

## Funding of personal injury litigation and claims culture Evidence from the Netherlands

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### 1. Introduction

In the Netherlands, as in many other countries, some debate has taken place on the so-called 'claims culture', *i.e.* the increasing popularity of tort law in trying to obtain compensation by victims. From a theoretical perspective several elements may encourage such a claims culture, such as the financing of the litigation system (including legal assistance insurance) and evolutions in substantive law with respect to compensation of victims. Additionally, the organization of the legal profession might have some influence through ethical rules and rules of conduct. It will be interesting therefore to analyze the legal framework in one particular country and to use some empirical data to investigate the relationship between the elements just mentioned and the claims culture.

The Netherlands is surely an interesting country from the perspective of analyzing the performance and funding of personal injury cases. Road traffic accidents, employers' liability and medical negligence are all treated differently and a great deal of legal doctrine exists on each of these issues. However, notwithstanding the considerable attention all these domains have received in recent literature, empirical evidence on the number of cases and damage awards is still relatively scarce. There is some information on road traffic accidents, mostly provided by insurers, but less on employers' liability and medical negligence, due to the lack of a central registration system. Nevertheless, various attempts have been undertaken in recent years to provide some information on evolutions in these domains, both as far as changes in the law and in the number of cases are concerned.

As a consequence of the (alleged or real) claims culture in some domains, reforms are envisaged in the Netherlands. For instance, with respect to medical negligence discussions are taking place concerning the introduction of a no-fault compensation system. Also in the area of employers' liability discussions have taken place concerning the abrogation of the system of liability with the idea of replacing it by a system of compulsory direct insurance by the employer to the benefit of employees. As far as the legal assistance system is concerned, important reforms are currently underway. Traditionally attorneys in the Netherlands were not allowed to use a 'no win no fee'

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or other forms of contingency fee system. As a result of many tendencies (one of them being that the national competition authority *NMa* has considered this prohibition contrary to competition law) attorneys now wish to start experimenting with ‘no win no fee’ systems. Introducing ‘no win no fee’ would make the tort system more accessible by removing wealth barriers. Another reason why attorneys themselves now seem interested in such a model is that other providers of legal assistance (not being attorneys) frequently use contingency fee systems in personal injury cases, thereby causing serious competition to the attorneys. However, up to now the current Minister of Justice has always declared himself to be a strong opponent of a ‘no win no fee’ system, precisely because he fears that this may once more encourage the ‘claims culture’.

Some of these and other evolutions will be outlined in this paper, whereby attention will especially be given to the performance of the personal injury system by providing (where available) some empirical data. Hence, our central goal is to focus on the funding of personal injury litigation in the Netherlands and to examine whether this funding system has any impact on the claims culture. In other words: to what extent does the financing of the litigation system provide incentives to litigate? We will also pay attention to evolutions in substantive law that may influence the preparedness of victims to file claims.

The paper is structured as follows: first we will provide a brief background on personal injury claims and the way in which these are financed in the Netherlands (2); then we will look at the performance of the personal injury system by addressing some empirical evidence concerning motor vehicle, work-related and medical injuries (3). We will then turn to the crucial question of how these cases are financed and more particularly how the litigation system is financed (4). A few final observations will conclude this paper (5). Although our research is focused on the situation in the Netherlands, our observations may very well apply to other (similar) countries, at least to some extent.

## **2. Background on personal injury claims**

### ***2.1. Structure***

The Netherlands is organized as a civil law country. It has a civil code, which has recently been renewed. To large parts of civil law today the new Dutch Civil Code applies. Tort law is regulated in this Civil Code in a general way, but the case law of the Netherlands Supreme Court (*Hoge Raad*) has an important influence on the contents and evolution of this case law.<sup>1</sup>

The Netherlands is a unitary state. It is divided into provinces which have some competence, for instance in the area of the execution of environmental policy. However, issues like tort law and compensation for personal injury are, as mentioned, dealt with in the Dutch Civil Code and the case law of the *Hoge Raad* guarantees a similar application and interpretation of the provisions of the Code throughout the country.

### ***2.2. Recovery of lawyers’ fees and extra-procedural costs***

Of course the question whether a potential victim can reclaim his/her legal fees from the losing defendant and equally the question whether the losing victim faces the risk of having to reimburse the legal fees of the defendant may play an important role in the decision to file a lawsuit or not. As is well-known, the American system generally accepts that every party takes care of its own legal fees. This system has been seriously criticized since it has been argued that the fact

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<sup>1</sup> The evolutions in case law are outlined in yearly overviews. For the most recent one see M. Faure and T. Hartlief, ‘The Netherlands’, in: H. Koziol and B. Steininger (eds.), *European Tort Law 2004*, Vienna 2005, pp. 420-450.

that an American plaintiff cannot be held liable for the legal fees of the defendant in cases of unsuccessful claims provides too little incentive to the victim to think twice before starting a lawsuit. Hence, this may lead to an excessively high number of claims.<sup>2</sup> In most European countries it is accepted that a successful plaintiff may get (a part of) his legal fees back from the losing defendant. In the Netherlands a similar principle applies; the duty to pay the costs is, however, in general limited to a certain amount and does certainly not cover all costs.<sup>3</sup> This means that attorneys' fees for litigation are only recoverable to a certain extent.

It is generally held that the fact that the losing party can be obliged to compensate part of the legal fees of the winner may be an important deterrent against frivolous law suits; one might therefore expect that in the Netherlands there will be fewer claims than in the American system where in case of failure a plaintiff only risks the legal fees which he paid to his own attorneys.<sup>4</sup> However, an important element in personal injury litigation is that in the definition of damage, the relevant legal provision (Art. 6:96 of the Civil Code) does not only mention the suffered loss and lost profits, but also a certain category of so-called 'extra-judicial' costs that the victim may recover from the tortfeasor.<sup>5</sup> These concern:

- (a) the reasonable costs to prevent or reduce the damage that occurred as a consequence of the event that gave rise to liability;
- (b) the reasonable costs to establish the damage and liability (also referred to as expertise costs);
- (c) the reasonable costs to obtain extra-judicial compensation (referred to as collection costs)

With respect to collection costs, it makes no difference according to the parliamentary history whether these are incurred internally or externally.<sup>6</sup> This means that when a company with its own collection department claims these costs, within reasonable limits, these costs can also be recovered from the tortfeasor.<sup>7</sup>

As far as the tendency towards a claims culture is concerned the expertise costs are considered of special importance. Article 6:96 (2)(b) of the Civil Code states that an injurer can also be held liable to compensate for, *e.g.*, legal fees incurred by the victim. These expertise costs also involve costs for having third parties establish the damage and the liability. If the victim therefore calls upon such a third party these costs can be passed on to the tortfeasor. However, case law holds that in this respect a what is called double reasonableness test has to be applied.<sup>8</sup> First of all the extent of the costs has to be reasonable and second it has to be reasonable that these costs were

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<sup>2</sup> This point has been repeatedly emphasized by Gordon Tullock. See *e.g.* his *Trials on Trials*, New York 1980.

<sup>3</sup> See generally B.T.M. Van der Wiel, *De Rechtsverhouding tussen Proccespartijen*, The Hague 2004, pp. 327-333 and W. Hugenoltz and W.H.Heemskerk, *Hoofdlijnen van Nederlands Burgerlijk Proccesrecht*, The Hague 2002.

<sup>4</sup> See R. Posner, 'An economic approach to legal procedure and judicial administration', 1973 *Journal of Legal Studies*, pp. 399 *et seq.*, as well as S. Shavell, 'Suit, settlement and trial: a theoretical analysis under alternative methods for the allocation of legal costs', 1982 *Journal of Legal Studies*, pp. 55 *et seq.* For a comparison of the European developments and the US system see M. Faure and T. Hartlief, 'Towards an expanding enterprise liability in Europe? How to analyze the scope of liability of industrial operators and their insurers', 1996 *Maastricht Journal of European and Comparative Law*, pp. 264-265.

<sup>5</sup> See in this respect *inter alia* F.Th. Kremer, 'Buitengerechtigde kosten nader beschouwd', 1994 *Aansprakelijkheid en Verzekering*, pp. 59 *et seq.*; J. Spier, 'De grenzen der buitengerechtigde kosten', 1995 *Aansprakelijkheid en Verzekering*, pp. 55 *et seq.* and F.Th. Kremer., 'Moeten alle buiten-gerechtigde kosten vergoed worden; en zo ja, waarom niet?', in: J.H. Wansink (ed.), *Een Salomonsoordeel*, Zwolle 1991, pp. 25-31.

