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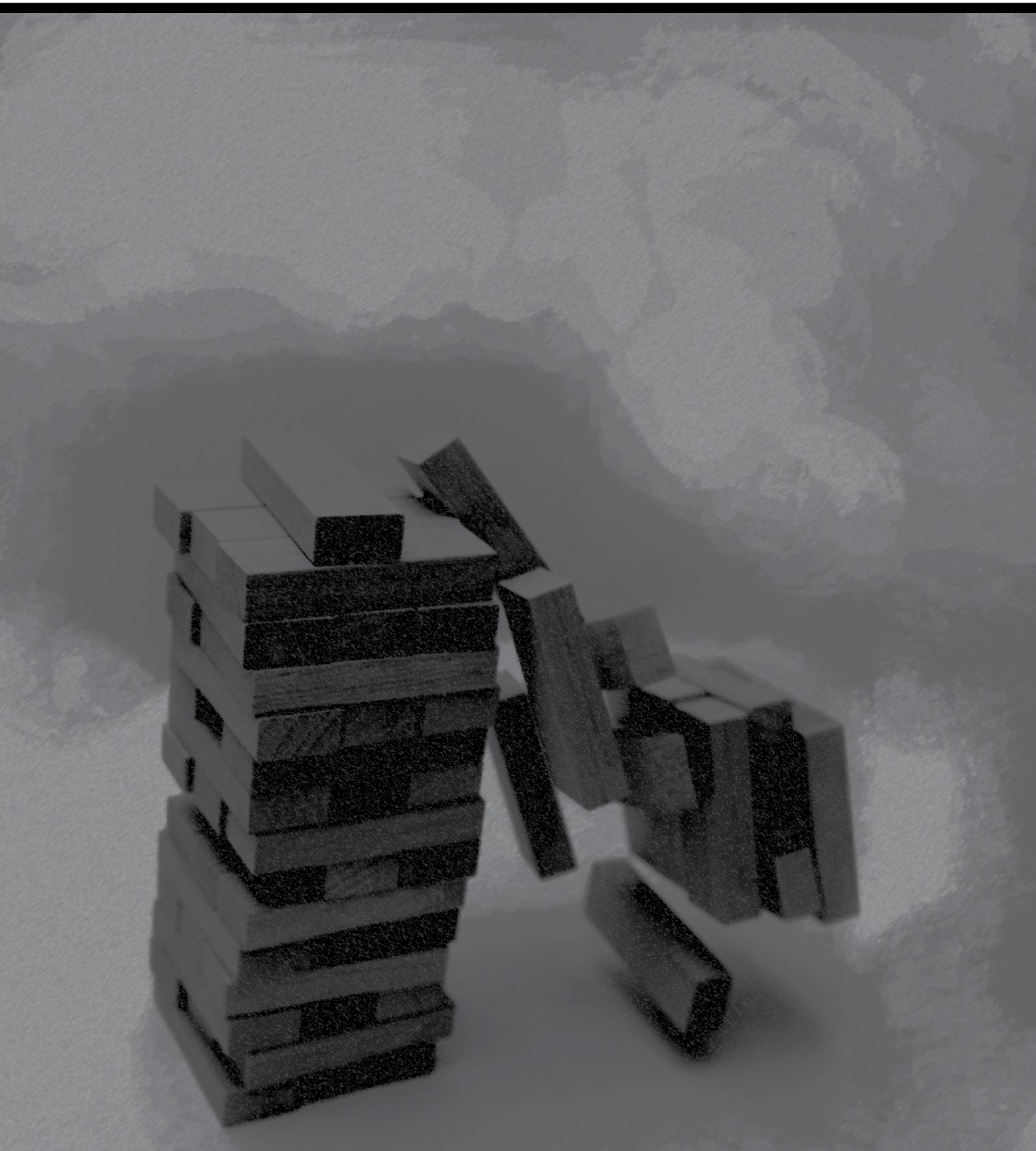

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Dutch personal injury law

Introduction

The principle of full compensation or restitution in integrum is the basic principle underpinning the law of damages in the Netherlands.[1] A person liable shall put the victim – so far as possible – in the position he would have been had the duty not been broken.[2]

The main source of the law of damages in personal injury cases is the Dutch Civil Code (*Burgerlijk Wetboek*, or BW). Articles 6:95-6:110 of the Civil Code contain rules in relation to the heads of loss and the methods of assessment of the amount of damages to be awarded.

