

Employers' liability for damage caused by his employee

A comparative study: Germany and the Netherlands

Karsini Vanessa Soerjaman

ANR: S125966

International European Labour Law

University of Tilburg

Supervisors Prof. Dr. R. Blanpain & LLM. S.J. Rombouts

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Table of content

Introduction

List of abbreviations

1. Employer's Liability in the European Member States

2. The concept of the employee, negligence and damage

§ 2.1. The concept of the employee

§ 2.2. The concept of negligence

§ 2.3. The concept of damage

§ 2.4. The concept of work related accidents

3. Legislation of employer's liability

§ 3.1. German Law

§ 3.2. Dutch Law

4. The requirement of a connection to the employment

§ 4.1. The connection to the employment under German law

§ 4.2. The connection to the employment under Dutch law

5. Damage

§ 5.1 German Law

§ 5.2 Dutch Law

6. Recovery of paid damages from the negligent employee

§ 6.1. German Law

§ 6.2. Dutch Law

7. Insurance

§ 7.1 German Law

§ 7.2 Dutch Law

8. The Conclusion: Comparative Perspectives

§ 8.1 Does employer's liability require a fault?

§ 8.2 What are the conditions for employer's liability under German and Dutch law?

§ 8.3 Is it possible for the employer to escape liability?

§ 8.4 Are the German and Dutch legal systems appropriate to provide compensation to the victim?

9. Recommendation

Bibliography

List of abbreviations

Germany

BGB	German Civil Law Book (Bürgerliches Gesetzbuch)
PETL	Principles of European Tort Law
DCFR	Draft Common Frame of Reference
SGB	German Social Security Act (Sozialgesetzbuch)
BGH	Federal Supreme Court (Bundesgerichtshof)
ZPO	Code of Civil Procedure (Zivilprozessordnung)
ArbG	First-instance Labour Courts (Arbeitsgericht)
LAG	Land Labour Courts (Landesarbeitsgericht)
BAG	Federal Labour Court (Bundesarbeitsgericht)
VOH	Institution of German motor liability insurers (Association Verkehrsofferhilfe)

The Netherlands

BW	Dutch Civil Law Book (Burgerlijk Wetboek)
Ktr	Sub-district sector (Kantongerecht)
HR	Dutch Supreme Court (Hoge Raad)
AW	Civil Servant Act (Ambtenarenwet).

Introduction

The cause of work related accidents that occur during the performance of work often lies in a lack of training; faulty equipment; high work pressure or unsafe work conditions. Usually employers pay for the damage because they are regarded to be in a better position to afford the damage compensation or to arrange an appropriate insurance coverage. Employers are also supposed to take care of safe work conditions; proper supervision; and work instructions of their employees. But to what extend does the employer have to carry responsibility for damage caused by his employee? It seems to be unfair to hold the employer liable if the only cause of damage seems to lay in the negligence of the employee. The accident could furthermore occur in a situation which the employer cannot influence or control.

It seems very interesting to compare employer's liability under German and Dutch Law. Germany owns a statutory insurance system for employers. This occupational insurance system covers the employee's damage caused by a job related accident or occupational disease. The injured employee will not have a direct claim for damages of the employer but of the insurance company. In contrast to Germany no insurance system is mandatory for employers under Dutch Law to insure against the employee's damage caused by a job related accident or occupational diseases. If employers in the Netherlands are uninsured, victims may be left empty handed. For example if the employer is bankrupt, he will financially not be able to pay damage compensation to the victim.

This thesis explores from a comparable perspective, employer's liability in the private sector, for damage caused by the negligence of the employee to himself, a third person; or the employer under German and Dutch law. It will show whether the regulations for employer's liability in these two neighbour countries meet the standard of an ideal liability system that guarantees a proper compensation to the victim. For the purpose of the thesis I have selected four questions:

1. *Does employer's liability require a fault?*
2. *What are the conditions for employer's liability under German and Dutch law?*

- 3. Is it possible for the employer to escape liability?*
- 4. Are the German and Dutch legal systems appropriate to provide compensation to the victim?*

The first chapter of this thesis contains a general introduction to employer's liability. The second chapter will describe important concepts for the thesis subject and these are the employee; negligence; damages and work related accidents. The third chapter discusses the legal provisions of employer's liability in the different member states. The fourth chapter will discuss the requirement of a connection to the employment. The fifth chapter shows which damage is compensated. The sixth chapter shows the employer's possibility of recovery of paid damages from the negligent employee. chapter seven explains the role of insurance companies. I will conclude with answers to the questions of the thesis and my personal recommendations in chapters eight and nine.

1. Employer's liability in Europe

Europe does not have a harmonized mutual Code for European Private Law that concerns the legal relationship between individuals such as Labour Law; the Law of Contracts or the Law of Obligations¹. Attempts in the past, to stimulate harmonization, are: 'the Principles of European Tort Law (PETL)'; and 'the Draft Common Frame of Reference (DCFR)'². Their wording included provisions for the accountability of damage caused by employees (article 6:102 PETL and 3:201 of book VI DCFR)³. These European proposals served as a common framework for the further development of national legal practice in Private Law. Aside from the non-binding soft law, the EU exercises influence on the national legal practices with binding law also known as hard law. In the legal area of Labour Law, it concerns for example the equal treatment of workers and workers' health and safety such as: the Directive on Health and Safety at Work⁴; and the Directive for Equal Treatment in Employment and Occupation⁵. European Member States must implement the Directives into their national law systems⁶.

European member states agree in general that the victim of a work accident should be able to hold the employer liable⁷. They acknowledge that employers need to accept responsibility based on the contractual obligations of the employment contract⁸. The justification of employer's liability is based on several arguments. The first is moralistic and holds that the employer benefits from employing the person in his company. Employers should therefore carry the risk of any damage coming out of the performance of the job by the employee⁹. Employer's liability often also offers a more

1 http://en.wikipedia.org/wiki/Private_law.

2 The publications of the DCFR and the PETL are the result of initiatives who favour the harmonisation of private law at a European level.

3 See the general outline of 'Principles, Definitions and Model Rules of European Private Law' (2009).

4 „Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work“, see <http://europa.eu/legislation_summaries/employment_and_social_policy/health_hygiene_safety_at_work/c11113_en.htm>.

5 Council Directive 2000/78/EC of 27 November 2000.

6 The means and methods to achieve this result are however left to each individual state control.

7 Jacobs (2011), p. 59.

8 Giliker (2010), p. 22.

9 Zmij (2009), p. 79.

proper protection to the victim because employers normally find themselves in a better financial position¹⁰.

Another economic consideration is that many employers generally are in a better position to insure against damage that results from work¹¹. It is also more practical and effective to let the employer take care of safety at work because he is the one person who is assumed to be most familiar with the dangers of the employment task, which is why he is also the best person to control the place at work and provide proper work instructions to his employees¹². Furthermore, employer's liability allows the victim to claim damage compensation even if the victim does not know the identity of the person who caused him damage but instead easily remembers the name of the company for whom the person has worked for¹³. Finally this encourages employers to take more care of proper safety standards for their employees¹⁴.

10 'Employer's liability ensures that victims who claim compensation for their damage are able to claim the party with the 'deeper pockets'. It ensures that the claimants have a means of recovery', see Steele (2007), p. 567.

11 Giliker (2010), p. 55.

12 Hoekstra (2000), p. 43.

13 Cane (2006), p. 232.

14 Howarth (1995), p. 633.

2. The concept of the employee, negligence, damages and work related accidents

§ 2.1. The concept of the employee

The Court of Justice of the European Union, Germany and the Netherlands

The Court of Justice of the European Union defines the term ‘worker’¹⁵ based on objective criteria which forms the scope of the free movement of workers, a fundamental freedom that the EC Treaty guarantees. The term ‘worker’ and ‘an activity as an employed person’ may not be defined by reference to the national laws of the member states to prevent that the Community rules on free movement of workers could be frustrated by national laws who would then be able to exclude certain categories of persons from the benefit of the Treaty.¹⁶

The German courts interpret the concept of employee as the opposite definition of the self employed person in the German Commercial Code: the employee is a person who is obliged to work for somebody else on the basis of a private contract in a relationship of personal subordination.¹⁷ Dutch law provides different than German law a general statutory definition of the term employment contract. Article 7:610 BW states that the contract of employment is a contract whereby one party, the employee, undertakes to perform work in the service of the other party, the employer, for remuneration and during a given period.¹⁸ The employment contract in Germany and the Netherlands complies with the definition of the Court of Justice of the European Union that “for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration”.¹⁹

15 The term ‘worker’ is an older notion of the term employee. Some still existing Dutch labour laws do not refer to the ‘employee’ but to the older notion of ‘arbeider’ (worker), see Labour law in the Netherlands – Jacobs (2004), p. 42.

16 Blanpain, European labour Law, 13th edition, Kluwer p. 294, 300-302.

17 Weiss (2008), p.45, and Delegation of work, although possible in principle, is atypical in employment relationships, and therefore indicative of self-employment, and see Federal Labour Court decision of 13.03.2008 – 2 AZR 1037/06. Further, a contract for work that cannot be performed without the involvement of third parties indicates self-employment: see Federal Labour Court of 12.12.2001 – 5 AZR 253/00. ILO employment relationship 2013.

18 <Meub, arbeidsrecht/An_begriff>, and Labour law in the Netherlands – Jacobs (2004), p.46, and Labour Law in the Netherlands, Jacobs (2004), p. 46-47.

19 Lawrie-Blum case.

The requirements: performance of services, remuneration and subordination

In Germany as well as in the Netherlands, the concept of employee requires three elements: a performance of services; for remuneration; and in subordination. Subordination means that the worker must perform the job/task in service of or under authority/influence of the employer whereby his position depends on his employer's instructions.²⁰ A test for control applies to indicate if the requirement of subordination is fulfilled. It means that the worker must perform his tasks according to the instructions of or under the direct control of the person who employs him.²¹ It may vary per individual situation to which extend the employer is required to have control over the employee's work performance. It depends on the agreement between the parties, the nature of the contract of employment and the principle of reasonableness and fairness.²²

The employee's obligation to perform service must further be personally.²³ Thus, there is no contract of employment for the worker if he is allowed to replace himself by another person to do the job, without the employer's permission.²⁴ The German courts refer to work that is based on a private contract'.²⁵ Those who do not work based on a private contract are for instance persons who are forced to work like a prisoner in prison, a person whose work is strictly voluntarily or persons whose work is purely based on religious reasons.²⁶ These persons do not qualify as employees.

Under German Law important indications for the status of an employee are: 'if the worker always needs to be ready to accept new tasks and is not free to refuse tasks that are offered to him by the company'; 'if the worker is integrated in the organization'²⁷; 'if the worker takes a long time to perform the task' and; 'if the worker must follow instructions' although this last indication is „not always typical in

20 Magnus (2004, part B), p. 62 and see also Bakels, p. 54, Penning, 2007.

21 Hoekzema (200), p. 50, 51.

22 Bakels, p. 55.

23 Penning, 2007.

24 Bakels, p. 54.

25 Magnus (2004, part B), p. 62.

26 Magnus (2004, part B), p. 62.

27 Federal Labour Court 30.10.1991 – 7 ABR 19/91: "Being integrated in another person's organisation and existence of a power to direct result in a worker being in a position of subordination. The power to direct may cover content, organisation, time, duration, and place of the activity." ILO employment relationship 2013.

professional services of a higher level because certain types of activity may imply that the worker enjoys a high degree of freedom, initiative, and professional autonomy.”²⁸

Also under Dutch law, the control test, which is a test if the employee must follow instructions, appears not to be so effective in cases where employees are highly skilled, specialized and experienced.²⁹ Because the factors that indicate the status of an employee are numerous, the German Labour Courts³⁰ must base their decision on an overall assessment of the situation, taking into account all relevant factors of the individual case³¹ and whereby the indications for a contract of employment including subordination do not have to be all present in the individual case.³² Also the Dutch courts focus more at the actual situation rather than at the formal situation. The employment status of the worker depends on a combination of various indications such as the extent to which the worker must perform according to the instructions; if he is obligated to work or may choose to decline the job and the extent to which the worker must carry the risk and financial costs. In case of doubt, it is the employer who must proof that there is no contract of employment with his worker.

Most employees in Germany as well as in the Netherlands perform work based on a full-time contract for an indefinite period. This means that the contract only ends after the employee’s death or retirement age or is terminated by the employer or employee. However a smaller group of employees perform work based on contracts for a definite period. Fixed term contracts end after a limited duration of time or after the completion of a particular job. In accordance with the implementation of the Directive 1999/70/EC employees who work in the last category may not be treated in a less favourable manner than a comparable employee working on a contract that is based on an unlimited duration.³³ To prevent unequal treatment, contracts for a definite period are governed by the German Act on Part-time Work and Fixed-term

28 An example forms the case in 1960 in which the court decided to redefine the notion of subordination and extended the definition of employees to the physician-in-chief; he personally gave direction and instructions to which medical treatment was necessary and in what way it had to be performed although it must be said that the physician’s capacity to work was almost totally absorbed by the hospital, see Weiss (2008), p. 46. Federal Labour Court of 30. 10. 1991 – 7 ABR 19/91: “ILO employment relationship 2013.

29 Hoekzema (200), p. 51.

30 These are the first-instance Labour Courts (ArbG), Land Labour Courts (LAG) and the Federal Labour Court (BAG).

31 Weiss (2008), p. 47. German Employment Relationship (LABOUR LAW CYCLUS).

32 The basis for this is a “general evaluation”, meaning that the courts apply a “holistic view” Federal Labour Court 15.03.1978 – 5 AZR 819/76 – and 13.01.1983 – 5 AZR 149/82) Federal Labour Court 23.04.1980 – 5 AZR 426/79 ILO employment relationship 2013.

33 Labour Law and Industrial Relations in Germany – Manfred Weiss and Marlene Schmidt (2008), p. 52, 53.

Employment and the Dutch Act on Fixed-term and indefinite Duration Contracts.³⁴ Both acts prescribe equal treatment of both fixed term and open-ended contract workers.

We have seen that the contract of employment under German as well as under Dutch law is a performance of services, in subordination, for remuneration. We have seen that various indications may point towards the employment status. The list of indication factors is not meant to be exhaustive and the weight that is given to an indication factor depends on each individual case for example the category of profession of the employee. Both member states use in general the same determining factors for the existence of a contract of employment. The key element is subordination and this is determined with the control test which means that the worker of whose performance of the task is controlled by the person who hires him and that has to follow the hirer's instructions and directions is a subordinate of the person who employed him. Other important elements which are shared by the legal systems are integration, risk of financial costs, and the obligation to accept work. The legal systems have furthermore in common that the judges determine the existence of a contract of employment with an overall assessment of the individual situation and rather focus on the factual than on the formal situation.

§ 2.2. The concept of negligence

The word negligence came into the English language, through French, from a Latin word 'negligentia' which means carelessness. In general usage today, negligence still means "carelessness".³⁵ In a legal context however the word negligence means carelessness that is actionable as a civil wrong.³⁶ Negligence is the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.³⁷ Unlike common law, civil law has always recognized the general obligation not to act unreasonably even in situations not governed by contract.³⁸ This

³⁴ Labour law in the Netherlands – Jacobs (2004), p. 56.

³⁵ Peter Cane (2006), p. 34.

³⁶ Under Common law systems it is carelessness actionable under a tort.

³⁷ <<http://legal-dictionary.thefreedictionary.com>>.

³⁸ <<http://www.cisg.law.pace.edu/cisg/biblio/tetley.html>>.

paragraph describes negligent behaviour of the employee that gives rise to liability under German and Dutch law.

Light, medium and gross negligence under German law

German law has embodied the term negligence in §276 (2) BGB. A person who does not exercise the ordinary care that is expected in everyday life is guilty of negligence.³⁹ Although, the standard of care is objective, the test is wide enough to allow that the care expected is also based on the skills and knowledge of the responsible person for example if he belongs to a certain profession, if he is expected to provide the same duty of care as his colleagues who work in that profession.⁴⁰ The German Labour Courts⁴¹ apply a limitation of the employee's liability towards his employer according to a threefold approach that recognizes three degrees of the employee's negligence (Fahrlässigkeit); a light, medium or gross negligence.⁴²

Light negligence is such a very slight breach of duty of care that the employee is not liable for damage caused by it.⁴³ *Medium negligence* is defined in §276 (2) BGB.⁴⁴ A person who does not exercise the necessary care that is expected in everyday life is guilty of negligence. The employee acts *grossly negligent* if he breaches the duty to take the ordinary care in everyday life to an unusual severe degree whereby he does not recognize a need for care to prevent harm, what any other person would have noticed under the same circumstances.⁴⁵ Gross negligence is defined by German case law and takes as opposed to medium negligence not only the objective but also subjective elements into account such as age, experience, if the employee was overworked etcetera.⁴⁶

39 Markesinis, (2002) p. 84.

40 *idem*.

41 These are the first-instance Labour Courts (ArbG), Land Labour Courts (LAG) and the Federal Labour Court (BAG).

42 Markesinis, (2002), 784.

43 BGH – NJW 1997, 1012, 1013.

44 Markesinis, (2002), 84.

45 'Grob fahrlässig handelt, wer die im Verkehr erforderliche Sorgfalt nach den gesamten Umständen in ungewöhnlich hohem Maße verletzt und unbeachtet lässt, was im gegebenen Fall jedem hätte einleuchten müssen. (BGH NJW 1997, 1012, 1013, see also the case of BAG v. 12.11.1998 – 8 AZR 221/97 (Haftung eines Kraftfahrers).

46 <<http://www.haufe.de>>.

The legal term wilful recklessness under Dutch law

Also Dutch Law recognizes various degrees of carelessness. To escape liability, the employer must prove that the employee caused damage with his negligent behaviour and this is carelessness to the degree of willful recklessness, (*bewuste roekeloosheid*). The liability provisions of the Dutch Civil Code which are: ‘the care duty of the employer’ in article 7:658 (2); ‘liability of the employee for damage inflicted on the employer or a third person’ in article 7:661 (1) as well as; ‘liability for faults (tortuous acts) of a subordinate’ in article 6:170 BW, show this by their escape clauses for the employer: “unless the damage results from an intentional act or omission or from willful recklessness on the employee’s part” and “unless he has caused the damage on purpose or he has knowingly behaved recklessly.”⁴⁷

Case law has shown the difficulty of convincing the court that employees have caused damage with their wilful recklessness.⁴⁸ The courts acknowledge first of all ‘the empirical fact that employees who perform the employment duties on a regular basis inevitably will cause them to work less carefully than is actually needed to prevent them from getting injured.’⁴⁹ Secondly, the courts define wilful recklessness through a subjective approach: ‘the employee must be actually aware of the reckless nature of his behaviour, while carrying out that behaviour that immediately preceded the damage’.⁵⁰ The employee must in other words have done some act realizing that it may result in injury loss or damage to the victim.

More of how the different degrees of negligence are assessed for employee’s (contributory) negligence by the German and Dutch courts will follow in chapter 6 which regards to the possibility for employers to recover paid damages from the negligent employee.

47 In HR 14.10.2005, JIN 2005/407 m.nt. Loonstra (City Tax/De Boer), the Dutch Supreme Court ruled that the meaning of willfully reckless in article 7:658 BW is the same as in 7:661 BW.