<sup>6</sup> See M.G. Faure *et al.*, 'Juridische aspecten van het beroepsziektenonderzoek', in: M.G. Faure and T. Hartlief (eds.), *Verzekering en de groeiende aansprakelijkheidslast*, Deventer 1995, p. 75.

<sup>7</sup> For an example see HR July 1993, *NJ* 1995, p. 150 with case note by C.J.H. Brunner.

<sup>8</sup> See more particularly HR 3 April 1987, *NJ* 1988, p. 275 and see on this topic P. Sieswerda, '(On)voorwaardelijke toevoeging en de vergoeding van pre-processuele kosten', 1987 *Advocatenblad*, p. 513.

made in the given circumstances. As far as the latter aspect is concerned various elements can play a role, such as:

- the relationship between the amount of the damage and the amount of the costs of expertise;
- the necessity or superfluousness of the expertise (*e.g.* if the damage was clear and not debated);
- the willingness of the defendant to compensate the damage; and
- the possibility for the victim to establish the damage in an easier and less costly way.<sup>9</sup>

It is important to stress that the mentioned case law only refers to pre-trial costs, *i.e.* costs made before the start of the civil procedure. Moreover, the court always has the possibility to mitigate the costs *ex officio* if they are considered excessive.<sup>10</sup> Finally, it should be noted that there is an increasing tendency to limit the scope of Art. 6:96 (2) of the Civil Code. In this respect Faure and Hartlief have discussed a number of recent cases in detail in a previous publication.<sup>11</sup>

### **2.3. Fixing of legal costs and lawyers' fees**

Lawyers' fees in the Netherlands are not governed by legislation, but by the ethical codes of the bar.<sup>12</sup> The rules of conduct in that respect provide that contingency fees are prohibited, but several other systems can be followed: the attorney can, *e.g.*, work on an hourly rate or fix his total fee *ex ante* taking into account various elements such as the importance of the case, the work performed, etc. Charging on an hourly rate basis is the most common way of fixing lawyers' fees today in the Netherlands. There has been quite some development concerning the question whether what are termed *quota pars litis* (known in common law countries as contingency fees) could be introduced in the Netherlands. On the one hand contingency fees may increase the volume of litigation, while on the other hand they improve access to justice by removing wealth barriers.<sup>13</sup> Traditionally contingency fees were prohibited in the Netherlands, although not statutorily (like in, *e.g.*, Belgium, France and Germany) but as a result of the ethical rules mentioned above.<sup>14</sup> The attorney was thus not allowed to agree with his client that only in case of a certain result a fee would be charged (prohibition of 'no win no fee') or that his salary would depend upon the amount of the claim (prohibition of *quota pars litis*). However, although contingency fees were traditionally prohibited for a long time it has been argued that this system of payment should be allowed in the Netherlands. One reason is that Dutch law firms operate on an international market in competition with – *inter alia* – American law firms, which could have a comparative advantage if they were allowed to charge contingency fees. Already since the early 1990s there has been a debate in the Netherlands on allowing contingency fees in the future.<sup>15</sup> Another reason, which was already mentioned in the introduction to this paper, is that other professionals, not being attorneys, play an important role in handling claims, especially as far as

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9 For an example see HR 8 December 1994, *NJ* 1995, p. 250.

10 For an example see HR 3 April 1987, *NJ* 1988, p. 275 with case note by C.J.H. Brunner.

11 See M. Faure and T. Hartlief, 'The Netherlands', in: H. Koziol and B. Steininger (eds.), *European Tort Law 2003*, Vienna 2004, pp. 300-302.

12 Nederlandse Orde van Advocaten (NOVA), *Gedragsregels 1992*, Regel 25. For more information, see the NOVA website at <http://www.advocatenorde.nl>.

13 For a general discussion of contingency fee systems in the law-and-economics literature and for an overview of empirical literature on the effects of contingency fee systems, see F.H. Stephen and J.H. Love, 'Regulation of the Legal Profession', in: B. Bouckaert and G. De Geest (eds.), *Encyclopedia of Law and Economics, Volume III: The Regulation of Contracts*, Cheltenham 2000, pp. 1001-1004.

14 Examples of European countries that do not have a prohibition on 'no win no fee' or similar systems are Ireland, Greece and the United Kingdom.

15 See *e.g.* E. Van der Schans, 'Contingency fees', 1994 *Advocatenblad*, pp. 663 *et seq.* and A.F.M. Brenninkmeijer, 'Advocatentarieven: niet op prijs gesteld', 1994 *Nederlands Juristenblad*, pp. 1246 *et seq.*

personal injury claims are concerned. Still attorneys have the exclusive right of audience before most courts (except before the subdistrict court [*Kantonrechter*], where other parties can represent the parties). However, recent evidence shows that a substantial number of personal injury claims are apparently settled through negotiations and therefore never go to court. In all of these cases the exclusive right of audience does not provide effective protection to attorneys. Over the past few decades, this has given rise to the emergence of increasing numbers of professionals specialized in dealing with personal injury cases who assist victims in their claims against (the insurers of) tortfeasors. The fees charged by these professionals are of course not regulated through the codes of ethics of the Bar. This means that attorneys are beginning to face serious competition from these commercial legal assistance agencies which increasingly offer their services on a 'no win no fee' basis.

An important recent development is that the Netherlands Competition Authority *NMa* has held that the general prohibition instituted by the Netherlands Order of Attorneys (*Nederlandse Orde van Advocaten, NOVA*) prohibiting their members to charge on a 'no win no fee' basis has to be abrogated especially in personal injury claims. The *NMa* (in a ruling of 2002)<sup>16</sup> held that this limits the freedom of personal injury lawyers to establish for themselves their method of payment and their fees. Thus the *NMa* explicitly held that they would have a competitive disadvantage compared to other professionals on this market who are not attorneys and who therefore are not bound by this prohibition. Moreover, it held that the introduction of a 'no win no fee' system increases access to the courts for less wealthy citizens and should therefore be encouraged.

The case arose out of a complaint by a personal injury lawyer who felt restricted by the prohibition instituted by the *NOVA* to compete with other legal assistance providers. The argument that the professional ethics as instituted by the *NOVA* could not be subjected to control by the competition authorities was rejected. Because of this ruling, the *NOVA* of course had to change its attitude and now seems to be in favour of some experiments with contingency fee systems. In 2004 the *NOVA* launched a plan to set up pilot projects in which it would examine whether 'no win no fee' could be introduced in some (personal injury) cases.

However, this provoked an interesting response from the Minister of Justice who wanted to prohibit this experiment. In the Netherlands, the Minister of Justice is competent to intervene in the regulation of the profession of attorney on the basis of the Attorneys Act (*Advocatenwet*). By taking this interesting position the Minister thus ran counter to the recently changed point of view of the *NOVA* and of the *NMa*. The argument advanced by the Minister was that 'no win no fee' would infringe on the independence of attorneys. He further feared that cases that do not offer a clear chance of a successful result would no longer be litigated. In a press release the government expressly stated that allowing 'no win no fee' would *inter alia* conflict with its policy of combating a claims culture.<sup>17</sup> As a result of this point of view of the Minister of Justice, the announced experiment was abandoned and the legal situation in the Netherlands therefore *de facto* still is that lawyers cannot charge contingency fees or introduce a 'no win no fee' system<sup>18</sup>. Victims of a personal injury who wish to be charged on a 'no win no fee' basis will thus necessarily have to go to other legal assistance providers (not being attorneys) to which the decision of the Minister of Justice does not apply. However, in the (rare) cases where the case has to be

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16 *Engelgeer v. NOVA* (Decision no. 560/2002).

17 Ministerie van Justitie, *Kabinet geen voorstander van no cure no pay*, press release, 4 March 2005.

18 The conflict has not been solved yet, see 'Minister Donner en NMa lijnrecht tegenover elkaar in no cure no pay kwestie', 2005 *Nederlands Juristenblad*, pp. 612-614 and *NMa, NMa maakt rapport op over verbod 'no cure no pay'*, press report, 4 March 2005.

litigated and the exclusive right of audience applies, the legal assistance providers will also have to involve an attorney barring the application of ‘no win no fee’.

