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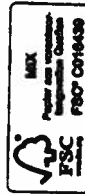
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Preface

Published jointly by the European Centre of Tort and Insurance Law (ECTIL) and the Institute for European Tort Law (ETL), this Yearbook provides information and analysis about tort law developments in Europe in 2011. It includes reports from most EU Member States, plus Norway and Switzerland, and an overview of developments in the field of EU law. Selected highlights are picked out and evaluated from a comparative perspective in the Introduction. A bonus feature in 2011 is a 10-year conspectus of developments in Israeli tort law.

The Yearbook is associated with the Annual Conference on European Tort Law, which is held each year in Vienna in the week after Easter. The 11th Annual Conference, including presentations on some of the developments addressed more fully in these pages, took place on 12–14 April 2012. The 12th Annual Conference will be in Vienna on 4–6 April 2013. Papers from the themed Saturday morning session of the Conference appear each year in a special issue of the Journal of European Tort Law. In 2012, the theme was Cultures of Tort Law in Europe. The papers can be found in vol.3 no.2 of the Journal.

This 11th edition of the Yearbook sees a partial change of editorship. Helmut Koziol – who established the Yearbook and Annual Conference in 2001, with the assistance of Barbara Steininger – is letting go of the editorial reins. These are taken up in his place by Ken Oliphant, ETL Director since 2009. The new editorial team is mindful of the substantial challenge it faces to maintain the Yearbook's reputation and its standards of scholarly excellence, but has the advantage of being able to follow Helmut Koziol's inspiring example and to build upon the very sound foundations he has left in place.

The editors express their gratitude for the support of this project provided by the Austrian Ministry of Justice, Freshfields Bruckhaus Deringer, the Kulturbüro der Stadt Wien, Wissenschafts- und Forschungsförderung und Munich Re. Without their assistance, the project's successful completion could never have been achieved. The editors also thank their colleagues on the ECTIL-ETL staff for their help with the Yearbook and Conference in myriad ways. Special thanks go to Lisa Zeller for organising the Conference and making it such a success, Thomas Thiede for Conference sound and visuals, Donna Stockenhuber for once again taking on the delicate and time-consuming task of proof-reading the entire manuscript, Kathrin Karner-Strobach for unifying the style of the footnotes and Edina Busch Tóth for compiling the Index and managing the publication process.

Ken Oliphant and Barbara C Steininger
Vienna, August 2012

Ivo Giesen and Anne LM Keirse XIX. The Netherlands

A. Legislation

1. Fixed Collection Costs in Obtaining Extra-Judicial Payments: Wijziging van Boek 6 van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering in verband met de normering van de vergoeding voor kosten ter verkrijging van voldoening buiten rechte¹

¹ As was outlined in our 2010 report, a legislative amendment has been proposed to protect consumers and small to medium-sized companies, such as one-man businesses, against unreasonable collection costs incurred in obtaining extra-judicial payments. This proposal is still pending.

² Article 6:96 of the Dutch Civil Code (hereafter: Civil Code) contains three types of damage that qualify for compensation as material loss, amongst which are reasonable costs for attempting to obtain satisfaction on the basis of an out-of-court settlement (para 2, subsec C). This proposal was put forward to amend the latter subsection, by means of adopting a ground for a governmental decree, in which the maximum allowed collection cost can be fixed.

³ Based on established case law, the current regime dictates a two-fold reasonableness inquiry: both the claim for extra-judicial collection costs as well as the amount of these costs must be deemed reasonable. Contractual agreements on extra-judicial costs (negotiating a fixed rate or a particular percentage of the principal due sum) are common. A judge may reduce such rates on the grounds of art 242 Code of Civil Procedure. Nevertheless, the reasonableness norm has offered insufficient guidance to determine the amount of reimbursement in the extra-judicial phase as debtors who are confronted with collection costs are already mired in a state of uncertainty. Furthermore, it is unlikely that debtors confronted with extraordinary claims for reimbursement of costs will initiate litigation proceedings as long as these claims relate to relatively small amounts. Additional legislative clarification of the rule is therefore deemed to be necessary

¹ Documents of the Second Chamber of Parliament (2010–2011) 32 418.

for the removal of legal uncertainties. This will potentially benefit both debtor and creditor.²

In the governmental decree, the maximum collection cost shall be fixed for contractual obligations. The maximum allowed reimbursement is calculated as a percentage of the principal amount, incrementally decreasing as the principal amount increases: reimbursement for an initial principal amount of up to € 2,500 may not exceed 15% of that sum, and this reimbursement decreases then, with three more steps in between, to a maximum of 0.5% for claims above a principal amount of in total € 200,000. The minimum amount for reimbursement of the collection cost is fixed at € 40. The provision is of a mandatory nature.

2. Extending the Scope of the Damages Fund for Violent Crimes Act: Aanpassing van de Wet schadefonds geweldsmisdrijven in verband met uitbreiding van de categorieën van personen die recht hebben op een uitkering uit het fonds en verruiming van de gevallen waarin men aanspraak kan maken op een dergelijke uitkering, aanpassing aan de Kaderwet zelfstandige bestuursorganen en enkele andere aanpassingen³

On 6 June 2011 an amendment was introduced to the Damages Fund for Violent Crimes Act, aiming to expand the scope of this Act. It entered into force on 1 January 2012.

The Damages Fund for Violent Crimes Act provides that when a convicted party who has been found guilty of a serious violent criminal act does not wholly or partially compensate the victim for the damage incurred within a period of eight months, the State will advance the injured party the entire balance of the compensation sum, provided that the victim is a natural person.⁴

The central consideration of the Damages Fund for Violent Crimes Act is to strengthen the position of victims and their relatives in criminal proceedings. The

² See for a complete analysis of this proposal: SMAAM Venhuizen, De verhaelbaarheid van buitengerechtelijke kosten, Weetblad voor Privaatrecht, Notariaat en Registratie (WPNR) 2011, 6881.

³ Documents of the Second Chamber of Parliament (2010–2011) 32 363; Staatsblad van het Koninkrijk der Nederlanden (Stb) 2011, 276.

⁴ See *Al Verheij*, Rechts hulpverleners van slachtoffers van gewelds- en zedenmisdrijven opgepast, Aansprakelijkheid, Verzekering, Schade (AV&S) 2011, 16.

amendment to expand the scope of this Act follows this line by means of broadening the categories of persons entitled to a payment from the Criminal Injuries Compensation Fund, while also increasing the maximum amount of compensation for victims. In particular, the amendment expands the term 'victim' in order to also include relatives of the deceased victim in the first and the second degree. Thereby, parents of deceased adult victims, adult children of deceased victims as well as siblings of the victim become eligible for compensation through the Criminal Injuries Compensation Fund. Before this amendment, these categories of persons fell outside the scope of the compensation regime, which in turn, has been found to lead to undesirable outcomes in practice.

8 Moreover, in contrast to the former regime, the new regime no longer requires that the relatives of a victim of a serious violent crime are to have been financially dependent on the victim. Furthermore the proposal removes the limitation clause that there must be a loss of livelihood due to the victim's death, or the need for reimbursement of funeral expenses. Finally, costs for such things as therapeutic help for bereavement may also give rise to a payment from the compensation fund.

3. Codification of State Liability in Respect of Lawful Activities and Unlawful Decisions by Public Authorities: Aamvulling van de Algemene wet bestuursrecht met bepalingen over nadeelcompensatie en schadevergoeding bij onrechtmatige overheidsdaad (Wet nadeelcompensatie en schadevergoeding bij onrechtmatige besluiten)⁵

9 The objective of this legislative proposal is to complement the General Administrative Law Act by codifying a simplified scheme for compensation by the State for loss due to lawful activities of public authorities as well as new rules on State liability for wrongful decisions, in order to provide citizens with an easier and clearer legal means for claiming compensation from the State.⁶

⁵ Documents of the Second Chamber of Parliament (2010–2011) 32 621.

⁶ See *MW Scheltema*, Het wetsvoorstel schadevergoeding bij rechtmatige overheidsdaad (nadeelcompensatie), Verkeersrecht (VR) 79 (2011) 200, and *E Alders*, Het wetsvoorstel nadeelcompensatie en schadevergoeding bij onrechtmatige overheidsdaad: beter een half ei dan een lege dop?, *Bouwnet* (BR) 2011, 146.

10 As it stands, compensation for loss due to lawful activities of public authorities has by and large fallen outside a general statutory scheme. Based on certain specific and varying regulations, but mostly case law, the State may in certain cases be held to compensate citizens, even though its actions were lawful. This obligation to offer compensation follows from the principle of equality of public burdens, or *égalité devant les charges publiques*. The proposal seeks to simplify and to bring clarity to this excess of scattered rules, by adding a new title in the General Administrative Law Act, in which the already existing rules are harmonised, revised and codified as a general rule.

