

# **Standardisation of Personal Injury Claims:**

## **Some preliminary remarks**

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### A. INTRODUCTION

This working paper contains some input that may help to structure the discussion on standardisation of damages at the expert meeting on in Tilburg on the 11<sup>th</sup> of January 2002. It tentatively addresses the issues mentioned in the memo attached to the letter of invitation for this meeting. We have tried to make the perspective as ‘international’ as feasible. Still, we have to apologise for the Dutch perspective and for using many Dutch examples. During the writing of this paper, we realised how little we know about the situation in other countries.

The first question to be addressed is what we mean by ‘standardisation’. For a discussion as the one envisaged, it is useful to start with a broad definition. A very broad definition would be: any measure that systematically improves the process of personal injury claim handling. A more narrow one would describe standardisation as ‘the process aimed at creating a set of standards, in which several interested parties (or their representatives) take part to develop (one or more sets of) rules and/or standards, and which strives for a level of acceptance of those rules and/or standards among the interested parties that is as broad as possible’.

Examples of forms of standardisation that fall within this broad definition are the following:

1 In England, the ‘*Guidelines for the assessment of general damages in personal injury cases*’ provide a number of specific guidelines to determine the amount of damages. These Guidelines are published by the *Judicial Studies Board* and are of

significant value in practice (although judges themselves tend to adjust the guidelines if necessary).<sup>1</sup>

2 The *smartengeldformule* (a formula for the calculation of damages for pain and suffering) as developed in the Netherlands by the Dutch Association of Insurers (*Het Verbond van Verzekeraars*): wishing to improve the handling of claims involving non-pecuniary losses, the insurers launched the *smartengeldformule* to determine the amount of damages to be awarded. The parties were expected to use this formula in their negotiations about individual claims. Being too one-sided, it has hardly ever been used.

3 The Belgian *Indicatieve tarief* (tables of indicative rates for the calculation of damages) of damages for non-pecuniary loss after traffic accidents: This is a set of guidelines and standard amounts relating to those guidelines, for which the Belgian judiciary took the initiative.<sup>2</sup>

4 Compilations of all the known cases involving an award of non-pecuniary loss bundled together in a book or a software system: Examples are the Dutch *Smartengeldbundel* and the German *Schmerzensgeld Beträge*, privately published books, edited by the ANWB and the ADAC, i.e. the Dutch and German automobile associations, respectively.<sup>3</sup> The books are largely dedicated to cases dealt with by lower courts and the (indexed) amounts are related to the seriousness of the injury. The books offer a very useful source of comparable materials, although their content is not binding in any way.

5 Institutionalising recourse: This involves the agreement between the parties involved in the Netherlands in recourse actions to standardise the handling of their respective recourse claims against each other, for instance, by agreeing to a lump-sum payment for all cases within a certain period.

6 The arrangement of Dutch insurers for the payment of *buitengerechtelijke kosten* (the extra judicial costs involved in determining liability and the amount of damages before legal proceedings begin, cf. Art. 6:97 Dutch Civil Code (*BW*)): this involves an agreement between several parties involved (liability insurers and legal aid insurers) to use a standard amount for extra judicial costs. This is now set at approximately EUR 840 per case handled.<sup>4</sup>

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1. On that aspect, Giesen 2001, p. 120 ff.

2. Schrijvers 1999, p 738 ff.

3. The Dutch version includes cases since 1959, the German version since 1980.

4. Weterings 1999, p. 96.

7 In France, the so-called *Baremas* are being used. These are specified sets of traffic accidents situations, for which percentages of blameworthiness have been fixed to determine the contributory negligence of the victim. In individual traffic accidents the *Barema* that has the greatest resemblance to the actual accident is taken into account to calculate the amount of damages.

## B. ADVANTAGES AND DISADVANTAGES OF STANDARDISATION

The current state of the discussion on standardisation of damages can be summarised by sketching the advantages and disadvantages of (a process of) standardisation as perceived by the participants in this debate. The disadvantages most frequently mentioned are:

### 1. *No Justice Done in the Individual Case*

A first and basic aim of (extra contractual) liability law in general is that of doing justice to the (personal injury) victim involved. A possible disadvantage of standardisation closely related to this aim is that the individual victim is not getting what he is entitled to.<sup>5</sup> One of the more important principles of the law of damages in several systems is that the total amount of loss that was really suffered by the victim should be compensated by the tortfeasor (we will refer to this principle as ‘the principle of total reparation’).<sup>6</sup> This may not be the case for some victims, if some form of standardisation is enacted.

This possible disadvantage can be overcome, to some extent, by introducing a form of standardisation that is sufficiently detailed (see below under G). Another possibility is to adopt a system in which the standards are not binding (in all situations), so that the outcomes can be varied to a certain extent, if this is necessary to do

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5. The importance of this is also stressed by Blumstein, Bovbjerg & Sloan 1991, at p. 173. See also Beer 2000, p. 18-19. On possible disadvantages also Stolker & Poletiek 1998, p. 78-80.

6. See, for instance, Hartkamp 2000, no. 415; Barendrecht, Kars & Moree 1995, p. 16, 19 and 20; Hartlief 2000, no. 196.

individual justice (see below under F).<sup>7</sup> As long as standardisation is dealt with as something that is an instrument helping parties otherwise destined to inefficient negotiations, nothing seems to stand between the victim and his just reward in damages. A real problem with individual justice might arise, however, if standardisation were to be enacted with rough and ready rules, which cannot be deviated from. A rule stating, for instance, that the loss of income of all victims of car accidents should be calculated on the basis of their actual monthly income immediately before the accident would seriously impair the rights of young victims with a promising career, and would unjustly benefit victims at the peak of their career.

The possible impact of standardisation on the principle of total reparation should be estimated with some form of realism, though. In practice, victims may have a hard time achieving full reparation. The costs of legal action may be high. The obstacles to reaching full compensation can prove to be great, because of the better negotiation position of liability insurers in situations of uncertainty on the facts (and maybe even the law). Standardisation may lead to lower outcomes for some victims, but improve their chances of securing these outcomes and lower their costs of doing so.

Furthermore, the principle of total reparation is not without exceptions. Calculating damages in an abstract manner, which is not an uncommon phenomenon in the law of damages, is already a deviation from this principle.<sup>8</sup> An important exception to the principle of total reparation is also that damages for pain and suffering are generally set at low levels.<sup>9</sup> Damages can hardly ever offer more than some form of comfort with regard to the grief suffered, especially in cases of severe disabilities.<sup>10</sup>

Summarizing, the idea of standardisation and the principle of total reparation are not by definition mutually exclusive.<sup>11</sup> There are indications in the literature on this subject that most of the important differences in outcomes under standards and under the current ways of handling claims for compensation, at least as far as damages for non-pecuniary losses are concerned, can be minimised by choosing the right type of standardisation.<sup>12</sup>

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7. This might work especially well since 'individualized justice' stems from a desire for flexibility in order to be able to fine-tune damage awards to make a victim 'whole' again, see Blumstein, Bovbjerg & Sloan 1991, p. 173.
  8. On this, see Hartkamp 2000, no. 417-418; Hartlief 2000, no. 207-208. This abstract calculation is not used for loss of income, see Storm, Kamp & Schön 1995, p. 177, but, as Bolt (Loose-leaf), art. 107, aant.12, states, and rightly so, even in those cases some form of abstraction will be present.
  9. See Hartlief 2000, no. 196. With regard to non-pecuniary losses, the ideal of full reparation is excluded from the start since no amount will as such fully compensate the immaterial damage suffered, see McGregor 1997, no. 1695; De Kezel 1999, 615. On standardisation of damages for pain and suffering, see also Geistfeld 1995.
  10. See Stolker & Poletiek 1998, p. 78-80.
  11. Wiechmann 2000, p. 65. See also Elzas 2000, p. 71.
  12. Stolker & Poletiek 1998, p. 78-80.

## 2. *Increase of Total Amount of Damages*

Liability insurers may be justified in fearing that standardisation will increase the total amount in awards that will have to be paid. Standardisation could well function as some sort of 'lowest threshold'. In cases in which someone would be worse off without the standardised amounts of a new system, a party involved will claim on the basis of the new system. In cases in which someone would be better off under the old system, a claim will be based on an exception to the new system. Furthermore, making the handling of claims easier is likely to trigger more claims.

Again, the situation under standardised damages awards should be compared to the one within the existing legal frameworks. If a Supreme Court decides, for instance, that the demands with regard to the evidence on the existence and amount of the victim's damage may not be set at a high level, which has in fact happened in the Netherlands,<sup>13</sup> this could well lead to the situation in which an extended amount of rewards will have to be paid by the national insurance companies. Hence, the current system does not prevent insurers from sometimes paying too much.