### 3. Performance of the personal injury system

This section contains some data on the performance of the Dutch personal injury system. We will address, respectively, traffic accidents, work-related injuries and medical negligence. However, while sufficient data is available on traffic accidents, there is less information on work-related accidents, and still less on medical negligence. We will nevertheless provide an overview of the type of studies that are available and that provide some relevant data, although not all of them are of very recent date. A general problem is that, except for traffic (where the Netherlands Association of Insurers collects data), adequate data collection has been (and to a large extent still is) lacking for the other two domains discussed here.

#### 3.1. Traffic accidents

In the 1970s, some quantitative research was done into the practical effects of traffic liability in the Netherlands. Most of this research was concerned with traffic accidents. One study analyzed the settlement of traffic liability cases from the position of the courts. It analyzed all judgments that were delivered with respect to traffic liability in the Netherlands in 1967 and 1968.<sup>19</sup> A second study concentrated on the position of the victim and was based on a random questioning of all male victims of traffic accidents in the age between 16 and 64 in the years 1967 and 1968.<sup>20</sup> A third study focused on traffic accidents from the perspective of insurers and contained 196 case studies on the handling of traffic accidents by three major insurance companies.<sup>21</sup> A summary of these three studies is provided in the doctoral dissertation of Van Dam.<sup>22</sup>

The first study, focusing on the position of the courts, found that in 79% of cases in which there was a traffic accident procedure, the negligence of the defendant was disputed, whereas only in 25% of cases disputes concerned the extent of the damage. The authors use this as an argument that most court cases merely deal with discussions concerning negligence. In the second research, focusing on the position of the victim, the authors claimed that less than full compensation was awarded to the victims and that the legal procedures to arrive at compensation were too lengthy. They also claimed that the role of tort law in compensating victims of traffic accidents would be relatively minor. Tort law, compared to other sources (mostly social security and first party insurance), would only contribute to 10% of the total compensation of traffic accident losses.<sup>23</sup> The third study focused on the position of the liability insurer. The authors claimed that in many cases the issue of negligence of the insured injurer is the most important point to determine before an insurer is willing to settle. In 71% of the 135 cases, negligence could be established without any problems; in only 10% of cases contributory negligence on the part of the victim was established.<sup>24</sup>

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19 See A.R. Bloembergen *et al.*, *Duizend botsingen, een kwantitatieve analyse van de civiele rechtbankvonnissen in verkeerszaken*, Deventer 1972.

20 A.R. Bloembergen and P.J.M. Van Wersch, *Verkeersslachtoffers en hun schade*, Deventer, 1973.

21 G.R.J. De Groot, *Schaderegeling bij verkeersongevallen*, Zwolle 1979.

22 M. Van Dam, *Verkeersongevallen. Een economisch, empirisch en positief-rechtelijk onderzoek naar aansprakelijkheid, verzekering en veiligheidsregulering in het verkeer*, The Hague 2001. See also M. Faure, ‘A selection of empirical socio-economic research with respect to the functioning of legal rules and institutions in Belgium and the Netherlands’, 2001 *European Journal of Law and Economics*, pp. 207-248.

23 According to Bloembergen and Van Wersch, *supra* note 20, pp. 137-145.

24 According to De Groot, *supra* note 21, pp. 34-37.

Some Dutch opponents of the liability system have argued that the costs of the liability system were huge, especially compared to other compensation mechanisms. In particular the studies referred to above argued that liability rules are a costly way of shifting loss from the injurer to the victim.<sup>25</sup> This claim is backed up by some modest statistical evidence in relation to the exercise of a right of recourse by first party insurers. The researchers claimed that in 57% of all examined traffic liability cases the plaintiff was a first party insurer.<sup>26</sup> Hence, they argued that many of the administrative costs related to traffic accident procedures were caused by the right of redress exercised by first party insurers. Moreover, 77% of all recourse claims allegedly related to claims with a value of less than NLG 3,000 (€ 1,361). For this reason, they claimed that an abrogation of the right of redress of social and first party insurers would halve the number of court procedures with respect to traffic accidents today.<sup>27</sup>

These figures on the relatively high administrative costs related to recourse procedures may well be correct, but the researchers ignore the fact that some of these recourse actions may have a positive effect on the incentives of injurers to prevent accidents. Nevertheless, these types of figures are often important in the debate concerning the reform of traffic liability. During the discussion concerning the reform of traffic liability in the Netherlands, it was claimed that of all the money paid by third party traffic liability insurers, 40% was paid to first party insurers in recourse actions and only 60% to the victims.<sup>28</sup>

It is possible to give some more details concerning the costs of recourse actions. In 1973, Bloembergen claimed that one-third of all amounts paid by third party traffic liability insurers for personal injury were paid to first party insurers.<sup>29</sup> In 1980, he claimed that two-thirds of all amounts paid by traffic liability insurers were paid to social insurers as a result of recourse actions.<sup>30</sup> Traffic liability insurers today claim that half of the total amount paid for personal injury is paid to first party insurers in recourse actions.<sup>31</sup> In 1993, traffic liability insurers paid about NLG 1 billion (€ 454 million); of this amount therefore half was paid to first party insurers.<sup>32</sup>

As far as the costs of traffic accidents are concerned, Haazen and Spier provide the following information in a report of 1996:<sup>33</sup> from 1957 until 1990 the total value of premiums increased from NLG 19 million to NLG 4,334 million; the total amount of damages increased from NLG 10 million to NLG 2,875 million. In the period from 1989 to 1994 the premium for liability insurance for motor vehicles increased by 19% whereas in the same period damage increased by 44%. This means that over this period the damage percentage (the damage suffered for every guilder of premium received) increased from 86 to 103. Not surprisingly, the gross profits of motor vehicle insurers fell in the same period from NLG +175 million to NLG - 425 million.<sup>34</sup> This general overview thus provides a rather pessimistic picture concerning the evolution of insurance companies' profits between 1989 and 1994 which was largely due to increased

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25 See in addition to the studies mentioned above also A.R. Bloembergen, 'Het SER-rapport over regresrechten: een fout verhaal', 1994 *Nederlands Juristenblad*, pp. 117-123.

26 See Bloembergen *et al.*, *supra* note 19, pp. 17-20.

27 *Ibid.*, p. 60.

28 See e.g. G.E. Van Maanen, 'Wetsvoorstel verkeersongevallen: dwaling of boerenbedrog?', 1998 *Nederlands Juristenblad*, pp. 116-121.

29 See A.R. Bloembergen, 'Naar een nieuw verkeersongevallenrecht', 1973 *Nederlands Juristenblad*, pp. 961-971 and pp. 998-1009.

30 A.R. Bloembergen, 'De invloed van verzekeringen', 1980 *Nederlands Juristenblad*, p. 182.

31 See M. Faure, 'Regres in een rechtseconomisch perspectief', in: W.H. Van Boom *et al.* (eds.), *Regresrechten afschaffen, handhaven of uitbreiden?*, Deventer 1996, p. 55.

32 For further details see Faure, *supra* note 31, pp. 55-58.

33 O.A. Haazen and J. Spier, 'Feitelijke ontwikkelingen en verzekeraarbaarheid', in: A.T. Boltand and J. Spier (eds.), *De uitdijende reikwijdte van de aansprakelijkheid uit onrechtmatige daad*, Zwolle 1996, pp. 25-26.