11 With regard to damages incurred due to an unlawful decision by a public authority, the proposal also seeks to provide clarity and simplicity. Firstly, it seeks to do so by providing a clearer division of jurisdiction between the administrative and civil judge, as in many cases it is currently often quite complicated to determine which judge – administrative or civil – has jurisdiction to hear an action for damages regarding the conduct of public authorities. A clear division is therefore proposed: damage claims that are within the remit of the Tax Court and the Central Court of Appeal will have exclusive jurisdiction of the administrative courts, while the civil court shall have jurisdiction to hear the remaining cases. An exception is made in this latter category for cases concerning compensation claims under € 25,000, as the legislature finds it unnecessary for the plaintiff claiming such relatively small amounts to be required to initiate a separate civil action, thus the administrative court is given jurisdiction instead. Secondly, the proposal seeks to improve access to the administrative judge for claims for damages, by introducing the possibility of independent petitions for redress for damages, whereby it is no longer required to first file a separate appeal against the harm causing decision with the administrative body, before being able to bring a claim before the administrative court.

12 In short, the legislative proposal is set to bring about some necessary changes that will lead to clearer and more efficient procedures regarding compensation claims and liability claims against the State.

4. Extending the Limitation Period in Civil Litigation for Damage due to Criminal Offences: Wijziging van de regeling van de bevrjldende verjaring in het Burgerlijk Wetboek in geval van schade veroorzaakt door strafbare feiten⁷

¹³ A legislative proposal concerning the statute of limitations in civil litigation aims to extend the limitation period of art 3:310 Civil Code for claims regarding personal injury incurred as a result of severe criminal offences.

¹⁴ Article 3:310 Civil Code provides that civil damage claims expire after the given limitation period. Under the current scheme, a claim for damages expires after a period of five years, from the day after which time the injured party becomes aware of his damage and has knowledge of the tortfeasor (the so-called relative limitation period). In any case, such a claim for damages expires after a period of twenty years – or thirty years with regard to damage suffered due to exposure to harmful substances – after the moment of the liability-creating event (the so-called absolute limitation period). However, since 1 February 2004 the absolute limitation period has been lifted for personal damage incurred as a result of death or injury.⁸ Therefore, for victims of criminal offences who suffer personal damage, only the relative limitation period remains relevant – excluding certain special criminal acts against minors.

¹⁵ In contrast to this relative five-year limitation period of the Civil Code, the Criminal Proceedings Act adheres to a wholly different limitation scheme in which the right to criminal prosecution is, especially in the case of criminal offences, often longer than its Civil Code counterpart. In the case of severe criminal offences, the limitation period is lifted altogether (art 70 para 2 of the Criminal Proceedings Act). This discrepancy may thus lead to situations in which a civil claim for damages resulting from a criminal offence is barred, whilst the possibility of criminal prosecution remains open.

¹⁶ This legislative proposal seeks to remedy the above-mentioned scenario by extending the limitation period of the Civil Code: prescription of the claim shall not occur as long as the right to prosecute has not expired. The extended limitation period provides victims who initially decided not to claim civil damages from the offender (eg for lack of civil evidence) with the possibility to benefit from

⁷ Documents of the Second Chamber of Parliament (2010–2011) 32 853. See also T. Harriëf, *Verstraffing van het privaatrecht, Nederlandse Juristenblad (NJB) 2012, 313.*

⁸ Sib 2004, 495.

the evidence provided by the criminal procedure.⁹ This measure can be seen in light of the broader emphasis that our current leadership has placed on protecting the position of victims and their relatives.

B. Cases

1. Hoge Raad (Supreme Court, HR) 11 March 2011, Landelijk Jurisprudentie Nummer (LJM) BN9967: Mortgage Broker

a) Brief Summary of the Facts

The case deals with a mortgage broker (hereafter: broker) who committed fraud in the course of his employment. During 2002/2003, the broker was employed by the loan office, Hypotheekwizjer, a sister company of the insurance company, Van Zundert. At the beginning of 2003, the broker had, on his own accord and without his employer's knowledge or authorisation, contacted a couple. He advised the couple on a home mortgage loan. The broker pretended to be acting on behalf of his employer and used the company's writing paper to that effect. After the couple agreed on a loan, the broker contacted a notary and instructed him to transfer a large sum of money to the couple. Shortly thereafter, the broker, once again, using the company's writing paper and the company's fax machine, contacted the notary and ordered him not to transfer the money to the couple, but instead, to a bank account for personal investments. After the notary had transferred the sum accordingly, it turned out that this bank account belonged to the broker and that the money had already been withdrawn.

The broker was subsequently prosecuted and charged with, *inter alia*, forgery and fraud. The couple then sued Van Zundert for damages. According to them, Van Zundert was to be held liable for the fraud committed by his employee: the couple had assumed that the broker was acting on behalf of Van Zundert as the bank account for personal investments was under Van Zundert's control. Moreover, even if the broker had acted without any authorisation for representation, Van Zundert had been contractually bound by the loan agreement.

The claim was based on art 6:172 in conjunction with art 3:61(2) Civil Code. Article 6:172 Civil Code states that if a representative, in the exercise of his powers,

⁹ *M. Frenk*, *Bevrijdende verjaring in geval van schade veroorzaakt door strafbare feiten*, VR 22 (2012) 90–94.

granted to him under the authorisation of representation, commits a fault which causes damage to a third party, then also the represented principal is liable towards this third person. Article 3:61 (2) Civil Code states that if an act has been performed in the name of another person, while the opposite party assumed and in the given circumstances reasonably could have assumed on the basis of a statement or the behaviour of that other person that an adequate authorisation for representation was granted, it is not possible to invoke the incorrectness of this assumption. This thus leads to a contractual relationship between the representative and the principal, which in turn means that liability can then arise based on a breach of contract – based on art 6:74 Civil Code. The district court granted the claim based on art 6:172 Civil Code and the Court of Appeal confirmed the district court's judgment.

b) Judgment of the Court

20 The *Hoge Raad* partly overturned the Court of Appeal's judgment. The Court of Appeal had ruled that for liability to arise under art 6:172 Civil Code, it is irrelevant that the broker had not been authorised to represent Van Zundert if the couple had assumed, and, under the given circumstances, reasonably could have assumed that the broker was authorised to represent Van Zundert.

21 According to the *Hoge Raad*, the scope of art 6:172 Civil Code is to be interpreted more narrowly. The Court reasoned that this assumption of a narrow scope is supported by the parliamentary history of the provision: the legislature created strict liability for damage caused by a representative. For liability to arise, the broker should have thus acted in the course of the powers granted to him under the authorisation of representation. Hence, the actions of a pseudo-representative, such as the actions of the broker in relation to Van Zundert, fall outside the scope of art 6:172 Civil Code. The *Hoge Raad* further reasoned that a narrow interpretation is also supported by considering that art 6:172 Civil Code is contained in Book 6, under title 3, sec 2 of the Civil Code. This section is dedicated to a limited number of strict liability provisions, such as, amongst other, arts 6:170 up to 6:172 Civil Code. These provisions deal with strict liability regarding specific circumstances, under specific conditions. In accordance with the exceptional character of this form of liability, the *Hoge Raad* had in a previous judgment ruled that art 6:171 Civil Code, on liability for faults (tortious acts) of non-subordinates – and in particular the therein contained condition 'work in pursuit of business' – is to

be interpreted narrowly.²⁰ Hence, in the view of the Court, the same narrow interpretation should apply to the requirement in art 6:172 Civil Code of 'in the exercise of his powers, granted to him under the authorisation of representation', as contained in art 6:172 Civil Code.

As to art 3:61 (2) Civil Code, the *Hoge Raad* confirmed the Court of Appeal's decision. Article 3:61 (2) Civil Code requires a 'statement or behaviour' of the pseudo-representative before a reasonable assumption can arise. This requirement can also be fulfilled if there are certain circumstances for which the pseudo-representative has to bear the risk. The fact that (inter alia) the broker used the company's writing paper and that Van Zundert mentioned on his website that he provides mortgage services, are a clear example of the said circumstances. There is a close connection between the pseudo-representation and the fault committed by the broker. As a result, Van Zundert was held liable for the damage.

c) Commentary

22 On 11 March 2011, the *Hoge Raad* handed down five highly related judgments regarding amongst others the liability of a loan office, on the bases of, but not solely, art 6:172 Civil Code.²¹ The central element was fraud committed by an employee of the loan office. With regard to art 6:172 Civil Code, the *Hoge Raad* reasoned that the legislature had created this strict liability for the represented principal. Liability was nevertheless established in almost all cases based on the general provision on the breach of contract of art 6:74 Civil Code, as a contractual relationship had thus been established through art 3:61 (2) Civil Code.

