



# ESSAYS ON PRIVATE AND BUSINESS LAW

A TRIBUTE TO PROFESSOR ADRIAAN DORRESTEIJN

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## 7 CHANGING THE CAUSATION REQUIREMENT AND ITS IMPACT ON COMPANIES FACED WITH TORT CLAIMS<sup>1</sup>

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### 7.1 INTRODUCTION

#### 7.1.1 The problem

The possible success of a (mass) tort claim against a company often depends on the causation requirement in Article 6:162 or Article 6:74 Dutch Civil Code (hence: CC) being fulfilled or not. Traditionally, this was a good legal instrument for defendants to have claims dismissed and thereby keeping the floodgates of liability shut. However, in our current globalizing world (multinational) companies are confronted with causation requirements that differ from country to country and, at least within the Netherlands, even within countries, depending on the factual situation. In the Netherlands the traditional requirement of *condicio sine qua non* (CSQN) to establish liability has been relaxed to a large degree, as will be shown below, with case law making exceptions to the rule on a case by case basis.<sup>2</sup> As we will also show, a justification or 'leitmotiv' that firmly underpins these exceptions is lacking. Since there is as yet no 'one-size-fits-all EU causation' either, a company that has its business in more (European) countries is faced with different types of causation requirements per country and sometimes even within a country. This means that the causation requirement has lost a great deal of its attractiveness for defendants over the years.

<sup>1</sup> This article draws in part on earlier work(s) by the authors. Most notably, some of the parts hereafter on (proof of) causation in sections 7.2, 7.3 and 7.4 are based on R. Rijnhout & I. Giesen, The Netherlands, in M. Infantino et al. (eds.): *Causation. Common Core Project*, to be published in the autumn of 2017; I. Giesen & E. Engelhard, Medical liability in the Netherlands, in: Koch (ed.), *Medical Liability in Europe*, Berlin 2011, and I. Giesen, R. Kool & F. Kristen, The Dutch Crush on Compensating Victims, in: M. Dyson (ed.), *Comparing Tort and Crime*, CUP: Cambridge 2015, pp. 355-358.

<sup>2</sup> The same holds true, no doubt, for other European countries, but in this contribution there is no room to engage in a comparative analysis. For a comparative overview see e.g. S. Steel, *Proof of causation in tort law*, Cambridge: Cambridge University Press 2015. See e.g. for English law, S. Steele, Justifying Exceptions to Proof of Causation in Tort Law (2015) 78(5) *MLR* 729-758. For American law see i.e. K.N. Hylton, *Tort Law A Modern Perspective*, Cambridge: Cambridge University Press 2016, chapters 11 and 12. See for a comparative overview of proportional liability, I. Gilead et al. (eds.), *Proportional liability: analytical and comparative perspectives*, Vienna: De Gruyter 2013.

### 7.1.2 Main question and structure

The main aim of this contribution in honour of Adriaan Dorrestein is to show the lack of a general and broad justification, a 'leitmotiv' if you will, for (most of the individual) changes in the causation requirement that facilitate the establishment of liability under Dutch tort law in this modern day and age. This lack of an overarching justification for a relaxation of the causation requirement has led, we think, to a rather scattered landscape of in fact different causation demands per type of claim, differing from topic to topic, from subfield to subfield. As it turns out, there is no longer a generally applicable causation requirement in tort law in the Netherlands; per type of case different rules and exceptions have been accepted. The consequence is that legal uncertainty for businesses, especially those operating in different countries, has grown considerably, to the detriment of those businesses.

Hereafter, we will show that the Dutch concept of causality differs on a case by case basis, both from a substantive and from a more procedural (evidence) angle (sections 7.2 and 7.3). In section 7.4 we will give two examples of questions of CSQN being reframed as questions of damage. We will round off this contribution with some conclusions (section 7.5).

## 7.2 CAUSALITY UNDER DUTCH LAW: A DUTCH OVERALL CONCEPT OF CAUSATION IS HARD TO FIND

### 7.2.1 General rule

The general rule of causation in the Netherlands consists of two stages. First, to establish liability a *conditio sine qua non* between the alleged wrongful behaviour and damage should be proven (factual causality). In principle the plaintiff has the burden of proof, and needs to convince the defendant or judge that a CSQN exists to 'a reasonable degree of certainty' (see section 7.3 below). Second, although the criterion of CSQN is the entry test for liability, in the second stage it should be determined whether there is a sufficient causal connection between the damage and the circumstance(s) that caused the damage, and that as a consequence the damage could reasonably be attributed to the tortfeasor (Article 6:98 CC; legal or normative causality).<sup>3</sup> Thus, the second stage aims at limiting liability even more. It is the tortfeasor who should argue that there is an insufficient causal connection between the damage and the circumstances that caused the damage.<sup>4</sup>

<sup>3</sup> C.J.M. Klaassen, *Schuldvergoeding: algemeen*, II (Mon. BW 135), Deventer: Kluwer, 2007, no. 32.

<sup>4</sup> HR 2 October 1998, *Nederlandse Jurisprudentie (NJ)* 1998/831. A.S. Harikamp and C.H. Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands burgerlijk recht. 6. Verbintenissenrecht, II. De verbinenis in het algemeen*, Deventer: Kluwer 2013, no. 82.

Article 6:98 CC embodies the question of legal causality. Several factors are used to answer this question<sup>5</sup>: the foreseeability of the damage; the remoteness of the damage; the blameworthiness of the damaging event; whether the harm was inflicted in the course of a business undertaking or by a private party; the nature of the norm infringed; and the nature of the damage caused (personal injury vs. purely financial loss).<sup>6</sup> Although legal causality aims at limiting liability, it is also used in several cases to justify exceptions to the bare minimum of CSQN. Some of these are dealt with hereafter.

### 7.2.2 Subsequent wrongdoing: hypothetical causation

The first generally accepted exception to the CSQN requirement is accepted in the case of subsequent events, *i.e.* when a subsequent event would have led to the same damage as that caused by the defendant, had the defendant's act not occurred. Two hypothetical situations exist. First, two persons wrongfully cause damage to the plaintiff simultaneously. It is generally accepted that in this situation both tortfeasors are responsible and one of them cannot argue that a CSQN does not exist because the other party caused the damage.<sup>7</sup>

The second hypothetical situation is when the damaging events do not occur at the same time, but subsequently in time. However, both events could have resulted in the same result, namely the damage suffered by the plaintiff. It could be argued that, because of the second damaging event, a CSQN connection between the behaviour of the first tortfeasor and the damage ceases to exist. However, this line of reasoning is not accepted under Dutch law. This situation is considered to be an instance of hypothetical causation for which an exception to the strict interpretation of CSQN is accepted. As a rule, the first tortfeasor (chronologically the person who first caused the damage) is liable for all the damage that occurred. The rationale of this rule is that the plaintiff should not bear the risk of the non-liquidity of the second tortfeasor, or of the fact that no one is liable for the second event that (again) caused the damage.<sup>8</sup> Sieburgh argues that the requirement of legal causality demonstrates the reason for its existence especially in these types of cases, by allowing a causal connection to be accepted whilst, strictly speaking, a CSQN does not exist.<sup>9</sup> This reasoning also shows that, due to reasons of reasonableness, the first stage of

<sup>5</sup> This part is based on I. Giesen and A.L.M. Keirse, 'The Netherlands', in H. Koziol and B.C. Steininger (eds.), *European Tort Law 2010*, Berlin-Boston: de Gruyter 2011, p. 445-6. See also the so-called 'Brunner rules', C.J.H. Brunner, 'Causaliteit en toerekening van schade', *Verkeersrecht (VR)* 1981, p. 210, 213; Asser/Hartkamp en Sieburgh, *Verbintenissenrecht 6-II* (2013), no. 57-73.

