XX. The Netherlands

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1. Hoge Raad (Supreme Court, HR) 20 December 2019 (*Urgenda*)[1]

The tort law decision from the Dutch Supreme Court (*Hoge Raad*) that, without a doubt, has received most attention nationally and internationally of all tort law decisions since the turn of the century is the historic climate case *Urgenda* against the Dutch State, putting climate change at the top of everyone's agenda.[2]

Already four years earlier, the decision in first instance in the Dutch tort law case *Urgenda* against the Dutch State became worldwide breaking news, covered by The Guardian, the New York Times, Al Jazeera, Le Monde, the BBC, The Economist and many more. Dutch citizens sued their government over inaction on climate change and they won; not once, not twice, but three times in a row! In the *Urgenda* case, in 2015, the Dutch district court (*Rechtbank*) in The Hague legally imposed an obligation on the Dutch State to take better precautions against climate change.[3] It was ruled that the State has done too little to prevent dangerous climate change and is doing too little to catch up, at least in the short term. The court ordered the State to limit the total volume of Dutch annual greenhouse gas emissions, or have them limited, so that this volume would have reduced by at least 25% at the end of 2020 compared to the level of 1990.

Following this decision, the significance of this Dutch case for climate change policy and litigation has been extensively discussed both in the Netherlands and also abroad. It was the world's first successful climate litigation case. Around the world, one wondered, would *Urgenda* survive the appeal? Against several odds, in appeal, the Court of Appeal

[1] ECLI:NL:HR:2019:2006.

[2] See also *EGD van Dongen/ALM Keirse*, The Netherlands, in: E Karner/BC Steininger (eds), European Tort Law (hereinafter ETL) 2019 (2020) 409, no 45 ff.

[3] Rechtbank (Rb) Den Haag 24 June 2015, ECLI:NL:RBDHA:2015:7145. See also *JM Emaus/ALM Keirse*, The Netherlands, in: E Karner/BC Steininger (eds), ETL 2015 (2016) 401, nos 42–54.

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(*Gerechtshof*) decided to uphold the initial verdict and to reject the appeal of the Netherlands.[4] The Dutch State still maintained that the legal arguments it raised were valid and appealed to the *Hoge Raad*. In cassation proceedings, the State addressed the question of principle regarding the government's freedom of choice in relation to policy.

There were believers and non-believers. The rightful place of activism is not the courtroom, but the House of Parliament, so the non-believers say. It has been argued that the court did not respect the constitutional principle of separation of powers. The *Hoge Raad* was urged to put the government back in charge, and restore the balance of powers. But, on the other hand, the *Urgenda* ruling has also been applauded. Many consider it a major victory for the climate and for future generations. States are meant to protect their citizens and if politicians do not do so of their own accord, then the courts are there to help. The Dutch Supreme Court agreed, shared Urgenda's view on this matter and Urgenda won again. The order that the Netherlands has to reduce its emissions by a minimum of 25% by the end of 2020 compared to 1990 levels was confirmed in this final decision.[5]

Although the district court and Court of Appeal reached the same conclusions, the substantiation for the decision was somewhat different. Whereas the district court based its decision on the general tort clause, as laid down in the Dutch Civil Code, the Court of Appeal grounded its judgment on the basis of the duty of care under arts 2 and 8 of the European Convention on Human Rights (ECHR). In cassation, the Dutch Supreme Court based its judgment on the UN Climate Convention (1992) and on the legal obligations of the State to protect the lives and wellbeing of citizens in the Netherlands. The Netherlands is included among the Annex I countries that must take the lead in combatting climate change and have committed themselves to reducing greenhouse gas emissions. These legal obligations are anchored in arts 2 and 8 ECHR.[6] The view of the State that decisions on the reduction of emissions are to be made by politicians failed. According to the *Hoge Raad*, it is a constitutional duty of the State to apply rulings from the European Court of Human Rights (ECtHR). Judges have to offer legal protection as an essential element of democracy, and have to protect the limits of law. The point of view of the State that an obligation to reduce emissions is not based on international

[4] Gerechtshof Den Haag, 9 October 2018, ECLI:NL:GHDHA:2018:2591. See also *Emaus*/*Keirse* (fn 3) nos 55–72.

