NETHERLANDS

Antoinette Collignon, lawyer in Amsterdam, lecturer at the University of Leiden the Netherlands

---

COMPENSATION FOR PERSONAL INJURIES IN THE NETHERLANDS

Number of inhabitants: 16 962 050

Capital town: Amsterdam

Currency: Euro

Date of entrance EU 1957: Treaty of Rome 1958

Number of members of European Parliament: 25

Commissioner from the Netherlands: Frans Timmermans (vice chairman)

1) Sources of law

a. *General (European Union Treaties or Rules, Constitution, Codes,)*
European Union treaties and regulations apply, Constitution of the Kingdom of the Netherlands, Dutch Civil Code, Dutch Code of Civil Procedure

b. *Specific (tort liability in general and concerning damages following a road accident)*
Articles 6:95-6:110 DCC lay down specific provisions on damages. The articles provide rules in relation to heads of loss and the method of assessment of the amount of damages to be awarded. These articles apply irrespective of the basis of liability.
The rules of liability can be found elsewhere in the Dutch civil code as well as in special codes. The most important causes of action in personal injury cases are the generally applicable article on tort; article 6:162 DCC and liability based on capacity and strict liability (articles 6:169-193 DCC). Furthermore liability can be based on breach of contract (article 6:74 ff DCC). There are also special articles with regards to liability of employer's for industrial disease and accidents at work (article 7:658 DCC) and liability for accidents in transport cases (road, rail, sea, air) which can be found in book 8 DCC).
It is important to know that the articles in our Dutch code leave room for judicial interpretation. Therefore case law should also be taken into consideration as well as academic writing.

2) Fundamental principles: 'The purpose of damages: punitive or compensative"?

The purpose of damage under Dutch law is compensative. Punitive damages are not allowed under Dutch law.

a. *Does a standard for "full compensative damages" exist?*
Yes, Dutch personal injury compensation is based on the principle of full compensation. The basic premise is that a liable party should put the victim – as far as possible – in the position he would have

taken if the wrongful act would not have occurred. The principle is not laid down in a specific rule. The Dutch Supreme Court referred to it in case law in the previous century[1].
There are however several exceptions to the rule.
1. For instance article 6:95 DCC provides the right to compensation for non-pecuniary losses but limits this to certain categories.
2. Furthermore the tort feasor is only obliged to compensate the loss which he in fact caused, applying general principles of causation (article 6:98 DCC) Article 6:98 DCC not only applies to questions of fact but also implies a determination of what is reasonable according to the nature of damages and the liability as well.
3. The principle of full compensation does not generally apply to third parties or secondary victims.
4. Another exception is laid down in article 6:109 DCC, if full compensation would lead to clearly unacceptable results a judge may reduce damages.
5. Last but not least the legislature has the power to impose limits or ceilings on certain liabilities (art. 6:110 DCC) by regulation (f.i. in transport accidents)

b. *Does a rule for Unitarian compensation of personal injuries or, alternatively, a method with different figures of it apply?*
No, as far as I'm aware this does not apply.

3) The forensic report:

a. In extrajudicial affairs does each party prepare a forensic report?
b. In judicial trials is it possible to the parties to forward a forensic report as evidence?
c. During the trial, does the judge have a duty, and if not, is there any rule to induce him to appoint a court expert? May the parties appoint an expert on their own side?
d. Which are the typical legal queries? Are there rules providing for medical or legal standards in assessment of personal injuries?
e. Is the forensic expert a member of a professional order or a judicial list?

It is common practice that both parties ask advice from their own medical advisors with regards to medical aspects of a case.
Furthermore parties are entitle to rely on medical experts and other experts if needed such as occupational health experts, case managers, experts calculating loss of income etc...
It is customary that parties agree on appointing a joint medical expert. However parties may of course use their own experts. Furthermore a judge may order an expert opinion. The law prescribes only a few general criteria which an expert witness must meet. He must perform his task without bias and to the best of his ability. There are no particular criteria laid down in relation to persons having sufficient medical experience. There are some guidelines from medical specialist organizations which are respected and referred to[2]. Courts also have guidelines[3]
The Dutch Code of Civil Procedure also contains general rules with regards to the use of expert reports and the weighing of evidence in court proceeding (Article 149 -154 DCCP). Dutch courts usually rely on either the joint expert report or the court appointed expert. An expert report by a single party expert is regarded as a party report and might be worth less if contested by the other party.
In civil proceedings as far as I know there is no public register of expert. Some courts keep files but whether or not they are used is not known. It is not mentioned in cases law. In most cases however parties will give the court a list of the experts they would like to be appointed.