23 Article 6:172 Civil Code is unique in Europe. The legislator created the provision in order to fill a gap left by the limitations imposed by provisions in Book 3, title 3 Civil Code (arts 3:60–3:79 Civil Code), regarding representation (procuration). In short, these provisions state that representative can be a ground on which the actions of one person (the representative) can be attributable to another (the principal) – as stated in art 3:60 (1) Civil Code. However, a limitation is that only a *juridical* act is attributed to the principal, thereby excluding *factual* (non-juridical) acts. Factual conduct, constituting an unlawful act, will

²⁰ HR 21 December 2001, Nederlandse Jurisprudentie (NJ) 2002/75 (*Deffland/Sweetenijl De Kroot*); HR 19 June 2010, NJ 2010, 389 (*Koeman/Slim Agro*). See also I Giesen/ALM Keirse, *The Netherlands*, in: H Koziol/BC Steininger (eds), *European Tort Law 2010* (2011) 403–437.

²¹ HR 11 March 2011, LJM: BN9967; HR 11 March 2011, LJM: BN9968; HR 11 March 2011, LJM: BN9974; HR 11 March 2011, LJM: BN9964.

26

The Council of State overturned the Water Board's decision and ruled that the Water Board should hold new elections. Eventually, new elections were held and the claimant was, again, elected as a member of the Water Board. The Water Board then sued the claimant and argued that he had committed an unlawful act (art 6:162 Civil Code). The Water Board claimed that by knowingly committing electoral fraud, the claimant could have foreseen (or should have foreseen) that his actions would lead to complications of a varying nature, which, in turn, would necessitate the Water Board taking costly measures, such as new elections. The claimant was therefore liable for the damage that the Water Board suffered. The District Court granted the Water Board's claim and the Court of Appeal later affirmed this decision.

b) Judgment of the Court

27

Ultimately, the question that needed to be answered was whether the causal connection between the damage suffered and the actions for which the claimant was responsible is such that the damage is imputable to the claimant under art 6:98 Civil Code. This article reads as follows: 'Only damage that is related in such a way to the event giving rise to the liability of the debtor that it, in regard of the nature of the liability and the damage, can be imputed to him as a consequence of the event, is eligible for compensation.' In this case the *Hoge Raad* ruled that it was not the redress sought by the Board that should have been foreseeable, but rather the damage resulting from the claimant's fraudulent actions. The Court also ruled that not only were the measures as taken by the Water Board reasonably to be expected, the claimant's intentional unlawful actions also justified a wide scope of imputability. Therefore, the fact that the claimant had not foreseen that the general meeting of the Water Board would bar him from the Board and that the Water Board would consequently seek redress for the costly measures it was forced to take, did not affect imputability in the sense of art 6:98 of the Civil Code.

c) Commentary

28

The causal connection between an unlawful act and damage suffered is usually established in two consecutive steps. Once it is clear that the damage could occur as a result of an unlawful act, the so-called *conditio sine qua non* (see arts 6:162 and 6:74 Civil Code), it needs to be established whether or not it is reasonable to impute the consequences of the act to the debtor in the sense of art 6:98 of the Civil Code.

therefore not qualify as a ground for attributability. Article 6:172 Civil Code partly addresses this gap: a principal can be held liable for the unlawful act of one who represents him if that person, in the exercise of his powers granted to him under the authorisation of representation, commits an unlawful act. However, the parliamentary history strongly suggests that art 6:172 Civil Code was chiefly brought to life for legal representatives (such as parents, guardians). From the *Hoge Raad*, it implies that the actions of a pseudo-representative fall outside the scope of art 6:172 Civil Code. Nevertheless, based on the parliamentary history it is unclear whether the legislator had actually considered such instances while drafting the provision. Commentaries have been critical, in particular on the rejection by the *Hoge Raad* to accept strict liability under art 6:172 Civil Code for circumstances that qualify for the reasonable assumption of representation in the sense of art 3:61 (2) Civil Code. In particular, Van Schaick is of the opinion that this is a flaw in the judgment, (partly) caused by the unfortunate choice of the legislator in Book 6, whereby the link to the provisions of Book 3, sec 2, that, amongst others, deal with the question as to when an act (of a pseudo-representative) can be qualified as representation, is somewhat lost.¹²

2. HR 25 March 2011, Nederlandse Jurisprudentie (NJ) 2011, 139: Electoral Fraud

a) Brief Summary of the Facts

25 The claimant in this case had committed fraudulent acts during the elections for the general management of a *Hoogheemraadschap* (Water Board). He specifically forged the required signatures to be nominated as a candidate for the Board. After the fraud had been discovered and investigated, it emerged that the electoral office could not declare the claimant's nomination valid as this was prohibited by the electoral regulations. This meant that, despite the claimant's fraudulent actions, his nomination remained valid and the claimant was consequently elected as a member of the Water Board. The Water Board, forced into a corner, then decided to bar the claimant from the management board. The claimant filed an appeal against this decision to the judicial section of the Council of State.

¹² AC van Schaick, Vijf arresten over de aansprakelijkheid van de vertegenwoordigers voor fouten van zijn vertegenwoordiger, Nederlands Tijdschrift voor Burgerlijk Recht (NTBR) 2011, 264-271.

and use of the animal form together; the fact that commercial activities are in principle carried out with the aim of obtaining profit; and that a business owner can be expected to insure his company from the risks involved in the conduct of his business activities.

36 The *Hoge Raad* further provides that for the transfer of liability under art 6:181, it is not relevant whether the business-user has consented to this shift of liability, as the shift simply follows from the law itself, and is thus not dependent on the will of the parties. Furthermore, whether the business-user is the possessor or holder of the animal is equally inconsequential in assessing this shift of liability, nor is it relevant whether the purpose of the commercial use is nearing its conclusion, or whether the business use has been ongoing and of a personal nature. In other words, the sole determining factor is that the nature of the contractual agreement between the owner and the riding school, concerning the taming and saddle-training of the horse, indeed falls within the scope of the customary course of business of a riding school.

37 Finally, the Court ruled that the business-user is to be held exclusively liable under art 6:181 Civil Code: a combination of legal liability of the owner and the business-user is thus not possible. However, in addition to the liability of the owner or the business-user, a third party may be held liable under the general fault-based liability of the general provision of tort (art 6:162 Civil Code). In that respect, a cumulative liability is possible.

c) Commentary

38 The judgment in the present case is, in our opinion, not all too surprising. Article 6:181 Civil Code serves the purpose of promoting clarity, by channelling legal strict liability for instances of business related damage. Clarity in this sense firstly refers to the position of the injured party, in that he or she ought to be able to easily ascertain towards whom he or she may direct a liability action. Secondly, clarity ought to come to all concerned parties on the other side (ie the business owner, owner and otherwise), so that they are able to calculate their risks with a certain degree of precision, and to, if necessary, obtain adequate insurance.¹⁵

¹⁵ See *FE Keijzer/FT Oldenhuis*, Aansprakelijkheid dieren, bedrijfsmatige gebruiker en profijt trekken, Tijdschrift voor Personenschade (TVP) 2011, 99. The purpose of art 6:181 Civil Code towards clarity is supported by the parliamentary history of the provision, see *AO Schoonbrood-Wessels*, De aansprakelijkheid voor gebrekkige zaken, opstellen en gevaarlijke stoffen in concernverhoudingen, WPNR 1991, 792 f; see also the case note of *TTE Jong Tjin Tai*, NJ 2011, 405.

39 The Court's consideration that the horse, at the time of the accident, was indeed used in the course of the business, and that thereby, the riding school's liability on the basis of art 6:181 Civil Code is given, is to be commended. The riding school was after all in the position to determine the use of the animal, and, therefore, a responsibility rests on the riding school. The business owner is required to define its business in order to be able to assess the associated risks, and to take the required steps in preventing the risks involved, while also taking out the necessary insurance policies needed to cover the risks that fall outside the scope of what is preventable.¹⁶

40 With regard to the relation between art 6:179 and art 6:181 Civil Code, the *Hoge Raad* paints a clear picture: the system of liability from arts 6:173, 174 and 179 Civil Code (regarding the liability for dangerous constructions, dangerous substances and animals), in principle, rests on the owner. Liability may however be shifted onto the business user (in the sense of art 6:181 Civil Code). In other words, the system is one of alternative liability: as soon as liability under art 6:181 Civil Code is established, the liability of the owner is excluded. Much can be said in favour of this exclusive liability. Firstly, it serves the purpose of clarity, which in turn, can also prevent double insurance premiums. The pitfall however, is that if the injured party claims damages from the owner – based on the general liability clause for animals – rather than the business user, liability is rejected on the simple ground that the claim is directed at the wrong party. This, unfortunately, occurred in the present case.