These articles however, leave considerable scope to judicial interpretation. It is therefore important to always take into consideration case law.

The articles apply irrespective of the basis of liability (tort or breach of contract). Rules regarding liability can be found elsewhere in the Civil Code and other Codes.

Restriction on right to full compensation

Although the basic principle is the right to full compensation, this may be restricted in case an award of full compensation would in the circumstances of the specific case give rise to an unacceptable result (article 6:109 BW):

> '1. the judge may reduce a legal obligation to repair damage if awarding full reparation would lead to clearly unacceptable results in the given circumstances, including the nature of the liability, the juridical relationship between the parties and their financial capacity;
> 2. the reduction may not exceed the amount for which the debtor has covered his liability by insurance or was obliged to do so;
> 3. any stipulation derogating from paragraph 1 is null.'

Article 6:110 BW adds another restriction. This concerns the power to set general limits on compensation regulation. Article 6:110 BW states:

> 'Maximum liability amounts can be set by regulation, so that the liability which may arise from damage does not exceed that which can be reasonably be covered by insurance. Separate amounts can be fixed according to, amongst others, the nature of the event and of the damage, and the ground for the liability.'

The article has so far been scarcely used. There is however a specific provision setting limits in case of personal injury whilst using public transport (bus, boat, tram, taxi) of a victim.[3]

Recoverable losses

All damages as a result of the liable act which are in causal relation to this act should be recovered. This means that all costs as a result of a tort or breach of contract should be paid, as well as lost income.

Loss of earnings is calculated by comparing the income after the accident with the hypothetical situation had the accident not occurred.[4] The actual loss constitutes the loss of earning capacity. As the hypothetical situation without the accident has to be calculated and the loss of earnings usually lay in the future it is often calculated by actuaries on the basis of medical and employment expert reports.

The duty to mitigate losses can give rise to an obligation to undergo further training.[5]

Even when a victim is not employed at the time of the accident compensation for loss of earning capacity can be claimed.[6]

Medical costs can be claimed. They are usually covered by a first party medical expense insurer. The injured person has a broad margin of choice as to how he wishes to recuperate, both mentally and physically. The Dutch Supreme Court allows recovery of all reasonable costs, incurred by the victim in relation to his recovery, taking into account all the circumstances, including what is medically necessary and the personal situation of the victim.[7] The victim has the obligation to mitigate his loss, including the injury. This means that in some cases he might not refuse treatment.

Where nursing care is provided not by professionals but by parents, compensation is provided when certain criteria are met.[8]

Interest is due from the moment the damage arises. Interest for non-pecuniary damages is due from the date of the accident/tortuous event. The interest rate is set by the legislature (Art 6:120 BW).

According to Dutch law (Art 6:95 in combination with Art 6:106 BW) there is a limited right to non-pecuniary damages. According to Art 6:97 BW the judge is entitled to quantify the total amount of damages suffered. If the extent of the damages cannot be determined precisely, it shall be estimated.

A victim has the right to equitably determined reparation of harm other than patrimonial damage.

Article 6:106 BW states:

'1. The victim has the right to an equitably determined reparation of harm other than patrimonial damage:

a. if the person liable had the intention to inflict such a harm;

b. if the victim has suffered physical injury, injury to honor or reputation or if his person has been otherwise afflicted;

c. if the harm consist of injury to the memory of a deceased person inflicted upon the non-separated spouse, upon the registered partner or upon a blood relative up to the second degree, provided that the injury took place in a fashion which would have given the deceased, had he still been alive, the right to reparation of injury to honor or reputation.

2. The right to reparation referred to in the preceding paragraph cannot be transferred or seized, unless agreed upon by contract or unless an action for such reparation has been instituted. For transfer by general title it is sufficient that the title-holder has notified the other party that he claims reparation.'