34 According to Haazen and Spier, *supra* note 33, p. 26.

damages. Recent data provide a more optimistic picture and also yield interesting data over a longer period. The following table, based on data provided by insurers, gives an impression of the average damages per case for motor vehicle liability claims.<sup>35</sup>

*Table 1. Traffic claims and damage*

Claims	1999	2000	2001	2002	2003
Gross incurred third party claims (in € billion)	1.7	1.7	1.7	1.9	2.0
Average amount per third party cars claim (in €)	2,341	2,517	2,569	2,660	2,979
Claim frequency third party cars (% claims)	9	8	8	7	7

The claim frequency reflects the number of claims per 100 insurance policies, *i.e.* claims submitted to the insurer, not necessarily to the courts. Precise information on the number of cases that effectively go to trial is lacking, but according to research and legal doctrine the number of cases settled is very high. This is connected with the fact that, as mentioned above, some Dutch studies indicate that the average cost per case, especially those related to recourse procedures, appears to be relatively high. Research done by Weterings and others claims that for every euro paid to a victim € 0.35 is paid in costs.<sup>36</sup> Similar research by Tzankova and Weterings confirms that only a very small percentage of personal injury claims go to court in the Netherlands.<sup>37</sup>

### **3.2. Work-related injuries**

For a long time accidents at work and occupational diseases were not properly recorded in the Netherlands. In 1995 a research project was carried out at the request of the Netherlands Association of Insurers to examine the potential volume of cases in this domain and future evolutions.<sup>38</sup> At that moment reliable data for the Netherlands were missing. Predictions were made that the number of accidents at work would stabilize, or at least not increase,<sup>39</sup> but the reverse appeared to be true for occupational diseases. Van Mierlo outlined various scenarios for the potential growth of the number of occupational diseases in the Netherlands whereby even in a minimum scenario it was estimated that the absolute costs of occupational diseases would increase from NLG 58 million (€ 26.3 million) in 1990 up to NLG 259 million (€ 117.5 million) in 2005.<sup>40</sup> This fear was mainly based on the expected increase in the number of asbestos-related illnesses, but also concerned new unknown occupational hazards like RSI (Repetitive Strain Injury) and OPS (Organic Psychic Syndrome).

Meanwhile, occupational diseases are registered through various sources, the most important one being the Netherlands Centre for Occupational Diseases (linked to the University of Amsterdam),

35 Source: Verbond van Verzekeraars, *Verzekerd van Cijfers 2004. Dutch Insurance Industry in Figures*, The Hague, Verbond van Verzekeraars, 2004, p. 20.

36 See W.C.T. Weterings, *Vergoeding van letselschade en transactiekosten. Een kwalitatieve en kwantitatieve analyse*, Deventer 1999 and J.M. Barendrecht *et al.*, *Schadeclaims: kan het goedkoper en minder belastend? Opties om de transactiekosten van het aansprakelijkheidsrecht te verlagen*, The Hague 2004, p. 31.

37 See I.N. Tzankova and W.C.T. Weterings, *Pre-processuele afwikkeling van personenschadeclaims. Een rechtsvergelijkende studie naar de mogelijkheden tot structurering van het proces van buitengerechtelijke afhandeling van personenschadeclaims in Nederland aan de hand van procedurele normen en andere instrumenten*, The Hague 2003.

38 See M. Faure, T. Hartlief, (eds.), *Verzekering en de groeiende aansprakelijkheidslast*, Deventer 1995.

39 See Haazen and Spier, *supra* note 33, pp. 26-27.

40 See J.G.A. Van Mierlo, 'Economische inschatting van de evolutie in de kosten', in: M. Faure and T. Hartlief (eds.), *Verzekering en de groeiende aansprakelijkheidslast*, Deventer 1995, p. 236.

to which occupational diseases have to be reported since 1999.<sup>41</sup> On the basis of these more recent data some information can be obtained on the volume of cases, but not on the average costs per case or the average damages.

As far as accidents at work are concerned the following figures can be reported concerning the number of fatalities, serious accidents (*i.e.* leading to hospitalization) and so-called ‘lost time accidents’ (*i.e.* those leading to a loss of at least one working day).<sup>42</sup> Reliable older data are unavailable.

Table 2. Accidents at work

		Fatalities	Serious accidents	Lost time
2000	Number	119	4,100	103,000
	Per 100,000	1.5	53	1,300
2001	Number	115	3,500	95,000
	Per 100,000	1.5	45	1,200
2002	Number	91	3,500	103,000
	Per 100,000	1.2	45	1,300
2003	Number	104	3,200	93,000
	Per 100,000	1.3	40	1,200

In addition Philipsen (2005) reports that there is some information on the direct and indirect damage caused by accidents at work to the companies. These estimates range from € 250 for accidents with no more than 1 working day lost to well over € 400,000 for serious accidents with lasting incapacitation and a successful tort claim as a result.<sup>43</sup> Note, however (see below), that not every accident at work leads to a successful tort claim, also because a large part of the damage is compensated through the social security system.<sup>44</sup>

Since occupational diseases now have to be reported, an impression can be given of the official numbers which are provided through the website of the Netherlands Centre for Occupational Diseases. However, as in many other European countries there is a considerable problem of underreporting so that there are some doubts as to the reliability of these data. The evolution in the official number of notified cases of occupational diseases is as follows:<sup>45</sup>

41 See <http://www.beroepsziekten.nl>.

42 Original source: A. Venema and A. Bloemhoff, *Monitor arbeidsongevallen in Nederland 2002*, TNO Arbeid, 2004, p. 25. For more information see also N.J. Philipsen, ‘Industrial Accidents and Occupational Diseases: Some empirical findings for The Netherlands, Belgium, Germany & Great Britain’, in: S. Klosse & T. Hartlief (eds.), *Shifts in Compensation: Issues of Work Injury*, Springer, forthcoming.

43 Estimates by TNO Work and Employment. See Philipsen, *supra* note 42.

44 The right of recourse is limited in cases of work-related accidents and occupational diseases.

45 Source: website Netherlands Centre for Occupational Diseases: <http://www.beroepsziekten.nl>. For the problem of underreporting in Europe see Eurogip, *Survey on under-reporting of occupational diseases in Europe*, Eurogip, 2002.

Table 3. Occupational diseases

	2000	2001	2002	2003	2004
Number of notifications	n.a.	6,384	6,639	7,147	n.a.
Accepted notifications <sup>46</sup>	6,063	5,593	5,335	5,973	5,778

Most of the damage caused by an occupational disease will be compensated under various social security schemes. However, in some cases employees will try to use tort law to recover parts of the damage not covered under social security from a liable employer. A bureau specialized in handling claims for occupational diseases (and linked to the largest trade union in the Netherlands) called the Occupational Diseases Bureau (*Bureau Beroepsziekten*) provides some information on the relationship between the number of claims notified generally for occupational diseases and the number of tort claims. In the period between May 2000 and September 2004 the Occupational Diseases Bureau received 2,300 notifications of employees; in 500 of these cases the Bureau considered filing a suit based on tort law against the employer.<sup>47</sup> Roughly speaking this means that in about 22% of all cases notified to the Occupational Diseases Bureau a tort claim is considered, but there is no certainty of course as to whether these will be successful.<sup>48</sup>

As was mentioned earlier there is unfortunately no detailed information available on the average damage or the duration per case. Only Weterings (1999) has come up with various estimates, but these are not based on hard fact. The report 'Dutch Insurers Industry in Figures' does not provide any information either on the amount that Dutch insurers are paying on occupational diseases on a yearly basis. The report only provides some key statistics on general liability. These data could be of interest here, although it should be kept in mind that they concern general liability and are thus not limited to employers' liability for work-related injuries.<sup>49</sup>

The first table provided shows the gross damage caused by claims in general liability (including work-related injuries, traffic accidents and medical negligence) in millions of euros:

Table 4. Claims in general liability

Claims	1999	2000	2001	2002	2003
Gross incurred damage	404	415	470	513	563
Of which private	141	136	150	160	163
Of which companies'	262	267	320	353	400

Another table provides interesting information on the average amount per claim:

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46 Some notifications are not accepted because they do not fulfil the criteria that define an occupational disease.

47 This of course does not mean that the Bureau will necessarily go to court (on behalf of the victim), but at least a claim will be made against the employer. As was mentioned, in most cases this will result in a settlement with the (insurer of the) employer.

48 For further information Philipsen, *supra* note 42.

49 See Verbond van Verzekeraars, *supra* note 35, pp. 24-25.

Table 5. Average amount per claim

Average amount per claim	1999	2000	2001	2002	2003
Private (in euros)	405	399	438	472	504
Companies (in euros)	3,465	3,867	4,536	5,060	6,290

Even more interesting is the information concerning the frequency of claims in the same period:

Table 6. Claim frequency

Claim frequency <sup>50</sup>	1999	2000	2001	2002	2003
Private	5.7	5.3	5.0	5.1	4.8
Companies	13.5	12.4	11.3	10.7	9.7

The interesting aspect about these tables is not so much the absolute figures, but the evolution. One may notice that, although the gross incurred damage by the insurance sector as a whole in general liability increases over the years just like the average amount per claim (although more strongly for companies than for the private sector), the claim frequency for both categories (private and companies) decreases. This means that insurance companies in general liability seem to receive fewer claims every year, but that on the other hand the average amount paid on every claim increases. Note again that these data consider general liability and not only work-related injuries.

