

edited by  
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judicial decision  
making in civil law  
determinants, dynamics,  
and delusions



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# JUDICIAL DECISION MAKING IN CIVIL LAW

*Determinants, Dynamics, and Delusions*

RAIMOND W.M. GIARD (ED.)

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## 2 ATTRIBUTION, LEGAL CAUSATION AND PREVENTIVE EFFECTS

*On Causal Imputation from a Psychological Perspective and Its Possible Consequences for the Preventive Effects of Tort Law*

Ivo Giesen\*

### 2.1 INTRODUCTION

#### 2.1.1 Introduction: Legal Issues and Solutions from Psychology?

Tort law is built on central issues such as unlawfulness, the protective norm, causation and fault. The tortfeasor must have committed an unlawful act specifically directed at another person. Moreover, his conduct must have caused damage, for which he can be blamed (unless his liability is based on risk). Both of these latter requirements ('cause' and 'blame') are forms of *attribution*, as psychologists call it. Their assessment has always been puzzling for lawyers as there are few 'hard' criteria for their application. In the end, it is all about the court balancing the circumstances of the case at hand.

Attribution (for now: assigning causes to events, making causal connections) is a familiar and much-researched phenomenon in (cognitive) psychology. One of the things that people in general do after an event is to assign the cause of such an event, at first instance, to the acting person; people then underestimate the influence of factors outside of that person (the rest of the situation).<sup>1</sup> This may affect our ideas on how accidents happen and how damage is caused. And so the question arises: can psychology teach us any lessons and provide answers that can help lawyers in this respect?<sup>2</sup> Perhaps lawyers use certain presumptions, rightly or wrongly, leading them

\* This paper is a translated and adapted version of my Dutch contribution in W.H. van Boom *et al.* (Eds.), *Gedrag en Privaatrecht*, Den Haag: Boom Juridische uitgevers 2008, pp. 181-208. I would like to thank Esther Engelhard, Laura Klaming, Fred van Raay, Willem van Boom and Albert Verheij for their critical comments on (the previous version of) this paper and Lonke Stevens for the inspiration she provided.

1 For more details see para. 2.3.2.

2 The fact that (cognitive) psychology could be interesting for lawyers and what it means, has been described by me in extensive detail on earlier occasions, see I. Giesen, *Handle with Care!*, Den Haag: Boom Juridische uitgevers 2005, pp. 17-24. I will omit that step here.

to think that certain behavioural effects are expected to occur. The aim of this paper is therefore to examine whether attribution as a psychological phenomenon is or can be linked to, or be aligned with, the notion of legal causation (causal imputation in the legal sense, *see* para. 2.2.1), and if not, whether both concepts can be made to comply better.

Hereafter I want to discuss the extent to which private law rules on causal imputation relate to and fit in with the actual behaviour of people, given the notion of attribution. Are there any behavioural presumptions (as held by legislators and/or the courts) underlying the rules of our civil code and case law as regards legal causation? Does this image match with psychological studies on causal connections? Or, to put it differently: do legal dogmatics correspond with psychological 'rules' on attribution? And if not, what are the consequences thereof?

The underlying, more general question addressed in this paper, can, as a result, be described as: what lessons should be learnt by tort law from the results of psychological research on attribution? Do the legislator's presumptions and intended effects match reality? And if not, should we worry? My point of departure for the last question is that if tort law and the law on compensation of damage do not correspond with common 'attributive notions' of citizens seeking justice, then there could be a problem, to say the least.

#### 2.1.2 Details on the Content and Structure of this Contribution

In this article I will focus, from the legal perspective, on the causation issue and in particular on the second step when it comes to the causation requirement, legal causation as it is usually called (*see* para. 2.2.1). My main focus in this respect will be Dutch law since that legal system has a rather recent civil code provision dealing with this issue, supplying us with a canon of factors deemed relevant for the decision to be made. I will also sketch the state of affairs in some other legal systems, most notably the French, German and English system.

By focussing on legal causation I will not address the aforementioned legal issue of 'blame' or 'blameworthiness', although this theme can also be dealt with from the psychological perspective of attribution theory.<sup>3</sup> This theme is less interesting, in my

3 Similarly to what de Hoon in M.W. de Hoon, 'Schuld in het Contractenrecht; een Exercitie naar een Verbeterde Samenhang Tussen Regels en Gedrag', in: W.H. van Boom, I. Giesen & A.J. Verheij (Eds.), *Gedrag en Privaatrecht*, Den Haag: Boom Juridische uitgevers 2008, pp. 129-149 has done, but then for contract law. The theme 'attribution' is thus also addressed under the heading 'fault', *see also* P.J. van Koppen, 'Krijgen wat je Verdient', in: P.J. van Koppen *et al.* (Eds.), *Reizen met mijn Rechter*, Deventer: Kuwer 2010, pp. 15 *et seq.*

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4 *See for exam* Kluwer 2005, *Burgerlijk rec* Willink 2011

5 *See, e.g.*, K.G. York: Springe *Controllabilit Science* 2003, *het fout gaat*, uitgevers 200

6 *See, e.g.*, R. V and pp. 77 *et s*

7 *See for now al* Hill 1993, pp.

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view, as the requirement of blame only plays a limited role in today's tort law next to the distinctive requirement that there must be negligence (in short: an act which violates the rules of proper social conduct).<sup>4</sup> This means, obviously, that both concepts, which are considered as one and the same by psychologists, must be distinguished from each other before lawyers can use them. Theories on the imputation of the blame, which address causality as well as responsibility, will therefore not be discussed.<sup>5</sup>

The theme of legal causation is however particularly interesting because psychological research<sup>6</sup> on attribution (see para. 2.3.1) has shown that people tend to assign the cause of an event to the acting person and thus underestimate other causal factors outside of that person (*i.e.* the rest of the situation). This 'fundamental attribution error'<sup>7</sup> (see para. 2.3.2) appears to be of importance with respect to issues of causation in tort law. After all, this 'error' could lead to misguided ideas on the course of events and thus lead to the wrong decisions regarding liability and compensation by courts deciding a case or by parties negotiating a settlement.

On the other hand, it is also conceivable that legal causation is based on the idea that real life, psychological imputation is not really relevant; the attribution error is approved, as it were, or accepted in any case, by the legal system as the resulting outcome is also the desired outcome on normative or public policy grounds. The same line of thought might also apply to the so-called 'defensive attribution', the phenomenon that people regard someone's responsibility graver if his conduct has led to more serious consequences. This will also be incorporated hereafter (para. 2.3.3), just as the actor-observer difference and the self-serving bias (para. 2.3.4 and para. 2.3.5).<sup>8</sup> Preceding these observations based on cognitive psychology, I will provide a short description of the legal framework, dealing with the *condicio sine qua non* (CSQN)

4 See for example A.J. Verheij, *Monografieën Privaatrecht. Deel 4: Onrechtmatige Daad*, Deventer: Kluwer 2005, p. 48. See also A.S. Hartkamp, C. Asser's *Handleiding tot Beoefening van het Nederlands Burgerlijk recht. Deel 6: Verbintenissenrecht IV De Verbintenis uit de Wet*, Zwolle: W.E.J. Tjeenk Willink 2011 no. 107.

5 See, e.g., K.G. Shaver, *The Attribution of Blame. Causality, Responsibility and Blameworthiness*, New York: Springer 1985. See also, e.g., De Hoon 2008; J. Mantler *et al.*, 'Attributions for Serious Illness: Are Controllability, Responsibility, and Blame Different Constructs?', *Canadian Journal of Behavioural Science* 2003, Vol. 35, No. 2, pp. 142-152; J.M. Barendrecht, 'Verdeling van Verantwoordelijkheid als het fout gaat', in: W.H. van Boom, M.J. Borgers, *De Rekenende Rechter*, Den Haag: Boom Juridische uitgevers 2004, pp. 55-56, and V.P. Hans & J. Dee, 'Whiplash: Who's to Blame?', 68 *Brook. L. Rev.* 2002-2003, pp. 1093-1094.

6 See, e.g., R. Vonk (Ed.), *Cognitieve Sociale Psychologie*, (2nd edn.), Utrecht: Lemma 2003, pp. 23-25 and pp. 77 *et seq.*

7 See for now already S. Plous, *The Psychology of Judgment and Decision Making*, New York: McGraw-Hill 1993, pp. 180 *et seq.*

8 The observations in para. 2.3 are written from the perspective of 'ordinary' people and not the civil court judge.

requirement as well as with legal causation (para. 2.2.1) and I will examine which behavioural presumptions and intended behavioural effects might be underneath those concepts (para. 2.2.2). Paragraph 2.4 will be devoted to the application of the results found in paragraph 2.3 to these legal issues: how can psychological insights be linked to such a legal issue as 'legal causation', looking at both from the perspective of a private law judge. I will list the consequences and discuss how we might be able to improve the connection between the two. Subsequently, I will specifically address the consequences of the psychological 'results' I found for the intended behavioural (preventive) effects on the legal rules regarding causation (para. 2.5). The answer as to whether and how such preventive effects can be achieved is partly negative and I will suggest explanations. This will lead to some general ideas on the (lack of) preventive effects of tort law. This contribution will be concluded in paragraph 2.6.

