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Alex-Geert Castermans, Thijs Beumers, Ruben de Graaff, Gitta Veldt, Benjamin Moron-Puech, Maxime Cormier, Clément Cousin, Alice Dejean de La Batie, Emmanuelle Lemaire, Marie Leveneur-Azémar, et al.

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Report on the french *avant-projet de réforme de la responsabilité civile*

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Leiden/Paris, 30 July 2016

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0.0. Introduction - main ideas about the avant-projet de réforme [Clément Cousin]

0.1. Introducing the Grotius-Pothier research group.

The Grotius-Pothier research group is a bilateral group comprised of researchers from the University of Leiden and Panthéon-Assas Paris II University. The group is composed of both experienced and early career researchers in private law. This group is led by Prof. Bénédicte Fauvarque-Cosson and Prof. Alex Geert Castermans.

The group has previously worked on the French *projet d'ordonnance de la responsabilité civile*. In coordination with the *Bureau du droit des obligations* of the French Justice ministry, it is currently working on the French *avant-projet de loi de la responsabilité civile*.

0.2. Why Dutch Law?

The Dutch Civil Code was reformed in 1992 and has therefore been tested for almost 25 years. Since its reform, it has proven to be a Code that easily adapts to new rules of law. At this point the Dutch Civil Code provides an inspirational model for the modernisation of essential parts of the French Civil Code.

0.3. Methodology

After a meeting in Paris during which the director of the *bureau de droit des obligations* explained some of the needs of the ministry to us, we chose two main topics of study: the mitigation of damages and concurrence of action. However, beyond this focus some of our members were able to shed light on some further particular problems. This led us to create an additional section dedicated to some separate themes such as private penalty or the question of links. From this experimental work the topic of imputation and causation was addressed.We also added some relevant topics such as proportionality and transition law.

More precisely, we conceived our work as an exchange between laws, leading us to build two national reports and comparing them.

0.4. Objectives

The objective of this work is to propose some modifications for the *avant projet de loi de la responsabilité civile*. Cf. the annex in which the propositions are summarized.

1. Varia

1.0. Private penalty [Nathan Allix]

Article 1266 is one of the main innovations proposed by the French Ministry of Justice. It creates civil fines. Civil fines are traditionally presented as fines, i.e. monetary sanctions[1] paid to the State rather than to victims, of a rather low amount, in order to punish breaches of a civil duty or procedural rules. More recently, the law also allowed for much higher civil fines on occasion[2]. An obvious example is the fine provided for by article L. 442-6 II of the French Commercial Code in order to punish certain restrictive practices: since the last legal reforms, this fine can now reach a high maximum that reminds us of the amount provided for by article 1266. However, article 1266 offers an unprecedented level of generality. This generality, together with the possibility to have severely high amounts, might be problematic in the context of certain core principles[3].

The genesis of this article may be traced back to a report ordered by Ms. Taubira, the French Minister of justice at the time[4], concerning damages to the environment. This report suggested the creation of article 1386-23 of the Civil code, which would have placed the new rule very close to article 1266 of the reform proposal[5]. Therefore, the report's arguments in favour of civil fines, although initially limited to damages to the environment, can legitimately be considered relevant - at least to some extent - to understand the Ministry's proposals. These arguments are of two kinds: the lack of efficiency and flexibility of Criminal Law regarding certain types of behaviour, and the superiority of civil fines compared to damages and punitive damages[6].

Beyond the sole principle of such fines, a few remarks can be made concerning their modalities. Formally, article 1266 belongs to Chapter IV about the effect of liability. This choice, probably partly explained by the intellectual link between damages, punitive damages and civil fines[7], may seem surprising. It is part of a more general tendency to rehabilitate the normative function of civil liability[8]. It would be interesting to look at the reference to "the author of the harm". Does it mean that civil fines are

[1] This idea is linked to inflation: the civil fine provided for by article 50 of the Civil code was initially equal to the rate of criminal fines.
[2] The fine provided for by article L430-9 of the *Code de l'urbanisme* may reach a maximum amount of 75000 euros.
[3] In particular the principles of Legality and of *ne bis in idem* (double jeopardy).
[4] For compensation of damages to the environment: report of the study group organised by Ms Christiane Taubira, Ministry of Justice, September 17th 2013.
[5] Two differences can be noticed: the word "*intentionnellement*" was replaced by "*délibérément*" and the expression "*faute grave*" by "*faute lourde*".
[6] The rejection of punitive damages seems to have played an important role in the development of civil fines in France. The introduction of such fines at article L. 442-6 III of the Commercial Code had already triggered the same kind of debates about the choice between punitive damages and civil fines (D. Fasquelle, *Concurrence déloyale : amende civile ou dommages punitifs*, GP 2001 p.1681).
[7] Civil fines are indeed partly considered as punitive damages that would not benefit the victims. This difference concerning the beneficiary could be understood as neutral or, on the contrary, as a hint about the different nature of the fines compared to punitive damages.
[8] The word "*rehabilitation*" is a bit clumsy: indeed, there is a difference between the normative role traditionally played by civil liability - sometimes assimilated with the compensatory goal of liability - and a purely repressive mechanism.

excluded when a person's bad behaviour had no harmful consequences, even when this person failed to reach their goal? The scope of civil fines is also very interesting: gross negligence may sometimes be a blurry concept, and intentional fault is better known in Criminal Law than in a civil context[9]. Moreover, it would be valuable to explore the normative value of the guidelines provided for in order to determine the amount of civil fines, as well as the triple upper limit imposed on this amount.

This modification is rather disturbing since the ECHR could consider, thanks to her Engel jurisprudence, that this provision is a penal one. Considering this risk, we advise to modify this provision by making it more precise, limiting it to particular cases in order to fulfil the legality and previsibility of criminal offences and penalties.

1.2. Distinguishing physical damage from other damages [Clément Cousin]

1.2.1. Project analysis

One of the major distinctions in the *avant-projet* is between physical and non-physical damages.

We shall exclude the special provision on traffic accidents. When there is a physical damage, product liability is not possible (art. 1290); the only possible liability is the extra-contractual one (art. 1233 al. 2) - in case of indetermination of the author of a damage included in a group, the Chancellerie is thinking of restraining the solidarity between the members of the group to physical damage. Concerning the exoneration of responsibility, the heavy fault ("*faute lourde*") of the victim is able to limit the responsibility of the author. Lastly, an entire sub-section dedicated to the compensation for physical damages has been created.

The distinction between physical and non-physical damages is used in Dutch law. When a physical damage is caused, the victim has the right to an equitably determined reparation (art. 106 book 6, 1.b.) and the liable person has to repair the damage itself but also the costs incurred to a third person in the benefit of the injured.

The comparative analysis shows the quite complex and developed solution of the *avant-projet*. Choosing this, the *avant-projet* designs a real regime for the physical damage.
Beside this, we can notice that there is no definition of what constitutes a physical damage. The Dutch civil code includes "physical or mental injury", including mental health in its scope. Mental health and physical health are more and more linked because of the concept of illness. It is, thanks to psychiatry, possible to distinguish mental illness and moral prejudice. Does the Chancellerie want to limit physical damage to non-mental illness or rather to adopt an inclusive definition of health such as the WHO's

[9] Not to mention the articulation of these two notions, and the problems associated to them (for example: can an intentional fault constitute gross negligence?)

definition ("Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity[10]").

Including mental injury would rejoin article 31 of the law of 1985 which includes mental injuries suffered. This prejudice should be distinguished from the moral prejudice which is not caused by an infirmity.

1.2.2. Conclusion

Avant l'article 1268, insérer un article 1267-1 rédigé comme suit:

"Le dommage corporel s'entend des lésions physiques et psychiques pathologiques."

1.3. Justifications and civil liability [Alice Dejean de la Bâtie]

Article 1257 of the Avant-projet is an original addition to the Civil Code as it would integrate Justifications - a type of legal defense - into the Code. Until now, justifications are only provided for in the Criminal Code, which led civil courts to adapting them in order to take them into account in their decisions. The main idea is that the existence of justificatory circumstances, such as self-defense or the state of necessity, not only prevents criminal liability from arising, but is also incompatible with the presence of a civil fault. Hence, there cannot be any civil liability grounded on the current articles 1382 and 1383 of the Civil Code.

Article 1257 (first part):

Le fait dommageable ne donne pas lieu à responsabilité pour faute lorsqu'il était prescrit par des dispositions législatives ou réglementaires, imposé par l'autorité légitime ou commandé par la nécessité de la légitime défense ou de la sauvegarde d'un intérêt supérieur.
Harmful events do not give rise to fault-based liability when they were compulsory under legislative or administrative provisions, or imposed by a legitimate authority, or ordered by the necessity of self-defence or of the safeguard of a superior interest.

Compared to the current state of the law, which is the result of Civil court decisions and Criminal court rulings on civil matters, this proposal goes back to a traditional understanding of justification. Not only does it borrow the different justifications provided for by the Criminal Code (1.3.1), but it limits their effects to fault-based civil liability (1.3.2).

[10] Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19-22 June, 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, p. 100) and entered into force on 7 April 1948.

1.3.1 Types of Justifications

1.3.1.1 General justifications

The French Criminal Code provides for three main justifications: the order or authorisation of the law or of a legitimate authority (art. 122-4), self-defense (art. 122-5) and the state of necessity (art. 122-7). Article 1257 of the *avant-projet* seems to be willing to keep this trilogy, but it does so in an incomplete way.

1.3.1.1.1 Order and authorisation of the law

The first difficulty arises with the mention of events "compulsory under legislative or administrative provisions". This is a partial reference to art.122-4 of the Criminal Code, but is limited to the justification provided for by an order of the law, and does not include the justification provided for by an authorisation of the law. This is surprising since authorisation of the law has an important justificatory effect on civil liability, for example concerning medical treatments : the surgeon cutting his patient's arm open does not do so because he is legally required to, but he is allowed, as a surgeon, to do so. His action is neither a crime nor a civil fault, because it is justified by an authorisation of the law. Hence, it is interesting to notice that the project seems willing to exclude the authorisation of the law from art. 1257. This may be interpreted either as a complete exclusion - which would be excessive considering the important effect of the justification - or as a choice to modulate differently the effect on civil liability of the order and the authorisation of the law. Indeed, whereas the order of the law will always prevent civil liability from arising, it is possible to imagine cases when a harmful event was authorised by the law - and exclude criminal liability - but remained faultive and may therefore ground civil liability. The difference here is that the person acting by order of the law is not really given any choice as to how they could act, and it would be contradictory to hold them liable for complying by the law. On the contrary, the person acting by authorisation of the law makes the choice to behave in one way or another, and if this choice caused a harm, the fact that the act is criminally justified should not prevent civil liability from arising in cases where the author of the harm made a choice that was clearly the 'wrong' one, in the sense that it was of no use to society.

In conclusion, we could say that the justification provided for by the authorisation of the law cannot be left aside and completely excluded from article 1257 but should not be given as broad an effect on civil liability as the order of the law. That is why it seems wiser to provide for it separately, in order to limit its effects to cases where the considered event was socially useful.

1.3.1.1.2 Self defense

The second difficulty comes from the mentions of "the necessity of self-defense". This is reference to the justification provided for by article 122-5 of the Criminal Code, but the use of the term "necessity" may be misleading and it is suggested that it should be removed. The formulation "necessity of self-defense" comes directly from the Criminal Code, but there it is accompanied by two more criteria: the defense must be proportionate and immediate, as well as necessary. It is a good idea to keep a simplified version of justifications in the Civil Code, since civil courts are not bound by the rigid principle of strict

interpretation that explains why Criminal Law is often very detailed. However, this simplificatory work should be done coherently. Keeping only one out of three criterias for self-defense, unless self-defense is considered as a "particular instance of the state of necessity"[11], does not comply with such coherence. Moreover, mentioning the requirement for necessity for self-defense but not for other justifications does not reflect the current evolution of court cases: under the influence of the European Court of Human Rights, judges tend to require necessity - and proportionality - for every kind of justification. For example, necessity was recently unexpectedly required in a case of authorisation of the law (a policeman pursuing a man driving away in a car shot him by accident and had to prove that his actions, justified by an authorisation of the law, were necessary)[12].

In conclusion, it would be clearer not to include the "necessity" of self-defense.

1.3.1.1.3 State of necessity

The last justification mentioned in article 1257 is "the necessity [...] of the safeguard of a superior interest", which is likely to be a reference to the state of necessity. Otherwise, it would mean that the state of necessity is excluded from justifications affecting civil liability, which would be a step backwards compared to court decisions on the matter[13]. This leads one to to wonder why the reformer decided not to refer to the state of necessity through its usual name, and prefered to use a formula that is in fact very broad. Indeed, the safeguard of a superior interest goes far beyond the scope of the state of necessity - which is limited to the safeguard of a person or a piece of property, and only applies in situation of actual or imminent danger. If the idea was only to refer to the state of necessity, then the formulation is inappropriate and it would be wiser to simply come back to "the state of necessity", especially if we agree that the term "necessity" should not be associated to self-defense.

However, another way to understand "the safeguard of a superior interest" would be as a reference to what criminal lawyers call "special" justifications.

1.3.1.2. Special justifications

This interpretation is bold in the sense that these justifications are not very well known because they are quite discrete, although very numerous. They intervene in very specific circumstances, for very specific behaviour. French criminal Law provides many such special justifications for diverse crimes such as discrimination in hiring, defamation, and resale below cost price. To give one example, public defamation is justified when the author of a defamation can prove they told the truth. All types of justifications can be analysed as a legal mechanism through which a protected interest is 'sacrificed' in the presence of another interest protected by the defendant's behaviour. Hence, "the safeguard of a superior interest", which strictly speaking applies to all justifications, could very well be understood as integrating special ones.

[11] J. Pradel, Droit pénal général, 17e éd. Cujas, 2008, n°351.
[12] Crim, 18 février 2003, n° 02-80.095.
[13] Although the state of necessity was only formally introduce into the French Criminal Code in 1994, it was referred to in court decisions since the XIXth century (Trib. corr. de Château-Thierry, 4 mars 1898, *Ménard* ; Crim, 28 juin 1958, Lesage, D.1958 p.693).

This remark is particularly important with the multiplication of judge-made justifications, in particular the right to a fair trial, which is now broadly used by courts to exempt defendants from criminal liability in various circumstances.