[5] *Van Dongen/Keirse* (fn 2) no 53.

[6] Ibid, no 48.

obligations also failed. The *Hoge Raad* ruled to the contrary because of European rules (ECHR), the liability which arises under UN conventions, the fact that the Netherlands is party to various climate agreements and is an Annex I country.

This case was exceptionally influential. The rulings have proven its merits and boosted global climate litigation. In the Netherlands another famous case is that of *Milieudefensie c.s. v Sh*ell,[7] which is now pending at the *Hoge Raad*.[8] Climate litigation even reached the ECtHR in its recent decision, where references are made to the *Urgenda* case.[9]

2. and 3. HR 24 February 2017[10] and HR 20 January 2023[11] (*Landje Pik I and II*)

Since the turn of the century, annually, the *Hoge Raad* has delivered two or three compelling decisions regarding the rules on prescription of tort claims. Prescription is the legal defence that bars civil actions on a claim after the expiry of a certain period of time. Due to these ongoing developments in case law, the rules and limits of the legal institution of prescription are rapidly changing. Considering that the doctrine of prescription aims to serve legal certainty, this may be regarded as striking. In this section, we will address the ongoing developments relating to prescription in Dutch tort law and will discuss the criticised cases *Land grabbing I* and *II*, highlighting the fact that the *Hoge Raad* does not shy away from taking a unique legal standpoint in Europe.

First, an overview shows a flexible interpretation and relativisation of the rules on prescription in Dutch tort law. Over the years, prescription has become less and less strict, making more belated claims enforceable. Justice in individual cases predominates over legal certainty. Second, a comparative overview brings to light the fact that Dutch law has a much more flexible prescription regime than most other (European) jurisdictions. In other countries, plaintiffs are more likely than they are in the Netherlands to be prevented from enforcing tort claims against defendants because a specific period of time has elapsed. A recent study of the European Group on Tort Law shows that the effects of the passage of

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[7] Rb Den Haag 26 May 2021, ECLI:NL:RBDHA:2021:5337; Gerechtshof Den Haag 12 November 2024, ECLI:NL:GHDHA:2024:2099.

[8] See eg, <https://milieudefensie.nl/klimaatzaakshell/tijdlijn-klimaatzaak-tegen-shell>.

[9] ECtHR *Verein KlimaSeniorinnen Schweiz et al v Switzerland*, 9.4.2024, no 53600/20, ECLI:CE:ECHR:2024:0409JUD005360020, at 451.

[10] ECLI:NL:HR:2017:309.

[11] ECLI:NL:HR:2023:62.

time on the enforceability of tort claims differ strongly across Europe.[12] We observe a wide range of approaches, from rather strict and rigid to less strict and flexible. The Netherlands is without a doubt to be placed at the latter end of the spectrum, and the recent developments in case law seem to make the Netherlands even more of an outliner.

An overview of the prescription regime

A full overview of the Dutch prescription regime can be found in the aforementioned comparative study and in the Yearbooks on European Tort Law but for the purposes of this contribution, the regime boils down to the following rules, to be found in art 3:310 of the Dutch Civil Code and case law interpreting this statute. A right of action to sue for damages is prescribed on the expiry of five years after the plaintiff becomes aware of both the damage and the identity of the tortfeasor; and in any event, on the expiry of 20 years following the event which caused the damage. In other words, Dutch law distinguishes between a subjective period of five years, starting with certain knowledge, and an objective period of 20 years, commencing at the time of the tort. In cases of pollution or toxic exposure, the objective period is extended to 30 years. In cases resulting in injury or death, caused after 1 February 2004, there is no objective prescription. Claims for compensation of damage in the form of injury or death only prescribe five years after the damage and the identity of the tortfeasor become known to the plaintiff. If at that moment the plaintiff is still a minor, the right of action is prescribed only on the expiry of five years after their 18th birthday. If the damage is caused by a criminal offence, the claim does not prescribe, provided the right to prosecute has not lapsed as a result of prescription in criminal law. This can be indefinite for certain severe crimes, such as manslaughter and rape.