[1] See for instance Hoge Raad 17 January 1964, NJ 1964, 322 Oranje Lijn/Bohne
[2] See for instance: https://www.rechten.vu.nl/nl/onderzoek/organisatie/onderzoeksinstituten-en-centra/projectgroep-medische-deskundigen/projecten/procedure-deskundigenbericht/aanbeveling-procedure-deskundigenbericht/correctierecht/index.asp and http://knmg.artsennet.nl/Nieuws/Overzicht-nieuws/Nieuwsbericht/39367/Richtlijn-medisch-specialistische-rapportage-1.htm
[3] https://www.rechtspraak.nl/procedures/landelijke-regelingen/sector-civiel-recht/pages/default.aspx There is an English version available which you can download

A couple of years ago a working group of the University of Amsterdam prepared a list of questions for medical experts with focus on causal relationship between the accident and injuries. Courts use this list regularly. http://www.rechten.vu.nl/nl/onderzoek/organisatie/onderzoeksinstituten-en-centra/projectgroep-medische-deskundigen/projecten/vraagstellingen/index.asp

4) **Personal harm to be recognized (in case of personal injuries, death excluded)**

a. *Temporary invalidity and measure of consequential damages*
b. *Permanent invalidity / personal damages and measure of consequential damages*

According to Dutch law (article 6:95 in combination with article 6:106 DCC) there is a limited right to non-pecuniary damages. A victim has the right to an equitably determined reparation of harm other than patrimonial damage
According to article 6:97 BW the judge is entitled to quantify the total amount of damages suffered. If the extent of the damages cannot be determined precisely, it shall be estimated.

Where an injured person suffers mentally from the consequences of physical injuries sustained, there are no specific requirements concerning the degree of seriousness of the mental suffering. If a victim has only suffered psychiatric injury, the threshold is that there is a recognizable psychiatric illness. Annoyance of greater or lesser mental discomfort will not suffice.

There is a wide margin of appreciation deciding on the amount of non-pecuniary damages. The victim doesn't need to specify to what extent he suffered non-pecuniary damages nor is he obliged to demand a specific amount. It is however wise to state all relevant facts and circumstances.

The Dutch Supreme Court has set out some basic rules. First of all a judge has to take into consideration all circumstances of a particular case[4]. More specifically a judge should look at the injuries and the consequences of the injuries on the victim's life. Furthermore the judge has to pay attention to case law in similar cases. This process is simplified by the collection of abstracts in a special edition in the review of traffic law '*Verkeersrecht*', the '*Smartengeldbundel*[5]' which provides index-linked awards. Judges can also refer to awards for non-pecuniary damages in other countries, albeit that the award can't be solely determined on that basis.[6] A judge may also take into consideration the nature of the liability. In practice this factor is rarely made explicit nor has an explanation of any award on this basis been provided.

There is no absolute limit on the amount of non-pecuniary damages that can be awarded. There are no caps set by law.

The past years discussion took place about the level of compensation which is regarded as low also in comparison to other countries in Europe. In light of the discussion about the level of compensation the Court of Appeal of Arnhem-Leeuwarden in its ruling of 14 January 2014[7] has increased the compensation for pain and suffering based on the Smartengeldgids 10%. The Court of Appeal found: "*All together the Court concludes that basically compensation for pain and suffering to the amount of € 61,050 is adequate given the nature of the injury of the mother and the consequences thereof and given her age at the time of the medical incident. As the Court also wants to take into account the discussion in the literature with regard to the level of compensation for pain and suffering, the Court*

[4] Dutch Supreme Court 8 July 1992, NJ 1992, 714, VR 1992,133
[5] https://www.smartengeld.nl/
[6] Dutch Supreme Court 17 November 2000, NJ 2001, 215 VR 2001
[7] ECLI:NL:GHARL:2014:183, VR 2014,86

will increase the aforementioned amount by 10%, so that a reasonable compensation for pain and suffering comes down to € 67,155."

In a verdict of 5 August 2014 the Court of Appeal Arnhem-Leeuwarden[8] also raised the level of compensation for pain and suffering reasoning that the awards for lottery prices (which measures luck) have gone up considerably the past decennia whereas the awards for pain and suffering (which measures bad luck) have not gone up. Furthermore the Court of Appeal argued that in light of the public opinion with regards to the awards for pain and suffering Courts should award higher amounts.