In conclusion, it is suggested to keep "the safeguard of a superior interest" among the justifications affecting civil liability, not as to designate the state of necessity, but as an acknowledgment of the potential effect of special justifications on fault-based liability.

1.3.2 The effects of justification on civil liability

Article 1257 of the *avant-projet* states that the presence of justification prevents fault-based liability from arising. This statement goes back to a very simple understanding of the effects of justification on civil liability, which may be oversimplifying things: judges have admitted that justifications could have an effect on strict liability (1.3.2.1.) and have also sometimes maintained fault-based liability in the presence of justificatory circumstances (1.3.2.2.).

1.3.2.1. The effects of justification on strict liability

Judges were confronted to a problem regarding the effects of justification on liability for the actions of things (*résponsabilité du fait des choses)* (see art.1243 of the *avant-projet*), especially in cases of self-defense involving a weapon. Logically, since the liability arising from having custody of a thing is strict and not fault-based, justification should have no effect and the agent should be held liable despite the circumstances. This would lead to treating differently persons defending themselves depending on whether they did so with their bare hands or not. Jurisprudence has suggested a solution to this problem by considering that the fault of the victim - who attacked the defendant - should be taken into account to explain why they cannot claim any damages. This is more convincing than extending the effect of justification to strict liability, provided that the victim's fault can be taken into account in such circumstances. In that regard, article 1253 of the *avant-projet* states that the victim's fault may lead to total exemption when it satisfy the conditions of *force majeure*, which may prove insufficient to cover the cases mentioned above since attacks are not always unforeseeable. However, the *avant-projet* gives a new and broader definition of *force majeure* (art. 1253) that could prove better suited to this issue because it only requires that the attack could not be prevented.

Another obstacle comes from the limits provided for by the *avant-projet* to the effects of the victim's fault: it is excluded in cases of physical injury unless it amounts to gross negligence, and it is also excluded when the victim had no discernment. Indeed, injuries caused by self-defense are mostly physical so it would require that an attack is always considered as gross negligence. Moreover, it would mean that persons who defended themselves or someone else ("self-defense" in badly named) against a young child or a person with mental disorder would not be covered by justification. Again, this problem may be addressed through a different angle: maybe we should keep civil liability in these cases because the self-defense is not socially useful anymore when the attacker has no discernment. The last problem is linked to when Criminal Law calls "putative" justification: the defendant thought they were in justificatory circumstances, whereas in fact they were not (for example, they thought someone was attacking them

when it was not the case and just a misunderstanding). In these circumstances, it is possible that there was no mistake on the part of the victim, so strict civil liability could arise again, unless it is admitted that such cases are not in fact proper cases of justification.

These comments about the effects of justification on strict liability, although made with regard to liability for the actions of things, could be taken into account for strict liability arising from the actions of a minor. However, since the court case *Fullenwarth* (1984), this liability is particularly severe since it does not require any fault on the part of the child. Thus, the following question arises: should a person liable for the action of a minor be responsible when such actions are "normal" but not when the minor's behaviour was covered by justification? Probably not, which would mean that the effect of justification on strict liability would vary depending on the source of such liability. This issue may be solved by article 1245 of the *avant-projet* which seems to overrule *Fullenwarth* to wisely go back to a standard strict liability requiring a fault on the part of the minor.

1.3.2.2. The persistence of fault-based liability despite justification

Since a court decision from 1884[14], French jurisprudence considers that fault-based liability may arise despite justificatory circumstances on the criminal side of things. The case itself is not very convincing because it concerns a situation in which the state of necessity was not characterised in the modern sense of the term: there was no imminent or actual danger since a man was crossing his neighbour's field without authorization in order to harvest his own enclaved field. Furthermore, the court did not use the term justification, instead relying on the blurry notion of excuse. However, it should be credited with raising an interesting issue: could civil fault survive the existence of justification? Article 1257 of the *avant-projet* suggests that it cannot, and this is correct for both self-defense and the order of the law or of a legitimate authority. However, this vision of justification seems quite superficial regarding the authorisation of the law, the state of necessity and special justifications.

Although some of these cases may be solved through a reference to unjust enrichment, provided that someone benefitted from the justified behaviour, this is not always the case - fault-based liability should not be categorically excluded. One author[15] has suggested that the criterion of social usefulness should determine which situations should only be justified criminally (i.e. without excluding fault-based civil liability) and which situations where behaviour that is justified criminally should for the same reason lead to exclusion of fault-based civil liability. This is a good idea because it would prevent courts from having to make up dubious legal reasoning to justify rulings that are in fact quite simple to understand if you use use social usefulness. For example, a firefighter who broke someone's arm to save them from a fire cannot be held civilly liable because of the state of necessity and the usefulness of his action from society's point of view. On the contrary, the person who ruined his neighbour's plants by stepping on them to get his pet-turtle who had escaped its aquarium may be covered by the state of necessity but could still be civilly faultive and liable since this action was not socially useful.

[14] Crim, 27 décembre 1884, D.1885, 1, p.219 (*Champonnais* case).
[15] J. Pélissier, Faits justificatifs et action civile, D.1963 p.121

In conclusion, article 1257 should provide separately for two types of justifications: on the one hand, those justifications that always prevent fault-based liability from arising, on the other hand, justifications that should only have such an effect when the harmful act was socially useful.

1.3.3 Conclusion: proposition for modification

Article 1257 (first part):
Harmful events do not give rise to fault-based liability when they were compulsory under legislative or administrative provisions, imposed by a legitimate authority, or ordered by self-defence. Provided that they are socially useful, harmful events also do not give rise to fault-based liability when they are authorised by the law, or ordered by a state of necessity, or the safeguard of a superior interest.

Article 1257 al. 1er
Le fait dommageable ne donne pas lieu à responsabilité pour faute lorsqu'il était prescrit par des dispositions législatives ou réglementaires, imposé par l'autorité légitime, ou commandé par la légitime défense. Dès lors qu'il est socialement utile, le fait dommageable ne donne pas non plus lieu à responsabilité pour faute lorsqu'il était autorisé par la loi, ou commandé par un état de nécessité ou la sauvegarde d'un intérêt supérieur.

1.4. Protecting the financially weak(er) debtor in the law of damages [Prof. dr. Alex-Geert Castermans and Thijs Beumers]

1.4.1. The law

In the New Dutch Civil Code (CC), the legislator included a quite revolutionary provision, which constitutes a new and uncommon exception to the principle that an award of damages should fully compensate for the losses suffered by an injured party[16]. This new provision, article 6:109 CC, holds that:

"1. The court may reduce a legal obligation to pay damages if a full award of damages would lead to clearly unacceptable results in the given circumstances, including the nature of the liability, the existing juridical relationship between the parties and their financial resources.
2. The reduction may not be made if it reduces the amount below that for which the obligor has covered his liability by insurance or was obliged to do so.
3. Any terms in breach of paragraph 1 shall be null and void[17]."

Reduction of a legal obligation to pay damages is the 'final piece' of the Dutch law of damages. Even when principles as contributory negligence and remoteness are applied by the courts, the award of

[16] A basic principle of the law of damages of most legal systems. In Dutch: "volledige schadevergoeding" and in French: "réparation intégrale du préjudice".
[17] Translation of Hans Warrendorf et al.

damages can, in some specific cases, lead to unacceptable results for the debtor[18]. Article 6:109 CC provides the courts with a final mean to lower the award of damages in such cases. With granting this power to reduce a legal obligation to pay damages the legislator mainly aims – and it has been used accordingly by the courts – to protect financially weak(er) debtors against excessive awards of damages, which they cannot reasonably be expected to bear, but which compensates for losses that are not particularly burdensome for their creditors.

The exception clearly has a social and redistributive goal. For that reason, it is not uncontroversial within Dutch legal literature. Some authors argue that such social considerations have no place in private law, but are a matter of public law, more specifically, of social security[19].

1.4.2. History and ratio

This power of the courts to reduce the obligation to pay damages, could already be found in the first draft of the new Dutch Civil Code, although formulated in a slightly different way:

"If a full award of damages results in severe economic hardship for the debtor, the court may reduce the award of damages, unless the debtor inflicted the losses deliberately or they are the result of his gross negligence (translation MTB)[20]."

Originally, the ratio of this provision was that in the modern society and economy, which arose after the Second World War, a minor fault or mistake of the debtor could lead to disastrous financial consequences[21]. Having to fully compensate for the losses of the injured party could place an excessive financial burden on the debtor, who, because of that burden, could be reduced to (extreme) poverty[22].

With the occurrence of social welfare and other social security schemes in the Netherlands, the need for this power of the courts became less urgent, as these schemes, in an different way, prevent that debtors are reduced to poverty. Article 6:109 CC was nonetheless included in the new Dutch Civil Code, but not before a few important changes were made to it during the parliamentary debates. Most importantly, article 6:109 CC obliges the courts to not only take into account the financial and economic position of the debtor, but also that of the creditor[23]. Furthermore, it was stated that reducing the obligation to pay

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[18] T. Hartlief, 'Schadevergoedingsrecht', J. Spier et al (eds),*Verbintenissen uit de wet en schadevergoeding*, Deventer: Kluwer 2012, p. 320-323.
[19] For instance by C.J.H. Brunner, *Aansprakelijkheid naar draagkracht* (oratie Groningen), Deventer: Kluwer 1973 and H.J. Snijders, 'Enige vragen bij schadevergoeding naar draagkracht ex art. 6:109 BW' in *Ongelijkheidscompensatie als roode draad in het recht* (Rood-Bundel), Deventer: Kluwer 1997, p. 266.
[20] Ontwerp-Meijers, artikel 6.1.9.7.: 'Indien toekenning van volledige schadevergoeding de schuldenaar in een noodtoestand zou brengen, kande rechter de schadevergoedingsplicht matigen, tenzij de schade door opzet of grove roekeloosheid van de schuldenaar is veroorzaakt.'
[21] Toelichting-Meijers, Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek, Boek 6, Algemeen Gedeelte van het Verbintenissenrecht (C.J. van Zeben, J.W. du Pon, red.), Deventer: Kluwer 1981, p. 440.
[22] MvA II, *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek, Boek 6, Algemeen Gedeelte van het Verbintenissenrecht* (C.J. van Zeben, J.W. du Pon, red.), Deventer: Kluwer 1981, p. 451.
[23] MvA II, *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek, Boek 6, Algemeen Gedeelte van het Verbintenissenrecht* (C.J. van Zeben, J.W. du Pon, red.), Deventer: Kluwer 1981, p. 451.

damages constitutes an *ultimum remedium*, which merely should be used by courts if a full award would have unacceptable consequences and which should be applied with restraint[24].

1.4.3. Case law

As the question whether a legal obligation to pay damages leads to clearly unacceptable results for a debtor depends heavily on the facts and circumstances of that specific case, the Supreme Court has not addressed article 6:109 CC often in its case law. It has merely confirmed that courts should use their power to reduce a legal obligation to pay damages with restraint[25].

A good example of an application of the court's power to reduce an award of damages is the case of a subcontractor, Van den Boom, who was doing road work on a Dutch highway. One day, he forgot to place warning signs, which resulted in a severe accident of a truck driver. The insurance company of that truck driver claimed damages from Van den Boom, who had, undisputedly, acted negligently by not placing any warning signs. The court considered that Van den Boom did not have an insurance for the damages suffered by the truck driver and that having an insurance for such liability is also quite unusual for subcontractors like Van den Boom. If Van den Boom would have to pay the full award of damages, all his (and his wife's) savings would be lost. However, for the insurance company the losses were not particularly burdensome as, *de facto*, the large collective of insured people would pay for the losses of the truck driver. For that reason, the court significantly reduced, ex 6:109 CC, the obligation of Van den Boom to pay damages[26].

Despite this example – and some other cases[27] in which the position of both the debtor and the creditor were taken into account by the court – Dutch courts do not always consistently and correctly use their power to reduce the obligation to pay damages. In some cases, the court merely addressed the weak financial position of the debtor, without taking the creditor's financial position into account[28]. It is also unclear whether the obligation to pay damages can be reduced by the court if the debtor deliberately committed a tort. In some cases of rape, the obligation to pay damages of the tortfeasor/rapist were reduced, despite his obvious deliberate behavior towards his victim[29]. However, in other cases of rape, the courts refused to reduce the obligation to pay damages, because the tortfeasor/rapist committed the tort deliberately and therefore did not, in the view of these courts, deserve a reduction of his damages[30].

In conclusion: although the courts do not always use their power consistently and correctly, the (new) Dutch Civil Code provides the courts with the possibility to take the financial position of debtors and

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[24] MvA II, *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek, Boek 6, Algemeen Gedeelte van het Verbintenissenrecht* (C.J. van Zeben, J.W. du Pon, red.), Deventer: Kluwer 1981, p. 449.
[25] HR 28 mei 1999, ECLI:NL:HR:1999:ZC2913, *NJ* 1999/510, r.o. 3.3.2.
[26] Hof Den Haag 7 juni 2005, ELCI:NL:GHSGR:2005:BA1320, *VR* 2007/40.
[27] Rb. Haarlem 26 september 2007,ECLI:NL:RBHAA:2007:BD5747, r.o. 4.19 and Rb. Leeuwarden 26 november 2003, ECLI:NL:RBLEE:2003:AR7136, *S&S* 2004/112, r.o. 7.
[28] Hof Amsterdam 9 augustus 2011, ECLI:NL:GHAMS:2011:BR6571, r.o. 4.8 and Hof Den Bosch 22 maart 2011, ECLI:NL:GHSHE:2011:BP9617, r.o. 4.12.
[29] Rb. Amsterdam 16 mei 1990, ECLI:NL:RBAMS:1990:AL773, *VR* 1991/69, r.o. 4.
[30] Rb. Utrecht 5 februari 1992, ECLI:NL:RBUTR:1992:AB9047, *VR* 1992/134, r.o. 4.9 en Hof Arnhem 18 februari 2003, ECLI:NL:GHARN:2003:AI1976, *NJ* 2003/500, r.o. 4.15.

creditors into account when they award damages. The ratio for granting this new and uncommon power is mainly to prevent that debtors are reduced to poverty as a result of liability.

1.4.4. Proposition of modification:

Ajouter un article 1265 rédigé comme suit:

"Si la réparation intégrale du dommage cause une difficulté économique sévère pour le débiteur, le juge peut réduire son montant à moins que le débiteur ait causé ce dommage délibérément."

