

Third party losses in a comparative perspective Three short lectures in honour of W.H.V. Rogers

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Introduction

On June 13th, 2007, Professor Horton Rogers delivered his inaugural address at Utrecht University as (rotational) G.J. Wiarda Professor.⁴ On that same day an expert seminar was held in honour of this event and of Horton Rogers' visit to Utrecht University. The seminar dealt with third party losses in a comparative perspective. It consisted of four short lectures⁵ followed by discussions with invited experts. The lectures delivered on third party losses in English, German and Dutch law, as well as the lecture on the position of the Study Group on a European Civil Code and The European Group on Tort Law have been combined in this collective contribution.⁶ We were confident that the value of each (rather brief) lecture would increase if it were to be set within the context of the other lectures delivered that day. In this way the readers will be far better equipped to compare for themselves the results achieved in several legal systems.

The organizers of the seminar chose the topic at hand – third party losses – because it is currently one of the most thought-provoking themes in the law of damages and tort law as a whole. In the Netherlands, for instance, the trend seems to be to expand the ambit of tort law and the law of damages as regards third parties, either by relaxing the rules on who can be considered a (direct) victim worthy of being compensated (*i.e.* by enlarging the class of people entitled to damages) or by multiplying the heads of damage that can be awarded to third parties (indirect victims). We were curious to find out whether this trend might be recognizable elsewhere in Europe⁷ as well and whether this is then a trend which is strong enough to be lasting.

Given what has been said above, an account of the state of the law in this regard in several European jurisdictions, combined with some reflections on what can, might or should be done instead, seems to be in order. This is what we propose to do hereafter. Part I consists of a direct

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4 This lecture (entitled 'Here lies the Common Law?') will be published in the *Ius Commune Lectures on European Private Law* series by the *Ius Commune Research School* (Maastricht, Leuven, Utrecht, Amsterdam).

5 The (fourth) lecture by Willem van Boom (Erasmus University Rotterdam) dealing with a law & economics perspective on third party losses unfortunately could not be included.

6 Each contributor remains responsible solely for his or her contribution as specified hereafter. This Introduction and the General Conclusion in Part IV are co-authored by all three contributors.

7 Up until now it is generally only the (direct) victim who can claim compensation for losses related to his personal injury, unless we are speaking about claims for burial costs and maintenance after the death of a relative, see B.A. Koch & H. Koziol, 'Comparative Analysis', in B.A. Koch & H. Koziol, *Compensation for Personal Injury in a Comparative Perspective*, Tort and Insurance Law, Vol. 4, 2003, nos. 56, 64 and 65.

comparison between English and German law with regard to the pecuniary losses of relatives and employers, while Part II deals with the same topic from the perspective of Dutch law. The last aspect mentioned above (where might this theme lead us in the future?) dealing with some of the developments on the European private law front, *i.e.* looking at the two sets of principles of European tort law that have been developed, seemed to be in order as well. Part III deals with this issue. A General Conclusion in Part IV ends this collective contribution.

PART I

Pecuniary loss of relatives and employers in case of personal injury *A comparison of English and German law*

Cees van Dam

1. Introduction

This paper will analyse English and German law on the rights of relatives and employers of the primary victim in case of personal injury. One may think of someone who is severely injured in a road traffic accident and who needs long-term treatment, particularly nursing and care. Empirical research by the English Law Commission in the 1990s has shown that in such cases a majority of claimants rely on care provided gratuitously by family members and friends.⁸

The focus of this paper will be on the rights of the primary victim's relatives (this includes other individuals such as friends or neighbours) and his or her employer. It will not deal with the position of insurers and social security providers.

This paper only deals with the right to compensation for pecuniary losses. Compensation of non-pecuniary losses, particularly for relatives, is not included. In general, English and German law do not provide relatives with such a right in case of personal injury.⁹

English and German law are of particular interest because they are reluctant to grant rights to compensation to third parties. Third party damage is considered to be pure economic loss and this head of damages is only compensated under strict conditions. For this reason, the position of third parties will be briefly explained prior to dealing with the specific questions regarding compensation.

2. English law

2.1. The basis of liability and the position of third parties

The legal basis for most personal injury claims in English law is the tort of negligence. This tort requires that the tortfeasor owed the victim a duty of care and that he breached this duty. This requirement does not cause many problems if someone has caused the damage directly and actively, for example in a road traffic accident. It causes slightly more problems if the damage

⁸ Law Commission, *Damages for Personal Injury: Medical, Nursing and Other Expenses* (Report no. 262), 1999, Para. 2.15. See http://www.lawcom.gov.uk/lc_reports.htm

⁹ See C. van Dam, *European Tort Law*, 2006, no. 1210. However, English law provides a right to compensation to third parties in the case of a fatal accident: see s. 1A(2) Fatal Accidents Act 1976.

was caused indirectly, for example by the tortfeasor's omission. However, it causes serious problems for third parties to recover their losses since it is generally assumed that the tortfeasor does not owe the victim's relatives or the victim's employer a duty of care. Their claim is considered to be for economic loss and not for personal injury loss.¹⁰ This implies that in English law third parties do not have a right to compensation towards the tortfeasor. However, as will be shown, this does not mean that it leaves relatives and employers empty-handed in this respect.

In May 2007 the Department of Constitutional Affairs published a Consultation paper on the Law on Damages.¹¹ It consulted stakeholders on a number of issues such as claims for wrongful death; bereavement damages; liability for psychiatric illness; collateral benefits; aggravated, exemplary and restitutionary damages; accommodation expenses; and the cost of private care. These issues have been highlighted in a series of reports published by the Law Commission in the past decade.¹² Where this is relevant reference will be made to the Government's Consultation Paper.

2.2. Test: Were payments reasonably necessary?

In cases of personal injury, the applicable test for compensation of each item of damage is whether the payments were reasonably necessary.¹³ This means, for example, that the claimant can claim more than the costs of the cheapest possible treatment. However, he is not entitled to the best and most expensive treatment. In *Rialas v. Mitchell* the Court of Appeal held that '(...) the claimant was entitled to what was reasonably necessary to alleviate his injury and diminish his disability, though not to the best possible facilities'.¹⁴ For example, it can be reasonable to award damages for treating a victim at home rather than at an institution even though the former would be cheaper. The burden of proving that it is reasonable to spend more money on nursing and care is on the claimant.¹⁵ This rule implies that it can also be reasonably necessary to receive *private* health care rather than the freely provided care by the National Health Service (NHS). Hence, a victim is not obliged to use the NHS.¹⁶

2.3. Compensation for nursing and care at home

Provided that it is reasonably necessary to receive care at home rather than in an institution, the question is whether care provided by relatives can be compensated and if so, to what extent. In *Hunt v. Severs*¹⁷ the House of Lords held that the claimant is entitled to claim damages for the cost of care provided gratuitously by friends or relatives.

The level of compensation in such cases is based on the commercial cost of the care provided with a discount of – usually – 25-33%.¹⁸ This discount reflects '(...) the free, family nature of the care and the fact that the carer does not have to incur expenses such as tax, National

10 See for an introduction to English tort law: Van Dam 2006, *supra* note 9, Chapter 5. Throughout this paper, I will use the term 'claimant' rather than 'plaintiff', also for older cases, following Horton Rogers in this respect who wrote in the preface to his 17th edition: 'My shocking practice of using "claimant" even for pre-1999 cases (...) has been continued.' (p. xii).

11 CP 9/07, 04/05/2007, also published on www.dca.gov.uk

12 Claims for Wrongful Death; Liability for Psychiatric Illness; Damages for Personal Injury; Medical, Nursing and Other Expenses; Collateral Benefits; and Aggravated, Exemplary and Restitutionary Damages; see http://www.lawcom.gov.uk/lc_reports.htm

13 B. Markesinis *et al.*, *Compensation for Personal Injury in English, German and Italian Law. A Comparative Outline*, 2005, p. 97.

14 *Rialas v. Mitchell* [1984] 128 SJ 704 CA; Markesinis *et al.* 2005, *supra* note 13, p. 98.

15 G. Exall, *Munkman on Damages for Personal Injuries and Death*, 2004, Para. 11.6.

16 S. 2(4) Law Reform (Personal Injuries) Act 1948 'In an action for damages for personal injuries (including any such action arising out of a contract), there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of facilities available under the National Health Service Act 1977'. The Government's Consultation Paper, no. 161-163, raises the question whether this provision should be repealed. If the answer would be in the affirmative the paper suggests a number of alternative arrangements.

17 *Hunt v. Severs* [1994] 2 AC 350, [1994] 2 All ER 385.

18 *Evans v. Pontypridd Roofing Ltd* [2001] EWCA Civ. 1657.

Insurance, or travel to work.¹⁹ The rate of discount is a matter for the discretion of the trial judge in the individual case.²⁰ There are no golden rules. In *Evans v. Pontypridd Roofing Ltd* Lord Justice May said: ‘I do not think that this can be done by means of a conventional percentage, since the appropriate extent of the scaling down and the reasons for it may vary from case to case.’²¹ For example, in *Newman v. Marshall Folkes*,²² the Court of Appeal refused a discount considering that the claimant had become an obsessive who demanded attention day and night. In *Hogg v. Doyle*²³ a nurse was even compensated time and a half for her lost earnings: the trial judge concluded that the claimant’s wife, who was a nurse, had probably done the equivalent of the work of two full-time nurses. He awarded one and a half times the net amount which she would have earned in employment as a nurse.²⁴ Hence, the judicial approach takes the human factor and the circumstances of the case into consideration.

The approach of the courts should not be that of a bookkeeper: ‘The services should not exceed those which are properly determined to be care services consequent upon the claimant’s injuries, but they do not, in my view, have to be limited in every case to a stop-watch calculation of actual nursing or physical assistance. Nor (...) must they be limited in every case to care which is the subject of medical prescription.’²⁵

Initially, it seemed as if claims for compensation for the commercial costs of care and nursing by relatives with a discount were only possible in serious cases,²⁶ but recent cases show that the claim can also be made in cases of modest and short-lived injury although in such cases the amount allowed will be modest and awarded in round figures.²⁷

If a housewife is injured in an accident she is entitled to claim the cost of employing domestic help.²⁸ Does this mean that she can claim compensation for the cost of her husband doing (some of) this work? Yes, according to a Canadian decision, although the minority objected that the tasks performed by the husband were not really performed for his wife but for the household which they shared.²⁹ However, if the defendant is the provider of the care he cannot recover damages (see 2.6).³⁰

2.4. Loss of earnings

If a relative gives up paid employment in order to care for the claimant, the latter has a right to compensation for the relative’s loss of earnings. This right is based on the overriding principle of reasonableness. The question to be answered is ‘(...) whether it was reasonably necessary for the family member concerned to give up work in order to care for the victim.’³¹ Relevant factors to be taken into account are the nature of the injury, the level of care required and the strength of the evidence. There is no hard and fast rule but the courts will be more likely to be sympathetic in the case of a mother-child or husband-wife relationship than in others.³² In *Roach v. Yates* the

19 P. Barrie, *Personal Injury Law*, 2005, Para. 25.12.

20 *Ibid.*, Para 25.12.

21 *Evans v. Pontypridd Roofing Ltd* [2001] EWCA Civ 1657, [2001] All ER (D) 13 (Nov) (25), per May LJ.

22 *Newman v. Marshall Folkes*, [2002] EWCA Civ 591, [2002] All ER (D) 47, per May LJ.

23 *Hogg v. Doyle*, CA, judgment of 6 March 1991 (Kemp & Kemp A2-005).

24 *Hogg v. Doyle*, CA, judgment of 6 March 1991 (Kemp & Kemp A2-005).

25 Lord Justice May in *Evans v. Pontypridd Roofing Ltd* [2001] EWCA Civ 1657, [2001] All ER (D) 13 (Nov) (23).

26 *Mills v. British Rail Engineering*, [1992] PIQR Q13.

27 Barrie, *supra* note 19, Para. 25.12. See for example *Giambrone v. JMC Holidays* [2004] EWCA Civ. 158, [2004] PIQR Q38.

28 *Daly v. General Steam Navigation Co. Ltd* [1981] 1 WLR 120; *Shaw v. Wirral Health Authority* [1993] 4 Med LR 275. See also Law Commission 1999, Paras. 3.87-3.93.