<sup>6</sup> See Giesen and Keirse, 'The Netherlands', p. 445-446.

<sup>7</sup> Asser/Harikamp & Sieburgh, *Verbintenissenrecht 6-II* (2013), no. 87.

<sup>8</sup> HR 7 December 2001, *NJ* 2002/576, comm. J.B.M. Vranken (*Genecente Leeuwarden/Loss*), no. 3.4.

<sup>9</sup> Asser/Harikamp & Sieburgh, *Verbintenissenrecht 6-II* (2013), no. 87.

other way around this is an argument for accepting the liability of the first tortfeasor, precisely this possibility weakens the argument that the person who is responsible for the second event should be fully responsible. Why should a person who wrongfully sets fire to an already destroyed house (due to an earthquake, and thus not a man-made event) be responsible for repairing the house? We could argue that the principle of reasonableness could again resolve this unjustifiable outcome, but that would not add to our search for one leitmotiv to justify exceptions to the CSQN requirement. Indeed, it would underpin the idea that causality seems to be accepted or denied on a case by case basis.

### 7.2.3 Joint wrongdoing results in damage: joint and several liability

A second situation that is illustrative of exceptions to the rule of CSQN is when so-called *samenlopende oorzaken*, joint causes, occur: factor A and B together caused the damage, and both tortfeasors acted wrongfully or wrongfully neglected their duty of care. However, the occurrence of one factor is, in itself, not sufficient for a CSQN to exist between the damage and the factor. In other words, both factors were essential in causing the damage. In this case, it is generally accepted that both the persons responsible for factor A and B respectively are jointly and severally responsible, when they have *together* caused the same damage (Article 6:102 CC).<sup>15</sup> An exception will, however, be made when the fault of the second tortfeasor is so much worse, when compared to the fault of the first tortfeasor, that this second fault cannot reasonably be attributed to the first tortfeasor. This is due to the fact that the second fault was an unforeseen consequence of the behaviour that led to the first fault and the second fault does not fall within the sphere of risk of the first tortfeasor.<sup>16</sup> Again, the facts of the case give rise to an exception to the CSQN criterion, which in essence is justified by the idea that the plaintiff should not be responsible for damage that is wrongfully inflicted, but is in essence caused by two tortfeasors.

### 7.2.4 Wrongdoing contributes to damage: partial liability

Another type of joint wrongdoing, however, results in partial liability. That is the case when the defendant could not have caused *all* the damage but merely *contributed* to the damage.<sup>17</sup> In other words, all tortfeasors *together* partially created the damage. The pre-

<sup>15</sup> HR 24 December 1999, NJ 2000/351, comm. C.I.H. Brunner (*Van Nugteren/Meskes*). See also Akkermans, 'Oorzakelijk verband', 47; Asser/Hartkamp & Sieburgh, *Verbindingsrecht 6-II* (2013), no. 86; Klaassen, *Schadevergoeding*, p. 35; Van Boom, 'Meervoudige oorzaken, hoofdelijke aansprakelijkheid en toerekening naar redelijkheid', p. 92-93.

<sup>16</sup> HR 25 September 1992, NJ 1992/751 (*Alpura/Dijkhuizen*), no. 3.3. See Asser/Hartkamp & Sieburgh, *Verbindingsrecht 6-II* (2013), no. 86; Klaassen, *Schadevergoeding*, p. 35.

<sup>17</sup> See A.J. Akkermans, *Proportionele aansprakelijkheid bij onzeker causaal verband* (diss. Tilburg), Deventer: W.E.J. Tjeenk Willink 1997, p. 74-76.

establishing causality, CSQN, is not the bare minimum but a criterion which in some cases is decisive and in others is not.

An exception to the rule of hypothetical causality is made when the plaintiff's damage is of a continuous nature and the second event falls within the plaintiff's sphere of risk.<sup>10</sup> The rationale of this rule, according to the Supreme Court in the case of *Vermaas/Staat*, is that:

'the obligation to compensate damage as a consequence of an accident does not go as far as the situation in which the tortfeasor should preserve the plaintiff from damage that would have fallen within his sphere of risk had the accident not occurred.'<sup>11</sup>

An example of a situation which falls within the plaintiff's sphere of risk is when he commits a criminal offence, or the plaintiff's shop remains open whilst licences were suspended.<sup>12</sup>

This reasoning of course explains why the first tortfeasor (in time) should be responsible; however, it has been questioned why the second tortfeasor should not be obliged to pay damages. The main argument against this is that he did not cause the damage, because the damage was already there. However, as Van Boom argues, the essence of hypothetical causality is to pretend that the other cause does not exist.<sup>13</sup> Hence, why is it allowed to pretend that the second cause never occurred and not to think away the first cause? Holding the second tortfeasor responsible could lead to unjustifiable outcomes due to, to him, unforeseeable damage, but liability law is equipped with other instruments to resolve that problem.<sup>14</sup> Additionally, the justification for accepting hypothetical causality with regard to the first tortfeasor, as outlined above, could partly be followed in accepting full liability in the second event: why should the plaintiff bear the risk of the non-liquidity of the first tortfeasor? An argument against this reasoning is, however, that the first damaging event could be an event for which liability does not exist, and although the

<sup>10</sup> HR 2 February 1990, NJ 1991/292, comm. C.I.H. Brunner (*Vermaas/Staat*); HR 7 December 2001, NJ 2002/576, comm. J.B.M. Vranken (*Gemeente Leeuwarden/Loss*), no. 3.4. Repeated by the Supreme Court: HR 23 December 2011, NJ 2012/377, comm. P. van Schilgaarde (*V. & P./De Nederlandse Bank N.V. & Stichting AFM*). See also A.J. Akkermans, 'Oorzakelijk verband', in *Onrechtmatige daad BW-Krant Jaarboek 1996*, Deventer: Gouda Quint, 1996, p. 49; Asser/Hartkamp & Sieburgh, *Verbindingsrecht 6-II* (2013), no. 90; Klaassen, *Schadevergoeding*, p. 36-39.

<sup>11</sup> HR 2 February 1990, NJ 1991/292, comm. C.I.H. Brunner (*Vermaas/Staat*), no. 3.3.  
<sup>12</sup> HR 23 December 2011, NJ 2012/377, comm. P. van Schilgaarde (*V. & P./De Nederlandse Bank N.V. & Stichting AFM*); comm. J.B.M. Vranken under HR 7 December 2001, NJ 2002/576 (*Gemeente Leeuwarden/Loss*), no. 6.

<sup>13</sup> W.H. van Boom, 'Meervoudige oorzaken, hoofdelijke aansprakelijkheid en toerekening naar redelijkheid', in: *Causaliteit*, The Hague: Vermande 2003, p. 7.

<sup>14</sup> Van Boom, 'Meervoudige oorzaken, hoofdelijke aansprakelijkheid en toerekening naar redelijkheid', p. 7-8.

vailing view in this matter is that the defendant should be held liable for the part of the damage for which he is responsible (partial liability).<sup>18</sup> An example of a Supreme Court decision in this regard is the *Kalimijnen* case. MDPA, a French company, had wrongfully drained off salt into the Rhine. The plaintiff, a Dutch farmer, who used underground water to irrigate his crops, suffered damage because of the high quantity of salt in the Rhine. That high quantity of salt was caused by both the behaviour of MDPA and by the large quantity of saltwater fish in local waters. The plaintiff claimed compensation for the cost of limiting and preventing his damage.