2. Concurrence of actions [Ruben de Graaff and Dr. Benjamin Moron-Puech with the help of Marie Leveneur and Ivano Alogna]

In this contribution we will study the concurrence between actions based on tort law and actions based on contract law.

At this point of the report, it is important to stress that when speaking of concurrence of contract and tort law, French and Dutch lawyers intend concurrence between contractual liability law and extra-contractual liability law.

The question we will address here is how Dutch and French civil law deal with the situation in which a person who is bound by a contract sues his contractor in order to get damages and would like to have the opportunity to choose between contract law and tort law. We will see that while the French courts mainly impose the use of contract law, the Dutch courts allow the plaintiff, under certain conditions, to choose whatever claim he believes to be the most advantageous to him.

2.1. French Report

Considering the concurrence between contract law and tort law, we have to distinguish whether the tort law action is made on the basis of articles 1382 (personal liability) and 1384 (vicarious liability or liability for the acts "of things"), which constitutes the common regime of tort law, or on the basis of article 1386-1 (liability for defective products), which is a special regime of tort law. Indeed the solution to the concurrence between contract law and tort law differs in those two cases.

2.1.1. General rules on the concurrence between actions based on the contract and actions based on national tort law

2.1.1.1. The current state of affairs: "*principe de non cumul*"

Concurrence of actions constitutes a fundamental and well-defined principle in the French legal system. French doctrine has discussed for a long time the duality or unity of civil liability[31]. On the one side, some scholars have supported the opposition between law and contract[32], on the other side, the thesis of the unity was defended[33]. Finally, the synthesis of those thoughts was made: "*il n'y a pas deux responsabilités, mais deux régimes de responsabilité*"[34] ("there are not two kinds of liability but two regimes of liability). Then, it is the victim that has to choose the regime of civil liability. Yet this choice is not free: "the plaintiff cannot opt for tort liability where a contractual relationship may serve as a cause of action"[35].

Indeed since the 1930's France has refused contractors the choice between contract law and tort law. The only actions available are those that derive from contract law; such a solution is called (improperly[36]) the principle of *non cumul.*

It is often said that this principle was announced earlier, but as professor Borghetti has proven[37], this is very unlikely. All the decisions that are usually put forward only say that when a contractual norm has been violated the damage has to be repaired on the basis of the rules linked to contractual liability. Those decisions do not state that this is the only solution. Also, before the 1930s,there are many cases in which plaintiffs were allowed to use both contract law and tort law[38].

The principle was adopted in the 1930s by the *Cour de cassation*, just after this Court adopted a very broad interpretation of article 1384. This principle was a sort of compromise between the members of the *Cour de cassation* on the scope of the general principle of liability for the acts of things. According to this other principle, first stated in the decision Teffaine (1896), the owner of a thing is responsible for the damage created by this thing, even if no fault can be proved. It has also been decided later that the only way to avoid this liability is for the owner of the thing to prove that he was not in charge of the thing or that a *force majeure* occurred. However, some judges in the *Cour de cassation* were quite reluctant to adopt such a general principle, believing that it should only apply to limited categories, such as dangerous

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[31] G.Viney, *Introduction à la responsabilité*,2e éd., LGDJ, 1995, n°161 ff.
[32] C. Sainctelette, *De la responsabilité de la garantie*,1884.
[33] J. Grandmoulin, *De l'unité de la responsabilité ou nature délictuelle de la responsabilité pour violation des obligations contractuelles*,1892.
[34] A. Brun, *Rapports et domaine des responsabilités contractuelle et délictuelle*, 1930, p. 382.
[35] O. Moreteau, "French Tort Law in the Light of European Harmonization", *Journal of Civil Law Studies*, 6 (2), 2013, p. 765.
[36] The expression is not correct since the plaintiff does not want to cumulate the benefit of an action based on contract and an action based on tort. He just wants to have an option.
[37] J.-S. Borghetti, *La responsabilité du fait des choses, un régime qui a fait son temps*", RTD civ. 2010, p. 1 s.
[38] See for instance Cass., Req., 14 déc. 1926 : *D.* 1927, 1, 105 note Josserand.

things. On the contrary, others believed that its scope should be general. In its decision Franck[39], the *Cour de cassation* finally decided that it was a general principle. But, indirectly, through the principle of *non cumul*, the scope of the liability for the act of things was limited to tort law, which was a subtle way to avoid its application in all the cases where the victim might have had a chance to anticipate the risk that the thing created for him. Therefore the principle of *non cumul* can be seen as a solution to avoid the effects of the unbalanced system of liability for the act of things on contracting parties.

Today this principle of *non cumul* is very strictly applied; exceptions are very rare. It is mainly used in the following situations:

- avoiding the application of the too large general principle of liability for the goods one owns or for the persons one has under control;
- avoiding the circumvention of the contractual clause related to liability, or the clause related to the judge who will have jurisdiction;
- avoiding the circumvention of the rules that are said to be peculiar to contractual liability, mainly article 1150 which states that only damages that are predictable have to be repaired.

It has to be noted that this *non cumul* principle is in fact also applicable to third parties, even though it is rarely explicitly said by the doctrine which rather explain this solution by using the principle of relativity of the contract. The reason why principle of *non cumul* can also be used here is because third parties are not able to choose between contractual law and tort law. In principle[40], the third party who suffers damages from the defective performance of the debtor has an action on the grounds of extra-contractual liability. Since Ass. Plén. 6 mai 2006 (arrêt *Myr'Ho*), to obtain damages, the victim has only to prove that the non-performance has caused his harm. It is not necessary anymore to prove a fault of the debtor independent from the breach of contract. This solution has been criticized by scholars who have argued that such a solution allows third parties to violate the expectations of the parties, since third parties could use the contract against the contractors whereas the contractors could not use against them the terms of the contract, such as an exoneration clause (if the claim is extra-contractual it is said that the exoneration clauses can not be opposed). This criticism seems even more relevant when linked to the *non cumul* principle which is aimed at protecting the expectations of the parties by making a clear distinction between the two regimes of liability. Indeed, the decision held in 2006 mixes the two regimes of liability. On the one hand, third parties are allowed to act as parties introducing a contractual liability claim, since third parties can ask for damages simply by proving that there have been a breach of the contract. On the other hand, third parties can use the rule of extracontractual liability since the exoneration clause is not applicable to them.

[39] Cass., Ch. réunies, 13 mars 1930.

[40] By exception, the action can be on the basis of contractual liability, when the victim is part of a "*chaîne de contrats*", i.e. a group of contracts where one of them passes property (for example sale + sale, or sale + service). However, if the group of contracts does not pass property (service + service), extracontractual liability has to be invoked. This state of law, complicated and unclear, would be changed by the project.

N.B.: The principle of *non cumul* also exists in public law but its function is quite different. Its main function is to protect the jurisdiction of the administrative court, which is much broader if there is a contract[41].

2.1.1.2. The future?

The French reform did not abandon this *non cumul* principle despite the criticisms that have been voiced against it (see professor Borghetti's articles). This is mainly due to the fact that a reunification of contractual liability and extra-contractual liability, as it was before 1911, was not considered. Moreover, an adjustment of the actions of things has not been considered. Even if the scope would be reduced to corporal things, it would still remain a very large category, that would apply for instance to non-dangerous things as well. The reform therefore keeps the principle of *non cumul* both for parties and third parties. However, for the latter, a more orthodox application of this principle is made.

Concerning the parties, article 1233 states in its first paragraph that if a contractual obligation has not been performed, neither the debtor nor the creditor can bring an action based on tort law. However, the second paragraph states that this rule does not apply to corporal damages which can only be repaired on the basis of tort law, even if they result from the violation of a contractual norm. If this second paragraph states a new rule, one can argue however that it works the same as the "*principe de non cumul*". Indeed, for corporal damages, neither the debtor nor the creditor can choose between contractual liability and extra-contractual liability. No option is allowed.

The second paragraph of article 1233 is not very satisfying, at least for two reasons. First, one can think of situations in which the claimant would rather use contract law rather than tort law. This can happen when someone has warned his contractor of all the loss he would suffer if the contract was not to be performed, including loss that would be considered, under tort law, as not directly linked to the original damage. In such a case the claimant would have a better compensation of his loss under contract law, since he will get compensation for the whole predictable damages (art. 1150), whereas under tort law he will only get compensation for the prejudice that is directly linked to the original damage.

This new principle can also be problematic for all contracts in which an act is performed on the human body by using a thing. In such contracts, the victim will be authorized to ask for damages without having to prove any fault of his co-contractor and it will be very difficult for the latter to avoid his liability by proving a *force majeure*. Some difficulties could rise for instance for tattooists, hairdressers or for some medical or paramedical professions that are not governed by article L. 1142-1 of public health code[42].

Concerning third parties, article 1234 states that if a contractual obligation was not performed and caused damage to a third party, this victim can seek damages only on the ground of extra-contractual liability. For this purpose, the proof of non-performance would not be enough; the victim would have to prove that

[41] The idea is suggested in Michel Paillet, "Quelques réflexions sur les rapports entre responsabilité administrative contractuelle et extracontractuelle. Sur la "tyrannie" du principe de primauté de la responsabilité contractuelle", *Contrats publics. Mélanges en l'honneur du professeur Claude Guibal*, p. 553 s.
[42] This text states that medical practitioners or in principle only liable if a fault is proven against them.

the debtor is liable based on extra-contractual liability (fault, negligence, liability for act of things...). Therefore, the solution is much stricter than today. This article overrules the decision of 2006 but also all the previous decisions on the "*chaîne de contrats*"[43]. This latter effect could be very embarrassing because it would deprive many victims of non-performance of compensation. To reduce this consequence, the project adds a special provision in sale law to allow successive buyers to sue the initial vendor. But this provision would not cover all situations. In a chain of work contracts, the final client who suffers from a contractual fault of the subcontractor (like defects in the construction) would not be able to get damages from him.

One could respond that the client could sue his own contractor, the builder, then the builder could sue the subcontractor, author of the defect. Although this system is possible, it multiplies actions, and leave the client without any compensation when his own contractor has disappeared.

Such difficulties existed in the 1980's. To solve them at that time, courts had decided to make the definition of the fault in tort law more flexible. Thus, the victim could get compensation from the subcontractor. With article 1234, we fly back to that time. It is therefore likely that the courts will lighten the proof of the fault of tort law. At the end we would go back to the solution of Ass. Plén. 6th october 2006, with all its defects.

To solve these difficulties, two other ways can be suggested.

First, we could keep the action of third parties on tort law, but let them prove a fault by showing that there have been a breach of contract, only when they could reasonably expect the performance of the contract. In this case, it is legitimate for the third party to get damages even though he suffers from a breach of contract. For instance, a lessee in a mall suffers from the violation a "non-concurrence" clause by his neighbour. He is not part of the violated contract but he could reasonably expect that all the members of the mall would respect their original allocation. On the contrary, a baker who suffers from the violation of a similar clause in a town could not rely on this breach. He could not reasonably expect that the new baker would respect his own contract with his former employer.

When the third party is entitled to invoke the breach of contract to get damages, the contracting party would be allowed to enforce contractual clauses on the victim. However, this enforcement would be uneasily justified. Exclusion clauses are stipulated by contracting parties to modify their contractual liability. Yet in our hypothesis, the ground used by the third party is extracontractual liability. To justify this enforcement, we could say that the clauses can be enforced against anyone who use the breach of contract to ask for damages. By invoking the breach of contract, the third party accepts that the contract can produce effects on him, he accepts the clause stipulated in the contract.

Secondly, to avoid this technical difficulty, we could simply change the ground of the action. If the third party, when invoking the breach of contract, has to put his claim on the contractual liability basis, the contractual clauses will apply to him without any difficulty.

One could say that another problem arises, related to the relativity of contract. But since this action is limited to third parties who could reasonably expect the performance of the contract, this violation of the principle of relativity of contract is legitimate. Then, this solution offers efficiency, and permits enforcement of the exclusion clauses.

Therefore, we could rewrite article 1234 in two possible ways:

[43] See *supra* footnote 36.

"When the non-performance of a contractual obligation is the direct cause of a loss suffered by a third party, the latter can only ask for compensation to the debtor on the ground of extracontractual liability.

The breach of contract is a fault toward the third party when he could reasonably expect the performance of the contract. In this case, the debtor can enforce the clauses of the contract toward the third party".

Or

"When the non-performance of a contractual obligation is the direct cause of a loss suffered by a third party, the latter can ask for compensation to the debtor *on the ground of contractual liability, if he could reasonably expect the performance of the contract. The debtor can therefore enforce the clauses from the contract toward the third party.*

The third party can also ask for compensation on the ground of extracontractual liability. In this case he has to prove a tort defined by Section II, Chapter II".

2.1.2. Special rules on the concurrence between actions based on contract law and actions based on EU tort law

The rules concerning the concurrence between the actions based on contract law and tort law on one side and EU law on the other one are different. Since EU law may seem more balanced, there is no need to restrain its application and to create a principle of *non-cumul*. Therefore French courts,[44] following the CJEU,[45] have decided that people could use both the action based on default safety product and the action based on common tort law or contract law. However, since the goal of the directive on safety products was to harmonize the rule of defective products, this goal implies that no other regime similar to the one created by the directive is allowed. Therefore, if a victim of a defective product wants to use article 1384, which was especially used to deal with the defaults of products before the directive, this will not be allowed. Likewise, if such a claimant had concluded a contract with the producer, he will not be authorized to sue the producer on the basis of an "*obligation de sécurité de résultat*", which was created in the past by courts in order to make the producer liable, even if no fault by them was proven.

2.2. Dutch report

The Dutch Civil Code is a 'layer cake' of legal rules, distributed over ten different Books and ranging from generally applicable basic principles to specific arrangements for special areas of law. The rules governing contractual and extracontractual liability in the Netherlands are contained in the general regimes on legal acts (Book 3, Title 2) and obligations (Book 6), but also in a special title on contracts

[44] Cass. 1re civ., 15 mai 2007, n° 05-17.947 or 26 novembre 2014, n° 13-18.819.
[45] ECJ, 2002/04/15, Gonzalez Sanchez, C-183/00.

(Book 6, Title 5) and in a separate Book on special contracts (Book 7, covering e.g. sales and exchange contracts, consumer credit contracts, tenancy contracts).