48 Oldenhuis (2013), p. 35.

49 HR 20.11.1996, NJ 1997, 198 (Pollemans/Hoondert).

50 HR 14.10.2005, JIN 2005/407 m.nt. Loonstra (City Tax/De Boer).

§ 2.3. The concept of damage

The German courts interpret damage in accordance with the so called balance hypothesis which compares the situation in which loss had not occurred' and 'the situation after the incident.'⁵¹ The Dutch description is comparable to the balance hypothesis under German law: damage is the negative difference of the circumstance which the victim faces after a violation of the norm with the hypothetical situation in which the victim would have been if the norm has not been breached.⁵²

Pecuniary and non-pecuniary damage

Both legal systems divide damage into pecuniary and non-pecuniary damage. Pecuniary damage is regarded as any loss of property that can be valued in money. It consists therefore purely of financial loss such as a loss of earnings; reduction of earning capacity and incurring of expenses; medical and nursing costs and other expenses.⁵³ Non-pecuniary damage regards the suffering of a person that is not linked to a financial loss. Examples are pain and suffering from temporary and permanent impairment; aesthetic damage (for example scar formation on the face); impairment of sexual function; loss of expectation of life; damages for spoiled holidays; protection of mental health: recoverable and non-recoverable loss; coma, vegetative condition and brain damage⁵⁴ (see chapter 5 for 'damage compensation').

Dutch law mentions two categories of damage in article 6:95 BW: pecuniary loss (vermogensschade) and other loss of well being which is non-pecuniary damage (ander nadeel/immateriele schade) and only to be compensated in so far as it is legally protected under statutory law.⁵⁵ German Law does not define the term damage as such under a statutory provision but provides the victim with an entitlement to compensation based on §823 (1) BGB if the responsible person causes him unlawfully injury to life, body health, freedom, property or another right that is protected by

⁵¹ Personal injury in Europe (2003), paragraph 2.1.

⁵² Personal injury in Europe (2003), p. 62.

⁵³ in accordance with 843 BGB (1) 'Where, as a consequence of injury to the body or health, the earning capacity of the injured party is destroyed or reduced, or there is an increase in his/her needs, compensation shall be made to the injured party by means of payment of a monetary annuity. Examples are increased wear of clothing; body care products; nursing care costs and courses of treatment and Charlesworth and Percy, p. 339.

⁵⁴ Charlesworth and Percy, p. 333.

⁵⁵ For example compensation for pain and suffering (the Dutch 'smartengeld'), see Personal injury in Europe (2003), p. 62.

statutory provisions. A second source for damage compensation is based on §254 BGB for pain and suffering which is non-pecuniary damage (Schmerzensgeld).

§ 2.4. The concept of work related accidents

Article 7 of the Employment Injury Benefits Convention number 121⁵⁶ (entry into Force: 28 July 1967) of the International Labour Organization provides that conditions must be set to judge if a ‘commuting accident’ is a job related accident. German Law embodied the term work related accidents in § 8 of their Social Law Book (SGB VII)⁵⁷. According to § 8, sentence 1 SGB VII, the work accident must be suffered by an insured person and must occur from an insured activity. Accidents are limited to an external occurrence that has an influence on the body and leads to damage to health or death⁵⁸. It could be for instance; ‘an employment trip on duty whereby the employee performs his obligation according to the employment contract’⁵⁹. It is stated in § 8 (2), No. 1-4 SGB VII that also a traffic accident whilst traveling for work or between home and work might fall under a work related activity such as leaving the work place or driving on the employment routes to the work based on a substantial connection with the actual performance of the employment⁶⁰.

Also Dutch law provide for a statutory definition of work accidents in article 1 of the Dutch Working Conditions Act (Arbo-Law)⁶¹. According to the Working Conditions Act a work accident is an accident that causes injury and occurs during the employee’s work. This might be in the company or office, but also somewhere else if the employee is travelling in the course of his employment. The interpretation of the term *work* must not be interpreted too strictly. Accidents during the work breaks are for instance also included, as well as accidents during travel time if this is according to the employer’s instructions. Under circumstances also employment outings might be included.⁶² Furthermore employers under Dutch law are in general only liable for the travelling during work times. Damage that occurs in the traveling between work and home is excluded from the legal term job related accidents, because this is not

⁵⁶ <www.ilo.org>.

⁵⁷ <<http://www.sozialgesetzbuch-sgb.de/sgbvii/8.html>>.

⁵⁸ <<http://www.sozialgesetzbuch-sgb.de/sgbvii/8.html>>.

⁵⁹ Markesinis, p. 725-728.

⁶⁰ The performance of work must be in accordance to § 105 Abs. 1 SGB VII, see BAG v. 14.12.2000 – 8 AZR 92/00, Markesinis, p. 725-728.

⁶¹ Translation found in <https://osha.europa.eu/fop/netherlands/en/legislation/index_html>.

⁶² Y.R.K. Waterman, De perikelen van de werknemer in het verkeer, ArA 2003/1, p. 59.

regarded as ‘during the work’ but as part of the employee’s own private sphere.⁶³ In case something happens on the way from work to home, the employee is therefore generally liable for his own damage.⁶⁴

⁶³ Arbeidsongevallen en beroepsziekten, Door Siewert Doewe Lindenberg, Kluwer (2009), Deventer, p. 105.

⁶⁴ Y.R.K. Waterman, De perikelen van de werknemer in het verkeer, ArA 2003/1, p. 59, see for case law § 4.2.

3. Legislation of employer's liability

This chapter shows which legal provisions for employer's liability exist in Germany and the Netherlands for damage that is caused by the employee.

§ 3.1. Regulation under German Law

As we have seen in chapter 2, the BGB holds several provisions that may form the basis for employer's liability. To this background we will now have a look at the provisions that German Law provides when damage occurs to the employee himself, to a third person and to the employer.

Liability of the employer may first of all have -the law- as its immediate source.⁶⁵ According to § 823 BGB (1) 'a person who willfully or negligently injures the life, body health, freedom, property, or other rights of another contrary to law is bound to compensate him for any damage arising there from and the same obligation attaches to a person who infringes a statutory provision intended for the protection of others'.⁶⁶ This provision covers claims only arising from tort; not from breaches of contractual obligations; and only if one of the four absolute rights of life, body health, freedom and property mentioned in § 823 BGB is infringed.⁶⁷ Absolute rights are rights that must be respected by everyone and that can be enforced against everyone.⁶⁸

The BGB provides in addition several other liability rules to protect also other important interests outside the scope of paragraph 1 in § 823 BGB. Paragraph 2 of this provision extends to liability for what is already protected under specific statutes.⁶⁹ This creates a claim for damages even where none of the absolute rights of paragraph 1 are infringed.⁷⁰ German law provides secondly a - contractual liability- for the actions of a third party that is charged with the performance of an existing obligation

⁶⁵ Gerard Spindler (2011), p. 47.

⁶⁶ Gerhard Robbers (2003), p. 230-231, Markesinis (2002), p. 14 and see also <http://www.gesetze-im-internet.de/bgb/__823.html>.

⁶⁷ Personal injury compensation in Europe (2003), p. 10.

⁶⁸ Merely contractual rights are for example not protected by § 823 BGB (1) because they only exist in relation to the other contracting party. If a contractual right is harmed, it can only be enforced in a contractual action, see Reimann, p. 209.

⁶⁹ Markesinis (2002), p. 14.

⁷⁰ <http://www.gesetze-im-internet.de/bgb/__823.html>.

based on the provision of §278 BGB.⁷¹ This means that if the employer chooses not to perform an obligation personally, but instead makes use of his statutory agent or a person whom he employs to perform his obligation for him⁷², that the employer will be liable for their wrongful acts as if they were his own. The employer may furthermore be liable based on § 31 BGB which is a true -vicarious liability- of an association for his organs⁷³

Aside from the contractual and vicarious liability, German law also sets an employer's liability for damage that is caused by the employee's acting in the course and scope of his duty based on the -tortuous liability - of §831 BGB (Verrichtungsgehilfe).⁷⁴ It requires a relationship of social dependency.⁷⁵ The employer who employs a person to exercise some task in this way will be liable for any harm caused by the employee in breach of a duty of care while acting in the course and scope of his duties.⁷⁶ This liability that is based on tort law does not exclude nor does it depend on the existence of a contractual relationship between the employer and the injured third party.⁷⁷

If the requirements of both forms of liability based on §831 and §278 BGB are met, then the victim has a choice of two possible causes of claims: a claim based on the contractual liability of §278 BGB or a claim based on the tortuous liability of §831 BGB. However when comparing these two legal provisions, the following two differences show.⁷⁸ The first difference is that the employer can escape liability under §831 BGB if he can prove that his employee was chosen with his due care and was subject of his proper supervision. This is not a defense for the contractual liability of §278 BGB.⁷⁹ The second difference is that §278 BGB only holds the employer liable

71 Gerard Spindler (2011), p. 47.

72 These persons are called 'Erfüllungsgehilfe', see §278 BGB.

73 <http://www.gesetze-im-internet.de/bgb/__31.html>, see also Francesco Donato Busnelli, J. S. (2003), p. 106.

74 <http://www.gesetze-im-internet.de/bgb/__831.html>.

75 Gerhard Robbers (2003), p. 230-231.

76 idem.

77 idem.

78 Gerhard Robbers (2003), p. 230-231.

79 idem.

for damage caused by persons whom he uses to perform his contractual obligations but who may in fact not be servants according to §831 BGB⁸⁰:

§ 3.1.1. Damage caused by the negligent employee to himself or a colleague-employee

In regards to the implementation of the Directives 89/391/EEC⁸¹ and 91/383/EEC⁸², German law created the employer's duty of care for the employee's health and safety in §618 of the BGB and a more specific regulation in section 3 of the Occupational Health and Safety Act of 1996.⁸³ Section 3 of the Occupational Health and Safety Act puts an obligation on the employer to take the necessary steps in order to protect the worker's health and safety at work. Secondly he must also make sure that these measures stay effective even if this means that he will have to adjust it because of changed circumstances.⁸⁴

However employers (as well as any other colleague of the victim who may also be responsible for the accident) are in principle not liable for personal injury of work accidents according to the immunity rules of §104, §105 SGB VII.⁸⁵ In these cases, victims have an entitlement to damage compensation from the mandatory insurance for accidents instead.⁸⁶ The only exception to this rule is when the employer has caused the personal injury intentionally or if it regards material injury such as damage to property.⁸⁷

Employers may be liable for damage to their employee's property. The employer has a duty based on §611 BGB to prevent his employee's property from harm (theft or loss). The employer will be liable based on §276 BGB in case he is in breach of this

⁸⁰ Markesinis, p. 703.

⁸¹ Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

⁸² Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed- duration employment relationship or a temporary employment relationship.

⁸³ Encyclopedie labour relations

⁸⁴ Encyclopedie labour relations

⁸⁵ Markesinis (2002), p. 726.

⁸⁶ Markesinis (2002), p. 903.

⁸⁷ *idem*, see also chapter 7 for the insurance scheme in Germany.

duty.⁸⁸ An example is that the employer does not provide his employees with the opportunity to keep their property safe at work.⁸⁹ The employer is in general also liable for damage that their employees cause in the course of the employment. However damage that belongs to the general risks of the daily life is excluded from this liability.⁹⁰ Damage to the employee's private car is only included in case it was directly used for work purpose and in case the employer without the employee's private car would have to use his own vehicle instead according to §670 BGB.⁹¹ Traffic fines are excluded even if the employer provided a time schedule that made it impossible not to speed on the road in order to reach the work deliveries in time.⁹²

§ 3.1.2. Damage caused by the negligent employee to a third person

The German Legislator did not create a specific provision for employer's liability for damage that is caused by the employee to third persons. Instead German law provides for a more general tort rule under §831 paragraph 1 of the BGB. This legal provision holds a person liable for damage to a third person caused by his servant, to whom he has '*entrusted the performance of a function*' if that damage is '*inflicted unlawfully in the exercise of the function assigned to him*'.⁹³ The term servant according to §831 BGB does not require that the worker gets remuneration or that the task was agreed upon by a specific contract of employment.⁹⁴ There must however be a social dependency between the servant who caused the damage and the person for whom he works, whereby the servant is subject to his instructions.⁹⁵

The provision applies to all such relationships of social dependency regardless whether it is on a short- or long-term basis or that it is unpaid. The provision of §831 BGB holds the employer liable in case the following requirements are met; "the victim must have suffered damage which is caused by the employee (the victim must

88 How far this employer's duty under §611BGB goes is shaped by the circumstances; for example if preventive safety measures were relatively easy for the employer to arrange but the need for it nevertheless ignored. This employer's duty is also limited by the employee's duty to keep his own property from loss or harm, see BAG 17, 229 = AP Nr. 75 § 611 BGB Employer's duty.

89 see BAG 17, 229 = AP Nr. 75 §611 BGB employer's duty.

90 See the Ameisensaure-fall; BAG, Court ruling of 10.11.1961 GS NJW 1962, 411, Busemann (1999), p. 119.

91 Judgment of the Senate 27.01.2000 – 8 AZR 876/98 – DB 2000, 1172.

92 see BAG v. 25.01.2001 – 8 AZR 465/00.

93 See Markesinis, p. 695-696.

94 Rieckers (2011), p. 73 – 79 and Gerhard Robbers, P. 261.

95 Tort Law in Germany, Gerard Spindler.

show relevant facts and also must prove the wrongfulness) and the damage must have occurred during the accomplishment of the task.⁹⁶ A last requirement is that the person who caused the damage must work in the interest of and be in a dependant work relationship with the employer whose instructions he has to follow when performing the job.⁹⁷ Relevant for employer's liability in §831 BGB is then to what degree the person must work under the direction and control of the employer.⁹⁸ As soon as the victim manages to prove these requirements it is assumed that the employer is at fault and that his fault is related to the damage that is caused by the employee in the performance of his task.⁹⁹ The employer must compensate for damage that is caused unlawfully by the employee in the performance of his employment. Proof of the employee's fault is not required, but the victim must show that the employee acted wrongfully.¹⁰⁰

The employer's liability under German Law is based on the employer's personal negligence, rather than that of the employee.¹⁰¹ This is shown by the escape clause according to §831 paragraph 1 BGB.¹⁰² The employer may exonerate himself if he proves that he was not at fault by showing that he has taken the necessary care in selecting (references, CV check) and supervising (control visits) his employee.¹⁰³ In regards to the burden of proof, the employee does not need to prove intentional or unintentional fault on part of the employer.¹⁰⁴ Fault on part of the employer is assumed as soon as the employee damages a third party. It is the employer who must deliver proof that he is not at fault by showing that he took proper care in the selection of the personal staff, provided proper equipment, supervision, instructions and training to the employee.¹⁰⁵ If the employer is a large company, decentralized exoneration may be applied which means that the employer only has to prove that he took proper care in selecting, supervising and instructing his leading employees such

96 Van Gerven (2000), p. 480-481.

97 Rieckers (2011), p. 73 – 79 and see also Giliker, (2010), p.57.

98 Rieckers (2011), p. 73 – 79 and see also Giliker, (2010), p.57.

99 Van Gerven (2000), p. 480-481.

100 Van Gerven (2000), p. 498.

101 *idem*.

102 Von Bar (1998), p. 202.

103 Tort Law in Germany, Gerard Spindler (2011), p. 47 and Van Gerven (2000), p. 498.

104 Rieckers (2011), p. 73 – 79.

105 Bruggemeier (2004), p. 120.

as managers because it would be impossible for him to personally accomplish these duties towards every single employee of his company.¹⁰⁶

§ 3.1.3. Damage caused by the negligent employee to the employer

The general rules regarding the positive breach of contract are also applicable to the employment contract.¹⁰⁷ The employee is liable for damage which is caused by the breach of his contractual duty towards his employer. The employee must be guilty of intentional or negligent behaviour according to §276 (1) BGB.¹⁰⁸ As we have seen in §276 BGB, German law defines negligence as follows: *‘a person who does not exercise the ordinary care that is expected in everyday life is guilty of negligence’*.¹⁰⁹ However German Labour Courts¹¹⁰ apply a system more to the advantage of the employee than to the employer.¹¹¹ The legal responsibility is formed by the principles regarding the limitation of employee’s liability. The employee would otherwise carry the risk of paying for each light form of carelessness which could ruin him and his family financially. It is the employer who is responsible for the organization and business risk of his own company.¹¹² The employer is not liable for damage that occurs in the employee’s private sphere, for example if he travels between work and home.

The employee who was driving too fast on an icy road and who crashed into a public traffic sign was regarded to be fully liable for his negligent behaviour in accordance with §823 BGB. The reparation costs of the car amounted to 3.046,52 German Marks¹¹³. The employer claimed damage compensation of the employee.

¹⁰⁶ *idem*.

¹⁰⁷ Sammlung Arbeitsrechtlicher Entscheidungen (SAE), 54. Jahrgang Januar/Februar I/2000, p. 4.

¹⁰⁸ *idem*.

¹⁰⁹ Markesinis, (2002) p. 84.

¹¹⁰ These are the first-instance Labour Courts (ArbG), Land Labour Courts (LAG) and the Federal Labour Court (BAG).

¹¹¹ Van Gerven (2000), p. 480-481.

¹¹² BAG – the Great Senate – Resolution of 27.9.1994 – GS 1/89 (A) – BAGE 78, 56, 60, 67 = AP Nr. 103 regarding §611 BGB employee’s liability under CI1 and IV of the Principles, Sammlung Arbeitsrechtlicher Entscheidungen (SAE), 54. Jahrgang Januar/Februar I/2000, p. 4.

¹¹³ The former official currency of Germany was the German Mark (Deutsche Mark). It was replaced in 1999 by the Euro. The historical exchange rate of the German Mark into the Euro is 0,51, see <<http://nl.coinmill.com/>>.

The court ruled that the employee was not entitled to a limitation of his liability and that he had to pay for the full amount of repair costs, because the accident occurred when he was travelling between work and home¹¹⁴.

Liability of the employee may only be limited, if his negligent behaviour causes damage ‘in the performance of the entrusted task’ according to his employer’s instructions or which is in the interest of the employer’s business.¹¹⁵ The limitation of the employee’s liability follows according to the application of contributory negligence in §254 BGB.¹¹⁶ To determine to what extent employees are liable German case law created a system that differentiates three degrees of carelessness (see for more paragraph 6.1.). According to this threefold approach, the employee may be (partly) liable if the damage was caused by his regular; gross negligence or deliberate intention.¹¹⁷

Light negligence

The employee who causes damage with only a light negligence is exonerated from liability.¹¹⁸

Regular negligence

In case the damage is caused by the regular negligence of the employee, damages are divided between the employer and employee whereby all the circumstances regarding the cause and result of damage are determined by the principles of equity and reasonableness. These principles include the degree of the employee’s fault, how dangerous or risk full the work is, the amount of damages, if the employer took the risk to damage into account or took care of a fitting insurance, the employee’s position in the company and the amount of employee’s payment that possibly include a risk insurance premium. Furthermore also factors as the personal circumstances of

114 *idem*, see LAG Cologne of 24.06.1994 – 13 Sa 37/94.

115 BAG GS 27.9.1994 – GS 1/98 (A) – aaO [SAE 1996, 1 mit Anm. Koller – d. Red.]; 12.6.1992 – GS 1/98 – aaO [SAE 1994, 89 mit Anm. Bydlinski – d. Red.]; BAG 23.1.1997 – 8 AZR 893/95 – aaO; MuenchKomm-Mueller-Gloege aaO.

116 this is in accordance with the Resolution of the Great Senate of 27.9.1994, aaO, under CII the Principles, Sammlung Arbeitsrechtlicher Entscheidungen (SAE), 54. Jahrgang Januar/Februar I/2000, p. 4.