## 2.2 A SHORT DESCRIPTION OF THE LEGAL FRAMEWORK

### 2.2.1 Causation: European Rules on CSQN and Legal Causation

If a person wants to hold someone else responsible for damage suffered, this not only requires an unlawful act but also a causal relation between that act and the damage. In basically all legal systems the assessment of the causation issue is split in two separate stages.<sup>9</sup> First, we look into what is called 'factual causation': is there a connection between the act and the damage in question? This concerns the issue of establishment of liability and the aforementioned *condicio sine qua non* (CSQN) test or *but for*-test. Subsequently, the question of the so-called 'legal causation' is addressed, which concerns the normative imputation of the damage to the event that caused the damage and which is used to limit the extent of causation and liability.<sup>10</sup>

To be more precise, factual causation is a requirement for the establishment of civil liability in all legal systems.<sup>11</sup> This issue of *condicio sine qua non* is dealt with by asking the question: would the damage also have occurred if the tortfeasor had not acted

9 The so-called Principles of European Law on Non-Contractual Liability arising out of Damage Caused to Another (PEL Liab. Dam), are a notable exception, see below and see C. von Bar, *Principles of European Law. Non-Contractual Liability arising out of Damage Caused to Another* (PEL Liab. Dam), Oxford: OUP 2009, chapter 4, Art. 4:101, Comments, B, 11-12. This seems to be based on the (assumed) different position in France (and Belgium) in this respect, Von Bar 2009, Chapter 4, Art. 4:101, Notes, II, 17, but many other authors disagree, see the references in the notes hereafter, and G. Viney & P. Jourdain, *Traité de Droit Civil. Les Conditions de la Responsabilité*, (2e éd.) Paris: L.G.D.J. 2006, no. 351 *et seq.*, especially nos. 353 and 359.

10 See Cees van Dam, *European Tort Law*, Oxford: OUP 2006, no. 1102, who observes in no. 1101 that neither France nor Germany nor England have a statutory provision on causation. The Dutch Civil Code (BW) does, in Art. 6:98 BW.

11 Van Dam 2006, no. 1102; W. van Gerven, J. Lever & P. Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law*, Oxford: Hart Publishing 2000, p. 452.

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in the way he did? If that is the case, acting correctly would not have prevented the damage, which means that the CSQN connection is not established. If that is not the case, if the answer to the question is 'no', a(nother) (lawful) act would have prevented the damage, or at least not have caused it, which means that the requirement regarding the connection between act and damage is met.<sup>12</sup> This CSQN issue is, first and foremost, a question of evidence: which facts can be proven?<sup>13</sup>

Having established causation in this manner, the second step of the causation requirement commences; it is about finding the limits of the causal connection by establishing legal causation. This (legal) imputation of (some of) the damage to the event that actually caused the damage, will have to be taken up by the courts.

Under Dutch law, this is done according to the rule set forth in Article 6:98 Dutch Civil Code (BW).<sup>14</sup> A general statement on the results of the assessment on the basis of this provision cannot be given beforehand, however. The (non-limitative) canon of relevant circumstances and factors must be weighed time and again by the court which tries the case. This court will then make a choice which is (to a large extent) normative by nature, involving a policy decision.<sup>15</sup> The major factors or elements of this assessment are the following. Practically the most influential factor is the 'nature of the damage'. If the damage is purely patrimonial, the imputation will be stricter (include fewer items of loss) than in the case of bodily injury.<sup>16</sup> The assessment of a specific case under Article 6:98 BW, however, also includes the 'nature of the liability'. This issue usually concerns the question whether the liability is based on fault or risk, whether one is liable for one's own acts or someone else's (vicarious liability) or whether the liability has arisen from a contractual setting or not. What also matters is that the bigger the fault leading to the event is, the more extensive the imputation can be. This implies that the 'degree of blame' is also relevant. The 'nature of the violated norm' (traffic rules and safety regulations versus a regular duty of care) may also determine the extent of the imputation. The 'foreseeability of the damage' will also play a role regarding the imputation (the more foreseeable, the more an extensive imputation can be justified) as well as the fact that the resulting damage may be less

12 On this subject for example A.S. Hartkamp & C.H. Sieburgh, *C. Asser's Handleiding tot Beoefening van het Nederlands Burgerlijk Recht. Deel 6: Verbintenissenrecht. De Verbintenis in het Algemeen, 2e Gedeelte*, (13<sup>th</sup> ed.), Deventer: Kluwer 2009, no. 51; Verheij 2005, pp. 27-28.

13 On such questions of evidence and related problems for example G. Wagner, 'Heuristics in Procedural Law', in: G. Gigerenzer & C. Engel, *Heuristics and the Law*, Cambridge: MIT Press 2006, pp. 281-302, pp. 281 *et seq.* and J. Schulz, 'Rules of Evidence as Heuristics: Heuristics as Rules of Evidence', in: Gigerenzer & Engel 2006, pp. 327 *et seq.*

14 Hartkamp *et al.* 2009, nos. 63 *et seq.*; Verheij 2005, pp. 28-29 and pp. 69 *et seq.*

15 This is a valid statement for all systems under review, *see* Van Dam 2006, no. 1102 and 1111. *See also* Van Gerven *et al.* 2000, p. 395.

16 This is a general trend in all systems under review, *see* Van Dam 2006, nos. 1102 and 1111.



or more 'remote' from the unlawful act (the event).<sup>17</sup> The consequences of all this is that, in the end, there is not much to say about this with certainty, if only because the factors that must be weighed may also contradict each other.

Under German and English law (and a lesser extent French law<sup>18</sup>), the issue of legal causation is also highly important but no statutory provision supplies the decision maker with a set of circumstances or factors to be considered.<sup>19</sup> Case law decides the issue, using several different legal techniques, but on the basis, mainly, of policy considerations, looking at what is fair, just and reasonable.<sup>20</sup> In this regard, German lawyers will analyse the protective function of the rule which imposes the duty on the tortfeasor ('scope of rule'), while English lawyers will see whether a certain cause is 'too remote' ('remoteness of damage'), which means that damage must be 'reasonable foreseeable'. Under French law one looks only for 'direct and immediate consequences' without being guided further by fixed criteria.<sup>21</sup>

As to the current state of affairs within European private law, the Principles of European Tort Law (PETL) distinguish between CSQN in Article 3:101 PETL and legal causation (scope of liability) in Article 3:201 PETL. As regards the latter, the article mentions some of the factors that are to be weighed (although the list is not exhaustive) in deciding the issue: the foreseeability, the nature and value of the protected interest, the basis of liability, the extent of the ordinary risks of life and the protective purpose of the violated rule. These factors are collected from and are known from the legal systems dealt with above. The Draft Common Frame of Reference is basically 'the odd one out' in Europe since its rules (as laid down in the Principles of European Law on Non-Contractual Liability arising out of Damage Caused to Another (PEL Liab. Dam)) do not make a division between establishing liability and limiting liability but use one (vague) phrase instead, *i.e.* 'to be regarded as the consequence of'.<sup>22</sup>

Even without any further analysis of the two forms of causation dealt with here, it will be clear that even though the first issue primarily seems to be a question of evidence (what did actually happen?), it also includes making normative decisions (*e.g.*

17 On the previous, Hartkamp *et al.* 2009, nos. 63-69, and Verheij 2005, pp. 70-72.

18 See above, note 9.

19 For details and cases, see Van Gerven *et al.* 2000, pp. 396-426; Van Dam 2006, nos. 1103 *et seq.*

20 Van Dam 2006, no. 1111; Van Gerven *et al.* 2000, p. 454 and p. 457. See also K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, (3rd ed.), Oxford: OUP 1998, p. 602 and p. 610.

21 See, in general, Zweigert & Kötz 1998, pp. 602, 609 and 621. See also H. Kötz & G. Wagner, *Deliktsrecht*, (11th edn.), München: Verlag Franz Vahlen 2010, no. 186 and nos. 209 *et seq.*; W.V.H. Rogers, *Winfield & Jolowicz on Tort*, (17th edn.), London: Sweet & Maxwell 2006, nos. 6-16 *et seq.*; Viney/Jourdain 2006, no. 359.