This report covers the question in what situations the Dutch regimes on contractual and extracontractual liability concur, and if so, how that issue is solved. Occasionally, insights from German and English law are included. The report will deal with the relationship between contracting parties (2.2.1.) and with the relationship between contracting parties and third parties (2.2.2.).

2.2.1. Concurrence of actions in the relationship between contracting parties

2.2.1.1. Overlap of and differences between contractual and extracontractual liability law

A breach of contract may also constitute a violation of a right to property or lead to an injury to body or health.[46] If a party decides to claim damages for such losses, he may be able to do so on the basis of contractual or extracontractual liability. This overlap between the laws of contract and tort does not lead to problems as long as application of the rules would produce the same legal outcome. In this context, it is important to note that when drafting the new Civil Code, the Dutch legislature decided to harmonise certain rules governing the different liabilities. For example, the legislature has unified the rules on the scope of damages (Art. 6:95 et. seq. BW) and on the prescription of claims (Art. 3:310 BW).

However, the laws of contract and tort still vary in certain ways, which may lead to different results, depending on the basis of the claim for damages. In practice, both regimes may differ in terms of establishment, scope and prescription of liability.[47] The following examples may illustrate this point. *Establishment of liability*: when the claim is based on extracontractual liability, the creditor has to prove that the unlawful act can be attributed to the tortfeasor (Art. 6:162 BW); when the claim is based on contractual liability it is up to the debtor to prove that the breach of contract *cannot* be attributed to him or her (Art. 6:74 BW). *Scope of liability*: damages for breach of contract aim to bring the creditor in a position as if the contract had been performed, whereas damages on the basis of extracontractual liability mean to restore the creditor in its original position – as if there has been no unlawful act. *Prescription of liability*: one action may already be barred by a special prescription period (e.g. Art. 7:23 (2) BW for consumer sales), while the other action could – theoretically – still be brought.

2.2.1.2. When are both regimes applicable?

When are both regimes applicable? According to Dutch law, a mere failure in the performance of an obligation (Art. 6:74 BW) does not constitute a ground for extracontractual liability (Art. 6:162 BW) in itself.[48] However, already before the adoption of the new Dutch Civil Code in 1992, the Supreme Court ruled that an act may constitute both a failure in the performance of a contractual obligation *and* a ground for extracontractual liability, provided that the extracontractual liability exists 'independently from a

[46] *Cf.* C. von Bar & U. Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe. A Comparative Study*, München: Sellier European Law Publishers 2004, p. 190-191.
[47] *Cf.* J.H. Nieuwenhuis, *Anders en Eender* (inaugural lecture, Leiden), Deventer: Kluwer 1982, p. 6.
[48] Already in HR 23 May 1856, W 1852; HR 13 June 1913, *NJ* 1913/787 (*Kuyk/Kinker*).

violation of contractual obligations'.[49] The purpose is to establish whether the facts of the case may qualify as an unlawful act *regardless* of the question whether there is a breach of contract as well.

2.2.1.3. If there is a concurrence of actions, how is it solved?

If the facts of the case qualify both as a breach of contract and as an unlawful act, the creditor may *choose* between the regimes of contractual and extracontractual liability. This is a consistent line in the case law of the Supreme Court.[50] According to a majority of the doctrine, the conclusion of a contract should not exclude the application of extracontractual law *by definition*.

This may be illustrated with an example. Two parties conclude a contract of carriage: the ship Bertha will be towed by the ship Revenir. During the performance of this contract the Bertha is damaged as a result of a collision. The owner of the Bertha claims damages from the owner of the Revenir, who defends himself by invoking the special prescription period of one year for claims based on contracts of carriage. According to the owner of the Bertha, his claim for damages can also be based on the rules governing collision (a special extracontractual liability), which is governed by a prescription period of two years. The Supreme Court agrees:

> 'When someone could, in relation to the same facts, be held liable both for collision and on the basis of a contract of carriage, the other party may choose on which liability he wishes to ground a legal action.'[51]

This solution is similar to the solutions followed by the *Bundesgerichtshof*[52] and the *House of Lords*.[53] Lord Goff of Chieveley expressed the 'ratio decidendi'[54] on behalf of the House of Lords:

> 'An assumption of responsibility coupled with the concomitant reliance may give rise to a tortious duty of care irrespective of whether there is a contractual relationship between the parties, and in consequence, unless his contract precludes him from doing so, the plaintiff, who has available to

[49] HR 6 May 1892, W 6183 (*Korf/Fhijnbeen*); HR 26 March 1920, *NJ* 1920/476; W 10 592(*Curiel/Suriname*); HR 11 June 1926, *NJ* 1926/1049, W 11 521(*Canter Cremers/Otten*); HR 9 December 1955, *NJ* 1956/157 (*Bogaard/Vesta*); HR 6 March 1959, *NJ* 1959/349 (*Revenir/Bertha*); HR 15 May 1981, *NJ* 1982/237 (*Temi IV/Jan Heymans*); HR 27 February 1987, *NJ* 1987/584 (*Van der Peijl/Erasmus College*); HR 6 April 1990, *NJ* 1991/689; *S&S* 1990/74 (*Van Gent & Loos/Vitesse*); HR 19 February 1993, *NJ* 1994/290 (*Gem. Groningen/Zuidema*).
[50] HR 6 December 1996, *NJ* 1997/398; *S&S* 1997/72; *VR* 1997/71 (*Fortes/Smits*); HR 3 December 1999, *NJ* 2000/235 (*Pratt & Whitney/Franssen*).
[51] HR 6 March 1959, *NJ* 1959/349 (*Revenir/Bertha*): 'Indien iemand op grond van zekere feiten zowel ter zake van aanvaring als uit hoofde van een door hem gesloten sleepovereenkomst aansprakelijk kan worden gesteld, mag de wederpartij kiezen op welk van beide aansprakelijkheden hij een rechtsvordering wil bouwen.'
[52] BGH 24 November 1976, *BGHZ* 67, p. 362 et seq.
[53] Earlier – in 1985 – the House of Lords had expressly rejected the application of tort law within a contractual relationship: 'Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship.' See HL 3 July 1985, *AC* 1985/80 at 107 (*Tai Hing Cotton Mill Ltd/Liu Chong Hing Bank*), statement Lord Scarman.
[54] Literally, the 'reason for the decision'. It is this the part of a judgment, agreed upon by the majority of the judges, which constitutes precedence in English (private) law.

> him concurrent remedies in contract and tort, may choose that remedy which appears to him the most advantageous.'[55]

So, in Dutch, English and German law, the concurrence of actions is not *a priori* excluded, but possible, subject to the condition that the facts of the case qualify as an unlawful act *regardless* of the question whether there is a breach of contract as well. If that is the case, the creditor may base his claim either on contractual or on extracontractual liability rules.

2.2.1.4. To what extent can the creditor avoid the contractual liability regime?

However, the fact that the two regimes concur does not mean that the creditor may always avoid the application of the contractual liability regime. The courts have limited the freedom of the creditor to bring any action he wishes, in order to do justice to the interests of the debtor. The creditor cannot avoid the rules on contractual liability if the law prescribes or inevitably involves that one rule is to be applied *exclusively*.

This may be illustrated with an example. Contractor Ballast Nedam puts out a job to subcontractor Fernhout. The dredging operations are carried out by using a crane ship that is owned by Fernhout. On 9 November 1999, the gas pipes at the bottom of the river are seriously damaged as a result of the operations. Essent claims damages under Article 6:162 BW. According to Fernhout, this event must be qualified as a 'collision' and is therefore subject to Article 8:1793 BW:

> 'An action for damages caused by an event, as meant in section 1 of heading 11, is barred by prescription, when it is not based on a contract, after the expiry of two years, a period that starts on the day after the day of the event.'[56]

By October 2002, when Essent commences proceedings against Fernhout, this period of two years had already lapsed. This is the reason why Essent tries to invoke Article 6:162 BW. This action is subject to the more favourable prescription periods mentioned in Article 3:310 (1) BW: a *short* period of five years, which commences on the day after the aggrieved party is aware of the damage and the liable person, and a *long* period of twenty years, which commences the day after the events which caused the damage.

The case comes before the Dutch Supreme Court, which finds in favour of Fernhout. Although statutory law does not provide clear instructions, the creditor cannot escape the shorter prescription period by basing his claim on general tort law: 'to that extent, the statutory regulation concerning collision is to be applied exclusively'. If a different outcome would be allowed, Article 8:1793 BW would have to be considered meaningless in practice, according to the Dutch Supreme Court.[57] As a result, Essent can base

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[55] HL 25 July 1994, [1995] 2 *AC* 145, at 184 (*Henderson/Merrett Syndicates Ltd*), my italics. Earlier, the Irish Supreme Court and the Supreme Court of Canada issued similar judgments: IESC, *IR* 1979/249 (*Finlay/Murtagh*); SCC, [1986] 31 *DLR* (4th) 481 (*Central Trust Company/Rafuse*).

[56] 'Een rechtsvordering tot vergoeding van schade veroorzaakt door een voorval, als bedoeld in afdeling 1 van titel 11, verjaart, indien zij niet op een overeenkomst is gegrond, door verloop van twee jaren, welke termijn begint met de aanvang van de dag, volgende op de dag van dit voorval.'

[57] HR 15 June 2007, ECLI:NL:HR:2007:BA1414 (*Fernhout/Essent*), par. 4.2 : 'De wet bevat geen voorschrift over hetgeen te gelden heeft bij samenloop van onrechtmatige daad en aanvaring. De omstandigheid dat voor een

his claim on extracontractual liability law (Art. 6:162 BW), but this claim is not successful, because Fernhout may rely on the special prescription period (Art. 8:1793 BW).

An exception is also made in German law, when 'the application of tort law would (…) *frustrate* the purpose of a contract law norm'.[58] And under English law, the concurrence between contract and tort is 'subject (…) to ascertaining whether the tortious duty is *so inconsistent* with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded'.[59] Tort law will therefore not always afford greater protection, because a claimant may benefit from its application only to the extent that this is allowed under the rules and terms governing the contract.

2.2.2. No concurrence of actions in the relationship between contracting parties and third parties

2.2.2.1. Principle: *la relativité du contrat*

Dutch law follows the principle of *relativité du contrat*. A contract only creates obligations for the parties to the contract. It is a prevailing doctrine that one can only become a party to a contract if one enters into a contract in person or through representation. It is important to note that third parties therefore cannot derive any claim directly from a contract. As a consequence, there is no concurrence between contractual and extracontractual liability rules in this area. In special circumstances, third parties may be able to claim damages, but the basis for such a claim is not the contractual liability regime, nor is a breach of contract sufficient to constitute an unlawful act towards third parties.

There are statutory exceptions to the principle of *relativité du contrat*, but we will not discuss them all here.[60] We will focus on the possibility of a third party to claim damages from a contracting party, and the effect of an exoneration clause in this context. It will become apparent that a solution has not been reached by stretching the concept of 'parties to a contract', but by stretching the boundaries of extracontractual liability law.

2.2.2.2. Third party may claim damages from contracting party

Even though contracting parties may pursue their own interests, this does not mean that they do not have to take into account the interests of third parties at all. If a third party has an interest in the proper performance of the contract and will suffer damages as a result of a failure to perform the contract, the

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vordering tot schadevergoeding uit onrechtmatige daad een langere verjaringstermijn geldt (art. 3:310) dan voor een vordering tot schadevergoeding uit aanvaring (art. 8:1793), brengt echter onvermijdelijk mee dat eiser de kortere verjaringstermijn van art. 8:1793, die strekt ter bescherming van de aansprakelijk gestelde persoon, niet kan ontgaan door zijn vordering te baseren op onrechtmatige daad, zodat de wettelijke regeling inzake aanvaring in zoverre exclusief van toepassing is.'

[58] Von Bar & Drobnig 2004, p. 201, emphasis added; *cf.* D. Koch, *Produkthaftung: zur Konkurrenz von Kaufrecht und Deliktsrecht*, Berlin: Duncker und Humblot 1995, p. 227.

[59] HL 25 July 1994, [1995] 2 *AC* 145, at 184 (*Henderson* v. *Merrett Syndicates Ltd.*), my italics.

[60] See Art. 6:251-257 BW.

extracontractual duty of care may imply that the contracting party must take into account the interests of the third party and determine its actions accordingly.

An example is the case *Vleesmeesters/Alog*.[61] It concerned a shop-in-a-shop formula, with a butcher being part of a supermarket. The supermarket wanted to relocate, which was against the terms in the contract with the landlord, an investment company. The butcher could not rely on this breach of contract as a cause of action. However, he could bring a claim for damages based on extracontractual liability law. The Supreme Court made clear that several viewpoints have to be taken into account:

(i) The capacities of the parties involved;
(ii) The nature and purpose of the relevant contract;
(iii) The way in which the interests of the third party are involved in the contract;
(iv) The question whether this involvement was apparent to the contracting party;
(v) The question whether the third party could reasonably expect that his interests would be spared;
(vi) The question to what extent it would be onerous for the contracting party to spare these interests;
(vii) The nature and scope of the damages faces by the third party;
(viii) The question whether the third party should have insured himself against this risk;
(ix) The question whether compensation of the third party would be reasonable.

A related question is whether the contracting party may rely on an exoneration clause against a third party. The general rule is that this is not possible, because of the principle of *relativité du contrat*. However, an exception can be made if this is justified by the facts of the case. According to the Supreme Court, a contracting party may rely on the exoneration against a third party if: (i) the acts of the third party have led to the reasonable expectation by the contracting party that the latter could invoke the exoneration clause against the third party;[62] or (ii) if this follows from the nature of the contract and the exoneration clause in question, and the special relationship between the third party and the contracting party.[63] A special rule has also been provided under Article 6:257 BW: Where a contracting party can derive a defence from the contract against his co-contracting party to shield him from liability for conduct by his servant, the servant may also invoke this defence, as if he were a party to the contract, if he is sued by the co-contracting party on the basis of this conduct.[64]

2.2.3. Conclusions

The comparison between Dutch and French legal systems shows a clear difference: the principle of *non-cumul des responsabilités contractuelle et délictuelle* is neither a general rule in the Netherlands, nor in Germany nor the United Kingdom. The Dutch experience shows that it is possible to grant the creditor an

[61] HR 24 September 2004, *NJ* 2008/587 (*Vleesmeesters/Alog*).
[62] HR 7 March 1969, *NJ* 1969/249 (*Gegaste uien*).
[63] HR 12 January 1979, *NJ* 1979/362 (*Securicor*).
[64] 'Lorsqu'une partie à un contrat peut en tirer un moyen de défense à l'encontre de sa responsabilité résultant d'une conduite de son préposé, ce dernier, poursuivi par l'autre partie en raison de cette conduite, peut également opposer ce moyen, comme s'il était lui-même partie au contrat.' (translations can be found at http://ssrn.com/abstract=1737848).

option when the regimes are well-balanced and the option to invoke extracontractual liability does not risk to distort the system of contractual liability.