As all circumstances are taken into account there is no separate award for temporary and permanent damages.

c. *Relatives of heavily-injured party: recognition of damages as collateral victims, entitlement and quantification of damages*

Persons other than the primary victim do not have a right to claim damages in respect of the injury to the victim. However article 6:107 DCC formulates a special rule for cases in which a person suffers physical or mental injury caused by someone who may be held liable. Other persons can claim expenses for the benefit of the victim provided that such costs could have been claimed by the victim himself, for instance travel expenses, hospital costs, medical expenses, costs of care. Only reasonable costs are compensated.

The Dutch Supreme Court in its ruling of 6 June 2003[9] decided that personal care and attention of a wife provided to the husband during the last days of his life was not considered to be recoverable. According to the ruling only care that is usually provided for by professional carers can be considered as recoverable care. If it is not normal and usual to engage professional care for the specific care supplied, the informal care supplied is not recoverable.

The ruling also implies that loss of holidays of the parents visiting the child in hospital are not recoverable. However the loss of spare time of a parent who takes care of an injured child are recoverable.

5) Economic damages: what is included (e.g. Medical expenses, loss of profits, etc..)

All costs incurred as a result of the accident as well as losses can be claimed (article 95 & 96 DCC). Examples are:
- travelling expenses or transport costs in connection with visits to doctors or hospitals;
- costs of stays in hospitals or rehabilitation centres;
- costs of domestic care;
- costs of nursing and/or care;
- medical expenses
- costs of long-invalidity (medicines, special diets, aids and equipment, prostheses etc.)
- costs because the victim is no longer able to carry out chores or repairs in and around the house
- costs of home modifications
- loss of earnings
- costs of engaging a lawyer[10]

Both the victim and any third party who has incurred costs on behalf of the victim resulting from the injury may make a claim (art 107 DCC). There is however a duty to mitigate losses. There are no caps on

[8] ECLI:NL:GHARL:2014:6223, RAV 2014,92
[9] Hoge Raad 6 June 2003, NJ 2003,504 "Wilton Feyenoord"
[10] According to article 6:96 DCC the costs of a lawyer are part of damages and can be claimed if reasonable and reasonably made.

general damages set by law.

There are special guidelines available which are published by the Personal injury board (www.deletselschaderaad.nl). This is a platform of all parties involved in personal injury cases in the Netherlands which goal is to create more transparency, clarity and harmony. They have produced several guidelines (which deal with travel expenses, costs while in hospital, housekeeping, self-reliance etc.) which are now used in most personal injury cases by all parties as well as judges as a reference.

6) Tort liability in case of death

a. *Are any non-economic damages awarded to the injured person if death has been immediate?*
No, unless there is a breach of a human right.

What if death occurred sometime after the event? By which criteria are these damages awarded to the heirs?
All rights to claim damages pass to the heirs by operation of law (article 4:182 DCC) as this is considered a right of patrimonial nature. There are no additional requirements. For transmission of a claim concerning non-pecuniary loss however there is an additional requirement set by law (article 6:106 (2)). According to this article the deceased has to notify the defendant that he intends to claim non-pecuniary damages. A new law which has not been passed Parliament will change this rule. If this law passes notification is no longer needed and heirs can claim non-pecuniary damages of the injured person[11].

b. *Is there any possibility to award non-economic damages iure proprio to the relatives of the victim? Who are the persons entitled to them and which are the criteria followed by the courts?*
No, according to Dutch law this is not possible. However there is a possibility to claim non-pecuniary damages if the claim if brought under article 6:107, 107a or 108 DCC. This is for instance the case when relatives suffer from a recognized psychiatric illness as a result of witnessing the accident or as a result of confronting the consequences of an accident. Another example could be that the death of a relative is a tortious act against a relative (for instance murder of a child by a father with the purpose to hurt the mother).

Proposal for law reform
Currently a proposal for law reform is pending in the Dutch parliament which allows damages for non-pecuniary loss as result of an injury or the death of a relative. According to this law relatives who stand in a close family or comparable relationship (partners, parents, siblings and grandparents) qualify for compensation. The quantum will be set by administrative order and will vary from € 12.500 - € 20.000,-. It is not clear if the law will be approved by the Dutch parliament and when this will enter into force[12].

c. Does the award change according the degree of kinship?
See above

d. *Economic damages: which damages are awarded to the relatives?*
Funeral and burial expenses, and loss of pecuniary support and loss of support provided by doing the household tasks can be claimed. Who can claim and to what extend is set by law (article 6:108 DCC).