### 3.3. Medical negligence

Also in this domain data are scarce. There is a well-known study by Verkruisen from 1997 which reports a potential medical liability explosion in the Netherlands. Although his study was mainly based on estimates (and not on actual liability cases) it was hotly debated as Verkruisen presented figures showing that the average number of people dying of medical malpractice in the Netherlands would be higher than the average number of fatalities resulting from traffic accidents.<sup>51</sup> Similar research was recently executed by a research division of Shell concerning the prevention of hospital-related incidents. This report states *inter alia* that each year 1,500 to 6,000 people die in Dutch hospitals as a result of ‘incidents that could have been prevented’<sup>52</sup>.

Notwithstanding these estimates, which all indicate that both the number of claims and average amounts for medical negligence are rising, there is little empirical data to back this up. In 1996 Haazen and Spier reported that the number of claims had increased, but that the amount of awarded claims was stable, as was the average compensation per claim. 50% of claims moreover were for less than NLG 5,000 (€ 2,269). 10% of claims were for more than NLG 50,000 (€ 22,689) and only 3% were for over NLG 100,000 (€ 45,378). However, the research on which

50 This concerns the number of claims per 100 insurance policies.

51 W.G. Verkruisen, ‘De medische aansprakelijkheidsexplosie in Nederland: de voorgeschiedenis en het te verwachten gevolg’, 1997 *Nederlands Juristenblad*, pp. 846-853. The figures (averages per year) presented by Verkruisen are as follows: 3,000 fatal accidents in hospitals versus 1,200 in traffic; 45,000-60,000 cases of serious health damage in hospitals (of which 25,000 were ‘avoidable’) versus 53,000 traffic injuries.

52 Shell Nederland, *Hier werk je veilig, of je werkt hier niet*, The Hague 2004, p. 5.

Haazen and Spier reported only concerned data up to 1990.<sup>53</sup> At the same time, the authors argued that data recorded by Dutch insurers revealed an increase in the number of claims. In any event the result has been that many commercial insurers withdrew from the liability insurance market, at least for the insurance of hospitals. These can only insure against medical negligence through specialized mutual societies established by the hospitals themselves.<sup>54</sup>

We should also point out a study by Weterings on transaction costs in the compensation of personal injury.<sup>55</sup> He estimated that the transaction costs involved in establishing medical causality, liability and the amount of damages on the one hand and the administrative costs in these three phases were about the same. These findings are, however, based on estimates as a result of the claim settlement practice in personal injury cases rather than on hard empirical data.

#### 4. How are cases financed?

##### 4.1. General

It is not easy to indicate how a typical traffic accident, work-related personal injury or medical negligence case is funded in the Netherlands for the simple reason that they are very different. We will therefore first indicate a few generalities, showing how generally a victim of personal injury in the Netherlands can try to obtain compensation; then we will address some specific features of the three separate cases. The path to be followed by a particular victim (social security, insurance or tort) very much influences the type of legal assistance that is needed. First the generalities.

A victim suffering personal injury in the Netherlands can of course, assuming he has sufficient financial means available, seek the help of an attorney. We already indicated in section 2.3 how such legal assistance is generally financed in the Netherlands: basically either an hourly fee will be charged or an amount based on the work performed and the complexity of the case. ‘No win no fee’ systems are formally still prohibited in the Netherlands (although it is rumoured that not all attorneys comply with this prohibition).

A second possibility for a victim to seek legal assistance is to call on a specialized legal assistance service. As indicated above there are now, especially for handling personal injury claims, an increasing number of commercial legal assistance services on which victims may call. The advantage (from the victim’s perspective) is that these are not bound by legal ethics and can thus usually work on a contingency or ‘no win no fee’ basis and also generally seem to do so. It must be recalled, however, that in the (rare) cases that a case has to be litigated before a tribunal where the exclusive right of audience of attorneys applies, the victim will still have to seek legal assistance from an attorney<sup>56</sup>.

The third possibility (but this is basically limited to work-related accidents) is to seek assistance through the trade union. Both members and non-members of the trade union can seek assistance from the Occupational Diseases Bureau (as already mentioned in section 3.2 above). However, members are charged a lower fee than non-members. The Bureau works on a ‘no win no fee’ basis.<sup>57</sup>

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53 Haazen and Spier, *supra* note 33, pp. 19-20.

54 For further evidence see equally J.C.J. Dute and M.G. Faure, *Evaluatie tijdelijk besluit verplichte verzekering bij medisch-wetenschappelijk onderzoek met mensen*, The Hague, ZonMW, 2002, pp. 181-208.

55 Weterings, *supra* note 36.

56 See J.H.W. De Planque, ‘Enige gedachten over verplichte procesvertegenwoordiging’, in: C.J. Bax *et al.* (eds.), *Procesvertegenwoordiging*, Deventer 2000, pp. 21-29 and M. Ynzonides, ‘Verplichte procesvertegenwoordiging in het burgerlijk procesrecht’, in: C.J. Bax, *et al.* (eds.), *Procesvertegenwoordiging*, Deventer 2000, pp. 41-51.

57 For more information see the website of the Netherlands Centre for Occupational Diseases at <http://www.beroepsziekten.nl>.

A fourth possibility for a victim who does not wish to (or cannot) make use of any of the above-mentioned possibilities is simply to call on the publicly financed legal aid system. If one falls into a low income category (the threshold is relatively low and therefore easily exceeded) one can call on the public legal aid system. This means that attorneys willing to work according to the legal aid fees can deal with these ‘legal aid cases’ and will be paid a fee directly from the state. The fee system is based on work performed and fees are standardized. Hence, the fees attorneys receive for legal aid work are lower than the commercial fees they can charge.<sup>58</sup> It is often argued today that it would be impossible for law firms to make a living simply out of legal aid cases.<sup>59</sup> From the perspective of the victim a disadvantage is that one cannot call on any attorney but only on those who are willing to work according to legal aid fees. Moreover, there is a low income threshold, so that many cannot make use of the system.

#### 4.2. Legal assistance insurance

Precisely because of the difficulties mentioned above – limits of the legal aid system and contingency fees not being allowed – many people nowadays take out legal assistance insurance. Records show that the popularity of legal assistance insurance is still increasing. The Netherlands Association of Insurers provides some interesting data on the increase in the number of insurance policies and claims in recent years:<sup>60</sup>

Table 7. Number of legal assistance insurance policies

Number of policies (1999 = 100)	1999	2000	2001	2002	2003
Family	100	112	124	145	166
Motor vehicle	100	104	111	115	111
Enterprises	100	106	113	116	117

The claim frequency (number of claims per 100 policies) in these years was as follows:<sup>61</sup>

Table 8. Claim frequency

Claim frequency	1999	2000	2001	2002	2003
Family	13	13	13	13	13
Motor vehicle	7	6	6	6	6
Enterprises	29	27	27	25	26

Legal assistance insurers in the Netherlands often have attorneys working for them on a contract basis. Therefore the right to choose one’s own attorney is often limited (of course depending on the policy conditions). In some cases the legal assistance provided under the insurance is limited

58 L. Combrink-Kuiters and N. Jungmann (Raden voor Rechtsbijstand), *Monitor Gesubsidieerde Rechtsbijstand 2004*, The Hague 2004, p. 100.

This report contains information and recent statistics on the publicly financed legal aid system in the Netherlands.

59 See on this point also Ynzonides, *supra* note 56, p. 44.

60 *Supra* note 35, p. 26.

61 *Supra* note 35, p. 27.

to a maximum amount. The legal assistance insurer will always test whether the claim is fair and whether there is a reasonable chance of success.

On the basis of the figures presented above one is given the impression that the availability of legal assistance insurance has not led to a ‘claims culture’ in the Netherlands. It is true that a remarkable increase in the number of policies has occurred (already starting from 1988), but there has not been a corresponding increase in the number of claims. Apparently the claim frequency in legal assistance insurance remains constant and, as was shown in section 3.2, the claim frequency in liability insurance has not increased either. It may therefore be concluded that the mere availability (and increase) of legal assistance insurance has apparently not led to the ‘moral hazard’ of increased claim behaviour by victims.