22 See Art. 4:101 PEL Liab. Dam and Von Bar 2010, Chapter 4, Art. 4:101, Comments, B, nos. 11-12, and note 9 above.

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on what can and cannot be proven), whereby the person making the decision may be affected by psychological influences and prejudices (bias). The second causal step is much more normative by nature (which losses will the decision maker impute to the tortfeasor?) and requires the judge to make his own very direct assessment. This is a decision which may be even more affected by all kinds of psychological pitfalls that anyone, including our judges, may come across.

### 2.2.2 Presumptions Regarding Conduct and Behavioural Effects?

Prior to the further discussion of some of these psychological pitfalls, it seems wise to examine if, and the extent to which, the legislator perhaps made certain assumptions on human behaviour when these rules on causality were drawn up. It is also interesting to examine whether these rules were expected to have specific behavioural effects, and if so, which ones. If, after all, this were the case, this could perhaps pave the way for the feedback (in para. 2.4) between the legal and psychological factors when dealing with causation issues. I will do so (only) for the Dutch legislation since this is the most recent (and in fact only rather explicit) codification of the legal causation requirement.

Unfortunately, the Dutch *travaux préparatoires* on this issue are not of much help. If the legislator had any presumptions or effects in mind at all, they have not been recorded. Obviously, this makes sense if one considers that this legislation and explanation have been created by private law experts. It does not mean however, that we are completely lost as it is possible to make the behavioural presumptions and intended behavioural effects of tort law *as such* our points of departure since those points of departure may also apply to the causation requirement. It is doubtful, however, whether the legislator has been willing to show his cards in this respect. And indeed, the *travaux préparatoires* are not very helpful here either.

Does this mean that the legislator had no ideas whatsoever on what could or should be achieved by tort law? It is not that serious, but this legislator has failed to record it. A generally-recognized point of departure of extra-contractual liability, however, and that is something I will assume below, is that the rules of tort law aim to find a balance between the need for safety (for the injured party) on the one hand, and the need for freedom of actions (for the addressed party) on the other. Today, the safety aspect has become more and more emphasized,<sup>23</sup> and this results in a broad recognition of at least two functions of tort law: the first one is the award of damages, which means that compensation must be provided if the other party acted wrongly or neg-

<sup>23</sup> See for example Verheij 2005, p. 16, C.C. van Dam, *Aansprakelijkheidsrecht*, Den Haag: Boom Juridische uitgevers 2000, no. 001; Hartkamp & Sieburgh 2011, no. 12.

ligerly, and secondly, whenever possible, the prevention of negligent behaviour by sanctioning such behaviour.<sup>24</sup>

Taking these functions of tort law as a point of reference, it is not too difficult to assume that the behavioural presumption underlying tort law in general is that the enforceable duty to pay damages in the case of negligent behaviour will lead to the actor avoiding such negligent (and as a result, unlawful) acts in future. This in turn implies that the legislator assumes and pre-supposes that negligent behaviour will be avoided due to the sanction it carries. When subsequently the actor actually displays such behaviour, damage as such is prevented and this is the intended behavioural effect, which is generally considered to be the result of tort law. The degree in which this effect occurs in reality (whether the rules of tort law really have a preventive effect) is a moot point,<sup>25</sup> which I will return to in paragraph 2.5.

Using all this as the point of departure, we can subsequently establish that the rules regarding causality are an important part of this bigger whole and therefore we can safely say that the same presumptions and effects will also play a role at that level. It is now time to consider whether all this fits in with the lessons of (cognitive) psychology on causal connections.

### 2.3 PSYCHOLOGICAL INSIGHTS

#### 2.3.1 *Several Attribution Theories*

The part of psychology that is devoted to attribution theory, in the broadest sense of the word, 'is concerned with the attempts of ordinary people to understand the causes and implications of the events they witness'.<sup>26</sup> People are 'seeking to discover why an event has occurred'.<sup>27</sup> It is important to note that there is not just one attribution theory, but rather a number of related theories that describe how people assign

24 See Verheij 2005, pp. 16-17, where other less generally-recognized functions are mentioned. I will ignore these here.

25 On this in general, W.H. van Boom, 'Compensating and Preventing Damage: is there any Future Left for Tort Law?', in: *Festkrift till Bill W. Dufwa - Essays on Tort, Insurance, Law and Society in Honour of Bill W. Dufwa. Volume I*, Stockholm: Jure 2006, pp. 287 et seq., and E.F.D. Engelhard, *Regres*, Deventer: Kluwer 2003, pp. 213-222.

26 L. Ross & C.A. Anderson, 'Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments', in: D. Kahneman et al. (Eds.), *Judgement under Uncertainty: Heuristics and Biases*, Cambridge University Press, Cambridge 1982 (reprint 2001), p. 129. The following is a very brief reflection of only a part of the theories on this subject.

27 B. Weiner, 'Attribution, Emotion, and Action', in: R.M. Sorrentino & E.T. Higgins, *Handbook of Motivation and Cognition*, New York: The Guilford Press 1986, p. 292. See also Van Koppen 2010, p. 17.

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the causes of events or acts.<sup>28</sup> An event can be an accident, but also something someone said or the result of certain acts.<sup>29</sup> The event can be the actor's own conduct or the act of someone else.<sup>30</sup>

This search for answers regarding the possible causes of events or acts is something people do not always engage in because that would be too much of a (cognitive) effort. Instead, people look in particular for explanations when something unexpected happens, when a wish is not fulfilled or when the outcome is of major importance. People are said to do so in order to prevent surprises and uncertainties from happening and to (be able to) control them. By doing so, people also want to achieve certain goals next time around, they want to learn.<sup>31</sup>

One of the founding fathers of attribution theory, Heider, distinguished three possible causes or actually three factors as possible causes for certain events. Firstly, 'the self', which means the person who acted; secondly someone else and thirdly coincidence or 'fate'.<sup>32</sup> Within this theory the first factor must be distinguished from the second and third one. So 'dispositional (personal) attribution' (to assign something to the person of the actor), also called internal attribution, is juxtaposed to external or 'situational attribution' (to assign something to factors outside of the actor, either another person or the situation).<sup>33</sup> The next important part of the theory concerns the stability of a cause. Does it apply temporarily or permanently? A permanent or stable cause, such as someone's personal characteristics, enables us to predict behaviour. It provides something to hold on to.<sup>34</sup>

28 See for example L.A. McArthur, 'The How and What of Why?', *Journal of Personality and Social Psychology* 1972, Vol. 22, No. 2, p. 171. Attribution is in itself only a part of the human 'information-processing system', see D.L. Hamilton, 'Causal Attribution Viewed from an Information-processing Perspective', in: D. Bar-Tal & A.W. Kruglanski, *The Social Psychology of Knowledge*, Cambridge: Cambridge University Press 1988, pp. 359 *et seq.*

29 Vonk *et al.* 2003, p. 23 and p. 78.

30 See Vonk *et al.* 2003, p. 97 and p. 117; R.E. Nisbett *et al.*, 'Popular Induction: Information is not Necessarily Informative', in: D. Kahneman *et al.* (Eds.), *Judgement under Uncertainty: Heuristics and Biases*, Cambridge: Cambridge University Press 1982 (reprint 2001), p. 103.

31 See Weiner 1986, pp. 292-293. See also R. Vonk (Ed.), *Sociale Psychologie*, (2nd edn.), Groningen/Houten: Wolters-Noordhoff 2007, pp. 210-212, and in particular Vonk *et al.* 2003, p. 117: attribution occurs when someone is important, something negative happens or when someone does something unexpected.

32 Vonk *et al.* 2003, p. 23 and p. 78.

33 Vonk *et al.* 2003, p. 78; Van Koppen 2010, p. 17.

34 See for more details Van Koppen 2010, pp. 17-18, and Vonk *et al.* 2007, pp. 208-212. Attributing either internally or externally thus also depends, for example, on whether a good person acts correctly (consistent behaviour, internal attribution) or acts incorrectly (inconsistent; external), D.T. Regan, E. Straus & R. Fazio, 'Liking and the Attribution Process', *Journal of Experimental Social Psychology* 1974, 10, pp. 385-397.