41 Overall, it can be argued that art 6:181 Civil Code remains a victim-friendly provision, albeit with the possible drawback of ambiguity on where responsibility lies. The practical remedy hereto would (as expected) be to initiate both actions. The liability then lies where the risks are most easily recognisable in society. A riding school is a business, and therefore, more accessible than the private owner. What is more, a riding school is driven by profit and can therefore be deemed to ensure its business risks as a whole, including damage that may arise from the behaviour of the animals used in the course of the business.

42 Finally, the consideration of the *Hoge Raad*, on the possibility of cumulative liability based on either strict liability provisions such as arts 6:173, 174 and 179 or art 6:181 Civil Code on the one hand, and the general tort provision – art 6:162 Civil Code, on the other, is not particularly surprising either. Strict liability provisions in part serve to offer the injured party the option to claim damages

¹⁶ *Keijzer/Oldenhuis*, TVP 2011, 99.

from an additional party (*qualitate qua*), next to the liable party on the basis of the general provisions of tort.¹⁷

4. HR 29 April 2011, NJ 2011, 406: *Melchemie v Delbanco*

a) Brief Summary of the Facts

43 In the case of *Melchemie v Delbanco*, the *Hoge Raad* considered the question of liability for damage caused by exposure to dangerous substances. CMI Containers (CMI) stored chemical substances (belonging to Melchemie) and benzene (belonging to Delbanco). The company failed in its responsibility to store the chemicals in accordance with the required safety regulations, and as a result thereof, a fire took place. The fire subsequently spread to the repository where Delbanco's horsehair was stored. Delbanco claimed damages from Melchemie under the general provision of tort (art 6:162 Civil Code). Melchemie breached its duty of care towards Delbanco because it (despite the fact that the company allegedly knew that CMI acted contrary to safety regulations) failed to store its chemicals elsewhere and otherwise failed to take additional appropriate measures to prevent the realisation of the risks of storing chemicals.

44 The district court rejected Delbanco's claim. The Court of Appeal then overturned the district court's decision and granted Delbanco's claim.

b) Judgment of the Court

45 Overturning the Court of Appeal's decision, the *Hoge Raad* ruled that Melchemie had no (general) obligation towards Delbanco to ensure that CMI acted in accordance with the required safety regulations. Therefore, Melchemie's liability could not solely be established on the general knowledge about safety regulations and their purpose in relation to CMI's failure to comply with these regulations.

46 The *Hoge Raad* reasoned that whether the user of a chemical substance, although the substance is under the control of a keeper, acted in violation of what according to unwritten law has to be regarded as proper social conduct, depends upon the specific circumstances of the case. In order to determine whether Melchemie can be held liable, account must be taken of Melchemie's knowledge

on (i) safety regulations; (ii) violations of safety regulations by CMI; (iii) the chance that, as a result of violations of the safety regulations, a potential danger of a serious nature for persons or property is realised; (iv) the characteristics of the stored substances and the dangers that might occur when those substances are mixed with other substances; (v) storage methods; (vi) the appropriate measures to be taken in order to prevent the realisation of the potential danger; (vii) and the urgency with which those measures should have been taken in conjunction with the time needed to actually take the measures.

The *Hoge Raad* provided that the Court of Appeal had not considered all the relevant circumstances of the case. In particular, the Court of Appeal had failed to take into account what the chances were that a potential danger of a serious nature for persons or property would take place. The judgment in appeal also failed to focus on the necessity with which certain safety measures should have been taken, nor did it establish which specific measures Melchemie could reasonably have been expected to take in order to prevent a fire from occurring and spreading.

c) Commentary

48 A person who, in the course of his professional practice or business, uses a substance or keeps it under his control, while it is known that this substance has such characteristics that it causes a special danger of a serious nature for persons or property, is liable when this potential danger is realised (art 6:175 (1) Civil Code). But if the substance is under the control of a keeper who makes it his business to store such substances, the liability shifts from the user to the keeper (art 6:175 (2) Civil Code). This shift of liability does however, not mean that the original user cannot be held liable under the general liability rule of art 6:162 Civil Code if the special danger is realised.

49 This judgment thus confirms that the duty of care, imposed upon the user of a dangerous substance, remains intact even after he has entrusted the substance to a keeper who is strictly liable for the chemicals stored. The user's duty of care extends to his choice of a certain keeper but also means that he has a duty to ensure, at least to a certain extent, that the keeper he engages does in fact comply with the relevant safety regulations.

¹⁷ See also *A Kolder*, *Begrenzing van kwalitatieve aansprakelijkheid: functioneel verband* binnen artikel 6:161 BW, NTBR 2011, 295–307.

50 Another important aspect of this case is that the *Hoge Raad* confirms that the so-called *Kelderwijk*-factors¹⁸ are of significant importance in order to establish one's liability based on art 6:162 Civil Code.¹⁹ In this sense, the ruling of the Court fits perfectly within the Dutch liability system in which these factors play a prominent role in deciding on the negligence of someone who created a dangerous situation.

5. HR 29 April 2011, NJ 2011, 191: *Bouwcombinatie v Liander*

a) Brief Summary of the Facts

51 In this case Paans, commissioned by the construction company *Bouwcombinatie*, performed digging activities for the (trouble plagued) construction of the *Beterwoude*, a freight train railroad track crossing the Netherlands from west to east. In the course of these digging activities, Paans damaged the cables of the power supply network, under administration by *Liander*, and caused a large-scale power cut. The power failure lasted for some seven hours.

52 Under art 31 (1) of the Electricity Act, in conjunction with art 6.3.1. (a) Netcode, the electricity grid administrator is obliged to pay compensatory damages to its clients in case of power failures lasting more than four hours. In compliance with these provisions, *Liander* was thus required to pay a large sum in compensatory damages as a result of the accident. *Liander* sought compensation of these paid damages from *Bouwcombinatie* and Paans, claiming, insofar as relevant, that they were jointly liable for having caused the power cut in the first place. *Liander* thus claimed reimbursement for the damage that it suffered after having to pay compensatory damages to its clients.²⁰

53 The district court rejected the claim. The main question was whether or not the compensatory damages paid by *Liander* to its clients were to be considered as a damage that could be imputed to the defendants as a consequence of the damage done to the cables under art 6:98 Civil Code. The district court answered in the negative. After all, the statutory provision of the Electricity Act and the *Netcode* places a clear obligation on *Liander* to restore the electricity-net within four hours. Since *Liander* had failed to do so, the court concluded that *Liander* itself had failed

in adequately managing its organisation, and as a result thereof, the compensatory damages paid by *Liander* remained for its own account and are not imputable to the defendants as a result of the damaging event. The court mentioned that *Liander* could have better handled the situation had it been managed more adequately by, for example, re-routing the electricity, and thereby restoring power sooner.

54 The Court of Appeal however overturned this decision. It ruled that the financial damage suffered by *Liander*, as a consequence of the cable damage, is attributable to the party that caused the initial damage. The Court of Appeal reasoned that the damage was the result of *serious damage to an object*, and that subsequent compensation sums should be considered as a foreseeable result of such severe damage to an object. Moreover, the Court rejected the argument that *Liander's* financial loss was the result of inadequate managing by *Liander* itself. The claim was granted. Paans and *Bouwcombinatie* consequently initiated cassation proceedings.

b) Judgment of the Court

55 The *Hoge Raad* dismissed the cassation appeal, as it found that the Court of Appeal had handed down a correct and sufficiently motivated ruling. The *Hoge Raad* did offer some further considerations. On the question whether the claimant indeed had an obligation to repair cable damage and power failures resulting thereof within four hours, the *Hoge Raad* stated that this was not the case. The wording of the relevant provisions of the Electricity Act and the *Netcode* could not lead to that conclusion. Furthermore, the fact that the claimant had not been able to repair the damage within four hours could indeed not justify the conclusion that it had failed to adequately manage its organisation. The relevant provisions of the Electricity Act and the *Netcode* simply provide for reasonable compensation in the event a power failure occurs, regardless of any contractual liability of the grid administrator towards its customers.

56 Secondly, the *Hoge Raad* held that with regard to the imputability of damage under art 6:98 Civil Code, the relevant question is whether the damage is related in such a way to the event for which the debtor can be held liable, that the damage, given the nature of the liability and the damage, is imputable to him as a result of this event. A *conditio sine qua non* between the damage done to the cables and the damage suffered by *Liander* is justly established, since *Liander* would not have had to pay compensation to its consumers in case the cables had not been damaged by the defendants. The *Hoge Raad* furthermore upholds the judgment that the damage suffered by *Liander* falls within the scope of art 6:98 Civil Code, given the fact that this damage was foreseeable.

¹⁸ See for more information on these *Kelderwijk*-factors the explanation of HR 9 July 2010, LFR: BL4088: Enschede Fireworks Disaster I, in *Giesen/Keirse* (fn 10) no 36 ff.

¹⁹ *TJE Tjong Tjin Tai*, case note under HR 29 April 2011, NJ 2011, 406 (*Metchemie v DeBenedictis*).