### **4.3. Various areas**

#### *4.3.1. Traffic accidents*

In order to be able to address how an average victim of a traffic accident would have to act to obtain compensation, one must, as is often the case, first make a distinction between personal injury damage and property damage and between non-motorized victims and motorized victims (say another car). For most victims suffering personal injury (whether victim or injurer) the social security system will intervene. The victim will therefore only need additional compensation systems (like tort or insurance) for those parts not covered under social security (like pain and suffering and the top part of one’s income). The same is true for property damage, which is typically not covered under social security.

Victims suffering property damage (for instance a damaged bicycle or motor vehicle) can either call on their own first party insurance (although not mandatory in the Netherlands) or try to use the tort system. Especially for motor vehicles, many have first party insurances that compensate the property damage of the victim. To some extent personal accident insurance may also compensate the parts of personal injury damage not covered under social security. The victim would of course only use the tort system for that part of the damage not compensated under social security or any first party insurance system. Hence, the need for legal assistance of the type described in section 4.1 only arises in case of a claim in tort. In that respect a distinction should be made between motorized and non-motorized victims.

There is a great deal of case law on this issue. One specific decision of the *Hoge Raad* of 4 May 2001<sup>62</sup> deserves special mention. The case deals with the so-called ‘reflex effect’ of Article 185 of the Road Traffic Act 1994 (*Wegenverkeerswet 1994*). This reflex effect relates to the question whether the specific provision of Article 185, which provides a wide scope of protection to non-motorized victims, also applies to a claim whereby the motor vehicle is the victim who acts as plaintiff against the non-motorized injurer. The *Hoge Raad* held that the motor vehicle is in all cases to be considered as a more dangerous object than the non-motorized (injurer). The effect is that this increased danger will be attributed to the motorized victim, at least to an important extent. Also when the owner of a motor vehicle is damaged by a non-motorized injurer and therefore sues the non-motorized injurer to obtain compensation, Article 185 still applies<sup>63</sup>.

As a consequence, it will be difficult for a motorized traffic participant injured through the fault of a non-motorized injurer to receive full compensation from the non-motorized injurer. He/she

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62 HR 4 May 2001, *RvdW* 2001, p. 99 (*Chan-A-Hung/Maalste*) with case note by Hartlief, 2001 *Aansprakelijkheid, Verzekering en Schade*, p. 73.

63 HR 6 February 1987, *NJ* 1988, p. 57 (*Saskia Mulder*).

can only be fully successful if he/she can prove that for him/her the presence of the non-motorized injurer was ‘*force majeure*’, as determined by Article 185. If the motorized victim cannot prove this, he/she will have to bear part of the damage himself. Precisely because the case law of the *Hoge Raad* is so generous to non-motorized victims, most of these cases will be settled out of court. However, victims may still need one of the means of legal assistance described in section 4.1.<sup>64</sup>

#### 4.3.2. Work-related injuries

In case of an occupational disease, Dutch social security traditionally provided limited compensation of lost income and took care of health care expenses. This corresponded with the traditional view that it is social security which takes care of the ‘*Existenzsicherung*’.<sup>65</sup> Tort law played a modest role in addition to social security. Victims (employees suffering from an occupational disease) only used tort law to receive compensation for the top part of their income (the part which was not covered by social security) and to get coverage for non-pecuniary loss. These were precisely the types of damage not covered under social security law. Prevention of occupational diseases was to a large extent guaranteed through health and safety regulations, imposing specific safety duties on the employer.

This resulted in a system whereby victims of an occupational disease primarily received compensation via the social security system to provide some ‘*Existenzsicherung*’. Tort law could be used – if the specific conditions were met – for that part of the damage which was not covered under social security. Obviously, some interrelationship between those systems could exist in the sense that – again, under specific conditions – the social security system might use tort law in the attempt to recover benefits paid to the victim. This is precisely the issue of recourse which we will discuss below (see section 4.4).

It is striking that in this traditional (Dutch, but to some extent European) system, tort law was an additional luxury and at the same time of rather limited importance in the compensation of victims. Indeed, only a limited amount of the damage which occurs in society is covered via tort law.<sup>66</sup> Damage was for the largest part covered either via social security or via private first party insurance. Tort law can be considered an additional luxury in the sense that it provides a guarantee of, in principle, full compensation for the damage suffered and even compensation for non-pecuniary loss. That is a luxury, so it has been held in the literature, which the social security system cannot afford.<sup>67</sup> Indeed, the essence of an ‘*Existenzsicherung*’ is that it provides a minimum, but not the ‘luxury’ of full compensation. The economic reasons why the social security system cannot guarantee full compensation (including compensation for non-pecuniary losses) are multifold; the costs of full recovery would be high and would lead to higher premiums or increased pressure on public budgets. In addition, non-pecuniary loss will be different for every individual, whereas social security usually works with more or less fixed, at least standardized, levels of compensation.

The amazing fact is that at the political level in the Netherlands, it was at times contended that victims of work-related incidents should increasingly use the tort system, since this was then

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64 For a description of the evolution of this case law see M. Faure and T. Hartlief, ‘The Netherlands’, in: H. Koziol and B.C. Steiniger (eds.), *European Tort Law 2001*, Vienna 2002, pp. 369-371.

65 See H. Koziol, ‘Die Arzthaftung im geltenden und künftigen Recht’, in: *Haftungsrechtliche Perspektiven der ärztlichen Behandlung*, Linz 1997, pp. 21-35.

66 This has also been proven empirically (by calculating the specific contribution of tort law compared to social security) by A.R. Bloembergen, ‘De invloed van verzekeringen’, in: *Schade lijden en schade dragen*, Zwolle 1980, pp. 16-17.

67 T. Hartlief, *Jeder draagt zijn eigen schade* (inaugural lecture Leiden), Deventer 1997.

considered as a means to reduce the pressure on the social security system. Apparently, politicians at the time (early 1990s) were not aware (or ignored) the fact that reduced social security coverage might not only lead to an increased use of the tort system, but could even expand beyond the reasonable (insurable) abilities of this tort system. Indeed, in addition to changes in the social security system (and maybe partly as a result of these), victims of workplace accidents increasingly used the tort system to obtain compensation. The decrease of social security protection was paralleled by a development in tort law in the Netherlands towards increased victim protection and expanding employers' liability for occupational diseases.

This can easily be demonstrated by looking at case law. In 1997 the Dutch legislator changed the system of employers' liability by introducing a reversal of the burden of proof concerning the fault of the employer (see Art. 7:658 Civil Code).<sup>68</sup> In addition, there is a trend in case law towards increased victim protection in case of the employer's liability.<sup>69</sup> More particularly, the Dutch Supreme Court also reversed the burden of proof in a case of causal uncertainty concerning the precise time when an employee had inhaled a fatal asbestos crystal, resulting in asbestosis. In a well-known Supreme Court case, *Cijsouw v. De Schelde*, a victim of asbestosis could not prove at what time he had been in contact with the fatal asbestos fiber that caused his disease. The determination of this moment was crucial for the case since Cijsouw had worked for the defendant firm for several years, but during the first period of his employment the employer could not have known that he had to take measures to protect his employees against asbestos and thus could not be liable. The Supreme Court shifted the uncertainty concerning causation to the enterprise by holding that it was presumed that the employee had been in contact with the fatal asbestos fiber during the second period of his employment with the defendant.<sup>70</sup> This presumption could have been rebutted if the defendant had been able to prove that it was not during the second period in which Cijsouw was employed by the defendant that he had been in contact with the fatal fiber, but such a defence was made practically impossible by the Supreme Court.<sup>71</sup> Moreover, the contributory negligence defence in case of employer liability was severely reduced as a result of the case law of the Supreme Court. It has, *inter alia*, been decided that employer liability can only be reduced in case of gross negligence on the part of the employee.<sup>72</sup> In addition, it was decided that gross negligence had to be interpreted as intent or wilful recklessness.<sup>73</sup> This wilful recklessness can only be accepted if it is clear that the employee in his conduct immediately preceding the accident was actually aware of the reckless character of his behaviour.<sup>74</sup> In other words, the contributory negligence defence almost lost its meaning in the context of employer liability. Although formally employer liability is still based on negligence, the scope of liability and the duty of care have been expanded in such a way that some claim that employer liability in the Netherlands is actually based on strict liability, even though this is, according to case law, not yet formally the case.<sup>75</sup>