Kelley was among those who built on Heider's work and further formalized the attribution theory.<sup>35</sup> Kelly distinguishes three attribution dimensions and three related sources of information. There is consistency information, which refers to the individual's behaviour at another moment or to another modality; consensus information, which refers to the behaviour of other actors<sup>36</sup> and distinctiveness information, which is related to the objects (entities) with respect to which the behaviour occurs.<sup>37</sup> Assigning something or someone as a cause depends on this information. Dispositional or personal attribution means that the cause of behaviour is within the individual, whereas an entity attribution assigns the cause to the object (which can also be an event). These forms can also be combined, but coincidence, too, can be a determining factor (situational attribution).<sup>38</sup>

Attribution theory thus addresses the way people process social information. It is a normative theory which says what we should do as rationally-acting human beings.<sup>39</sup> As stated earlier, there is no time, however, to always attribute in accordance with the theory. Sometimes we do not even want to do so. There are many occasions in which we lack information. By way of compensation we then use existing knowledge and existing rules of thumb, which are the result of our experience stored in the form of causal frameworks.<sup>40</sup> An example is the 'multiple sufficient causes' scheme which says that if more than one cause is likely, a single cause is sometimes already identified as an adequate explanation. The down side is, however, that distortions occur and 'errors' are made. It may result in wrongly ignoring another cause in the scheme because 'the' cause is already known; this is referred to as the 'discounting principle'.<sup>41</sup>

35 See on this subject Nisbett *et al.* 1982, p. 101, and Shaver 1985, pp. 50 *et seq.* Plous 1993, p. 174, places Kelley on an even higher pedestal regarding the development of the 'attribution theory'.

36 In the meantime, there is an increasing amount of evidence that consensus information (what do others do) exerts little or no influence on attributing causes. See Nisbett *et al.* 1982, pp. 102-103; Vonk *et al.* 2003, p. 133, and Plous 1993, pp. 176-178. This has probably to do with the 'false consensus effect', the presumption that any other person would act in a similar fashion as the observer in the same situation (Vonk *et al.* 2003, p. 133).

37 Vonk *et al.* 2003, pp. 88-89; Plous 1993, p. 174; Nisbett *et al.* 1982, p. 101; Van Koppen 2010, p. 18. All this is part of Kelley's co-variation model or ANOVA principle, see also Vonk *et al.* 2007, pp. 209-211. I will not discuss this here any further; more details on this subject are not necessary for this paper.

38 See Vonk *et al.* 2003, pp. 90-93; Plous 1993, pp. 174-175.

39 As said earlier, this concerns a collection of theories. I will leave untouched topics such as the performance attribution theory by Weiner, see for example Weiner 1986 and Vonk *et al.* 2003, pp. 97 *et seq.*, and the self-observation theory of Bem (see Vonk *et al.* 2003, pp. 107 *et seq.*).

40 Vonk *et al.* 2003, pp. 94-95. See on this also Van Koppen 2010, pp. 15-17.

41 Vonk *et al.* 2003, p. 95; Ross & Anderson 1982, p. 132.

This is one huge consequence (from the perspective of a judge) in

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42 Van Koppen

43 Plous 1993, p. and Perceptual pp. 439-445 and How Advocates L.J., Vol. 47 pp. 65-67.

44 Plous 1993, p. p. 135. See also Thinking about Na de Calam Aansprakelijkheid explanation for actors in cases Kluwer 2005, p.

45 See Plous 1993; Ph.E. Tetlock,

This is one of the many examples of what we call 'attribution errors'. They may have huge consequences.<sup>42</sup> Below I will address some of these distortions (always from the perspective of a regular person, and not yet from the perspective of, for example, a judge) in more detail.

### 2.3.2 *The Fundamental Attribution Error*

The fundamental attribution error is a distortion related to another (also psychological) phenomenon: salience. Salience is the ability to draw attention; the more salient factors, the factors which draw more attention, are typically considered to be the more likely cause. Hence someone's perception of causality also depends on what has captured his attention in a certain context and in which direction his attention is drawn is then determined by the salient character of a factor (or a person).<sup>43</sup>

If that is our starting point and we then make the link with a social environment where behaviour, and thus the actor, captures most of the attention of an observer, it is only a small step to realize that this focus on the actor will lead to an attribution by the observer of the behaviour which overestimates dispositional factors and personal characteristics, such as possibilities and motives (internal attribution), and underestimates situational factors (external attribution). This means that we tend to assign the cause of an event, in first instance, to the acting person and we underestimate the effects of factors outside that person (the rest of the situation).<sup>44</sup> As this tendency appears to be huge, and the attribution often mistaken, this has been qualified as 'the fundamental attribution error' instead of a regular bias. Follow-up studies have confirmed this error (also called: correspondence bias) time and again; even when the test subjects are given a more detailed explanation, they focus on the personal characteristics to predict behaviour. The result is that the same error is made.<sup>45</sup> This

<sup>42</sup> Van Koppen 2010, p. 19.

<sup>43</sup> Plous 1993, pp. 178-180, who refers to people such as S.E. Taylor & S.T. Fiske, 'Points of View and Perceptions of Causality', *Journal of Personality and Social Psychology* 1975, Vol. 32, No. 3, pp. 439-445 and Ross & Anderson 1982, pp. 138-139. See N.R. Feigenson, 'The Rhetoric of Torts: How Advocates Help Jurors Think About Casuation, Reasonableness, and Responsibility', *Hastings L.J.*, Vol. 47 1995-1996, p. 128. On 'attention' also Vonk *et al.* 2003, pp. 135-136, and Giesen 2005, pp. 65-67.

<sup>44</sup> Plous 1993, p. 180; Van Koppen 2010, pp. 19-20; Vonk *et al.* 2003, p. 124; Ross & Anderson 1982, p. 135. See also Feigenson 1995, pp. 126 *et seq.*; W. Farnsworth, *The Legal Analyst. A Toolkit for Thinking about the Law*, Chicago: The University of Chicago Press 2007, p. 242, and R. Giard, 'Na de Calamiteit: Perceptie en Primaire Psychologische Reacties en hun Betekenis voor het Aansprakelijkheidsrecht', *Letsel & Schade* 2010, no. 2, p. 10. Perhaps this also provides a (partial) explanation for the tendency to think in terms of primary (the main responsible) and secondary actors in cases of failing supervision (more on this I. Giesen, *Toezicht en Aansprakelijkheid*, Deventer: Kluwer 2005, particularly pp. 37-40).

<sup>45</sup> See Plous 1993, pp. 180-181; Vonk *et al.* 2003, p. 124, and Van Koppen 2010, p. 19. See also Ph.E. Tetlock, 'Accountability: A Social Check on the Fundamental Attribution Error', *Social*

does not mean, though, that the argument has never been made that this error does not exist or at least that it is not fundamental.<sup>46</sup>

The reason why correspondence bias occurs is because it is difficult to make an attribution that does justice to the influence of the situation. We must 'know' in which situation the actor is in, we must have 'expectations' about the behaviour of other people in such cases; we must 'identify' behaviour and perhaps 'correct' that behaviour after a comparison with what others would do. Things may go wrong in all of these fields. And when they go wrong, they go badly wrong. Take a closer look at the third step, for example: even when we know the situation and our expectations are correct, our judgment may still be off. Our perception of the behaviour we expect may be much stronger than it is in reality. Because of this we think this response is perhaps 'too much'; we conceive it as exaggerated. So even when we have a sound grasp of the situation distortions, extreme conclusions still occur.<sup>47</sup>

### 2.3.3 Defensive Attribution

The next feature related to attribution theory is what is termed defensive attribution; the phenomenon that people assign more responsibility to other individuals (the actor or the victim) if the conduct has more serious consequences.<sup>48</sup> This is a defensive distortion because people guard themselves against the unbearable thought that negative events with serious consequences happen accidentally, which means it can happen to you, too, without your being able to control it. By assigning the cause to someone else, another person, the event becomes something that can be evaded.<sup>49</sup> Therefore, the bias serves the individual's own wellbeing and is the result of individual motives.<sup>50</sup>

*Psychology Quarterly* 1985, Vol. 48, No.3. pp. 227-236, particularly p. 228 and Vonk *et al.* 2007, p. 44 and pp. 203-207.

46 See for example J.H. Harvey *et al.*, 'How Fundamental is "The Fundamental Attribution Error"?', *Journal of Personality and Social Psychology* 1981, Vol. 40, No. 2, pp. 346-349 and the response by G.D. Reeder, 'Let's Give the Fundamental Attribution Error Another Chance', *Journal of Personality and Social Psychology* 1982, Vol. 43, No. 2, pp. 341-344.

47 For more details see Vonk *et al.* 2003, pp. 124-128.

48 See Vonk *et al.* 2003, p. 139; see also Hans & Dee 2002-2003, pp. 1103 *et seq.* and Barendrecht 2004, pp. 55-56.

49 In that respect this theory looks like the so-called 'just world hypothesis', see, e.g., Van Koppen 2010, pp. 23 *et seq.*

50 Vonk *et al.* 2003, p. 139; J.M. Burger, 'Motivational Biases in the Attribution of Responsibility for an Accident: A Meta-Analysis of the Defensive-Attribution Hypothesis', *Psychological Bulletin* 1981, Vol. 90, No. 3, pp. 497-498 and p. 510; Farnsworth 2007, p. 242, and A.E. Stewart, 'Attributions of Responsibility for Motor Vehicle Crashes', *Accident Analysis and Prevention* 2005, Vol. 37, p. 682. This also explains why rape victims often blame themselves, because being responsible for it yourself means that the event can be avoided (in the future), see the overview in Burger 1981, p. 497. See also Farnsworth 2007, p. 242.