117 Gerhard Robbers, p. 333.

118 Judgment of the Senate of 12.10.1989 – 8 AZR 276/88 – BAGE 63, 127, 131 = AP Nr. 97 regarding §611 BGB Liability of the employee, II 2 the principles.

the employee, the duration of his employment in the company, his age, family circumstances and his past behaviour are taken into account.¹¹⁹

Gross negligence

The employee is in general fully liable in case he caused damage with his gross negligence. Exceptions to the rule are possible. This depends on the circumstances of the individual case, for example in case of a discrepancy between the employee's salary and risk to liability.¹²⁰

§ 3.2. Regulation under Dutch Law

A victim may make a claim for damage compensation against a person responsible for his loss and damage under Civil law. This may either be based on a tort or for breach of contract.¹²¹ Below we will discuss provisions on the general tort liability via article 6:162 BW (the unlawful act of the employee is seen as the act of the employer through the identification theory); strict liability via articles 6:170 (liability for the tortuous act of the subordinate); and breach of contract via article 7:658 BW (care duty of the employer which may establish liability for industrial accidents and diseases) and article 7:611 BW (duty to act as a reasonable and fair employer or employee). Furthermore also article 7:661 BW is important and this provision helps to determine to what degree the employee has to pay for damage compensation if he has caused damage to the employer or a third person. These statutory provisions in combination with case law and academic writing form the fundamental basis of the Dutch employer's liability. This paragraph is subdivided in damage to the employee himself (or a co-worker); damage to a third person; and damage to the employer.

§ 3.2.1. Damage caused by the negligent employee to himself or a colleague-employee

First of all employers are responsible for damage that is caused by the employee to himself or another employee-colleague based on the health and safety protection that

¹¹⁹ *idem*.

¹²⁰ *idem*.

¹²¹ Personal injury in Europe (2003), p. 356.

is provided for employees in the Dutch civil code in article 7:658 BW. Based on this regulation, the employer is obliged to ensure safety of his employees on the work floor by providing safe work systems; work tools, work instructions. Employers must show by his safety measures and duty of care that he paid attention to; ‘the empirical fact that employees who perform the employment duties on a regular basis inevitably will cause them to work less carefully than is actually needed to prevent them from getting injured.’¹²² The employer carries the burden of proof to show that he was in any case prepared for this. If he gives for instance work instructions to his employee: he must make sure that he repeats even the well known safety procedures and/or check and control periodically if each employee still follows his safety orders.¹²³

If the employer breaches his duty of care for safety of his employees which causes property damage and/ or personal injury, the victim can hold the employer liable and claim damage compensation. In case employees are not capable anymore to work, victims may only claim damages that have not already been compensated by social benefits.¹²⁴ If the employee can prove that he suffered damage from the activities that he performed in the course of his work assigned by his employer ¹²⁵, he will in principle be able to claim compensation of his employer based on 7:658 BW.¹²⁶

An employer must compensate the damage that his employee suffered in the course of his employment if the employer did not take the necessary steps to protect the employee against the risk to damage of which he should have been aware in the moment that the damage was caused provided it would not have occurred if the employer would have taken care of the necessary safety measures.¹²⁷ Nevertheless, the employer may still escape liability in case he can prove (reversal of the burden of proof¹²⁸) that he did comply with his duty of care or that the damage resulted to a

122 HR 27 March 1992, NJ 1992, 49, the case concerns employer’s liability for an accident in the course of the employment conforms article 7:658 BW.

123 *idem*.

124 Social security legislation will not contribute for the entire loss of income, Giesen, (2001), p. 174.

125 Giesen (2001), p. 165 and Van Drongelen (2010), p. 45.

126 HR 10 December 1999, NJ 2000, 211, (Fransen/Pasteurziekenhuis), HR 15 December 2000, NJ 2001/198, (Van Uitert/Jalas), HR 4 Mai 2001, NJ 2001, 377, (Bloemsma/Hattuma) and Hr 29 June 2001, NJ 2001/476, (Industomontanza/Banfic), see: Alt (2009), p. 193.

127 <<http://www.arbeidsrechter.nl/werkgever-aansprakelijk-voor-schade-die-werknemer-lijdt>>.

128 In Dutch labour law, the employer is regarded to be in a much stronger position than his employee. Therefore the Dutch legislator established a ‘compensation for inequality’ in the form of a reversal of the burden of proof Ascher-Vonk (2003), p. 16 and Alt (2009), p 194, see also Haak (2004), p. 53.

substantial degree from a deliberate act or willful recklessness on part of the employee. The courts base their judgment on facts rather than on appearances because each individual case is different.¹²⁹

The employer's duty of care in article 7:658 BW is furthermore not 'absolute'¹³⁰ and there are indications to hold on to when determining what can be reasonably expected from the employer; "the nature of the activities; the awareness of the danger; the to be expected negligence of the employee; the obligation of the employer to give the employee a warning, the extent to which the worker is bound to directives of the employer; the freedom of the worker to determine irrespective of the employer's will whether or not to work; who carries the risk of the business; and who invests in the raw materials and the equipment etc".¹³¹ The duty of care is a rule of mandatory law; any deviating agreement to the disadvantage of the employee is not allowed, see article 7:658 paragraph 3 BW.

§ 3.2.2. Damage caused by the negligent employee to a third person

Next to the provision for damage to the employee, article 6:170 paragraph 1 BW describes an employer's liability for damage that is caused by a fault of his subordinate to a third person. Concerning the term fault and subordinate, two remarks need to be made. One is that a fault is an unlawful act for which the employee is liable according to article 6:162 BW. To establish the unlawful act in accordance to article 6:162 BW, five requirements need to be fulfilled which are unlawfulness; imputability (fault); damage; relativity and a causal connection between damage claimed and the unlawfulness.

An unlawful conduct is; 'a violation of right, an act or omission breaching a duty imposed by law (written law) or a rule of unwritten law pertaining to social proper conduct.'¹³² The rights are not enumerated, need not to be absolute in character¹³³ and the last category is above all sufficiently flexible to cover all other situations while it

¹²⁹ Alt (2009), p. 194.

¹³⁰ <<http://www.flexnieuws.nl/2012/07/04/werkgevers aansprakelijkheid-schending-zorgplicht/#.UJvhD2dGbt8>>.

¹³¹ Van Drongelen (2010), p. 31,32.

¹³² Jeroen Chorus, p. 146.

¹³³ The interaction of contract law and tort..christian Bar, p. 28.

does not require an intention to cause damage.¹³⁴ Thus, not only the employer but also the employee himself is liable for the damage that he causes to a third person.¹³⁵ Secondly according to its definition subordinates are much more inclusive than the term employees described in chapter 2. For example article 6:170 paragraph 1 BW includes employees in the private sector whose work is based on ‘a contract of employment’, but may also include public sector workers¹³⁶ who work in service of the government.¹³⁷ The liability for employees under this provision is purely based on the fact that the liable person, the employer has assigned the subordinate to perform a task.

The following requirements need to be fulfilled. The employee must have made a fault and finally this fault must be in a clear causal connection with the employment. The employee who has caused the damage must furthermore be a subordinate of the employer.¹³⁸ Subordination is often determined with the test for control which is also the key element to establish a contract of employment for the employee and employer. Article 6:170 paragraph 1 has a wide scope because it concerns a risk liability of the employer. The employer is liable based upon the mere fact that the risk to the fault is enhanced by the employment of the subordinate and if he controlled the way the subordinate performed the task that resulted in the fault.¹³⁹

However as we have seen, this wide scope of application is limited to the requirement that the employer must exercise control over the behavior of the employee that has caused the fault.¹⁴⁰ If the act has been performed within the framework of the employer’s profession or business liability is stricter than where no profession or business is involved and where the employer is a natural person.¹⁴¹ Paragraph 2 of article 6:170 BW concerns natural persons who hire a subordinate and when entering into a legal relationship with the subordinate do not act in the course of their professional practice or business (they hire for example a cleaner in the household

134 Jeroen Chorus, p. 131.

135 Bakels, p. 120.

136 See art. 1 Civil Servant Act (Ambtenarenwet, AW).

137 Hoekzema (2000), p. 50, 51; <<http://www.eurofound.europa.eu/emire/NETHERLANDS/PUBLICSERVANT-NL.htm>>.

138 Hoekzema (2000), p. 50.

139 Hoekzema (2000), p. 81.

140 Hoekzema (2000), p. 82.

141 Jeroen Chorus, p. 148.

which is for private reasons). In this case, liability only covers acts committed by the employee ‘in the performance of his duty’ whereas in the case of paragraph 1, it includes all acts which the employment has made possible and which are sufficiently related to it. According to paragraph 3 of article 6:170 BW, in the mutual relationship between the employer and employee normally the employer must bear the loss.¹⁴²

Finally the liability for subordinates is a rule of mandatory law and does therefore not allow any deviating agreements.¹⁴³ The victim may claim compensation that is based on the principle of cumulative liability. The Dutch legislator took into account that the victim often does not know which party is responsible for his damage which is why he is able to hold more than one possible responsible party’s liable at the same time.¹⁴⁴

§ 3.2.3. Damage caused by the negligent employee to the employer

A third regulation answers the question what happens when the employee causes damage to the employer. Article 7:661 BW states that the employee can only be held liable for faults made by him in the course of his employment to his employer and also to a third person towards whom the employer is liable for damages, in case of intentional act or willful recklessness of the employee.¹⁴⁵ The regulation furthermore differentiates the employee’s damaging faults being in- or outside the course of employment. If the employer damages his employer and the damage did not occur from a fault that was made in the course of the employment, then the employee is regarded to be solely liable.

The employee who did not act intentionally may be entitled to compensation from his liability insurance. However it is not always clear whether or not the employee’s fault was made in the course of the employment. Case law by the Supreme Court shows that very high standards must be met before the employee will be liable. The employer has the difficult task to prove that cause of the damage lies in the personal

¹⁴² Jeroen Chorus, p. 148.

¹⁴³ This also counts for article 6:162 BW mentioned in paragraph 2.3.

¹⁴⁴ Hoekzema (2000), p. 77 – 82.

¹⁴⁵ Labour Law in the Netherlands, Jacobs (2004).

action or deliberate neglecting behaviour of the employee (see for more, paragraph 6.2.).¹⁴⁶ An exception to the liability rule is formulated under paragraph 2 of article 7:661 BW. Under the condition that the employer and employee have agreed upon this in written form, deviation to the employee's disadvantage from the rule of 7:661 BW is allowed provided that the employee is properly insured for the loss of expenses.¹⁴⁷ Most of these written agreements will fail this last requirement which is why this exception is hardly of any meaning in legal practice.¹⁴⁸

¹⁴⁶ Bakels mentions the case of HR 10 May 1996, NJ 1996, Bakels, p. 119.

¹⁴⁷ Conform article 7:661 BW second sentence, see also Ascher-Vonk (2003), p. 119, see also W.H. van Boom, Annotation of HR 14 October 2005, C04/200HR, NJ 2005, see also Van drongelen (2010), p. 79 and Klaassen (2000), p. 73 and 539 (City Tax BV/ De Boer) earlier also published in 'Jurisprudentie Aansprakelijkheid 2006/1', nr. 10, p. 103-106.

¹⁴⁸ Klaassen (2000), p. 73.

4. The requirement of a connection to the employment

The extent to which the courts hold employers civilly liable for the employee's negligence is always limited by the requirement that a connection must exist between the negligent act which was cause of the damage and the contract of employment. Dutch as well as German law confine liability to harm caused 'in the accomplishment of the tasks set.'¹⁴⁹ In the next paragraphs we will take a closer look on how the courts decide if the condition: "a connection to the employment" is fulfilled.

§ 4.1. Connection to the employment under German Law

The BGB provisions §278 and §831

Both the provisions §278 BGB as well as §831 BGB require some connection between the negligent act of the employee and the damage.¹⁵⁰ The employee is for instance not liable for highly unusual consequences of his act.¹⁵¹ It depends on the facts of the individual case if the damaging behaviour of the employee has the required objective and direct connection to the accomplishment of the employee's task. The German courts formulate this as a: 'substantial connection' that is an inseparable link of the damage to the particular accomplishment of the task rather than to the employee's general activities.¹⁵²

An accident that occurs in the workplace, during work time and with equipment of the company which use was explicitly forbidden for the employee by the employer, does not necessarily fall under a work related activity.¹⁵³ A task is only 'work related' if it is entrusted to the employee by the employment contract or if it is performed in the interest of the employer's business.¹⁵⁴ The task must be performed in connection to

149 Vicarious liability in tort.

150 Rieckers (2011), p 73 – 79.

151 Gerhard Robbers, p. 234. RGZ – Reichsgericht 133, 126.

152 Markesins (2002), p. 696.

153 BAG GS 27.9.1994 – GS 1/98 (A) – aaO [SAE 1996, 1 with Anm. Koller – d. Red.]; 12.6.1992 – GS 1/98 – aaO [SAE 1994, 89 with Anm. Bydlinski – d. Red.]; BAG 23.1.1997 – 8 AZR 893/95 – aaO; MuenchKomm-Mueller-Gloege aaO.

154 *idem*.

the company and fall within the work related sphere.¹⁵⁵ Generally damage that occurred outside the working hours and/ or work place falls outside the employer's liability scope.¹⁵⁶ For example according to the Senate's judgment of 25.05.2000 – 8 AZR 518/99, the employee's travelling from and to work is not part of work related activity but falls under the employee's own legal responsibility.¹⁵⁷

Another exception to the scope is formed by damage that occurs during incidental activities of the employee's task such as 'coincidence in time or place',¹⁵⁸ unless it's proven that the employer himself was at fault.¹⁵⁹ This kind of damage falls outside the accomplishment of the task.¹⁶⁰ However, the boundary between on the one hand a substantial connection and on the other hand a more incidental connection is not always very clear; in this case the court will consider to what degree the employee deviated from the normal duty of the assigned task.¹⁶¹ Fraudulent or unauthorized behaviour of the employee is in itself not excluded from employer's liability.¹⁶²

Selection of German Case Law

Deviation from the employer's instructions

A good example of a case where the employee deviated from his employer's instructions is the case of the employed pilot. The employee flew the airplane with passengers of his delayed pilot-colleague and caused an accident.¹⁶³ The German court held the employee's fault outside the course of employment because he acted against the explicit instructions of his employer to only inform the passengers that the other pilot-colleague would arrive later.

155 BAG GS 12.6.1992 – GS 1/89 – BAGE 70,337,347= AP BGB §611 Haftung des Arbeitnehmers Nr.101 [SAE 1994, 89 mit Anm. Bydlinski – d. Red.]; BAG 14.3.1974 – 2 AZR 155/73 – AP RVO § 637 Nr. 8 = EzA RVO §637 Nr. 5.

156 Hoekzema (2000), p. 77.

157 However this is still covered by the mandatory insurance for work accidents, see for more chapter 6 Insurances.

158 Van Gerven (2000), p. 512.

159 The courts put for example the employer's right to instruct his employee into causal connection to the damage; if the employer had performed his competence to give instructions in a correct way, damage would not have occurred see Van Gerven (2000), p. 498.

160 'The fault' could be a willful crime such as fraudulent investments by an employee of a credit institution are not executed in the course of employment; see Rieckers (2011), p. 73 – 79.

161 Van Gerven (2000), p. 512.

162 Hoekzema (2000), p. 77.

163 BGH 14 February 1989; flight without authorization, see Van Gerven (2000), p. 513.

However damage does not necessarily fall outside the accomplishment of the task if the employee deviates from his instructions under the condition that his performance is still work related.¹⁶⁴ One case example is the case where the employee uses the employer's car against the will of his employer¹⁶⁵, or if the employee helps another person to unload the truck even though the task is not covered by the driver's contract of employment¹⁶⁶ or if he deviates from the assigned route to get to the same destination.¹⁶⁷

In another case¹⁶⁸ *‘the German Supreme Court found that an employed driver who had been instructed to bring an excavator from the yard to the repair workshop for a checkup using a low-loading trailer, was still acting in the course of the employment when he decided to drive it instead along the highway and caused a traffic accident’*¹⁶⁹. The employee's act that caused damage will fall within the course of the employment if it has ‘a substantive connection’ with his entrusted assignment. The requirement of a ‘substantive connection’ is not met if the connection between the employee's act that caused damage and the entrusted task was just a matter of coincidence of time and space.¹⁷⁰ In the mentioned case the employee had clearly been instructed to take the excavator to the workshop and although he had disobeyed his employer's instructions to use the trailer, this only amounted to a deviation as to how the task would be accomplished. In this case, the Supreme Court found that the employee's driving was therefore substantively connected with his employment. If the servant gives a free ride to the injured plaintiff in the employer's car, despite the latter's express prohibition, then the employer may not be liable¹⁷¹. The same is true of the so called deviations cases where the servant while on duty deviates from the prescribed route or even goes on a trip of his own and then causes damage. The answer here will largely depend on the extent of the deviation.¹⁷²

164 <<http://www.gesellschaftsrechtskanzlei.com/index.php/bgh-urteil-vom-14-mai-2012-ii-zr-6912/>/.>

165 BGH VersR 1966, 1074; BGH NJ 1971, 31, see Markesins (2002), p. 697.

166 Rieckers (2011), p. 73 – 79.

167 idem.

168BGH 20.09.1966 VersR 1966, 1074, see also Van Gerven, J. Lever and P. Larouche, Tort Law: Ius commune casebooks for the common law of Europe (Oxford: Hart, 2001), p. 511 BGB 2 February 1955, VI ZR 225/53 – VersR 1955, 205, BGH 23 February 1955 VI ZR 14/54 – VersR 1955, 214 and BGH 30 October 1959 – VI ZR 156/58 – NJW 1960, 355 = VersR 1960, 134).

169 Giliker, (2010), p. 152, 153.

170 Rieckers (2011), p. 73 – 79.

171 BGH NJW 1965, 391.

172 RG LZ 1930, 589.

§ 4.2. Connection to the employment under Dutch Law

Article 7:658 BW Liability for damage to the employee

The scope of article 7:658 BW reaches as far as it concerns the employer's competence to control the workplace (organization, furnishing, etc) and give work instructions to his employees.¹⁷³ This requirement is also described as the causal connection to the employment or in the course of the employment. It is however not a strict condition and must not be taken too literally¹⁷⁴ because the causal connection between the employee's behaviour and the damage is already assumed if the employer could have prevented the damage with health and safety measures.¹⁷⁵

It is not always clear whether or not the employee's fault was made in the course of the employment and it may even include damage that has occurred during at or near the employee's task.¹⁷⁶ An example is damage that occurs during the lunch breaks whereby the employee is present at work or damage that occurs during a task for which the employee is employed and for which he does not earn remuneration such as helping the colleagues or the organization of a party at work.¹⁷⁷ Even damage that occurs during the breaks or damage at the arrival or departure from the workplace may be included.¹⁷⁸ However article 7:658 BW does generally not include traffic accidents during the traveling between work and home¹⁷⁹ and other risks in the private sphere of the employee such as damage that occurs at company outings, night outs or sport events in behalf of or organized by the employer.¹⁸⁰

Article 6:170 BW Liability for subordinates.

Employer's liability based on article 6:170 BW requires that the employee's performance of the task is under the control of the employer, that the employee has

¹⁷³ Van Drongelen (2010), p.67.

¹⁷⁴ Van drongelen (2010), p. 24.

¹⁷⁵ Van Drongelen (2010), p. 47.

¹⁷⁶ <<http://www.arbeidsrechter.nl/werkgever-aansprakelijk-voor-schade-die-werknemer-lijdt>>.

¹⁷⁷ <<http://www.arbeidsrechter.nl/Werknemer-aansprakelijk-voor-schade-werkgever-opzet-bewuste-roekeloosheid>>.

¹⁷⁸ idem.

¹⁷⁹ <The employer cannot control the situation in traffic and therefore article 7:658 BW does not apply, see HR 16-11-2001, NJ 2002, 71, JAR 2001, 260.