Article 6:106, para 1b refers to a person who has been otherwise afflicted. This phrase if open to judicial interpretation.

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

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

The Dutch Supreme Court has set out some basic rules. First of all a judge has to take into consideration all circumstances of a particular case.[9] More specifically, a judge should look at the injuries and the consequences of the injuries on the victim's life. Furthermore, the judge has to pay attention to case law in similar cases. This process is simplified by the collection of abstracts in a special edition in the review of traffic law '*Verkeersrecht*', the '*Smartengeldbundel*' which is updated every three years and provides index-linked awards. Judges can also refer to awards for non-pecuniary damages in other countries, albeit that the award can not be solely determined on that basis.[10] A judge may also take into consideration the nature of the liability. In practice this factor is rarely made explicit nor has an explanation of any award on this basis been provided.

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

According to Art 6:106(2) BW the injured party should notify the defendant that he or she wishes to claim non-pecuniary damages. If an injured party dies before he has notified the defendant the estate cannot claim these damages, as Art 6:106(2) states that the right to reparation referred in Art 6:106(1) BW cannot be transferred or seized unless agreed upon by contract or unless an action for such reparation has been instituted. For transfer it is sufficient that the claimant notifies the other party that he wishes to receive an award for pain and suffering.

Recoverable losses in death cases

Damages of a primary victim

Damages are considered as a patrimonial right.[11] All rights of a patrimonial nature pass to the heirs according to Art 4:182 BW. For the passing of claims for pecuniary damages no further legal requirement need to be met. As stated above, for the passing of a claim for non-pecuniary damages it is necessary that the deceased has notified the defendant that he wants to claim this head of damages. This extra legal requirement is criticised in legal writing.[12]

Secondary victims

Dutch law recognises the right to bring a claim on behalf of secondary victims.

Article 6:108 BW describes which persons are entitled to bring a claim in a fatal accident case and which damages they may claim. The group of persons is limited to spouses, registered partners, minor children and people who the deceased actually maintained or was obliged to maintain by court order.

According to Art 6:108 BW these persons can only claim costs of funeral and burial up to a level that is in accordance with the standard of living of the deceased and loss of support. Other pecuniary losses can't be claimed, with the exception of lawyer's fees.

There is no right to claim non-pecuniary losses of secondary victims.

In principle a husband or wife and/or his/her children can claim compensation for the economic loss arising from the loss of support provided by the partner who was a housewife.[13]

In case a surviving spouse remarries his or her claim for compensation ends.[14]

Lawyer's fees

A distinction is made between costs of a procedure and the out of court lawyer's fees.

According to Art 6:96 BW, costs of legal assistance and other disbursements which are made before or without the need to issue proceedings are to be compensated in full. They should be reasonable and reasonably made. This means that it should be reasonable to incur these costs and their extent should also be reasonable.

In case of court proceedings other rules apply. According to Art 241 of the Dutch Code of Civil Procedure (*Rechtsvordering* or RV) legal fees are awarded on a fixed basis. The courts use tables. The awards do not cover the actual lawyer's fees.

An exception to this rule is set in a new law which has recently entered into force. According to this new law a victim can ask for a decision for a part of the dispute provided that this will assist to settle his case (Art 1019w RV). According to this law, fees should be assessed in accordance with Art 6:96 BW instead of Art 241 RV, if liability has been accepted (Art 1019aa RV). This means that it is now easier for a victim to issue proceedings.

Personal injury lawyers generally charge on an hourly rate basis. They are not allowed to charge on a contingency or conditional fee basis. Claims adjustors are not bound by these rules. There is an ongoing discussion to allow contingency or conditional fees in certain cases for lawyers. If this will ever happen remains to be seen.

Taxation

When calculating damages and more specifically loss of earnings the starting point is the net income after deduction of tax, social insurance and pension contributions. No income tax is due either on awards for permanent loss of earnings or on any other head of damages.

However a victim has to pay wealth tax (Box 3 tax) of 1.2 per cent on the likely interest (which is set by legislation) earned from an award of damages.