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This bias has been subjected to further studies. One of the discoveries was that it is difficult to find confirmation for this bias and so it was modified as follows: when the observer judges someone else's responsibility, the attribution may be distorted if the observer and actor are very much alike and the actor is in a situation the observer could also be in. So the similarities between the actor and the observer, as well as the seriousness of the result contribute to defensive attribution.<sup>51</sup>

As far as the similarities between the actor and observer are concerned: the similarities will occur if the observer (could or) will face the same situation as the actor in the future. Subsequently, the observer will seek to deny the personal similarities. If this fails, he may resort to other strategies such as the attribution to coincidence, and not to the person who is not so different from the observer himself, or the consequences are minimized. This is how the observer ensures that he will not or cannot be the one to blame for any future accident in which he may be involved.<sup>52</sup>

If, however, the observer does not see any similarities, meaning he does not regard himself as a potential actor but rather as a victim, he will not be willing to assign the event to coincidence.<sup>53</sup> Our assessment of a person with whom we share certain traits tends to be milder than our assessment of a person who does not display these similarities. Subsequently, it was also confirmed that if the observer is similar to the actor and the situation is the same, the attribution to that actor will be less, even more so when the consequences are more serious.<sup>54</sup> If there are no situational or personal similarities, however, more responsibilities are assigned to the actor if the gravity of the consequences is greater (the original theses of defensive attribution).<sup>55</sup> The idea is, again, that if it is not a matter of chance, a serious event can be evaded, can be controlled.

#### 2.3.4 Actor-Observer Differences

The previous observations addressed the attribution by someone who is observing the actor. This situation can and should be distinguished from the case in which the attribution by the actor himself is at issue. After all, the observer focuses on the actor (who is salient, see para. 2.3.2), but the actor himself is not able to focus on that, so he will focus on the situation as it appears to him. As the actor himself will be particularly focused on his environment – which is, after all, salient for him – the attribution of his own conduct will then be too-strongly focused on that environment (*i.e.*, too

51 Burger 1981, p. 498; Stewart 2005, p. 682. *See* (for whiplash cases) Hans & Dee 2002-2003, p. 1103.

52 Burger 1981, p. 498.

53 Burger 1981, pp. 498-499.

54 The victim is even held responsible, *see* Hans & Dee 2002-2003, p. 1105.

55 Hans & Dee 2002-2003, p. 1106.



much external attribution). The difference between the attribution of an individual's own behaviour and that of others is called the actor-observer difference.<sup>56</sup> The explanation for this can be found in the differences in observation and the fact that the actor has more information available about his own situation.<sup>57</sup>

The cause of this difference in perception can probably be found in the understanding (the knowledge) of the situation, as mentioned earlier (in para. 2.3.2); while the observer sees the acting person, the actor himself sees the environment and that creates, literally, a different perspective. If we were to adjust these positions, for example by placing the actor in front of a mirror or by asking the observer to try and place himself in the actor's position (to create empathy) the difference in attribution is also reduced.<sup>58</sup> As the existence of the actor-observer distortion as such has recently been brought up for a principle discussion, we will have to use this 'adjustment' with caution, however.<sup>59</sup>

### 2.3.5 Self-Serving Bias

'People are more likely to make self-attributions for positive than for negative outcomes', according to the self-serving bias.<sup>60</sup> Success is particularly and sooner assigned to internal factors (such as someone's ability and effort), whereas failure is attributed to external factors such as the difficulty of the job, someone else's errors and bad luck. This is how we can preserve our self-confidence and self-conceit. It is in the interest of the individual.<sup>61</sup>

Thus this bias has two components. The first is self-defence: people do not assign the cause of negative events (failure) to themselves. The second is self-enhancement:

56 See on this in particular E.E. Jones & R.E. Nisbett, *The Actor and the Observer: Divergent Perceptions on the Causes of Behavior*, Morristown: General Learning Press, especially p. 15; R.E. Nisbett *et al.*, 'Behavior as Seen by the Actor and as Seen by the Observer', *Journal of Personality and Social Psychology* 1973, Vol. 27, No. 2, pp. 154-164; D. Watson, 'The Actor and the Observer: How are Their Perceptions of Causality Divergent?', *Psychological Bulletin* 1982, Vol. 92, No. 3, pp. 682-700 and furthermore, among others, Vonk *et al.* 2007, pp. 207-208; Vonk *et al.* 2003, pp. 131-132; Van Koppen 2010, pp. 19-20; Plous 1993, p. 181.

57 See for example Watson 1982, p. 683.

58 Vonk *et al.* 2003, p. 132, and in more detail Jones & Nisbett 1971, p. 5 *et seq.*, and pp. 9-10, and also for example M.D. Storms, 'Videotape and the Attribution Process', *Journal of Personality and Social Psychology* 1973, Vol. 27, No. 2, pp. 165-175; D.T. Regan & J. Totten, 'Empathy and Attribution: Turning Observers into Actors', *Journal of Personality and Social Psychology* 1975, Vol. 32, No. 5, pp. 850-856 and R.E. Galper, 'Turning Observers into Actors: Differential Causal Attributions as a Function of "Empathy"', *Journal of Research in Personality* 1976, 10, pp. 328-335.

59 See Malle 2006, especially p. 907.

60 Plous 1993, p. 185; Vonk *et al.* 2003, p. 137. See also Vonk *et al.* 2007, pp. 131-134, and Farnsworth 2007, p. 243.

61 See Weiner 1986, p. 300 and Vonk *et al.* 2003, p. 137.

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people think they themselves are responsible for positive results (success).<sup>62</sup> This distortion does not occur, though, when the other person is someone with whom one has a bond because people want to maintain the positive self-image of the other person.<sup>63</sup>

The existence of this bias has been the subject of a fierce discussion though, which is not over yet.<sup>64</sup> It implies we have to proceed with caution here. Moreover, we should not forget that this error is (also) understandable and functional. After all, always assigning failure to yourself and success to external factors could be paralysing. It can lead to not achieving anything at all in the long run.<sup>65</sup>

### 2.3.6 Interim Conclusion

There are more distortions or errors related to attribution theory, such as the egocentric bias. A person accepts more responsibility for a result achieved jointly than the other participants assign to this individual.<sup>66</sup> Also think of augmentation, the reverse of the discounting principle mentioned earlier (para. 2.3.1).<sup>67</sup> It means that the facilitating cause of certain acts (the cause that smoothes the way for the act to take place) is regarded as more dominant if there is also an inhibitive factor. If you persevere in your divorce, in spite of the loss of luxury, your home situation must indeed have become unbearable.<sup>68</sup> Furthermore, I will just mention the positivity effect,<sup>69</sup> the way we process new information and the way we use stereotypes,<sup>70</sup> and the recently-claimed sexual attribution bias.<sup>71</sup> I will ignore these as the previous observations have already

62 The mirror of this internal attribution of your own success and the external attribution of your own failure is that someone else's success is attributed externally and someone else's failure attributed internally (to that individual).

63 Vonk *et al.* 2003, p. 137.

64 See on this Ross & Anderson 1982, pp. 133-135 and, for example, Th.S. Duval & P.J. Silvia, 'Self-Awareness, Probability of Improvement, and the Self-Serving Bias', *Journal of Personality and Social Psychology* 2002, Vol. 82, No. 1, particularly p. 49 and p. 57 (the attribution in case of a failure remains particularly unclear).

65 Vonk *et al.* 2003, pp. 137-138 and p. 141.

66 Plous 1993, pp. 185-186. This also occurs with undesired (negative) results, such as the cause of a marital row.

67 Vonk *et al.* 2003, pp. 96-97; see also Shaver 1985, pp. 54-56 and Van Koppen 2010, p. 17. The role played by the causal factor in discounting is always considered smaller if there are also other facilitating causes.

68 Vonk *et al.* 2003, pp. 96-97. Or, but that is much more speculative: if a supervisor as secondary wrongdoer failed to supervise and damage is suffered after someone else, the primary wrongdoer, acted this act must have been very determining (very strong causal contribution in the assessment of the acts of both wrongdoers).