While these five-, 20- and 30-year periods seem clear and strict, in practice they can be extended. It has been repeatedly established in case law that, under certain circumstances, both the subjective period and the objective period can be set aside if the principles of reasonableness and fairness so require. Furthermore, interpreting the statutes of limitations in light of the principles of reasonableness and fairness, the *Hoge Raad* has ruled that the subjective prescription period only starts running after the plaintiff is actually able to file a claim for damages. This will be the case if the plaintiff has obtained sufficient certainty – which does not have to

[12] *I Gilead/B Askeland* (eds), Prescription in Tort Law: Analytical and Comparative Perspectives (2020).

be absolute certainty – that the damage was caused by inadequate or tortious actions of a known party. The answer to the question at what time the plaintiff has obtained sufficient insights and is therefore truly able to file a claim depends on the particular circumstances of the case.

Based on the above, the Dutch law of prescription can be summarised thus: the decisive point in time is the moment the plaintiff should have acted. From the moment that it could be expected from the plaintiff to file a claim onwards, the clock on the prescription period starts ticking. As long as plaintiffs are unaware of one or more elements of their alleged cause of action, they are not truly able to file a claim and their claims will not be time-barred and thus their claims may still be accepted.

In general, these developments and this relativisation of prescription are perceived as improvements and have been applauded by Dutch practitioners and legal scholars. So far so good. However, one of the developments brought by the *Hoge Raad* faces severe criticism and the *Hoge Raad* was in fact asked to reconsider one of these new lines.

Prescription and Land grabbing cases I and II

And this brings us to the highlighted *Land grabbing cases I and II*. *Land grabbing I* was a groundbreaking and unexpected decision by the *Hoge Raad*, presented in the form of an *obiter dictum*.[13] *Land grabbing I* offered a helping hand to municipalities which have to deal with residents who take possession of municipal land in bad faith and become the owners thereof as a result of prescription. Up until then, it was widely assumed that a claim based on tort against a landgrabber would be time-barred at the same time as the claim for restitution of the land and thus after 20 years following the grabbing of the land.

But this turns out not to be the case: after losing ownership of the property and the expiry of the prescription period, the legal race is not over yet, for the *Hoge Raad* found that 20 years after the grabbing of the property, a new claim can emerge: a tort claim with a new prescription period, of a minimum of five years and a maximum of 20 years. Anyone who takes something into possession and holds it, knowing that another person rightfully owns it, is acting unlawfully towards this other person – the (previous) owner. This previous owner who has lost their property due to the expiry of the prescription period can claim damages from the possessor, being the new owner. And since they can seek compensation

[13] See also *ALM Keirse/T Bouwman*, The Netherlands, in: E Karner/BC Steininger (eds), ETL 2017 (2018) 412, no 10 ff.

in kind, the transfer of the property can be ordered and the property has to be returned. For this claim, a new prescription period starts running: five years following the awareness of the loss of ownership or 20 years after the loss of ownership (and thus adding up to a maximum of 40 years after the initial loss of possession).[14]

This unexpected turn was challenged in *Land grabbing II*.[15] This case concerns two neighbours. One neighbour had planted a conifer hedge on his neighbour's land and had thus taken some land into possession, to be more precise 46 square metres. After 20 years, this landgrabber became the owner of this 46 square metre piece of land. But then, a few years later, his neighbour filed a claim against him, not long after he had discovered the true borderline of demarcation, stating a tort was committed. And it was indeed decided that the landgrabber had to put the previous owner in the position he would have been in without the unlawful possession. And thus the piece of land was returned.

The view of the Hoge Raad

This decision was challenged before the *Hoge Raad*. The ruling was obviously fully in line with *Land grabbing I*, but the *Hoge Raad* was asked to reconsider this line. The most far-reaching complaint in cassation entails that the approach of the *Hoge Raad* in *Land grabbing I* was not well thought through, was claimed to be unjust and puts the Netherlands in a unique position: because no other country accepts a shift of ownership due to prescription, it is assumed that the landgrabber is liable in any case. And even the Grand Chamber of the European Court of Human Rights ruled in the *Pye* judgment that 'losing' property due to prescription is not in itself an infringement of art 1 First Protocol to the European Convention on Human Rights.