The question whether to concur or not to concur depends, therefore, on an evaluation of both liability regimes, as Schlechtriem wrote:

> 'The circumvention of one liability system by relying on concurring actions, which thereby gain factual priority over the other system, might be welcome and therefore not be regarded as a problem at all. This is true especially if the superseded rules of liability are outdated, inadequate and need correction. (...) Where, however, the rules of one liability system are regarded as adequate, well-balanced and just, there is a need to protect them from being pushed aside by concurring actions. This is especially the case if tort law uses broad general clauses, protecting even purely economic interests (in contrast to such tangible goods as life, health and property) and thereby (theoretically) allowing tort actions for every interest violated by a breach of contract.'[65]

Since the French "*avant-projet de loi*" does not decide to restrain the scope of the general principle of liability for the acts of things, the principle of *non-cumul* still seems to be appropriate in order to prevent the interference of extracontractual liability claims. Upholding the principle of *non-cumul* in the first paragraph of article 1233 of the "avant-projet de loi" may not be desirable from a theoretical point of view, but may be advisable from a practical point of view.

The same cannot be said of the second paragraph of article 1233, which is a confirmation of the principle of *non-cumul* from the inverse perspective: in the case of corporal damages it is the extra-contractual option that must be followed, to the exclusion of the contractual regime. While this solution assumes that extracontractual liability law is more favourable to the victim, the French report has shown that this is not necessarily the case. Also, as our comparative study has shown, the principle of *non-cumul* was originally designed to protect contract law and put that liability regime on an equal footing with general tort law. It was not designed to protect general tort law from the application of contract law, as the second paragraph of Article 1233 is trying to achieve. It appears that such a use of the *non-cumul* principle is therefore not appropriate and overshoots the mark as a general solution. Therefore, we recommend to exclude the second paragraph of article 1233 from the final bill.

Concerning the actions of third parties, we have seen that this question is generally not perceived as a question of concurrence of actions, because the principle of the *relativité du contrat* prohibits that contracts create obligations for and towards third parties. While Dutch law still firmly adheres to this general rule, the French *Cour de cassation* decided that a breach of contract constitutes a *fault* and thus automatically creates a basis for extracontractual liability. The *avant projet de loi* proposes to remove this possibility and to require additional circumstances in order to constitute extracontractual liability. From a comparative perspective, this proposal brings French law closer to Dutch law in this respect.

[65] Schlechtriem, "The Borderland of Tort and Contract", *Cornell International Law Journal*, 1988, p. 468.

If protecting the interests of contracting parties is the main reason behind Article 1234 of the proposal, two other possibilities may be considered. First, French law could continue to adhere to the rule that a breach of contract constitutes a tort in itself, but could add a criterion: the third party has to prove that he could reasonably expect the performance of the contract. Then, in response to that use of the breach of contract by third parties, contracting parties may rely on an exoneration clause towards third parties. This solution would be favourable to third parties, because a breach of contract is easier to prove, but it is also favourable to contracting parties, because they are allowed to invoke an exoneration clause against such a claim. While French law does not recognize yet the possibility that an exoneration clause has this effect on an extra-contractual claim, Dutch law shows that such a solution is conceivable when contracting parties may reasonably expect to be able to rely on an exoneration clause.

Secondly, we could give an option to third parties: either use contractual liability by proving that the contract has not been performed, when he could reasonably expect the performance; or use extra-contractual liability by proving a fault distinct from the violation of the contract. Also these actions would not obey to the same regime. Mostly in the contractual liability action the party could oppose to third parties all the contractual clauses, whereas in the extra-contractual liability action parties could not rely on such clauses.

The second option seems better than the first one, since French law already allows third parties to base their claim on contractual liability in some chains of contracts, whereas it is reluctant to enforce exoneration clauses against third parties seeking damages on extra-contractual liability base.
One could say that this second solution is a violation of the French principle of non cumul. But this has to be qualified. Indeed, as it has been said, this principle is rarely used to explain the solution that governs the actions engaged by third parties. Moreover, the rule suggested is quite well-balanced for both sides, since it is limited to legitimate third parties. Therefore, this indicates that there is no need for a principle of non cumul in this particular case.

Article 1234 could then be written as follows:

Lorsque l'inexécution d'une obligation contractuelle est la cause directe d'un dommage subi par un tiers, celui-ci ne peut en demander réparation au débiteur que sur le fondement de la responsabilité extracontractuelle.
L'inexécution d'une obligation contractuelle est constitutive d'une faute à l'égard du tiers s'il pouvait raisonnablement compter sur la bonne exécution du contrat. Dans cette hypothèse, le débiteur peut lui opposer les clauses du contrat.

or

Lorsque l'inexécution d'une obligation contractuelle est la cause directe d'un dommage subi par un tiers, celui-ci peut en demander réparation au débiteur sur le fondement de la responsabilité contractuelle, s'il pouvait raisonnablement compter sur la bonne exécution du contrat. Le débiteur peut alors lui opposer les clauses du contrat.
Il peut également obtenir réparation sur le fondement de la responsabilité extra-contractuelle, mais à charge pour lui de rapporter la preuve de l'un des faits générateurs visés à la section II du chapitre II.

There is one additional piece of advice we would like to offer. The legislature should take into account the increasing importance of EU law relating to contractual and extracontractual liabilities. This raises the question whether the *non-cumul* principle should applied in the same way to these situations, when the relationship between the contracting parties is governed by a limited set of contractual rules on the European level. French courts will be inclined to apply the principle of *non-cumul* also in favour of EU contract law. However, it may not be as desirable to protect these instruments, which explicitly leave some matters to national law, against the interference of French tort law as it is to protect French contract law against French tort law. At the same time, these instruments have to be interpreted according to the principles underlying of EU law. That is, however, a result that can also be reached by allowing concurrent claims, as the experiences in Germany, England and the Netherlands - but also the implementation of the Product Liability Directive in France, and even the case-law of the Cour de Cassation before 1930[66] - show.

3. Mitigation of damage [Thijs Beumers and Maxime Cormier]

3.1. A French perspective

Among the substantial innovations of the *avant-projet de réforme de la responsabilité civile*, the introduction of the principle of the mitigation of damages in French Law is worth noticing. Indeed, article 1263 of the *avant-projet* states that "For contractual matters, the judge can reduce compensation when the victim did not take those safe and reasonable measures that would have prevented the aggravation of the loss, considering amongst other things the victim's means".

This text will address the current reluctance of French Law to embrace the mitigation principle (3.1.1.) before considering the reasons underlying the evolution suggested by the *avant-projet* (3.1.2.). Finally, we will briefly list the questions arising from the proposed wording of article 1263 (3.1.3.).

3.1.1. The French current reluctance to embrace the principle of mitigation

If one asks whether there is in French Law a principle "which imposes on a claimant the duty of taking all reasonable steps to mitigate the loss consequent of the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps[67]", the answer is clearly negative.

Nevertheless, relying on a few decisions reached by French courts - especially lower courts - commentators have argued that French Law imposes an implicit duty to mitigate on claimants[68] thanks to

[66] J.-S. Borghetti, *La responsabilité du fait des choses, un régime qui a fait son temps*", RTD civ. 2010, p. 1 s.
[67] British Westinghouse Co v Underground Ry [1912] A. C. 673 at 689 (Viscount Haldane L.C.).

tools such as the remoteness of damage[69] or the contributory negligence of the victim[70]. For instance, in a litigation between two professionals, one being economically dependant to the other, it has been held that the victim of wrongful termination may not be fully compensated for the loss suffered when he made no effort to seek other commercial opportunities[71].

But this emerging principle of mitigation was boldly rejected by the *Cour de cassation* in two major decisions[72]. In the first case, the claimant suffered from a mental disorder after a car accident caused by the defendant. In the second case, the claimant was injured in similar circumstances and, as a consequence, was not able to run her business which remained closed for an extended period of time. In both cases, the appellate judges reduced the compensation due to the claimants because, in the first case, she did not undergo psychological treatment as advised by two doctors and, in the second case, she failed to mitigate her loss by not hiring a temporary manager to run her business. Both decisions were quashed by the *Cour de cassation* which held that under article 1382 of the Civil Code 'the tortfeaser has to compensate the victim of a tort for all the losses incurred; the victim does not have to mitigate her loss in the interest of the tortfeaser'.

While some argued that these cases only dealt with tort law and that, consequently, one can find a duty to mitigate in contract law, commentators have suggested that the solution reached by the *Cour de cassation* has a broader scope. This view was subsequently confirmed by the *Cour de cassation* in cases where it refused to impose a duty to mitigate on promisees[73].

At the end of the day, it is clear that French law knows neither a general principle of mitigation in tort law nor in contract law. That is why the introduction of such a principle in the *avant-projet* comes, *prima facie*, as a surprise. However, this feeling vanishes into thin air when one considers the reasons underlying the evolution suggested by the *avant-projet*.

3.1.2. The reasons underlying the evolution suggested by the *avant-projet*

Why is French Law likely to adopt a different solution on mitigation of damage in its upcoming reform?

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[68] See A. Laude, 'L'obligation de minimiser son propre dommage existe-elle en droit privé français ?', *in Faut-il moraliser le droit français de la réparation du dommage ?*, *LPA* 20 Nov. 2002, p. 55 et seq.

[69] Article 1151 of the Civil code states "Even in the case where the non-performance of the agreement is due to the debtor's intentional breach,damages may include, with respect to the loss suffered by the creditor and the profit which he has been deprived of, only what is an immediate and direct consequence of the non-performance of the agreement".

[70] See M. Baccache-Gibeili, *Les Obligations, La responsabilité civile extracontractuelle* (2nd ed, Economica: Paris, 2012), p. 580 et seq.

[71] CA Douai, 15 March 2001, *Dr. Aff.* 2002, p. 307 et seq.

[72] Cass. civ. 2e, 19 June 2003, n° 00-22302 and n° 01-13289, D. 2003, p. 2326. For a comprehensive account of the cases in English, see S. Le Pautremat, 'Mitigation of Damage: A French Perspective' (2006) 55 ICLQ 205 and, for a comparative account between French and English legal systems, see S. Rowan, Remedies for breach of contract, A comparative analysis of the protection of performance (Oxford University Press: Oxford, 2012), p. 142 et seq.

[73] Cass. civ. 3e, 19 May 2009, n° 08-16002, *RDC* 2010/1, p. 52 et seq.

French Law first acknowledges that many legal systems – not only Common Law systems – impose on claimants a duty to mitigate their loss: Belgian, German, Canadian, Italian and Swiss systems are indeed very familiar with the duty to mitigate. Moreover, many international texts or compilations have embraced the duty to mitigate: the Principles of European Contract Law,the Unidroit Principles of International Commercial Contracts, and the United Nations Convention on Contracts for the International Sale of Goods[74].

More importantly, commentators have cast doubts on the opportunity of the broad rejection of the doctrine of mitigation. While compensating the victim of a wrong is paramount under the principle of full compensation, the latter does not authorize the victim to remain absolutely passive. On the contrary, victims should be encouraged to reduce their loss when they take reasonable means to achieve this aim. Such a view can be supported in different ways. First, from a rather political perspective, the mitigation principle promotes economic efficiency[75] and also altruistic behaviour[76], which are both paramount in contemporary French Law[77]. Secondly, from a more technical perspective, the principle of full compensation already knows limitations where the loss is too remote, unforeseeable or partially caused by the victim's negligence. Finally, the recent development of self-help remedies in contract law contributes to a contractual environment inclined to establish a duty to mitigate[78] despite the wide availability of specific performance in French Law[79].

This is certainly why rules similar to article 1263 of the *avant-projet* can be found in the previous "*Avant-projet Catala-Viney*[80]","*Avant-projet Terré*[81]" and in "*Béteille's proposition de loi*[82]". The fact that

[74] It should be noticed that French courts apply the UN Convention on Contracts for the International Sale of Goods.
[75] Since the principle of mitigation prevents resources from being wasted, a legal system willing to be efficient is very likely to impose a duty to mitigate on victims.
[76] As suggested by Belgian Law, where the notion of good faith is the legal basis of the duty to mitigate, the requirement of *bona fide* does not vanish after a breach and parties may still be required to collaborate by mitigating their loss.
[77] One can easily find examples in the *avant-projet* or in the recently published reform of the Law of contract, especially in rules governing contractual remedies: anticipatory defence of non-performance (article 1220), unilateral termination of the contract (article 1224), exclusion of specific performance where it is unreasonable (article 1221) etc.
[78] Now that termination and the possibility to ask a third party to perform the promise in kind are self-help remedies, claimants are likely to act quickly after the breach in order to mitigate his loss.
[79] Commentators have submitted that the supremacy of specific performance in French Law would render the mitigation principle ineffective as promisees would be able to avoid it easily (see Y.-M. Laithier, 'La Cour de cassation refuse d'imposer au créancier le devoir de minimiser le dommage', *RDC* 2010/1, p. 52). However, this view does not take into account the fact that promisees do not consistently ask for the specific performance of the promises. Thus, the mitigation principle would be effective in many situations.
[80] Article 1373: "Where the victim had the possibility of taking reliable, reasonable and proportionate measures to reduce the extent of his loss or to avoid its getting worse, the court shall take account of his failure to do so by reducing his compensation, except where the measures to be taken were of a kind to have compromised his physical integrity".
[81] Article 121 (contract): "(…) [The promisee's compensation shall be proportionally reduced where here] did not take the safe and reasonable measures to avoid, mitigate or remove his loss. The promisee shall recover for loss incurred in reasonable attempts to avoid loss". Article 53 (tort): "Except where the victim's physical or mental integrity is compromised, the court may reduce the compensation due when the claimant did not take the safe and reasonable measures to limit his loss".
[82] Article 1386-26: "(…)"[The court must assess the victim's loss] by taking account of his opportunity to reduce the extent of his non-physical injury or its worsening by taking safe, reasonable and proportionate measures".