²⁰ *Liander* also claimed damages for the repair of their damaged power cables.

c) Commentary

57 What is surprising in this second case dealing with causal relations and attribution²¹ is that the *Hoge Raad* affirmed the Court of Appeal's ruling in that the damage is attributed to the defendants as a result of their wrongful conduct based on the sole factor of its foreseeability.²² As said in the above-mentioned election fraud case, foreseeability is merely one of the factors by which attribution is pursuant to art 6:98 Civil Code is tested, as part of the current *toerekenings* doctrine (doctrine of attribution).

58 The use of this doctrine of attribution has been standard practice since the abandonment of the former *adequaattheorie*, in which foreseeability forms the measure for attribution. This former doctrine was, and still is, criticised, chiefly because it lacks distinctiveness, as in practice a judge would be inclined to consider the most unlikely consequences as foreseeable.²³ It should also be mentioned, as Advocate General Spier points out in his conclusion in the case at hand, that the singular focus on foreseeability in this judgment may very well be a mere consequence of the process strategy of the parties themselves, as they initially sought an answer to the question of whether the financial loss of Llander could be attributable to Paans and Bouwcombinatie, while leaving the broader liability question for later. Be that as it may, the strong focus on foreseeability is not standard practice in the Netherlands and this decision should be regarded with caution.

6. Hof Den Haag (Court of Appeal of The Hague) 5 July 2011, LJN: BR0132: Dutchbat

a) Brief Summary of the Facts

59 In this case, the relatives of *Mustafic* (*Mustafic* cum suis) filed a complaint against the Dutch State. *Mustafic* – a UN employee – and his family took refuge at a UN-designated 'safe area' controlled by the Dutch army battalion 'Dutchbat' in the

²¹ See also I Giesen Attribution, Legal Causation and Preventive Effects: On Causal Imputation from a Psychological Perspective and its Possible Consequences for the Preventive Effects of Tort Law, in: R Glard, Judicial Decision Making in Civil Law (2012) 23–48.

²² Compare case 2 'Electoral fraud' (no 25 ff above) and *W Dijkshoorn*. Een puzzelrte voor onder de kerstboom, AVAS 2011, 255 f.

²³ See also DM Gouweloos, in her case note under HR 26 April 2011, jurisprudentie Aansprakelijkheid (JA) 2011, 109.

former Yugoslavia, after General Mladic invaded Srebrenica. Dutchbat at one point forced *Mustafic* to leave the compound, after which he was killed during the 1995 Srebrenica massacre. Dutchbat allegedly knew that men were being beaten and killed by the invading army and thus should reasonably have known that forcing *Mustafic* out of the compound meant putting him in grave danger.

60 Since the Dutch soldiers operating under the UN flag knew about the ill-treatment and killing of male Bosnian refugees, they negligently failed to protect *Mustafic* when they compelled him to leave the 'safe area' and turned him over to the Bosnian-Serbs. Ultimately, it was the actions of the Dutch peacekeeping forces that led to the massacre and *Mustafic*'s death. According to *Mustafic*'s relatives, the State was therefore to be held liable for *Mustafic*'s death and the damage suffered as a result thereof. The State, however, was of the opinion that liability should be borne by the UN, since the UN had operational command and control over the peacekeeping operations, and not the Dutch State.

b) Judgment of the Court

61 The district court rejected the claim of *Mustafic*. Contrary to what the district court had ruled, the Court of Appeal ruled that the answer to the question of who had operational command and control was of little importance to establish State liability. Rather, the crucial question was who had effective control over the conduct of the peacekeeping forces. In determining this, the Court provided that it is of significant importance to establish whether Dutchbat acted under command of either the State or the UN. Furthermore, it is also relevant to determine whether the State, or the UN, would have been able to actually prevent Dutchbat from acting if specific instructions had been absent.

62 The Court ruled that Dutchbat had indeed received specific instructions from the Dutch Government on to how to handle the pressing situation in Srebrenica. The State thus had effective control over the Dutchbat actions and as a consequence those actions can be imputed to the State. The State was therefore held liable for the Dutchbat actions under art 171 (1) Contract Law of Bosnia-Herzegovina, given that Dutchbat soldiers were employed by the State and had caused damage 'in the course of their work or in connection with work.' Moreover, the State was held liable for the non-pecuniary loss that *Mustafic* suffered under art 155 Contract Law of Bosnia-Herzegovina.

c) Commentary²⁴

63 Firstly it is imperative to consider that this ruling, declaring the Dutch State liable, might very well give pause to governments that send troops to peacekeeping missions around the world: in such missions, national contingents routinely receive instructions through national chains of command, even though they are formally under the command of the UN. That practice is now likely to come under scrutiny. This judgment sends a signal that governments which pass instructions to their national peacekeepers in the field cannot expect to hide behind the UN when things go wrong. The Court's judgment might therefore make national governments less inclined to provide troops in the future.²⁵

64 We should also consider that the Court of Appeal dismisses (in conformity with what was thought to be the rule²⁶) the notion that the UN can be liable, as the UN enjoys immunity from legal process with regard to implementation (by virtue of art 105 of the UN Charter, in conjunction with art II (2) 2 of the Convention on the Privileges and Immunities of the United Nations). Perhaps due to this the Court was (even) more willing to investigate the liability of the Dutch State instead. Next to the legal reasons for or against this decision, it is important to take into account that the tragedy of the Srebrenica massacre has left a deep impact and caused trauma and political turmoil in Dutch society, and this may therefore explain the Court's willingness to hold the State liable, now that liability of the UN was found to be not an option.

7. Hof Arnhem (Court of Appeal of Arnhem) 9 August 2011, LJN: BR5350: Eternit

a) Brief Summary of the Facts

65 The case centres around an elderly woman who was diagnosed with mesothelioma and shortly thereafter passed away due to her illness in 2004. The woman was born in 1946, and from her birth up until 1969, she lived at her family farm.

24 See also *T Barkhuysen, Achteraf Srebrenica*, NJB 2011, 1673; *C van Dam, Nederland aansprakelijk jegens Srebrenica nabestaanden*, VR 2011, 198.

25 It goes without saying that other factors such as internal and political forces might be instrumental as well. There is no empirical proof that this will indeed be the effect of the judgment.

26 See more elaborately on this theme *AMH van Hoek et al, Making Choices in Public and Private International Immunity Law* (2011).

Her father had paved the area surrounding his farm with asbestos waste that was made freely available by the company Eternit for that very purpose. After having left the farm, the woman nonetheless came into frequent contact with the still existing asbestos contaminated pavement, during the time she regularly visited her parents who still lived at the farm, in order to take care of them. After her death, the husband of the woman went on to sue Eternit for damage incurred on the grounds that a) Eternit had made the material available for pavement purposes, b) Eternit had not given sufficient warning regarding the highly hazardous nature of the materials to those whom Eternit had provided with the asbestos waste, once the dangers of asbestos had become known and c) Eternit failed to retrieve the asbestos waste from those who had used the materials.

66 In the follow proceedings before the district court, the claimant was denied compensation as the claim had expired, as is often the case with asbestos liability cases due to the long latency period of mesothelioma, based on the statute of limitation of art 3:310 Civil Code. The provision works with two limitation periods: a relative, short time limit that is determined through a subjective test, and an absolute, long time limit based on an objective test. The relative period is five years and begins to run from the date from which the victim becomes aware of his damage and also has knowledge of the tortfeasor. The absolute period of limitation is twenty years, or thirty years specifically with regard to damage suffered due to exposure to harmful substances, after the moment of the liability-creating event. An action for damages expires with the lapsing of five years from the moment that a victim becomes aware of his damage and also has knowledge of his tortfeasor, or, in any event, after twenty years – or in cases of dangerous substances – thirty years after the liability-creating event occurred. Since asbestos can be regarded as a dangerous substance, the absolute limitation period in asbestos exposure-related liability cases is prolonged to thirty years.²⁷ Relevant here is also that with regard to the liability-creating event, a threefold distinction is made between a suddenly occurring fact, a continuously occurring fact or a series of facts arising from the same cause. If the event forms a continuously occurring fact, then the period of thirty years begins after this fact has ceased to occur. If the event forms a series of facts arising from the same cause, then this period starts to run after the last fact in line has occurred. For asbestos liability,

27 The thirty year limitation period in case of harmful substances came into effect as an exception to the twenty year rule in para 2 of art 3:310 of the Civil Code; Law of 24 December 1992, *Stb 691*.

this means that the absolute period of limitation begins from the date of the claimant's last exposure to asbestos.²⁷

b) Judgment of the Court

67 The Court of Appeal confirmed the decision by the district court only insofar as with regard to the liability claim based on making the asbestos waste available without precautionary warnings. The liability-creating event stopped once the practice of making asbestos waste available ended – the parties contested this date to be somewhere between 1963 to early 1973. However, with regard to the claim that Eternit had also later failed to provide adequate warning, the Court of Appeal held that regardless of whether the last year of exposure to the asbestos waste by Eternit was 1963, this still does not take away the fact that Eternit was required to offer adequate warning to them, from the moment that it became aware, or should have been aware, that the use of asbestos material could pose grave health risks to those who are exposed to it. That time lies in the period from 1967 until 1970. The defence was thus rejected and the claim was granted.

c) Commentary

68 The ruling of the Court of Appeal makes for an interesting development in the field of asbestos liability in Dutch law. The judgment is particularly relevant with regard to the statute of limitations in asbestos liability litigation. Due to the long latency period of mesothelioma, asbestos liability claims often expire before the damage actually manifests. From this judgment it follows that in case of non-compliance with the duty to provide adequate warning, the limitation only starts running once the duty to warn has been fulfilled.