However, the *Hoge Raad* dismissed the complaints and saw no reason to revoke the rule given in the case *Land grabbing I*. Some find the stance of the Hoge Raad in the *Land grabbing* cases difficult to comprehend, while others have applauded the rulings, pointing out the fairness of the outcome which penalises unlawful land grabbing. We concur with the latter. It is true that the plaintiff failed to file an action on the claim for restitution of possession during the running of the first term of 20 years, but, first of all, this was due to the surreptitious behaviour of the land grabber

[14] *EGD van Dongen*/*ALM Keirse*, The Netherlands, in: E Karner/BC Steininger (eds), ETL 2023 (2024) 459, no 7.

[15] See also *van Dongen/Keirse* (fn 14) no 3 ff.

and more importantly the plaintiff could still have filed a claim for losing ownership. Therefore, besides moral grounds that can be put forward, we acknowledge a legal justification to support the outcome by distinguishing two tort claims: one reclaiming possession and another reclaiming ownership, each of them giving rise to two separate prescription periods.

Conclusions

To conclude, the discussed developments illustrate the struggle of finding a good balance between legal certainty, on the one hand, and justice in individual cases, on the other hand. We believe that the current balancing acts of the *Hoge Raad* in prescription cases strengthens the trust and credibility of the legal system and its fairness, but we do realise that (many) others have another standpoint. In other European jurisdictions, the outcome of cases such as these would certainly be different. But is standing alone not all about embracing individuality, ie bringing justice in individual cases, even if this is at odds with the principle of legal certainty?

4. HR 31 March 2006 (*Nefalit/Karamus*)[16]

First application

In 2006, when the call for proportional liability was growing within Dutch tort law doctrine,[17] and proportional liability was already once applied before in lower case law,[18] the *Hoge Raad* ruled on the important decision in the case of *Karamus v Nefalit*,[19] opting for proportional liability in cases of causal uncertainty. The rule is only intended for cases where it is clear that damage has occurred, but it remains unclear what caused the damage. The case was discussed in the Tort Law Yearbook of 2006[20] and can be summarised as follows. The case involves a former employee

[16] ECLI:NL:HR:2006:AU6092.

[17] See *AJ Akkermans*, Proportionele aansprakelijkheids bij onzeker causal verband (dissertation Tilburg, 1997); *ALM Keirse*, Going Dutch: How to Address Cases of Causal Uncertainty, in: I Gilead/M Green/BA Koch (eds), Proportional Liability: Analytical and Comparative Perspectives (2013).

[18] See Ktr Middelburg 1 Februari 1999, Tijdschrift voor Milieuschade en Aansprakelijkheid no 6 (1999) (*Schaier v De Schelde*).

[19] HR 31 March 2006, Nederlandse Jurisprudentie (NJ) 2011/250, with note *TFE Tjong Tjin Tai* (*Nefalit v Karamus*).

[20] *M Faure/T Hartlief*, The Netherlands, in: H Koziol/BC Steininger (eds), ETL 2006 (2008) 338, no 22ff.

and heavy smoker who was exposed to asbestos during his employment and later developed lung cancer. The employee filed a claim against his employer under the employer's liability provision set out in art 7:658 of the Dutch Civil Code (DCC), asserting that his lung cancer resulted from asbestos exposure. The employer, however, contended that the illness could have been caused by factors other than asbestos, specifically the employee's smoking habits.[21]

The *Hoge Raad* rejects the all-or-nothing approach – arising from the rules on the burden and reversal of proof – which would entirely shift the effects of causal uncertainty to either the employer or the employee. Instead, it abandons this traditional method and introduces a proportional approach as an alternative. Under the theory of proportional liability, judges neither fully grant nor entirely deny damages based solely on the presence or absence of proof of causation. Instead, they award damages in proportion to the probability of causality. However, according to the *Hoge Raad*, 'if it appeared that this likelihood is very small, the result would generally be that the judge rejects the claim, whereas, if the likelihood were very high, he would sustain the claim.'[22]