¹⁸⁰ <<http://www.letselschade-kenniscentrum.nl/verschillen-tussen-artikel-7-658-7-611-bw.php>> and Van Drongelen (2010), p.67.

made a fault (imputable unlawful act); and ‘a causal connection’ between the damage and the employee’s performance of the task. This last requirement is met as soon as the employment task that was assigned to the employee contains a risk of damage.¹⁸¹ There are relevant factors to indicate whether or not a causal connection exists between the damage and the employment. Examples are; the nature of the employee’s behaviour; context of time and place of the damage (it is easier accepted in the workplace); and if the employee caused damage with help of employment tools (the risk to damage may be enhanced by providing the equipment).¹⁸²

Article 7:661 BW Employee’s Liability for damage to the employer or a third person

Also this provision has the condition that the occurred damage is in a connection to the employment. Employers are for example responsible for damage that occurs in car accidents of the employee provided that the connection to the employment is satisfied.¹⁸³ However, if the employer proves intention or willful recklessness on part of the employee, he is not liable of damage to the employee’s own car or incase it involves the company’s car, he is entitled to subrogation.¹⁸⁴

Article 7:611 BW Good employment practices

Case law shows that if exceptional circumstances do not satisfy the requirement of the connection to the employment, employer’s liability may still be possible based on article 7:611 BW.¹⁸⁵ According to this provision employers as well as employees have a duty to behave as a good employer and a good employee and this broad scope of application may include a risk liability (as opposed to the fault liability of 7:658 BW) for the employer.¹⁸⁶ Damage may fall outside the scope of article 7:658 BW if it occurs outside the regular work place or work times where employer’s control/instruction rights are missing. Employees may however still claim compensation based on the employer’s liability of article 7:611 BW for good employment practices provided that the damage is work related.¹⁸⁷ Article 7:611 BW does not apply if the employer’s duty of care in article 7:658 BW is not breached where damage to the employee

¹⁸¹ Hoekzema (200), p. 67.

¹⁸² idem.

¹⁸³ Hoge Raad 13 juni 2008, LJN BC8791.

¹⁸⁴ idem.

¹⁸⁵ HR 13 juni 2008, LJN BC8791, see Kruijswijk Jansen (2008), p. 281.

¹⁸⁶ Jacobs, labour law in the Netherlands, p. 62.

¹⁸⁷ Aansprakelijkheidsrecht - C.C. van Dam.

occurs from an accident at the workplace or during regular work times (the typical work accident). Article 7:611 BW does not replace article 7:658 BW in that sense. Instead, the provision for good employment practices often applies in situations where damage is caused outside the scope of article 7:658 BW (outside the typical/regular work times and work place) provided that the damage is still ‘work related’.

Selection of Dutch Case Law

Work related damage outside the regular work place and/or work times

An example is the case of the Stichting Reclassering Nederland/S.¹⁸⁸ Here an employee who worked at a social psychiatric department was heavily injured in his private home by the abuse of his client who was on parole. The employee could not work anymore due to the injury. The employer could not be held liable for taking insufficient safety measures. Taking into account the facts that the accident took place outside the work place and that the damage was not caused by the use of the work tools, liability of the employer could not be based on article 7:658 BW. However in this case the court still found the employer liable based on article 7:611 BW (good employment practices) because the employer was aware of the specific risk to the danger of damage.

In the case where a company outing took place outside the regular scope of the employment relationship and outside the normal working times, the Supreme Court considered that when deciding if there is control (formal control), it is also relevant if employees and employer were acting as a certain unity for third parties at the time and place where the damage was caused by the employee. This unity is not required to be in the exercise of the company¹⁸⁹.

The workplace

In the case of Van Riemsdijk/Autop¹⁹⁰ the employee slips over the slippery bottom of a gas station that was already known for its dirt by the employer and employees.

¹⁸⁸ HR 22.01.1999 NJ 1999, 534, NJ 1999, 534, nt. PAS, VR 1999, 118, nt. L. Bier.

¹⁸⁹ HR 9 November 2007, RvdW 2007, 960; JA 2008, 25, see Spier, p. 97-98 <<http://detailpage.aspx?ljn=BA7557zoeken.rechtspraak.nl/>> and <<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2007:BA7557>>.

¹⁹⁰ HR 20 February 2009, NJ 2009, 335, see <http://nl.wikipedia.org/wiki/Arrest_Van_Riemsdijk/Autop>.

The accident resulted in personal injury of the employee.¹⁹¹ The employer was well aware of the dirty gas station. The court of appeal concluded however that the employer was not liable. The court took into account that the employee was an experienced professional driver that could reasonably have known which dangerous risks occurs when diesel oil is spilled at a gas station (common sense). The court of appeal continued that the employee was furthermore aware of the situation and not instructed by his employer to fill the tank at that particular gas station. The High Supreme Court followed the judgment of the court of appeal and confirmed that there was no employer's liability based on article 7:658 BW. The court ruled that taking into account the circumstances; it was not an infringement of the employer's duty to take care that the employer did not prohibit his employees to fill up their gas tanks there any longer. Regarding the work place, this court ruling is important because the Supreme Court confirmed that the employer may also have a duty to take care of the safety of their employees who perform the work at places other than the regular workplace according to the norm of the Working Conditions Act.¹⁹²

Traveling between work and home

Employers under Dutch law are in general only liable for the travelling during work times, not for damage that occurs in the traveling between work and home (private sphere).¹⁹³ In case something happens on the way from work to home, the employee is generally liable for his own damage. In the case of Gundogdu/Frans Mulder Fast Food¹⁹⁴, the employee who was on her way between the two workplaces of the employer's company suffered injury from a traffic accident. The High Supreme Court distinguishes the travelling between work and home from travelling between workplaces: "Generally transport of the employee that in regards to the performance of the assigned task takes place between different work places, such as between two different locations of the employer, is transport according to the contract of employment in regards to the assignment that is instructed by the employer".¹⁹⁵

191 J. Doomen, Annotation to the ruling of the Dutch Supreme Court of February 20th, 2009: Van Riemsdijk – Autop (LJN BF0003; case number 07/11410).

192 according to 'article 1, sub 3, and under g.' of the Working Conditions Act' (Arbowet), see J. Doomen, Annotation to the ruling of the Dutch Supreme Court of February 20th, 2009: Van Riemsdijk – Autop (LJN BF0003; case number 07/11410); HR d.d. 12-12-2008; RvdW 2009, 35 'Van der Graaf/Maatzorg', see <http://www.grm.nl/bestanden/pdf_persb/1242716251.pdf>.

193 Arbeidsongevallen en beroepsziekten, Door Siewert Doewe Lindenergh, Kluwer (2009), Deventer, p. 105.

194 idem, and see HR 19.12.2008, NJ 2009, 333.

195 idem.

In *De Bont/Oudenallen*¹⁹⁶ the employee De Bont was employed by Oudenallen to travel with his own car on a daily basis to Deventer which was a long distance to drive from where he lived. De Bont received therefore compensation for the travel costs. On his way from home to work, he caused a traffic accident in which he suffered personal injury as well as damage to his car. His damage was not insured by the Civil Liability for Motor Vehicles Act and De Bont therefore claimed compensation from the employer Oudenallen.

In contrast to the Court and the Court of Appeal, The High Supreme Court denied a normal traffic from work to home- situation and ruled that the employer under certain circumstances may also be liable outside the scope of article 7:658 BW (so without breaching his duty to care). Special circumstances that may be relevant may be for instance;

(I) the employer's obligation/ instruction to arrange transportation with the employees own private own car regarding the accepted assignment

(II) a work place that is located at a far distance from the own home addressee and;

(III) receiving compensation expenses for carpooling; the travel and car expenses.

The High Supreme Court ruled that the Bont's travelling must be regarded as transport in accordance with the employment contract (in the course of employment) and that the employer was based on the reasonableness and fairness of article 6:248 BW, generally liable for the uninsured damage that the employee suffers from damage that occurs from this transport unless he showed intention or willful recklessness.

In the case of *Autostar*¹⁹⁷, the High Supreme court held that the employee of car company Autostar who was on a obligatory nightshift for emergencies, (this means that he was obliged to be available day and night to answer the phone and provide medical help at the place needed). To save time, many employees drove the car ambulance home, and if needed would drive from there on to the garage of Autostar. One morning the employee got injured in a traffic accident when he was on his way from home to the regular work place in the car ambulance. In this case the High

¹⁹⁶ HR 09.08.2002, JAR 2002, 205.

¹⁹⁷ HR 19 December 2008, LJN BG7775.

Supreme Court agreed with the court in appeal that based on the circumstances, there was no normal situation of traffic between home and work but that the transportation took place according to the obligations of the contract of employment. Important factors were;

(I) that the employee because he was on a emergency shift, at the time of the accident made lawful use of the car ambulance in a way that was in accordance with the assigned task;

(II) that by taking the car ambulance home, the employee prevented the travelling back and forth to the company and the lost time in case of an emergency and;

(III) that the employees who were on an emergency nightshift had to be permanently available.

The case of Vonk/Van der Hoeven¹⁹⁸ concerns property damage as well as personal injury (immaterial damage) to the employee. Van der Hoeven was an employee of the company Vonk in Didam. Vonk assigned him to work in Amsterdam for which Van der Hoeven had to travel on a daily basis with two more other colleagues. Vonk provided a van to his employees to travel back and forth from Didam to Amsterdam. On their way to Amsterdam, the employees got in a traffic accident, in which Van der Hoeven got seriously injured. Unlike his colleagues' damage, the injury that Van der Hoeven suffered from the accident was not covered by the Legal Liability Insurance (wettelijke aansprakelijkheidsverzekering (WA)) because he was the driver of the van when the accident happened.

Van der Hoeven tried to obtain compensation from his employer. Relevant circumstances were in this case that Vonk obliged Van der Hoeven to travel on a daily basis between Didam to Amsterdam; that the financial consequences of all passengers were insured with the exclusion of Van der Hoeven's personal injury. The High Supreme Court ruled that the employer under the circumstances was liable for the personal injury of the employee even if the requirements of article 7:658 BW were not met.

¹⁹⁸ Vonk/Van der Hoeven, HR 12.01.2001, NJ 2001, 253, JAR 2001, 24 see <
http://repub.eur.nl/res/pub/7511/hypoglykemie_JA_2006_nr_12.PDF>.

Another case example is KLM/de Kuier¹⁹⁹. The case was about a pilot who undertook a flight to Ivory Coast on behalf of the employer; KLM. While waiting for his next flight, the pilot took a cab from his hotel to a restaurant where he got personally injured in a traffic accident. Because most of his injury was non-compensable according to the law system of Ivory Coast, the pilot claimed damage compensation from his employer. The High Supreme Court held the waiting time as a necessary part of the employment that the employee must exercise for his employer.

This waiting time occurred because of the work schedule organized by the employer and taking the employee's safety and well being into account it was necessary that the pilots could rest between the flight shifts. The employer fails in this case by not taking care of insurance for accidents of his employee or to make sure the employee would take care of this himself. Because the employer failed to warn his employee for the risks and failed to take care of an appropriate insurance, he was still liable based on article 7:611 BW (good employment practices).

Traffic fines

In the case of Vonk/Van der Hoeven²⁰⁰, the High Supreme Court ruled that there is no statutory law for the employee's redemption of the traffic fine unless there are special circumstances that holds the employer based on article 7:611 BW (good employment practices) liable for the traffic fine, for example if the employer could have controlled the situation that had led to the traffic offence has encouraged the employee to commit the traffic offence²⁰¹. Comparable is the case where the employer and not the employee was responsible for the overloaded truck that the employee was driving for work.

In TPG / Abvakabo²⁰² the High Supreme Court decides whether an employee who causes a traffic fine in the course of his employment is entitled to an indemnity of his employer by way of compensation. The employees in the case were the drivers of the company TPG Post who were employed to drive the company's car.

199 HR 18.03.2005, JAR 2005, 100.

200 HR 12.01.2001, NJ 2001, 253, JAR 2001, 24.

201 See the court judgment of the District Court of Rotterdam 23.09.2009, JAR 2009/62.

202 TPG / Abvakabo, NJ 13.06.2008, JAR 2008/185.

According to article 5 of the Dutch Traffic Regulations (Administrative Enforcement Act), also known as the Wet Mulder (Mulder Law)²⁰³, the registered owner of the vehicle has a risk liability, in case the driver of the car who committed the traffic offence cannot be immediately identified. “This means that if the offender has not been stopped by the police the registered owner of the vehicle or trailer is liable. In that case it is irrelevant who was using or driving the vehicle at the time the offence was committed”²⁰⁴.

As registered owner of the vehicle, TPG Post paid the administrative penalties to the Dutch Central Fine Collection Agency, but has recovered this from the employees. The claimants in this case were one of the employees and the Dutch Trade Union Abvakabo²⁰⁵ claims that this is not allowed based on article 7:661 sub 1 BW. The court ruling was that employers are entitled to recover their contribution for the traffic fine from the employees who committed the traffic offences.

An important note is that it is possible and of practical use that the employment contract contains a written agreement for these situations. There are a few companies and branches that have agreed upon supplementary rules in the Collective Labour Agreements (hereafter; CAO).²⁰⁶ Based on the circumstances of the case and taking into account the nature of the contract, the court determined that the TPG Post was not liable for the traffic offences that their employees caused in the course of employment.

This chapter has shown that employer’s liability under both systems requires evidence of some connection between the actions of the employee and the employment relationship with the employer. This is a fundamental aspect of employer’s liability. In all examples of court decisions the question remained the same; “was the employee still acting in a way connected to his employment?” We have seen that the act of the

203 <<http://www.cjib.nl/International/english/210-D-mulder/traffic-fine.aspx>>.

204 *idem*.

205 < www.abvakabofnv.nl/>.

206 An example is article 81 of the CAO for public transportation 2006 which contains a regulation for traffic fines and applies to employees of the driving employment staff. According to this regulation employers are entitled to recover traffic fines from the employee who committed the traffic offence unless it regards a minor speeding fines under a maximum of 8 kilometer an hour which will be on account of the employer, see

<http://www.salaris-informatie.nl/Sectoren/openbaar_vervoer/CAO/CAO_openbaar_vervoer_2005-2006.pdf>.

employee which was expressly prohibited by his employer, does not necessarily take it outside the course of the employment²⁰⁷ Furthermore in determining the scope of employer's liability, much will depend on the way the courts interpret the tasks that are assigned to the employee. A restrictive interpretation will on the one hand discourage employers to take more care of their employee's safety and forms a burden to the victim who then finds it is more difficult to find a responsible person who is able to compensate his damage. On the other hand, employers must not be burdened too lightly and should be able to spread the entire loss through insurance cover.²⁰⁸

²⁰⁷ Vicarious liability in tort, p. 157.

²⁰⁸ *idem*.

5. Damage compensation

Damage compensation in general is regarded as replacing ‘something of which a person has been deprived’ or making good ‘the lost difference between the disadvantageous position that a person has because of the (damaging) misconduct and the position that the person would else have’.²⁰⁹ The main purpose of civil liability law in Germany and the Netherlands is the recovery or compensation of damage that is suffered.²¹⁰ Positive side effects may be that it prevents and corrects misbehavior and/or that the victim accomplishes recognition for the fact that he has suffered damage.²¹¹ Civil liability law does not serve a punitive or repressive purpose which belongs more to the national criminal law in accordance with the EU Civil law countries.²¹² A claim for compensatory damage in the civil court may be based on pecuniary damage (often damage to property but may also be personal injury if it can be valued in money) and non-pecuniary damage (moral damage such as pain and suffering). In this chapter we will see what damages are rewarded for claims of employer’s liability under the German and Dutch law.

§ 5.1. German Law

The German courts calculate the pecuniary loss by comparing ‘what would have happened with the property in the situation that loss had not occurred’ with ‘the situation after the incident’ (this is the so called balance hypothesis).²¹³ Compensation for the loss of earning for example is based on the difference between how the victim’s salary would have increased had the accident not occurred and the actual income. If the employee suffers from property damage which is caused unlawfully by his colleague based on negligence or intention, he may claim damages based on § 823 BGB.²¹⁴ If he suffers from damage that is caused with deliberate intention he may

²⁰⁹ Peter Cane, p. 4.

²¹⁰ Monografien BW, schadevergoeding: algemeen, deel 1, S.D. Lindenberg (2008) kluwer, p. 5 and Haftungsrecht, Gert Brueggemeier, Springer Berlin Heideberg, 2006, p. 8.

²¹¹ Monografien BW, schadevergoeding: algemeen, deel 1, S.D. Lindenberg (2008) kluwer, p. 5.

²¹² Haftungsrecht, Gert Brueggemeier, Springer Berlin Heideberg, 2006, p. 9.

²¹³ Giesen (2001), p. 125-127.

²¹⁴ idem.

base his claim for damages on § 826 BGB.²¹⁵ If the employer has breached his duty of care for a safe work place he may base his claim for damages on § 618 BGB.²¹⁶

Victims may generally only claim compensation for pecuniary damage under German Law.²¹⁷ Compensation for pain and suffering is not possible since personal injury is paid by statutory occupational accident insurance which is financed by the mandatory employer's liability insurance.²¹⁸ However reasonable compensation in money may be demanded for any damage that is non pecuniary loss (immaterial or moral damage) if damages are to be paid for an injury to the body, health, freedom or sexual self-determination or if this is stipulated by law, see § 253 BGB 'Damage which is not a pecuniary loss may be the subject of a claim by a person for monetary compensation only where expressly provided for by legislation'.²¹⁹ Examples of statutory provisions that provide for compensation of non-pecuniary loss can be found in the German Road Traffic Act and the German Equal Treatment Act of which § 15 provides an entitlement to compensation for pain and suffering if the victim suffers from unequal treatment based on his race, gender, religion or age.²²⁰ In case of liability in tort, §847 BGB also provides damages for pain and suffering in the event of infringements of physical integrity, health and freedom.²²¹

The German courts do not apply the principle of full compensation nor do they have a point system or other fixed tables to refer to when they determine particular amounts for each type of injury.²²² The only exception is that in case of a claim for disability made under an insurance policy the amounts are determined by the fixed degrees of disablement of the extremities table.²²³ In accordance with §253BGB (2), the German Courts provide instead 'reasonable compensation in money' for non-pecuniary damage.²²⁴ The German courts may determine to their own discretion the amount of

²¹⁵ *idem*.

²¹⁶ *idem*.

²¹⁷ Giesen (2001), p. 125-127.

²¹⁸ <<http://www.zeitarbeit-und-recht.de/tce/frame/main/435.htm>>.

²¹⁹ Personal injury compensation in Europe (2003), p. 213.

²²⁰ <<http://www.east-law.com/rechtstipps/schadensersatz-und-schmerzensgeld/>>.

²²¹ Giesen (2001), p. 125-127.

²²² Personal injury compensation in Europe (2003), paragraph 1.3.

²²³ Hacks/Ring/Boem, ADAC SchmerzensgeldBeträge or IMM-DAT, Slizuk/Schlindwein, Verlag C.H. Beck, Muenchen (CD-Rom); for instance the loss of an arm 70%; loss of a foot 40% and loss of an eye 30% of disablement.

²²⁴ Personal injury compensation in Europe (2003), paragraph 1.3.

damages to be paid for pain and suffering and base this on an overall assessment of all the relevant circumstances of both parties including the financial position, the degree of fault of the person responsible, the type, degree and duration of the injury.²²⁵ The assessment method of the German court to determine the amount of compensation for non pecuniary damage and the variation of many individual cases leads to different amounts awarded.

Normally the victim's claim for compensation contains an indication of a minimum amount and the court will explain the criteria used for the assessment of the damages and refer to previous court rulings or law reports on damage compensation for pain and suffering. For the majority of claims for compensation, a single sum of damages is awarded instead of separate awards of damages for pain and suffering for physical injuries and mental injuries. In accordance with §287 Code of Civil Procedure (ZPO) this may only be different in very unusual circumstances of necessity of repeatedly painful medical treatment or persistent pain where a monthly annuity is more appropriate than a single capital amount.²²⁶

§ 5.2. Dutch Law

The Dutch legal provisions regarding damage are to be found in articles 6:95-6:611 BW. They provide the rules to determine the entitlement of damage compensation for the various kinds of damage. The articles hold a 'common damage regime' because they apply in principle irrespective of the basis of liability, whether the cause of action is based on tort or on the breach of contract (see the relevant statutory provisions in chapter 3).²²⁷

In accordance with articles 6:95 and 6:96 BW, all pecuniary losses caused by a tort or breach of contract must be compensated, irrespective of whether such losses for instance arise from damage to the person; to goods; or to other interests.²²⁸ Article 6:95 BW provides compensation for pecuniary damage. This includes the recovery

²²⁵ *idem*.