69 What is new in this judgment, compared to earlier judgments, is that the unlawful conduct in the non-compliance to provide sufficient warning is not substantiated by a duty to warn at the time that the material was made available, but rather in a duty to warn afterwards; Eternit is considered to have acted unlawfully by not providing sufficient warnings, in the form of a public warning

campaign, after the dangers of the normal use of asbestos waste had become known (or should have been known), in the period 1967–1970.

This ruling can thus have far-reaching consequences. Mesothelioma victims who have (on more than occasional instances) been in contact with asbestos cement or asbestos waste products originating from a company, could successfully hold the company liable for the consequences of their exposure to asbestos in contracting mesothelioma, after 1967–1970, by basing their claim on the ground that the company had failed to give a general warning against the health risks of asbestos-exposure, which by that time, were known. That claim has not expired since the warning duty is (still) not fulfilled.

8. HR 16 September 2011, NJ 2011, 527: *Tara Beach Resort v Aruba*

a) Brief Summary of the Facts

In 2002, Tara Beach Resort (Tara), a resort on the northwest coast of Aruba, filed an administrative application for a permit with the responsible administrative body in Aruba. The resort requested to be certified as a business under the *Landsverordening bevoordere indusriëvestiging en hotelbouw* (Ordinance to Promote Industrial Development and Hotel Construction, LBHS), as this would allow Tara to pay a lower tax-rate (a so-called 'tax holiday'). Following the application by Tara, the administrative body failed to decide on the application within the statutory time limit, which in turn, constituted a *fititious* refusal of the application. A subsequent appeal by Tara, on 15 November 2002, against the *fititious* refusal was also left unanswered by the administrative body. As of 1 January 2003, the said Ordinance was revoked, whereby the possibility of a tax holiday was no longer available for Tara. On 3 February 2003, Tara was finally handed an actual decision, in which its application was formally rejected, based on the fact that the Ordinance was no longer in effect and also because Tara did not meet the required criteria of the Ordinance to begin with. Consequently, Tara seized all administrative actions against the *fititious* decision, including the revocation of its appeal against *fititious* refusal of 15 November 2002. Tara then filed an appeal against the actual refusal of 3 February 2003.²⁸

²⁸ It should be noted that there are variances in the administrative law of Aruba and that of the Netherlands. Relevant to the present judgment is that under the *Algemene wet bestuursrecht* (General Administrative Law Act, AWB) of the Netherlands, a failure of an administrative State to

²⁸ See in general *IJ Smeethuizen*, *De berijpende verjaring* (diss VU Amsterdam) (2006).

72 In the administrative appeal proceedings with the administrative body, the decision of 3 February 2003 was left unchanged (on 25 August 2003). Tara then appealed this decision with the administrative district court of Aruba, but the court rejected the appeal and left the decision to refuse the application of Tara for a permit in place (ruling of 21 April 2004). Subsequently, the administrative Appeal Court of Aruba again rejected the case of Tara, and once again left the original refusal by the administrative body in place (ruling of 29 November 2004).

73 After the administrative appeal proceedings and the subsequent refusal of both the administrative district and Appeal Court of Aruba, Tara chose the civil route and initiated a civil action against the State in which it claimed financial damages as a result of the loss of the possibility to make use of the tax advantage, due to the unlawful conduct of the administrative body in failing to offer a decision within the required time period. While the district court initially granted Tara damages, the civil Court of Appeal ruled to the contrary, on the ground that Tara had not made use of all possible administrative remedies against the fictitious refusal: it had only filed an appeal against the actual decision of 3 February 2003, and not the initial fictitious decision (ie failure to hand down a decision within the required time limit). Thus Tara had failed to make full use of the administrative route of appeal. Thereby, the fictitious decision of refusal had gained formal legal force and would have pre-emptive effect in any subsequent civil proceedings. Therefore, the civil Court of Appeal was bound by the ruling of the administrative Appeal Court in rejecting Tara's administrative claim and therefore had to reject Tara's civil claim for damages. Tara then pursued an appeal in cassation before the *Hoge Raad*.

74 Here it is worth pointing out that the ruling in the present case centres on the principle of 'formal legal force' (*formele rechtskracht*) of administrative decision, in Dutch administrative law. As a general rule, an administrative decision that has not been challenged in an administrative review procedure before an administrative court is deemed to be lawful. Should an appeal for example either be dismissed or not initiated in time, then the administrative decision gains the status of formal legal force. In turn, this means that before filing a civil claim for damages against the State, a party must first draw on all available administrative means to oppose and appeal the administrative decision. Only when all admini-

take a decision within the required time-period no longer qualifies as a fictitious refusal, rather, the AWB provides that in case of a delayed decision, the applicant can file opposition with the responsible administrative body (art 6:2, preamble and under subsec b AWB), or directly appeal the lack of action by the administrative body with the Administrative Court of Appeal (art 7:3 para 1, subsec e AWB in conjunction with sec 8:2.4a AWB).

tative options are exhausted, can a civil action be initiated. A civil judge will then follow the administrative verdict on the (un)lawfulness of the creation and the content of the decision. At the same time, a decision which is not appealed in time is consequentially deemed to be lawful in any following civil proceedings.³⁰ The central question in this case was thus whether an exception could be made to the principle of formal legal force of administrative decisions, in the situation where an applicant has erroneously seized further available administrative action against a fictitious decision. Because after all, according to Tara, a further continuation of the administrative route would have been futile, since the LBHHS had already been revoked.

b) Judgment of the Court

75 The *Hoge Raad* affirmed the ruling by the Court of Appeal in holding that there was no ground for an exception to the consistently strict application of the principle of formal legal force. The *Hoge Raad* further elaborated its reluctance to establish a new exception to the rule, by considering that Tara should have realised that the law prior to January 2003 would have been applicable to its appeal against the fictitious refusal, now that the (then also fictitious) decision should also have been made in accordance with the then applicable law, even if a timely decision would in practice have had to have been taken after January 2003. Thus, by not fully utilising all administrative means, the still fictitious decision had gained formal legal force and would have pre-emptive effect. As a result, the *Hoge Raad* correspondingly rejected the claim for damages.

c) Commentary

76 This judgment by the *Hoge Raad* can be regarded as an enforcement of the application of the rule of formal legal force of administrative decisions. The reluctance of the *Hoge Raad* to accept exceptions to the rule is in line with the rigorous application of the rule in the past.³¹ After its introduction in the 1980s, the *Hoge Raad* has only in special circumstances allowed room for any departure from the

³⁰ The doctrine of the formal legal force was firmly established by the HR 16 May 1986, NJ 1986, 723 (*Heesch/Van de Akker*).

³¹ See eg *Giesen/Keirse* (fn 10) no 69 ff.

general rule.³² These exceptions can, in general terms, be categorised as follows: firstly, in case the unlawfulness of a decision by the administrative body against the party is explicitly recognised by the administrative body.³³ Secondly, in case the party cannot be held accountable for their failure to appeal or initiate appeal proceedings against a decision. This is the case if a party is under the false assumption that an administrative appeal is not possible, due to a later change in case law, due to conduct by the administrative body by which a non-transparent situation is created, intentionally, regarding the possibility for opposition or appeal of a given decision, or regarding the nature of the proceedings (in particular if the administrative body gives the false impression that the party is involved in a civil proceeding).³⁴ It is important to note that the bar is placed high for this category of exceptions. Finally, an exception to the general rule can also be made in instances where, during an administrative proceeding, a fundamental legal principle is violated, whereby a fair and impartial treatment of the case is no longer certain.

77 The *Hoge Raad* found that Tara's claim does not meet the previously established exceptions to the general rule of formal legal force. Considering the state of the law, this is a valid point of view. Hence, the refusal of the Court to grant Tara's claim is, in light of the stringent regime of the rule of legal force, and the established reluctance to apply exceptions to the rule, not all too surprising: the present case therefore, once again, confirms the rigorous application of the rule of the formal legal force of administrative decisions.