The Supreme Court ruled that considering the fact that the plaintiff had to incur expenses in limiting or preventing his damage because of both the behaviour of MDPA and the large quantity of saltwater fish in local waters, and the linear connection between the amount of salt and the quality of the crops respectively, MDPA should partially compensate the plaintiff for the damage. According to the Supreme Court, damages should be a reflection of the extent to which MDPA contributed to the total quantity of salt by wrongfully draining off ('its') salt.<sup>19</sup>

### 7.2.5 Wrongdoing perhaps caused damage: proportional liability

Another exception to the requirement of CSQN is made for situations in which more than one cause could explain the damage which occurred, but only for one possible cause does the legal responsibility of the defendant exist. This rather recently<sup>20</sup> accepted exception is the idea of proportional liability, which implies that damages are awarded in accordance with the degree (the chance or possibility) to which the defendant has in fact caused the damage. Hence, the theory of proportional liability is a mechanism to cope with uncertain causation,<sup>21</sup> and aims at fairly distributing the problems of evidence that stem from such uncertainty. However, it is uncertain to what extent this theory may be applied, which will be illustrated by the three Supreme Court decisions which we will deal with here.

<sup>18</sup> Akkermans, *Proportionele aansprakelijkheid*, p. 76-77; Asser/Hartkamp & Sieburg, *Verbitenisrecht 6-II* (2013), no. 95-96. See e.g. on the European Union's principle of the polluter pays, P.E. Lindhout & B. van den Broek, 'The polluter pays principle: Guidelines for costs recovery and burden sharing in the case law of the European Union', *Utrecht Law Review* 2014, vol. 10-2, p. 46-59.

<sup>19</sup> HR 23 September 1988, NJ 1989/743, comm. J.C. Schultsz and J.H. Nieuwenhuis (*Kalimijnen*), no. 3.5.1.

<sup>20</sup> HR 31 March 2006, ECLI:NL:PHR:2006:AU6092, NJ 2011/250, comm. T.F.E. Tjong Tjin Tai (*Nefaiti/Karamus*), no. 3.13.

<sup>21</sup> The theory could be seen as an exception to the rule that there must be a CSQN between someone's wrongful act and the damage suffered by the plaintiff.

The theory of proportional liability was accepted in the case of *Nefaiti/Karamus*.<sup>22</sup> The judgement is a clear illustration of how the Dutch Supreme Court – mostly based on a general notion of fairness, given the contractual relationship between an employer and an employee – has dealt with evidentiary problems that arise due to causation and uncertainty. A former employee who had worked with asbestos claimed damages because of the fact that he suffered from lung cancer. One difficulty existed: the CSQN between the damage as a result of cancer and the wrongful act of the employer (Article 7:658 CC) could not be established. The cause of the lung cancer could have been the inhaling of asbestos dust, but could also have been the fact that the plaintiff was a heavy smoker; but the cancer could also have been due to genetic factors. In other words, there was uncertainty about the existence and extent of causation.

The Supreme Court decided in general that if there is a very small chance that the damage to the plaintiff's health has been caused by the wrongful act of the defendant, his claim should be denied. However, when that chance is very high, the claim should be allowed. As regards the 'grey area' – neither a very small nor a very high possibility – the Supreme Court decided that, considering the rationale of the norm which was breached (to prevent damage to the health of employees and the nature of the wrongful act), it would be contrary to reasonableness and fairness to either leave the risk on the side of the employee, or on the side of the employer. The Supreme Court decided that 'also in view of the starting points that underlie Articles 6:99 and 6:101 CC, it has to be accepted that, when an employee suffers damage that, considering the possibilities in percentage terms, could have been suffered both because of the wrongful act of his employer and his duty to protect the health of his employees, and because of circumstances that could be attributed to the employee himself, without the possibility of ascertaining how far the damage is a consequence of one of these circumstances, the judge could allow the claim by the employee; however, damages should then be decreased in proportion to (and with a reasoned estimation) the extent to which the circumstances that increased the damage should be attributed to the plaintiff'.<sup>23</sup>

In other words, under certain circumstances a judge can decide to hold the defendant partly liable, that is, for the part for which he (on the basis of a probability calculation) in fact could be responsible but not with regard to the circumstances that fall within the plaintiff's sphere of risk. Thus, the defendant could be held proportionally liable for the damage to the plaintiff in the course of the *establishment of liability*; the proportionality rule does not extend to the assessment of damages (see Article 6:98 CC).

<sup>22</sup> HR 31 March 2006, ECLI:NL:PHR:2006:AU6092, NJ 2011/250, comm. T.F.E. Tjong Tjin Tai (*Nefaiti/Karamus*), no. 3.13.

<sup>23</sup> HR 31 March 2006, ECLI:NL:PHR:2006:AU6092, NJ 2011/250, comm. T.F.E. Tjong Tjin Tai (*Nefaiti/Karamus*), no. 3.13.

question regarding the interpretation of the factor of the nature of the norm that has been breached. In that particular case a so-called traffic norm, a rule aimed to prevent people from being injured, was breached. The Supreme Court decided in this case that the theory of proportional liability could be applied.<sup>24</sup>

7.2.6 *Intermediate conclusion: establishing causality on a case by case basis*

Since the exceptions to CSQN which we have dealt with can be justified in each individual setting and on a case by case basis, as they are mostly underpinned by the notion of reasonableness, we cannot but face the conclusion that the CSQN requirement as such is not, or perhaps not at all (?), decisive for establishing causality. Although some exceptions are certainly accepted, e.g. cases of joint causes or hypothetical causation, other solutions are of course still being questioned, or are bestowed with a judicial warning that reluctance in its use is required (e.g. proportional liability). This cannot be explained by the degree to which CSQN does exist or not, because that is a question of either yes or no. We can only guess at the reasons for this difference in reception, but perhaps it is just a matter of time: hypothetical causation has been well established for many years while proportional liability is of a more recent date.

7.3 THE FORMER DUTCH CONCEPT FOR PROOF OF CAUSATION IS NOW 'MISSING IN ACTION'

7.3.1 *General rules on the standard and burden of proof as regards causation*

Factual uncertainty about what actually caused what damage is bound to lead not only to fierce debates about causation as such (see section 7.2 above), but also to difficult evidential questions as regards causation, especially when it comes to (finding) the required CSQN connection between the established wrongdoing and the damage that ensued. In particular, questions relating to the burden and standard of proof as well as the possible use of presumptions will arise here.

In general, a plaintiff will bear the *burden* of having to prove, to the required standard of proof, that there was indeed a causal connection between the unlawful act and the damage complained of (Article 150 Code of Civil Procedure CCP). The *standard* of proof in Dutch civil cases refers to the extent or degree of certainty or probability that the evidence adduced by the litigants must generate in the mind of the judge when deciding an issue of

<sup>24</sup> HR 14 December 2012, ECLI:NL:HR:2012:BX8349, NJ 2013/236, comm. S.D. Lindenbergh (*Nationale Nederlanden/S&L*).