When calculating damages this tax is included as part of damages and will be paid by the liable party.

Limitation law

The general article on limitation of damages claims is Art 3:310 BW. This article is applicable for any claim for damages irrespective of the cause of action. The article describes two limitation periods, a short one of five years and a long one of 20 or 30 years.

The limitation period for minors starts to run from the date they become 18 years old (Art 3:310(5) BW). There is no exception for disabled or elderly people under Dutch law.

The short or 'relative' limitation period of five years starts from the day following that on which the victim became aware of both the damage and the identity of the responsible person. The long or 'absolute' periods are 20 or 30 years following the event which caused the damage. There are however a few exceptional cases in which the Supreme Court ruled that the defendant could not apply this period,[15] as this would not be reasonable given the circumstances.

Some particular causes of action have their own limitation periods, for instance:

- Art 6:191 BW regarding product liability – three years after the victim became aware of the damage with a maximum of ten years;
- Art 10 WAM, road traffic accidents direct action against the insurance company – three years after the date of the accident;
- Art 8:1751 BW, personal transportation – three years after the accident;
- Art 8:1753 BW – there is a period of three months after the accident in which a victim must give notice of his claim to tort feasor;
- Montreal Convention – 2 years' right to direct action against the insurer article; and
- Art 7:942 BW – three years' limitation period.

Stopping the limitation period

The limitation period can be stopped by writing a letter to the defendant in which the right to performance is unequivocally reserved. Another way to stop the limitation period is by a writ which is serviced by a process server or by issuing proceeding.

The limitation periods starts to run for another five years the following day (Art 319 BW). If court proceedings have been issued the limitation period start to run after these proceedings have been finished (Art 3:316 (2) BW).

Article 10 (5) WAM (*Wet aansprakelijkheid motorrijtuigen* – Motor Vehicle Insurance Act) provides a particular way of stopping the limitation period. The period of prescription with respect to an insurer is interrupted by any negotiation between the insurer and the injured party. A new period of prescription starts running from the moment one of the parties sends a letter to the other, by registered mail, or when a writ is served by a process server, in which it is made clear that one party is terminating the negotiation.

A similar way of stopping the limitation period applies to the right to direct action against a liability insurance (Art 7:942 (2,3) BW).

In a number of cases, such as an accident in trams, trains and buses, or plane crashes, the limitation period can only be stopped by issuing proceedings. It is therefore important to check which limitation period applies and how it should be stopped in order to avoid mistakes.

Medical experts in PI law

Medical experts play an important role in the assessment of the medical situation. The opinions of medical experts are important but not decisive.

Usually both parties jointly agree on appointing an independent expert. It is, however, possible for each party to appoint their own medical expert. Parties can also ask a judge to appoint an expert prior to issuing proceedings (pre-trial preliminary expert reports).

Employment experts, case managers and other experts in PI law

In cases where an injured person is incapable of work it is common practice that parties agree to appoint an employment expert whose task can be twofold. He will assist the claimant in re-integrating or further training and finding a job which he or she can do despite the injuries. An employment expert can also sort out the hypothetical situation would the accident not have occurred.

In the Netherlands there is a growing need for a case manager who assists the injured person with sorting out social security benefits, aids, equipment, adaptations to the house or car, and other care needed.

In case of future losses of earning and loss of household chores and DIY the loss is usually calculated by an actuary/loss adjustor.

Right to recourse and subrogation in personal injury claims

The basic principle of Dutch tort law is that only the person who has sustained damage as a result of an unlawful act can claim compensation from a liable party. If this person received compensation from a third party he can't claim this from the liable party. This is a consequence of Art 3:303 BW which states that a person has no right of action where they lack sufficient interest.

Only a person's own damages and costs can be claimed. This means that there is no claim for compensation for damages sustained by a third person. An exception to this rule is Art 6:107 BW:

> '1. Where a person suffers physical or mental injury as a result of an event for which another person is liable, that other person must not only compensate the loss of the injury but also defray the costs which a third person, otherwise than pursuant to insurance, has incurred for the benefit of the injured person and which the latter, had he incurred them himself, would have had against the injured person.'