French Law finally embraces the doctrine of mitigation does not seem surprising at all. However, the proposed wording of article 1263 of the *avant-projet* raises questions about its future enforcement.

3.1.3. Questions arising from the proposed wording of article 1263 of the *Avant-projet*

Questions arise from the proposed article 1263 of the *avant-projet* especially when it is compared to the above-mentioned proposals and international texts.

First, one can notice that article 1263 solely deals with the promisee's duty, contrary to the "Avant-projet Catala-Viney" and the"Avant-projet Terré". In other words, the victim of a tort seems to have no duty to mitigate his loss, even though it would have been possible through reasonable means. Such a limitation is quite surprising since it does not exist in Common Law systems[83]. Moreover, there is no p*rima facie* reason which calls for this limitation; in both contractual and tortious matters, there is a need to induce victims to act reasonably.

It is submitted that this restrictive scope is due to the legislator's reluctance to impose a duty on the victim whose sole way to mitigate his loss would be to undergo surgery or another medical treatment[84]. Bearing in mind the fact that the *avant-projet* excludes all physical injuries from contractual liability[85], it might seem logical to limit the scope of the doctrine of mitigation to contractual matters. Since the victim of a physical injury can only seek compensation for the loss suffered by relying on non-contractual rules, he would be under no duty to mitigate his damage in general and would not be forced to undergo medical treatment.

While this approach preserves the matter from the past debate between harmless and risky medical treatment, it can also be criticized. First, it is submitted that damages resulting from tortious activities are not confined to physical injuries; the victim of a tort can suffer from a material loss which could be mitigated. Secondly, if one effectively wants to protect the victim's physical integrity, as the *avant-projet* does in several occasions[86], the issue should be directly addressed.

The last proposition leads us to another aspect of the duty to mitigate which is surprisingly omitted in the proposed article 1263: the limit consisting on the victim's physical or mental integrity. It is submitted that

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[83] Despite some French commentators' views (G. Viney and P. Jourdain, *Traité de droit civil, Les effets de la responsabilité* (3rd edn, LGDJ: Paris, 2010), p. 168), the victim of a tort is required to mitigate his loss in Common Law. See H. McGregor, *McGrefor on Damages* (19th edn, Sweet & Maxwell: London, 2014), n° 9-015 and mentioned cases.

[84] Commentators have first suggested that the compensation of victims suffering from physical harm should be reduced where they failed to undergo harmless medical treatment. The Cour de cassation finally rejected this view by relying on dispositions protecting one's consent to medical treatment (article 16-3 of the Civil Code).

[85] Article 1233: "In cases of non-performance of a contractual obligation, neither the debtor nor the creditor can avoid the application of provisions regarding contractual liability to opt for the rules specific to non-contractual liability. However physical injuries are compensated following the rules governing non-contractual liability even though these injuries may have occurred during the performance of the contract".

[86] See, amongst other, articles 1240, 1254, 1281 and 1287 of the *Avant-projet*.

French Law would not admit the duty to mitigate but for this limit[87]. Since, as mentioned above, the suggested means to implement this limit seems unwanted, other approaches have to be explored. Surely, as proposed in the"Avant-projet Catala-Viney", the duty to mitigate can be set aside where the measures to be taken are of a kind that compromises the victim's physical integrity. But, once again, one might argue that benign or harmless medical procedures do not compromise the victim's integrity, this situation being unsatisfactory as French Law is willing to effectively prevent constrained medical treatments. Consequently, it is submitted that the limit should be rather formally than substantially phrased thanks to a reference to the provision protecting one's assent to medical treatment[88].

Secondly, the precise wording of the duty to mitigate should be considered. While international texts refer to 'measures reasonable in the circumstances' (UN Convention on Contracts for the International Sale of Goods, article 77) or 'reasonable steps' (UNIDROIT Principles, article 7.4.8 and PECL, article 9.505), French proposals consistently adopt a more precise approach. Thus, the victim is required to take 'reliable, reasonable and proportionate measures'(« Avant-projet Catala-Viney »), 'safe and reasonable measures'(« Avant-projet Terré ») or, in the *avant-projet* 'safe and reasonable measures (…) considering amongst other things the victim's means". This concern for detail is, it is submitted, actually unhelpful since a court will certainly hold a disproportionate, unsafe, unreliable or extremely expensive measure for the victim to be unreasonable. It actually seems that these excessive precisions are justified by the French reluctance towards legal standards, the latter being obsolete when one considers recent evolutions of French Law[89].

While article 1263 of the *avant-proje*t is loquacious as to the measures falling within the scope of the duty to mitigate, it does not address the question of the recovery of the expenses incurred in reasonable attempts to avoid loss. This omission does not seem problematic since article 1237 of the *avant-projet* states that 'The expenses incurred by the claimant in order to prevent an imminent loss, to avoid its getting worse and also to reduce its consequences, are recoverable where they are so reasonably'. Thus, where the claimant does take steps to mitigate the loss, he will recover expenses incurred in doing so[90].

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[87] *Contra* J.-L. Aubert, 'Quelques remarques sur l'obligation pour la victime de limiter les conséquences dommageables d'un fait générateur de responsabilité, A propos de l'article 1373 de l'avant-projet de réforme du droit des obligation', *in Etudes offertes à Geneviève Viney* (LGDJ: Paris, 2008), p. 55 et seq.

[88] See article 16-3 of the Civil Code which states: "There may be no invasion of the integrity of the human body except in case of medical necessity for the person or exceptionally in the therapeutic interest of others. The consent of the person concerned must be obtained previously except when his state necessitates a therapeutic intervention to which he is not able to assent".

[89] This standard is used nine times in the *avant-proje*t and fifteen times in the recently published reform of the Law of contract. At most, official commentaries, which usually accompany Acts, should mention what kind of considerations courts might take into account when assessing the reasonableness of a measure (its cost compared to the promisee's means, the certainty of the measure's capacity to substantially reduce the loss etc.). This way to proceed would both help courts and prevent the reasonableness test, which is essentially 'open' to all circumstances of the case, to be restrained to few factors. One must also expect the legal literature to heavily comment on the reform and thus gives practitioners valuable information on how to establish the reasonableness or the unreasonableness of a measure.

[90] Surely, there will be litigations where the claimant took reasonable steps to try to mitigate his loss but actually failed to do so and, as a consequence, increased the loss suffered. In such cases, courts will have to determine whether the additional loss is recoverable as it is in English Law (Winn L.J. in *The World Beauty* said that 'if mitigating steps are reasonably taken and additional loss or damage results notwithstanding the reasonable decision to take those steps, then that will be in addition to the recoverable damage and not a set-off against the amount of it', [1970] P. 144 CA at 156).

Finally, one can notice that article 1263 of the *avant-projet* merely expects the claimant to avoid their loss from getting worse while above-mentioned proposals sometimes require the claimant to take reasonable steps to 'reduce' or 'remove' their loss. Commentators have submitted that while one can easily understand why a claimant can be expected to avoid his loss from getting worse, the same does not hold true for its lowering or removal[91]. The *avant-projet*'s relatively restrictive approach should be welcomed as it might be too harsh to expect a claimant to reduce his loss - though courts would hardly find that the claimant had reasonable opportunities to actually remove his loss[92].

3.2. The Dutch Perspective

3.2.1. General perspective

In the Dutch Civil Code (CC), there is no statutory provision which explicitly states that a creditor has a duty to mitigate his losses. Although such an explicit statutory provision lacks, this duty of creditors does exist in Dutch law[93]. Mitigation is considered to be a species of contributory negligence, which is codified in article 6:101 sub 1 CC:

"Where circumstances which can be attributed to the person suffering the loss have contributed to the damage, the obligation to repair the damage is reduced by apportioning the damage between the person suffering the loss and the person who must repair the damage, in proportion to the degree in which the circumstances which can be attributed to each of them have contributed to the damage, provided that a different apportionment shall be made or the obligation to repair the damage shall be extinguished in its entirety or maintained if it is fair to do so on account of varying degrees of seriousness of the faults committed or any other circumstances of the case[94]."

In Dutch law, 'pure' contributory negligence and failing to mitigate losses are not seen as essentially different. These legal concepts only differ gradually. In the first case, a creditor's own acts have partly caused the *occurrence* of the losses. In the second case, the losses have *increased* as a result of the creditor's acts, either because he did not take measures to prevent the losses or because he failed to take measures after the breach of contract or tort which would have diminished the losses. In this sense mitigation and contributory negligence differ, but both originate from the creditor's own behavior which is (partly) the cause of (a part of) the losses[95].

Under the old Dutch Civil Code, it was generally held that a failure to mitigate certain losses meant that for those losses no damages could be awarded to creditors. So, the duty to mitigate prevented them from claiming the portion of the damages corresponding to the increase of the losses due to their failure to

[91] J.-L. Aubert, *op.cit.*, esp. p. 57.
[92] The restrictive approach does not excessively diminish the principle efficiency as a claimant, in order to avoid its loss from getting worse, is likely to take steps actually reducing it.
[93] Boonekamp, *GS Schadevergoeding*, art. 6:101 BW, aant. 5.2.1.
[94] T-M Parl. Gesch., p. 564.
[95] Boonekamp, *GS Schadevergoeding*, art. 6:101, aant. 5.2.1 and Asser/Hartkamp & Sieburgh 6-II 2013/126.

mitigate[96]. However, in the parliamentary debates on the New Civil Code it was explicitly stated that a failure to mitigate the losses does not necessarily mean that damages for these losses are completely unavailable to a creditor. In some cases, it can be reasonable to distribute these losses between the creditor who failed to mitigate, and the debtor[97]. Over the past centuries, this alternative view was defended frequently in Dutch legal literature[98], but was also criticized and rejected[99]. Moreover, Dutch case law is not yet clear on this matter and seems to favor the 'old' method[100].

3.2.2. Torts or Contract?

In the New Dutch Civil Code, the legislator decided to include a general chapter on damages in the law of obligations (currently, chapter 6.1.10 CC). The statutory provisions in this chapter are applicable on all legal obligations to pay damages, regardless whether they arise out of tort or contract[101]. Article 6:101 CC on contributory negligence – of which the duty of mitigation is a mere species according to Dutch law – is codified in this particular chapter and thus applicable on both contract and tort law.

3.2.3. Mitigation and predisposition

It should be stressed that in Dutch case law and legal literature the general duty to mitigate is distinguished from a closely-related, but conceptually different rule of the law of damages.

An important adagium of the Dutch law of damages namely holds that: "the tortfeasor takes the victim as he finds him." The predispositions or characteristics of the debtor can result in his losses caused by a tort or a breach of contract being higher than average. For instance, some victims of car accidents recover more slowly, because they are old or are weakened by an illness. Consequently, their losses as a result of the accident are higher than that of an average person. In Dutch law, however, the tortfeasor is also liable for these higher-than-average losses of his victim. He bears the risk of the unfavorable predispositions and characteristics of his victim and cannot escape liability by arguing that his victim is not an ordinary one: he has to take his victim as he is[102].

This rule seemingly contradicts with the principle that losses should be mitigated by the victim, but, on closer inspection, no contradiction exists at all. A tortfeasor or contract breaker indeed bears the risk for the unfavorable dispositions and characteristics of his victim, but he can to some extent demand that *before* or *after* the tort or breach of contract the victim takes measures to minimizes his losses. So, an older victim of a car accident needs more time to recover than an average victim and for that the tortfeasor is liable. However, the tortfeasor can demand that his older victim minimize his losses after the

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[96] A.R. Bloembergen, *Schadevergoeding bij onrechtmatige daad,* Deventer: Kluwer 1965, par. 275-276 and A.L.M. Keirse, *Schadebeperkingsplicht,* Deventer: Kluwer 2003, par. 2.2.3.
[97] T-M. Parl. Gesch., p. 5
[98] Keirse 2003, par. 2.2.3 and Bloembergen 1965, par. 276.
[99] For an overview: Boonekamp, *GS Schadevergoeding*, art. 6:101 BW, aant.5.3.
[100] Keirse 2003, par. 5.3.2.
[101] Lindenbergh, *GS Schadevergoeding*, afdeling 6:10 BW, aant. 2.1-2.3.
[102] See for instance: HR 8 februari 1985, ECLI:NL:HR:1985:AG4961, *NJ* 1986/137, r.o. 3.3, and further: Keirse 2003, par 4.3.1; A.L.M. Keirse, 'Een sigaar uit eigen doos' in A.G. Castermans et al (eds), *Ex libris Hans Nieuwenhuis*, Deventer: Kluwer 2009, p. 567-568.

accident (e.g. by going to a hospital) or took preventive measures (wearing a seat belt). These issues are separated in Dutch law[103].

3.2.4. The reasonableness of the measure

The question that then rises, is: to what extent does a creditor have a duty to mitigate certain losses? What can the debtor expect of his creditor? In Dutch law, the answer to these questions is determined by "the reasonableness of the measures to prevent or to reduce losses". The Dutch duty of mitigation is governed by an open-ended and broad principle of reasonableness. Therefore the circumstances of a specific case are always of great importance[104].

However, a few general principles can be formulated. Firstly, in answering the question what can be reasonably expected from a creditor, his predispositions and characteristics again come into play. It has to be determined what, given his physical and mental conditions, can be reasonably expected from the particular creditor in the given circumstances. For instance, from a mentally ill victim or an elderly victim of a car accident less can be reasonably expected than from a healthy and young victim. In this sense, the adagium "the tortfeasor takes the victim as he finds him" also influences the duty of mitigation.[105]

Secondly, there is in Dutch law a great emphasis on the fact that the debtor breached a legal obligation (either acted tortiously or breached a term of the contract) and is therefore the primary cause of the losses of the creditor. He is primarily responsible for any losses caused by his act and should, in principle, fully compensate for these losses. The creditor should mitigate his losses if this is reasonable, but he does not have to go to great lengths to do so. Not much is asked of the creditor[106]. This means – for instance – that, if both the debtor and the creditor can mitigate certain losses, it is the debtor (the tortfeasor or contract breaker) who should mitigate. A debtor cannot point to a creditor's failure to mitigate certain losses, if he could have prevented or minimized these losses himself[107].