After the ruling in *Nefaiti/Karamus* it was questioned to what extent the theory of proportional liability could be used to resolve problems of CSQN. The second decision of the Supreme Court, *Fortis/Bourgonje*, shed some light on this matter.<sup>24</sup> The first question that arose was to which kind of risks (in this case financial risks) the theory could be applied. The Supreme Court decided that this theory could not be generally accepted throughout liability law in its entirety. Also, the judge should exercise restraint with regard to applying the rule of proportional liability, and if he does apply this rule he should justify his decision according to the rationale of the norm which is breached, the nature of the wrongful act, and the nature of the damage suffered. However, the theory of proportional liability should not be limited, according to the Supreme Court, to cases similar to the aforementioned case of *Nefaiti/Karamus*. In general, the Supreme Court decided that:

'[A judge can choose to hold the defendant proportionally liable] especially when the liability [the wrong] of the tortfeasor is definite, the possibility of a CSQN between the wrong and the damage is not very small, and the rationale of the norm breached, and the nature of the wrongful act, justify the application of proportional liability.'<sup>25</sup>

In the case of *Fortis/Bourgonje* itself the Supreme Court declined to apply proportional liability, because it concerned the duty of an asset manager to warn his client, and the rationale of this duty – this legal norm – is (merely) to prevent financial loss. Furthermore, the Supreme Court ruled that the possibility that the client in this specific instance would in fact have listened to a warning given by the bank and that he would have sold his shares – after a lock-in period – in due time, would not have been very great.<sup>26</sup>

The reasoning in *Fortis/Bourgonje* has been criticized in Dutch academic literature, because, considering the importance of the question of whether an exemption to the rule of CSQN can be made, it is not very clear under which circumstances the theory of proportional liability can and should be applied and – all the more important – on what justification (except 'fairness' in general) it could then be based.<sup>27</sup> In the case of *Nationale Nederlanden/S&L* the Dutch Supreme Court cleared up some of the fog surrounding the

<sup>24</sup> HR 24 December 2010, ECLI:NL:HR:2010:BO1799, NJ 2011/251, comm. T.F.E. Tjong Tjin Tai (*Fortis/Bourgonje*).

<sup>25</sup> HR 24 December 2010, ECLI:NL:HR:2010:BO1799, NJ 2011/251, comm. T.F.E. Tjong Tjin Tai (*Fortis/Bourgonje*), no. 3.8.

<sup>26</sup> HR 24 December 2010, ECLI:NL:HR:2010:BO1799, NJ 2011/251, comm. T.F.E. Tjong Tjin Tai (*Fortis/Bourgonje*), no. 3.10.

<sup>27</sup> See I. Giesen, '(Dis)Proportionale duidelijkheid', *NTBR* 2011, no. 19, p. 149-150; S.D. Lindenbergh & S.B. Pape, 'Proportionele aansprakelijkheid bij onzeker causaal verband: deel 2', *AA* 2011, p. 720-725.

When considering these rules on the standard of proof, one must however be aware that there might be other mechanisms to compensate for a difficult procedural position of one of the parties. For instance, it might be that the burden of proof can be shifted between the parties (a so-called reversal of the burden of proof *stricto sensu*). Other private law mechanisms that could be used in just about any case where evidentiary problems arise include presumptions of fact, including *res ipsa loquitur* (see section 7.3.5) and, as already alluded to, a lowering of the standard of proof.<sup>35</sup> These mechanisms are also of use when dealing with evidentiary issues that arise due to uncertainties about causation, as will be illustrated below.

### 7.3.2 The DES rule on alternative causation

In Dutch law some noticeable exceptions have been created by the Supreme Court. A first landmark case that attracted some fame also outside of the Netherlands is the Dutch case of the *DES daughters*.<sup>36</sup> Here, causal uncertainty led to difficulties for the plaintiffs. Several manufacturers had brought a similar pharmaceutical product onto the market, the *DES* drug; these drugs all had similar, cancerous side-effects, not so much for the pregnant women taking the pills but for their soon to be born daughters. The plaintiffs in the *DES* case were thus the daughters of the women who had bought and used the pharmaceutical product. However, these 'DES daughters' could not prove which manufacturer supplied their respective mothers with the products, and therefore they could not prove a CSQN between the damage and the wrongful act of the – or rather one of the – manufacturer(s). In this case, the Dutch Supreme Court decided that the *DES* daughters could claim damages in full from one manufacturer that could have caused all the damage to the plaintiffs.<sup>37</sup>

The Supreme Court was called upon to decide the case under the former Civil Code, and no rule to solve this CSQN problem was laid down in that code. The Supreme Court however decided that the new (and current) Art. 6:99 CC was already substantive law at the time the facts of the case took place.<sup>38</sup> According to this standard, if two or more wrongful acts may have caused the damage, but it is unclear which of the alternative causes did, in fact, cause the damage, then each responsible actor is liable in full unless

<sup>35</sup> See I. Giesen, 'The burden of proof and other procedural devices in tort law', in H. Koziol and B.S. Steiniger (eds.), *European Tort Law 2008*, Springer: Vienna 2009.

<sup>36</sup> HR 9 October 1992, ECLI:NL:HR:1992:ZC0706, NJ 1994/286 comm. C.J.H. Brunner (DES). On that case, see e.g. W. van Gerven, *Tort law*, Oxford: Hart Publishers 2000, p. 447-452; W.H. van Boom, I. Giesen, in: B. Winiger, H. Koziol, B.Z. Koch, R. Zimmermann, *Digest of European Tort Law, Vol. 1: Essential Cases on Natural Causation*, Vienna/New York: Springer 2007.

<sup>37</sup> The Supreme Court did not accept the theory of market share liability, HR 9 October 1992, NJ 1994/535 note C.J.H. Brunner (DES), no. 3.8.

<sup>38</sup> HR 9 October 1992, ECLI:NL:HR:1992:ZC0706, NJ 1994/286 comm. C.J.H. Brunner (DES), no. 3.4.

fact.<sup>29</sup> If the required degree is reached, the court can say that it is convinced of the 'truth' of a certain factual proposition and decide the case accordingly. Included in the foregoing description is the notion that in principle, but with exceptions, the courts in the Netherlands are free to attach their own weight to different pieces of evidence. Whether they believe an eyewitness or not, to give one example, is at their discretion. Related to that notion is the starting point that the standard of proof is decided according to the weight that the judge in question decides to give to the evidence. It is thus in principle a subjective judgment, but one which is subject to at least some 'objective review' by the judge's obligation to give reasons for his decision.<sup>30</sup>

As to the degree or extent of the evidence required to pass the standard of proof hurdle in a civil claim, this is put at 'a reasonable degree of certainty'. It is also noteworthy that this standard of proof can vary according to the type of case that is being dealt with. In line with that, the Dutch courts lower the standard in so-called *kort geding* procedures. These are very expeditious preliminary proceedings, issued at short notice before a single judge, based mainly on oral arguments, in cases where a speedy decision is needed due to the nature of what is at stake. There, the standard is lowered to *aanmerkelijkheid*: 'is it more likely than not?'.<sup>31</sup> Thus, the standard of proof can in fact be varied. For possible reasons why demanding more evidence might be unjustified, one can refer to the general justifications for a court to accept a reversal of the burden of proof. For example, one party has in fact caused the evidentiary problems of the opposing party, or there is a substantive justification such as the need for the law to protect employees against employers to a certain extent.<sup>32</sup>

The standard of proof is also of great influence on the burden of proof; this standard will affect the extent to which the concept of the burden of proof determines the final outcome of a case. If a court is convinced of the existence of a certain fact, the required evidence apparently has been brought forward, allowing the judge to decide the matter accordingly. The risks associated with the burden of proof are then no longer at stake; it would be impossible to have a so-called *non liquet* situation, the situation in which the fact that needed to be proven has not been proven according to the standard of proof which is applicable.<sup>33</sup> From this it follows that if the required standard of proof were to be lowered, the degree of evidence necessary to reach the standard would also be lower, making it less likely that the burden of proof will be decisive in that case at hand.<sup>34</sup>

<sup>29</sup> See I. Giesen, *Bewijs en aansprakelijkheid* (diss. Tilburg), The Hague: Bju 2001, p. 50.

<sup>30</sup> For details, see Giesen, *Bewijs en aansprakelijkheid*, p. 53-55.

<sup>31</sup> See Giesen, *Bewijs en aansprakelijkheid*, p. 56.