According to article 6:108 DCC (1a) spouses or registered partners may claim compensation for loss of pecuniary support provided that they lived with the deceased. Divorced husband or wife may no

[11] See footnote 12
[12] See also: https://www.rijksoverheid.nl/actueel/nieuws/2015/07/20/wetsvoorstel-affectieschade-bij-tweede-kamer-ingediend

longer bring a claim under 6:108 DCC even if there was a duty to pay maintenance. Furthermore the claim ends when a surviving spouse remarries.

Also children and adopted children of the deceased can claim compensation provided that they are minors or students depending on their parents. Once a child is adopted the liability to pay end.

Claims can be brought by the person who paid for the funeral/burial.

Loss of pecuniary support can also be claimed by grandparents, grandchildren, brothers, sisters, lovers, boyfriends/girlfriends, unmarried partners, same-sex partners, close friends, and other relatives, if they - in their relationship to the deceased - meet specific requirements (article 6:108 (1b) DCC).
Other relatives by blood or marriage may claim compensation provided that the deceased actually maintained them or was obliged to do so by court order.
People who lived with the deceased as family may also claim compensation (article 6:108 (1c) DCC) they must make plausible that the maintenance would have continued had the fatal accident not occurred. They also have to make plausible that the family members themselves could not reasonably provide for their own maintenance. This claim thus depends on future expectation regarding potential future provision as well as an estimate of what the needs of the family members would have been.

Persons whose maintenance the deceased supported by contributing to the common household may also claim damages (article 6:108 (1d) DCC). This is to permit these family members to provide for domestic tasks in another way.

7) **Limitation of actions, if any regime exists**

Limitation periods and the way they are stopped are set by law.

The general article on limitation of damages claims is article 3:310 DCC. It is applicable for any claim for damages irrespective of the cause of action. The article describes two limitation period, a short one of 5 years and a long one of 20 or 30 years.
The short or 'relative' limitation period of 5 years starts from the day following that on which the victim became aware of both the damage and the identity of the responsible person. The long or 'absolute' period is 20 or 30 years following the event which caused the damage.

Some particular causes of action have their own limitation periods. For instance product liability claims the limitation period is 3 years after the victim became aware of the damage with a maximum of 10 years (upon which the claim lapses). In road traffic accidents the limitation period is 3 years after the date of the accident (article 10 WAM) and in personal transportation 3 years after the date of the accident (article 8:1751 DCC) Note however that there is a 3 month period in which the victim must give notice of his claim against the tortfeasor.
Furthermore there is a right to direct action against the insurer, which also has a limitation period of 3 years (7:942 DCC).

It is possible to interrupt the limitation period by institution of an action or a written warning or written communication in which the creditor unequivocally reserves his right to performance. Furthermore the limitation period is interrupted by acknowledgment of liability by the liable person (or his insurer). Interruption of the prescription of a right of action otherwise than by institution of an action which is upheld starts a new prescription period as of the beginning of the following day. See also articles 3:316-3:319 DCC.

In road traffic cases the limitation period with respect to an insurer is interrupted by any negotiation between the insurer and the injured party (art. 10 (5) WAM). A new period starts running from the

moment one of the parties sends a letter to the other, by registered mail, or when a writ is served by a process server, in which it is made clear that one party is terminating the negotiations.

The same applies to claims against insurers under the right to direct action (article 7:942 (3) DCC).

8) ALTERNATIVE DISPUTE RESOLUTION (ADR)

a. *Existence, its real effectiveness, average length, average costs*

In the Netherlands most of personal injury cases are settled out of court. In recent years the various guidelines have been issued by the Letselschaderaad (an institute in which plaintiffs as well as defendants are represented) which have made it easier to settle cases.
Furthermore mediation is common in personal injury cases. Mediation is always voluntary. It is usually quick and successful but expensive. In court proceedings most courts will set a date for an oral hearing in which the court will try to persuade parties to settle their case. Furthermore there is a possibility to issue a 'part of the claim proceeding' (art. 1019w-1019cc DCCP). This is a quick and easy way to resolve a particular part of the personal injury case after which parties can further negotiate their case out of court. These proceedings usually take 2-3 months. Costs of these specific proceedings have to be paid by the liable party.

Amsterdam-Milano, 29th October 2015

Antoinette Collignon, lawyer in Amsterdam, lecturer at the University of Leiden the Netherlands