With respect to situations where the probability is neither very low nor very high, the *Hoge Raad* held that, given the purpose of the breached norm – to prevent damage to the health of employees and the nature of the wrongful act – it would be inconsistent with reasonableness and fairness to place the entire risk on either the employee or the employer. In order to resolve the matter of causal uncertainty, the *Hoge Raad* ruled: 'Taking into account the principles which underlie arts 6:99 and 6:101 DCC, it has to be accepted that when an employee suffers damage, which, considering the aforementioned possibilities, can be caused both by attributable negligence on the part of the employer in his duty to exercise reasonable care … as well as through a circumstance which can be attributed to the employee himself or … through a combination of these, where it cannot be established with sufficient certainty to which extent the damage suffered by the employee has been caused by all of these circumstances or one of them, the judge can order the employer to compensate the entire damage of the employee, but reducing the employer's duty to compensate proportionally, based on a well reasoned estimate, to the extent to which circumstances can be attributed to the employee have also contributed to his damage.'[23] In legal doctrine, the proportional solution is generally

[21] Ibid, no 22.

[22] Ibid; HR 31 March 2006, ECLI:NL:HR:2006:AU6092, at 3.13.

[23] Ibid 22-24; HR 31 March 2006, ECLI:NL:HR:2006:AU6092, at 3.13.

regarded as a fairer alternative to the all-or-nothing approach, or the reversal of the burden of proof (which continues to coexist alongside the proportional solution).

Extending the boundaries

When the ruling came out, it was considered important but also received critical comments. However it may be, while accepting proportional liability, the *Hoge Raad* still left enough leeway for further refinements to be made.[24] Some years later, in 2010, in the case *Fortis v Bourgonje*,[25] the *Hoge Raad* ruled that proportional liability as accepted in *Nefalit v Karamus* can be applicable beyond the particular case of occupational diseases/employers' liability to all kinds of cases, while still emphasising that it should be applied with caution and that an exceptional justification is required, which can especially be present if '… the liability of the defendant has been established and if there is a more than very small possibility that a *conditio sine qua non* relationship between the violated norm and the damage exists, while the rationale of the violated norm and the nature of the norm violation also justifies the application of the said rule.'[26]

In 2012, in *Nationale Nederlanden v Mother and Son*, the doctrine of proportional liability was affirmed. It was decided that causal probabilities are decisive in cases of proportional liability and that in assessing proportional liability, an equity correction such as is applicable in cases of contributory negligence on the basis of art 6:101 DCC is not applicable here.[27] Ten years later, in 2022, in *Cardiologist/State*, the *Hoge Raad* overturned the ruling, as the Court of Appeal had not considered the requirement of 'restraint', nor whether the chances were not 'very small' (as claimed by the State), nor had it examined whether the scope of the violated standard and the nature of the violation (including the nature of the damage suffered by the cardiologists) justified the application of proportional liability in the specific case.[28] In conclusion, proportional liability remains important, and has even become more important because

[24] *Faure/Hartlief* (fn 20) no 25.

[25] See also *I Giesen/ALM Keirse*, The Netherlands, in: H Koziol/BC Steininger (eds), ETL 2010 (2011) 403, no 82 ff.

[26] HR 24 December 2010, ECLI:NL:HR:2010:BO1799.

[27] HR 14 December 2012, Rechtspraak van de Week (RvdW) 2013, 37 (*Nationale Nederlanden v Mother and Son*); *JM Emaus/ALM Keirse*, The Netherlands, in: H Koziol/BC Steininger (eds), ETL 2012 (2013) 469, nos 72–85.

[28] HR 14 December 2022, ECLI:NL:HR:2022:1454.

of its possible broad applications, being not only confined to personal injury and health cases.

Relationship with loss of a chance

An important development in case law, on which much has been written in doctrine, is the distinction drawn between proportional liability and loss of a chance. Already in 2012, proportional liability was described by the *Hoge Raad* as a concept intended to provide a solution for certain situations in which there is uncertainty about the *conditio sine qua non* relationship between the breach of the standard and the damage, while the doctrine of loss of a chance is intended as a solution for cases in which it is established that the wrongdoer acted negligently, but it cannot be determined what damage was caused by that negligence.[29] The amount of compensation owed is equal to the percentage of the chance of improvement thus determined, multiplied by the monetary value of the hypothetical better scenario. It must, however, be a realistic, not insignificant, chance of success.[30] Also small chances that are nevertheless real may be compensated.[31] Judges will often base their assessment on the opinion of experts. In the absence of precise information, the extent of the lost chance and therefore the amount of damages must be estimated by the court.