68 See on this reduced burden of proof for the injured employee HR 10 December 1999, *NJ* 2000, p. 211.

69 See in this respect L. Bier, *Aansprakelijkheid voor bedrijfsongevallen en beroepsziekten: De civielrechtelijke aansprakelijkheid voor de aan het arbeidsmilieu gerelateerde beroepsschade*, Deventer 1988; S. Klosse, 'Bedrijfsongevallen en beroepsziekten: individuele of collectieve verantwoordelijkheid?', 1993 *Nederlands Juristenblad*, pp. 1608 *et seq.*; S.D. Lindenbergh, *Arbeidsongevallen en beroepsziekten*, Deventer 2000 and T. Hartlief, 'Van art. 7A: 1638x naar art. 7:658 BW', in: S.C.J.J. Kortmann (ed.), *Onderneming in vijf jaar nieuw burgerlijk recht*, Deventer 1997, pp. 495 *et seq.*

70 J. Spier, (ed.), *The Limits of Liability, Keeping the Floodgates Shut*, The Hague 1996, pp. 124-125.

71 HR 25 June 1993, *NJ* 1993, p. 686.

72 HR 9 January 1987, *NJ* 1987, p. 948.

73 HR 27 March 1992, *NJ* 1992, p. 496.

74 HR 20 September 1996, *NJ* 1997, p. 198.

75 See T. Hartlief and R.P.J.L. Tjittes, 'De aansprakelijkheid voor bedrijfsongevallen en -ziekten. Recente ontwikkelingen met betrekking tot tewerkstelling en bewijslast', 1990 *Sociaal Recht*, p. 286.

As a result, the finding of liability, the burden of proof, causality as well as the interpretation of contributory negligence, all tend towards increased victim protection and increased employer liability. The employee is not only protected against the dangers at work, but even against him/herself. Some have claimed that such a tendency is contrary to the fundamental principles of liability law.<sup>76</sup>

#### *4.3.3. Medical negligence*

A distinction should be made between on the one hand 'traditional' medical negligence cases and on the other hand medical experiments. As far as medical negligence is concerned basically the same applies as has been explained above for work-related injuries, namely that the victim will usually call on social security to recover most of his/her damage and only use tort law (or where available personal accident insurance) to recover the part not covered under social security. To recover that top part of his/her income (and pain and suffering) the victim will then have to call on the liable physician (or hospital) or his liability insurer. Funding of such a typical medical negligence case would thus take place via the various means of legal assistance outlined above (see section 4.1).

A somewhat different model is followed for medical experiments. Specific legislation in the Netherlands governs the liability for and insurability of biomedical research with human subjects.<sup>77</sup> A specific statute requires that scientific research is only carried out if at the time when the research commences insurance has been taken out covering any damage suffered. According to the literature this is a direct insurance which has to be taken out to the benefit of the test subject; hence it is often considered personal accident insurance. This means that in the event of damage the victim does not have to call on tort law, but can directly call on the insurer of the medical experiment who will have to provide coverage on the basis of the conditions provided in the policy. In this particular case there would not be a need for the victim to call on the liability of the sponsor of the experiment or his liability insurer. Note, however, that the obligation to insure is without prejudice to the researcher's liability. For (exceptional) issues that would not be covered by the test subject's insurance the victim could still use tort law.<sup>78</sup>

#### *4.4. The right of recourse*

In tort law, generally, amounts paid under social security will be deducted from the compensation due by the injurer. Hence there is a relationship between tort law, private insurance and social security. In the Dutch system (which is also the most common system) the social security agency has a right of recourse against the injurer. It is held that in the Netherlands 95% of all recourse actions for personal injury occur in traffic liability situations.<sup>79</sup> The question concerning the extent of the administrative costs involved arises. In section 3.1 we already presented some indications of the administrative costs of recourse in the framework of traffic accidents as estimated by Bloembergen. In addition, estimates have been made of the costs of exercising a right of recourse. It has been estimated that the costs for the institutions exercising a right of recourse amount to about 15% of the gain.<sup>80</sup> Furthermore, one has to take into account the

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<sup>76</sup> So Hartlief, *supra* note 67, pp. 43-44.

<sup>77</sup> See J. Dute *et al.* (eds.), *Liability for and insurability of biomedical research with human subjects in a comparative perspective*, Vienna 2004.

<sup>78</sup> For further details see J. Dute, 'Netherlands', in: J. Dute *et al.* (eds.), *Liability for and insurability of biomedical research with human subjects in a comparative perspective*, Vienna 2004, pp. 229-263.

<sup>79</sup> For further details see Faure, *supra* note 31, p. 54.

<sup>80</sup> These amounts have been estimated empirically by Bloembergen in 1973 (Bloembergen, *supra* note 29, p. 1006) and may be found in an opinion of the Social Economic Council (for a critical analysis see T. Hartlief and G.E. Van Maanen, 'Regres bij volksverzekering; de dader heeft het gedaan', 1994 *Nederlands Tijdschrift voor Burgerlijk Recht*, pp. 75-78).

transaction costs on the part of liability insurers. If one assumes that these are in principle no lower than the transaction costs on the part of those who exercise recourse, 30 % of the total damage goes to administrative costs for the exercise of recourse. This has led to very critical remarks, among others by (again) Bloembergen, concerning the effectiveness of a right of recourse.<sup>81</sup>

Obviously, these estimates are not very accurate and only constitute indications of administrative costs. However, it shows that the administrative costs for handling recourse claims might indeed be substantial and cannot be neglected. Insiders hold that the administrative costs are also that high because the legal conditions for exercising recourse in the Netherlands are apparently highly complicated. There is in fact no general rule and almost every separate social security law has a different recourse regime.<sup>82</sup> Complex regulations concerning recourse inevitably leads to high administrative costs. These administrative costs are moreover increased since the amounts for which recourse is exercised are sometimes very low. The administrative costs for handling many different small files with a lot of conflicts and complications are obviously much higher than dealing with only a few files involving substantial amounts. Some experts estimate that a liability insurer dealing with personal injury cases as a result of traffic accidents spends 25% of his time on recourse claims.<sup>83</sup>

If these data concerning the administrative costs for recourse in the Netherlands are correct, the exercise of recourse hardly seems efficient. It would only be efficient if there were a countervailing benefit in the form of deterrence. However, if one regards the way in which the bonus/malus system in traffic accident cases functions in the Netherlands, this deterrent effect is highly doubtful. In many cases the exercise of a right of recourse will have no effect on premiums. In the words of Bloembergen: the injurer will not notice any difference in his wallet if recourse has been exercised.<sup>84</sup> Currently, recourse actions in the Netherlands therefore merely seem to lead to high administrative costs without clear compensating benefits.

Given the high administrative costs of recourse, Dutch insurers have thought about a system to reduce these administrative costs, aiming at a system which would, on the other hand, still allow adequate risk spreading. Therefore, the idea of so-called 'collectivization' of recourse has been launched and to some extent already effectuated in the Netherlands.<sup>85</sup> The simple idea is that recourse should no longer take place on an individual, but on a collective basis. This means that part of the compensation paid by social security agencies will be shifted to liability insurers. The advantage of such a collective model is that the costs of individual recourse for both parties disappear. Collectivization of recourse is, by the way, not merely a Dutch phenomenon. Van Boom gives examples in Germany and France.<sup>86</sup> Although this collectivization of recourse is still in the initial stages, it might be an important future development in the Netherlands with important consequences for the relationship between social security and tort law.

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81 See Bloembergen, *supra* note 29, p. 969 and Bloembergen, *supra* note 25, pp. 120-121.

82 For an overview of the recourse rights in the Netherlands see W.H. Van Boom, *Verhaalsrechten van verzekeraars en risicodragers*, Deventer 2000 and see Hartlief and Tjittes, *supra* note 75, pp. 69-111.

83 Faure, *supra* note 31, p. 56.

84 Bloembergen, *supra* note 25, p. 119.

85 See Bloembergen, *supra* note 25, p. 122, but also T. Hartlief, and G.E. Van Maanen, 'Bedrijfsvereniging, verhaal en NBW. Het eind van het verhaal!', 1991 *Sociaal Maandblad Arbeid* 5, pp. 292-302. See also Van Boom, *supra* note 82, pp. 116-119 and Hartlief and Tjittes, *supra* note 75, pp. 107-110.