29 *Kroeker v. Jansen* [1995] 123 DLR (4th) 652.

30 Exall 2004, *supra* note 15, Para. 11.13, with reference to *Hunt v. Severs* [1994] 2 AC 350, [1994] 2 All ER 385.

31 Markesinis *et al.* 2005, *supra* note 13, p. 101.

32 *Ibid.*

Court of Appeal awarded the claimant compensation for the loss of income of his wife and sister-in-law since '(...) he would naturally feel he ought to compensate [them] for what *they* had lost.'³³

This head of compensation does not bring anything new because normally the loss of earnings are capped at the level of the cost of commercial care had it been provided.³⁴ The Law Commission has advocated taking the commercial rate as a starting point but also to be more willing to compensate for lost earnings even if these exceed the commercial cost of care,³⁵ but, unfortunately, the Government's Consultation Paper has not taken up this point.

2.5. Travel costs

The claimant is entitled to the compensation of travel costs which he incurs while visiting hospitals, doctors, etc. He is also entitled to recover the costs incurred by immediate relatives when travelling to visit him in hospital or, where reasonably necessary, accompanying him to hospital and medical appointments.³⁶ According to Rogers there is no case '(...) which actually *decides* that the cost of visits is recoverable but such claims are often conceded, correctly so on the basis of what is said in *Hunt v. Severs*.' He suggests that the rationale '(...) would seem to be that the visits serve a therapeutic purpose so, logically, the cost might be irrecoverable if the claimant were in a coma.'³⁷

2.6. Claimant's obligation towards a relative

Although it is only the claimant who can claim money for the costs of care and nursing, the money which the claimant receives for the help provided is technically held in a trust for the relative. This was decided by the House of Lords in *Hunt v. Severs*, vindicating Lord Denning's considerations in *Cunningham v. Harrison* and rejecting the Court of Appeal in *Donnelly v. Joyce*.³⁸

In *Cunningham v. Harrison* Lord Denning took the position that, in fact, the loss was that of the third party but that, for technical reasons, the money was claimed by the primary victim. He would hold this sum on trust for the relative (the benefactor). One day later, in *Donnelly v. Joyce*, a differently constituted Court of Appeal reached the same final result but via a different route, namely that the loss was that of the primary victim and it consisted not of the expenditure itself, but of the *need* for the nursing services. The *Donnelly v. Joyce* ruling was the leading decision for the next twenty years until *Hunt v. Severs* in which Lord Bridge said: 'By concentrating on the plaintiff's need and the plaintiff's loss as the basis of an award (...) the reasoning in *Donnelly* diverts attention from the award's central objective of compensating the voluntary carer. Once this is recognised it becomes evident that there can be no ground in public policy or otherwise for requiring the tortfeasor to pay to the plaintiff, in respect of services which he himself has rendered, a sum of money which the plaintiff must then repay to him.'³⁹ Hence, the victim holds the damages on trust for the carer.

33 In *Roach v. Yates* [1938] 1 KB 236.

34 *Housecroft v. Burnett* [1986] 1 All ER 332; *Fish v. Wilcox and Gwent Health Authority* [1994] 5 Med LR 230. If the relative does not give up his or her employment the commercial rate is considered to be inappropriate: *McCamley v. Cammel Laird Shipbuilders Ltd* [1990] 1 WLR 963 at 966-967.

35 Law Commission 1999, *supra* note 8, Paras. 377-386.

36 Markesinis *et al.* 2005, *supra* note 13, p. 103.

37 W.V.H. Rogers, in U. Magnus (ed.), *Unification of Tort Law: Damages*, 2001, p. 69.

38 *Hunt v. Severs* [1994] 2 AC 350; *Cunningham v. Harrison* [1973] QB 942, 952; *Donnelly v. Joyce* [1974] QB 454.

39 *Hunt v. Severs* [1994] 2 AC 350, 363 per Lord Bridge.

In *Hunt v. Severs* the defendant was the claimant's husband who was the volunteer offering services. The claimant was injured when she was a pillion passenger on a motorcycle ridden negligently by the defendant, her boyfriend whom she later married. In her claim against him she claimed the value of his gratuitous nursing services. However, the consequence of *Hunt v. Severs* is that damages are not awarded for gratuitous services provided by the tortfeasor because they would only be held in trust and returned. In other words, an award of damages for the care he provided would amount to an order that he should pay himself. This means that there is no recoverable loss.⁴⁰ In a later decision the Court of Appeal made clear that the trust construction did not solely serve as a solution for a case in which the tortfeasor provided the care. The trust on which the claimant holds the damages on behalf of the carer is a real trust which the court will enforce.⁴¹ In practice, most family members will not accept the money and leave it to the claimant to spend it for his own benefit. However, this breach of trust does not concern the defendant.⁴²

The flaws of *Hunt v. Severs* are that victim and carer are encouraged to enter into a contract for services and with agreed remuneration and it provides a disincentive for accident victims to accept gratuitous care from close relatives. Most of all, it disregards the insurance aspects since in practice it is not the defendant who pays the damages (and then have them repaid by the claimant) but his insurance company. The effect of the House of Lord's judgment was that 'plaintiff and defendant were unable collectively to call upon the proceeds of the defendant's indemnity insurance to cover the costs of caring for the plaintiff'.⁴³

In its Consultation Paper on *Damages for Personal Injury: Medical, Nursing and other Expenses* the Law Commission recommended that *Hunt v. Severs* should be reversed by statute in favour of a rule that the claimant should be under a personal legal obligation to account for damages for past care to a relative or friend who has provided the gratuitous care. However, there should be no legal duty on the part of the claimant to pay over the damages recovered in respect of future gratuitous care.⁴⁴

This recommendation has been adopted in the Government's Consultation Paper (no. 115): a personal obligation '(...) would involve less formality and be simpler for the claimant. The onus would be on the carer to claim the money due. If the claimant died before the damages were exhausted, the remainder would go to the claimant's general estate, whereas with a trust the carer receives the outstanding money for care they will never provide. On the other hand, with a personal obligation the carer has no prior claim to any outstanding damages if the claimant becomes insolvent, even though they may be continuing to provide the care. On balance, the Government agrees that a personal obligation is preferable to a trust.'

2.7. Employer's loss

An employer is statutorily obliged to pay sick pay in case of illness lasting at least four consecutive days up to a maximum of 28 weeks. In 2006 the standard rate was £72.55 (€ 107) per week. If the earnings are less than £87 (€ 128) a week, there is no obligation to pay sick pay.

The employer who continues to make payments to an employee after the accident does not have a right to recover these losses from the tortfeasor for the simple reason that the latter did not

40 Barrie 2005, *supra* note 19, Para. 25.17.

41 *H (a child) v. S* [2002] EWCA Civ 792, [2003] PIQR Q1.

42 Markesinis *et al.* 2005, *supra* note 13, p. 100.

43 Law Commission, *Consultation Paper* (no. 144), 1996, Para. 3.65; Markesinis *et al.* 2005, pp. 130-131.

44 Law Commission 1996, *supra* note 43, Para. 3.68; Law Commission 1999, *supra* note 8, Para 3.76; Exall 2004, *supra* note 15, Para. 11.26.

owe him a duty of care. Neither does the Social Security legislation provide him with such a right. However, there are several ways in which he may be able to cover his losses.

First, there can be a legal liability on the part of the employee to repay the employer's payments. In this case these monies must form part of the victim's special damages claim.⁴⁵ This also holds true if the claimant has given an undertaking to repay his employer.⁴⁶

Second, the claimant does not have to deduct voluntary payments by the employer from his special damages claim. However, if the employer has entered into a legally binding contract with the claimant that he should be reimbursed out of the damages recovered, the amount should be added to the special damages claim. In such a case the award of the claim is usually subject to a direction that the money should be paid to the employer.⁴⁷

Third, if the employment contract entitles the claimant to part or all of his wages or salary during a period of incapacity, the claimant has not suffered damage and hence cannot claim them as part of his special damages. The same is true if the money is paid by an insurance company under a permanent disability scheme. Whether or not the payments are deductible depends upon who has paid the premiums and how the money is actually paid. So, for example, if the employer takes out the policy and pays the premiums and the money is paid to him to be passed on to the claimant as wages or salary, the money will be deducted from any past or future loss of earnings.⁴⁸ Hence, the claimant has to claim them from the tortfeasor.⁴⁹

3. German law

3.1. *The basis of liability and the position of third parties*

The legal basis for personal injury claims in Germany is the fault liability rules of § 823 BGB or one of the strict liability rules in special statutes. One may particularly think of § 7 StVG (Road Traffic Act) having a rule of strict liability for damage caused by a motor vehicle.⁵⁰ As regards § 823 I, a third party cannot claim damages from the tortfeasor because there is no infringement of his health or bodily integrity. Also § 823 II (violation of a statutory rule) is not very helpful for the third party since such rules will generally only aim to protect the primary victim. And as regards strict liability, the third party will not have suffered the required personal injury or property damage.

The only third party rights are mentioned in §§ 844 and 845. § 844 only applies if the primary victim has died whereas § 845 provides: 'In the case of causing death, or causing injury to body or health, or in the case of deprivation of liberty, if the injured party was bound by law to perform services in his household or industry, the person bound to make compensation must compensate the third party for the loss of services by the payment of a monetary annuity'. The provisions of § 843 s. 2-4 apply *mutatis mutandis*.

For all other claims, a third party has to rely on the primary victim who may claim compensation for the costs he has incurred. The general rules of §§ 249-254 apply to all obligations to pay compensation, regardless of their legal foundation (tort, breach of contract or unjust

45 *Browning v. War Office* [1963] 1 QB 750.

46 *Markesinis et al.* 2005, *supra* note 13, p. 173.

47 *Ibid.*

48 *Hussain v. New Taplow Paper Mills Ltd* [1988] AC 514.

49 In the Government's *Consultation Paper*, no. 130, the preferred approach is to disregard sick pay in the assessment of damages and to enable employers to recover sick pay payments. However, consideration would need to be given to whether recovery would be appropriate where the employer was also the tortfeasor, and whether any right of recovery should be limited to sick pay which exceeds the statutory minimum requirement.

50 See for an introduction to German tort law: Van Dam 2006, *supra* note 9, Chapter 4.

enrichment). §§ 842-845 contain provisions dealing with the right to damages in the case of tortious liability. § 249 I provides that reparation is to be implemented by way of reparation in kind (*Naturalrestitution*). This means that the tortfeasor himself must rectify the situation of the victim, or call and pay a doctor to treat the victim. Alternatively, the victim may ask for a sum of money in order to organise the reparation himself to restore the status quo ante: § 249 II 1. In theory this is an exception to the rule of reparation in kind, but in practice it will rather be the rule.

3.2. Test: Were payments necessary according to medical standards?

According to German law a particular treatment can only be compensated if it is necessary for the victim's recovery or for the improvement of his state of health or if it mitigates his suffering and this necessity has to be determined according to medical standards.⁵¹ This medical necessity test implies that medical expertise is needed to assess the right to and the amount of compensation.

Contrary to compensation for property loss, the personal injury victim is not free to spend the money on care or not: if he does not spend the money on care, he has to repay it. Otherwise, according to the BGH, the received money would amount to compensation for non-pecuniary loss which the statutory system does not allow.⁵²

The exception to this rule is § 843 which only applies to tortious liability. It provides a right to compensation for persisting *special needs* of the victim of an infringement to his body or health. Under this provision the claimant does not claim his actual expenses, but his existing, additional needs caused by the injury. This means that if the victim receives money to enable him to pay for future care, he is entitled to keep the money if later on he decides to manage without help.⁵³

3.3. Costs of nursing and care

If a relative provides nursing and care for the victim he or she does not have a right to compensation towards the tortfeasor. It is the primary victim who has to recover the money as compensation for his own damage (his special needs) even though, in reality, the economic loss is suffered by the relative.