In this respect, it might also be wise to remember that at this moment, at least as far as products liability cases are concerned, under compensation seems to be the rule rather than the exception. This indicates that a rise in awards could be justifiable, at least to some extent.<sup>14</sup> Justifiable is not the same as acceptable to insurance companies, but most insurers seem to be willing to cover more risks, if this is done in a gradual, monitored, and controlled process. For them, standardisation may be an interesting tool for managing legal change, certainly when compared to being exposed to unpredictable developments in case law. In short and on a more general level, when debating the disadvantages of standardisation, it should be borne in mind that the current system is not an ideal one either and has several striking disadvantages.<sup>15</sup>

Like under compensation of victims, possible overcompensation by insurance companies could to some extent be evened out by the lower (transaction) costs of

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13. See HR 15 mei 1998, *NJ* 1998, 624 (Vehof-Vasters/Helvetia): the demands with regard to the proof of the existence of damage may not be set too high since it was the tortfeasor who created the factual uncertainty. In HR 14 januari 2000, *NJ* 2000, 437 note CJHB (Van Sas/Interpolis), the lower courts were given a bit more freedom in this respect. See also the German cases BGH *VersR* 1995, 422, at 424, and BGH *VersR* 2000, 233.

14. See Graddy 2001, p. 29 ff.

15. Cf. Blumstein, Bovbjerg & Sloan 1991, p. 172, pointing at inconsistency leading to unfairness. See also p. 174 (variable results in similar cases) and p. 175-176 (large discretion for juries and judges) and the list of disadvantages at p. 176 (variation encourages different views on cases, which impedes settlements, which in turn raises the cost of administrating the system' poor predictability raises insurance premiums' inconsistency undercuts the perceived fairness and legitimacy of the system).

dealing with personal injury claims under a standardised system.<sup>16</sup> If set up intelligently, a standardised system of claim handling can fix rewards for victims at such a level that the majority of victims and insurance companies are better off, because what they receive less or pay more is compensated by lower transaction costs. We therefore do not share the fear that standardisation will lead to lower awards or to higher awards in an important number of cases.<sup>17</sup> Additional safeguards can be found in the procedure of standardisation, where a certain measure of acceptance by all the parties involved should be built in (below under C).

### 3. *Lower Costs of Negotiations and Court Decisions*

Having thus dealt with the most frequently mentioned disadvantages of standardisation, it seems time to turn the perspective towards the possible advantages. Standardisation does have several advantages for both parties involved as regards the costs of dealing with claims.<sup>18</sup> When costs are not just taken to include out-of-pocket expenses, but also the opportunity costs of time spent, the costs of uncertainty, and the costs of stress and other negative emotions involved in negotiations on claims, the following advantages can be mentioned. Standardisation will lead to more certainty and predictability on (the content of) the law,<sup>19</sup> to faster out-of-court settlements of claims,<sup>20</sup> to fewer burdens on and for the victims,<sup>21</sup> and to better possibilities for fixing insurance premiums, at an earlier stage, possibly also leading to lower premiums.<sup>22</sup>

Whether these advantages really pay off, however, depends on the quality of the standards. Very complicated standards, standards that lead to difficult problems of interpretation, or standards that need information to be applied that is very costly to obtain, may even lead to higher transaction costs.

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16. Vranken & Weterings 2000, p. 61; Hennekam 2000, p. 13. Cf. Blumstein, Bovbjerg & Sloan 1991, p. 176.

17. On this aspect, see Hennekam 2000, p. 13; Vranken & Weterings 2000, p. 61.

18. Weterings 1999, p. 118; Vranken & Weterings 2000, p. 60; Bovbjerg, Sloan & Blumstein 1989, p. 969; Kaplow & Shavell 1996, p. 202-203; Blumstein, Bovbjerg & Sloan 1991, p. 212.

19. For instance, Blumstein, Bovbjerg & Sloan 1991, p. 178 and 212; Barendrecht 1998, p. 116. This in turn will lead to promoting the fairness of awards and maintaining public confidence in the judicial system, see Blumstein, Bovbjerg & Sloan 1991, p. 186.

20. Vranken & Weterings 2000, p. 60; Van Dam 2000, no. 825.

21. Vranken & Weterings 2000, p. 60.

22. See Blumstein, Bovbjerg & Sloan 1991, p. 176, 178 and 186 in relation to keeping insurance available. On the advantages of standardisation: Cane 1999, p. 137-138; Blumstein, Bovbjerg & Sloan 1991, p. 176 and 186; Knol 1986, p. 77; De Haas & Hartlief 1998, p. 4; Giesen 2001, p. 122.

#### 4. *More Equality*

An advantage worth mentioning is that standardisation promotes equality.<sup>23</sup> Under a vague rule, cases that should be treated in a like manner may be treated very differently. In a transparent system of more precise standards, this may occur less frequently. On the other hand, the standards may expose inequalities that were not visible to the parties under a rule that is more vague. So the perceived inequality might even rise in a system with standards.

Questions for discussion:

- Do the (perceived) advantages of standardisation actually outweigh the (perceived) disadvantages?
- Will the goal of doing individual justice be lost if a system of standardisation is chosen or are the possible solutions to try and prevent this adequate?
- Will there be an increase in the total amount of awarded damages in a standardised system? Why (not)?
- Is the fear that damages will be set at too low a level justified?
- These questions are not really relevant. What is relevant is .....

### C. EVALUATION: SETTING GOALS FOR STANDARDISATION

#### 1. *Evaluation*

The advantages, and the prospects of minimizing the disadvantages, seem to justify more research into the possibilities of designing a system of standardisation of handling personal injury claims. It might even be possible to claim that standardisation is

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23. See Barendrecht 1998, p. 54, and Von Bar 1996, Rdn. 568. Cf. Blumstein, Bovbjerg & Sloan 1991, p. 212, Wissler, Kuehn & Saks 2000.

necessary, to some extent, whatever its advantages or disadvantages, because the huge number of claims may lead to a very real, factual barrier to carefully judging each individual claim on its own merits. This argument of the maximum workload the system can sustain is similar to the one on the costs of claim handling. It relates to the aggregate costs of claim handling, instead of the costs per claim. Standardisation is necessary to prevent the system from collapsing, according to some authors.<sup>24</sup>

As we have seen, achieving all or some of the advantages mentioned depends largely on the quality of the standards or rules that the parties have agreed to. Do they really cover all the frequent cases? Is there enough support for the solutions chosen? Do they really educe the burdens of the current process? The quality of the rules and/or standards will in turn depend on the investments into the process of creating them. Trying to regulate a larger number of details through the drafted rules will probably lead to more costs in creating and applying these rules.

A recurring problem with standardisation, especially if more detailed drafting is excluded, will probably remain the issue mentioned above, of doing justice to the individual.<sup>25</sup> It could well be that 'individual justice' is not served enough in this system. However, a system of standardisation can, and should, achieve a fair amount of differentiation, for instance, by incorporating some form of flexibility with regard to the measure of the binding force of the chosen rules or standards or by introducing minimal and maximum amounts of awards. A second point in this respect is that the current system of non-standardisation seems to undermine another important principle of law, the principle of equality, since the amounts of awards differ quite extensively in similar cases.<sup>26</sup>

Thirdly, there is a reason to question the effectiveness of the present system of non-standardisation when it comes to doing individual justice. At least, the effectiveness of both possibilities should be compared. It might well be that a system of standardisation serves the individual better. Indeed, there are serious doubts as to the preference for the present situation, at least from the point of view of the personal injury victim. Is a situation of negotiations under rather vague rules between victim and insurer really in the best interests of the former? The balance, or rather: the division of power is clearly not to the advantage of the victim. In short, are those advocating

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24. Vranken & Weterings 2000, p. 57.

25. If the objection is that one plaintiff would get too big an award, while another would receive too little, we like to point to the fact that the system would still lead to a justified and correct average in amounts of damages and would lead to a reduction of costs, thus saving and making a profit for all involved, cf. Bovbjerg, Sloan & Blumstein 1989, p. 969.

26. Cf. Bovbjerg, Sloan & Blumstein 1989, p. 924 (who point out that the faith in the judicial system is hampered and that the deterrence function of liability law is lost), p. 947 ff. (at which point they too relate to the alternative of minimal and maximum amounts) and p. 964.

against standardisation (mainly the representatives of the plaintiffs) really seeing what is best for individual victims? Or do they overestimate their abilities to reach better than average outcomes for their clients? Do they prefer solutions that coincide with their own interests as paid representatives of the victims?