Some other guidelines – for instance: a measure should be reasonable at the moment it should have been taken by the creditor and not, with the benefit of hindsight, at the moment the increased losses have actually occurred[108] – have been formulated in legal literature, although most of these rules are not firmly established in case law. In general, the question whether a creditor should have mitigated a loss is determined by the standard of reasonableness, which is, again, a very open-ended measure.

3.2.5. Mitigating the compensation for physical injuries

What does this mean for personal injury cases? Firstly, the principle of 'the reasonableness of the measures' makes it hard to diminish damages because a creditor refuses to undergo a dangerous

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[103]See for instance: HR 8 februari 1985, ECLI:NL:HR:1985:AG4961, *NJ* 1986/137, r.o. 3.3, and further: Keirse 2003, par 4.3.1.3. and Keirse 2009, p. 569.
[104] Boonekamp, *GS schadevergoeding*, art. 6:101, aant. 5.5.1.; Asser/Hartkamp & Sieburgh 6-II 2013/126 en Keirse 2003, par. 4.3.
[105] HR 8 februari 1985, ECLI:NL:HR:1985:AG4961, *NJ* 1986/137, r.o. 3.3, and see further: Keirse 2003, par 4.3.1.3 and Asser/Hartkamp & Sieburgh 6-II 2013/126.
[106] Keirse 2003, par. 4.2.
[107] Boonekamp, *GS schadevergoeding*, art. 6:101, aant. 5.5.3.
[108] Boonekamp, *GS schadevergoeding*, art. 6:101, aant. 5.5.4, who refers to: HR 21 november 1940, *NJ* 1941/425.

operation. That does not seems to be a reasonable measure to mitigate damages and presumably conflicts with his right of bodily integrity. Secondly, the question what can be medically expected of a creditor is not answered exhaustively in Dutch case law and legal literature. It has been defended that usual and normal operations should be undergone by a creditor in order to mitigate and prevent further losses[109]. In the legal literature it has been discussed whether creditors should have to quit smoking or have to lose weight in order to mitigate losses. A definite answer to that questions has not been given yet[110]. Also, the question to what extent a creditor's religious beliefs should matter, constitute a debated topic[111]. The issue is thus addressed in Dutch law, but the discussion does not seem to be very developed yet.

3.3 Proposed amendments

Considering that:

- Dutch Law knows a duty to mitigate damages the extra contractual field;
- The ministry does not want to impose a duty to mitigate on victims whose sole way to reduce their loss is to undergo a medical treatment;
- There is no need for the provision implementing the duty to mitigate to be so detailed on the way a measure can be regarded as reasonable;

We propose these amendments:

i) Amend article 1263 of the *avant-projet* as follows:

"*Sous réserve de l'article 16-3 du Code civil [ou 'du présent code'], le juge peut réduire les dommages et intérêts lorsque la victime n'a pas pris les mesures raisonnables propres à éviter l'aggravation de son préjudice*."

[Subject to article 16-3 of the Civil Code [or 'the present code'], the judge can reduce compensation when the victim did not take those reasonable measures that would have prevented the aggravation of the loss]

ii) On the assumption that the second paragraph of article 1233 of the *avant-projet* was solely designed to prevent the case of a victim forced to undergo medical treatment in order to mitigate his loss, this paragraph should be removed.

4. Imputation and causation [Emmanuelle Lemaire and Gitta Veldt]

[109] Schreuder VR 2014 andBarendrecht et al 1995, p. 202-204.
[110] Keirse 2009, p. 543-571.
[111] Schreuder VR 2014

Traditionally the concept of liability is thought to be constituted of three elements: a damageable event, a damage and a link between those two elements. This presentation of the constitutive elements of liability is not satisfactory for at least two reasons. First, this presentation does not bring to light the process by which the damageable event is connected to the debtor, in other words how this damageable event is imputed to someone. To emphasize this link, some scholars have created the concept of the 'imputation link' and they especially stress that this link is very different from the causal link. For instance, the conditions one has to establish in order to get compensation from the parents of a child who caused damage are part of the imputation link - they have nothing to do with causality. The causal link is only useful to connect the damageable event to the damage, not to the debtor.

Second, the traditional presentation of the constituent parts of liability is problematic when considering indirect damages, i.e. damages that are linked to other damages. Indeed, this presentation doesn't clearly indicate how to deal with the damages that are the consequences of other damages. In French law the compensation of indirect damages is often granted, but one can hardly identify under what conditions. It's very likely that this question could be partially dealt with here by using here the notion of the causal link. An indirect damage is compensated only if there is a causal link between this type of damage and the direct damage. For instance, economic losses that are the consequence of physical damage are compensated.

When looking at the project, it's clear that there are some improvements on this question of the constituent elements of liability. Indeed, the project introduces this concept of the imputation link in the civil code. The notion appears in article 1239 of the project which states that "*La responsabilité suppose la démonstration d'un lien de causalité entre le fait imputé au défendeur et le dommage*". The notion also appears clearly in the title of subsection 2 of the chapter 2 of the project: "*L'imputation du dommage causé par autrui*".

However this formulation is quite awkward:

- The first first occurrence of this concept (in article 1239) it is placed in a heading dedicated to causality link, which is a bit confusing. The confusion between the causality link and the imputation link is also patent in article 1240 (damages created by a member of a group) which deals with a problem of imputation and not a problem of causality.
- Not all the applications of this concept are related to it. For instance this concept also explains why the owner of a thing has to compensate the damages created by his good, but the project does not use this concept here.

Concerning the second problem — the link between the original and consecutive damage —, the project is a bit disappointing. If the idea of a link between the direct damage and indirect damages appears in some articles (art. 1235, 1236, 1237), it's never clearly expressed. Moreover, article 1239 gives the impression that the causal link only designates the link between the damageable fact and the damage. This is a pity, since a correct understanding of this link between direct damage and indirect damage could help French lawyers to admit more easily the idea, stated in article 1239, that the debtor has to mitigate his damage. Indeed, in such a case, if the aggravated damages of the debtor are not compensated, it is because there is no causal link between those indirect damages and the direct damages: the debtor could have

avoided those damages if he had been more active. Therefore the cause of these aggravated damages lies in his inaction and not the in the direct damage.

This part aims at discussing the relevance of distinguishing the concepts of imputation and causation, which are often confused in French law, contrary to Dutch law where the distinction appears to be clearer (4.1.). The difficulties linked to so-called "alternative causation" will then be discussed (4.2.).

4.1. A difficult distinction between imputation and causation:

The reform project needs to determine whether imputation should be recognized as an independent requirement in the process of establishing civil liability. This requires us to first consider whether imputation is a necessary condition to establish liability (4.1.1.) and then to discuss whether imputation can actually be distinguished from causation (4.1.2.).

4.1.1. Imputation: a necessary condition to establish liability?

This question will be discussed with regards to (substantive and prospective) French law (4.1.1.1.) and Dutch law (4.1.1.2.).

4.1.1.1. French law

4.1.1.1.1. In substantive law:

The concept of “imputation” in French Law actually relates to the question of the attribution of liability. In other words, once it has been determined that a causal link connects the damageable event to the damage (or the consecutive damage), the question remains to attribute the liability to someone.
In most situations, this question can be answered fairly easily: for example, the person who is at fault and whose fault has caused a damage will be considered to be liable for the damage they have caused. No one would even think twice about this proposition. In most cases, the question regarding the attribution of liability will be settled without any awareness of the process by which this attribution has taken place. However, the legislator and the Courts recognised a series of situations since 1804 in which the person who caused the damage is not the person to whom civil liability is attributed: in these situations, the concept of “imputation” becomes particularly relevant.

In the current article 1384 of the Civil Code, the legislator recognized that parents were liable for the damage caused by their minor child (alinéa 4), that employers were liable for the damage caused by their employees (alinéa 5), that teachers and craftsmen were liable for the damage caused by their students for

the time they were under their supervision (alinéa 6). On 29 March 1991, the *Cour de cassation* extended these situations to include associations which permanently organised the way in which disabled people lived to be held liable for the damage caused by the disabled people in their care[112]. In two decisions in 1995[113], confirmed on 29 June 2007[114], the *Cour de cassation* also accepted that a sports association could be held liable for their members' negligence if it caused damage to other players. The justifications for these solutions have evolved with time. Initially, holding someone liable for damage that somebody else had caused could be explained by the idea that the person held liable could have prevented the damage (parents, association, and teachers) or was making a profit thanks to the tortfeasors' work (employers). Nowadays, the attribution of liability to somebody who did not in fact caused the damage can mainly be explained by the need to compensate the victims. As such, the search for a deep pocket should be kept in mind.

In substantive law, two observations can be put forward:

- Formally, the Civil Code does not recognize the concept of "imputation" as such.
- Substantially however, the process of "imputation" is actually included, although informally, in the Civil Code.

Take for instance article 1382 of the Civil Code (freely translated): "Any act committed by a person who causes damage to another shall render the person through whose fault the damage was caused liable to compensate it". Even though article 1382 does not use the word "imputation", it is clear that liability is attributed to the person who committed the fault: this is the process of "imputation". The same could be said of articles 1383, 1384, 1385 and 1386 of the Civil Code. All these articles identify the person who should be held liable for damageable events which are legally actionable.

4.1.1.1.2. In the reform project

The aforementioned solutions of article 1384 of the Civil Code (and their judicial extension to educative and sports associations) have all been sanctioned in the reform project in five articles contained in a subsection 2 called "imputation of damage caused by somebody else".

Formally at least, the reform project is a positive evolution since the very concept of "imputation" has been recognized. However, we might be surprised to find a reference to this concept in only two places, one of which is the title of subsection 2. Why not use this concept throughout the whole reform project since the attribution of liability is a necessary step in the process of tort law? Why not use the concept of imputation when dealing with negligence, private nuisance, or liability for a damage caused by one's things etc.?

This recognition only seems to be a half-measure which is highly regrettable. This half-recognition is all the more regrettable since "imputation" is clearly sanctioned in the subsection related to causation applicable to both contractual and non-contractual liability.

[112] Cass, AP, 29 mars 1991,n°89-15.231, Bull. A.P., 1991, N°1,p. 1.
[113] Cass, civ. 2, 22 mai 1995, n°92-21.871, Bull. civ. II, 1995, N°155, p. 88.
[114] Cass, AP, 29 juin 2007, n°06-18.141, Bull.A.P., 2007, N°7.

4.1.1.2. In Dutch law

Under Dutch law, imputation is an explicit requirement under article 6:162 paragraph 1 of the Dutch Civil Code (DCC). Imputation is specified under article 6:162 paragraph 2 DCC which holds that an unlawful act can be imputed if it results from fault (imputation by fault) or from a cause for which the person who committed the act is answerable according to law (imputation by law) or common opinion (imputation by common opinion; sometimes translated as general principles although this might not cover its full meaning). The general tort rule under article 6:162 par 1 DCC only applies when the defendant or person himself committed an unlawful act. Only two articles regard imputation by law under tort law for one's own unlawful acts. Art. 6:164 BW states that an act of a child under 14 may not be imputed as an unlawful act and art. 6:165 par. 1 DCC holds that an 'active' act (so not negligence in the sense of a failure to act) of a person committed under the influence of a mental or physical incapacity may still be imputable. Imputation by common opinion would require assessing whether, under the current common opinion and unwritten norms, one would find certain damage or conduct imputable to a person, also outside fault. A famous example is damage as a result of inexperience, like an accident caused by an inexperienced driver which probably would not have occurred if the driver in question had had more experience. Under Dutch law such an act may be not a result of fault, but would definitely be imputed based on common opinion[115].

A lot of the imputation issues under French law that concern the imputation of acts of third parties or imputation outside fault, are, in the Netherlands, regulated under a separate section in Book 6 of the Dutch Civil Code on Liability for persons and goods (or substances). These grounds for liability are also described as 'quality based liabilities'. This section includes liability for children (6:169 BW), liability for subordinates (like employees, art. 6:170 BW) and non-subordinates (like other contractors or hired persons, 6:171 BW), liability for representatives (art. 6:172 BW), liability for defective goods (art. 6:173 BW), liability of the possessor of defective immovable property (art. 6:174 BW), liability for dangerous/hazardous substances (art.6:175 BW), liability for contamination caused by dumps (art. 6:176 BW), liability for mining operations (art. 6:177 BW) and liability for animals (art. 6:179 BW). The liability of the manufacturer for defective products resulting from the European Directive 85/374/EEC is placed in a separate section (Book 6, titel 3, section 3), as are unfair commercial practises (section 4) and unfair or misleading advertisement (section 5). The last two are implemented as *lex specialis* of the requirement of unlawful act.

In case the liability concerns another person than the one held liable (art. 6:169-172 BW), the law requires at least an imputable, unlawful act of the initial person and causation between that act and the damage as prerequisites for liability of the third person under these rules. The liability for persons is often justified by the fact that the person held liable had some responsibility, saying and/or control over the person (minors or subordinates) or has had the benefit of his services for his own cause (non-subordinates and representatives). The liabilities for goods are construed in a different manner in a sense that the unlawful act itself does not require an active act, but the fact that a person who is responsible for that good leaves it in a state in which it may cause damage (hence the requirement of a defect or deficit is to be proven by

[115] Nieuwenhuis 2015, p. 107 referring to parliamentary history of Book 6, p. 618.

the victim). Fault is not required; also in cases where the person was not aware of the dangerous state or risk, the main rule is liability. Therefore, these articles are forms of strict liability. Nevertheless, most articles contain specific, limited defences the responsible person may invoke. The idea behind these liabilities is that it shifts the burden of proof of imputation from the victim (who does not have to prove that the person knew about the danger) to the responsible person who only has limited defences regarding this imputation. For goods, these defences can be summarised as defences concerning the situation or 'fiction' to be proven by the defendant that, if the defendant would have been aware of the danger at the time the damage occurred, liability would also have lacked under regular tort law. In practise, these defences are of little relevance since the burden of proof is very high.

4.1.1.3. Proposed solutions

The process of "imputation" is a necessary step to establish any form of legal liability. Its purpose is to identify the person who is to be held liable for the damage which was caused. Therefore without this process, the victim will always be left without compensation because there will never be a liable party. Without the process of imputation, the mechanism of Tort law is rendered useless as it cannot fulfill its main function, which is compensation.