<sup>32</sup> For an elaboration, see Giesen, *Bewijs en aansprakelijkheid*, p. 475 and 477.

<sup>33</sup> See for instance G. Baumgärtel, *Beweis(asi)praxis im Privatrecht*, Berlin: Heymanns 1996, no. 377.

<sup>34</sup> Giesen, *Bewijs en aansprakelijkheid*, p. 476; C. Bumberger, *Zum Kausalitätsbeweis im Haftpflichtrecht*, Linz: Trauner Verlag 2003, p. 42.

(factual) question to answer because it enquires about someone's hypothetical state of mind in the past, which is something that cannot be proven.

The precise extent and ambit of this 'omkeringsregel' (the 'reversal rule') as it has been dubbed, is still not exactly settled, and neither is its underlying justification since the Supreme Court never alluded to this, except for invoking the fairness of its consequences.<sup>45</sup> The rule has nevertheless gained a great deal of importance and has triggered a lot of litigation. During the last couple of years the Supreme Court has limited the instances in which this burden of proof rule might be applicable. Nowadays, before the rule can be applied, it needs to be proven by the claimant that a certain specific risk of damage was created or enlarged by the wrongful behaviour of the defendant and that this specific risk has in fact materialized.<sup>46</sup> In 2012 the Supreme Court again decided on the range of applicability of this 'reversal rule', by holding that:

'in order to apply this rule it is required that the defendant's behaviour infringed a norm that aims at preventing a specific danger with regard to causing damage, and that the person who refers to this norm, makes it plausible, also in the case of argument, that in his specific case the danger that the norm aims to prevent has nevertheless been realized.'<sup>47</sup>

Beware also, when using this rule, that a 'shift' of the burden of proof under Dutch law in this sense does not mean a shifting of the 'legal' burden, but rather that of the 'evidential' burden. That is, the burden of proof actually does not change, it only denotes that, for the time being, that burden has been discharged. It is then for the opposite side, similar to the situation where a presumption of fact is accepted, to come forward with evidence to rebut that provisional judgment.<sup>48</sup>

This rule as regards the possible 'shifting' of the (evidentiary) burden of proof has had a tempestuous past.<sup>49</sup> It seems, however, as if nowadays the rule is limited to the situation

<sup>45</sup> On that aspect, see HR 29 November 2002, ECLI:NL:PHR:2002:AE7345, NJ 2004/304 (TFS/NS) and HR 29 November 2002, ECLI:NL:PHR:2002:AE7351, NJ 2004/305 (Kastelijn/Achterkarspelen).

<sup>46</sup> HR 29 November 2002, ECLI:NL:PHR:2002:AE7345, NJ 2004/304 (TFS/NS) and HR 29 November 2002, ECLI:NL:PHR:2002:AE7351, NJ 2004/305 (Kastelijn/Achterkarspelen) and on these important cases e.g. T. Hartlief, 'Causaliteitsonzekerheid. Opkomst en ondergang van de 'omkeringsregel'', AA 2003, p. 298-306; G.R. Rutgers, 'De aantrekkingskracht van de redelijkheid en billijkheid', AA 2003, p. 307-313.

<sup>47</sup> I. Giesen, 'The burden of proof and other procedural devices in tort law', p. 56. See also HR 23 November 2012, ECLI:NL:HR:2012:BX7264, NJ 2012/669 (Erven van A./B. & C.), no. 3.7.

<sup>48</sup> I. Giesen, 'De aantrekkingskracht van Loreley. Over opkomst en ondergang (?) van de 'omkeringsregel'', p. 69-86. See also A.J.P. Schild, 'Het "conditio sine qua non"-verband bij de schending van een zorgvuldigheidsverplichting: enige wegen naar Rome', *Rechtsgeleerd Magazijn THEMIS* 2009-6, p. 257.

he can prove that his act did not cause the damage.<sup>39</sup> The rationale of this shift in the burden of proof seems to be the idea that it is unfair that the plaintiff should bear the risk of the impossibility of proving which of several defendants' wrongful behaviour caused the damage.<sup>40</sup> The Supreme Court even decided that a defendant (who has in fact acted wrongfully) was liable in full when the possibility existed that the plaintiff suffered damage because of taking DES which had been produced by another manufacturer which had not acted wrongfully.<sup>41</sup>

### 7.3.3 The so-called 'reversal rule'

A second possible exception to the regular division of the burden of proof is to accept a reversal of that burden of proof as regards that CSQN element. Ever since the famous 1996 judgment in the professional liability case of *Dicky Trading II*,<sup>42</sup> the Supreme Court has decided cases on the division of the burden of proof in a manner which is contrary to the general burden of proof rule as laid down in Article 150 CCP. This burden of proof then does not rest on the claimant, but on the defendant. This rule is particularly relevant where traffic rules or safety regulations or other protective measures have not been followed, for instance in cases of traffic accidents or work-related accidents.<sup>43</sup> Think also of cases of omissions to inform or to warn someone else against the potential dangers of a certain act.<sup>44</sup> In such situations, the question arises whether the person who should have been given the information or should have been warned would have acted differently if (s)he had received the information or warning. If (s)he would not have acted differently, the omission to warn that person did not cause the damage. This is of course a difficult

<sup>39</sup> The Dutch Supreme Court also applied the DES rule in an environmental tort case (HR 17 January 1997, ECLI:NL:HR:1997:ZC2247 NJ 1997/230) and in a tort case concerning property damage (HR 31 January 2003, ECLI:NL:PHR:2003:AF1301/NJ 2003/346).

<sup>40</sup> C.J. van Zeben, J.W. Du Pon & M.M. Olthoff, *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek. Boek 6. Algemeen gedeelte van het verbintenissenrecht*, Deventer: Wolters Kluwer 1981), p. 346. The Supreme Court also decided that this also applies when the plaintiff is unable to name all the possible tortfeasors: HR 9 October 1992, NJ 1994/535, comm. C.J.H. Brunner (DES), no. 3.7.4.

<sup>41</sup> HR 9 October 1992, ECLI:NL:HR:1992:ZC0706, NJ 1994/286 comm. C.J.H. Brunner (DES), no. 3.7.6. An exception should be made when there is a good chance that the damage to the plaintiff has been caused by taking Des of another manufacturer which did not act wrongfully. The burden of proof rests with the defendant, however.

<sup>42</sup> HR 26 January 1996, ECLI:NL:HR:1996:ZC1976, NJ 1996/607 (*Dicky Trading II*).

<sup>43</sup> See I. Giesen, 'De aantrekkingskracht van Loreley. Over opkomst en ondergang (?) van de 'omkeringsregel'', in T. Hartlief and S.D. Lindenberg, *Tien penneutrekken over personenschade*, The Hague: Sdu 2009, p. 69-86.

<sup>44</sup> There is a vast amount of literature on this, see e.g. I. Giesen, *Bewijslastverdeling bij beroepsaansprakelijkheid*, Deventer: Wolters Kluwer 1999, p. 66; A.J. Akkermans, *De omkeringsregel bij het bewijs van causaal verband*, The Hague: Bju 2002; D.T. Boks, *Notariële aansprakelijkheid: enige aspecten van de civielrechtelijke aansprakelijkheid van de notaris*, Deventer: Wolters Kluwer 2002, p. 211.



interpretation through the notion of effective legal enforcement, *i.e.* making sure that the legal norm will be lived up to by providing a legal sanction when it is not.