## *2. Optimising the Outcome: Using Aims to Guide and Evaluate the Standardisation Process*

Optimising the advantages and minimizing the disadvantages is a complicated task. Having decided, given the possible gains, that it is time to embark on standardisation, the decision-makers on the part of either of the parties have to deal with this problem. A way to manage this is to list the aims of the standardisation process and to monitor to what extent these goals are attained during the actual process. These aims may overlap, or conflict. What matters is that it is possible to reach some degree of agreement on the extent to which these goals are achieved and to establish how different alternative forms of standards score on these variables. These aims might include:

- reduction of administrative costs;
- reduction (perceived) of inequality at the level of application;
- more predictability of individual outcomes;
- more predictability of aggregate outcomes;
- sensitivity to individual circumstances;
- flexibility with regard to new developments;
- conformity with existing legal standards (in both statutes and case law);
- acceptability to interest groups;

What is apparent here is that this list of standardisation aims includes (most of) the advantages of standardisation and the disadvantages that have to be surmounted. Given the attention devoted to these (dis)advantages in the previous part of this section, we need not elaborate too much on these specific aims.<sup>27</sup> Specific mention should be made of the fact that, not surprisingly, the aim that is most important to one party (e.g., reduction of administrative costs for insurers) may not be the aim most important to the other (e.g., sensitivity to individual outcomes for (organisations of) victims).

Questions for discussion:

- What is (are) the most important aim(s) of standardisation?
- Is this aim (are these aims) reconcilable with the interest of all the parties involved? How could this be done? Or: Why can it not be done?
- These questions are not really relevant. What is relevant is .....

#### D. CRITERIA FOR STANDARDISATION

Having decided to try and achieve some sort of standardisation, the follow-up question is whether it is possible to translate the aims mentioned above into more concrete criteria. Before starting a standardisation process, the aims may have to be defined and translated into criteria for the process and its outcomes. These should not be too rigid or they may stifle innovation in the subsequent standardisation process.

##### 1. *Procedural Criteria: Who is Involved and How?*

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27. The issue of acceptability will be addressed in detail in § D below.

When drafting a certain type of rules or standards for a certain type of relationship and for certain different interests involved, it will have to be clear what the procedure is.<sup>28</sup> For example, it is possible to have someone develop, largely from his own perspective, certain rules, having heard the representative interest groups, followed by (non-)approval of those rules by the different groups. However, it is also possible to organise the process of developing the standards or rules as a (tightly scheduled) process of negotiations between the interest groups involved. (See on procedures for standardisation in more detail § I).

Before embarking on standardisation, it seems wise to have a clear picture in mind of what to do: what are the goals, what are the means to get there, etc. Standardisation is a time consuming and costly process,<sup>29</sup> and all parties must try to prevent having regrets afterwards with regard to the time and energy devoted to it. Often it will be useful not only to try to get to clear procedural agreements, but to also try to agree beforehand on the goals of the process and on the criteria which the outcomes will have to meet. This will enhance the efficiency of the project.<sup>30</sup>

## 2. *Translating Aims into Criteria*

The parties in the standardisation process have to reconfirm the goals of the standardisation process. Usually this will include the quick and efficient handling of the process of handling personal injury claims, but the parties can also aim at more equality, or a better position for the weaker party.<sup>31</sup> The next step is to move from the goals to more concrete criteria for (the outcomes of) the standardisation concerning the most important controversies resulting from conflicting goals. For instance, if the goal is the reduction of administrative costs, the parties could agree that the outcomes of the disputes involved (the total amount of awards in damages) should remain the same on average. This will enhance the negotiation process, in which the criteria could serve as a means to re-unite diverging interests. Depending on the goal of the standardisation process, criteria relating to objectivity, efficiency, speed, etc. could be used.

Criteria relating to the required degree of acceptance by the parties are important as well. Even the idea of trying to get to a standardisation of damage awards seems to need a certain amount of acceptance first. This acceptance is slowly emerging, although

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28. Beer & Colignon-Smit Sibinga 2000, p. 9, also underline that much depends on the way the standardisation is handled.

29. Cf. Barendrecht 1999, p. 81.

30. Meredith & Mantel 1995, p. 200 ff.

31. For instance, Barendrecht & Weterings 2000a, p. 1-2. Cf. Vranken & Weterings 2000, p. 55.

critics are still voicing their concerns.<sup>32</sup> The degree of acceptance is closely related to the measure of satisfaction with the outcome for the parties involved and thus, to a large extent, to the chances of the standardisation being successful in practice. A rule that is not accepted by a considerable proportion of the ‘users’ will not have much effect. The chosen method of standardising must therefore be the one having the highest possible degree of acceptability to all the parties,<sup>33</sup> and the parties involved should have the opportunity to comment on the outcomes.

A Dutch example, if we may, might explain this. In 1984, the Dutch Organisation of Insurers (*Verbond van Verzekeraars*) created the *smartengeldformule*, a formula on how to calculate awards of damages for pain and suffering (non-pecuniary losses). This formula was a one-sided draft in the sense that the other parties (the counterparts of the insurance companies) were not involved in the creation of this formula. The resulting lack of acceptance created is still seen as one of the more important reasons why this formula never caught on.<sup>34</sup>

A limit imposed by other aims is that acceptance by all participants should not be secured at the expense of the quality of the standards. Settling controversies by allowing ambiguities in the rules, for instance, should be a measure of last resort, because it will seriously impair the usefulness of the rules. Moreover, this often comes down to letting individual parties settle these controversies in all their cases, instead of dealing with them once and for all.

Questions for discussion:

- Is it possible to translate the aims set out above into more precise criteria, which the outcome should meet?
- What are the most important criteria in this respect?
- Is the degree of acceptance by the parties involved as important as we think or could certain ‘disagreements’ in that respect be circumvented?

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32. See, for example, *Kamerstukken II* 1999/00, 26.630, nr. 2, p. 15; Spier 1997, p. 61.

33. See, for instance, Barendrecht & Weterings 2000a, p. 19 and 20; *Kamerstukken II* 1999/00, 26.630, nr. 2, p. 15.

34. On this formula, see Stolker & Poletiek 1998, p. 77-78; Lindenberg 1998, p. 237-238; Weterings 1999, p. 93-94.

- These questions are not really relevant. What is relevant is .....

#### E. STANDARDS RELATING TO THE CALCULATION OF DAMAGE AWARDS OR RELATING TO THE PROCESS OF CLAIM HANDLING?

Standards may be related to the calculation of damage awards or may be of a procedural nature. The first type could, for example, be a system of fixed amounts to be paid as compensation for a specific injury (*substantive* standardisation). The second type could consist of some form of standardisation of the process of personal injury claim handling (*procedural* standardisation). Of course, a number of variations are possible within each category but for now we would like to focus on these two main types.

##### 1. *Substantive Standards*

First, there is standardisation of the damage award itself. When determining the amount of damages for a certain form of loss, the decision-maker does not look at the individual case before him or her but starts from a fixed standard, for example, by connecting a certain amount in damages to a certain loss or category of loss.<sup>35</sup> For instance, for each hospital visit the victim has to make, a sum of for example EUR 0,20 per kilometre travelled is awarded to cover transportation costs.

##### 2. *Procedural Standards*

Standardisation could also focus on the process of dealing with claims. The steps that the parties have to take to determine what damages the victim is entitled to can be put in a standard form. Issues that can be dealt with are communication, the fact-finding process, the determination of the (correct) interpretation of the relevant facts, and the process of negotiations determining the amount of the award. For each step, a certain form (oral or in writing), a time-table (each next step should, for example, be taken

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35. According to Vranken & Weterings 2000, p. 60, this form of standardisation could very easily work for small, non-variable forms of loss (travel expenses paid out per kilometre; awards per day of hospitalisation).

within 4 weeks), etc., can be laid down. One could even come to some sort of ‘Code of Conduct’ with regard to the attitude of the parties involved in the handling of personal injury claims.<sup>36</sup> Vranken and Weterings suggested designing what they call ‘general standards for processing claims’ (*algemene procesvoorwaarden*). These general standards should then specify the policy of the liability insurers with regard to claim handling.<sup>37</sup>

Questions for discussion:

- As a starting point, a division in the two forms of standardisation mentioned above as two prototypes seems plausible or are there more ‘prototypes’?
- In what types of situations should either prototype be used?
- Is a combination of the two prototypes possible/preferable?
- What advantage, if any, does one type have over the other? What are the advantages and disadvantages of the two types of standardisation?
- These questions are not really relevant. What is relevant is .....

