughly revised reprint of the 1996 edition provides a brief introduction to the general provisions on tort law in the Dutch Civil Code (art 6:162–6:168), concerning inter alia the aspects of unlawfulness, accountability, causal relationship, relativity, youth offenders and group liability.

9. *SD Lindenbergh*, Arbeidsongevallen en beroepsziekten, Monografieën Privaatrecht (Deventer, Kluwer 2nd edn 2009)

89 This monograph on employers' liability is a revised reprint of the 2000 version. It discusses employers' liability for occupational mishaps and occupational diseases, particularly focusing on personal injury damages.

10. *J Spier et al*, Verbintenissen uit de wet en schadevergoeding (Deventer, Kluwer 5th edn 2009)

This revised reprint of the 2006 edition is a monograph concerning liability for damage, mainly written for students, providing an easy to read introduction to tort law. 90

Dissertations

11. *HJW Alt*, Ongelijkheidscompensatie bij stelplicht en bewijslast in het civiele arbeidsrecht en het ambtenarenrecht (Deventer, Kluwer 2009)

Through Dutch procedural law, in particular through rules on the obligation to submit facts and the burden of proof, inequalities between parties are sometimes compensated. This is particularly the case in civil employment law and civil service law. This dissertation discusses procedural inequality compensation in those fields, also answering the question whether one uniform system for inequality compensation in both civil employment law and civil service law should be drafted. 91

12. *YRK Waterman*, De aansprakelijkheid van de werkgever voor arbeidsongevallen en beroepsziekten. Een rechtsvergelijkend onderzoek (The Hague, Boom Juridische Uitgevers 2009)

This dissertation discusses Dutch law on employers' liability and social security. It contains a comparison with Belgian and English law. The author concludes inter alia that the Dutch social security system, which is based on *risque social* (so that the employer is obliged to make payments regardless of the cause of the employee's injury) does not comply with the Employment Benefits Convention 1964 (which presupposes more or less a system based on *risque professionel*, which determines that the employer only has to pay for injuries due to occupational mishaps). 92

13. *MG Faure*, The Impact of Behavioural Law and Economics on Accident Law (The Hague, Boom Juridische Uitgevers 2009)

93 Faure, the Maastricht Professor of Comparative and International Environmental Law who has written several contributions to these Yearbooks, also became Professor of Comparative Private Law and Economics at the Erasmus University in Rotterdam. His inauguration address discusses the importance of behavioural studies for tort and insurance law. He observes that economic theories presupposing rational and utility maximising people do not comply with the findings of behavioural studies. However, he does not advocate a fundamental change to economics or tort law. Concerning insurance, cognitive limitations concerning accidents may be a reason for mandatory insurance.

14. *JS Kortmann*, The Tort Law Industry (Amsterdam, Vossiuspers UVA 2009)

94 Kortmann observes a growing interest in the more instrumentalist idea of law enforcement by means of tort law (see supra no 82 f), not only in the USA, but also in Europe. This idea places the aim of enforcement alongside the traditional tort law aim of compensating damage. In his inaugural lecture Kortmann shows his displeasure with this, naming several reasons to retain the compensatory aim of tort law as the primary aim.

Special Issue

15. *T Hartlief et al*, Goed werkgeverschap, AV&S 5 (2009), special issue (Deventer, Kluwer 2009)

95 This issue on employers' liability discusses the new case law in this field, concerning the question of and to what extent employers can be held liable for traffic accidents involving an employee.