²²⁶ Personal injury compensation in Europe (2003), paragraph 1.3.

²²⁷ Personal injury compensation in Europe (2003), paragraph 1.3.

²²⁸ Personal injury compensation in Europe (2003), paragraph 1.3.

costs of the victim, such as expenses that are reasonably needed to allow the body as much as possible to become as in the situation before the accident for example medical costs and orthopedic devices; damaged clothing, extra costs for the help in the household; extra travel costs²²⁹; pure economic loss; costs of measures taken to prevent or mitigate the damage based on article 6:96 and 6:184 BW; and loss of income.²³⁰ The loss of income is calculated by comparing the factual income situation after the accident with the hypothetical situation before the accident which depends on the reasonable expectation of the court regarding the future developments of the victim as this would be if the accident did not happen.²³¹ The difference of income that the employee has lost is then regarded as the loss of income.

The right to compensation for non-pecuniary damage is limited to certain categories. In accordance with article 6:95 and 6:106 BW other harm than pecuniary damage must be repaired ‘to the extent that the law grants a right to reparation thereof’. Because the right to compensation for non-pecuniary damage is restricted to certain categories of persons, formulated by reference to the infringement of certain interests, the nature of the interest is relevant.²³² According to article 6:106 (1) b BW compensation for this type of damage is provided if the victim suffers from physical injury, injury to honour or reputation or if the victim has been otherwise personally injured.²³³ If the victim suffered from psychiatric damage, it is required that the illness is recognizable to the medical experts. In the rest of the cases, the importance of the medical reports when assessing the non-pecuniary loss lies in the discretionary power of the courts.

Dutch law applies generally an all or nothing principle of full compensation.²³⁴ This principle means that the person responsible for the damage must put the victim -in so far as this is possible- in the position he would have been if the incident did not

229 Van Wassenae 2008, p. 54 e.v.

230 J.M. Barendrecht, p. 118, see (<<http://arno.uvt.nl/show.cgi?fid=63681>>).

231 HR 15 mei 1998, NJ 1998, 624.

232 Personal injury in Europe (2003), p. 358.

233 Liability for Damage to Public Natural Resources, Edward H. P. Brans, p.29 “note that if a type of damage is considered not to be material or pecuniary loss, it is not automatically immaterial or non-pecuniary damage. Under current Dutch law, immaterial damage is not a residual category that comprises all types of damage that are not compensable insofar as the law recognizes the type of damage, see Asser-Hartkamp 4-1, pp 403, 405” O.a. HR 13 januari 1995, NJ 1997, 366; HR 1 november 1996, NJ 1997, 134 en HR 21 February 1997, NJ 1999, 145.

234 Loonstra (2010), paragraph 11.2.15.

happen by reinstating the damage or if this is impossible provide a full compensation. However although the all or nothing principle is the basis rule for determining compensation for damage, Dutch law allows under certain circumstances several exceptions.

As we have seen earlier in this paragraph article 6:95 BW limits first of all the obligation to provide compensation to non-pecuniary loss to certain categories. The person responsible for the damage is furthermore only obliged to pay damage in so far as the causal relation with the employment activities is proven and reasonable taken into account the nature of the damage and the liability, see article 6:98 BW.

Another exception to this principle is the difficulty in proving the causal relation between the injury and the employment activities. Based on article 7:658 BW employers are liable for unsafe work conditions (see paragraph 3.3.) that may cause physically or even psychological illness of the employee. The employer only has to compensate that part of damage of which the employee can prove that it is caused by the employment activities.²³⁵ When psychological injury occurred partly at work and partly at home, the proportional liability may offer the solution.²³⁶ Attention is paid to the contributory negligence but only to the degree of willful intention or willful recklessness (see chapter 6).²³⁷

Another exception is that the breach of a duty of care towards a person may only establish liability in respect of that person. The principle of full compensation does therefore not apply where it concerns third parties (with the exception of several articles in case of personal injury²³⁸) or secondary victims. The final exception to the principle of full compensation is formed by statutory restrictions. According to articles 6:109 and 6:110 BW, the court may first of all adjust the damage

²³⁵ The employer is in principle not liable for injury to the employee that occurs outside the course of employment, see Loonstra (2010), paragraph 11.2.1.6.

²³⁶ The High Supreme Court accepted proportional liability for the first time in HR 31 maart 2006, RvdW 2006, 328 (Karamus/Nefalit). The employer was held partly liable for the explosion to asbestos of his employee. It would be unreasonable to hold one party liable in cases where the causal connection of the damage to the employment is unclear. Instead of the all or nothing principle, proportional liability will then apply, see Mr. J.S. Kortmann, Karamus/Nefalit: proportionele aansprakelijkheid? Aansprakelijkheid voor longkanker na asbestblootstelling in het licht van HR 31 maart 2006, RvdW 2006, 328 (Karamus/Nefalit). 7 JULI 2006 | NR. 26 | NJB, p. 1404-1411, <<http://www.stibbe.com/upload/ee260b010cca0019010137e6.pdf>>.

²³⁷ Loonstra (2010), paragraph. 11.2.1.5.

²³⁸ Article 6:107 (1); 107a; and 108 BW see Personal injury in Europe (2003), p. 60.

compensation according to the factual circumstances based on article 6:109 BW if this is necessary to prevent clearly unacceptable results.²³⁹

The discretionary power of the Dutch courts to determine the amount of compensation is bound by article 6:101 BW which states that the court must base his assessment on the principle of equity (*billijkheid*). This means that the courts have to consider all the relevant circumstances of the individual case; the nature and seriousness of the injury and the consequences for the victim.²⁴⁰ The High Supreme Court approves that the courts refer to comparable cases in determining the amount of compensation including the maximum amounts awarded.²⁴¹ There exist no maximum amount awarded for non-pecuniary damage but the highest amount awarded up until now is €136.134,00.²⁴² The calculation of damages is to the exclusive discretion of the district courts and court of appeal (the High Supreme Court is excluded because he cannot judge the factual situation). It is important to note that the courts do not apply a statutory table with fixed amounts awarded per category of injury but rather base their calculation on similar case law which prevents gross differences in the assessments of different courts. Just like the pecuniary losses also all non-pecuniary losses are to be paid by one single award. The norm is furthermore that non-pecuniary damage is calculated in advance and in the form of a lump sum. Postponed or periodical awards are rather the exception but in accordance to article 6:105 BW, the courts may allow this in case this is appropriate according to the circumstances of the individual case (the medical position of the victim is for example uncertain).²⁴³

239 Article 6:107 (1); 107a; and 108 BW see *Personal injury in Europe* (2003), p. 60.

240 *Personal injury in Europe* (2003), p. 360.

241 *idem*.

242 *Personal injury in Europe* (2003), p. 360.

243 *Personal injury in Europe* (2003), paragraph 2.3.

6. Recovery of paid damages from the negligent employee

In general, a person who has caused damage must compensate all damage which he has caused with his act. However both legal systems have special provisions for employer's liability to protect the employee because of the particular social dependency he has towards the employer. In this chapter we will discuss the employee's (contributory) negligence which is a mere question of causation, whereby liability is apportioned to the degree of the employee's negligence.

§ 6.1. German Law

The general legal provision for liability of §275 sub 1 BGB states that every causer of damage has to answer for his intention and negligence. Employees may cause by their own negligence, damage to the company's assets, the person of the employer, a colleague of the employee or some third party. However because of the special employment relationship in which the employee normally cannot pay for the damages they may run very high, the German Court limits the employee liability with the employer's duty of care/ company's risk. "In 1957, in a fundamental decision of the large Senate, the Federal Labour Court generally accepted the idea that employee liability should be limited."²⁴⁴

The liability was limited as follows. Towards his employer, the employee might be entitled to subrogation depending on whether his (contributory) negligence can be leveled with light; medium; gross negligence or intention. Regarding the temporary agency workers, these principles apply to the relationship of the employee with the agency as well as with the user company.²⁴⁵ The employer is obliged to indemnify the employee from his liability towards the third party if the employee is free of liability due to light or medium negligence. If the employee caused damage to the employee-colleague of the same company, he will be liable for the personal injury provided that the accident was caused intentionally according to §105 SGB VII. If the risk of damage is not in proportion with his salary, the court may also limit the damage costs to be paid by the employee who has caused it, to three or four times his monthly

²⁴⁴ Labour law and industrial relations in Germany, Manfred Weiss and Marlene Schmidt, p. 265.

²⁴⁵ <<http://www.zeitarbeit-und-recht.de/tce/frame/main/435.htm>>.

income.²⁴⁶ If a third party (non-employees) suffered damage, the employee who has caused him damage in the course of his employment will be responsible according to the general principles of German Tort law.

Selection of German Case Law

The German Courts limit the employee's liability according to the differentiation into three levels of negligence that was originally developed for work with the inherent danger of causing damage²⁴⁷;

(I) In the first type of cases employees stay immune to liability because the damage occurs only from a light/minor negligence of the employee.²⁴⁸ In accordance with § 254 BGB damage belongs to the risks of the employer's company and not to the employee's responsibility. The employer pays therefore for the full recovery of his own damage or the damage of a third party for which the employer is liable.²⁴⁹

(II) In the second type of cases, the employer and the employee must each compensate partly for the damage that is caused by the medium negligence of the employee. The internal responsibility between employer and employee to pay the damages varies per individual case and may depend on factors as; predictability, if the work is monotonous, the employer's insurable risks, the amount of remuneration for the job; the employee's personal conditions such as behavior, age, financial obligations for the own existence/ family etcetera.²⁵⁰ The judge considers 'equity' and the circumstances of the individual case to determine which part is paid by whom.

(III) The third type of cases holds the employee liable for the full recovery of the damage that he has caused intentionally or by his gross negligence.²⁵¹

246 Arbeitnehmerhaftung Wenn der Kaffee den PC lahmlegt... Wann haften Arbeitnehmer für Schäden? Pressemitteilung von D.A.S.

Rechtsschutzversicherung <<http://www.fair-news.de/pressemitteilung-19330.html>>, accessed 28 July 2012.

247 Labour law and industrial relations in Germany, Manfred Weiss and Marlene Schmidt, p. 265.

248 Busemann (1999), p.63.

249 Busemann (1999), p.63.

250 BAG Beschluss vom 12.06.1992, DB 1992, 1424, see
<http://www.meub.de/Inhalte/arbeitsrecht/indiv_ar/indiv_pdf/09_leist_stor/leistungsstoe_neu.pdf>.

251 see Bruggemeier (2004), p. 708.

This may be limited by the court depending on the circumstances of the individual case such as the amount of employee's salary. The court ruled that gross negligence or deliberate intention is not accepted on the mere fact that the employee ignores orders of the employer.²⁵² Gross negligence concerns rather a subjectively inexcusable breach of duty.²⁵³ Examples are driving drunk; falling asleep while driving²⁵⁴, ignoring a red light in traffic²⁵⁵ or building a window frame with the wrong measures so that it does not fit the customer's need.²⁵⁶ Nevertheless even in this category, the courts may decide otherwise based on exceptional circumstances of the individual case and allow a limitation to the employee's liability which results in a reduction or even full immunity to the employee if this is appropriate (§ 254 BGB).²⁵⁷

The court found exceptional circumstances in the case where an employee, a truck driver, caused damage to the company's car with his negligence behaviour. While he was searching for a radio signal during the waiting time in front of a traffic light, he heard the sudden blowing horn of a car from behind. Without looking up, he falsely interpreted this as a sign from the other car driver that the traffic light had turned into green. Then he started to drive and ignores a red light which causes a traffic accident. Based on these circumstances, the court limited the employee's liability so that the employee was not obliged to compensate the damage to the company's car.²⁵⁸

In the following case an employee who worked at an airport caused an accident under influence of alcohol with a 30-ton vehicle an accident.²⁵⁹ The damage costs were 150.000 German Marks. The BAG took his monthly salary in account which was 2.500 German Marks and held him only liable for the compensation of 20.000 German Marks.²⁶⁰

252 idem, see BGH NJW92, 2418.

253 BAG DB 1973, 1405, <http://www.meub.de/Inhalte/arbeitsrecht/indiv_ar/ar_indiv_pdf/09_leist_stor/leistungsstoe_neu.pdf>.

254 idem and see BGH NJW 1988, 1265.

255 BGH VersR 85, 441, Köln VersR 89, 139, see Bruggemeier (2004), p. 708.

256 LAG Köln, Court ruling of 14.02.02, Az.: 7 Za 3 877/01, where the court ruled that the employer was entitled to recover the loss from the salary of the negligent employee, see, <<http://www.archiv.anwaltskontor.com/12.html>>, accessed 17 July 2012, see also see Bruggemeier (2004), p. 708.

257 <<http://www.mahnerfolg.de/urteile/index.php/keine-arbeitnehmerhaftung-trotz-rotlichtverstosses/>>, accessed 17 July 2012.

258 idem and see LAG Hessen, 27.05.2008, Az.: 12 Sa 1288/07.

259 The former official currency of Germany was the German Mark (Deutsche Mark). It was replaced in 1999 by the Euro. The historical exchange rate of the German Mark into the Euro is 0,51, see <<http://nl.coinmill.com/>>.

260 BAG 23. January 1997, 8 AZR 893/95, NZA 1998, 140.

An employee caused a traffic accident with his employer's vehicle because he overlooked a red traffic light. The accident happened when a phone call from work took his attention away. The damage was 6.705, 05 German Marks and the employee's monthly salary was 5.370, 00 German Marks. The BAG did not see an incongruity between the employee's monthly salary of 5.370 German Marks²⁶¹ and the damage of 6.705, 05 German Marks and denied limitation to the liability of the damage.²⁶²

The fueling of a truck with petrol instead of diesel by a temporary employed driver was seen as gross negligent. The driver of the truck had to compensate two-third of the damage. The employer had to bear the remaining damage.²⁶³

A professional driver was held liable for his gross negligence because he failed to check the oil level of the truck before driving it.²⁶⁴ Several German courts have limited the liability to a maximum of three times the employee's monthly salary to prevent that the conviction would else ruin the employee financially.²⁶⁵ However this depends again on the circumstances of each individual case. In the following case, the circumstances were that the employed truck driver caused a traffic accident with his gross negligence. He drove drunk with 0,94 per mil of alcohol and caused an accident with damage that amounted up to € 16.718,00. Under these circumstances, the employee could not defend himself with the argument that the damage could only have a maximum of three times his monthly salary.²⁶⁶

§ 6.2. Dutch Law

The Dutch Contributory negligence is embodied in the general provision of article 6:101 (1) BW; 'the obligation to compensate damages is reduced by imputing the total damage to the injured person and to the liable person in proportion to the degree

²⁶¹ The former official currency of Germany was the German Mark (Deutsche Mark). It was replaced in 1999 by the Euro. The historical exchange rate of the German Mark into the Euro is 0,51 , see <<http://nl.coinmill.com/>>.

²⁶² BAG DB 1999, 288, (289).

²⁶³ LAG Rheinland Pfalz, court ruling of 29.12. 2003, AZ: 7 Sa 631/03.

²⁶⁴ BGB § 254, § 276 // BAG v.16. März 1995-AZR 898/93.

²⁶⁵ <<http://www.zeitarbeit-und-recht.de/tce/frame/main/435.htm>> and see also BAG DB 1990, 48.

²⁶⁶ BAG, court ruling of 15.11.2012, Az.: 8 AZR 705/11, see <<http://www.janschweers.de/Workers-Law/>>.

in which the circumstances which have contributed to the damage can be attributed to them individually'. However an exception to this proportional liability rule of article 6:101 BW forms the 'all or nothing principle' which applies to the contract of employment.²⁶⁷ The contract of employment under Dutch Law is regarded as a special relationship, whereby the employee's contributory negligence in itself does not reduce his entitlement to damage compensation. Contributory negligence of the employee can never be an employer's defense unless in the exceptional case that the court will accept deliberate intent or willful recklessness on part of the employee.²⁶⁸ Article 7:658 (2) BW provides an escape clause to the employer; 'unless he (...) shows that the damage to a substantial degree results from an intentional act or omission or from willful recklessness on the part of the employee'.

The employee who caused damage to a third person is entitled to a subrogation of the damage compensation (which he paid to the victim in accordance with his liability based on article 6:162 BW) from the employer unless he caused damage intentionally or with his willful recklessness.²⁶⁹ The concept of deliberate intention and wilful recklessness in article 7:658 BW has the same meaning as in article 6:170 BW²⁷⁰ and also claims based on article 7:611 BW will not succeed in case of willful recklessness on the employee's part.²⁷¹ Furthermore the employer and not his employee, carries the burden of proof.²⁷²

²⁶⁷ Lindenberg 2000, p. 63 en Waterman 2009, p. 139.

²⁶⁸ Koziol (2001), p. 365 and See W.H. van Boom, Annotation of HR 14 October 2005, C04/200HR, NJ 2005, 539 (City Tax BV/ De Boer) earlier also published in 'Jurisprudentie Aansprakelijkheid 2006/1', nr. 10, p. 103-106 see also HR 10 Mai 1996, NJ 1996, 669, JAR 1996/131 see Arbeidsovereenkomst, 5 Kastekorten en bewijslast bij: BW Boek 7, Artikel 7=661 [Aansprakelijkheid jegens werkgever].

²⁶⁹ HR 14 okt 2005, NJ 2005, 539; JA 2006, 10 (W.H. van boom), see spier, p.100 spier p. 80 – 88.

²⁷⁰ Waterman (2009), p. 293 see also (van Doesburg/Tan), HR 9 November 2001, NJ 2002, 79 (PAS).

²⁷¹ HR 1 February 2008, LJN BB6175, JAR 2008/56; NJ 2009/330 (Maasman/AKZO).

²⁷² Rb. Zwolle 8 Novembre 1995, JAR 1996/59, see Arbeidsovereenkomst, 5 Kastekorten en bewijslast bij: BW Boek 7, Artikel 7=661 [Aansprakelijkheid jegens werkgever].

There exists a number of case law concerning the extent and interpretation of the terms intention and willful recklessness.²⁷³ The court was convinced of the employee's deliberate intention in the case where the employee drove into the office of the working conditions service with the company's car for revenge²⁷⁴ or where the angry employee damaged the wallpaper in the staff canteen.²⁷⁵

An example where the employee was not held liable is the case in which the employee allowed a stranger inside her car while she left a cashbox full of company's profit money next to the driver's seat.²⁷⁶ The court took into account that the employer had given her instructions to bring the cashbox safe with a profit money of 7.000 Dutch guilders to the bank and ruled that; 'the mere fact that the employee is not able to give any plausible explanation for a shortfall in cash will not be enough to convince the court that the employee caused the damage deliberately or with gross negligence.'²⁷⁷

The question if the employee caused damage with his deliberate intention or reckless behaviour depends on all the circumstances of the individual case and the nature of the contract.²⁷⁸ As we have seen in paragraph 2.2., case law has shown that the court is difficult to convince wilful recklessness on part of the employee.²⁷⁹

The case of Pollemans/Hoondert²⁸⁰

This case is about an employed carpenter who repaired a roof which was an employment task on behalf of his employer. The employee injured himself from the fall through the roof when he ignored several warnings of his employer not to walk outside scaffolding parts. The High Supreme Court did not agree

273 <<http://www.jpr.nl/show/nl/nieuwsbrief/1,90/2013,-nr.-2>>.