#### F. BINDING FORCE OF THE RULES THAT RESULT FROM THE STANDARDISATION

Another variable is the binding force of the resulting rules, for instance, the ones on the quantum of damages. At first sight, a dichotomy prevails in thinking about rules. A rule is either enforceable in court as a binding rule or not. In this line of thought, whether the rule is a binding one depends on the way it is enacted: by the legislature, or through delegation to another authority.

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36. Vranken & Weterings 2000, p. 57.

37. See Vranken & Weterings 2000, p. 57 ff.

## *1. Court Discretion*

In reality, the picture is much more diverse. Courts often have a certain degree of discretion in applying rules. Some possible situations are mentioned below, ranked according to the degree of discretion granted to the courts.

1. The rules may be binding in all cases, with no power at all for the courts to deviate from them. In practice, this situation will occur infrequently. Often the courts will have some discretion, because they can invoke general principles of reasonableness or fairness, or even constitutional clauses, in order to reach a fair solution in a case where the rules would clearly not lead to such a solution. When no discretion exists, and the rules lead to unfair results in some cases, as rules sometimes do, there will be pressure on the courts to create discretion. Creative lawyers will try to invoke rules that can trump the rules at hand.
2. Other rules may be binding in all cases, except in situations of concrete hardship. This discretion can be provided by a hardship provision in the rules themselves or, for instance, by a constitutional provision.
3. Many rules of private law are binding in principle, but may be trumped by more general rules in situations that differ in some relevant respect from the situations for which the rules were intended. In most countries, this is the practical state of affairs with respect to rules formed in case law. Other courts, at least courts lower in the hierarchy, will mostly feel bound by such a rule, but feel free to deviate from the rule when they think the circumstances require this.
4. A different category is formed when courts accept rules as generally good practice. A court may, for instance, announce in a decision that it will apply a certain set of rules in future cases. The court does not feel bound to do so because the hierarchy of the legal order imposes the rules. It merely binds itself, often for the practical reason that a public announcement that it will apply certain rules in the future enables the parties to settle their disputes out of court, thus diminishing the court's workload.
5. Rules may also influence court decisions when interest groups to whom one or both of the parties belong publicly accept them. An example is the German set of rules on compensation for the loss of the possibility to use a car during the time necessary for repair. Most courts will at least feel the need to explain why they do not follow such rules, when these were carefully considered by representatives of the parties and

regularly updated following new developments or changes in attitudes regarding fair compensation.

6. As academics are all too aware, the mere formulation of a rule by someone who has apparently devoted at least some time to thinking about the subject is bound to exert some influence on a court decision. In practice, not every solution brought to the attention of the court will be considered. Legal academics have a lead over other problem solvers, because their writings are more likely to be brought to the attention of a court and also because they tend to look not just at the substance of the solution, but also show the court how the proposed solution can be fitted into the existing patchwork of rules and earlier court decisions.

## 2. *Rules as Tools that Limit the Circumstances to be Considered in 'Normal Cases'*

Which degree of binding force should rule-makers strive for?<sup>38</sup> Most discussions on such topics tend to end with the conclusion that 'it depends'. This issue is close to the debate on rules and standards that has been going on in American literature since the early 1990's. There are two main perspectives in this literature:<sup>39</sup> one departing from legal philosophy<sup>40</sup> and one from law and economics.<sup>41</sup> One familiar outcome of this research is that rules are very useful tools to simplify decision-making, because they limit the circumstances to be considered to those immediately relevant for the application of the rule. Moreover, they are summaries of earlier experience in making similar decisions. The danger of rule-based decision-making, however, is precisely that rules stop the decision-makers from considering circumstances that are relevant, but not contemplated by the rule. In order to prevent this, Schauer has argued that rules should be presumptions. They should not be reasons to close the decision-makers eyes to other circumstances than the ones relevant under the rule, but to glimpse at them, in order to check whether they are relevant or not. Rules save time and effort, because they make it unnecessary to fully inspect all the possibly relevant circumstances.

## 3. *Rules as Tools to Minimize Decision Costs and Error Costs*

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38. See for example Blumstein, Bovbjerg & Sloan 1991, p. 179, using non-binding information (on awards of damages in similar cases) as a 'presumptive benchmark'.

39. For an excellent overview, see Kaplow, Encyclopedia.

40. See, for instance, Schauer 1991.

41. Kaplow 1992, p. 557-629; Kaplow 1995, p. 150-163.

Another important outcome is that leaving more or less discretion to courts can be seen as a matter of minimizing decision and error costs. Designing more precise rules with less discretion requires more effort, but saves costs at the time of application. On the other hand, errors in drafting the rules have more consequences than errors in individual cases. As Sunstein has argued, in the end, the choice between formalism and leaving more discretion to courts is an empirical question.<sup>42</sup> Much depends on the quality (and speed, we might add) of the judges to whom the decision is entrusted, as compared with the quality of the rules enacted on a higher level. In the following, we will build on this literature, and expand it a little bit to account for the psychological and economic incentives for judges and other lawyers involved in the decision-making process. The main argument is that these add to the error costs of a rule-based system, when rules are just instructions that leave the judge no discretion.

#### 4. *Consequences of Striving for a Higher Degree of Binding Force*

As a rule of thumb, striving for a higher degree of binding force will lead to more effort being necessary to arrive at the norms. More information is needed, because the decision-makers will want to have more certainty that they are imposing the appropriate rules. Interest groups will have more reason to intervene, and with heavier ammunition. Sometimes there will even be opposition from the courts and lawyers that have to apply the rules. A mixture of different concerns can nourish this opposition. Both groups may have sincere worries about the quality of outcomes under strict rules, but their personal interests may slumber in the background. Judges are bound to lose some of their discretionary power that enables them to reach outcomes they perceive as just. Lawyers lose some of their influence over the outcome as well, may have the feeling that they contribute less to the safeguarding of the interests of their clients, and will probably suffer financially, because the easier resolution of disputes is not always compensated by other sources of billable work.

At first sight, a higher degree of binding force will obviously enhance uniformity, but the forces described above will sometimes work in the opposite direction. Courts and lawyers will have incentives to regain the lost discretion by finding ways to get around the rules. In the long run, most of the strictest rules will be softened by all kinds of trumps, higher rules like constitutional ones and general principles. However, the same effect may be achieved by developing a new ground for a claim or even a completely new action, to which the original rules do not apply, or, on the part of the defendant, an entirely new line of defence. This process of softening may lead to a new equilibrium, where the rules are applied to situations in which they give the right solutions and in which ways around the rules are used just in those exceptional cases where applying the rules would lead to undesirable results. It is questionable whether this equilibrium will

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42. See Sunstein 1999.

always be a stable one. The essence of the process described is that judges and lawyers will have to set aside the rules or find ways around them. In a sense, the rule becomes their enemy. This may result in the rules being eroded completely. There are even cases in which the highest courts have refused to accept an intricate system of rules developed by lower courts or interest groups, because they would lead to undesirable results in some exceptional situations.

##### 5. *Consequences of Using Rules with a Lower Degree of Binding Force*

When the likely developments after the rules are enacted are taken into account, a lower degree of binding force may be preferable. It makes a big difference whether courts and the lawyers appearing before them see rules primarily as instructions, which they have to follow, or primarily as tools that help them do their jobs of deciding and negotiating claims in a better way. Granting them discretion on whether to follow the rules might change their attitude towards the rules. If they see rules as tools, they might be more willing to consider applying them, and not to see them as an enemy in a battle to reach a fair solution in the individual case. When not applying them in such a case is allowed, they do not have to go around them or find higher norms to override the rules. They can leave the rule in place, but craft an exception with a scope of application that is necessary from a substantive point of view and is not determined by the scope of the higher rule invoked. In other words, the process of adjustment and refinement of the rules can be much more controlled and focussed on improvement.

A lower degree of binding force may lead to anarchy, however, if courts and lawyers simply go their own way. Why should they follow rules when they do not bind them? The answer is probably that the majority will follow rules when this is advantageous for them. When the rules are of such a quality that they really help people to arrive at better decisions and to arrive at them more quickly, the majority will follow them. Whether the minority not wishing to follow them is big enough to endanger the equal application of the rules will be determined also by the culture of the relevant court system. In a highly individualistic culture, with much stress on individual judgmental independence, the minority might be considerable. If joint responsibility, learning from each other, and team spirit are part of the culture, courts can be trusted to sort out the individual differences in approach over time.