This means that the victim themselves can't claim compensation for damages paid by a third party with the exception of Art 6:107 BW. The question is how third parties can claim damages from the liable party. It concerns the question of the right of recourse.

The construction of the Dutch right to recourse is based on two principles. First the principle that a victim can't receive compensation twice and secondly that the tortfeaser should not benefit from the fact that a third party pays compensation.

The two main bases for recourse in personal injury cases are subrogation (Art 6:12 BW and Art 7:962 BW) and the statutory rights of recourse.

Subrogation

Article 6:12 BW states as follows:

> '1. Where the obligation is discharged for the account of a jointly and severally liable obligor to an extend in excess of his share, such obligor shall be subrogated for such excess to the rights of the obligee against co-obligors and third parties, in each case up to the share of the co-obligor or third party in accordance with the relationship with that obligor.
> 2. Where the claim relates to an obligation other than for the payment of money, it shall be converted by the subrogation into a right to claim money payment of equal value.'

According to Art 7:962 BW, a claim can be transferred to a third party insurer. Article 7:962 BW states:

> '1. Where the insured has a claim for compensation against third persons arising otherwise than from insurance on account of a loss suffered by him, those claims shall be transmitted to the insurer by way of subrogation insofar as the insurer indemnifies such loss, whether or not obliged to do so. The insured must refrain from conduct which will impair the right of the insurer against such third person after such a risk has materialised.
> 2. The insurer may not exercise the claim to which the insurer is subrogated or which the insurer acquired by assignment to the detriment of the insured's right to compensation.
> 3. The insurer will not acquire a claim against the policyholder, a co-insured, the spouse from whom the insured is not judicially separated or the registered partner or other life companion of an insured, nor against blood relatives in the direct line of an insured nor against an employee or employer of the insured or against a person employed by the same employer as the insured. This rule does not apply insofar as such a person is liable towards the insured on account of a circumstance which if attributable to the insured, would have impaired the former's right to payment under the insurance.'

This article does not apply for benefit insurances. Furthermore rights arising from Arts 165, 166, 169, 171, 173, 174, 175, 176, 177 and 185 as well as from Sections 4 of Title 6, 4 of Title 11, 1 of Title 14 and 4 of Title 19 of Book 8 are not subject to subrogation, except to the extent that the insurance payment concerns the liability of the insured person and that another person was also liable pursuant to those articles (Art 6:197(2) BW).

Article 165 concerns liability of persons with a person under the influence of a mental or physical handicap and the liability of persons who have supervision over such persons. Article 166 concerns group liability. Articles 169-177 BW concerns liability for persons and things. Article 185 concerns product liability. The sections of Book 8 concern liability for dangerous substances onboard seagoing vessels, onboard inland waterway vessels, onboard vehicles and onboard railway vehicles.

In those cases the insurer has to found his claim on other articles, such as Art 6:162 BW (general an article regarding tort), which makes it more difficult to receive compensation.

Under the Care Insurance Act of 2006 it is compulsory for all Dutch residents to take out (private) healthcare insurance. A premium is payable. The insurance covers medical expenses, some equipment and sometimes dental and pharmaceutical costs. It is not means-tested. This health care insurer has a right to claim expenses paid, provided these are paid in connection with a person's injuries. This is a subrogatory right.

Right of recourse set by law

In a few cases, set by law, a third party will have a separate right to take recourse. This is the case with employers (Art 6:107a BW), and with governmental bodies that pay benefits. These are the Work and Income Ability to Work Act (Art 99 WIA), the Invalidity Insurance Act (Art 90 WAO), the Invalidity Insurance Self-employed Act (Art 68 WAZ), Invalidity Insurance Young Disabled Persons Act (Art 60 WAJONG), the Sickness Benefits Act (Art 52a ZW), the Surviving Benefits Act (Art 61), the General Exceptional Medical Expenses Act (Art 65b AWBZ) and the Military Invalidity Provisions Act (Art 8 WAVM).