274 Ktr. Bergen op Zoom 10 April 2002, JAR 2002/109.

275 Ktr. Amsterdam 30 Januar 2007, JAR 2007/55.

276 Her employer gave instructions to bring it safe to the bank and the profit money was at the time 7.000 Dutch guilders, see the Money cash-box, Civil Court Den Haag 14 September 1995, JAR 1995/204, see also Ktr. 's-Gravenhage 14 September 1995, JAR 1995/204 and HR 30 March 2001, JAR 2001/127.

277 In this case the employee was an accountant who could not be held liable; see V-N 1985/511, 42: Burgerlijk recht Aansprakelijkheid werknemer voor kastekort. Bewijslast, HR 4 February 1983 LJN AG 4537, NJ 1983, 543 (PAS).

278 Van drongelen (2010), p. 79.

279 Oldenhuis (2013), p. 35. and Klaassen (2000), p. 73, Rb. Rotterdam 28 August 1997, JAR 1997/211 and Ktr. Tilburg 6 Novembre 1997, JAR 1997/254, see also Ascher-Vonk (2003), p. 119.

280 HR 20.11.1996, NJ 1997, 198.

with the judgment of the court of first instance and court of appeal²⁸¹ and ruled that the employee acts only willfully reckless if he would be actually aware of the reckless nature of his behaviour immediately preceded the damage that is caused while carrying out that behaviour.

As opposed to the courts of first and second instance, the High Supreme Court held the fact that the carpenter was clearly and repeatedly warned did not proof in itself his ‘conscious awareness’ of his reckless behaviour immediately preceded the damage he caused, which was walking outside the scaffolding. The court continued by stating that this also is in accordance with the scope of article 7:658 BW which is the protection of the employee. In this case, the High Supreme Court acknowledged for the first time ‘the empirical fact that employees who perform the employment duties on a regular basis inevitably will cause them to work less carefully than is actually needed to prevent them from getting injured’.²⁸²

Secondly, the High Supreme Court described deliberate intention and willful recklessness through a subjective approach in the case of City Tax/De Boer.²⁸³

HR 14.10.2005, JIN 2005/407 (City Tax/De Boer)²⁸⁴

The employee was a professional cab driver who ignored a traffic sign and drove into a street which was forbidden and only allowed for traffic that belonged there. The employer City Tax did not succeed in proving circumstances or facts that convinced the court that the employee; ‘was aware of the reckless nature of driving into the forbidden street immediately preceded the material damage to the car that he caused by carrying out that behaviour’.

The High Supreme Court ruled in this case that the legal terms ‘intention’ and ‘willful recklessness’ for articles 7:658 has the same meaning as article 7:661 BW and denied deliberate intention or gross negligence on part of the employee.²⁸⁵

281 The sub-district court as well as the court of appeal ruled both that the carpenter was guilty of willfull recklessness.

282 HR 20.11.1996, NJ 1997, 198 (Pollemans/Hoondert).

283 HR 14.10.2005, JIN 2005/407.

284 W.H. Van Boom, Annotation bij HR 14 Oktober 2005, C04/200HR, NJ 2005,539 (City Tax BV/ de Boer) eerder gepubliceerd in Jurisprudentie Aansprakelijkheid 2006/1, nr 10, p. 103-106.

285 Annotation bij HR 2-12-2005, C04/353HR, JurisprudentieAansprakelijkheid2006/1, p. 130-

According to the High Supreme Court deliberate intention is a preconceived plan to cause the accident and willful recklessness is the actual awareness of the reckless nature of the behaviour immediately preceded the damage that is caused while carrying out that behaviour.²⁸⁶

The High Supreme Court has established a very subjective approach to determine if the employee acted willfully reckless. It is a difficult concept because it regards what is in a person's mind, what he knew or believed to have been thinking when he caused the damage and this is hard to measure from the outside.²⁸⁷ The court may in addition adjust the damage compensation according to the factual circumstances based on article 6:109 BW.

133 < http://repub.eur.nl/res/pub/7511/hypoglykemie_JA_2006_nr_12.PDF>, City Tax / De Boer arrest (NJ 2005, 539), <<http://www.employment-lawyer.nl/salarypayment/liability-damage-by-employees/employees-only-liable-for-damage-or-loss-in-exceptional-circumstances.html>> accessed 12 Mai 2012.

286 City Tax / De Boer arrest (HR 14-10-2005, NJ 2005, 539).

287 Honée 2008, p.98.

7. Insurance

This chapter shows the employer's insurance schemes either mandatory or voluntarily, subrogation rights of the social security institutions and/ or the private insurance companies. We will furthermore discuss the role of insurance companies who subrogates the victim's entitlement to damage recovery in traffic accidents for the paid damages to the insured victim.

§ 7.1. German Law

The no-fault statutory insurance scheme for accidents at work

In regards to the employment relationship, the statutory insurance aims to protect the employer who finances the insurer by paying premiums²⁸⁸ and to protect the employee who suffers an accident at work in accordance with § 8 SGB VII or who sustains an illness that is related to specific health risks of the assigned to the employee (occupational disease in accordance to § 9 SGB VII)²⁸⁹. Insured events are thus industrial accidents and industrial diseases.²⁹⁰ Accidents on the way or to work are also covered.²⁹¹

A basic assumption of the statutory insurance scheme is that if an employee is entitled to compensation under SGB VII (for an accident suffered at work), the injured victim cannot claim any further compensation by relying on the ordinary tort rules of the BGB because the employer or any other employee who might be responsible for the accident enjoy an immunity (§§ 104, 105 SGB VII).²⁹² Here the rules of tort law are replaced by a mandatory insurance scheme.²⁹³ The main advantage for the employee is that he will be able to obtain compensation from a solvent debtor and that he does not need to prove fault of the employer. His own contributory fault is also not taken into account and will not have any negative effect on his entitlement of “damages”.

²⁸⁸ Markesinis, p. 728.

²⁸⁹ Markesinis, p. 728.

²⁹⁰ SGB VII/1, § 7 (1) sentence 1, see Personal injury compensation (2003), p.208.

²⁹¹ SGB VII/1, § 8 (2), see Personal injury compensation (2003), p.208.

²⁹² Markesinis, p. 726.

²⁹³ Markesinis, p. 727.

However, one disadvantage does exist and that is that the employee cannot recover damages for pain and suffering under § 847 BGB (see paragraph 5.1.).²⁹⁴

Excluded from the entitlement to compensation under the provisions of SGB VII

Entitlement to damage compensation for an accident suffered at work, based on the SGB VII is excluded in three situations; if the damage is sustained as a result of a commuting accident (travelling to and from work)²⁹⁵; if it involves a material injury such as damage to his belongings or property (see below)²⁹⁶; and finally if the employer/colleague has caused the damage deliberately or with his gross negligence.²⁹⁷ If social insurances cover damages in employment accidents, they are entitled to subrogation towards the employer in case the employer caused the accident with intention or gross negligence based on §110 SGB VII.²⁹⁸

Material damage

The employer is liable if he breaches a contractual obligation or commits an unlawful act that results in damage to the employee's property in the course of the employment (for example clothes). But also employers without fault stay liable towards the employee who causes damage to his own belongings, provided that the damage occurs in the course of the employment. Employer's liability for material injury of the employee is based on an analog application of § 670 BGB (reimbursement of expenses). However it only regards damage that does not belong to the daily life risks of the employee or damage that is not already covered by the employee's salary according to §670 BGB. In that case, employers are not liable for the property damage to the employee.

In the case of the *Ameisensäure*²⁹⁹, an employee who was a longshoreman got his trouser damaged while he was unloading the ship. The cause was the acid that flew out of a broken bottle which he had accidentally dropped on the floor.

²⁹⁴ idem.

²⁹⁵ Oliphant (2012), p. 280.

²⁹⁶ Giesen (2001), p. 172, 173.

²⁹⁷ Apart from these exceptions, an employee who suffers personal injury only has social insurance claims against the Berufsgenossenschaft. He cannot claim damages directly against the employer, see Fisher (2009), p. 281.

²⁹⁸ Markesinis, p. 728 and see also paragraphs 2.2. and 6.1.

²⁹⁹ BAG, Court ruling of 10.11.1961 GS NJW 1962, 411, Busemann (1999), p. 119.

The court held that employer's liability for property damage covers only the unusually extensive damage (the employer cannot be held liable for regular damages) which occurs from the employee's performance of the task and is connected to the dangerous nature of the work.³⁰⁰

Traffic accidents occurring while travelling to and from work

The treatment and benefits for injuries occurring while travelling to and from work are regulated by the statutory insurance scheme as well as the Road Traffic Act.³⁰¹ The provision of §7 of the Road Traffic Act holds the *keeper of a motor vehicle* strictly liable for personal injury that results from the use of the vehicle.³⁰² The person who uses a car vehicle at his own expense is the keeper and he may also be the owner but this is not a requirement to be the keeper.³⁰³ Cars driven by the employees of the keeper and causing damage will establish liability of the keeper under the Road Traffic Act 1953.³⁰⁴

If the keeper agreed with the use of the car, or the car was stolen because of the keeper's negligence, the keeper (including the user) will stay liable based on §7 III Road Traffic Act 1953.³⁰⁵ However if there was no consent of the keeper, then only the user and not the keeper will be liable under the Road Traffic Act.³⁰⁶ The keeper as well as the driver may be held liable in accordance with the very high standard of care under §18 of the Road Traffic Act. Drivers may only escape if they can prove that they were not negligent when driving the car.³⁰⁷ The part of the compensation to be paid by the keeper as well by the driver is in accordance with each contributory fault based on § 254 BGB.³⁰⁸

300 See the Ameisensaure-fall; BAG, Court ruling of 10.11.1961 GS NJW 1962, 411, Busemann (1999), p. 119.

301 Markesinis, p. 728.

302 Markesinis, p. 729.

303 *idem*.

304 Markesinis, p. 733.

305 *idem*.

306 Markesinis, p. 734.

307 Markesinis, p. 733.

308 *idem*.

An example case of gross negligence of the employee is the case where an employed professional truck driver caused a traffic accident because the employee ignored a red traffic light.³⁰⁹ The employee was distracted by a telephone call of his employer when he was crossing a crossroad. *The insurance company* of the employer claimed compensation of the employee for the reparation costs for the damaged truck. The court ruled that the employee acted gross negligent and that he was liable for the damage that occurred from the accident in accordance with §276 BGB. The court did not limit his liability because there was no clear discrepancy between the repairing costs of 6.705 German Marks³¹⁰ and the employee's monthly salary of 5.370 German Marks.³¹¹

*LAG Cologne - 5 Sa 305/91, court ruling of 30.04.1992 – 8 AZR 409/91*³¹²

Provided that the employee uses his own private auto vehicle to perform the contractual task in the course of the employment and provided that the employer pays the employee; the under tax law recognized 'kilometer rate', the employer is only liable for the cost of downgrading the liability insurance premium for damage in the work accident, if this is agreed upon by the parties to the contract. If the employer and employee agreed to a certain compensation of the kilometer rate and if the employee was free in the pick of his car vehicle and insurance company, it is doubtful if the payment of the kilometer rate also covers the costs of downgrading the insurance premium of the *liability insurance*.

In the European Union, driver's working hours are regulated by EU regulations. The non-stop driving time may not exceed 4.5 hours. After 4.5 hours of driving the driver must take a break period of at least 45 minutes. However, this can be split into 2 breaks. The daily driving time shall not exceed 9 hours. The daily driving time may be extended to at most 10 hours not more than twice during the week. The weekly driving time may not exceed 56 hours. In addition to this, a driver cannot exceed 90 hours driving in a fortnight. Within each period of 24 hours after the end of the

309 BAG of 12.11.1998 – 8 AZR 221/97.

310 The former official currency of Germany was the German Mark (Deutsche Mark). It was replaced in 1999 by the Euro. The historical exchange rate of the German Mark into the Euro is 0,51 , see <<http://nl.coinmill.com/>>.

311 The compensation costs did not exceed the amount of three times his monthly salary which is the suggested maximum limit for employee's liability according to the legal reform discussion; see Peifer, *haftung des Arbeitnehmer*, AR-Blattei SD 870 Rz 24 ff. 124 ff.).

312 SAE 3/93.

previous daily rest period or weekly rest period a driver must take a new daily rest period. Most serious accidents on the Road include trucks whereby the cause often lies in overtiredness of truck drivers. In compliance with these facts, violation of the legal driver's working hours is punished with very high fines.³¹³

Any agreement of the employer in the contract to compensate fines of his employee based on a violation of the Regulation Driving Working Hours is immoral because they are in contrast to the purpose of the criminal and administrative punishments. Such agreements in the contract are therefore ineffective (§138 BGB).³¹⁴

An employer who provides instructions and or directions to his employee, of which he foresees and consciously accepts it's possible consequence that this may lead to a violation of rules on driving times, acts immoral and is according to § 826 BGB (tort) liable for the (intentional) damage to his employee that occurs from it.³¹⁵

However the court does not easily accept the cause of claim for compensation of fines that are imposed on the employee for violation of rules on driving times. The professional driver carries in principal the full responsibility in case he violates the legal driver's working hours. Based on the court ruling of the LAG Rheinland-Pfalz³¹⁶ drivers should oppose against the employer's instructions if this means an obstruction against the law.³¹⁷

The employee must prove that it could not be reasonably expected despite his legal obligations as a truck driver that he opposed the orders of his employer.³¹⁸

The employer's orders should be directly related to the violation of the rules on driving times. Sufficient is for example if the victim can prove that the employer assigned the employee to drive on appointments that inevitably lead to the improper driving.³¹⁹

313 The obligation for drivers of goods to drive within the certain borders of driving working hours and drive with the obligated driving breaks is based on Articles 6, 8 EWG, Nr. 3820/85. Violation of these rules are offences and punished with a fine according to 8 paragraph 1. Nr. 2 FPersG i.V.m. Art. 6 paragraph 1 and art. 8 paragraph 1 Verordnung (EWG) nr. 3820/85, see the ARST Entscheidungen 9/2001, p. 205.

314 BAG of 25.01.2001 – 8 AZR 465/00, ARST 4/2001.

315 BAG of 25.01.2001 – 8 AZR 465/00, ARST 4/2001.

316 <LAG Rheinland-Pfalz, Urteil vom 26.01.2010, Az.: 3 Sa 497/09>.

317 <Bron: Urteils-TICKER Betriebsrat > Ausgabenarchiv > Urteils-TICKER Betriebsrat Ausgabe 11/2010>.

318 BAG of 25.01.2001 – 8 AZR 465/00, ARST 4/2001.

319 BAG of 25.01.2001 – 8 AZR 465/00, ARST 4/2001.

An employee was working for a company as a truck driver until his contract ended on the 23rd of August in 2008.³²⁰ He caused several traffic offences (including a violation of the driver's working hours) while acting in the course of his employment which resulted in a total sum of € 8.520,00. The employee's defense was that he only followed the explicit instruction of his employer and that he would have lost his job in case he would have disobeyed the instructions. According to the employee, the employer therefore needed to pay compensation of the damage costs.

The Court however disagreed with the employee and held the employee fully responsible for his own violations of the law. Based on the strict protective regulation rules for a legal termination of the employment contract and the many other protection rights for employees, it is not easy to fire an employee. A disobedience of the employer's instructions which would violate the law, are certainly not sufficient. In that regard, it was recognized that employees do not have to follow arrangements of an employer that conflict with the law. The employee does on one side not have to be afraid of being fired for not following these instructions and on the other side, obeying these rules will not lead to a claim against the employer for repayment of a fine.

European Law established the Motor Insurance Liability Directive (2009)³²¹ which obliges vehicle owners to take out first-party insurance with minimum coverage insurance at €5 million per event.³²² Victims may submit a claim for damage compensation directly to the insurer of the employee at fault or in case this party is unknown or uninsured to special funds.³²³ In Germany, 'the Association

320 LAG Rheinland-Pfalz, Urteil vom 26.01.2010, Az.: 3 Sa 497/09.

321 National Report: Mandatory Insurance in the Netherlands prepared by Houthoff Buruma for the 2010 AIDA World Congress; Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability.

322 This is the Compulsory Insurance or security against third party risks of the Road traffic act 1988, see (<<http://www.legislation.gov.uk/ukpga/1988/52/contents>>), the Pflichtversicherungsgesetz für Kraftfahrzeughalter in Germany, see (<<http://aserv.toptarif.de/html-banner/downloads/pflichtversicherungsgesetz.pdf>>); and the Wet Aansprakelijkheid Motorrijtuigen in the Netherlands, (<http://wetten.overheid.nl/BWBR0002415/geldigheidsdatum_13-08-2013>).

323 Article 30(1) of the Act states that the failure to take out insurance constitutes a criminal offence punishable by a maximum penalty of 3 months' imprisonment or a fine "in the second category" (€3,700). A person guilty of this offence may also be disqualified from driving motor vehicles for a period of one year at the most, under art. 30(6) of the Act, see National Report: Mandatory Insurance in the Netherlands prepared by Houthoff Buruma for the 2010 AIDA World Congress.

Verkehrsofferhilfe (VOH), an institution of German motor liability insurers³²⁴ provides compensation for victims of accidents caused by uninsured and untraced drivers.³²⁵

§ 7.2. Dutch Law

The Dutch social security system

The department of social security is entitled to recover from the employer for the paid benefits to the injured employee by way of subrogation (see article 99 WIA).³²⁶ The liability of the employer towards the health insurance companies is less extensive than the employer's liability for damage towards the injured employee. The compensation excludes the health insurance costs of the employee in so far as it is already compensated by the public health insurance companies such as hospital bills.³²⁷ It is up to the health insurance company to claim the costs from the employer or the employee-colleague who has caused damage to the injured employee. In respect of subrogation rights the employer is, based on article 100 WIA only liable in case he or the employee-colleague acted intentionally or willfully reckless.

The Dutch employer's insurance scheme

Employers under Dutch law are not obliged to insure against job-related accidents or occupational illnesses. Most employers take out a type of insurance called "business liability insurance"³²⁸ as a way of transferring this risk to the insurers because the employer's liability for damage can lead to very high damage costs³²⁹ and this is especially true in those situations in which the employee becomes fully disabled.³³⁰

324 Personal injury compensation in Europe (2003), paragraph 8.9.

325 Schadevergoeding: personenschade, kluwer deventer 2008, Mon. BW B37 (Van wassenaer/Bouman), p. 18 and see 325 These are the 'Entschädigungsfonds' in Germany; and the 'Waarborgfonds Motorverkeer' in the Netherlands.

326 <<http://www.arbeidsrechter.nl/werkgever-aansprakelijk-voor-schade-die-werknemer-lijdt>>, Barentsen 2008 B. Barentsen, Monografieën Sociaal recht.

327 HR 15 mei 1998, NJ 1998, 624 'Het verlies van verdienvermogen wordt berekend door de feitelijke inkomenssituatie na het ongeval te vergelijken met de hypothetische situatie bij wegdenken van het ongeval. Bij de hypothetische situatie komt het aan op de redelijke verwachting van de rechter omtrent de toekomstige ontwikkelingen van de getroffenene zoals in de situatie zonder ongeval het geval zou zijn', see also Barentsen 2003, p. 15.

328 In Dutch: aansprakelijkheid voor bedrijven (AVB) (business liability insurance).

329 Lindenbergh 2000, p. 108.

330 De Boer 2006, p. 18.

Usually around 90%³³¹ of employers do get insurance either through third party insurances or first party insurances.³³²

The employer's insurance schemes usually only covers for damage that occurred during the period of insurance³³³ and so victims whose damage occurs after the expiry date of the employer's liability insurance, only can claim a compensation from the employer directly or in case the company ceases to exist (insolvent employer) from the curator based on article 213m lid 2 sub a Dutch Insolvency Law.