In order to assess the damages the market value is the decisive standard for all cases. Hence, the question is how much the victim would have to pay for comparable care by a professional person.⁵⁴ There are, however, three restrictions. These have been fiercely criticised in the legal literature because, according to § 843 BGB, the amount of damages is not determined by the actual expenses but only by the special needs of the victim (section 3.2):⁵⁵

- a. tax and social security payments are deducted since a non-employed relative does not have to pay these contributions, unless he is paid by social security insurance;⁵⁶
- b. some courts also make deductions due to the reason that there is no distance to travel to the workplace, that a relative has to provide help anyway and that he or she is usually untrained;⁵⁷

51 BGH 8 June 1999, NJW 1999, 2819, 2820; BGH 8 January 1965, VersR 1965, 439.

52 BGH 14 January 1986, NJW 1986, 1538; Markesinis *et al.* 2005, *supra* note 13, p. 159.

53 RG 23 May 1935, RG 148, 68, 70-71; BGH 29 October 1957, NJW 1958, 627; BGH 15 December 1970, VersR 1971, 442, 444.

54 BGH 15 October 1985, VersR 1986, 264; BGH 10 November 1998, VersR 1999, 252; Markesinis *et al.* 2005, *supra* note 13, p. 156.

55 Markesinis *et al.* 2005, *supra* note 13, pp. 154, 156.

56 BGH 10 November 1998, NJW 1999, 421.

57 Markesinis *et al.* 2005, *supra* note 13, p. 157.

- c. if a parent spends more time with a child than a professional carer, this time is not recoverable; hence, a distinction is made between compensatory care by a relative, on the one hand, and emotional or psychological attachment and help, on the other, which only a close relative can provide and which, accordingly, cannot be bought on the commercial market.⁵⁸

If a housewife is injured in an accident she is entitled to claim the costs of professional help in the household.⁵⁹

3.4. Loss of earnings

If a relative gives up paid employment in order to care for the claimant, the latter has a right to compensation for the relative's loss of earnings. However, for this head of damages the commercial value of the work for nursing or caring is the upper limit⁶⁰ and therefore it does not bring anything new.

3.5. Travel costs

Travel costs are only compensated if they were 'medically necessary for the recovery of the patient'.⁶¹ This rule has been fiercely criticised as being unworkable because it means, for example, that parents' visits to their dying child or visits by a close relative to a person in a coma cannot be compensated.⁶² The BGB has only accepted narrowly construed exceptions to the general rule. The expenses as such and their actual amount are recoverable only insofar as they were 'unavoidable' in the given circumstances.⁶³

The lower courts have tried to find loopholes to avoid the harsh consequences of the BGH's decisions. For example, OLG Bremen held that a mother's duty to remain in contact with her incurably injured child (§ 1606 III 2 BGB) could only be performed by continuous travelling between her home and the institution where the child was in care. For this reason the court considered these journeys as responding to the special, permanent needs of the child (§ 843 BGB). Although the BGH does not distinguish between a temporary (§ 249-251) and a permanent need for visits (§ 843), it refused an application to review the decision and hence seems to have implicitly accepted it.⁶⁴

Another consequence of the BGH's obedience to the BGB system is that only visits to hospitals are compensated, not visits to places outside a hospital or home where the victim is treated.⁶⁵

The circle of relatives for which compensation has to be paid is narrow. It is limited to parents, spouses, registered partners and engaged partners.⁶⁶ Brothers and sisters are excluded and cohabitants are a disputed group. There is, however, a tendency to look at the factual rather than the legal relationship. This coincides with the emphasis on the medical need for the visit.⁶⁷

Apart from young and severely injured children, who qualify for daily visits, the courts have accepted as 'reasonable' two or three visits per week or every other day.⁶⁸ If there are two

58 BGH 8 June 1999, NJW 1999, 2819, 2820; Markesinis *et al.* 2005, *supra* note 13, p. 157.

59 BGH 25 September 1973, NJW 1974, 41, 42; BGH 4 December 1984, NJW 1985, 735.

60 Markesinis *et al.* 2005, *supra* note 13, p. 155-156.

61 BGH 13 February 1991, NJW 1991, 2340, 2341; Markesinis *et al.* 2005, *supra* note 13, p. 108.

62 See for instance Wolfgang Grunsky, 1991 *JuS*, p. 907 *et seq.*

63 BGH 13 February 1991, NJW 1991, 2340, 2341; Markesinis *et al.* 2005, *supra* note 13, p. 108.

64 OLG Bremen 31 August 1999, FamRZ 2001, 1300.

65 BGH 19 February 1991, NJW 1991, 2340, 2341.

66 Markesinis *et al.* 2005, *supra* note 13, p. 110.

67 Münchener Kommentar-Oetker, § 249 N 379.

68 Markesinis *et al.* 2005, *supra* note 13, p. 111.

parents of comparable importance to the child, the visit of only one parent at a time is considered to be ‘necessary’.⁶⁹

3.6. Claimant’s obligation towards a relative

There is no court decision on the question whether the victim is under an obligation to reimburse a nursing and caring family member. In the legal literature the issue is disputed. The majority view is that the victim is not obliged to pass on the money to his relative. In practice, however, parents as legal representatives can assign the claim of the child to themselves. Coester argues that the sums recovered can be considered part of the family budget which is not split up into individual claims and the distribution of the money is left to family autonomy.⁷⁰

3.7. Employer’s loss

The employer is obliged by statute to continue to pay wages if the employee is not able to work because of illness for a period of six weeks (§ 3 I Entgeltfortzahlungsgesetz). If the employee has a right to compensation against a third party for not being able to work, this right is conferred on the employer inasmuch as he has compensated the employee. The amount is inclusive of social security and pension premiums (§ 6 I Entgeltfortzahlungsgesetz). The employer cannot exercise this right to the detriment of the employee (§ 6 III Entgeltfortzahlungsgesetz).

If the employer has made *ex gratia* payments he can recover the expenditures by demanding that the employee cedes his claim to him.⁷¹ However, the employer cannot seek reimbursement for more than the gross earnings including the employer’s contribution to the social security insurance scheme, even if he voluntarily pays more to the injured employee.⁷²

3.8. Geschäftsführung ohne Auftrag (§ 683 BGB): Agency without authority

In what seems to be a stand-alone case, the BGH awarded the claim of a husband who had moved home to be able to be closer to his injured wife. The husband did not have a right of his own to claim on the basis of *unerlaubte Handlung* but since he had acted as an agent for the tortfeasor the BGH held that he could recover his loss on the basis of *Geschäftsführung ohne Auftrag* (agency without authority).⁷³

4. Comparison and evaluation

4.1. Test for costs which can be compensated

In English law the test for compensating personal injury costs is whether these costs were reasonably necessary (2.2). In Germany, personal injury costs are only compensated if they were necessary according to medical standards (3.2).

The German approach sits uneasily with common sense solutions and leads to harsh consequences, particularly as regards visits by relatives. These are not compensated if they do not contribute to the improvement of the primary victim’s health. In fact, any link with therapeutic purposes in this respect leads to harsh results.

69 Münchener Kommentar-Oetker, § 249 N 379.

70 Markesinis *et al.* 2005, *supra* note 13, pp. 159-160.

71 BGH 22 June 1956, BGHZ 21, 112, 119; BGH 9 April 1964, BGHZ 41, 292, 294; BGH 23 May 1989, BGHZ 107, 325, 329. This is based on an analogous interpretation of § 255 BGB.

72 Markesinis *et al.* 2005, *supra* note 13, p. 188.

73 BGH 21 December 1978, NJW 1979, 598.

What travel costs are really about is enabling the continuation of social life, the continuation of being in touch with someone's close relatives. This is both in the interest of the relatives and the primary victim. In fact, the compensation of travel costs (pecuniary loss) prevents non-pecuniary loss. They are both in the interest of the primary victim and his/her relatives.

4.2. Costs of nursing and care by relatives

According to English law the costs of nursing and care by relatives are compensated on the basis of commercial fees with a discount of 25-33%. This reflects the free, family nature of care and the fact that the carer does not have to incur expenses such as tax, National Insurance, or travel costs. Also in German law, the market value of nursing or caring work is the standard for assessing damages and also here deductions are made for the equivalent for tax and social security payments; some courts also make deductions because the relative does not have expenses in travelling to work, that the relative has to provide help anyway and that he or she is usually untrained.

There do not seem to be serious differences in this respect between English and German law: both see the commercial fee as a starting point and then apply a discount. Courts in both countries calculate on an individual basis. However, the English courts seem to be more inclined to apply a standard discount of 25-33% although in special circumstances they have also awarded compensation without applying a discount at all.

4.3. Loss of earnings

In both English and German law, loss of earnings by the carer will be capped at the level of the cost of commercial care had it been provided.

Are these solutions reasonable? In the 1970s the Pearson Commission already argued that basing the award on the market value of the services rendered is harsh on those who give up a highly paid job to nurse an injured relative.⁷⁴ In the 1990s the Law Commission stated that given that the purpose is to compensate the carer then, if it was reasonable for the carer to give up paid employment, the starting point should be the carer's lost earnings and the full commercial rate should not be seen as an effective ceiling. In assessing the reasonableness of a claim in such circumstances the courts should particularly consider whether care by that particular person is of special comfort and help to the claimant.⁷⁵ More generally, relatives will only consider giving up their job if the needs of the claimant are of a permanent and serious nature. This would be even more so in the case of giving up a highly paid job.

4.4. The claimant's obligation towards a relative

In English law the money which the claimant receives for the relative is held in a trust for that relative. A breach of this trust (*e.g.* the relative refuses to accept the money) does not concern the defendant. German law is unclear on this point. There is no court decision on the claimant's obligation to reimburse his relative. The majority view in the literature is that he is not obliged to do so.

In practice, the sums recovered will often be considered part of the family budget and in those cases the distribution can be left to family autonomy. This is particularly so when the carer is a parent or the partner of the claimant. In other circumstances, however, the position of the relative is more vulnerable and in English law he is better off than in German law. In English law

⁷⁴ Exall 2004, *supra* note 15, Para. 11.27.

⁷⁵ *Ibid.*, Para. 11.30.

he has an equitable interest on the basis of a trust. The suggestion in the Government's Consultation Paper to strengthen the position of the relative by imposing on the claimant an obligation to pay the relative is to be welcomed.

4.5. Employer's loss

In English law the employer's payment obligation in case of sick pay is 28 weeks but it is limited to a relatively low maximum daily amount. The employer does not have a third party right but he can be compensated via the primary victim on the basis of the employment contract or an additional contract. In German law, the employer's payment obligation in case of sick pay is 6 weeks of full salary. The employer has a direct statutory right to compensation towards the tortfeasor.

Both the English and the German employer do not have to suffer loss in case their employee is injured, but the German employer has an easier life than his English colleague since the former can rely on a direct statutory right whereas the English employer needs to safeguard his claim in a contract with the employee.

5. Concluding observations

The reluctance of both English and German tort law to provide rights to third parties (see s. 1) has not prevented both systems from providing the primary victim with a right to compensation for costs incurred by a nursing and caring third party (a relative, neighbour or friend). In English law, this also holds true for the employer. Only the employer in Germany has a direct statutory right to compensation for the six weeks' sick pay he is statutorily obliged to pay his employee.

The reluctance towards third party rights is often said to be based on the argument that extending liability to persons other than the primary victim '(...) would open the floodgates, since it would be difficult to draw any boundary lines; in practice, it would be problematic and too expensive to extend liability to whoever suffers loss as a result of injury to the primary victim.'⁷⁶ However, since most countries allow the primary victim to claim compensation for the nursing and care costs of third parties⁷⁷ the fear of opening the floodgates to claims is not a valid argument against third party rights: the tortfeasor (his liability insurer) pays for this head of damages anyway. Hence, the reason not to provide third parties with a direct right to compensation cannot be to protect the tortfeasors against an avalanche of claims.

A more efficiency-related argument not to provide third parties with their own right to claim is to keep the claim in one pair of hands. This also protects the primary victim against the relative because a direct right by the relative against the tortfeasor may interfere with the interests of the primary victim. It would at least require additional rules to protect the primary victim against the relative, such as that the relative cannot exercise his right to the detriment of the primary victim.

The flip side of this coin is that the relative can be in a vulnerable position towards the primary victim if he wants his costs and efforts to be compensated. Hence, the English proposal (2.6) to impose an obligation on the claimant to pay the relative is interesting because it strikes a proper balance between the interests of the claimant and those of the relative.

The efficiency argument to keep the claim in one pair of hands is less compelling with regard to the position of the employer. His claim does not interfere with the way the victim's budget for

⁷⁶ M. Bona et al. (eds.), *Personal Injury Compensation in Europe: Fatal Accidents and Secondary Victims*, 2005, p. 426.