### 7.3.5 Presumptions of fact; *res ipsa loquitur*

So far, we have not yet mentioned nor dealt with the use of 'regular' presumptions of fact, *i.e.* the kind of presumptions that any given court has at its disposal in any given case, and we have not done so for that very reason. In any case, if a court finds enough weight in a certain fact to presume the presence of another fact, *i.e.* the fact that actually needs to be proven, a presumption to that effect may be used, leading to a shift of the evidentiary burden of proof, as explained earlier. Since this is in no way special to the causation requirement in tort cases but a general evidentiary notion,<sup>53</sup> we will not delve any further into this matter now, except for mentioning that this presumption might sometimes also be labelled as the maxim of *res ipsa loquitur*, the 'case speaks for itself'.<sup>54</sup>

### 7.3.6 Intermediate conclusion: the worrying effect of a missing justification

In this third section, we have dealt with the general rules as well as the most noticeable exceptions to the burden and the standard of proof when it comes to causation issues under Dutch law.<sup>55</sup> What we take away from this overview is, firstly, that there are in fact several exceptions to the main rules. Apparently, the need is felt quite often in Dutch case law to provide the (admittedly usually deserving) plaintiffs with some form of help to get some form of legal redress in the civil court. Of course, as a downside, these help lines put the defendant companies quite often at a (sometimes even big) disadvantage, if viewed from the perspective of the general rules of evidence law as they are still in place.

Secondly, although there are – we think – good justifications for this course of action, the cases that actually take a stand and that provide solace to plaintiffs most often do so without really providing for an explanation and/or justification. We have seen many references to 'fairness' instead of concrete arguments being used. This is, thirdly, albeit understandable to a large extent (in fact: how should one further justify what is fair from the outset?), troublesome because it is (and has proven to be) actually possible to provide such a more thorough justification, as shown by some of the examples we have also seen.

<sup>53</sup> Giesen, *Bewijs en aansprakelijkheid*, p. 64-69, with references. See also I. Giesen, 'The burden of proof and other procedural devices in tort law', no. 18-24.

<sup>54</sup> See e.g. Giesen, *Bewijs en aansprakelijkheid*, p. 69-73, with further references; I. Giesen, 'The burden of proof and other procedural devices in tort law', no. 22-23.

<sup>55</sup> The law of civil procedure even provides for more possibilities to increase the plaintiff's success rate, for instance through the so-called 'duty to provide information', see I. Giesen, 'The burden of proof and other procedural devices in tort law', no. 25-35.

in which a safety or traffic norm has been infringed.<sup>50</sup> This does not mean, though, that a judge cannot use other procedural devices to lessen the burden of proof that falls on the claimant, such as a presumption. Also, the theory of proportional liability (see below) can be used to solve the difficulty as regards proving a CSQN that arises due to uncertainties about causation.

### 7.3.4 Presumptions in financial cases

For another mechanism we need to point to the decision in the *World online* case. The Supreme Court decided in that case that in principle the burden of proof falls on the investor whose investment has gone bad due to misleading statements by the CEO of the stock issuing company. However, providing such evidence will be problematic (due to causation uncertainty), as the Supreme Court stated, and this would lead to a situation where the protection that the EU prospectus guidelines aim at would become illusory.<sup>51</sup> Giving due weight to 'effective legal enforcement' is thus the key notion here.

In light of this starting point of effective protection that should be attached to these European rules by means of national law, the Supreme Court decided to introduce a presumption of a CSQN between the misrepresentation and the damage. In other words, as Pijls and Van Boom rightly pointed out, the Supreme Court did not decide to shift the burden of proof in the strict sense of the phrase ('*het bewijsrisico*'), but simply presumed that a CSQN is present and placed the onus of having to adduce counterevidence (the 'evidentiary burden') on the shoulders of the defendant.<sup>52</sup> However, when the defendant succeeds in raising doubts regarding the presence of a CSQN between the breach of duty and the damage (*i.e.* the judge starts to doubt this presumption, *prima facie*), then the plaintiff should again prove that a CSQN is indeed present.

This line of reasoning could be applied when the investor claims damages under Article 6:193c CC (in conjunction with Article 6:162 CC), but probably also when the claim is made under EU Regulation No. 462/2013 (liability of credit rating agencies), because the EU introduced this regulation to protect parties against unfair ratings and this protection would also become illusory when the CQSN is not presumed. 'Fairness' as a justification for new rulings on causation seems to have thus received a somewhat narrower

<sup>50</sup> I. Giesen, 'De aantrekkingskracht van Loreley. Over opkomst en ondergang (?) van de 'omkeringsregel'', p. 80; A.J. Akkermans and C.H. van Dijk, 'Proportionele aansprakelijkheid, omkeringsregel, bewijslastverlichting en eigen schuld: een inventarisatie van de stand van zaken', *AV&S* 2012, no. 17, p. 157-77.

<sup>51</sup> HR 27 November 2009, ECLI:NL:HR:2009:BH2162, *Rv/W* 2009/1403, no. 4.11.1.

<sup>52</sup> A.C.W. Pijls and W.H. van Boom, 'Handhaving van prospectusaansprakelijkheid niet illusoir: vermoeden van causaal verband bij prospectusaansprakelijkheid', *WPNR* 2010, p. 195-196.

should then be dismissed. Determining what would have been the outcome of an appeal if it had been filed properly is of course difficult, if only because one of the parties that would have been present at that appeal, the original defendant, is no longer present. Furthermore, a ruling on what someone else 'would have done if' is always difficult from an evidential point of view.

The Dutch Supreme Court allows the lower courts to use either one of the two methods mentioned above in determining this issue: courts can decide what would have been decided in the original case and determine the damages based on that outcome (leading to an 'all or nothing' result), or they can determine by an estimate the chances of success on appeal and, by doing so create a new (or separate) head of damage (the lost chance), base the amount of damages on that estimate. A further justification for this until then unavailable tort law mechanism was sadly not provided. Courts are not obliged to use this method, but they may do so as an alternative to the more classic approach of deciding what (another) court would have decided in the original case (the trial within a trial method).<sup>57</sup> In general, the loss of a chance approach is then seen as a subsidiary option.<sup>58</sup> By now, this is established and widely followed case law.<sup>59</sup>

The dogmatic features of this theory and its place within the overall system of Dutch liability law are, as yet, not entirely clear. The original wording by the Supreme Court suggests that this loss of a chance doctrine can be based on Article 6:97 CC, in conjunction with Article 6:105 CC. The former article basically states that if the amount of damage cannot be determined precisely, it will be estimated. This estimate could then of course be the percentage of chance that the claim would have had on appeal. The second article states that the determination of future loss can be postponed or undertaken immediately, after weighing the good and the poor chances.<sup>60</sup>

Since this approach has been approved by the Supreme Court, more and more lower courts have used the loss of a chance approach to decide cases (of professional liability).<sup>61</sup>

<sup>57</sup> See also the preliminary advice of the Advocate General before the decision of the Dutch Supreme Court, under no. 3.3 ff, who also deals with the pros and cons of both methods.

<sup>58</sup> See A.J. Akkermaans, 'Theorie en praktijk van proportionele aansprakelijkheid', in: A.J. Akkermaans, M. Faure & T. Hartlief (eds.), *Proportionele aansprakelijkheid*, The Hague: Boom Juridische Uitgevers 2000, p. 108; Chr.H. van Dijk, 'Onzeker causaal verband in de rechtspraak', in: A.J. Akkermaans, M. Faure & T. Hartlief (eds.), *Proportionele aansprakelijkheid*, The Hague: Boom Juridische Uitgevers 2000, p. 39.

<sup>59</sup> See HR 19 January 2007, ECLI:NL:HR:2007:AZ6541, NJ 2007/63 (*Kraaiendijk Holding BV en De Vries/A*).  
<sup>60</sup> See T. Hartlief, 'Proportionele aansprakelijkheid: een introductie', in: A.J. Akkermaans, M. Faure & T. Hartlief (eds.), *Proportionele aansprakelijkheid*, The Hague: Boom Juridische Uitgevers 2000, p. 1-25, p. 15.