69 Plous 1993, p. 186.

70 Van Koppen 2010, pp. 21-22.

71 F. Fösterling *et al.*, 'Ability, Luck, and Looks: An Evolutionary Look at Achievement Ascriptions and the Sexual Attribution Bias', *Journal of Personality and Social Psychology* 2007, Vol. 92, No. 5, pp. 775-788.

provided enough food for thought. Which of all these distortions or biases discussed earlier affects or could affect (our dealings with) the law, particularly regarding the decisions made with respect to causation issues and how? And if such effects are present, should we or must we do something about it and if yes, what?

## 2.4 BACK TO THE LEGAL APPRAISAL

### 2.4.1 Decisions on Causation

Now that I have described the legal as well as the psychological view on the theme of the assignment of causes, the question arises how good or bad the link is between the legal and psychological field. As I primarily focus on the legal aspects of causation issues in this paper, the issue narrows down to what lawyers – whereby I will particularly focus on the civil law judge's perspective or that of the citizen seeking justice – could learn if they were to take the newly-provided perspective to heart.

Well, judges cut the Gordian knot; they are the people who make and must make decisions. And even before that, the parties' lawyers, during the litigation or settlement process, wonder about the decision the judge is probably going to make and in order to do that they place themselves in the judge's position. Is there enough evidence to support the *condicio sine qua non* argument? Will item of loss x or y be compensated?

Any distortions or biases, regardless of their nature, on the decisions of people in general then also become highly relevant for judges and advocates alike. In order to reach the right decisions, these biases should be eliminated as much as possible or at least be allowed for in the sense that one is aware of and takes into account the possibility of mistakes being made. Examples are, apart from the attribution theories discussed in this paper, the studies which have shown that laypeople serving as jurors are less likely to accept liability if the causal chain between accident and damage is more complex, has more chains or when more time has passed between the behaviour and the damage, whereas these are factors that are legally irrelevant.<sup>72</sup> Of course, judges in civil cases must also bear this in mind when they assess the causal chain.

The 'errors' made by judges and others related to the attribution of causes to persons or events are all the more relevant in this context as private law abounds with assess-

72 See J.T. Johnson & J. Drobny, 'Proximity Biases in the Attribution of Civil Liability', *Journal of Personality and Social Psychology* 1985, Vol. 48, No. 2, pp. 283 *et seq.*; T. Wayte *et al.*, 'Psychological Issues in Civil Law', in: J.R.P. Ogloff, *Taking Psychology and Law into the Twenty-First Century*, New York: Kluwer 2002, p. 347.

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ments on causal relationships. After all, judges are required at all times to uncover causal relationships and assess them, not only regarding tort law which is my focus of attention in this paper, but also outside of tort law, for example when a party relies on the doctrine of 'mistake'.

The method of attribution people use, as described above, should impress on us that judges (and advocates) often and probably make mistakes when they assess causal relationships. Note that this is certainly not meant to reproach the judiciary or the bar; all it means is that judges and advocates are human and fallible, just like the rest of us. This does not mean, however, that we can or should leave it at this. We must be willing to learn from our attribution errors, whenever possible.

#### *2.4.2 Clues for the Improvement of the Rules or their Application?*

##### **2.4.2.1 Introduction**

What we can and should do about this kind of errors is simply the following.<sup>73</sup> We will have to seek to eliminate the biases or at least try to reduce them; we will have to go into 'debiasing'. And while we are considering this, we will also have to examine whether we need other or better legal rules than the ones we have now. I will focus, in the first instance, on the rules regarding causation, but I cannot avoid addressing also the legal system (including procedural law) as such.

##### **2.4.2.2 Debiasing the Fundamental Attribution Error**

The fundamental attribution error, the tendency to assign the cause of an event to the acting individual and underestimate factors outside of that individual (the rest of the situation) may lead to an assessment of causal connections in which the decision maker, the judge, the observer, looks at the acting individual in particular, as a result of which the latter will dominate instead of the situation. The difference in result can be substantial: are this person's properties to blame or is it his environment?<sup>74</sup>

We are able, however, to eliminate this fundamental 'error' by paying close attention to 'consensus information' (what do other people do?). After all, in such a case (when everyone is acting the same) an explanation based on the properties of an acting individual is not very likely. Moreover, we will have to look for hidden causes, the causes that are not obvious or salient.<sup>75</sup> The latter may happen spontaneously when

<sup>73</sup> I will ignore the issue whether it is the legislator or the judge who should act here. According to J.J. Rachlinski, 'Bottom-up versus Top-down Lawmaking', in: Gigerenzer & Engel 2006, pp. 159 *et seq.*, such depends on the circumstances.

<sup>74</sup> See also Plous 1993, p. 183, and especially in relation to accident law and the role in lawyers in that regard, Feigenson 1995.

<sup>75</sup> Plous 1993, p. 187 and p. 188.

the observer thinks that the acting individual has a hidden agenda. In such cases we really start thinking about the behaviour, which will weaken the distortion. In fact, thinking longer and harder can reduce this fundamental attribution error and the requirement (known beforehand) to account for and explain the choices made, has been shown to be able to prevent it from occurring.<sup>76</sup> The same applies when we focus on the situation instead of the person, but then there is a risk that we overshoot the mark.<sup>77</sup>

The focus and reflection on the case as a whole, including the situation as well as the actors, can be encouraged, in my view, by making sure that the focus of the judge is spread, by encouraging those involved to consider other causes as well. This is precisely what I think can be achieved (as, indeed, we would then consider more than one cause) by applying, from a technical-legal point of view, the doctrine of proportional liability, which is for example used these days in the Netherlands<sup>78</sup> in the field of liability for asbestos-related diseases and discussed elsewhere in Europe.<sup>79</sup> After all, in these cases all possible known causal contributions (such as the exposure to dangerous substances, like asbestos, but also smoking and the known environmental factors and risks) must be incorporated in the assessment, as they are part of it. As a result, each cause can be considered on its own merit. Judges will have to think long and hard about the assessment of the causal connections of all these factors and that may prevent or reduce the chance of attribution errors being made.<sup>80</sup>

Apart from this, admittedly, rather speculative idea, the following also applies here. A judge who is asked to assess causal connections must try to look beyond the person and also consider the situation. It may be an advantage in this case that civil

76 See on the last subject, Tetclock 1985, especially p. 232 and p. 233. If an individual is required to give an account of his choices, the attribution error is diminished. This is particularly the case when it is known beforehand that this will be required.

77 Vonk *et al.* 2003, pp. 128-130; Vonk *et al.* 2007, p. 206; Harvey *et al.* 1981, p. 347.

78 See, e.g., Dutch Supreme Court 31-3-2006, NJ 2011, 50 (*Karamus/Nefalit*) and the many comments related to it, such as I. Giesen & T.F.E. Tjong Tjin Tai, *Proportionele Tendensen in het Verbintenissenrecht*, Deventer: Kluwer 2008, with many references to earlier studies on the phenomenon of proportional liability. Of course, 'other possible causes' will also be considered, if, for example, a decision has to be made on the distribution of the cost when there are a number of parties who are jointly and severally liable.

79 On (the discussion about) proportional liability outside the Netherlands, see, e.g., Th. Kadner Graziano, 'Loss of a Chance in European Private law', *European Review of Private Law* 2008, pp. 1022 *et seq.*; J. Taupitz, 'Proportionalhaftung zur Lösung von Kausalitätsproblemen: Insbesondere in der Arzthaftung?', in: A. Heldrich (u.a.) (hrsg.), *Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag*, München: Beck 2007, pp. 1231 *et seq.*; M.D. Green, 'The future of Proportional Liability: the Lessons of Toxic Substances Causation', in: M. Stuart Madden, *Exploring Tort Law*, Cambridge: Cambridge University Press 2005, pp. 352 *et seq.* and Art. 3:103 of the Principles on European Tort Law (PETL).

80 Part of the judge's assessment is that he may also incorporate the degree of blame by virtue of Arts. 6:98, 101 and 102 CC, which presents an additional pitfall. See below.

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proceedings (at least on the continent, in civil law jurisdictions) are to a large extent conducted in writing, and only become 'alive' on paper since the paperwork detracts the observer's (the judge's) focus from the actor. It may make for 'improved' (less extreme) assessments of all the relevant factors. If this fails and, as a result, the dispositional factors outweigh the rest,<sup>81</sup> this may become manifest in wrongly assuming a high degree of fault, one of the imputation factors, which can lead to an imputation that is too broad in the sense of Article 6:98 BW. This does not mean that this legal rule is wrong – far from it, there is a lot to be said for the idea of more strictness when someone has committed a major mistake – but its application must remain a point of attention.