⁷⁷ *Ibid.*

his special needs, particularly nursing and care, is managed. Hence, a direct statutory right for the employer could be welcomed provided that he cannot exercise his right to the detriment of the primary victim.

PART II

Third party losses in Dutch law

Esther Engelhard

1. Introduction

What is the legal position of the husband (A) who effectively pays for his wife's (B's) hospital bill after her accident which was caused by someone else © who is liable *vis-à-vis* the wife? Will C then also be liable for these expenses? Moreover, what if the husband in this example has to take leave for a few hours each week throughout a certain period of time to nurse his wife and he then loses career opportunities because of this? Is the financial value of his lost time or his loss of earnings recoverable? In my paper I will deal with the legal position of third parties for damages caused by injuries from a *Dutch* perspective. As Van Dam in Part I, I will only analyze the rules concerning the position of relatives and the victim's employer and here, too, the focus will be on pecuniary damage, not on pain and suffering or nervous shock.

Currently under Dutch law third parties can in principle only claim compensation for costs incurred on behalf of the primary victim.⁷⁸ The amount of compensation is limited to the amount that would have been awarded to the primary victim if the particular costs would have been borne by him. Relatives can, in other words, basically claim no more than the victim would have been able to recover. Their right to compensation is limited to heads of damages and to amounts that can be seen as so-called *transferred losses* (*verplaatste schade*). But there are growing voices to expand the system so that it will include other heads of damages as well – even damages that could only be incurred by a third party and are therefore independent of the victim, such as the costs of the victim's spouse who, due to the victim's injury and the consequential inability to drive, needs to obtain her or his own driving licence. The obvious question that is then crucial is the following: where do we (need to) draw the line? These are the issues that I will discuss, but I will start with the law as it currently is. For the sake of comparison I will follow Van Dam's order of discussion as far as possible.

⁷⁸ I will also refer to the primary victim as the 'injured party' or 'victim' and to his relatives as 'third parties'. The liable person will, depending on the context, be called the 'liable person', 'defendant' or 'tortfeasor'.

2. Current Dutch law

2.1. The general exclusionary rule: No ‘normal’ liability claim⁷⁹

Long before the Dutch Civil Code of 1992 (hereafter Civil Code or BW) came into force, the Supreme Court⁸⁰ held that in the field of personal injury only the primary victim had a personal claim for damages in his own name.⁸¹ Of course his claim can, through subrogation or cession, be made by insurance companies, banks or by the victim’s legal successors, but it will then still be a claim in the victim’s name to obtain his damages. Third parties such as relatives do not have a ‘normal’ tort claim directly based on the rules of tort law. Technically, the reason for this lies in the mere fact that their losses are consequential to someone else’s (the victim’s) injury. For losses which are consequential to someone else’s injury or death, the Civil Code has two provisions: Article 6:107 BW (claims by third parties for so-called transferred losses in case of wrongful injury) and Article 6:108 BW (claims by financial dependents in the case of wrongful death). According to the Supreme Court these rules must be taken to be exclusive: that means that beyond the claimants and the kind of damages mentioned in both provisions, no one but the primary victim can claim damages.⁸² If, for example, A’s employee (B) suffers ill-health as a result of the violation of a permit (caused by C) which serves to protect A’s business interests, A cannot recover from C (e.g. for the extra expenses incurred in finding a replacement).⁸³ Normally tort law would protect A’s interests but because A’s damages are consequential to B’s illness, C cannot be held liable for these damages.

This is based on a long tradition that was embraced by the legislature when the Civil Code was drafted. The legislature wanted to limit third party rights to transferred losses for three reasons. Firstly, the issue of third parties’ rights to recover was related to the debate concerning the position of private and social insurers’ rights to reimbursement. The desirability of the latter was questioned and pending the outcome of this debate the legislature did not want to expand the rights of other third parties to recover.⁸⁴ Also in that way the amount of liability would not be expanded and its boundaries would be clear.⁸⁵ Although much can be said about this,⁸⁶ I suspect that the courts’ restrictiveness in more recent cases may simply find its roots in a good conservative tradition: abandoning the exclusionary rule carries the risk of (potentially) opening the floodgates and courts feel that it is not their task to make such choices.

2.2. Recovery is based on Article 6:107 BW (‘transferred loss theory’)

Article 6:107 BW gives all third parties in the case of injury, except insurers, the right to compensation for the costs they have incurred for the benefit of the primary victim for which the latter, if he would have borne those costs directly himself, would have been entitled to compensation (‘transferred loss’). This has the effect that the action for damages ‘follows’ the loss: for the

79 A ‘normal’ claim means a claim *directly* based on rules of liability (tort) law. For such claims the claimant must argue, in the case of fault liability, that a behavioural rule was violated and that he and the interests for which he seeks protection fall within the protective ambit of that rule (Art. 6:163 BW).

80 In footnote references I will refer to the Dutch Supreme Court (*Hoge Raad*) as ‘HR’.

81 See e.g. HR 2 April 1936, *NJ* 1936, 752 (*Crasborn/Liverpool*); HR 10 January 1958, *NJ* 1958, 79 (*Van Hoof/Van der Plas*); HR 16 June 1972, *NJ* 1972, 375 (*Van Wettem/Courtois*) and HR 12 December 1986, *NJ* 1987, 958 (*Rockwool/Poly*).

82 See for instance HR 8 September 2000, *NJ* 2000, 734 nt. ARB (*Baby Joost*).

83 HR 12 December 1986, *NJ* 1987, 958 nt. CJHB (*Rockwool/Poly*).

84 *Parl. Gesch. Boek 6*, p. 1288. See more extensively on this E.F.D. Engelhard, *Regres*, 2003, pp. 142 *et seq.*

85 *Parl. Gesch. Boek 6*, p. 1288.

86 I refer to my thesis, Engelhard 2003, *supra* note 84, pp. 378-381. It could, for one thing, be argued that such a preliminary bar is not consistent with the right of access to a court as laid down in Art. 6 of the ECHR. Here, these issues will not be further dealt with.

costs that were incurred by relatives, the victim loses his claim since to this extent he has not suffered damage and an independent action is given to the relatives.

As I see it, Article 6:107 BW differs from a ‘normal’ tort claim in at least three different ways. Firstly, liability is based on the breach of a duty of care that the defendant owed to the primary victim.⁸⁷ The action by the relatives is based on the liability of the defendant *vis-à-vis* the victim. Secondly, the liable person may invoke all the defences that he would have had if he was sued by the primary victim, such as contributory negligence or expiration⁸⁸ (or: the payments made were unreasonable, see section 2.4 below). Thirdly, as said, the action is limited to the damages that could have been recovered by the victim if he would have incurred them himself.

2.3. Basic test: Were payments medically desirable and reasonable?

Where does this leave the relatives who suffer from pecuniary damages as a result of the victim’s injury? As said, Article 6:107 BW⁸⁹ gives them the right to compensation for all the expenses they have incurred for the benefit of the primary victim, in as far as the victim himself would have been entitled to recover – if he would have incurred these costs himself. The striking difference with English and German law⁹⁰ is that Article 6:107 BW gives the relatives their own claim but, as I explained above, only to the extent that the primary victim would have been able to successfully claim the damages himself. For claims by the primary victim the test is whether or not the given treatment or facility is ‘*medically desirable*’ and it must have been ‘*reasonable*’ that the victim incurred the given costs for his recovery in two ways:⁹¹ the choice of the given treatment or facility as such and of the amount of money spent thereon.⁹² Therefore these criteria must also be applied when the relatives claim these damages based on Article 6:107 BW; within these limits the costs that relatives incur when taking the primary victim to hospital, for example, can be recovered by them directly to the extent that the primary victim would have been entitled to compensation if he would have incurred his own costs.

This means, similar to what Van Dam has shown for English law, that third parties are in principle also entitled to more than the cheapest treatments for the primary victim if they pay the bill, provided that the more expensive treatment is ‘*medically desirable*’ and ‘*reasonable*’. As for the reasonableness test, the best treatment available is not necessarily ‘*reasonable*’ and if there are several options, the primary victim must opt for the one that is economically more desirable. The burden of proof as to reasonableness is borne by the relatives. Taken literally, the Dutch criterion (‘*medically desirable*’) takes a middle-ground somewhere in between English law (‘*reasonably necessary*’) and German law (‘*medically necessary*’). But with regard to the costs of carers the Supreme Court provides a stricter criterion, see section 3.2.

87 In other words, the debtor is the person who is liable *vis-à-vis* the primary victim for the event by which the latter’s injury was caused.

88 This follows from the fact that the relatives’ action based on Art. 6:107 BW rests on the defendant’s liability towards the victim (‘*derived*’ liability therefore), but is also made explicit by Art. 6:107 s. 2 BW.

89 Art. 6:107 s. 1 BW states that if someone, due to an event for which another person is liable, suffers a physical or mental injury the liable person not only has to compensate the injured person for the damages suffered by him, but also to compensate the costs that a third party has incurred for the benefit of the injured party and that the latter would have been able to recover if these costs would have been borne by him (my translation). Third parties that incur costs based on an insurance contract (*i.e.* insurers) are explicitly excluded from this right to recovery in this article.

90 As explained above in Part I by Van Dam.

91 H.M. Storm *et al.*, ‘Personenschade’, in J.M. Barendrecht & H.M. Storm (eds.), *Berekening van schadevergoeding*, 1995, pp. 167-306, at p. 169.

92 HR 9 November 1990, *NJ* 1991, 26 (*Speeckaert/Gradener*). The same test was applied to the costs of medical tests and the examination of the victim, as well as any surgery performed as a result.

3. Some (of the many) more complex heads of damages

3.1. Inconsistent results

Due to this ceiling (to be determined by the damages that could have been recovered by the primary victim) certain kinds of damage incurred by relatives are more difficult to bring under the umbrella of Article 6:107 BW. Relatives' expenses in travelling to *visit* the primary victim, for instance, are generally taken to be recoverable under Article 6:107 BW,⁹³ but it is doubtful, to say the least, whether such costs can be seen as losses that were transferred from the victim to the relative.⁹⁴ Days on leave spent to visit the victim in hospital are for that last reason *not* recoverable.⁹⁵ The costs of professional care for the victim's children or of professional assistance for running the household (including chores around the house or the garden) can be recovered based on Article 6:107 BW, even though Article 6:107 BW – if taken literally – does not necessarily provide room for this (as these are not costs which are directly incurred for the benefit of the victim).⁹⁶ The argument may be that the costs of hiring professionals to carry out the necessary tasks in or around the house are consequential to the victim's disability and can thus be regarded as transferred losses.⁹⁷ But what if the relatives have done the work themselves? What if they, personally, invested their time and energy in doing work around the house (cooking, cleaning or gardening) and/or caring for and nursing the injured victim?

3.2. Time and energy put into nursing or care

Relatives can to some extent obtain damages for the time and costs put into running the victim's household or personal care. In a case where the former civil code was to be applied, the Supreme Court even allowed compensation for days spent on leave in order to care for a relative.⁹⁸ In this case the parents of a seriously injured child had taken on the special care and nursing of the child and they claimed that the resulting costs were essentially those of their daughter, as Article 6:107 BW could not be applied. The Supreme Court held that the costs necessary for the recovery of the child had to be compensated by the defendant regardless of the fact that she was legally entitled to be nursed and cared for of by her parents. According to the court, her right to compensation – which in effect would benefit her parents – was not limited by the fact that the parents had taken on that caring role. This is generally referred to as 'commercialization of care', but is also seen as 'reasonable'.⁹⁹ However, this right to compensation by carers based on Article 6:107 BW seems to be limited to cases where obtaining (private) professional help can be regarded as 'normal and common'.¹⁰⁰ This criterion has been criticized due to the fact that in most cases in which familial care is needed, it is not normal and/or common to hire professional help for this purpose. Lindenbergh advocates the concrete need for care as the better criterion, to be deter-

93 See *e.g.* Rb. Middelburg 30 March 2005, LJN AZ5725 (claim by parents for travelling to and from hospital). Here, the claim was denied, however, because there was no ground for liability *vis-à-vis* the victim.