Questions for discussion:

- Is it true that the rules on the quantum of damages would be likely to erode over time if the degree of discretion left to courts is too low?
- Can rules with little or no binding force lead to the benefits to be expected from standardisation?
- These questions are not really relevant. What is relevant is .....

#### G. DETAILED RULES OR MORE GENERAL RULES

Rules can be detailed and tailored to many different specific situations or they can be formulated in more general terms. This issue can also be seen as an aspect of minimizing decision and error costs. The general approach to this topic also includes an analysis of the preventive effects of more detailed or more general rules.<sup>43</sup> Although rules on the quantum of damages obviously have some preventive effects, these effects are bound to be minimal. It is reasonable to assume that people have a fairly general but sufficiently realistic picture of the amount of damages they will have to pay when they commit a tort.<sup>44</sup> If this assumption holds, the focus can be on the decision costs and the error costs involved in drawing up and administering the rules.

##### *1. More Detail will lead to Higher Decision Costs at the Time of Formulation of the Rules*

Formulation costs will be higher when the rules are more detailed. Formulation costs have to be earned back by decreases in decision costs at the time of application. So in general, the more cases the rule applies to, the more detailed the rule can be. There is a danger that rules become too complex to be applied smoothly. Usually, the complexity of application can be reduced by better formulation, by rearranging rules and exceptions, or by explanatory comments that work as a manual. However, systems of rules that are too complex may also lead to inequality between experienced and inexperienced users

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43. Kaplow 1994.

44. Or (which amounts to the same thing) that they do not know more about the amount of damages they would have to pay under a system of more precise rules than under a system with more general rules, because they have not studied the rules.

and thus to errors. How precise rules can be depends also on the degree of specialization of the users.

## 2. *More Detail will lead to Lower Error Costs*

The degree of precision required is also related to the amount of error that is acceptable. Rules on purely financial matters like the quantum of damages do not need to be precise to the last Euro, Pound, or Dollar. What level of precision is needed is not so easy to determine, however. Some numbers may help to get some focus in this type of discussion. Rules may be acceptable for small claims when the resulting total damages award in the majority of cases is not more than 20 to 30% different from the award that would be set, all individual circumstances considered. For higher claims, the tolerance for error in the majority of cases will be lower. A deviation of 10 to 20% might be acceptable here.

This kind of exercise may lead to concrete criteria that help to determine the level of detail that is needed. Applying the 10 to 20% criterion to loss of income, for instance, would lead to a fairly fine-grained system of rules on this subject, distinguishing between many different career paths of the victim, had it not been harmed.

Questions for discussion:

- What level of detail is required for which types of damages?
- How expensive (in terms of the investment in drafting and negotiating the rules) are more detailed rules?
- Is the amount of acceptable error in the majority of cases a useful way to approach this problem?
- These questions are not really relevant. What is relevant is .....

## H. A CONFLICT RESOLUTION SYSTEM: PART OF THE STANDARDISATION PROCESS?

Even with standardised damages (substantive standards) or processes for claim handling (procedural standards), there will still be room for conflicts. For example, disputes can arise about the exact amount of damages the victim is entitled to according to the standards. If standards are developed for the process of claim handling, differences of opinion can occur about the question of whether or not such a Code of Conduct is followed. The effectiveness of a set of standards therefore seems to depend, at least to a certain extent, on the way disputes are handled. The time and costs saved by standardisation can easily evaporate when time-consuming proceedings are used to solve these conflicts. An alternative might be to use less expensive and less formal (alternative) forms of dispute resolution. It also seems that easy access to a cheap possibility of resolving problems leads to more support for the standards.<sup>45</sup>

### 1. *Evaluative and Facilitative Dispute Resolution Procedures*

In relation to solving conflicts, there are several possible procedure options. Litigation and arbitration are well known. A problem with these is that they are time-consuming and expensive.<sup>46</sup> Procedures that seem to fit the ideal of an easily accessible and cheap resolution process better are, for example, fast track versions of arbitration or procedures in which an expert can give, on short notice, a binding opinion. A more creative method is, for example, the procedure used in France in connection with conflicts arising from claims between insurers involving rights of recourse.<sup>47</sup> This method obliges parties to move the conflict to a higher level in their respective organisations if they fail to solve the problem themselves. Only if the problem cannot be solved on the highest level, a third party is involved in the conflict resolution.

Depending on the envisaged users of the standards and the different kinds of relationships between them, more 'soft' forms of conflict resolution could be considered. These devote more attention to restoring and improving the relationship between parties. In personal injury claim handling, the atmosphere can easily get

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45. See Barendrecht & Weterings 2000, p. 17 and 33-35.

46. The high amount of preparation time needed for arbitration cases will make the costs of this process as high as legal proceedings before a court, see Hirst & Morrish 1991.

47. Based on the *Loi Badinter*. On this aspect, see Barendrecht & Weterings 2000, p. 17 and p. 33-35.

hostile because of the strong opposing interests.<sup>48</sup> To encourage a constructive negotiation process, a soft conflict resolutions system might then be helpful.

There are a variety of soft ADR forms.<sup>49</sup> Mediation is a well-known example. The process provides a mediator facilitating the stagnated negotiations between parties. Other forms that could be thought of are conciliation, mini-triage, or mini-trial.<sup>50</sup> A combination of different conflict resolution procedures could also be effective. In that way, it is possible to benefit from the different advantages of the several forms of dispute resolution. An example that has worked in practice is a mix of mediation and arbitration, known as ‘med-arb’. This form of conflict resolution aims at finding a solution while serving the interests of both parties. If the parties do not succeed in finding a solution, however, an arbitrator will decide upon the matter.<sup>51</sup> A final alternative would be to develop a resolution system that provides parties with several options to choose from. This would allow the parties to pick a procedure that fits the specific conflict at hand best.

## 2. *Advantages of Incorporating a Dispute Resolution System in the Standards*

Making a conflict resolution system part of the standardisation process, regardless of what form is chosen, seems to have advantages in itself. Firstly, this makes it possible to tailor the system to the type of standards the parties want to develop.<sup>52</sup> This might be useful especially when future-users themselves are involved in the standardisation work, because they can choose in which way the (possible) future conflicts arising from those standards will be resolved. The adoption of a dispute resolution procedure by the parties will be less of a problem if parties have agreed on it before the dispute arises, or if they have developed these procedures themselves. The positive ‘spirit’ the parties might feel

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48. At the time this paper was written, there was a discussion in the media between representatives of lawyers and doctors (*Werkgroep Artsen Advocaten, WAA*) and the Dutch Organisation of Insurers (*Verbond van verzekeraars*). It started when a WAA representative accused the Organization of Insurers of unethical behaviour during claim handling: an example of the (sometimes) hostile environment in which claim handling takes place. See *Telegraaf*, 24 September 2001, *Bondig*, October 2001, p. 20.

49. The use of ADR forms in personal injury claim settling is mentioned, amongst others, by Cane 1996, p. 358-366. For use in medical negligence cases, see also Woolf 1996, Chapter 15.

50. For an overview of these forms, see Goldberg, Sander & Rogers 1999, p. 272-290.

51. The use of an arbitrator to speed up the process of negotiations between parties has been promoted before in connection with personal injury, see Blumstein, Bovbjerg & Sloan 1991, p. 16.

52. Which implies that the choice of a conflict resolution system should be made after parties have agreed on the type of standards that they want.

during the constructive development of a set of standards might also provide fertile soil for choosing or developing an efficient conflict resolution arrangement.<sup>53</sup>

On the other hand, it should be taken into account that the development of a tailor-made conflict resolution system is a difficult and therefore time-consuming process. This will make the standardisation process as a whole even more expensive.<sup>54</sup> An option to save costs is to let specialists in process design develop such a procedure. In this case, the interested parties would only have to make their wishes and interests clear to the conflict resolution system designers.<sup>55</sup>

Questions for discussion:

- Is a special conflict resolution system really needed or could existing procedures also be used?
- Which procedure/system would fit the special situation of personal injury claims best?
- What criteria should a conflict resolution system meet?
- Is it wise to let the developers of the standards also choose or develop a conflict resolution arrangement?
- These questions are not really relevant. What is relevant is .....

## I. THE BEST WAY TO ORGANISE THE STANDARDISATION PROCESS

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53. A disadvantage of an approach in which parties have to decide which system to use to resolve their problems if the problem already exists is that the atmosphere probably will be less constructive due to polarisation.

54. See Barendrecht 1999, p. 82. But then again, his investment might be worth the cost if more conflicts can be prevented and transactions costs can be saved.