As far as the injured party's own fault (contributor negligence<sup>82</sup>) is at issue, the foregoing may also play a role since that assessment is about weighing the (amount of) responsibility and thus the causal contributions of both parties (tortfeasor and victim). After that initial causal assessment, these considerations can be 'corrected' or mitigated by also looking at the respective degrees of fault or blame of both parties. But this is a possible pitfall again, since this may go wrong if the actor receives too much attention. The fact that, for example, the Dutch Supreme Court has broadened the margin of discretion of lower courts, by laying down only very limited requirements regarding the motivation of their decision on contributory negligence – as this is supposedly an intuitive<sup>83</sup> assessment – is certainly not helpful to prevent such pitfalls.<sup>84</sup> The same remark could be made in relation to English law since the same 'leniency' towards the motivation of lower court judgments, who, after all, are giving a judgment on the facts, seems to exist in England.<sup>85</sup>

81 This may happen, for example, because the civil judge only actually sees the parties on rare occasions, such as during the personal appearance of the parties to give information or reach a settlement and during the oral pleadings at the end of the trial phase. This means there is little experience with these parties and so there is little information and then the attribution fails, see Van Koppen 2010, p. 19.

82 See, e.g., §254 German Civil Code; Section 1(1) of the Law Reform (Contributory negligence) Act 1945; Art. 6:101 Dutch Civil Code; Art. 5:102 PEL Liab.Dam.; Arts. 8:101 and 3:106 PETL, and the comparative overviews in Von Bar 2005, Chapter 5, Art. 5:102, Comments and Notes (pp. 808 *et seq.*); Van Dam 2006, nos. 1212-1215; Van Gerven *et al.* 2000, pp. 689-728; J. Spier, *Schadevergoeding: Algemeen, Deel 3. Mon. Nieuw BW (B36)*, Deventer: Kluwer 1992, pp. 5-8. See also Viney/Jourdain 2006, nos. 425-1 *et seq.*, on French law which has no code provision on this topic. However, for French law, the Arts. 3-5 of the *Loi Badinter* (Loi no 85-677; the act dealing with road traffic liability) are especially important in this regard.

83 On the importance of intuition in judicial decision making: W. van Rossum, 'Vier Reflecties op Empirisch Onderzoek naar Rechterlijke Oordeelsvorming', *NJB* 2010, pp. 2467-2472.

84 See in general Hartkamp *et al.* 2009, no. 124, and cases such as the Dutch Supreme Court 4-5-2001, *NJ* 2002, 214 (*Chan-a-Hung/Maalsté*), at 3.7.4.

85 See Rogers 2006, p. 332: 'the judges give little by way of reason for their assessments' because the issue 'is commonly treated as a matter of fact'.

The absence, in these systems, of a necessity to provide proper arguments underlying the outcome, will most probably not contribute to more and more thorough reflections on this issue, which is the very thing that would be required from the psychological point of view. Thinking longer and harder can reduce fundamental attribution errors and the requirement (known beforehand) to account for and explain the choices made, has been shown to be able to prevent them from occurring.<sup>86</sup> After all, the motivation makes choices transparent. As this idea also means that the judicial motivation of a decision must meet high(er) standards, this part of the law must be adjusted. This would only be different if the judiciary were to make no or fewer attribution errors, but as far as we can tell there are no indications to assume this.<sup>87</sup>

#### 2.4.2.3 What to Do with the Codified Defensive Attribution Bias

The bias of defensive attribution can be used (or should we say: misused) in systems which still use juries<sup>88</sup> by making sure and emphasising that the members of such a jury and the plaintiff in for instance cases such as traffic accidents, are very similar. A jury consisting of members who have been victims of traffic accidents themselves would be the preferred choice for the victim in such a case. Those jury members will not assign their past accident to themselves, nor to the victim, as a result thereof.<sup>89</sup> His opponent and society will obviously have very different views on the 'desirability' of the composition of the jury.

Most European legal systems, with professional judges instead of juries, however, do not work like this. Here we have to make sure that there is no 'identification' between a litigating party and the judge (same social background, same social environment?), which could make the judge's view on that party's causal contribution more lenient. The judge must be impartial and independent, we say, and that is why the system lays down safeguards. It is my view that the required intervention by advocates on both sides leads to the aversion of many calamities. After all, judges will sense a certain

86 See on the last subject, Tetlock 1985, especially p. 232 and p. 233. If an individual is required to give an account of his choices, the attribution error is diminished. This is particularly the case when it is known beforehand that this will be required. Judges know, obviously, before they reach a decision that at some moment in time a motivation is needed.

87 After all, judges (and advocates) make decisions in a state of uncertainty, which means errors are made because they, too, are influenced by several biases. See Giesen 2005a, p. 92, n. 290. See on this subject in a broader context P.J. van Koppen & J.W. de Keijser, 'Beslissende Rechters', in: P.J. van Koppen *et al.* (Eds.), *Reizen met mijn Rechter*, Deventer: Kluwer 2010, pp. 861 *et seq.*, and also W.A. Wagenaar, H.F.M. Crombag & H. Israëls, 'Ook Rechters Maken Menselijke Fouten', in: P.J. van Koppen *et al.* 2010, pp. 875 *et seq.* I do not know, however, of any hard figures showing that judges in civil cases, as a specific group, make (many) attribution errors.

88 On decision making by juries see, e.g., Feigenson 1995 and specifically on juries and damage awards, see E. Greene *et al.*, 'Jurors and Juries', in: J.R.P. Ogloff, *Taking Psychology and Law into the Twenty-First Century*, New York: Kluwer 2002, pp. 240 *et seq.*, and Wayte *et al.* 2002, pp. 348 *et seq.*

89 Hans & Dee 2002-2003, pp. 1115-1117.

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feeling of equality towards both advocates (at least they have all read law as a student) which means that any effect is 'shared' by both parties.

The judge must, however, be extra attentive in those (seemingly safe) situations where there are no situational and personal similarities between him and the litigating parties. The judge's open-mindedness which is simply assumed to be present in such cases is not obvious. After all, in those cases more responsibility will be assigned to the actor if the seriousness of the consequences is greater, which means that there is a chance that the causal consequences of a negligent act will be imputed to a too large extent to the tortfeasor if it actually concerns a serious form of negligence with serious consequences.

This is, in essence, exactly what, for instance, the PETL, but also Dutch legislation and case law allow to happen. After all, the law as it now stands enables the imputation of the damage and loss to the liable individual to be dependent on the nature of the damage, whereby this imputation can be more extensive in case of bodily injuries (such injuries are regarded as more serious, which requires this extended imputation, *see* para. 2.2.1). The law therewith allows the imputation to be more extensive if the actual cause is the same as in a similar event without such injuries.<sup>90</sup> This means that defensive attribution has been codified, as it were, in our tort law. This effect is strengthened furthermore by the rule regarding the extensive imputation in cases of traffic or safety norm violations since these cases also concern bodily injuries, which implies that the consequences are more serious. It means that judges are invited, once again, to use a distortion regarding the imputation of causes to behaviour.

Note that this does not suddenly make the present rules on imputation wrong, as these rules may be well indicated owing to normative considerations (such as stricter sanctions if the consequences are more serious; the principle of full compensation). Therefore my opinion on the pros or cons of these legal rules as such (which enjoy strong support among lawyers) is not relevant here. I do want to say, however, that given the previous observations, we should proceed with caution when we apply these rules and ask ourselves the question whether the imputation does not go too far. Fortunately, this aspect is also one of the factors that are part of the assessment of Article 6:98 BW.

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90 Think for example of two cases in which boys playing football break a window. If the first case leads to injury and the second one does not, the imputation will be more extensive in the first case, whereas the causal relation (cause and effect) is, in essence, the same.



**2.4.2.4 Actor and Observer: Emphatic Judges**

As discussed, there is a difference in attribution depending on the question whether this concerns someone else's behaviour or the actor's. If the observer were to take the place of the actor (partly) by putting himself in the other person's position (in other words: to show empathy), the difference in attribution disappears. The other individual's act (those of the actor), is more often imputed by the observer to the environment (external attribution, just like the actor would do himself) than is the case with attribution of the conduct of someone else who is just being observed.<sup>91</sup> The result is that the fundamental attribution error is reduced.<sup>92</sup>

This may also be of importance for the legal assessment. After all, if the observer (read: the judge) must or is willing and able to imagine himself in the situation of the actor, which means he shows empathy, he will have more consideration for the environment as a factor of causality. This reduces the distortion of the fundamental attribution error (assigning the conduct too much to personal characteristics). At first sight this seems to lead to a more-balanced assessment of each individual's causal contribution. Therefore there does not seem to be any harm when a judge puts himself, to a certain extent, in the position of the person addressed. When doing so (see para. 2.4.2.2), it turns out that judges think longer and harder. It would appear that empathic judges produce more-balanced judgments.<sup>93</sup>

**2.4.2.5 The Self-serving Bias and the Acceptance of Negative Results**

The self-serving bias discussed earlier may also have consequences for some legal issues. After all, the imputation of damage or loss to the tortfeasor will not always be sufficiently understood by him. As a result of this distortion, this actor will not easily attribute the negative result of certain acts (damage) to himself. At best, he will accept the result with difficulty as it does not match his own image.<sup>94</sup>

Obviously, the civil judge may be able to enforce that 'acceptance' by the person addressed, in the sense that he provides the other party with a title to enforcement of his judgment, but this bias will already have made the negotiations on the settlement

91 See para. 2.3.4; Regan & Totten 1975, and Vonk *et al.* 2003, p. 132.

92 One has to proceed with caution when linking both distortions, see B.F. Malle, 'The Actor-Observer Asymmetry in Attribution: A (Surprising) Meta-Analysis', *Psychological Bulletin* 2006, Vol. 132, No. 6, p. 896.