94 Storm *et al.* 1995, *supra* note 91, p. 174.

95 HR 28 May 1999, *NJ* 1999, 564 nt. ARB (*Kruidhof*).

96 Storm *et al.* 1995, *supra* note 91, p. 206.

97 Some argue that this can be derived from the victim's obligation in family law; Art. 1:81 BW states that spouses must contribute to their mutual household. If the primary victim is unable to do this, the costs incurred, according to the degree of the victim's invalidity, by his or her spouse in hiring professional help to carry out the household chores would be costs that were incurred for the victim's benefit. See Storm *et al.* 1995, *supra* note 91, p. 206.

98 HR 28 May 1999, *NJ* 1999, 564 nt. ARB (*Kruidhof*).

99 Lindenbergh claims that this is necessary in order to have the actual damage (the lost time and energy) borne by the defendant; see S.D. Lindenbergh, 'Verzorging en huishoudelijke hulp, onzichtbare schade op een lastig kruisvlak', 2006 *TVP*, pp. 105-110, at p. 106.

100 HR 6 June 2003, *NJ* 2003, 504 nt. JBMV (*Krüiter-Van de Pol/Wilton-Feijenoord*).

mined by factors such as the exact type of injury, the amount of invalidity, the victim's needs etc.¹⁰¹

As for the *amount* of compensation for non-professional nursing or care by relatives, the victim's obligation to mitigate damages will bar the right to compensation for more than the average rate charged by professionals. The professional rate is thus, similar to English and German law as discussed above in Part I, the very *maximum*. But whether the compensation should also be *determined according to* professional standards and, if so, to what standard (declared or undeclared earnings) and to what extent (excluding taxes and distribution costs) is still unclear.¹⁰² The position taken by English law in this respect, as shown by Van Dam, that is the commercial standard with – *in principle* – a 'fixed' deduction of 25-30%, seems interesting.

3.3. *Loss of earnings due to nursing or care*

More obvious 'gaps' in relatives' right to recover can be found where the lost income and/or lost career opportunities, working hours or the loss of the job itself are concerned and were the direct result of the time (or energy) spent on behalf of the primary victim. Here Dutch law differs somewhat from English law, where, as Van Dam shows,¹⁰³ the injured party can, when paid employment was given up to care for the injured party, claim damages for the consequential lost earnings. This might stem from the fact that Article 6:107 BW limits the relatives' right to compensation explicitly to losses that were transferred from the injured victim to them. Contrary to the time and energy spent on nursing or care, which – if done by professionals – would have been charged by them, the lost income or lost profits can hardly be qualified as 'transferred' losses. As will be seen, however,¹⁰⁴ there has been a recent initiative to change the law in order to improve the position of relatives in this respect.

3.4. *Employer's loss*

Compared to English and German law, employers must, in the case employees' illness, continue to pay the victim's salary for a much longer period of time; they must continue to pay at least 70% of the salary for a period of 104 weeks (Article 7:629 s. 2 BW). For net salary payments they have an action for reimbursement against the liable person, independent of the victim's claim for damages, which is then reduced to the extent of the net salary payments received from the employer (Article 6:107a BW). For other payments or facilities which the employer provides for the injured victim, the employer has the right to compensation based on Article 6:107 BW. Typical examples are the costs of physiotherapy paid by an employer, but also certain forms of reintegration measures such as adjusting the workplace after the victim's accident. Both claims are limited to the amount of compensation to which the primary victim would have been entitled if he would have had to bear the losses himself.¹⁰⁵

Other costs that employers need to bear due to the victim's inability to work must be incurred by them and cannot be shifted to the liable person. This means that employers bear the risk that, as a result of someone else's tortious act, they will need to hire a replacement at higher wages and/or additional expenses. If they are insured against the risk of such costs, then the

101 Lindenbergh 2006, *supra* note 99, p. 107.

102 Lindenbergh 2006, *supra* note 99, p. 108 suggests leaving this issue to the insurance branch (the '*Nationaal Platform Personenschade*') to agree upon, thereby saving the judiciary time and legal insecurity.

103 See above in Part I, Para. 2.4.

104 See Para. 4.

105 Technically, there is, at least textually, the difference that the right to reimbursement based on Art. 6:107a BW is only limited to the (total) sum of compensation for all damages that the primary victim would have been entitled to (which is then called the '*civiel plafond*') while Art. 6:107 BW is only limited to the amount the primary victim could have recovered for the specific kind of damage.

insurance company will – consequentially – also not be able to invoke any subrogation right against the person liable since the employer is not entitled to recover. Also certain reintegration costs for measures that employers may take to employ handicapped employees, including the victim, such as structural changes in the work schedule, remain uncompensated if they cannot be regarded as transferred losses. But here, too, there are currently plans to change the existing law. Here, the idea is to strengthen the position of employers (mainly) in order to improve the recovery of reintegration costs.¹⁰⁶

3.5. In summa

The common core of Articles 6:107 BW and 6:107a BW seems clear. Both provisions (and the same is true for the reimbursement rights of social insurance companies) lead to the result that only the losses that would originally be suffered by the *primary victim* but that have been borne by the third party are recoverable. Secondly, the third party cannot claim more than the amount that the victim would have been entitled to if he would have had to bear his own losses. As a result, the liable person will not profit from third party assistance (meaning that he cannot escape liability), yet he is also not worse off.¹⁰⁷ This seems like a fair result except that it leaves several heads of damages or amounts of damages suffered by third parties uncompensated. For relatives the following ‘gaps’ that Article 6:107 BW leaves must be mentioned (amongst others):

- a. the income losses suffered by carers that exceed the costs of professional standards,
- b. the income losses suffered by carers where it is not ‘normal and common’ to replace the familial care with professional care, and
- c. the income losses suffered by other members of the household (due to their changed way of life as a result of the primary victim’s injury).

For the primary victim’s employer we have seen that Articles 6:107 BW and 6:107a BW leave the following, for example, uncompensated:

- a. the reintegration costs that would never be incurred by the primary victim, and
- b. the extra costs of (finding) employees to replace the primary victim.

4. Legislative changes?

4.1. Political context

Currently there are a few separate legal proposals pending to improve the position of relatives and employers in this respect. Where relatives are concerned, this was initiated in the context of the legislative proposal for ‘Damages for emotional loss’, which has been debated in Parliament over the last few years. This proposal in essence seeks to offer a fixed sum of compensation – currently thought to be €10,000 –¹⁰⁸ to an enumerated list of relatives in the case of ‘severe injury or death’ suffered by the primary victim.¹⁰⁹ In the parliamentary debates concerning this legislative proposal questions were raised as to the purpose and legitimacy of this legislative

¹⁰⁶ See Para. 4.

¹⁰⁷ This is not completely true, as I have also argued in my thesis (Engelhard 2003, *supra* note 84, p. 299) since both the victim and third parties are also entitled to compensation for – in short – (pre)procedural expenses. Except for this latter issue of (among other things) out of court litigation costs, the guiding principle is, however, to limit third parties’ right of recovery to the losses of the victim (that would have entitled him to damages).

¹⁰⁸ *Kamerstukken I* 2005-2006, 28 781, C, p. 5. There is concern that the simplicity of a fixed sum will attract more claims (at p. 2).

¹⁰⁹ See my chronicle on the law of damages in 2007 *AV&S*, pp. 14-28, at pp. 16-17, for a survey of the latest developments.

proposal in relation to other categories of victims and/or kinds of damages.¹¹⁰ The debate then focussed on the legal position of third parties where pecuniary (purely economic) losses were concerned. Why, it was asked, were those losses left uncompensated while affectionate damages would be made recoverable. The better view would be that if we do take the path of awarding damages beyond the so-called transferred losses, we must not just include the relative's emotional damage but also his *financial* situation.

All this has led to a successful motion in the Second Chamber of Parliament, initiated by two left and right-wing members of parliament, Wolfsen and Luchtenveld.¹¹¹ In this motion the government was asked 'to prepare legislation that will enable direct relatives and employers to recover from their income losses and other damages better than under the current law'.¹¹² It starts from the point 'that in the case of death and serious injury the legal position of third parties and employers is too limited where, for example, income loss and other damages that are directly linked to the accident are concerned'.¹¹³ In his response the Minister of Justice announced that an initiative would be taken.

4.2. First draft for the proposal on 'Relatives' lost income'

So far, there seems to be a preliminary draft on a legislative proposal referred to as 'Relatives' lost income' (*Inkomensschade van naasten*). I am not concerned here with the exact contents of this draft. Not much can be said about it as its existence, let alone its content, has not been publicly announced or made known through the formal channels. On the internet an advisory or consultation letter by the Council for the Judiciary (the *Raad voor de rechtspraak*) can be downloaded 'concerning the first draft of "Relatives' lost income"'.¹¹⁴ This gives a rough understanding of the plans of the Minister of Justice; any more than this is simply a jigsaw puzzle, as the Council's letter is fragmented. But I cannot resist discussing this draft briefly, particularly since the information is accessible for everyone to download. Of course this must be read with the awareness that the information is not formal and therefore uncertain and subject to changes.

Of interest for our present purposes is the idea behind this initiative and the method chosen to convert it into a legal concept. The draft aims to improve the right to compensation for the employer and relatives concerning their pecuniary losses caused by the primary victim's injury or death, *beyond* the 'transferred losses' of the primary victim (the leading criterion for compensation under Article 6:107 BW). According to the Council this draft aims at 'offering better possibilities than are currently possible for the recovery of income losses that relatives and employers may incur if they take on the care, nursing and guidance of the victim'.¹¹⁵ With 'currently possible' it means that Article 6:107 s. 1 BW – as was seen above – only gives third

110 *Kamerstukken II* 2004-2005, 28 781, no. 60, 16 March 2005, p. 3876. As a result of this it was decided in May 2006 to include the results of the research led by Akkermans and Van der Wal that show what victims expect of liability law. Part of this was already published, but the Upper House wanted to await all results before deciding on its approval. See K.A.P.C. van Weesp, 'Het wetsvoorstel affectieschade in de ijskast', 2006 *TVP* 4.

111 More recently these two were known for their new bill on a 'Law for imposing a non-compliance penalty on authorities which violate the prescribed period in which to make decisions' (*Kamerstukken I* 2006-2007, 29 934, B).

112 My translation, EE. Motion 16 March 2005, *Kamerstukken II* 2004-2005, 28 781, no. 10. In Dutch the proposal asks 'om wetgeving voor te bereiden waardoor directe naasten en werkgevers door hen geleden inkomens- en andere schade beter dan nu kunnen verhalen op de veroorzaker'.

113 My translation, EE. In Dutch: 'dat bij overlijden en ernstig letsel de positie van directe naasten en werkgevers te beperkt is waar het gaat om het kunnen verhalen van bijvoorbeeld inkomens- en andere schade die direct is toe te rekenen aan de schade veroorzakende gebeurtenis'.

114 The 'advisory letter' by the Council for the Judiciary can be found at: <http://www.rechtspraak.nl>. My translation; in Dutch: 'inzake het voorontwerp "Inkomensschade van naasten"'.
115 Advisory letter, *supra* note 114, at p. 1. According to the Council this first draft results from the aforementioned proposition by parliament (my translation, EE). In Dutch it is said that the aim is: 'om de inkomensschade die naasten en werkgevers lijden indien zij de verzorging, verpleging en begeleiding van een verwant op zich nemen, in ruimere mate dan thans mogelijk is verhaalbaar te maken'.

parties the right to compensation for injury losses that is transferred to them from the primary victim and that without their interference would have been successfully recovered by the victim directly (in this draft also referred to as the ‘civil law ceiling’). The idea is to add new rules to Article 6:107 BW in such a way that it, according to the explanatory words of the Minister, as cited by the Council for the Judiciary:¹¹⁶

‘offers relatives the possibility to be compensated for their full income loss in the situation where they, by taking on the care or nursing, were forced to reduce their regular working hours. Thereby, their loss of income is then much greater than the compensation they can claim within the current limit of the civil law ceiling’.