9. HR 11 November 2011, NJ 2011, 597: *TNT v Wijenberg*

a) Brief Summary of the Facts

78 The claimant in this case concerning employer's liability was a female postal worker who during a routine delivery run had slipped on a patch of ice and broke her ankle. The accident occurred due to the treacherous road conditions during the especially harsh winter weather of that year. The postal worker never fully

recovered from the accident and after having received a small insurance settlement, she nevertheless went on to sue her employer (TNT) for damages. Her claim was based on art 7:658 and/or art 7:611 Civil Code. Article 7:658 Civil Code obliges the employer to provide a safe working environment in order to prevent any damage to his or her employee in the course of his or her employment. Article 7:611 Civil Code further obliges the employer to behave as befits a reasonable and fair employer.

79 According to the postal worker, the accident could have been prevented if TNT had provided its employees with suitable footwear. Since TNT had failed to do so, TNT was allegedly liable for the damage the postal worker had suffered. The district court ruled that TNT was not liable under art 7:658 Civil Code, and stated that TNT had not breached its duty to provide a safe working environment. According to the judge, TNT was nevertheless liable under art 7:611 Civil Code, since the company had failed to conclude adequate insurance coverage. TNT had not done enough to make sure that the postal worker's damage was covered and had thus not acted as befits a reasonable and fair employer.

b) Judgment of the Court

80 The *Hoge Raad* had in a previous judgment ruled that an employer can be liable for the damage an employee suffers even if there is no breach of the employer's duty of care.³⁵ In that case, art 7:611 Civil Code might give some solace. This will be the case with accidents that fall outside the scope of art 7:658 Civil Code, but where the duty to act as befits a reasonable and fair employer (art 7:611 Civil Code) demands that the employer provides adequate insurance for his or her employee. Such a duty is exceptional, however, and only imposed upon the employer with regard to any damage an employee suffers in work-related traffic accidents if the employee: (i) as a driver of a motorised vehicle is involved in a traffic accident;³⁶ (ii) as a cyclist or pedestrian is involved in a traffic accident with one or more other vehicles;³⁷ (iii) is involved in a unilateral cycling accident. In the present case, the *Hoge Raad* therefore needed to determine whether the established rules

³⁵ See HR 1 February 2008, NJ 2009, 330 (*Maassman/Alzoop*); HR 1 February 2008, NJ 2009, 331 (*Zoodier/Taxicentrale*); *MG Faure/T Hartlief*, The Netherlands, in: H Koziol/BC Steining (eds), *European Tort Law 2008* (2009) 461, nos 23–27.

³⁶ See HR 1 February 2008, NJ 2009, 331 (*Koeliker/Taxicentrale*); HR 1 February 2008, NJ 2009, 330 (*Maassman/AMZO Mobeel*).

³⁷ See HR 12 December 2008, NJ 2009, 332 (*Moatzorg/Van der Graeff*).

³² See *G Snijders*, *Overheidsprivatrecht*, algemeen deel (2011) 43–53, and *BJ Schueller*, *Schadevergoeding en de Awb: aansprakelijkheid voor appellabele besluiten* (2011) 105–121.

³³ See HR 18 June 1993, NJ 1993, 641 (*St Oudestrada/Van Aarde*).

³⁴ See HR 16 May 1986, NJ 1986 723 (*Hees/Van De Akker*); HR 23 February 2007, LJN: AK3070 (*RV DMB*) and HR 11 November 1988, NJ 1990, 563 (*Ebro/Stoof*).

on employers' liability could also apply with regard to an employee who suffers damage in the course of his or her employment if he or she is involved in a unilateral pedestrian accident.

82 Overturning the decision of the district court, the *Hoge Raad* further ruled that TNT could not be held liable under the specific circumstances of the case and that the rules mentioned above do not apply here. The Court reasoned that it does not follow from art 7:611 that an employer has a general obligation to provide insurance that covers the damage suffered by an employee who is involved in a work-related unilateral pedestrian accident. Although the Court acknowledged that there may be good reasons to formulate a rule extending the insurance obligation on the basis of art 7:611 Civil Code to all work-related accidents, it provided also that it is not for the Court to formulate such a rule. The Court reasons that a line should be drawn somewhere, even if it is somewhat arbitrarily: a further expansion of the employer's insurance obligation on the basis of art 7:611 Civil Code to all work-related accidents would lead to legal uncertainty, and would amount to an unacceptable encroachment of the present system of employers' liability.

c) Commentary³⁸

83 The present case once more proves that establishing employers' liability under Dutch law is not self-evident, even though the boundaries have been stretched very wide.³⁹ The judgment of the *Hoge Raad* is somewhat dissatisfactory in that it is difficult to find the justification for the distinction the Court makes when applying art 7:611 BW between work-related unilateral cycling accidents and work-related unilateral pedestrian accidents. The borderline between what falls within or outside liability is often an inherently subjective divide, nevertheless, in the present case, the borderline seems very arbitrary.

84 The sudden stop to the previous incremental line of cases as set out by the *Hoge Raad* regarding employers' liability through the use of art 7:611 Civil Code and the duty to provide for adequate insurance may very well be the consequence of the increased understanding that this route to employers' liability may have been broadened too far. The *Hoge Raad* thus, while unable to revert back to a prior stance as regards the law, sought to limit the scope of liability by means of the present judgment.

³⁸ See also the case note by T Hartlief, NJ 2011, 597.

³⁹ T Hartlief et al, *Goed werkgeverschap*, AVA/S 2009-5, 207 ff; *Faure/Hartlief* (in 38) nos 23-27.

85 Furthermore, given the Court's past readiness to expand the employer's liability by formulating new rules, it is particularly striking that the Court refrained from doing so in the present case.⁴⁰ What might also be relevant in the present case is that the Advocate-General was of the opinion that TNT should have been liable under art 7:658 Civil Code. TNT only gave its employees coupons which entitled them to a discount when buying new footwear, but could easily have provided them with suitable footwear.

86 It is worth mentioning that the *Hoge Raad* ruled another case on the very same day, also dealing with employers' liability, in which the Court referred to the present case.⁴¹ In that case, the same limit is applied in order to restrict the further expansion of the scope of the employer's duty to provide adequate insurance, based on art 7:611 Civil Code. Instead, the claim was granted under art 7:658 Civil Code, by applying a much more rigorous requirement for the burden of proof on the part of the employer. Hence, art 7:611 Civil Code could be left aside, as the tougher requirement of the burden of proof of the employer meant that the employee could hold the employer liable, but on the grounds of art 7:658 Civil Code. This shows that primacy in this domain lies with art 7:658 Civil Code and not art 7:611 Civil Code, which is and remains the exception.

10. HR 23 December 2011, NJ 2012, 34: *Island of St Eustatius*

a) Brief Summary of the Facts

87 Dating as far back as the 1960s, a group of six families co-owned a number of estates on the Island of St Eustatius (the Netherlands Antilles). At some point, a conflict arose between Bauer, one of the co-owners, and the other families, regarding the ownership of one of the estates. In an effort to settle the dispute between the quarrelling families, the Island government and the families reached an agreement: if Bauer purchased the entire estate at a public auction, he would subsequently transfer the estate to the Island government. The government would then resell the estate to the other families who, before the public auction, had been entitled to the estate. The Island government also promised to pay the additional costs of the transfer, such as the transfer tax. But what should have been a perfect settlement of a dispute amongst the co-owners failed to happen. Bauer did transfer the estate to the Island government, but the government (due

⁴⁰ T Hartlief, *Rust aan het front van de werkgeversaansprakelijkheid* AVA/S 2012, 3 f.

⁴¹ HR 11 November 2011, NJ 2011, 598, with case note by T Hartlief.

to a variety of complications) failed to transfer the estate to the families, despite numerous promises by members of the Island government and the Executive Council.

88 After some 40 years, the heirs of the families eventually sued the Island government, holding that the government had committed an unlawful act against them, since the government, despite numerous promises made by its representatives, had failed to perform its obligations under the agreement. The State should therefore be held liable for the damage suffered by the families. The Island government rejected the claim, arguing that since the Island Council had never given any authorisation to conclude the said agreement, the Island government was not liable for the actions of its representatives. The court of first instance ruled that the government could not be held liable and the Court of Appeal confirmed that decision.

b) Judgment of the Court

89 The *Hoge Raad* was in particular faced with the question as to when certain actions, committed by unauthorised government representatives, amount to State liability under the general tort clause of art 6:162 Civil Code, in conjunction with art 6:172 Civil Code whereby principals can be held liable for the torts of their representatives. The *Hoge Raad* overturned the Court of Appeal's judgment and referred the case to another Court of Appeal to reassess the dispute. The *Hoge Raad* was not convinced by the Court's rejection of State liability and ruled that the Island government may well be held liable for the actions committed by the government representatives; this should be assessed again by a different Court of Appeal.