<sup>61</sup> See for example Hof Arnhem 14 December 1999, ECLI:NL:GHARN:1999:AC3940, NJ 2000/742 and Rb. The Hague 12 July 2000, TVP 2000/4, p. 94, comm. I. Giesen.

The explanation that the possibility of actually enforcing duties of care (effective legal enforcement) warrants a form of relief for plaintiffs is a fine example thereof. Lastly, we must conclude that the 'justification deficit' described here has left the 'proof of causation' part of Dutch tort law surrounded with many uncertainties. This may have rather negative consequences, as we will explore further in section 7.5. But first, there is a third way of handling difficult causation issues that warrants attention.

#### 7.4 CREATING A NEW HEAD OF DAMAGE TO REMOVE THE CSQN PROBLEM

##### 7.4.1 *Loss of a chance*

Another approach to CSQN, and to deal with the problems posed by that requirement, was approved by the Dutch Supreme Court's decision of 24 October 1997,<sup>56</sup> by allowing a new head of damage to be compensated: a loss of a chance. The 1997 case dealt with the professional liability of a lawyer. A former employee, Baijings, of the Sara Lee/DE company claimed damages for not having been able to cash in on a set of stock options after the termination of his employment contract. Because of an error made by his lawyer, his appeal against the rejection of the claim at first instance was never filed. Baijings then claimed damages from his (by then former) lawyer. The main issue in that second case was whether an appeal in the previous proceedings could and would have been successful if the appeal had been filed on time.

The Court of Appeal decided that given the rules of Dutch labour law the claim by Baijings against Sara Lee/DE would not have succeeded. The claim against the lawyer was therefore also dismissed. The Supreme Court first dealt extensively with the labour law aspects of the original case and overruled the decision of the Appellate Court in this respect. The Court continued as follows: the question in this case is whether, and to what extent, the client of the attorney has suffered damage as a consequence of his failure to file an appeal against the verdict at first instance. To find the answer to this question the court needs to determine, either, how the Court of Appeal would have decided the original case, or alternatively, to estimate the amount of recoverable damage on the basis of the good and poor chances that the party would have had on appeal.

In cases dealing with damage resulting from the fact that the appeal, contrary to what was intended, has not been filed or has been filed too late, the relevant CSQN question is whether the original proceedings would have led to success on appeal. If that is not the case, the plaintiff has suffered no damage through the negligent act. The plaintiff's claim

<sup>56</sup> HR 24 October 1997, NJ 1998/257 (*Baijings/mr H*).

7.4.2 *Damage to integrity*

A current and much debated topic, and yet another example of turning a CSQN problem into a question of damage, is the idea of 'damage to integrity' as used in medical malpractice cases. When a patient, from a legal perspective, is inaccurately informed about a medical treatment and subsequently suffers damage, the question arises whether the patient would have withheld his consent if he would have been correctly informed, and therefore would not have suffered damage. In essence, this is again a question of CSQN: would the patient's decision have been any different if he had been correctly informed? This question is difficult, if not impossible, to answer. Therefore this CSQN question has been reframed by plaintiffs' representatives as a question of damage: the right to informed consent is infringed, which is as such a personality right, and therefore damages for non-pecuniary loss should be awarded for that infringement as such, no matter what the patient would have decided.<sup>69</sup>

Up to now there is no definite outcome on the acceptability of this line of reasoning under Dutch law. It has been accepted in lower courts' decisions but has not yet been decided by the Supreme Court.<sup>70</sup> And both a 'yes' and a 'no' answer give rise to follow-up questions. For example, if 'yes': what are additional personality rights that justify non-pecuniary damages being awarded (the slippery slope argument)? If 'no': how could it be justified that a personality right aimed at protecting patients against undesired medical treatment, as laid down in the Dutch Civil Code in Articles 7:448 and 7:450 CC, cannot be enforced in a civil court? Whatever the answer may be, what this discussion makes clear from the outset is that by taking a different starting point, e.g. a legal right, the question of CSQN can be reframed as a question of damage.

62. See e.g. Hof Arnhem 14 December 1999, ECLI:NL:GHARN:1999:AC3940, NJ 2000/742; Rb. The Hague 12 July 2000, TVP 2000/4, comm. I. Giesen; Hof The Hague 10 October 2002, ECLI:NL:GHSGR:2002:AE5796, NJ 2003/99; Rb. Amsterdam 28 May 2003, ECLI:NL:RZAAMS:2003-AHR760, NJ 2004/45, as well as HR 23 december, NJ 2017/133 (*Erasmus MC*).

63. HR 21 December 2012, ECLI:NL:HR:2012:BX7491, NJ 2013/ 237 (*B. & Deloitte/H. and H. & H.*); HR 7 June 2013, ECLI:NL:HR:2013:RZ1721, NJ 2014/99, comm. T. Hardlef (*Lansink/Rituma*).

64. On the cumulative use of several techniques in this respect, see Giesen 1999.

65. Akkermans, *Proportionele aansprakelijkheid bij onzeker causaal verband*, p. 393; Giesen, *Bewijs en aansprakelijkheid*, p. 72, 122 en 474.

66. See however comm. S.D. Lindenbergh, HR 21 December 2012, ECLI:NL:HR:2012:BX7491, NJ 2013/237 (*B. and Deloitte Belastingadviseurs/H. and H. & H. Beheer*), no. 7-10.

67. HR 21 December 2012, ECLI:NL:HR:2012:BX7491, NJ 2013/237, comm. S.D. Lindenbergh (*B. and Deloitte Belastingadviseurs/H. and H. & H. Beheer*); JA 2013/41, comm. Chr.H. van Dijk and A.J. Akkermans. See also the conclusion of Advocate General Hardlef (see ECLI:NL:PHR:2016:871), before HR 23 December 2016, NJ 2017/133 (*Erasmus MC*), who also mentions proponents of the Court's line of reasoning.

68. See e.g. C.H. van Dijk, 'Causale perikelen: het is moeilijk en zal moeilijk blijven', *Tijdschrift voor vergoeding personenschade* 2013, p. 61, p. 81-82. See also Akkermans, *Proportionele aansprakelijkheid bij onzeker causaal*

and also medical negligence cases.<sup>62</sup> The Supreme Court has ruled that the theory of the loss of a chance is not restricted to mistakes by lawyers and doctors, and has applied it, e.g. in the case of the liability of an investment consultant and the liability of an employer under Article 7:658 CC.<sup>63</sup> One can thus safely say that the loss of a chance approach has been widely accepted in the Netherlands. This does not mean, however, that the loss of a chance theory has become predominant or has become the only approach that might be taken. For instance, the reversal of the burden of proof is also still used. Several approaches are thus at hand to decide a case.<sup>64</sup> Sometimes these two approaches are even combined, or at least it is suggested that a combination of the two might work.<sup>65</sup>

A key question now, comparable to the theory of proportional liability, is under which circumstances the theory of the loss of a chance can be used to solve CQSN problems, and when resort can and should be had to another mechanism, if at all. The relevance of this question is reflected in the outcome of the case of *Fortis/Bourgoijc* (the second case on proportional liability which we dealt with above). In essence, the Supreme Court decided that proportional liability – as a solution to CSQN difficulties – could only be applied in exceptional cases. In the case of *B. and Deloitte Belastingadviseurs/H. and H. & H. Beheer* it was however decided that this reluctance is not needed when applying the theory of the loss of a chance.<sup>66</sup> The Supreme Court also explicitly stated that proportional liability and the loss of a chance are two different theories, with a different reach regards the types of cases they can deal with.<sup>67</sup> This distinction which is made between the theory of proportional liability and the loss of a chance respectively has been heavily criticised in legal discourse, the main argument being that both theories in essence aim to solve the same problem, namely the impossibility of proving a CSQN in a situation in which it is uncertain what the outcome would have been if the tortfeasor would not have acted unlawfully.<sup>68</sup>