The right of recourse is limited to civil claims. Furthermore, according to Art 6:197 BW a number of civil claims are excluded. According to the so-called temporary rules regarding rights of recourse, Arts 165, 166, 169, 171, 173,174,175, 176, 177 and 185, and Sections 4 of Title 6, 4 of Title 11, 1 of Title 14 and 4 of Title 19 of Book 8 do not apply

in the determination of the total amount for which there would be liability according to private law, such determination being required for the calculation of the amount for which there is recourse pursuant to the above mentioned parties.

Most of the regulations which enable recourse exclude recourse from the employer and colleagues unless the damage was caused on purpose or as a result of reckless behaviour. Furthermore recourse on family members is usually excluded.

Notes

1 Hoge Raad 17 January 1964, NJ 1964, 322 (Oranje Lijn/Bohne).
2 A R Bloembergen, S D Lindenbergh, *Schadevergoeding: algemeen, deel 1*, (2nd Edn) (Kluwer, 2001), p 6.
3 Article 8:105 BW and Art 8:110 BW and Decree of 24 November 2008, which entered into force on 1 March 2009. According to this decree the present limit for injuries of passengers in road traffic accidents is €1,000,000. For train and boat accidents there is a limit of €137,000.
4 HR 15 May 1998, NJ 1998, 624.
5 HR 5 October 1979, NJ 1980, 43 (Tauber/Verhey). See also A Keirse 2003, pp 99-100. And A R Bloembergen, *Schadevergoeding bij onrechtmatige daad* (Kluwer, 1965), p 402 and Keirse 2003, p 117.
6 HR 15 May 1998, NJ 1998, 624; VR 1998, 121.
7 HR 2 November. 1962, NJ 1963, 61 m. nt. HB.
8 HR 28 May 1999, NJ 1999, 564, m. nt. ARB
9 HR 8 July 1992, NJ 1992, 714, VR 1992, 133.
10 HR 17 November 2000, NJ 2001, 215 VR 2001, 9.
11 A legal claim is a patrimonial right in the sense of Art 3:6 BW and can form part of the estate of the victim.
12 S D Lindenbergh, *Smartengeld* (Kluwer, 1998), pp 331-332.
13 HR 16 December 2005, NJ 2008, 186 *Pruisken v Organice* and HR 11 July 2008, NJ 2009, 385 *Bakkum v Achmea*.
14 *Nationale Nederland v Het Algemeen Burgerlijk Pensioenfonds*, HR 29 April 1994, NJ 1995, 609 (with commentary by CJH Brunner).
15 HR 28 April 2000, NJ 2000, 430 (m.n. PAS under NJ 2000, 431).

A full measure of damages: effect of inflation in Nigeria

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Introduction

Every plaintiff hopes to obtain from the court adequate compensation for injuries suffered at the hands of the defendant. Owing to the limits of human intelligence and the demands of fairness, the measure of the adequacy of damages, as all lawyers know, is not 'a full measure pressed down, shaken together and running over…'.[1] Rather the primary aim of damages in negligence, as in all tort cases, is to put the plaintiff, as far as money can do it, in the position he was in before the injury.[2] But that is not an easy task in view of the time value of money, especially in an economy such as ours, in which inflation is high and the value of money depreciates rather quickly and unexpectedly. The matter is made more disturbing because of regular delays in legal proceedings: on average it takes as long as three years to try a case at the court of first instance.

Common approach

Most practitioners attempt to ameliorate the effect of inflation and devaluation of the currency by claiming pre-judgment interest (ie interest running from the date of injury until the date of judgment) and post-judgment interest (ie interest on the judgment debt running from the date of judgment until liquidation). But as the Nigerian Supreme Court held in *Ekwunife v Wayne (West Africa) Ltd*,[3] the success of the practice of claiming pre-judgment interest depends on pleading and proving the plaintiff's entitlement thereto, while the claim for post-judgment interest is usually awarded because of the power given to the courts under the Civil Procedure Rules applicable to the various courts in Nigeria.[4] In *Ekwunife*, the Supreme Court held that a claim for payment of interest can only succeed if it is based on an agreement of the parties or is prescribed by law. None of the states of the Federation of Nigeria has a law permitting award of pre-judgment interest.[5]