Another way for the employer to comply with the obligation to provide a proper insurance is by making it financially possible for the employee to obtain a proper insurance himself. If insurance benefits are paid by the insurance company for personal injury to the insured party then the insurance company may recover the paid benefits by way of subrogation from the person responsible of whom the insured party has a claim of damage compensation.³³⁴ Sum-insurances³³⁵ are exceptions because they are not a deductible collateral benefit with the result that the victim may obtain insurance benefits as well as damage compensation from the person responsible.

The employer's duty to provide a proper insurance of traffic accidents for his employees

Where article 7:658 BW does not apply because the employer's control or right to instruct the work conditions of the employee are missing, a solution is offered by the open norm of article 7:611 BW.³³⁶ Based on this provision employer's liability may be established in those cases where article 7:658 BW cannot be applied for example in case the victim suffers injury in the private sphere or in case damage occurred from a traffic accident caused by the employee.³³⁷ Dutch Case law shows that based on article 7:611 BW employers have a duty to provide a proper insurance for employees

331 Hartlief en Mendel 2000, p. 388 e.v

332 W.H. van Boom e.a., Compensatie van verkeersletsel van werknemers: wat is een behoorlijke verzekering?, ArA 2008/2, p.49.

333 Waterman 2001, p. 18.

334 Article 284 of the Dutch Commercial Code.

335 A sum-insurance pays out on the happening of a certain event regardless of whether damage resulted from that event.

336 W.A. Zondag, Aansprakelijkheid van de werkgever voor ongelukken in het woon-werkverkeer, O&F 2002 nr 54, p.20. M. van den Steenhoven, Waar eindigt de verantwoordelijkheid van de werkgever voor (verkeersongevallen van zijn werknemers?, VR 2009 nr. 5, p.133.

337 idem.

who in the course of the employment suffer injury from traffic accidents (either with motor vehicle or without, such as pedestrians or bikers).³³⁸

Excluded are accidents that occur while the employee travels between his home and work. In case the employee uses his own car, the employer complies with his obligation by providing the employee with financial means to get a proper insurance himself.³³⁹ If article 7:611 BW applies, damage is limited to what the employee has suffered from the breach of the employer's obligation to provide proper insurance. The following court rulings show that in these situations, the employer's obligation to provide a proper insurance based on article 7:611 BW does not necessarily mean that the employer is always liable for (the entire) damage to the employee.³⁴⁰ The liability of the employer depends also on the circumstances of the individual case.

In the case of *Maasman/Akzo Nobel*³⁴¹, the employee Maasman claimed a compensation from his employer Akzo for damage that he had suffered in the course of the employment from a traffic accident that was caused by a third person. The damage of Maasman was only covered for 75% by the WAM insurance of the third person. Maasman claimed the remaining 25% from his employer based on article 7:658 BW and 7:611 BW. The court in appeal held that the claim based on article 7:658 BW could not succeed because the employer did not breach his duty to care. It also denied compensation based on article 7:611 BW because Maasman showed willful recklessness since he did not wear a safety seatbelt during the accident.

In the case of *Kooiker/Taxicentrale Nijverdal*³⁴², a cab driver claimed compensation from his employer for damage that he suffered from a traffic accident with a train. The insurance for accidents provided by the employer did not entirely cover the employee's damage. In a legal procedure, Kooiker claimed the remaining damages from his employer based on article 7:658 BW and article 7:611 BW.

338 idem.

339 W.A. Zondag, Aansprakelijkheid van de werkgever voor ongelukken in het woon-werkverkeer, O&F 2002 nr 54, p.20. M. van den Steenhoven, Waar eindigt de verantwoordelijkheid van de werkgever voor (verkeersongevallen van zijn werknemers?, VR 2009 nr. 5, p.133.

340 idem.

341 HR 1 February 2008, JAR 2008, 56 < <http://www.burgers->

schade.nl/actueelnieuws/verzekeringplicht_van_de_werkgever_bij_verkeersongevallen.html>.

342 HR 01.02.2008, JAR 2008, 57.

The claims were denied by the court in appeal because the employer had behaved in accordance with his duty to care of article 7:658 BW and duty to behave as a good employer of article 7:611 BW.

The case of *Maatzorg/Verzorgingshulp*³⁴³ regards an employee who got injured in the course of the employment, when she was on her way with the bike from one client to another. The High Supreme Court acknowledged that the same rules for traffic accidents with employees driving a vehicle are also applicable for employees who get injured in a traffic accident without a motor vehicle (pedestrians or bikers).

Up until now Dutch law does not comply with the obligations of the ILO convention in regards to accidents that occur when travelling between home and work.³⁴⁴ Article 7 of the ILO Convention number 121, demands that conditions must be set to judge if a ‘commuting accident’ is a job related accident.³⁴⁵ These conditions are still missing under Dutch Law. The legal term job related accidents does not even include traffic accidents that occur when travelling between home and work.³⁴⁶ Under Dutch law the employer’s obligation to provide insurance is based on the open norm of article 7:611BW. Case law shows that the employers are at least obligated to insure their employees against traffic accidents.³⁴⁷

European Law established the Motor Insurance Liability Directive (2009)³⁴⁸ which obliges vehicle owners to take out first-party insurance with minimum coverage insurance at €5 million per event.³⁴⁹ Victims may submit a claim for damage compensation directly to the insurer of the employee at fault or in case this party is

343 Hoge Raad 12 December 2008, LJN BD3129, < http://www.burgers-schade.nl/actueelnieuws/verzekeringplicht_van_de_werkgever_bij_verkeersongevallen.html>.

344 Y.R.K. Waterman, De perikelen van de werknemer in het verkeer, ArA 2003/1, p. 59.

345 idem.

346 Y.R.K. Waterman, De perikelen van de werknemer in het verkeer, ArA 2003/1, p. 59.

347 Y.R.K. Waterman, De directe verzekering van arbeidsgerelateerde verkeersongevallen, Tijdschrift arbeidsrechtpraktijk. 2011-7, p.70.

348 National Report: Mandatory Insurance in the Netherlands prepared by Houthoff Buruma for the 2010 AIDA World Congress; Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability.

349 This is the Compulsory Insurance or security against third party risks of the Road traffic act 1988, see

(<<http://www.legislation.gov.uk/ukpga/1988/52/contents>>), the Pflichtversicherungsgesetz für Kraftfahrzeughalter in Germany, see

(<<http://aserv.toptarif.de/html-banner/downloads/pflichtversicherungsgesetz.pdf>>); and the Wet Aansprakelijkheid Motorrijtuigen in the Netherlands, (<http://wetten.overheid.nl/BWBR0002415/geldigheidsdatum_13-08-2013>).

unknown or uninsured to special funds.³⁵⁰ In the Netherlands, the ‘Waarborgfonds Motorverkeer’ provides compensation for victims of accidents caused by uninsured and untraced drivers.³⁵¹

350 Article 30(1) of the Act states that the failure to take out insurance constitutes a criminal offence punishable by a maximum penalty of 3 months' imprisonment or a fine "in the second category" (€3,700). A person guilty of this offence may also be disqualified from driving motor vehicles for a period of one year at the most, under art. 30(6) of the Act, see National Report: Mandatory Insurance in the Netherlands prepared by Houthoff Buruma for the 2010 AIDA World Congress.

351 Schadevergoeding: personenschade, kluwer deventer 2008, Mon. BW B37 (Van wassenaer/Bouman), p. 18 and see 351 These are the ‘Entschädigungsfonds’ in Germany; and the ‘Waarborgfonds Motorverkeer’ in the Netherlands.

8. The Conclusion: Comparative Perspectives

In the previous chapters we have analyzed the employer's liability systems Germany and the Netherlands. In this chapter we will come to the concluding part of the thesis. This chapter will compare the reviewed member states regarding the questions of the thesis; 'does employer's liability require a fault; what are the conditions for employer's liability under German and Dutch law; is it possible for the employer to escape liability and; are the German and Dutch legal systems appropriate to provide compensation to the victim?'

§ 8.1. Does employer's liability require a fault?

German Law

Employer's liability under German law is a fault based system. This is based on the idea that the employee is only able to cause damage because the employer was at fault by hiring the employee or failing to provide proper supervision. According to German law, the employer caused the accident because he initially started the whole process by hiring a negligent employee. This idea is shown in the German Civil Code under § 831 BGB. This provision states that the employer may avoid liability for damage of third parties caused by his employees by proving that the employee was carefully selected and supervised. Employer's liability under German Law is based on the employer's personal negligence, rather than that of the employee.

However in practice, damage of a work accident does not always require a fault of the employee before the victim may claim compensation and this is because of the statutory accident insurance that also recovers in case there is no person to blame. If an employee is entitled to compensation under SGB VII for an accident suffered at work, (except if the personal injury is caused intentionally), the injured victim cannot claim any further compensation by relying on the ordinary tort rules of the BGB: the employer or any other employee who might be responsible for the accident enjoy an immunity (§§ 104, 105 SGB VII) (see chapter 7). The victim benefits of such a system because this procedure to obtain damages does not take as long or is not as expensive as the civil liability procedure to claim damages of the employer. As we

have seen in chapter 7, the immunity rule of victims of work related accidents are not entitled to compensation based on SGB VII in three situations.

1) *The first exception is, in case damage occurs outside the employment course* (this also falls outside the scope of employer's liability, see chapter 4).

It could for instance regard an accident in the own private sphere of the employee. Paragraph 2, number 1-4, of § 8 SGB VII states that traffic accidents (*Wegeunfaelle*) might still fall under the insured work related activity such as leaving the work place or driving on the employment routes to the work based on a substantial connection with the actual performance of the employment (see chapter 2, paragraph 4)'.

2) *The second exception is, in case it involves a material injury such as damage to his belongings or property.* Proof of the employee's fault is not required, but the victim must show that the employee acted wrongfully. Depending on the circumstances, liability of the employee towards his employer may be limited. Furthermore, the case of the *Ameisensäure*³⁵² showed that damage that belongs to the general risks of the daily life is excluded from employer's liability and falls under the own responsibility of the employee (see paragraph 3.1.1. and 7.1.). So while 'incidental' damage at work is included under the Dutch system, it is excluded under the German system that applies a much stricter and objective approach. German Law does *not* apply a limitation to the employee's liability in case *material damage* occurred from an accident in the private sphere of the employee which also includes the accidents between work and home (see LAG Cologne of 24.06.1994 – 13 Sa 37/94 in paragraph 3.1.3.).

3) *The third and last exception is, in case the employer/colleague has caused the damage deliberately or negligently* (see chapter 6). If the employee's liability towards his employer will be limited by the courts, depends on the circumstances of the individual case. We have seen the example of the truck driver who acted gross negligent because he drove a truck in traffic while being drunk. Under these circumstances, the employee could not defend himself with the argument that the

³⁵² BAG, Court ruling of 10.11.1961 GS NJW 1962, 411, Busemann (1999), p. 119.

damage should be limited to a maximum of three times his monthly salary (see chapter 6, court ruling of BAG, court ruling of 15.11.2012, Az.: 8 AZR 705/11).

Dutch law

1) Regarding the entitlement to claim damages of third persons under the Dutch system, it is required that the negligent employee has caused him damage by an unlawful act. In this case the victim may not only claim compensation from the employee under article 6:162 BW but also from the employer who is liable for faults of his subordinates based on article 6:170 BW. The unlawful conduct is; ‘a violation of right, an act or omission breaching a duty imposed by law (written law) or a rule of unwritten law that holds a person to behave in accordance with a social proper conduct. The last category is *sufficiently flexible* to cover all remaining situations while it does not require an intention to cause damage (see chapter 3). An extreme minor fault could therefore be sufficient in this case.

2) Towards the injured employee, employers own many duties that may determine his liability. We have mentioned his duty based on 7:658 BW to take care of health and safety of employees; his duties based on 7:611 to behave according to good employment practices and to insure traffic accidents of his employed staff. The employer’s liability is based on his own failure to act (fault) in accordance with his duty to take care of the health and safety of his employees. He is liable for compensation of the employee’s injury if he breached one of his duties and this is regardless of the employee’s fault unless the employee injured himself with conscious recklessness or his intentional behaviour.

3) In case the employer is damaged by the negligent behaviour of his employee, he may only claim compensation in case the employee made a fault to the degree of consciously recklessness or intentional behaviour. An extreme minor fault is in this case not sufficient.

A big difference with the German system is that employers might not be insured for damage caused by a job related accident or occupational disease. In case the employer is uninsured, fault either on the employer’s part (he failed his duty to take care of the health and safety of his employee) or on the employee’s part is required for a claim of

action of the victim. Even if the victim's claim of action is successful, he may still be left empty handed, in case the employer is bankrupt. The employer will then financially not be able to pay damage compensation to the victim.

The occupational insurance system which is obligatory for employers in Germany covers the employee's damage caused by a job related accident or occupational disease and this does not require fault on the employer's nor on the employee's part. The injured employee will not have a direct claim for damages of the employer but of the insurance company. Here the victim is in a better position than he would be under Dutch law. Bankruptcy of the employer does not form a problem, because the victim obtains his damages directly from the insurance company.

§ 8.2. What are the conditions for employer's liability under German and Dutch law?

For employer's liability the victim must firstly prove in both member states that he suffered damage caused by another person; secondly that this other person was in employment contract with the person that the victim holds liable; and thirdly that the damage must occur within the scope of the employment. The Dutch employer's liability contains a very broad scope of employer's liability and is regulated by article 7:658; 6:170; 7:611 and 7:661 BW. The requirement for a causal connection to the employment is satisfied as soon as the employee can prove that his injury occurred in the performance of the task or that the performance in particular has enlarged the risk to damage.

However, the scope is limited by the important requirement of control. The person who makes use of the subordinate and who is held liable must for instance satisfy the condition that the subordinate performs the employment under his control and that damage occurs from that performance according to article 6:170 BW. Germany applies a much more limited scope of employer's liability. Much depends on if the concerned case offers enough objective facts to prove that there is a close connection with regards to what the normal duty of the employee is and/ or belongs to his discretion. Objective indications are for instance; time; place; the nature of the employee's behavior; and equipment that the employee made use of.

So while ‘incidental’ damage at work is included under the Dutch system, it is excluded under the German system that applies a much stricter and objective approach. Required is a substantial connection with the employment which is based on all the facts of the individual case. The substantial connection must be more than just an (incidental) opportunity to cause damage that is given in the assignment itself whereby attention is paid to; (-) how much the employee deviated from the instructions and or directions of the employment task; (-) how much the purpose of the deviation is work related; (-) and whether the behaviour of the employee that resulted in the damage was regarded as his normal duty and/ or to his own discretion.

Unlike in the Netherlands, incidental damage lacks a ‘substantial’ connection with the course of employment under German law and that’s why it is excluded from employer’s liability. This requirement for a substantial connection between the damage and the employment activities is not easily accepted because it is determined by objective indication factors. The employer is not liable for damage that occurred incidentally on occasion of the function. Also the connection between the function and the damage is assessed objectively; it depends on time, place, behavior of the subordinate and the equipment that he makes use of. The purpose of this rule is to prevent that it would else be too easy to prove a connection between the damage and the activities and it also prevents a person to take abuse of his function.

§ 8.3. Is it possible for the employer to escape liability?

German law

Under German law a civil wrong on the employer’s part is assumed as soon as the employee damages himself or another person in the scope of his employment with the exception of personal injury in work accidents (§ 104 and §105 SGB VII) in which case employees may only apply for compensation through the social insurance system. The victim benefits of such a system because this procedure to obtain damages does not take as long or is not as expensive as the civil liability procedure to claim damages of the employer. The German system allows according to §831 BGB that the employer may avoid liability for damage of third parties caused by his employees by proving that the employee was carefully selected and supervised. Employer’s liability under German Law is based on the employer’s personal

negligence, rather than that of the employee. The employer may prove that he is not at fault by showing that he took proper care in the selection of the personal staff, provided proper equipment, supervision, instructions and training to the employee. If the employer is a large company, 'decentralized exoneration' applies; for which it is sufficient to prove that the employer took proper care of the management team of his personal staff.

Employers may furthermore also get redemption from liability in case they prove that damage would have occurred regardless if they took all the necessary safety measures to take care of the health and safety of their employees within the limits of reasonable expectations. If this is the case, then there is also no causal connection between the employee's wrongfulness and the employer's fault.

Finally employers may defend themselves based on §670 BGB in order to get contribution/ or an indemnity for damage to the employee's belongings. The employer may base his defence on the argument that he has already contributed payments to his employee for the total coverage of any later occurring damage; or with the defence that the employee contributed by his own negligence to the cause of the damage provided that fault on the employee's part is to the degree of gross negligence or deliberate intention.

Dutch law

Under the Dutch system, the employer may get redemption from liability if he proves that he did not breach his duty of care for safety (article 7:658 BW) or proves that deliberate intention or willful recklessness on part of the employee was the cause of the damage (article 7:658 and 6:170 BW). Both defenses however are not easily accepted by the court. The first defense (the employer's duty of care) is limited to what may be reasonably expected from the employer to take care of the health and safety of his employees and this depends on the circumstances of the individual case. Indication factors are for instance; the nature of the activities; the awareness of the danger; the foreseeable negligence of the employee; and the obligation to warn of the employer. The second defense (deliberate intention or willful recklessness) is also not easy to prove. The High Supreme Court ruled that the empirical fact that employees who perform the employment duties on a regular basis will inevitably cause them to

work less carefully than is actually needed to prevent them from getting injured. According to case law willfully reckless is the employee who immediately proceeded to his behavior is aware of the reckless character of his action that has finally led to the damage.

The Dutch employer's liability law shows a very strict employer's liability that makes it very hard for the employer to escape his responsibility regarding employee's faults that cause damage. However there are employees who suffer from work related injury and still do not succeed to hold the employer liable based on article 7:658 BW. If the employer can prove that he did not breach his duty to take care of the employee's health and safety, he will get exemption from liability. It is obvious that article 7:658 BW was created for the need of a safe environment rather than meeting the need to compensate the injured employee. The provision of article 7:658 BW is not a risk liability for which an employer's obligation to insure exist. It is a contractual liability that is based on the employer's duty of care for his employee's safety in the work environment.

§ 8.4. Are the national legal systems appropriate to provide compensation to the victim?

Both member states have their up- and downsides for the victim but neither one of these reviewed national systems is really appropriate for the victim because they do not cover all possible employers' liability cases in which a victim suffers damage that is caused by the employee.

Insurance system

The main advantage of the German no fault statutory insurance system for the employee is that he will be able to obtain compensation from a solvent debtor (the insurance company) and that he will not have to establish the fault of the employer, nor will his own contributory fault be taken into account to reduce his "damages". Its main disadvantage (see paragraph 5.1.) is that the employee cannot recover damages for pain and suffering (§ 847 BGB). This is where the system can and must be improved. Another improvement for the employee is to change the very strict and objective approach of the German system towards the liability for material damage of

the employee. The general risks of the employee's daily life is now excluded from employer's liability and falls under the own responsibility of the employee (see paragraph 3.1.1. and 7.1.).

An example of a system which is different is the Dutch system that does include 'incidental' damage at work because of the less strict and objective approach. One problem of the Dutch legal system is that insurance of the employee's damage caused by a job related accident or occupational disease is not obligatory for the employer; it is up to him if he takes care of this. In case the employer does provide insurance, the burden of damage compensation can be replaced from the employer to the insurance company. Up until now the Dutch legislator only provides for an employer's duty to provide for insurance regarding traffic accidents. It created this duty under article 7:611 BW to determine liability for the traffic between home and work.

In all other liability fields it is possible that the victim will not find a solvent debtor to compensate his damages. The employer is not obliged to provide for insurance, and this leaves the victim left empty handed, if the employer as well as the employee does not have sufficient financial means. Although Dutch courts have expanded employer liability, insurers have reacted and changed their insurance policy by excluding occupational illnesses from coverage and liability arising under article 7:611 BW.