70. See the literature mentioned in the previous footnote for further references.

7.5 WHAT EMERGES FROM ALL OF THIS? SOME FOOD FOR THOUGHT

7.5.1 Four categories of legal techniques

In the previous sections we have seen that under Dutch tort law several techniques have been developed and used in the last few decades to 'escape' the sometimes devastating effects of the 'regular' CSQN requirement for plaintiffs. This seems to be especially salient where it has already been established that the defendant in question has acted negligently in some way. After an analysis of the examples dealt with below, we think we can group these techniques into four basic categories. These four main techniques to escape the usual (reading of the) CSQN requirement – and their legal consequences when it comes to compensation – are:

1. Liability in full by way of reinterpreting (in fact: 'downplaying') the (ambit of the) regular CSQN requirement, that is: relaxing the standards by which one is to rule on the requirement being fulfilled or not (sections 7.2.2 and 7.2.3);
2. Liability in full by way of accepting an exception under the law of evidence, such as a (rebuttable) presumption (section 7.3.2) or an actual reversal of the burden of proof in the strict sense of the term ('*bewijsrisico-omkering*') (section 7.3.2);
3. Partial (or better: proportional) liability by way of accepting the concept of proportional liability as such (section 7.2.5) and/or the theory of the loss of a chance (section 7.4.1);
4. Partial liability, and thus compensation, by reinterpreting the causation element by in fact changing the concept of damage as such (the theory of the loss of a chance, damage to integrity, see section 7.4.1. and 7.4.2).<sup>71</sup>

7.5.2 Too little by way of justification (?)

Our analysis has also taught us that the justification for the use of one of the four escape routes found is not always a prominent feature of the case at hand, notable exceptions (such as the *DES* case and *Gemeente Leeuwarden/Loss*) excluded. Much comes down to just handing down the new rule in question (example: loss of a chance; the 'reversal rule') and/or actually limiting its usage, to notions of fairness (example: the 'reversal rule') and to very strict interpretations of the route chosen in the preliminary stages (example: proportional liability in *Nefaliti/Karamus*) while it is foreseeable that these routes will

<sup>71</sup> Whether the theory of the loss of a chance fits into either category 3 or 4 does not matter as far as the main legal consequences (partial compensation) are concerned; its classification depends on the view one holds as regards the doctrinal issue of the interchangeability (or not) of the loss of a chance as a theory with the concept of proportional liability, an ongoing discussion with strong proponents on either side (see section 7.4.1) and one that we cannot go into in this contribution.

soon be tested in a different setting anyhow (as happened, for example, in *Fortis/Bourgonje*). And differences in the treatment (use with or without reluctance) of seemingly comparable instruments have not been explained either (see the *Deloitte* case).

We may be – in fact we are – judging the Dutch civil courts rather harshly here, and measuring them up against a very high standard indeed, but since the justifications for alternative action are readily available, as can be seen, for example, from the use thereof in the *World Online* case, we think that the courts could and should have done (somewhat) more in this regard than they have generally done so far. Why? Because really explaining the justification for an accepted exception, formulating its *rationale*, also clarifies and limits the ambit and scope of the exception. Any new fact pattern that does not then fit that rationale is excluded, whereas anything that does fit is included. This will thus profoundly ease the use of the causation exceptions for future courts, for practitioners preparing novel cases and for society at large.

7.5.3 Leaving uncertainty to reign...

The current 'justification deficit', as we overdramatically would like to call it, has left the (proof of) causation element within Dutch tort law surrounded with (still too) many uncertainties. This has important negative consequences, for instance for defendant companies facing tort actions.

As a company lawyer faced with a tort claim against one's company, it is nowadays almost impossible to advise the CEO or the Board on the chances of success when going to court or on the terms and amounts of an agreeable settlement. For example, the general burden of proof rule (section 7.4.1) would usually provide some (maybe even a great deal of) comfort from a defence lawyer's perspective, given the difficulties that the causation requirement normally poses, but this perspective is nowadays heavily blurred by all the possible exceptions that might be invoked (and their still relatively unknown interaction). The same is happening in other instances where causation is of the essence for a claim. And this is even more the case since totally new alternatives might also come to light in the case at hand; we have seen it happening. The ensuing uncertainty is only added to since each of these mechanisms/alternatives/exceptions has its own set of conditions for applicability and most often still a relatively unknown or underdeveloped area of application. That state of underdevelopment is furthermore not yet addressed by a strong (set of) justification(s) for certain rules, which is a pity since such a justification could act as an alternative way to provide some certainty as to where the law stands and/or is actually going.

forward by the many law lecturers he has inspired on a daily basis in striving to pioneer in teaching and reforming legal education. But without hesitation, he has most of all served society by actually teaching and training (probably) thousands and thousands of law students to become good (and in many cases: excellent) lawyers and legal professionals who now serve our society to the best of their abilities. Thanks for doing this for society, and for Utrecht University.

Of course this leaves a lot to be desired. What companies in fact need is legal certainty. If a company knows that liability will be incurred in situations A, B and C, the budget needed to deal with those claims can be set aside for that purpose. But if no one knows what to expect from claims A, B and C, nobody knows how to prioritize budgets any more. The result is to either leave valuable resources unused or to end up with a financial gap at the end of the fiscal year. Furthermore, this unpredictability might also lead to higher legal costs (more advice will be needed from more expensive external experts, cases going to trial where this was not self-evident, and so on) and thus a smaller return on investments.

#### 7.5.4 The easy solution...

Of course, the easy solution to all of this flows directly from the problem analysis itself. And that is of course that courts from now on, and if possible retroactively for the exceptions already developed, use the reasoning in their case law to explicitly phrase the rationale of and the justification(s) for the alternative route chosen, and that they do so in an open manner and in plain language.<sup>72</sup> The examples of how to do this are already out there,<sup>73</sup> and the most important substantive justification is as such already known (i.e. negligence is already proven and not fixing the causation requirement would make the actual enforcement of the duty of care next to impossible<sup>74</sup>). Now, if the case at hand warrants an individual equitable solution that is not to be generalized – which might have been the reason for the lack of a justification in the first place – that is stated as well by the court, honestly. And if no exceptions are in order, the reasoning will also reflect this, at least to some extent, because that will then allow others to better judge on new fact patterns in the future and thus serves society at large as well.

#### 7.5.5 For Adriaan

'Serving society at large'... that is also what Adriaan Dorrestein has been doing for all of his professional life. By serving as a professor, by serving as Dean of the LEG faculty at Utrecht University, by acting as chairman of the board of Utrecht Law College, and by redesigning and thinking about legal education all of his career. His legacy will be carried

<sup>72</sup> Hartlief also suggests that the Supreme Court should underpin its decisions with regard to the development of Dutch tort law in general, T. Hartlief, 'Wat doet de Hoge Raad anno 2015 in het aansprakelijkheidsrecht?', AA 2015, p. 923-926.

<sup>73</sup> See e.g. the case of *Fortis/Bourgonje*, HR 24 December 2010, ECLI:NL:HR:2010:BO1799, NJ 2011/251, comm. T.F.E. Tjong Tjin Tai.

<sup>74</sup> Cf. Giesen, 'De aantrekkingskracht van Loreley. Over opkomst en ondergang (?) van de 'omkeringsregel'', p. 81-83, with further references.