55. On process design, see Ury, Brett & Goldberg 1993. See also Constantino & Merchant 1996. For the Netherlands, see Barendrecht & van Beukering-Rosmuller 2000, p. 31-39.

Various players in the field can initiate the standardisation process. The first question is of course who is the most suitable person or organisation to take the initiative and develop the actual standards. Would that be the legislator, the judiciary, insurers, victims, scholars, other third parties, or maybe a combination of (some of) these groups? A second question that needs to be answered is what role the several parties should play in the process of developing standards.

The most important indication for an answer seems to be connected to the kind of standards that is aimed for and what they should look like. Therefore, a decision needs to be made concerning the aims of the standards, concerning the choice of standards relating to the calculation of damage awards or the process of claim handling, concerning the question of whether they should be binding or non-binding and detailed or general. The answers to these questions will make it easier to decide what person or organisation is suitable for the job.

Apart from the type of standards, (natural) incentives for the parties to take up standardisation should be taken into account. What incentives might influence the parties will be dealt with in more detail in section J. For now, we will take a brief look into the reasons to involve the different parties, and the qualities they (are supposed to) have in connection with the different types of standards.

### 1. *Self-Regulation*

The future users themselves, such as insurers, personal injury lawyers, and (potential) victims could play an important role in drafting the standards. Since they are after all the parties who will have to work with the standards, they should be given the opportunity to make themselves heard. Letting them do the actual standardisation work themselves would give them the best opportunity to tailor the standards to their interests and wishes. The process would then lead to some sort of self initiated self-regulation.<sup>56</sup> If the goal of the standardisation process is to develop standards for the calculation of damage awards, they have the necessary experience and knowledge. Other parties that should also be involved in drawing up the standards for these same reasons are, for instance, medical advisors and labour specialists.<sup>57</sup> If these parties<sup>58</sup> draft the standards together, they can negotiate directly about the amount of the different damages. The

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56. Something the Dutch and probably also other European legislators are fond of because it saves work and money. See Ogus, *Encyclopedia*, p. 587.

57. For an overview of the different parties involved and the role they play in the claim handling process, see for example Tromp 1996, p. 29-49.

58. It seems advisable that these parties develop the standards together. In this respect, much can be learned from the mistaken one-sided attempt of the *Verbond van Verzekeraars* in the past. See § D.

same applies to the standards for the process of claim handling, for example, resulting in a Code of Conduct. If parties decide that the standards should be binding they can make binding agreements. If they do not want binding standards, they can choose for non-binding guidelines instead. The parties among themselves can also make the choice between more detailed rules and more general standards.

The strongest incentives for insurers, lawyers, and victims to work on standards will be related to the financial advantages and the timesaving effect that standards can have.<sup>59</sup> These advantages will encourage parties to do their best to come up with an effective standardisation system and will make them far less reluctant pay for the process themselves. As long as the total benefits are higher than the total costs of engaging in standardisation, it is attractive for them to engage in standardisation.<sup>60</sup> The problem is, however, that the parties that directly benefit from the creation of standards are not the ideal leaders of a standardisation process. The reason is of course that they have an interest in an outcome that will bring them the highest benefits. Therefore, in order to design a set of standards that is accepted on the largest scale, it might be wise to ask a third party to lead the standardisation process.

## 2. *Representation Problems*

Another issue that has to be dealt with when considering the question of parties developing standards is the representation of the interested parties during the standardisation process. During the drafting of the standards, all interested parties should be able to make their interests and wishes heard. This can be realised by having face-to-face negotiations with all interested parties present, or, for example, by asking the interested parties to give their opinions on proposals drafted by one of the parties. Because of the parties involved are too big to negotiate with all the members of all the groups present, they must be represented by spokespersons.

Insurers already have spokespersons. Members of the Board of individual insurance companies and, on sector level, the Dutch Association of Insurers (*Verbond van Verzekeraars*), could represent this group in negotiations about standards. Personal injury lawyers could use board members of leading (personal injury) law firms or representatives of the *Vereniging voor Letselschade Advocaten* (Association for Personal Injury Lawyers) to make them heard. The victims of personal injuries,

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59. Barendrecht 1999, p. 80.

60. See Ogus, Encyclopedia, p. 589. A recent research project carried out by Barendrecht and Weterings has proven that parties (in casu insurers) who think they will benefit from standards are willing to pay (a part of) the costs to develop them, Barendrecht & Weterings 2000a.

however, are less well organised. Some of them are members of associations that defend the rights of victims (an example is the Dutch victims assistance association (*Vereniging Slachtofferhulp Nederland*), but the majority of victims is not organised and will therefore have no spokespersons.

Next to this group of victims is the biggest interested party: the group of potential victims. Included here are after all the future (but so far unknown) victims that will be dependent on the standards at a later stage. This group is not organised at all and therefore has no representatives. This will make it especially difficult to involve this group in a negotiation process. Possible alternatives are, for example, appointing existing consumer organisations such as the national traffic organisations (*e.g.*, the Dutch *ANWB*, the German *ADAC*, the British *AA*) or foundations defending consumer rights (*e.g.* the Spanish *Organización de consumidores y Usuarios*, the English Consumers' Association, the French *Organisation Fédérale des Consommateurs*) as representatives of this interest group. In each case, however, it has to be accepted that this will not be an adequate representation of the entire group.<sup>61</sup> The risk of having an imperfect representation is that the interests of the group are not sufficiently put forward, which can easily lead to a loss of confidence in the representatives. As a result, the acceptance of the standards, which is one of the most important conditions for the development of a successful standardisation, will decrease.<sup>62</sup>

Another risk ensuing from incomplete representation is that the negotiation process can easily lead to unbalanced results. The well-organised and well-represented professional (insurers, personal injury lawyers) can easily out-vote the victims and potential victims.<sup>63</sup> This could result in standards that conflict with one of the important aims of standardisation, that of doing justice to the (personal injury) victim (see § B).<sup>64</sup> One possibility of solving the 'representation problem' is to let the government represent the interests of the potential victims, being all the citizens of a country.<sup>65</sup> In such a case, however, intensive communication with the group seems necessary to guarantee a representation of interests that is as broad as possible.

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61. The *Nationaal Platform voor Personenschade*, a Dutch foundation that aims to improve the information about claim handling, and claim handling itself and to standardise certain damages, uses the same formula to represent (potential) victims. Apart from organisations as the *Verbond van Verzekeraars* and the *Vereniging van Letselschadeadvocaten*, (potential) victims are represented by the *ANWB* and de *Vereniging Slachtofferhulp Nederland*.

62. See § D on criteria for standards.

63. A lesson can be learned from the poor bargaining position of an inexperienced claimant paying his own costs in comparison to a victim who is supported by a trade union. Cane 1999, p. 215. The same goes for bargaining beforehand; again, costs and experience seem to be decisive. The difference is, however, that lawyers representing the victim have their own interest, so it will be difficult to let them represent the victims.

64. This would clash with the first aim of the law of damages as referred to under § B.

65. See Vranken & Weterings 2000, p. 57.

### 3. *Government Lead Standardisation*

Instead of letting the envisaged users develop the standards themselves, the (European) government could also take up the standardisation work. Some sort of co-operation with the envisaged users of the standards would be advisable, however. This would make it possible to use the experience and knowledge of these parties on personal injury claim handling, and would make it possible to take their interests and wishes in account.<sup>66</sup> The legislator could then develop standards for the calculation of amounts of damages as well as for the process of claim handling. The government can, also take decisions about how detailed standards should be and whether or not they should be binding. The disadvantage of a set of standards developed by the government which is binding and rather detailed, is that its standards will have the characteristics of rules, which can decrease the degree of support by the users.<sup>67</sup>

The government does have a strong incentive for taking up the standardisation process. In the Netherlands and several other European countries, there is a high caseload for judges, and standardisation can release the judges of some of their burdens in this respect.<sup>68</sup> 'Access to justice' can be enhanced by standards that educe the total number of conflicts in which parties will have to go to court.<sup>69</sup> An important risk of a set of standards prepared by the government is that the result will be criticised by (some of) the users.<sup>70</sup> This might be a threshold for the government to initiate the standardisation process. Politicians may be hesitant to start processes that will more or less automatically lead to criticism. Another barrier that needs to be mentioned is the fact that there does not seem to be any (direct) financial advantage for the government.

### 4. *Other Possible Leaders of the Standardisation Process*

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66. This approach will again improve the degree of acceptance mentioned by us as one of the main criteria. See also § B. Information costs with regard to the formulation and interpretation of standards will also be lower, see Ogus, *Encyclopedia*, p. 591.