5. HR 22 February 2002 (*Taxibus*)[32]

When someone is involved in an accident, it impacts not only the injured party but also their loved ones (secondary victims). This is especially true if the victim dies. The question arises whether material and immaterial losses can be compensated in a financial way for secondary victims.

For immaterial losses suffered by the injured party, the possibility of compensation for pain and suffering (*smartengeld*) was already possible under Dutch law preceding the Napoleonic times, but compensation for pain and suffering was not incorporated in the *Code civil* nor the Dutch Civil Code of 1838. In case law, compensation for pain and suffering in

[29] HR 21 December 2012, ECLI:NL:HR:2012:BX7491, NJ 2013/237, with note *SD Lindenbergh* (*Deloitte*/*Hassink*).

[30] See HR 21 December 2012, NJ 2013/237; HR 27 October 2017, NJ 2017/422 (*Caudasyndroom*).

[31] HR 19 July 2019, NJ 2019/356 (Srebrenica) shows that 10% is a real compensable chance of success.

[32] ECLI:NL:HR:2002:AD5356.

the event of personal injuries was disputed until a decision of the *Hoge Raad* in 1943.[33] Since then, awarding moral damages became established case law, for example in the case of injury. The possibility for compensating immaterial damage became codified in the Dutch Civil Code in 1992. According to this established rule, immaterial damage only qualifies for compensation to the extent that the law confirms a right to damages therefor. A right to immaterial damages arises if the liable person had the intention to inflict such harm; under certain conditions: if the harm consists of injury to the memory of a deceased person; and if the person suffering the immaterial loss sustained physical injury, their honour or reputation has been negatively affected or if they have been harmed otherwise in person (*op andere wijze in zijn person is aangetast*).

Over the years, the limits of the scope of the open norm 'if he is harmed otherwise in person' of art 6:106 para 1 sub b final part DCC have changed: first, for an eligible mental injury, a recognised psychiatric illness was initially required, but that is no longer the case. Even if there is no physical or mental injury, compensation for immaterial damage might be granted in cases of moral damage (such as anxiety) resulting from movement of soil as a result of the construction or operation of a mining work if certain conditions are met.[34] An award of compensation for damage resulting from shock also falls in the category 'if they are harmed otherwise in person' (art 6:106 para 1 sub b DCC), but will in most cases also result in compensation for the material damage caused by the severe shock. Furthermore, in 2019, awards for affection damage or bereavement damage for relatives of the victims of an unlawful act became possible.[35]

Case law: it started with Taxibus

Compensation for material and moral damage resulting from the shock experienced by secondary victims was first awarded in 2002, with a ruling of the *Hoge Raad* (*Taxibus*) that received considerable attention both in the general media as well as in legal doctrine.[36] In this decision, the *Hoge Raad*

[33] See eg, *EGD van Dongen/GLH van Rosmalen*, De vergoeding van immateriële schade in Nederland en Italië: een vergelijkend-rechtshistorische analyse, Tijdschrift voor Privaatrecht (TPR) 2022, 1415 ff.

[34] See HR 19 July 2019, ECLI:NL:HR:2019:1278 (Earthquake Damage Groningen); *van Dongen/Keirse* (fn 2) no 28 ff.

[35] See also *van Dongen/Keirse* (fn 2) no 1.

[36] See also *M Faure/T Hartlief*, The Netherlands, in: H Koziol/BC Steininger (eds), ETL 2002 (2003) 305, nos 24–28.