The result is an increase of liability cases in which the employer is not properly insured and has to pay for the damages himself which he might not manage to do because the damage compensation may run very high. This could be solved by a statutory mandatory insurance for the employer to take out his employees, who would then be considered the insured and who would be able to claim directly under the policy such as is the case in the neighbor countries. Benefits of a mandatory insurance could be that there will be less employer's liability procedures, and the employee would be compensated more quickly and easy. Under Dutch law it is difficult for the employer as well as for the employee to find the appropriate insurance. They also have to decide on their own if in accordance with the guidelines/ basic principles of the High Supreme Court the insurance is regarded as 'appropriate' in accordance with article 7:611 BW. It is clear that this is not an easy job for either of the parties

(employer and employee). Above all, some risks for example the risk to injury in traffic without motor vehicles are uninsurable.

Cumulative liability and incidental damage

The Dutch system applies different from the German system a cumulative liability; which means that the injured victim is allowed to hold more than one person responsible for his damage. The Dutch legislator wanted to provide a proper legal protection to the victim; to prevent that he obtains less or nothing if he claims damage compensation from the wrong person. The victim is therefore entitled to claim damages of more possible defendants and in accordance this is something positive because it enhances the likeliness that at least one party can pay the compensation for the damage or has an insurance that pays for it instead. Cumulative liability also refers to the victim's choice of which legal provision to use. He may claim compensation from the employer based on liability for subordinates of article 6:170 BW or based on the employer's personal actions in accordance with the identity theory of article 6:162 BW. Employer's liability under Dutch law also includes incidental damage. As opposed to German Law incidental damage may also fall in the course of employment which regards the connection between the negligence of the employee that caused damage and the employment task.

The employee's gross negligence/ conscious recklessness

The conclusions showed that the employer is not responsible if the employee caused damage by his gross negligence under German Law or if he acted with conscious recklessness under Dutch Law. If the employee is also uninsured, the victim does not have a solvent debtor to compensate his damage. The German and Dutch law systems regarding the employer's liability for damage that is caused by the employee are therefore not appropriate to provide compensation to the victim. The employer should always be responsible with the possibility to recover his paid damages from the employee who caused the damage. Only then will the victim obtain the necessary protection, unless the employer is insolvent or uninsured.

9. Recommendations

This thesis showed us a very interesting comparison between the employer's liability under German and Dutch Law. As mentioned in the introduction Germany owns a statutory insurance system for employers unlike the Netherlands. The victim has the advantage that he will be able to obtain compensation from a solvent debtor (the insurance company) and that he will not have to establish the fault of the employer, nor will his own contributory fault be taken into account to reduce his damages. Furthermore benefits are that there will be less employer's liability procedures, and the employee would be compensated more quickly and easy. In contrast to Germany no insurance system is mandatory for employers under Dutch Law to insure against the employee's damage caused by a job related accident or occupational diseases. If employers in the Netherlands are uninsured, victims may be left empty handed. For example if the employer is bankrupt, he will financially not be able to pay damage compensation to the victim. Based on the comparison I recommend that the Dutch system also should have a mandatory insurance system for damage caused by job related accidents or occupational diseases.

The comparison showed us furthermore that the employer is not responsible if the employee caused damage by his gross negligence under German Law or if he acted with conscious recklessness under Dutch Law. If the employee is also uninsured, the victim does not have a solvent debtor to compensate his damage. The conclusion showed us that the Dutch as well as the German system finally are both not sufficient enough to provide an appropriate compensation to the victim. I recommend that the employer should always be responsible with the possibility to recover his paid damages from the employee who caused the damage. Only then will the victim obtain the necessary protection, unless the employer is insolvent or uninsured

Bibliography

Books

- Alt, H. J. W. (2009) Ongelijkheidscompensatie bij stelplicht en bewijslast in het civiele arbeidsrecht en het ambtenarenrecht: naar een eenvormig stelsel?, Deventer: Kluwer.
- Ascher-Vonk, I. P.; Bouwens, W. H. A. C. M.; Bakels, H. L. (2003) Schets van het Nederlands arbeidsrecht, Deventer: kluwer.
- Bar, C. Von (1998) The Common European Law of Torts, New York: Oxford University Press.
- Bar, von C. & Drobnig, U. (2004), The Interaction of Contract Law and Tort and Property Law in Europe, A comparative Study, Munchen: Sellier European Law Publishers GmbH.
- Bar, von C. (eds) (2009) Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, Munich: Sellier.
- Bona, M.; Mead, P. (2003), Personal injury compensation in Europe, Peopil Research Group: Kluwer.
- Brans, E.; Hermanus, P. (2001), Liability for Damage to Public Natural Resources: Standing, Damage, and Damage assessment, Den Haag: Kluwer Law International.
- Bruggemeier, G. (2004), Common Principles of Tort Law: A Pre-statement Of Law, London: BIICL.
- Busemann, A. (1999), Die Haftung des Arbeitnehmers gegenüber dem Arbeitgeber und Dritten Haftung im Vorvertragsstadium, während des Arbeitsverhältnisses und im Nachvertragsstadium, Berlin: Schmidt.
- Cane, P. (2006) Atiyah's Accidents, Compensation and the Law, New York: Cambridge University Press.
- Cooke, J. (2007), Law of Tort, Harlow: Pearson Education Limited.
- Cotter, B.; Brittendon, S.; Munkman, J. H.; (2006), Munkman on employer's liability, London: LexisNexis.
- Countouris, N. (2007), The changing Law of the employment relationship, comparative analysis in the European context, Aldershot: Ashgate.
- Draft Common Frame of Reference, (Outline Edition) (2009), Principles, Definitions and Model Rules of European Private Law, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group),

Based in part on a revised version of the Principles of European Contract Law, Edited by Von Bar, C.; Clive, E.; and Schulte-Nölke, H.; and Beale, H.; Herre, J.; Huet, J.; Storme, M.; Swann, S.; Varul, P.; Veneziano, A.; and Zoll, F., Sellier: European Law Publishers.

-Drongelen, van (2010) Werkgeversaansprakelijkheid voor arbeidsongevallen en beroepsziekten. Alphen aan den Rijn: Kluwer.

-European Group on Tort Law (2005), European Group on Tort Law, Principles of European Tort Law. Text and Commentary, Wien: Springer.

-Francesco Donato Busnelli, J. S. (2003), Unification of Tort Law: Liability for Damage Caused by Others , The Hague, the Netherlands: Kluwer law International

-Fischer, H. D. (2009), The German legal system and legal language, Oxon: Routledge-Cavendish

-Gerven, W. Van; Lever, J; Larouche, P. (2000), Tort Law, Ius Commune Casebooks For The Common Law Of Europe, Oxford Portland: Hart Publishing.

-Giesen, I. (2010), The reversal of the burden of proof in the Principles of European Tort Law, a comparison with Dutch tort law and civil procedure rules, Utrecht Law Review vol. 6, issue 1 (January) 2010, p. 22-32, see: (<<http://www.utrechtlawreview.org>>)

-Giliker, P. (2010), Vicarious liability in tort, a comparative perspective, Cambridge [u.a.]: Cambridge Univ. Press.

-Haak, K.F.; Koot, F.L. (2004), Bewuste roekeloosheid in het privaatrecht, Rotterdam: Erasmus Universiteit, Sanders Instituut.

-Hardy, Stephen (2010) Part I. The Individual Employment Relationship, p. 87-230 National

-Monographs Great Britain International Encyclopaedia for Labour Law and Industrial Relations

-Hardy, S. (2011) Labour Law in Great Britain. The Netherlands: Kluwer International B.V.

-Harpwood, V. (2000), Principles of tort law, Great Britain: Cavendish Publishing Limited.

-Howarth, D. (1995), Textbook on Tort, London: Butterworths.

-Hoekzema, J. W. (2000), Kwalitatieve aansprakelijkheid voor ondergeschikten en aansprakelijkheid voor onrechtmatige daad, Groningen: Boom Juridische uitgevers.

- Jacobs, A. (2011), *Labour and the Law in Europe: A satellite view on labour law and social security law in Europe*, Nijmegen: Wolf Legal Publisher (WLP).
- Hartkamp, A. S. (2011) *Towards a European Civil Code*, Nijmegen: Wolters-Kluwer: *Ars aequi*.
- Keulen, B. F.; Otte, M. (2006) *Opzet en schuld*, Nijmegen: *Ars Aequi Libri*.
- Kirchner, J.; Kremp, P. R.; Magotsch, M. (2010), *Key Aspects of German Employment and Labour Law*, Berlin: Springer.
- Koch, B. A.; Koziol, H.; Busnelli, F. D. (2002), *Unification of Tort Law: Strict Liability*, The Hague: Kluwer.
- Koziol, H. & Steininger, B. C. (eds) (2001) *European Tort Law*, Springer-Verlag/Wien.
- Kremp, P. R.; Kirchner, J.; Magotsch, M. (2010), *Key Aspects of German Employment and Labour Law*, Berlin: Springer.
- Loonstra, C.J.; Zondag, W. A. (2010) *Arbeidsrechtelijke themata*, The Hageu: Boom Juridische Uitgevers
- Lubach, R. D. (2008), *Aansprakelijkheid voor zelfstandige hulppersonen*, Deventer: Kluwer BV.
- Lunney, M.; Oliphant, K. (2008) *Tort Law: Text and Materials*, Oxford: Oxford Univ. Press.
- Magnus, U.; Micklitz, H. (2004) *Comparative analysis of national liability systems remedying damage caused by defective consumer services, a study commissioned by the European Commission; final report*, Berlin: Institut für Europ. Wirtschafts- und Verbraucherrecht.
- Markezines, B. S.; Unberath, H.; Odersky, W. (2003), *The German Law of torts: a comparative treatise*, Oxford: Hart.
- Markezines, B.S. (1990), *A comparative introduction to the German Law of torts*, Oxford: Clarendon Press.
- Oliphant, K., Wagner, G. (2012), *Employers' Liability and Workers' Compensation*, Berlin/Boston: Walter de Gruyter.
- Otto, H.; Schwarze, R.; Gamillscheg, F. (1998) *Die Haftung des Arbeitnehmers*, Karlsruhe: Verlag Versicherungswirtschaft (VWV).
- Pennings, F.J.L. (2007) *Nederlands Arbeidsrecht in een internationale context*, Deventer: Kluwer.

- Reimann, M., Zekoll, J. (2005) Introduction to German Law, The Hague: Kluwer Law International.
- Rieckers, O.; Spindler, G. (2011) Tort Law in Germany, the Netherlands: Kluwer Law International.
- Robbers, G. (2006) An introduction to German Law, Baden-Baden: Nomos-Verl-Ges.
- Rogers, W.V. H. (ed.) (2001), Damages for Non-Pecuniary Loss in a Comparative Perspective, Vienna and New York: Springer.
- Rogers, W.V. H.; Winfield, P. H. (2010), Winfield and Jolowicz on tort, London: Sweet & Maxwell.
- Salmond; Heuston, R.F.V. (1996) Salmond and Heuston on the Law of Torts. London: Sweet & Maxwell.
- Schmidt, M.; Weiss M. (2008), Labour Law and Industrial Relations in Germany, Alphen aan den Rijn: Kluwer Law International.
- Snijders, H. J.; Klaassen, C. J. M.; Meijer, G. J. (2011), Nederlands burgerlijk procesrecht, Deventer: Kluwer.
- Steele, J. (2007), Tort Law: Text, Cases, & Materials, Oxford: University Press.
- Verhulp, E. (2008), Disfunctioneren en wangedrag van werknemers, Deventer: Kluwer.
- Waterman, Y. R. K. (2009), De aansprakelijkheid van de werkgever voor arbeidsongevallen en beroepsziekten: een rechtsvergelijkend onderzoek, The Hague: Boom Juridische Uitgever.
- Weiss Manfred, Schmidt Marlene, Labour Law and Industrial Relations in Germany 4th Edition by: September 2008
- Werro, F.; Palmer, V. V. (eds.) (2004), The Boundaries of Strict Liability in European Tort Law, Durham, NC: Carolina Academic Press.
- Winiger, B.; Koziol, H.; Koch, B. A.; Zimmermann, R. (eds.) (2007), Digest of European Tort Law, Volume 1 Essential cases on Natural Causation, Wien & NewYork: Springer.
- Zmij, G.; Heiderhoff, B. (2009) Tort Law in Poland, Germany and Europe, München: Sellier, European Law Publisher.

Articles

- Barendrecht, J.M. (1998). Pure Economic Loss in the Netherlands. In E.H. Hondius (Ed.), *Netherlands Reports to the Fifteenth International Congress of Comparative Law* (pp. 115-135).
- De Knijff, D. M.; Ryazi, T. (2010), Beroepsfouten: hoe kan de kans erop worden verminderd? En als er aansprakelijk wordt gesteld: wanneer begint de verjaringstermijn te lopen, en vanaf wanneer wordt de benadeelde geacht te klagen?, *Advocatenblad : tevens orgaan der Nederlandsche Advocaten-Vereeniging* vol. 90 (2010) nr. 2 p.62-71.
- De Wolff, D. J. B. (2006), Schuld en boete, *Sociaal Recht*.
- Faure, M.; Hartlief, T.; Simoens, D. (2004), Schade door arbeidsongevallen en nieuwe beroepsziekten, *Rechtskundig weekblad* vol. 67 nr. 19.
- Giliker, P. (2011), Vicarious Liability or Liability for the Acts of Others in Tort: A Comparative Perspective, *Journal of European Tort Law*.
- Hartlief, T. (2011), Waar ligt de toekomst van artikel 6:170: in Wenen of in Brussel? *Ars aequi : onder auspiciën van de Vereniging van Juridische Faculteiten in Nederland* vol. 60 (2011) nr. 1 p.53-59.
- Honée 2008 J. Honée, 'Bewuste roekeloosheid in het arbeidsrecht. Een verheldering van een moeilijk begrip', *Ars Aequi* 2008, p.98 - 106
- Jähne, F. (2002), Die Auswirkungen des "Neuen Rechts" auf das Arbeitsrecht, *Anwaltskanzlei Baumgarte & Kollegen Hannover: Kronsberg Nachrichten*, see webpage: <<http://www.baumgarte-recht.de/sites/archiv/02-0419.html>>, accessed.
- Kidner, R. (1995), Vicarious liability: for whom should the employer be liable? *Legal Studies* Volume 15, Issue 1, pages 47–64, see webpage: (<<http://onlinelibrary.wiley.com/doi/10.1111/j.1748-121X.1995.tb00052.x/abstract>>), accessed 15 July 2012.
- Kruijswijk Jansen, J. (2008), Verhaal van verkeersboetes op werknemers, *Nieuwsbrief bedrijfsjuridische berichten* (2008) nr. 21 p.281-285.
- Loonstra, C. J.; Zondag, W. A. (2003), De bewust roekeloos handelende werknemer. Beschouwingen over het begrip 'bewuste roekeloosheid' in titel 7.10 BW, *Arbeidsrechtelijke Annotaties (ArA)*.
- Lubach, R. D. (2008), PETL: Liability for others, *Aansprakelijkheid, Verzekering & Schade (AV&S)*, nr. 17, p. 1-8.

- Parsons, P. (2002) Liability Rules, Compensation Systems and Safety at Work in Europe, The Geneva Papers on Risk and Insurance Vol. 27 No. 3 July 2002, p. 358 – 382.
- L. de Boer, ‘Aansprakelijkheidsverzekering moet aan nieuwe toekomst beginnen’, AV&S 2006-4.
- S.D. Lindenbergh, Arbeidsongevallen en beroepsziekten, Deventer: W.E.J. Tjeenk Willink 2000.
- M. van Ewijk, M. Engelen en C. van der Werf, Werkgeversaansprakelijkheid bij beroepsziekten. Eindrapport, Doetinchem: Elsevier 2001.
- B. Barentsen, Monografieën Sociaal recht. Arbeidsongeschiktheid. Aansprakelijkheid, bescherming en compensatie (diss. Leiden), Deventer: Kluwer 2003.
- G.M. van Wassenae, Monografieën BW. Schadevergoeding: personenschade, Deventer: Kluwer 2008.
- S.D. Lindenbergh, ‘Schending van een verzekeringsplicht als grond voor aansprakelijkheid’, AA 2008, p. 735-742.
- Y.R.K. Waterman, ‘De directe verzekering voor arbeidsongevallen en beroepsziekten. Een terugkeer naar de Ongevallenwet?’, Arbeid Integraal 2001, p. 17 e.v.
- Y.R.K. Waterman, De aansprakelijkheid van de werkgever voor arbeidsongevallen en beroepsziekten. Een rechtsvergelijkend onderzoek (diss. Rotterdam), Den Haag: Boom Juridische uitgevers 2009.

Dissertations

- De Wit, M. A. C. Het goed werkgeverschap als intermediair van normen in het arbeidsrecht, (diss. 1999) Tilburg: Universiteit van Tilburg.
- Raulf, M., Die Haftung des Arbeitgebers für Schaden des Arbeitnehmers bei betrieblich veranlassten Fahrten mit dem Privat-Pkw, (diss. 1999).
- Schwartzek, T. (2005), Die Mankohaftung im Arbeitsverhältnis, Bonn Uni Frankfurt am Main [u.a.]: Lang, (diss. 2003) Potsdam Uni.

Internet

- Anwaltskontor, Arbeitsmängel führen zu persönlicher Haftung, Az.: 7 Za 3 877/01, (www.archiv.anwaltskontor.com/12.html); choose: Vermischtes und älteres/2002/14-02-2002).
- European Group on Tort Law EGTL (2005), Principles of European Tort Law, (<http://civil.udg.edu/php/index.php?id=129/> >).
- European Judicial Network in Civil and Commercial Matters (2007), Procedural Time Limits – Germany, (www.ec.europa.eu/civiljustice/time_limits/time_limits_ger_en.htm >).
- Jähne, F. (2002), Die Auswirkungen des "Neuen Rechts" auf das Arbeitsrecht, Kronsberg Nachrichten (www.baumgarte-recht.de/sites/archiv/02-0419.html >).
- James's blog (December 04, 2010), Vicarious liability of employers in German law, (www.blogs.warwick.ac.uk/jnetto/entry/week_9_vicarious >).
- Kuschel, T. Arbeitnehmerhaftung, Deutsche Angestellten Krankenkasse DAK, (www.bewerberaktiv.de/pdf/01194.pdf >).
- Sharon, P. (2008) Limitation period in reinsurance, comparative study, AIDA Reinsurance Working Party: Levitan Sharon & Co., Advocates and Notaries, (www.aida.org.uk/docs/Limitation%20Report.doc >).
- Swart en de Schepper advocaten, Employees only liable for damage or loss in exceptional circumstances, (www.employment-lawyer.nl/salarypayment/liability-damage-by-employees/employees-only-liable-for-damage-or-loss-in-exeptional-circumstances.html >).
- Eurofound, Industrial Relationships, 'Employee' (www.eurofound.europa.eu).
- D.A.S. Rechtsschutzversicherung (2009) 'Arbeitnehmerhaftung, Wenn der Kaffee den PC lahmlegt... Wann haften Arbeitnehmer für Schäden?' (www.fair-news.de/pressemitteilung-19330.html >).
- (www.gesetze-im-internet.de/englisch_bgb/ >).
- Keine Arbeitnehmerhaftung trotz Rotlichtverstoßes - LAG Hessen vom 27.05.2008 - Az. 12 Sa 1288/07 25. Februar 2009 (www.mahnerfolg.de/urteile/index.php/keine-arbeitnehmerhaftung-trotz-rotlichtverstosses/ >).
- (www.rechtspraak.nl >).
- Van Schaik c.s. Advocaten, 'Verzekeren, Foutje bedankt!' (www.vanschaikcs.nl/index.php?id=29&mrzid=60 >).