90 Admittedly, the responsible administrative body of the Island government did enter into an agreement with the disputing families, on behalf of the Island government, although this body was not authorised to do so without the consent of the Island government, which is made quite clear by law. Yet, this does not take away from the reality that certain concrete expectations were raised, whereby a breach of trust regarding those expectations could be a tort, which in turn, could constitute a tort on the part of the Island government. For a tort to be established, the conduct that raised expectations must firstly be seen as conduct of the State itself, in accordance with what is generally accepted in society. In this regard, the *Hoge Raad* is reluctant as it provides that only under certain circumstances can the conduct of representatives be considered as though they were that of the official body (ie the public authority). This reluctance is related to the following conditions: on the Island, the division of powers between the organs of the

government were straightforward and unambiguous; in a democratic society, a strict division of powers is of the greatest importance; the Island of St Eustatius is a relatively small community, where personal connections between the members of that community are very important. On the other hand however, the following is to be considered: the underlying intention of the handover, namely, the aim of resolving the family dispute; the rights of the heirs in respect to the land; the extraordinary position of trust in which the Island government came to be after the handover as owners of the land, in relation to the previous owners and the heirs; while also taking into account the fact that the Executive Council (or its representatives) tried to (actively) settle the dispute between the quarrelling families. These thus may lead to a judgment establishing a tort by the Island government.

c) Commentary

91 The principles of reasonable expectations and justified trust are of great importance in this case. Under certain circumstances, a public authority can be held liable for the conduct of an unauthorised representative if, due to those actions, the opposite party could have reasonably assumed that the public authority consented to the said actions. This concerns liability based on tort for justified reliance upon unauthorised representation.

92 In this judgment, the *Hoge Raad* refers back to the previously established general rule in the *Vitesse* case, in which the relation between the doctrine of unlawful conduct due to a breach of trust caused by unauthorised conduct and the public law regulations on the division of powers of public bodies were considered. In the *Vitesse* case, the *Hoge Raad* particularly considered that the liability of a body of a province – due to unauthorised conduct by one of its representatives – is not easily assumed given the fact that the factual relevant division of powers based on the law of the provinces could and should have been known publically.⁴² There, the *Hoge Raad* made reference to the principle of democracy. Yet, liability was established nonetheless. The case dealt with a soccer club that was in deep financial difficulties. The unauthorised representative of the province had led the club to believe that the province would aid the club by means of a substantial financial contribution. The club could not be expected to question the proposed aid by the representatives of the province. In such circum-

⁴² HR 25 June 2010, NJ 2011, 371 (*Vitesse*); see also HR 6 April 1979, NJM 1980, 34 (*Kleinverschoot* subbed).

stances, the representatives could have been expected to provide some reservation regarding the approval of the aid by the province, or could have explicitly warned that the province was only considering the aid as a potential obligation. Now that the representatives had failed to do so, the province, and in turn, the State was held liable for the damage caused by their conduct in creating an expectation. It is conceivable that a similar reasoning will lead to liability of the Island government in the present case, once it is brought back before the Court of Appeal.

C. Literature

Volumes

1. *CEC Jansen/SAJ Munneke/FJ van Ommeren/JW Rutgers, Zorgplichten in publiek- en privaatrecht (The Hague, Boom Juridische Uitgevers (Bju) 2011)*

93 In this book, the authors place the concept of the duty of care at centre stage and study this legislative instrument from both a private law and public law perspective. The premise is that the public law and private law literature deal with the duty of care in quite different ways, but that there are some important similarities. The authors consider what we can learn from each field. After a general analysis on the nature of the duty of care as a legislative instrument, the book further pays particular attention to the duty of care in, for example, the financial, banking and corporate sectors. The value of the duty of care in administrative law is considered as well as the position of the duty of care in employer/employee relations.

2. *GE van Maanen/SD Lindenbergh, EVRM en privaatrecht: is alles van waarde weerloos? (Deventer, Kluwer 2011)*

94 The European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR) have recently come to play an increasingly important role in national private law. As such, the Convention provides various concrete leads for remedies in private law litigation, in such areas as property law or tort law. In this contribution, the authors provide an analysis of the relation between the ECHR and national private law. For example, art 6 of the

Convention places an obligation on the State to, by means of an effective scheme of regulation, guarantee citizens the right to access justice, which in certain circumstances may allow the possibility to set aside a claim based on national law provisions regarding the statute of limitation. The authors explore such topics through examples in both Dutch and ECtHR case law and consider the position of fundamental human rights in national private law.⁴³

3. *WM van Boom/JH van Dam-Lely/SD Lindenbergh (eds), Rake remedies – Opstellen over handhaving van rechten, naleving van plichten en sanctiëring van verkeerd gedrag in het privaatrecht (The Hague, Bju 2011)*

95 The focus of private law is rights and how they are enforced. As such, private law deals with duties and how they are imposed and – more generally – how private law deals with rules and how compliance with these rules is achieved. In this sense, remedies – a broad term that includes all claims and sanctions that private law offers to private citizens, litigants and the courts – are there to enforce those rights and rules. The contributors to this book examine the origins of legal remedies in private law, and furthermore, investigate such topics as to why a given remedy is designed as it is designed. How does one effectively enforce a duty to negotiate? What demands does EU law place on national remedies? What is the effectiveness of statutory interests? What is the value of prospectus liability in preventing deception? Are there sufficient remedies against obstructing claimants? Should imprisonment be used more often? The contributions include both substantive and procedural aspects of remedies. The authors provide insights from comparative law, law and economics and empirical studies.

⁴³ See also the review of this book by *JM Emaus/ALM Keirse, EVRM en Privaatrecht – een bespreking van de preadviezen 2011 uitgebracht voor de Vereniging voor Burgerlijk Recht, NTBR 2011, 497–504.*

Dissertations

4. *EM Witjens, Strafrechtelijke causaliteit (Deventer, Kluwer 2011)*

96 The connection between cause and effect, in other words, the causal link, is not a straightforward affair for jurists. This is because of the normative approach that both criminal and civil law impose upon the requirement of causality. In this sense, to factually cause an effect, an empirical finding differs from causing an effect in the legal sense of the word. The theories that were devised in the law over the course of time have been unable to fully explain the difference with empirical causation. Because these theories are, for the most part, common to criminal and civil law, the two areas were subjected to study and a fundamental comparison was made. Witjens finds that the underlying principle of causation in the law, according to which a necessary condition for an effect to occur is classified as a cause if without it the effect would fall to materialise (the so-called *conditio sine qua non* test), does not sit well with (empirical) reality. A decision on empirical causation always implies a certain amount of uncertainty. The author considers that the *causa* test conceals this issue. In his study, other theories are also examined and found to be problematic in their application. Witjens calls for the devising of a new approach for criminal causation, as according to his study, it is clear that the current system can no longer be of use.

5. *SB Pape, Warnings and Product Liability: Lessons Learned from Cognitive Psychology and Ergonomics (The Hague, Eleven International Publishing 2012)*

97 EU citizens are injured each year whilst using products. The producer is liable for such damage while judges who need to rule in these cases are often faced with a wide range of warning related questions. Was for example the warning label adequate? What is a product warning? Which risks require a warning? And how should one be warned? In her dissertation Pape investigates how product liability law can contribute to preventing the occurrence of damage while using a particular product. One way to prevent such harm is by giving product warnings. Product liability can contribute to this prevention by the way in which the liability requirements in the context of warnings are framed and applied. According to Pape, prevention is possible by considering the way in which the law treats

warning related questions. Pape uses insights from cognitive psychology and ergonomics to make recommendations to the European civil courts and litigants.

6. *W Dijkshoorn, Planschaderecht en privaatrechtelijk schadevergoedingsrecht: een intern rechtsvergelijkende studie (Den Haag, Bju 2011)*

This thesis is a comparative study of the Dutch law regulating damage due to spatial planning and the Dutch private law compensation rules. Administrative law and civil law are two separate fields of law. In recent years, however, the idea gained foothold that these fields of law should not diverge more than absolutely necessary so as to achieve legal unity and equality. This comparative study seeks to clarify at what points further harmonisation of the law regulating damage due to spatial planning and the private law compensation rules is needed. The purpose of this research is to make suggestions regarding how to improve the law regulating damage due to spatial planning, for example when there are internally inconsistent rules, deficiencies or undesirable practical effects of the law. These suggestions are drawn from the private law compensation rules and contribute to the further development of the law regulating damage due to spatial planning. In his dissertation, Dijkshoorn thus investigates the question of whether the private law compensation rules contribute to the further development of the law regulating damages due to spatial planning. This question is answered positively. With regard to several topics, Dijkshoorn concludes that further harmonisation is possible and desirable.