93 On this theme earlier already I. Giesen, 'Rechtspraak Is Mensenwerk', *Recht der Werkelijkheid* 2003-1, pp. 39 *et seq.* (with a response from Kerkmeester on pp. 45 *et seq.*). It must be said here that a judge, and that is the hard part of his work, must not identify himself too much with the victim because that can lead to underestimating the victim's contribution too much.

94 To this we must add that owing to the 'actor-observer bias' (see para. 2.3.4), parties may disagree on the interpretation of an event such as a traffic accident, see S.R. Wilson *et al.*, 'Attribution Complexity and Actor-Observer Bias', *Journal of Social Behavior and Personality* 1997, Vol. 12, No. 3, p. 710.

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96 See Babcock  
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97 Vonk *et al.* 20

of the claim more difficult.<sup>95</sup> Moreover, after the court's decision this bias may lead to an increased willingness on the part of the person addressed to lodge an appeal.

Preventing this error would be a bonus, considering the previous observations as more extra-judicial settlements and fewer appeal cases would save the parties costs<sup>96</sup> and reduce the judiciary's workload, but it is also very difficult. Debiasing is possible, though, because the self-serving bias is less strong if there is a bond with the other individual, but in tort law that is typically not the case. The parties concerned were not acquainted before the accident. To try and make the parties bond afterwards seems to be a sensible thing to do. It will not have adverse effects on the mutual acceptance and may even help it. That is perhaps also the reason why mediation, once initiated, often succeeds.

#### 2.4.3 *Interim Conclusion*

The previous observations demonstrate how, in a limited number of situations, the attribution errors discussed earlier may affect legal issues and, subsequently, which remedies we have available (or must have). In addition to this, I could have pointed out that the degree of perceived responsibility of an individual increases if his acts are intentional.<sup>97</sup> This thought fits in very well with our present theories on causation since the degree of fault (intent indicates a large degree of fault) plays a role in the imputation on the basis of Article 6:98 BW. This sub-rule (this is one of the factors of causal imputation) is thus well-chosen even though the very same consideration may also carry a certain risk (see para. 2.4.2.2). The latter is still of importance: it is not at all easy to attune psychology and rules of law to each other, but things will become even more difficult when contrary forces (distortions) are at work. The advantages that may be gained with this are such, however, that it is worthwhile making the effort.

#### 2.5 THE EFFECT OF ATTRIBUTION ON THE INTENDED BEHAVIOURAL EFFECT?

Before I come to the conclusion of this paper, there is still one last issue that must be addressed. In paragraph 2.2.2, I already addressed the aim of tort law (including its rules on causation) to prevent the potential tortfeasor to commit any damaging acts and to cause damage to another individual. So far, I have assumed that this so-called

95 In more detail L. Babcock & G. Loewenstein, 'Explaining Bargaining Impasse: The Role of Self-serving Biases', in: C.R. Sunstein (Ed.), *Behavioral Law and Economics*, New York: Cambridge UP 2000, pp. 355 *et seq.*

96 See Babcock & Loewenstein 2000, pp. 362. Earlier experience with negotiations does not annul the bias (pp. 362-363 and p. 367).

97 Vonk *et al.* 2003, p. 88.

preventive effect is present, at least to a certain extent.<sup>98</sup> The psychological views presented above also lead, in my view, to the deduction that attribution theory, the ideas on how people impute causes to persons or events, is essential for the answer to the question whether the intended behavioural effect of tort law can actually exist and does exist. The argument is as follows.

If the actor (in this case: the injured party, the person addressed) imputes the cause of a certain event (the event causing the damage) to himself, if he attributes the event internally, and if he does so with the (unconscious) aim of learning from earlier experiences (which is one of the reasons why persons attribute, para. 2.3.1), then my conclusion would be that the actor will act with more caution in the future (special prevention). And if he then tells his story to the people around him, this will also have a general preventive effect, I presume.<sup>99</sup> Since the method of (internal) attribution determines the learning effect and prevention here, and even though there is no input from tort law (which basically has nothing to do with this), the intended behavioural effect of tort law may yet be achieved (though by a different method) as the learning effect is in itself achievable.<sup>100</sup>

If the actor, however, imputes the event to another person or the local situation at the moment when the event occurred, if he attributes 'externally', the actor will also think that he goes scot-free as far as the cause of the damage is concerned. Thus, there is no reason to adjust his behaviour in the future and to act with more caution. The intended behavioural effect will not manifest itself and there is nothing tort law can do to change this. Tort law has no preventive effects as (stronger) attribution mechanisms prevent or annihilate any possible learning effects in advance.

When we link all this to the notion that people tend to attribute events to another individual (rather than to themselves) if the conduct in question has more serious consequences ('defensive attribution', para. 2.3.3) and particularly to the thought that success is attributed internally while failure is attributed externally (para. 2.3.5, the self-serving bias), the obvious conclusion would be that acts which cause damage – often behaviour with serious consequences which must be qualified as a failure – will lead to external attribution and therefore fail to have the intended behavioural effect. One will explain away one's own behaviour and will not be willing to learn.

98 See, generally on prevention (deterrence) and psychology, J. Darley, S. Fulero & C. Haney *et al.*, 'Psychological Jurisprudence', in: J.R.P. Ogloff, *Taking Psychology and Law into the Twenty-First Century*, New York: Kluwer 2002, pp. 37 *et seq.*

99 However, the empirical basis of this presumption should be examined.

100 It is difficult, anyway, to make any firm (or firmer) statements on this as the influence of the so-called consensus information on the attribution is not obvious, see para. 2.3.1.

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This conclusion is of major importance. The idea unfolded here forms, in my view, a possible explanation for the often suggested lack of preventive effect of tort law. When people attribute events externally there is no didactic effect. That attribution is too strong; tort law cannot compete with it.<sup>101</sup> Earlier events therefore will not lead to prevention of damage and this confirms the doubts on the preventive effect of tort law.

This explanation becomes even stronger, in my view, when we also incorporate the distinction that is often made by academic lawyers between the preventive effect when it concerns 'one-shotters', namely the private person or consumer who rarely faces the consequences of tort law or 'repeat players', such as companies who make their considerations regarding liability part of their decisions.<sup>102</sup> According to these academics, the preventive effect of tort law is stronger in the second case. This image matches the previous observations to the extent that the first group (the one-shotters) may be expected to attribute more externally because their own personal conduct is at issue (in other words: their self-image), whereas the second group (the institution-alized defendants) attribute the error they made internally within their organization as this does not concern an individual whose feelings of self-confidence are affected. The organization as a whole, the company, and not a particular individual, takes the 'blame' and points to itself as the guilty party. This organization may also be expected to act more rationally and to consider it important to learn from mistakes made in the past, which implies that this organization will sooner attribute internally than an individual does.<sup>103</sup>

## 2.6 CONCLUSION

The aim of this paper was to examine whether attribution as a psychological phenomenon fits in with the notion of causal imputation in the legal sense, and if not, whether both concepts can be aligned to some extent. The conclusion is that both concepts are not simply compliant. Therefore we should proceed with caution when we make decisions on causation issues and try to take into account the lessons from attribution theory. In addition to specific suggestions for improvements it has be-

101 This may be different (but I am now speculating) if the damages awarded to compensate for negligent behaviour are so weighty that an individual will learn from it anyway (tort law then contributes to the awareness regarding the attribution error), but it is not clear when that moment sets in and if it is at all achievable. Considering the present degree of insurance coverage and the fact that the wrongdoer will often not directly feel that a payment must be made, the 'learning effect' of tort law must be considered small, in my opinion. Moreover, if someone attributes externally and has to pay anyway he will consider it an unfair 'punishment'.

102 See particularly Van Boom 2006 and Giesen 2005b, pp. 148-149, with more references.

103 As to leave no doubts: this last mentioned expectation is one which is not confirmed by specific psychological research, at least not as far as I have been able to find out and it must therefore be regarded in that light.