The Council’s advisory letter mentions that a newly planned subsection *c* in Article 6:107 s. 1 BW would give relatives the legal right to compensation for their free time spent on intensive nursing and care with regard to the victim. The Council takes it for granted that the Minister seeks to relate this to the current case law as the Supreme Court, as shown above, already allows compensation for free time despite the fact that Article 6:107 BW only mentions the recovery of ‘costs’.¹¹⁷ According to the Council a truly new ruling would be a subsection *d*, which aims to: ‘improve the possibilities for the recovery of income losses of relatives who take on the caring, nursing and guiding of the victim’.¹¹⁸ As said, this draft aims, according to the Council which refers to passages from the explanatory memorandum of the Minister, ‘to allow the loss of income of relatives in principle to be fully recoverable’.¹¹⁹ It is concerned, according to the Council, with costs other than those which are meant in the current Article 6:107 BW. According to the Council the examples mentioned in the explanatory words of the Minister are: ‘visiting costs; costs for travelling from abroad (to visit); costs for domestic assistance, provided the partner can no longer do the particular chores around the house; the costs involved in obtaining a driving licence, if the partner can no longer drive; and the costs of an alternative vacation’.¹²⁰ Clearly, the primary victim would not, if he would bear his own losses himself, be entitled to compensation for most of these heads of damages (as they are more typically directly incurred by the relative). Therefore the draft can be regarded as a substantial improvement for relatives.

4.3. Legislative proposal to extend reimbursement actions

More recently, on 26 June 2007, also another legislative proposal (not a draft but an actual proposal) was sent to the Second Chamber of Parliament which aims to extend the existing reimbursement claims of employers (and of social insurance providers, which I will only briefly touch upon).¹²¹ The aim of this proposal is to improve the legal position of employers and social insurance providers in order to enable them to be fully compensated for the *reintegration costs*

116 Advisory letter, *supra* note 114, at p. 3 (my translation, EE). In Dutch: ‘dat dit de naasten de mogelijkheid biedt om hun volledige inkomensschade te vorderen in de situatie dat zij door deze taken op zich te nemen genoodzaakt zijn minder te gaan werken. Hun inkomensschade is dan immers omvangrijker dan de vergoeding die zij binnen de grenzen van het civiel plafond kunnen vorderen’.

117 HR 28 May 1999, *NJ* 1999, 564 nt. ARB (*Kruidhof*) and HR 6 June 2003, *NJ* 2003, 504 nt. JBMV (*Krüter-Van de Pol/Wilton-Feijenoord*). The Council for the Judiciary is uncertain as to whether, based on this first draft, lost time will only be recoverable, as in the case law, ‘if hiring professional help would otherwise be the normal and common thing to do, and only in as far as the costs of professional help are saved by using the claimant’s own free time’. See its advisory letter, *supra* note 114, p. 3.

118 Advisory letter, *supra* note 114, p. 2 (my translation, EE). In Dutch: ‘de inkomensschade die naasten lijden indien zij de verzorging, verpleging en begeleiding van een verwant op zich nemen, in ruimere mate verhaalbaar te maken’.

119 In Dutch: ‘om de inkomensschade van de naaste in beginsel volledig voor vergoeding in aanmerking te laten komen’.

120 Advisory letter, *supra* note 114, p. 2. In Dutch: ‘bezoekkosten; kosten van overkomst uit het buitenland (voor bezoek); kosten van huishoudelijke hulp, nu de partner die dat deed wegvalt; kosten voor het halen van een rijbewijs, omdat de partner niet meer kan rijden; kosten van een andere noodzakelijke vakantiebestemming’.

121 *Kamerstukken II* 2006-2007, 31 087, nos. 1-4. The Council of State (*Raad van State*) has in principle approved this draft, no. 4.

they expend on behalf of the primary victim. The conservative party in the Upper House had insisted on an initiative of this kind by the Minister during the parliamentary debates concerning recent changes in social security law. As a result of the latter changes, an extra financial burden was (again) placed on employers to provide reintegration measures for the victim who – for any reason – has been handicapped or unable to work. It was thought to be fair if the employer could recover such costs in full and not limited to the extent that the victim would have been able to obtain compensation for these costs. The draft thus proposes to give employers and social security providers the right to recover reintegration costs in full and not limited by the heads of damages and the maximum amount of compensation that would have applied if the victim would have requested the recovery of these costs.¹²²

As said, this legislative proposal has resulted from the (political) need to relieve employers of financial burdens that have significantly increased due to the social security reforms during the last few years. It leaves the more cynical mind with the impression that addressing the latter issues on a fundamental level seemed socially undesirable and/or too sensitive (from an electoral point of view) and that, as a result, the solution was to be found in a civil law action. My concern lies with the civil law consequences of this draft, but beyond that I am guessing that for employers this hardly provides any ‘real’ relief as far as their interests are concerned (*i.e.* the financial burdens regarding reintegration under the so-called Gatekeeper’s Act (*‘Wet Poortwachter’*)).

5. An alternative approach

5.1. Analysing these developments

A few overall remarks can be made concerning these developments. The new draft on income losses and the legislative proposal to extend reimbursement claims both seek to seriously alter the law as it stands. Currently the right to compensation is limited to damage to the victim and therefore, one could say, to the damage that was caused *directly by the accident* itself. For example: the hospital bill, the costs of professional care, medical treatment etc.¹²³ Both legislative drafts propose to change this by cumulatively making other heads of damages also recoverable, damages that were not directly caused by the event but were suffered as a result of the injury, ‘a second layer’ of violated interests (*‘ricochet’* damages).¹²⁴ But it would be naive to expect that this would be the end of the matter. Even under the new proposals many heads of damages will still remain uncompensated. Making a ‘hard’ (enumerative) list implies – inevitably – having to make rather arbitrary and harsh choices as to the interests that will and those that will not be protected. Does the victim’s employer, for instance, have a claim for lost profits during the period of time when he cannot find an appropriate replacement? Does the victim’s husband also have a claim for the extra working hours he takes on and for his lost career opportunities because of emotional and practical distress? Can the *husband’s* employer claim damages for *his* absence from work? Will we be adding to the list the possibility for employers to claim damages for their business losses when *carers* (family members who take care of the primary victim) call in sick?

122 *Kamerstukken II* 2006-2007, 31 087, nos. 1-2. In order to achieve this the draft proposes to add a provision to the reimbursement rights of employers and social insurance providers (a newly proposed section 3 for Arts. 6:107a BW, 52a Sickness Benefits Act, 69 Invalidation Insurance Act and 61 Invalidation Insurance (Young Disabled Persons) Act, a – uniform – section 4 to add to Arts. 90 Invalidation Insurance Act and 99 Work and Income (Ability to Work) Act and a new Art. 3a to add to the Recovery by Public Servants (Industrial Accidents) Act).

123 Certain *relatives* who witnessed the accident or its immediate aftermath and are suffering from nervous shock as a result also have the possibility to make a tort claim. Thus, certain relatives may have a claim for emotional suffering and/or income losses because of witnessing the accident.

124 This is not the first time; in an earlier draft version of Art. 6:107 BW the legislature also proposed a list of protected interests but, for the reasons mentioned in section 2.1, this was later replaced by the criterion of ‘transferred losses’ only.

Or claims by neighbours and grandparents who have to care more often for the primary victim's children, or the carers' children, or those of the carers' carers? How about the injured victim's sister who donates her kidney to her? What criterion could be used to decide which interests – of persons other than the injured party – deserve protection? *All* these financial damages can(*not*) be seen as losses that were transferred from the primary victim to the third party and will therefore be left uncompensated. What are the reasons for not including them in the list of the legislative drafts?

5.2. What we need is a leading principle

It seems clear that there will always be objections if we leave the question as to what interests deserve protection to the legislature or the legal literature to decide *in abstracto*. But that is not the biggest problem here – we need to draw the line somewhere. What it rather boils down to is what end-objective(s) do we want to achieve by liability law? In what seems to be the dominant view, liability law serves, ultimately, *not* to promote compensation, but to sanction violations of behavioural rules in private law relations in order to restore the violated interests of those protected by these rules. In the field of personal injury this means, as I see it: promoting the primary victim's physical and/or mental recovery.

But where will this leave us as far as the social need for more protection for third parties is concerned? The rules of tort law (Article 6:162 BW etc.) are not likely to give us the results we want: relatives' lost income would almost always be left unprotected because of the mere fact that the relative was not directly involved in the accident himself.¹²⁵ Having said this, and given the (presumed) need to improve the position of third parties, some intervention by the legislature does seem desirable. Not in the form of an enumerated list of what interests should be protected, but rather in the form of a rule that explicitly allows third party claims for damages that were incurred on behalf of the primary victim. Instead of limiting their claims to 'transferred' losses (as in Article 6:107 s. 1 BW) we should consider an open provision. For example, one that allows third parties to recover fully where they, in cases of serious injury, have suffered pecuniary damages on behalf of the primary victim's physical and/or mental health. In effect this would mean that the criterion of 'transferred losses' would be replaced by a criterion that in my view seems more efficient in respect of tort law's aforementioned goal: did the claimant (the relative, the employer, etc.) incur these costs in behalf of the primary victim (being the one that falls within the protective scope of the violated norm)? For example, damages due to extraordinary care would then be covered, but also other attempts to restore the primary victim's health, either made by relatives (*e.g.* family members donating a kidney) and/or the employer. The consequential loss of earnings and of career opportunities and the reintegration costs specifically incurred for the benefit of the primary victim would, under such a new provision, in principle all be recoverable.

Technically, this could take the form, for example, of adding a new section to Article 6:107 s. 1 BW, ruling that in the case of serious injury the liable person must also compensate all pecuniary costs, including the loss of earnings, of third parties (with the exception of insurers), if incurred on behalf of the injured person's physical and/or mental health. By an additional rule the loss of days on leave for care purposes could explicitly be included.

¹²⁵ Based on the rules of tort law, for instance, the claimant (here: the relatives) must in the case of fault liability argue that a behavioural rule (*e.g.* a road traffic regulation) was violated and that he and the interests for which he seeks protection fall within the protective ambit of that rule (based on the requirement of relativity, Art. 6:163 BW).

6. Concluding remarks

As was argued above, in my view it would be welcome if the legislature would use the current debate to create room for a general rule for recovery by third parties, based on the principle of the recuperation of the primary victim rather than an enumerated list of all the interests that must be protected. In this way we would opt for a reasonable and efficient middle-ground solution, which offers more compensation for third parties (beyond their ‘transferred losses’) without, at the same time, being caught in an automatic and enumerated list.

PART III

Third party losses in European tort law

The ‘Principles on European Tort Law’ and the ‘Principles on European Law on Liability for Damages’ compared

Ivo Giesen

1. Introduction

In the following brief observations I would like to take a look at what is to be expected in the distant future from European private law, especially European tort law, when we are dealing with third party losses. I will thus add a minor European dimension by looking at what is being developed on a larger common scale within European tort law. Most notably, the former ‘Spier/Koziol Group’, nowadays called the European Group on Tort Law has developed the so-called *Principles on European Tort Law* (hence: PETL)¹²⁶, and the Study Group on a European Civil Code, otherwise known as the ‘Von Bar Group’, has presented us with *Principles on European Law on Liability for Damages* (in short PEL Liab.Dam, hence: Von Bar Principles).¹²⁷

I presume that these private initiatives of learned scholars, both aiming at some sort of harmonisation and/or unification of European tort law by developing principles common to tort law in the whole of Europe, are by now at least to some extent known. Therefore I will not deal specifically with the existence, precise working methods and results of these groups in general.¹²⁸ The beauty of having two sets of principles on tort law in Europe is that this immediately gives us the opportunity for an interesting comparison, especially since the two sets actually seem to be, at least to some extent, competing to become the most prominent principles of tort law in Europe.

¹²⁶ See www.egtl.org.

¹²⁷ See www.sgecc.net.