67. See § C for the criteria.

68. The activities of Lord Woolf, resulting in the report *Access to Justice* (Woolf 1996) can be seen as an example of a heavy caseload that is an incentive to make the legal process more efficient (which can also be done by standardisation). There are also other incentives for the government, see Blumstein, Bovbjerg & Sloan, 1991, p. 186, who mention keeping insurance available, promoting fairness of awards, and maintaining public confidence in the judicial system.

69. Even if a standardised system is introduced, enough cases will be taken to court to keep the legal development going. There will always be conflicts about the interpretation of the standards for which the opinion of a judge is needed. How often this will occur will of course depend on the type and quality of the standards.

70. See Barendrecht 2000, p. 697.

The judiciary could also serve as an initiator for developing standards. Practically, they already have an important role as developers of standards in ordering and motivating the amount of damages that has to be paid to the victim in connection with the injury.<sup>71</sup>

Legal scholars could serve as yet another possible group of initiators for standardisation. They are independent, having no interest in the outcome of the standards, and they might have more expertise on personal injury law, on damages, and on standardisation than the government or the parties have. These scholars could ask interest groups to give their opinion on the aims of standardisation and the type of standardisation. During the process of standardisation, the developers could ask for comments on the drafts on a regularly basis. On the other hand, the lack of interests this group has with regard to having standards is a disadvantage. The only natural incentive a scholar could have seems to be the appreciation that could be gained by the development of successful standards. Therefore, another incentive might have to be created, for instance, some form of financial compensation.<sup>72</sup>

##### 5. *Integration: Negotiated Rulemaking*

Future users as well as impartial third parties such as scholars or the government could take the initiative for standardisation, as sketched above. All have their weaknesses, however, as we observed, that could have negative effects on the standards. Making the different players work together on standards might lead to the best results. Advantage can be taken from the experiences of all parties in the field of personal injury claim handling and the drafting of standards or rules. With regard to such a co-operative approach of developing standards, a lesson might be learned from the procedure of negotiated rulemaking.<sup>73</sup>

Negotiated rulemaking is used in the United States of America for the development of rules by local government agencies. It is an example of how users of rules and the developers (the government) can work together to create effective rules, which makes it possible for interested parties to have a certain level of influence on the rules resulting

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71. For an example of an English case (*Heil v. Rankin* [2000] 3 All ER 138) in which the Court of Appeal used its judgement as a means to standardise several amounts of damages for several categories of pain and suffering, see Giesen 2001. In Belgium, judges took the initiative to adopt rates for personal injury damages, Schrijvers 1998-1999, p. 738-743. For the role of judges see also, Hammerstein 2000, p. 65-72. Blumstein, Bovbjerg & Sloan, also mention the need for judges (and juries) to have a context or frame of reference to guide them in determining the amount of damages in individual cases, see Blumstein, Bovbjerg & Sloan 1991, p. 5.

72. See Barendrecht 2000, p. 697.

73. On negotiated rulemaking, see Harter 1982; Harter 2000; Susskind & McMahon 1985. Criticism comes from Coglianese 2001 and Coglianese, 1997.

from that process. The proponents of this rulemaking process are enthusiastic about the savings achieved in time needed for developing the rules in comparison with a normal rulemaking procedure, and the (low) number of cases brought to court as a consequence of the rules.

A similar co-operation could be worthwhile when developing standards for personal injury claims. Considering the advantages of users having direct influence on the result, it could be advisable to give users even more scope to present their interest and wishes. Another adaptation that could be thought of is replacing the government as the administrator of the procedure by a leading scholar.<sup>74</sup> These methods, however, also have disadvantages. When opting for a co-operative development of standards, it must be realised that well-organised interest groups can easily have a decisive influence. Another problem that can arise is informational asymmetry between different parties.<sup>75</sup>

Another procedure that could be taken into account is the one used by standardisation institutes. These institutes develop technical standards on their own initiative or at the request of the government or private parties. They work with teams of internal and external experts paid by the requesting parties or organisations. Before the result of the standardisation work is laid down, several drafts of the norms have been made public and have been commented upon by interested parties.<sup>76</sup>

## 6. *'Mediated Rulemaking'*

A final possibility we would like to mention is a method in which a third party is appointed as a kind of a mediator between the parties involved in the standardisation work, in order to stimulate a constructive negotiation process. Hence, the impartiality and objectivity of the procedure can be guarded and impasses during the negotiations can be overcome. Depending on the wishes of parties the role of the third party can be more or less active. They can choose for a kind of chairperson or for someone who also comes up with options and suggestions. The chairperson can keep an eye on the legal but also the economic implications of suggested standards.<sup>77</sup> This form would make it possible for the third party to contribute to the negotiation process and come up with ideas the users did not think of. On the other hand, an active role might harm his image of impartial party. One more variation might be to attribute decisive power to the third

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74. This in order to prevent the decrease in support by imposing a binding rule on users.

75. Ogus, Encyclopedia, p. 596.

76. On standardisation in the Netherlands see, Evers 1998, p. 87.

77. In this respect, we can learn from research into the production of legal rules by government agencies. There seems to be a big contrast between the approach by employees with technical or legal training and economists, see McGarity 1991.

party. He could be given the power to decide the issue if parties cannot agree on a certain aspect of the standardisation in order to keep the process of standardisation moving.<sup>78</sup>

Questions for discussion:

- Who can best represent the potential victims? Might that be the government?
- Who should take the initiative and organise and/or lead the process towards standardisation? Is the government best suited to do so?
- What would in general be a good procedure? What is better: third party involvement or negotiations between interested parties without outside help?
- Which other parties should be involved in the process of standardisation of personal injury claims, and which parties should absolutely not be involved? Who should be in charge?
- Would negotiated rulemaking be a good approach to developing standards for personal injury claim handling or is some other procedure better?
- These questions are not really relevant. What is relevant is .....

## J. FUNDING THE STANDARDISATION PROCESS

So far, an important issue of a standardisation process has not been fully addressed and that is the costs of such an operation. Even more important seems to be the question: who should bear these costs? The development of standards will lead to a lot of work (collecting the essential information, finding support for the standardisation and

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78. Having an arbitrator who will make the decision for parties if no solution is reached also provides an incentive for parties to solve things themselves, Blumstein, Bovbjerg & Sloan, 1991, p. 16. Another option in cases where parties cannot agree unanimously is a majority vote. This way of working is usually followed at standardisation institutes.

communicating the results to the public, etc). After a while, the standards will probably also have to be improved or upgraded, leading to even more work. The exact amount of money that is involved in developing and maintaining standards is difficult to predict and will depend to a large extent on the type of standards and the procedure that is used to develop them. For example, detailed rules will cost more than broader standards, because of the lengthier negotiation process.

### 1. *Instruments for Fund Raising*

Given this (for now) inescapable uncertainty as to the total amount of costs, we will concentrate on the question of who should pay for the development of standards. In answering this question, one should also take into account the question as to what mechanism should be used to trace these costs back to persons or organisations. Both questions are also closely related to who will be doing the standardisation work. The advantages and disadvantages of the involvement of several groups have been dealt with in the previous section. Here we will provide a list of possible answers to the question concerning the instruments that the different players could bring into action to raise the money for the standardisation process.

1. The first group that could take the initiative are the envisaged users (*i.e.*, insurers, personal injury lawyers, and organisations representing victims). To finance the standardisation process, they could, for example, collect money from the group they represent or raise the insurance premium and/or membership contributions. Another possibility might be to set up a system through which the standards can be sold. Standardisation institutes, for example, also use the sale of standards as a source of income.<sup>79</sup> A rather speculative way of financing would be to try to obtain patent protection for the standards and collecting royalties.<sup>80</sup>

2. If the (European) government as legislator were to engage in drawing up standards, they could use the tax instrument as a tool for financing the standardisation process.<sup>81</sup> In doing so, they would make (EU) citizens pay for the standards, which seem reasonable because they are also, as potential victims of personal injury, the persons who will

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79. These institutes sell their standards, for example, via the Internet. See for example, <http://www.ansi.org/#ANSI>, <http://www.bsi.org.uk/>, <http://www.din.de/>. To sell the standards, there has to be a market for them; therefore, the standards need to be supported on a wide scale.

80. It seems worthwhile to look into this option but it could also be costly to maintain. See Barendrecht 1999, p. 81.

81. The tax instrument is also used to pay a large part of the costs of compensation systems, see Cane 1999, p. 339. There is much law and economics literature on the tax instrument as a way of financing the production of goods, see Ledyard 1995, p. 111-194.

benefit from, the standards. If judges were to take up the standardisation work, the courts might be able to arrange for some sort of fee to be paid by the parties that go to court for a personal injury case, towards the costs of standardisation.