first accepted the possibility of compensation for damage resulting from shock, holding that a person who kills or injures another by a wrongful act may also act unlawfully towards the person to whom the confrontation with that act or its consequences causes a severe emotional shock. Whether this is justified in a particular situation will depend on a weighing of the circumstances of the case. In this ruling, four (cumulative) requirements were formulated for such unlawful acting: (i) an infringement of a violation of traffic or safety standard, (ii) leading to the injury or death of the primary victim. The third party should have (iii) observed the accident or have been directly confronted with the consequences thereof, and (iv) because of that confrontation, this led to a severe emotional shock resulting in mental injury, qualifying as a recognised psychiatric illness.[37] It is important to note that, at the time of the ruling, no compensation for bereavement damage (*affectieschade*) could be claimed.[38] *The Hoge Raad*, in this ruling, also rejected compensation for bereavement damage, clarifying that a legislative intervention was needed to regulate compensation of this damage. As to the requirement of direct confrontation in the *Vilt* decision from 2009,[39] the *Hoge Raad* did not accept the attempt to abandon the criterion of direct confrontation in the light of the seriousness of the norm violation, eg an intended norm violation. Some years later, this requirement, as well as the different views that have emerged since the decision of 2002 on the question in which cases damages for emotional shock should be awarded, was discussed in an elaborate Conclusion of the Advocates-General,[40] attempting to obtain a response from the *Hoge Raad* to several recommendations in this area. At that time, the *Hoge Raad* did not address these (because the case was not suitable, in terms of procedural law).[41]

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[37] Later, the Hoge Raad decided that damage caused by an unlawfully induced emotional shock is limited to damage resulting from mental injury, which must be serious by nature and duration and substantiated by objective standards, not necessarily limited to recognised psychiatric disorders, but always diagnosed by an appropriately qualified and competent practitioner. A psychiatric qualification is no longer required. See HR 29 June 2021, ECLI:NL:HR:2021:1024.

[38] See Law on Affection Damage, which entered in force on 1 January 2019.

[39] HR 9 October 2009, ECLI:NL:HR:2009:BI8583; *ALM Keirse/I Giesen*, The Netherlands, in: H Koziol/BC Steininger (eds), ETL 2009 (2010) 426, nos 52–60.

[40] Conclusion A-G TNBM Spronken and A-G SD Lindenbergh, ECLI:NL:PHR:2022:166, to HR 12 April 2022, ECLI:NL:HR:2022:560.

[41] Art 81 Judiciary Organisation Act (Wet op de rechterlijke Organisatie): If the Hoge Raad considers that a complaint that has been filed cannot result in cassation and does not warrant the answering of questions of law in the interests of the uniform application of the law or the development of the law, it may confine itself to this consideration when stating the grounds for its decision.

The Hoogeveen case

This changed shortly thereafter in the *Hoogeveen* ruling, in which the *Hoge Raad* realised that clarification was awaited, stating that, to the extent that its previous case law on this issue could be read differently, this was now reconsidered. In this ruling,[42] the *Hoge Raad* clarified the criteria for awarding compensation for serious mental injuries resulting from shock. While the criteria formulated in the *Taxibus* case still apply, the question of whether those criteria are met must be answered using (non-exhaustive) points of view. In this 'multi-factor approach', the points of view that play a role in this assessment are: (a) the nature, the circumstances and the consequences of the unlawful act committed against the primary victim, including the intention of the perpetrator and the nature and severity of the suffering inflicted, (b) the manner in which the secondary victim is confronted with the unlawful act committed against the primary victim and its consequences, and (c) the nature and closeness of the relationship between the primary and the secondary victim.

Judges have to assess the (un)lawfulness towards the secondary victim on a case-by-case basis, taking into account, inter alia, these points of view in their interrelationship, without giving *a priori* decisive importance to any of them. If one of these points of view does not provide a clear indication to assume unlawfulness, unlawfulness may nevertheless be assumed if the relevant circumstances, from other points of view, are sufficiently substantial. In this way, the *Hoge Raad* makes clear that other circumstances can make the factor of direct confrontation less decisive, and it moves from a cumulative approach to a multi-factor approach with more discretionary power for judges.

The right to compensation for damage caused by an unlawfully induced emotional shock is limited to the material and moral damage resulting from mental injury. The existence of mental injury must be established according to objective criteria – this does not mean that it only applies in cases of an illness recognised in psychiatry, nor that this mental injury can only be diagnosed by a psychiatrist or psychologist.[43] If such mental injury is established, both material and immaterial damage caused by this shock are eligible for compensation.

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[42] *EGD van Dongen/ALM Keirse*, The Netherlands, in: E Karner/BC Steininger (eds), ETL 2022 (2023) 437, nos 38–46, and nos 73–79. When this case was heard at the court of first instance, in 2018, a request for bereavement damages was not yet possible under Dutch law.

[43] HR 29 June 2021, ECLI:NL:HR:2021:1024.