¹²⁸ For more information, see for instance C. van Dam, *European Tort Law*, 2006, nos. 101-2, 603-1 and 606; W.H. van Boom & I. Giesen, ‘Van Nederlands naar “Europees” onrechtmatige daadsrecht’, 2004 *NTBR*, pp. 515 *et seq.*; N. Jansen, ‘Principles of European Tort Law?’, 2006 *RabelsZ* 70, pp. 732 *et seq.*; G. Wagner, ‘The Project of Harmonizing European Tort Law’, 2005 *CML Rev* 42, pp. 1269 *et seq.*; J. Blackie, ‘The Tort Provisions of the Study Group on a European Civil Code’, in M. Bussani (ed.), *European Tort Law. Eastern and Western Perspectives*, 2007, pp. 55 *et seq.*; J. Blackie, ‘Tort/Delikt in the Work of the European Civil Code Project of the Study Group on a European Civil Code’, in R. Zimmerman (ed.), *Grundstrukturen des Europäischen Deliktsrechts*, 2003, pp. 133 *et seq.*; H. Koziol, ‘Die “Principles of European Tort Law” der “European Group of Tort Law”’, 2004 *ZEuP*, pp. 234 *et seq.*; J. Spier & O.A. Haazen, ‘The European Group on Tort Law (Tilburg Group) and the European Principles of Tort Law’, 1999 *ZEuP*, pp. 469 *et seq.*

The research question I will address here is as follows: what have the two groups of scholars that have been working on an overarching European law on torts and damages brought us when it comes to third party losses? In doing so, I will use the term third party losses interchangeably with phrases like ‘losses of secondary victims’ or ‘losses by indirect victims’. In each case, what is meant is a loss suffered not by the *direct* victim of a tort, but by someone else, a third party or secondary victim, usually someone close to the direct victim.¹²⁹

The structure of the following is straightforward enough. I will deal, first, with the PETL, then I will describe the Von Bar Principles and after having done so I will try to make a comparison between the two and briefly evaluate what has been put forward.

2. The PETL

2.1. General scheme

When it comes to damages, the first and probably most fundamental principle in the PETL is that of Article 10:101: ‘Damages are a money payment to compensate the victim, that is to say, to restore him, so far as money can, to the position he would have been in, if the wrong complained of had not been committed. Damages also serve the aim of preventing harm.’¹³⁰ This principle is thus about compensating the victim. Without actually and explicitly stating so, what ‘victim’ in this respect means is of course the ‘direct victim’. That is the person who has been wronged, the person entitled to damages according to the other rules of the PETL on establishing liability.

A possible indirect victim, a third party, does not seem to be included unless, *maybe*, the case is such that the behaviour by the tortfeasor towards this third person constitutes a tort (against this third party) in its own right according to the general rules of the PETL. But in such a case, he is no longer an indirect victim, of course. I specifically used the term ‘maybe’ here because what might actually be the case is that this escape clause is not possible after all. It might well be, as is the case in the Netherlands,¹³¹ that circumventing the limits to compensation by positioning oneself not as an indirect but as a direct victim, by framing the claim differently thus constituting a new tort towards oneself (‘the damage done to X is such that I, the plaintiff, am victimised by that action as well’), will not be accepted.

This limitation on the possibilities of receiving compensation for persons other than the direct victims becomes apparent if one takes a closer look at the other principles on damages. In those other principles – that is to say, in two exceptions to the general set-up – third parties are mentioned specifically as having a right to some form of compensation. The fact that these indirect victims are named specifically in those two cases in my opinion also means that there is an exclusion of these indirect victims when it comes to having rights to compensation on a more general footing. This is the only logical inference that can be drawn because if this had been meant to be otherwise, the specific rules would not have been needed at all.

129 I will not specifically deal here with ‘nervous shock cases’ although they are briefly mentioned hereafter. Those cases could, of course, be considered as claims relating to secondary victims (since another person has been primarily injured in those cases), but they also form a topic in their own right. Cf. S. Lindenbergh, ‘The protection of secondary victims: a comparative overview’, in: M. Bona *et al.* (eds.), *Personal Injury Compensation in Europe: Fatal Accidents and Secondary Victims*, 2005, p. 414.

130 It must be noted that the wording of this article is not particularly useful. Using terminology like ‘that is to say’ within a rule such as this does not seem to be an example of professional drafting skills.

131 See Part II of this joint contribution by Engelhard above.

2.2. Exceptions

So, secondary victims are not generally covered by the PETL. However, they have been granted a few rights along the way, by way of exception.¹³² Let us take a closer look at those exceptions.

First, there is an exception for pecuniary damages in Article 10:202 Paragraph 2.¹³³ In cases of death (of the primary victim, of course), persons *such as* family members whom the deceased maintained or would have maintained if the death had not occurred *are treated as* having suffered recoverable damage.¹³⁴ These indirect victims have not, apparently, at least when one reads the article as it stands, suffered recoverable damage in the sense of Article 2:101 PETL, but they ‘are being treated’ for present purposes as having suffered such damage to the extent of the loss of that support. Yet again, this proves, in my view, my contention earlier that the PETL in principle only relate to primary victims. That limitation now seems to be inherent even in the (slight) expansion beyond the primary victim that is foreseen here in this specific article.¹³⁵

Now, to be more specific concerning this exception: who can be treated as having suffered recoverable damage? The answer is persons who would have been or were maintained by the deceased. Of course, the next question is then: who are these persons? Surprisingly, in that respect the rule of Article 10:202 is all of a sudden quite broad in its wording since it relates to anyone who was or would have been maintained. This is not just the spouse or the children of the deceased – the family members are mentioned specifically in the article, but only as an example by using the words ‘such as’ – but one can also think of persons who were *in fact* maintained by the deceased even if there was no legal entitlement to maintenance given by any legal provision.¹³⁶ One can think in that respect of a non-marital partner.

The fact that these damages are compensated in these cases is manifestly just, or as Rogers has put it:¹³⁷ ‘*compensation for it would be universally seen as a necessity*’. I agree completely,¹³⁸ but I also think that the same holds true for a few more items of damage that should also have been included. Most notably, one could think of funeral expenses.¹³⁹

Next to the previously mentioned slight opening for allowing compensation of pecuniary loss, there is a second exception allowing non-pecuniary loss to be awarded to indirect victims as laid down in Article 10:301 Paragraph 1.¹⁴⁰ In cases of a fatal injury or a very serious non-fatal injury, persons having a close relationship with the primary victim can be compensated for their own non-pecuniary damage as well. The exceptional character of this rule is again underlined by

132 The exceptional character of compensation for third parties is in my view also highlighted by the terminology used by U. Magnus when speaking about the different types of victims and separating the two sorts. He writes about ‘certain indirectly affected persons’, see European Group on Tort Law, *Principles of European Tort Law. Text and Commentary*, Chapter 10: Damages, Art. 10:202 (Magnus), 2005, Comment 7 at p. 166.

133 This reads: ‘(2) In the case of death, persons such as family members whom the deceased maintained or would have maintained if death had not occurred are treated as having suffered recoverable damage to the extent of loss of that support.’

134 This means that the loss of the life of the deceased *himself* (the value he would attach to it) is not included, which is, of course, the general rule in Europe, but which also seems to be troublesome from a law & economics perspective (leading to undercompensation and under-deterrence), see R. Van den Bergh & L. Visscher, ‘The Principles of European Tort Law: The Right Path to Harmonization’, 2006 *ERPL*, pp. 535-536.

135 Of course, no account is made here of the fact that in all European systems the claim for economic losses of a deceased survives his death in the sense that this claim will be inherited by another, albeit only to the extent to which the deceased had suffered damage himself prior to and up to his death, see Lindenbergh 2005, *supra* note 129, pp. 407 and 408.

136 European Group on Tort Law, *Principles of European Tort Law. Text and Commentary*, Chapter 10: Damages, Art. 10:202 (Magnus), 2005, Comment 5 at p. 165, and Comment 13 at p. 167.

137 European Group on Tort Law, *Principles of European Tort Law. Text and Commentary*, Chapter 10: Damages, Art. 10:301 (Rogers), 2005, note 3 at p. 173.

138 See also Lindenbergh 2005, *supra* note 129, p. 416.

139 Every European system recognizes these, see Lindenbergh 2005, *supra* note 129, p. 421.

140 Art. 10:301 PETL states: ‘(1) Considering the scope of its protection (Art. 2:102), the violation of an interest may justify compensation of non-pecuniary damage. This is the case in particular where the victim has suffered personal injury; or injury to human dignity, liberty, or other personal rights. Non-pecuniary damage can also be the subject of compensation for persons having a close relationship with a victim suffering a fatal or very serious non-fatal injury.’

the comment that the case for awarding these damages is ‘less clear’ as is the case with non-pecuniary damages to the direct victim of personal injury. Horton Rogers even states in the comment to the article¹⁴¹ that there has been some discussion on whether to include the non-fatal cases in this rule, but the majority of the members of the European Group on Tort Law were in favour of doing so.¹⁴²

One should be aware, however, that the mere mentioning of this form of damages does not make them automatically awardable, since the court will have the discretionary power to refuse the award.¹⁴³ This could become relevant in the future because the notion of ‘very serious injury’ has not been defined by the PETL or in the comments, which gives a court more room to manoeuvre and to imply its own meaning of the term. Furthermore, there is no fixed list of persons who are included in this rule.¹⁴⁴ The statement is supposed to be one of principle, and thus it is not one that has an eye for detail, I would add. Most probably, relationships of *de facto* cohabitation comparable to those of husband and wife, also in the form of a same-sex relationship, seem to be included.¹⁴⁵ But at least there must be some resemblance to a family relationship.¹⁴⁶ Parents and children will probably be included also, but maybe only if they were actually living together. A relationship that has ended, or a relationship involving mere friendship, is not enough.¹⁴⁷

To conclude this part: What sort of non-pecuniary loss is meant also remains unclear. Bereavement is mentioned in the comments just as the loss of a loved one,¹⁴⁸ so those cases would be included. We are talking then about cases of emotional loss, *prejudice d'affection* in French or *affectieschade* in Dutch. Of course, this was to be expected, but what is less clear is whether the article also aims at compensating nervous shock cases. If seen from a Dutch tort law perspective, that form of essentially indirect victim compensation would most probably fall under the wording of this article 10:301 PETL. However, both the PETL (Article 10:202 (1)) and the Von Bar Principles (Article 2:201 (2b)) have specific provisions on this type of case.¹⁴⁹

3. The Von Bar Principles

Having dealt with the PETL, how about the rules on Non-Contractual Liability Arising out of Damage Caused to Another, as the subtitle of the Von Bar Principles read? In short, the following can be said on those rules.

141 European Group on Tort Law, *Principles of European Tort Law. Text and Commentary*, Chapter 10: Damages, Art. 10:301 (Rogers), 2005, Comment 5 at p. 173.

142 See also Wagner 2005, *supra* note 128, p. 1287.

143 European Group on Tort Law, *Principles of European Tort Law. Text and Commentary*, Chapter 10: Damages, Art. 10:301 (Rogers), 2005, Comment 7 at p. 175. The question which ‘court’ is meant here is of a far more general character and relates to the possibility of being able to use the PETL in practice (which is actually not really the case). Of course, until now no specific court can be named since there has not been any official reception of the PETL.

144 Para. 3 of Art. 10:301 adds in its second sentence that in assessing damages (also in these exceptional cases of secondary victims claiming non-pecuniary losses) similar sums should be awarded for similar losses. This seems to be an assignment to those working with the PETL; justice requires treating like cases alike (*cf.* European Group on Tort Law, *Principles of European Tort Law. Text and Commentary*, Chapter 10: Damages, Art. 10:301 (Rogers), 2005, Comment nr. 11 at p. 177). The drafters want comparability and similarity to govern although a rigid tariff of awards is not possible in their view (European Group on Tort Law, *Principles of European Tort Law. Text and Commentary*, Chapter 10: Damages, Art. 10:301 (Rogers), 2005, Comment no. 9 at p. 175). I think it is possible to come to some form of tariff system if that were to be really desired and I feel it should be strived for since that is the only way to get to treat similar cases really alike. Especially in cases of bereavement, this seems possible since one simply cannot differentiate one person’s bereavement from the next.

145 See also Van Dam 2006, *supra* note 128, no. 1210, at p. 331.

146 European Group on Tort Law, *Principles of European Tort Law. Text and Commentary*, Chapter 10: Damages, Art. 10:301 (Rogers), Comment 8 at p. 175.

147 *Ibid.*, Comment 16 at p. 178.

148 *Ibid.*, Comment 5 at 173.