3. If a third party, for example, a group of scholars, is asked to do the job, they might do it for the appreciation they stand to gain from it. In this way the costs of the standardisation process could be relatively low. But probably they will have to be paid to a certain extent to do so, because they do not have any other personal benefit from the standards.<sup>82</sup> Private parties, the government, or a combination of the two would be the groups that would have to pay them.

4. A final possibility is that all parties mentioned, engage in developing the standards together and also contribute to the costs. In this case, a combination of the different instruments could be brought into action to finance the standardisation.

## 2. *The Public Goods Character of Standards*

In order to answer the question of which of the previous forms is to be preferred to finance the standards, not only the type of standards that is aimed at is important, but also some other factors should be taken into account. One of these factors is that standards have the characteristics of public goods. In the law and economics literature, this term is given to goods for which the private market does not function adequately. The reason why such goods cannot be traded on the private market is (1) the fact that the benefit that users of such goods have does not decrease when users are added, and (2) the use of such goods is non-excludable, which means that it is impossible or impractical to prevent those who do not pay for their use from enjoying the benefits of the goods. Next to examples like the protection of the environment, the presence and maintenance of roads, public education as well as laws, standards developed for settling personal injury claims can also be seen as public goods. As with other public goods, if they are developed and made public, it is hard to exclude free riders,<sup>83</sup> and there is a demand for them but at the same time it is almost impossible to trade them. The private market is therefore not fit as a system for financing the production of these public goods.<sup>84</sup> This is the reason why, instead of letting individual users pay for the use, the production is financed by the public. The state takes care of the production and taxes the

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82. Barendrecht 2000, p. 697.

83. Although this might be possible, it would surely contribute neither to the support and popularity of the standards, nor to their use.

84. Although sometimes public goods can be transformed into private goods and supplied by the market, such as roads with toll roads, this assumption seems to be commonly accepted for the provision of public goods in general, Merrill 1986. See also Lewinson-Zamir 1998. See also footnote 84.

public for the production costs. If the development of standards for personal injury claim handling were to be paid by using the tax instrument, this would mean that the government should be involved in the development of those standards. A system that makes users pay individually (for example, by selling the standards), might prove to be difficult to implement and high costs will be connected to the maintenance of such a system.<sup>85</sup>

Another point that should be considered in deciding upon the way to finance the standards is that, as observed above, there is a close connection between the way the process is financed and the persons developing the standards. Therefore, when deciding upon who should be involved in drawing up the standards, the financing method should be considered at the same time. As we have seen, choosing the government as (one of the) developers has the advantage that the tax instrument can be used. This might be an attractive way of financing the process considering the characteristic of standards and the fact that the tax instrument already exists and has proven successful.

### 3. *A Closer Look at the Incentives to Participate in Standardisation*

The costs of any standardisation process will, regardless of who will bear them, be some sort of barrier for the realisation of standardisation. This barrier is not only formed by the high amount of costs of the process as such, but also in the risk that the process is broken off and no standards are realised. The costs already made are then of course pure loss.<sup>86</sup> An important factor here seems to be again the incentives acting on the different parties involved. These incentives originate from the advantages the standards might bring them. A general incentive for all parties might be that the current system is not exactly ideal, as we concluded before (see § B, 2). The several incentives are well worth looking into, because they say something about the probable willingness of different parties to contribute to the costs of the development of standards. Incentives are financial advantages but also other advantages such as saving time, fast payment of damages and therefore an early end to uncertainty for victims.<sup>87</sup>

The starting point should be that the parties with the strongest incentive, *i.e.*, those profiting the most from the standards, should be the ones paying the largest part of the costs of development and maintenance of the standards. The advantage for the insurance companies is a speedier settlement of claims and the possibility to manage legal chance

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85. On the idea of patents, see Barendrecht 1999, p. 84.

86. On the other hand, if parties have already started the process and invested in it, this could be an incentive to continue until a set of standards with a high quality is reached.

87. Barendrecht 1999, p. 80.

with standards (see §B, 2). Standards in any form will (should) have the advantage of speeding up the settling process, which means a decrease in transaction costs. For insurers, this seems to form a strong incentive to embark upon standardisation. For this reason, a contribution to the total costs by the insurers seems to be reasonable.

On the part of the (potential) victims, the incentive can also be found in the financial cost-saving effect of standards. Good standards might save them the cost of legal assistance in arguing over the amount of damages before a court. Apart from this, they will have another incentive given the fact that speeding up the process means a shorter period of uncertainty as to whether or not they will receive damages and how much. This will enable them to get on with their lives sooner.<sup>88</sup> These costs stemming from uncertainty and all the fuss and emotions will contribute to the willingness of parties to have adequate standards that will award them a reasonable compensation for their injuries in a fast and easy way. Therefore, on the part of the (potential) victims, there also seems to be quite a strong incentive to get a set of standards in place, and they might be willing to pay for standards that lead to reasonable compensation.

A third important group involved in the personal injury claim handling process are (personal injury) lawyers. At first sight, this group will not have an incentive to develop standards.<sup>89</sup> Standards that are used by insurers and victims do not seem to leave much room for lawyers in defending the financial interests of the parties on both sides. A faster settling process will mean fewer hours to bill.<sup>90</sup> On the other hand, depending on the type of standards that are chosen, there is always room for negotiation and there are always cases in which parties want a decision of a judge and therefore need representation.

The government can find an incentive in the fact that having a set of standards for settling personal injury claims will result in a decrease of the (currently too heavy) workload of the courts.<sup>91</sup> Any (good) standard will lead to fewer cases going to court. If the future users themselves come up with standards, it will save the legislator much work and they will benefit from its advantages. The government in its role as judiciary also profits from the advantages of standardisation. A judge will have an interest in a better framework that gives him, as non-specialist in the field of personal injury, the tools to come to a sound judgement based on this framework.<sup>92</sup> Besides that, the judges

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88. Harris 1984, p. 93-112, also refers to the difficulty and uncertainties of litigation and the fear of lengthy further negotiations as negative factors for victims in the claim process.

89. Barendrecht 1999, p. 83.

90. See Barendrecht & Weterings 2000b, p. 435 ff.

91. Blumstein, Bovbjerg & Sloan 1991, p. 185, link the government's involvement rather exclusive to the need for a budget ('Because the process needs a budget to operate, the legislature must be involved').

92. In general on judges playing a role as a third party in claim settling, see Hammerstein p. 65 ff and Van Hilten-Kostense 2000, p. 73 ff.

are the ones directly benefiting from a decrease in caseload resulting from a higher percentage of settled cases.<sup>93</sup> These advantages make it reasonable that the government also finances a part of the standardisation work.<sup>94</sup>

Hence, these indications put together lead to a division of the costs among various parties. Negotiations on the exact division of the total amount to be paid by the different parties will of course be necessary.<sup>95</sup>

Questions for discussion:

- Which of the instruments mentioned could/should be used to finance the standardisation process? Which are the ones that might be most effective?
- More generally: who should pay? Is spreading the cost a feasible option?
- What level of importance is to be contributed to the different incentives acting upon the different parties?
- What is the (negative) effect of the fact that the rules or norms developed are public goods? Can this effect be curtailed?
- What other factors should be considered in the process of finding ways to finance standardisation?
- These questions are not really relevant. What is relevant is .....

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93. The number of cases that are decided upon by a judge is not that high however. In the Netherlands, according to research by Weterings, about 5 % of the personal injury cases go to court. In England, 4,500 claims go to court each year on a rate of 300,000 claims (*i.e.* 1 ½ %) that are settled, according to Cane 1999, p. 465.

94. This would link up with what the Dutch Minister of Justice has indicated, *i.e.*, is that standards are welcome. On the other hand, he has also stated that it would be up to the future users to develop them, see *Kamerstukken II* 1999/00, 26 630, nr. 2, p. 15.

95. An important issue in connection with the division of the costs and the method of financing are the 'free rider effects': other users might easily make use of the standards without paying for them.

## K. CONCLUSION

The preliminary conclusion could be that there is definitely much to say in favour of designing some sort of system of standardisation of personal injury claims, especially since it seems to be possible to resolve many of the problems encountered. An important aspect that we need to keep in mind however, relates to the position of the individual victim. Standardisation is not meant to make the victim pay (again), but just that might be an unwanted side-effect. Possible involvement of the government might be helpful to reduce the chances of that side-effect actually occurring. Getting the government involved might also solve some of the problems related to funding a standardisation process and might ease the pain in relation to the fact that the standards developed are public goods.

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