86 See Van Boom, *supra* note 82, p. 117.

## 5. Concluding remarks

In this paper we have addressed the financing of the litigation system (including legal assistance insurance) and the substantive law with respect to compensation of victims in the Netherlands, in order to find out whether these elements encourage a ‘claims culture’. Although empirical data on the incidence of particular injuries and claims are often not available or at best circumstantial (especially concerning work-related injuries and medical negligence), our paper contains some interesting (and sometimes surprising) observations.

Particularly interesting are the data on the evolution of the availability of legal assistance insurance and the evolution in the number of claims. The figures provided by insurers show that legal assistance insurance is gaining popularity, but that the call on legal assistance insurance policies remains stable. The claim frequency in liability insurance is even diminishing (notwithstanding stories of a claims culture), although the average amount of damage per claim is increasing.

We have shown that legal assistance insurance is just one of the many possibilities that a potential victim of personal injury can use in the Netherlands to obtain assistance in recovering for personal injury. In addition to legal assistance insurance, state-financed legal aid plays a role (for lower income groups) as well as legal assistance provided through trade unions and specialized commercial legal assistance agencies for personal injuries. But it is striking that the latter two also use contingency fee schemes, whereas these are still prohibited for attorneys. Notwithstanding a clear opinion of the competition authority *NMa* (declaring that a generalized prohibition of contingency fees violates free competition) and the willingness of the Netherlands Association of Attorneys to start an experiment with contingency fees, the current Minister of Justice is severely opposed against such a payment system. For this reason, he has made use of his statutory powers to prohibit the launch of the experiment. The Minister has also stated, *inter alia*, that allowing ‘no win no fee’ would conflict with the government policy of combating a claims culture in the Netherlands. There is still, however, considerable debate on this issue in the Netherlands since many consider ‘no win no fee’ a necessary instrument to provide better legal assistance to lower and middle class income groups suffering personal injury. Now that the Association of Attorneys has clearly declared its willingness to start experimenting with such a payment system, it is to be expected that, probably with a changing political situation, this issue may again be placed on the political agenda in the future.<sup>87</sup>

The description of the situation in the Netherlands has also shown that the funding of litigation and the need for legal assistance depends to a large extent on the structure of the substantive law concerning the compensation of personal injury, as was made clear in section 4. If, for instance, in the area of medical experiments, a mandatory insurance to the benefit of subjects of medical experiments were to exist, this would reduce the victim’s need to seek legal assistance in cases where the insurer would cover the damage on the basis of the insurance policy. Also trends in legislation and case law, like the one we described concerning traffic liability where there is a clear trend towards extended protection of unmotorized victims, can reduce the need for legal assistance. In many of those clear-cut cases (where there can be little debate on the liability of the owner of the motor vehicle and hence little need to litigate) victims and their representatives often negotiate with the liability insurer of the liable motor vehicle owner whereby mostly only

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<sup>87</sup> The observation that Dutch attorneys are suddenly willing to experiment with ‘no win no fee’ is interesting in itself. It runs counter to the widespread belief that profession members organised in a professional body are generally opposed to competition in their market. The explanation here lies in the fact that there actually already is competition, albeit with commercial legal aid bureaux.

the assessment of the amount of the damage is an issue. Most of these cases thus never go to trial and are settled, although precise data on the settlement rate are lacking.

Still more changes can be expected in this domain in the future in the Netherlands. On the one hand, we have shown that already in the 1970s eminent legal scholars like former Netherlands Supreme Court (*Hoge Raad*) Judge Bloembergen criticized the tort system for being too lengthy, too costly, too complicated and thus too victim-unfriendly. In legal doctrine, it is therefore repeatedly suggested that we should move away from tort (and liability insurance) towards alternative (often insurance-based) compensation mechanisms. These potential changes in substantive law will of course have an impact on the need to litigate and therefore also on the funding of litigation. Debates on changes in this respect are taking place in all three domains. As far as traffic liability is concerned various proposals have been launched in legal doctrine and also at the political level. Some plead in favour of generalized strict liability of motor vehicles towards third parties backed up with compulsory liability insurance, thereby following the French model of the *Loi Badinter*.<sup>88</sup> Others plead in favour of generalized traffic accidents insurance. A similar debate is taking place concerning work-related injuries. In legal doctrine arguments had already been formulated in favour of mandatory direct insurance to be purchased by an employer to the benefit of his employees, thereby seriously limiting the role of employer liability (to cases of intent or gross negligence).<sup>89</sup> This proposal has also reached the political level since a draft was prepared that would introduce such an insurance system for occupational diseases. With respect to medical negligence, many authors following *e.g.* Scandinavian examples have argued that the current liability system is unsatisfactory both for victims and for healthcare providers and that it should thus be replaced with a no-fault accident scheme.<sup>90</sup> It is, however, less clear whether these initiatives will ever be turned into legislation. Many (especially private lawyers) still fear that by replacing tort law with insurance or no-fault compensation schemes the deterrent effect of tort law will be lost which may negatively affect the accident risk. Others on the other hand tend to attach less belief to this deterrent effect of tort law and hold that deterrence can likewise be achieved through legislation backed up by administrative and criminal sanctions.

Other reform initiatives more particularly address the procedural aspects of litigating tort claims. Following the early work of Bloembergen a research group in Tilburg has advanced various proposals in many publications to reduce the administrative costs of the tort system. Some proposals address the increasing use of settlements and out-of-court solutions in order to award speedy compensation at lower costs; other proposals address a standardization of the compensation due to the victim, arguing that too much debate is taking place today on fixing the precise amount of the damage.<sup>91</sup> It is of course uncertain whether these proposals formulated in legal doctrine will ever lead to changes at the political and legislative level. It may be clear, however, that most of these proposed changes will have an important impact on the need for victims to seek legal aid and therefore on the funding of litigation.

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88 See on this French model A. Tunc, 'The "Loi Badinter", Ten Years of Experience', 1996 *Maastricht Journal of European and Comparative Law* 4, pp. 329-340 and A. Tunc, 'Traffic Liability and Victim Protection. Lessons from ten years of experience with the "Loi Badinter"', in: M. Faure and T. Hartlief (eds.), *Verkeersaansprakelijkheid in België en Nederland*, Antwerp 1998, pp. 217-234.

89 See for instance M. Faure and T. Hartlief, 'Verzekering en financiering van beroepsziekten: enkele tips voor de SER', 1998 *Nederlands Juristenblad*, pp. 1135-1142.

90 This is not only being discussed in the Netherlands, but in many other legal systems as well. For an overview see J. Dute *et al.* (eds.), *No-fault compensation in the healthcare sector*, Vienna 2004.

91 See for instance W.C.T. Weterings, *Efficiëntere en effectievere afwikkeling van letselschadeclaims. Een studie naar schikkingsonderhandelingen in de letselschadepraktijk, normering en geschiloplossing door derden* (doctoral dissertation University of Tilburg, 2004); Tzankova and Weterings, *supra* note 37 and Barendrecht *et al.*, *supra* note 36.

Summing up, it seems that the increasing popularity of legal assistance insurance in the Netherlands has not led to an increase in the number of tort cases, whereas the substantive law with respect to compensation for victims and the resulting case law (especially concerning traffic accidents) has to some extent been 'successful' in preventing more cases from going to court, encouraging parties to settle out of court instead. Furthermore, it is not at all clear whether allowing attorneys to charge on a 'no win no fee' basis would change this situation, as currently contingency fees are already charged by commercial legal assistance agencies. These are indeed interesting observations, and it would therefore be interesting to examine also in other legal systems what elements influence the existence of a 'claims culture'. The evidence from our paper shows that the tendency to file a claim in tort is influenced more by evolutions in substantive law (like the reduction of social security coverage), rather than by changes in procedural aspects (like allowing attorneys to charge on a 'no win no fee' basis). If this finding were to be confirmed for other legal systems as well, this may have important policy implications. In that context it seems to make less sense to introduce measures to limit the access to justice of accident victims (as is the case today). It would then be more useful to focus on reforms of substantive law that reduce the need for victims to use the tort system at all, *e.g.* by moving towards (compulsory) first party insurance systems. Thus, either the number of settlements could be increased, or the (already compensated) victim would simply lack the incentive to file a claim in tort.