149 On that aspect, see Van Dam 2006, *supra* note 128, no. 1211, at p. 334.

Its basic rule in Article 1:101 states that someone, in order to have a right to reparation from someone else, the tortfeasor causing the damage, must suffer ‘legally relevant damage’.¹⁵⁰ As a next step, this notion of ‘legally relevant damage’ is elaborated in more detail in Chapter 2 of the Von Bar Principles. A loss is legally relevant, amongst other possibilities, if that Chapter so provides, states Article 2:101 Paragraph 1. Relevant is then, first, that Article 2:201 defines Personal Injury and Consequential Loss as including (see subsection 2a) ‘the cost of health care including expenses reasonably incurred for the care of the injured person by those close to him or her’. Health care expenses are thus recoverable if a third party, not being the direct victim, has incurred them.¹⁵¹ Who should actually claim these costs remains unclear, however.

Next, Article 2:202 specifically deals with ‘Loss Suffered by Third Persons as a Result of Another’s Personal Injury or Death’.¹⁵² It first states that non-economic loss (which includes pain and suffering and impairment of the quality of life, see Article 2:101 Paragraph 4) as a result of another’s personal injury or death is relevant if the person is in a particularly close relationship with the primary victim. Non-pecuniary losses are thus covered, much in the same way as under the PETL.¹⁵³

Again, what sort of non-economic loss is meant to be included here is not specified extensively and so this remains somewhat doubtful. It is only specified to the extent that pain and suffering and an impairment of the quality of life are included (Article 2:101 Paragraph 4). But what do those two types of non-economic loss actually include? Damages for bereavement, for instance, seem to be something else. And grief for the loss of a loved one is not necessarily an impairment of one’s quality of life. Still, chances are that those types of damage were meant to be included simply because these would be the types of damage one would immediately think of. If something else was meant, that would most probably then have been elaborated in more detail.

As for pecuniary damages, two forms of pecuniary loss are recoverable under the same Von Bar principle (Art. 2:202). First, reasonable funeral expenses are legally relevant damage for the person incurring them. Second, loss of maintenance can be legally relevant for the person who was maintained by the deceased or would have been maintained had the death not occurred. This maintenance can be due according to statutory provisions or because the deceased in fact provided care and financial support.

4. Comparison

If we now combine the foregoing two short descriptions, what does that tell us? First, we notice that only ‘family members’ (*i.e.* people with a sufficiently close relationship to the direct victim) will be able to receive some form of compensation as a third party, either in the form of maintenance or as (non-economic) bereavement damages, if the direct victim dies as a result of the tort committed. These rules thus effectively exclude all other possible indirect victims, most notably

150 In full, it reads: ‘(1) A person who suffers legally relevant damage has a right to reparation from a person who caused the damage intentionally or negligently or is otherwise accountable for the causation of the damage.’

151 The PETL also cover medical expenses in Art. 10:202 (1), but here the reimbursement of a third party who has incurred the costs does not seem to have been foreseen by the drafters.

152 The article states: ‘(1) Non-economic loss caused to a natural person as a result of another’s personal injury or death is legally relevant damage if at the time of injury that person is in a particularly close personal relationship to the injured person. (2) Where a person has been fatally injured: (a) (...); (b) reasonable funeral expenses are legally relevant damage to the person incurring them; and © loss of maintenance is legally relevant damage to a natural person whom the deceased maintained or, had death not occurred, would have maintained under statutory provisions or to whom the deceased provided care and financial support.’

153 See also Van Dam 2006, *supra* note 128, no. 1210, at p. 331.

employers.¹⁵⁴ Those rules also exclude third party claims for pecuniary losses almost entirely when the direct victim survives the wrongdoing.¹⁵⁵ The reason for this ‘exclusionary approach’ is most probably that we are dealing here with a form of pure economic loss, which is, of course, considered to be a problem from a compensation perspective in several jurisdictions.¹⁵⁶

More specifically, looking at *pecuniary losses* and comparing the two sets of principles, one can say that with regard to the maintenance of surviving ‘family members’, the two groups have reached more or less the same result. He who was maintained or would have been maintained by the deceased had the death not occurred can be compensated. This is even the case if there was no statutory duty obliging one to maintain another but only a *de facto* situation of maintenance. However, I still prefer the Von Bar Principles with respect to pecuniary losses since that set of principles does not use an example in its wording like the EGTL has done in its principle (the term ‘such as family members’ is included). I strongly believe that this is not something that should be included in a Principle like this, or in any other principle for that matter. Examples can be and usually are great instruments to further the understanding of a provision, although they should not be included in the provision as such but should rather be dealt with in comments. Of course, there was ample opportunity for the EGTL to do so.

A second reason why the Von Bar Principles are to be preferred is that they are just a bit broader (if looked at from the point of view of a secondary victim) than the PETL. Of course, this relates to the fact that funeral expenses as well as medical expenses incurred by a person close to the direct victim are also included in the first case while they are not, or at least do not seem to be, under the rules of the PETL. Notwithstanding this preference, what needs to be noted on a more general footing is that both sets of principles are not all that generous as regards third party losses when it comes to pecuniary losses.

As to *non-pecuniary losses*, both sets of rules are somewhat vague as to what sorts or forms of non-pecuniary losses are recoverable. Do they only wish to include bereavement damages or are other types of losses meant as well? Given the current state of affairs in this regard in Europe, which, on the whole, still seems to be at least reluctant to award non-pecuniary losses for indirect victims,¹⁵⁷ one is inclined to interpret the words used rather strictly, although Van Dam, for instance, also admits that by now it is actually doubtful where the balance (between systems awarding and systems not awarding these damages) lies these days.¹⁵⁸

Apart from that, both sets of rules seem to have made a different choice as regards the way in which to limit compensation. The rule composed by the SGECC is somewhat broader than the PETL rule since in that first case no ‘serious’ non-fatal injury is needed; a personal injury is enough to be able to claim non-pecuniary loss. On the other hand, although the required closeness of the relationship between primary and secondary victim seems to be roughly the same in both cases, this condition is actually a bit more relaxed under the PETL principles since the requirement of ‘close’ is probably not the same as ‘particularly close’. Thus, both groups seem to limit the extent of compensation, but at a different level (that of the injury or at the level of the

154 *Ibid.*, no. 1209, at p. 328. For nervous shock cases (not dealt with here), ‘family membership’ is as such not required but most national rules tend to be such that it is usually family members that fulfil the requirements that have been set. For an overview, *ibid.*, no. 1211.

155 As Lindenbergh 2005, *supra* note 129, p. 426, has noted, in those cases all jurisdictions focus on providing compensation to the direct victim. Extending claims to others would open the ‘floodgates’. Exceptions, however, do exist in several national systems.

156 See Van Dam’s remarks in Part I of this contribution. Especially the English and German systems are reluctant to compensate these losses. The Dutch and French have problems in doing so. See in general, W.H. van Boom, ‘Pure Economic Loss: A Comparative Perspective’, in W.H. van Boom *et al.* (eds.), *Pure Economic Loss*, 2003.

157 Van Dam 2006, *supra* note 128, no. 1210. The French system is less strict, and in the Netherlands the legislator is developing new, broader rules in this respect.

158 *Ibid.*, no. 1210, at p. 331, pointing to the Principles already dealt with.

required relationship between those involved). However, one must not forget that different people who might have meant similar things have used both words so one cannot be really sure here.

5. Evaluation

By way of an evaluation I would like to raise two points. My first one relates to what Lindenberg¹⁵⁹ has argued previously, in 2005. He wrote that in Europe one could identify basically two groups, two types of compensation systems, with regard to secondary victims. The first group consists of a group of legal systems in which it is principally accepted that the act on which liability is founded does not only give rise to a claim for the primary victim but also for whoever suffers loss as a consequence of the act. This system prevails in Belgium, France, Luxembourg and Spain. Elsewhere, as a second way of dealing with this issue, in principle only the primary victim has a right to compensation for the loss suffered, others only have a right as well where this is granted by a specific provision.

I think it is clear that the PETL principles are in the second group mentioned above, allowing secondary victims to be compensated only in limited and specifically mentioned situations. On the other hand, one could argue that the Von Bar Principles are of the other type of system. In that liability system the secondary victim's claim is indeed totally embedded within the regular structure of the compensation system, just as is the case for several other types of damage, such as personal injury, loss upon infringement of property, etc. So each and every victim needs to suffer 'legally relevant damage' in order to be awarded compensation under this system, and this exact same rule also applies to people we usually consider to be secondary victims. If such a person suffers legally relevant damage (as defined in Article 2:202), he is a victim in the sense of this system. He is then 'a person who suffers legally relevant damage' and this person thus has 'a right to reparation from a person who caused the damage' in the sense of Article 1:101. He is thus no longer a secondary victim, he is a regular victim, a victim entitled to some form of damages.

The fact that the actual results in awards under both groups might not always differ is not decisive here,¹⁶⁰ since what is highly relevant, in my opinion, is that the starting point differs between the two groups when it comes to the legal reasoning. That fact could become very relevant in the future, I believe. How come? If a future trend would indeed develop – as I think it will, given the developments in several national systems – consisting of an increased allowance for secondary victims to claim for more types of 'secondary' damage, such a trend would and will indeed be much more easily accommodated within a system that principally allows secondary victims to sue for their own damages. Thus, choosing for either one or the other of these sets of principles might be of influence on the reception of this possible future development towards allowing more types of damages to be compensated for secondary victims.

That conclusion, tentative as it is, becomes all the more relevant since, and that will also be my second evaluative remark, the current state of affairs as regards the rights of secondary victims on the European Private Law level is not fair and reasonable. I think that secondary victims should be entitled to more types of damage than have been recognised so far, especially in the sphere of pecuniary losses. Next to maintenance and possibly funeral expenses it would be welcomed, as far as I am concerned, if the losses related to, for instance, spare time and vacations spent on caring for someone else, were to be recognized as well. Other types of damage

159 Lindenberg 2005, *supra* note 129, pp. 406 and 413-414.

160 See *ibid.*, p. 406.

might be considered also, as is being done in the Netherlands as we speak.¹⁶¹ My prediction in this respect is that exactly this issue will become a big issue in the forthcoming years, leading eventually to an extension of claims.

Given what has been said above, concluding that the rights of secondary victims have not yet been taken care of properly, and repeating that I would like to see the trend of enlarging their rights to be facilitated as effectively as possible, I would also be in favour of adopting a system that would best incorporate those claims. In this case, that would be the Von Bar Principles.

PART IV

General conclusion

Combining the perspectives outlined above provides a somewhat scattered picture. On the one hand, it illuminates the fact that there is a distinguishable trend towards new kinds of third party losses being compensated. For instance, under Dutch law the case law has been stretched in order to attain justified solutions and currently the legislator is working on proposals to improve the position of relatives and employers. A preliminary draft seeks to entitle relatives who nurse and take care of the primary victim to full compensation for their consequential loss of income. Another draft, which has taken the form of a legislative proposal by the legislator, seeks to reimburse employers fully for reintegration costs. In Part II it was argued that drafting these lists of kinds of damages takes no account of tort law's main goal, which is to restore the primary victim's financial and mental situation. From this point of view a general rule was favoured which, based on the principle of the recuperation of the primary victim, would entitle third parties in cases of serious injury to recover fully all pecuniary costs (including the loss of earnings) incurred on behalf of the injured person's physical and/or mental health.

From an English and German perspective the development of expanding the law of damages in this respect is much less visible. In both legal systems the costs incurred by third parties, particularly for nursing and care by relatives, are in principle compensated. However, it is not the third party but the primary victim who is entitled to claim. This means that relatives are dependent on the primary victim to obtain compensation. There are as yet no indications that this is about to change, although the British government is considering strengthening the position of the third party *vis-à-vis* the primary victim. What seems to be highly relevant here is the English and German position as regards pure economic losses. In Dutch law there is much less reluctance towards claims for pure economic loss.

As a second concluding remark one could point to the fact that, as things stand nowadays, the existing Principles on the law of damages within the existing sets of principles on European Tort Law, from whatever group they may come, are not completely up to date. Compensating employers for losses incurred because employees have been injured and thus are not able to do the job they were supposed to do, has not been addressed by these principles at all. There is simply nothing on that. As regards family members and their losses, in some jurisdictions the law of damages is already taking further steps, albeit small ones. This has not been foreseen in any of the principles on tort law either. As mentioned above, the Von Bar Principles here have the

¹⁶¹ See Part II by Engelhard above.

advantage of having a more open mind towards third parties. This will probably allow those Principles to incorporate a possible enlargement of the compensation for third parties more easily, but even then, awarding compensation outside their scope as has now been envisaged will no doubt prove to be difficult.