The reform project in its present version needs to be more consistent: the very concept of imputation needs either to be formally recognized as a general requirement to establish civil liability or not to be mentioned at all. The second solution does not mean that the process of imputation will not occur, it simply means that any formal mention of it be taken out (as in the current French Civil Code).

The first solution was favoured by Dutch law. There are two possibilities: either the concept of imputation is recognized as being a condition on its own to establish liability (the Dutch position), or it is formally included for all legally actionable events giving rise to a damage, and not only in the subsection related to cases of liability for somebody else's actions.

4.1.2. Imputation: a distinct condition from causation?

The distinction between imputation and causation can prove to be challenging the reform project shows (4.1.2.1). This blurry distinction is linked to the conception one may have of causation (4.1.2.2).

4.1.2.1. A blurred distinction within the reform project:

Article 1239 (al. 1) of the reform project indicates that "liability implies that a causal link be demonstrated between the event giving rise to a damage attributed to the defendant and the damage. Causation may be proved by any means".

Yet, strictly understood, causation is the process by which a cause is legally connected to a consequence; more specifically, a tortious event is connected to a damage. As such, the process of attribution of liability (imputation) by which the damage is connected to the defendant should clearly be distinguished from the causal link *per se*. Once again, the recognition of the concept of imputation is formally a positive evolution although the relevance of including it in a subsection dedicated to the causal link may be discussed and/or criticised since the nature of these links could not be more different. Causation is a process in which legal truth is searched for: is event B the result of event A? Imputation is a process in which a choice is made: since it has been determined that event B is the result of event A, who should be held liable for event B? The answer to this question is clearly a matter of choice guided by policy reasons: a choice made firstly by the lawmakers (see for example subsection 2 "imputation of damage caused by somebody else" of the reform project), and then by the judge who has to decide the issue in the specific case at hand.

The difference of nature between these two links (causation/imputation) might call for the need to delineate them more clearly in the reform project.

4.1.2.2. A blurred distinction linked to the problematic conception of causation

4.1.2.2.1. In French Law

The proper place of imputation in the reform project depends on how causation is understood. Strictly understood, causation is the concept expressing the link between the event giving rise to a damage and the damage: if this conception of causation prevails, the concept of imputation is clearly misplaced in the reform project. However, causation may be understood more broadly as the link from the defendant to the damage through their connection to the tortious event. This conception of causation, if approved, explains and justifies the reason why imputation has taken place in the subsection dedicated to the causal link. If one had to make a guess as to the favoured conception of causation displayed in the reform project, article 1239 (alinéa 1) seems to opt in favour of the broad conception.

As such, the place of imputation in the reform project questions the very definition of causation. Defining causation has always proven to be problematic: this is probably the reason why the legislator and the judge have never really felt inclined to propose a rigid definition of this concept. However the lack of a proper definition has not prevented the judge to admit that causation needed to be direct and certain in order to be legally established. This is a well-established principle even though these two characteristics, and in particular the requirement of certainty, may be debated. That the project reform has not mentioned these two characteristics nor attempted to define, even roughly, this concept is extremely surprising, although probably voluntary. The approach to causation has been described as pragmatic[116]. As such, defining the concept of causation is not only a difficult exercise but could also potentially limit the flexibility of its use, which would not be a desirable outcome.

[116] Y. BREILLAT, « Incertitude et causalité » in Cycle Risque,assurances et responsabilités, 2005 (Cour de cassation).

If imputation is to be properly distinguished from causation, these two concepts need to be legally defined. This will only be possible if a thorough reflection is undertaken to determine what is the purpose of these two concepts in establishing civil liability. As such, the reform project seems lacking as far as article 1239 is concerned.

4.1.2.2.2. In Dutch Law:

The problem in distinguishing causation and imputation and defining both in a consistent manner is also known in Dutch liability law.
Under Dutch law, one should distinguish between causation (i.e. the causal link) between the unlawful act and the damage as a prerequisite to establish liability (art. 6:162 par 1 DCC, also known as `Phase I´), and causation for the determination of the amount of damages paid (art. 6:98 DCC, also known as `Phase II`) on the link between the event and the damage (and not the unlawful act and the damages). To make matters confusing, this last type of causation is also known as ´imputation of the damage based on reasonableness´, but it regards more than just the initial imputation of the unlawful act itself in Phase I (see below). Article 6:98 DCC is part of the general section on damages that is applicable both to tort, as to contract and unfair enrichment, undue payment and *negotiorum gestio* (as other sources of obligations)[117].

Phase 1 - *Condicio sine qua non*
Both under general tort liability for one's own acts, as under liability for persons or goods, causation in the first phase (establishing liability) would be the well known *condicio sine qua non*, which means that the victim has to state (and when disputed, prove) that if the unlawful act was not committed or unlawful omission omitted their damage would not have occurred. This is such an obvious criterion that is not codified in the law. If all the other requirements are met, liability is established.

Phase 2 - Imputation of the damage
The next phase would then determine what amount of damages should be awarded. Art. 6:98 DCC states as main rule (freely translated): `Compensation is only awarded for damage which is related to the event giving rise to the liability of the person, which, also having regard to the nature of the liability and of the damage, can be attributed to him as a result of such event.´ The text of the article itself does not correspond very well with the way it has been applied and elaborated in case law. It is formulated as a condition but in practice it is used as an exception. The starting point is that, normally, under article 6:98 DCC, the liable person should pay for all damages caused by his act[118]. The causation requirement in art. 6:98 DCC serves as a safety valve preventing damages to be awarded that cannot be reasonably been foreseen when committing the act or preventing a too heavy a burden to be placed on the defendant in cases where fault is lacking or the act or norm violated is seen as not as grave[119].

Art. 6:98 BW gives two circumstances which have to be taken into account in assessing the link between the event and the damage: 1) the nature of the liability (the legal ground and whether it is based on fault or risk) and 2) the nature of the damage (for example, economic losses or physical harm).

[117] Asser/Hartkamp & Sieburgh 6-II 2013/6 and 50.
[118] HR 20 december 2013, ECLI:NL:HR:2013:2102, NJ 2014/35.
[119] Asser/Hartkamp & Sieburgh 6-II 2013/50.

Furthermore, other circumstances identified by the supreme court are (non-restrictive because of the word `also´ in 6:98)[120]:

3) the nature of the norm violated (safety or traffic norm v. general rule)
4) the nature of the act (the actual behaviour or conduct, this also includes the degree of fault)
5) whether the damage is the result of the manifestation of the risk created
6) the foreseeability of the damage
7) too tenuous a link (when A caused B caused C caused D caused etc. and the damage claimed in this case is too far removed from the actual cause but there is still *condicio sine qua non*)

In general, one could state that the graver the fault, the more reasonable one finds it that certain damage that could not have been reasonably foreseen is imputed to the person responsible. The graver the damage (for example physical harm as opposed to economic loss) the further imputation goes (also unforeseen damage or predispositions of the victim will be imputed to the defendant). The more normative value the violated norm has (road traffic and other safety norms), the faster imputation follows. This means that, indeed, also under Dutch law, the imputation of the unlawful act as assessed in the first phase becomes relevant again for the amount of damages to be paid, but only after liability has already been established. Plus, the imputation of the damage - phase II - entails an evaluation of more circumstances of the case (not only the imputation of the unlawful act).

Until recently, circumstance 6 (above) was seen as the decisive factor for imputation of damages. This was also called `the theory of adequate causation´ (adequatieleer)[121]. Nowadays the prevailing opinion in the literature, based on case law, is that this circumstance is still highly relevant but not always decisive (in physical harm cases for example, damage that cannot reasonably be foreseen will often still be imputed based on the violation of the norm or the nature of the damage)[122]. Most of the aforementioned circumstances point in the direction of a normative judgment, but some (like 5, 6, and 7) do focus on the causal link between the act and the damage. Because of this approach, the result can sometimes be an unclear mix of factors that relate to both imputation and causation, hence probably the use of both causation and imputation in this context. Furthermore, article 6:98 DCC may - in very rare and exceptional cases - also be used as a ground for a causal link where *condicio sine qua non* is lacking (in case the 'phase I test' fails)[123].

4.1.2.2.3. Proposed solutions:

Given the different nature of causation and imputation, we propose for these two concepts to be clearly distinguished.

Causation should be understood strictly as being the link between the event giving rise to a damage and the damage. This proposition relies on causation's purpose which is to determine whether the damage was

[120] Asser/Hartkamp & Sieburgh 6-II 2013/63.
[121] Asser/Hartkamp & Sieburgh 6-II 2013/56 and 57.
[122] HR 9 juni 1972, NJ 1972/360, HR 21 maart 1975, NJ 1975/372, HR 08 februari 1985, NJ 1986, 137.
[123] Asser/Hartkamp & Sieburgh 6-II 2013/79, 83 and 86.

the result of a legally actionable event. Regarding this test, it is not really necessary to know who is responsible for this event.

The process of attributing legal liability to someone regards a separate condition or test: this is the process of imputation which is a matter of legal choice. Generally, the law decides to attribute liability to the person who actually caused the damage through a legally actionable event (fault, etc.). This process of imputation is the "general principle" for attributing liability and most of the time it goes hand in hand with the determination of causation. Without being able to determine whether event A caused event B, we cannot attribute any liability to the person who committed event A. Therefore, in principle, the process of imputation depends directly on the determination of causation. This is the main reason why causation and imputation can be difficult to distinguish. Under the general principle, the attribution of liability is generally "painless" and one hardly thinks of it.

Sometimes however, the legislator and the Courts decide to attribute liability to somebody who did not cause the damage: these are exceptions to the general process of attribution of liability which are strictly constricted to some specific cases (parents/children, employers/employees and so on). In this configuration, the process of imputation still depends to a certain extent on causation: in all these specific cases, the person (X) is held liable for an action which was caused by somebody else (Y). So there is still a need to prove that Y caused the damage. Only if it is proved that Y caused the damage can X be held liable for Y's action. In the exceptional cases pointed out, the reliance on causation is however indirect, contrary to the general principle. This explains why causation can be more clearly distinguished from imputation in these scenarios.

For this reason, we propose to define imputation as a legal process which aims at identifying the person who is to be held liable for the event giving rise to the damage. We propose that the reform project recognises "imputation" as a requirement distinct from the other conditions needed to establish civil liability.

4.2. The problem of so-called "alternative causation":

The problems linked to “alternative causation” encompass two types: the “two hunters-one bullet” type of situation (4.2.1.) and the DES type of situation (4.2.2.)

4.2.1. "Alternative causation" and the "two hunters-one bullet" type of situation:

The issues linked to the “two hunters-one bullet” type of situation will be studied both in French Law (4.2.1.1.) and Dutch Law (4.2.1.2.).

4.2.1.1. In French law:

As regards to French law, we will focus on the solutions applied in substantive law (4.2.1.1.1.) compared with the solution proposed in the reform project (4.2.1.1.2.).

4.2.1.1.1 In substantive law:

The recognition of the concept of "imputation" is not only relevant to explain how a person who has not caused a damage can be held legally liable, but can also help to understand the solutions in cases where a damage has been caused by an indeterminate member of an identified group. This is generally illustrated by the "one victim - two hunters" situation: two hunters both fire their guns but only one bullet reaches the victim. However, it is impossible to know from which gun the damageable bullet has been fired. Two possibilities are available: either the two hunters are not held liable since the victim (or their inheritor) will be unable to prove which one of the two hunters fired the damageable bullet, or the two hunters are both held liable since neither of them will be able to prove that they did not fire the damageable bullet.

Until the 1950s, the courts systematically refused to hold the participants liable *in solidum*. Summing up quite well the reasons for such refusal, H. and L. Mazeaud expressed that "collective punishment is in line with the idea of totalitarianism, which is not part of French traditions: here is a rule of elementary justice [translated]"[124]. Being unable to identify the person who caused the damage, the courts preferred to dismiss the claims. However, the judges changed their position in order to admit that, in cases such as the two hunters, where the action of the members was concerted, all members of the group could be held liable *in solidum*. This solution was underpinned by the idea of "collective negligence"[125].This was also recognised in case of liability for the damage caused by one's thing, where the idea of "collective custody" has emerged. However, the conditions which enable to hold an indeterminate member of an identified group liable are generally understood very strictly.

4.2.1.1.2. In the reform project:

Article 1240 of the reform project formalises the solution when the damage caused is a personal injury: "When personal injury has been caused by an indeterminate member of an identified group of people acting together or for similar purposes, each of them answers for it all, except if they can prove that they could not have caused it". The idea of a "collective action" is clearly put forward in this article. As such, the project reform accepts that liability could be attributable to all members of the group, even though only one or a few of them have actually caused the damage. The concept of imputation is clearly to be distinguished from the issue of causation and expresses the idea of a choice. Whether one chooses to protect the victim to the detriment of members of the group who have not caused the damage, or chooses to protect the members of the group leaving the victim without compensation, is a matter of legal choice.

The project reform has decided in favour of the protection of the victim for a specific case, when personal injury occurs. This is an attempt at balancing the interests between the victims and the "innocent" members of the group which should be approved.

4.2.1.2. In Dutch law:

Alternative causation: Two hunters, one bullet

[124] S. CARVAL, G. VINEY, P. JOURDAIN, Les conditions de la responsabilité, Traité de droit civil, LGDJ, 4ème éd., p. 297.
[125] S. CARVAL, P. JOURDAIN, G. VINEY, Ibid, pp. 297-298.

For the ´two hunters - one bullet´-case, Dutch law has included a separate article 6:99 DCC in the general section on damages, to solve the problem of burden of proof that the victim cannot prove who fired the bullet that wounded him (freely translated): `If the damage is the result of two or more events, for each of which a different person is liable, and it is ascertained that one of these events has caused the damages, then each person carries the obligation to pay the damages, unless he proves that the damages is not the consequence of the event that he is liable for.` This article is not limited to personal injury cases but may be applied to all types of damage. Furthermore article 6:99 DCC differs from the French proposal, article 1240 of the project, since it focusses on concurring events and is not limited to 'people acting together or for similar reasons (*motifs*)'. Article 6:99 DCC is therefore also applicable if the different types of events or alternative causes concur or when damage could have been caused by one out of multiple people acting with different reasons (*motifs*) (as long as each of them could have caused the damage in full independently). Article 6:99 DCC only solves a causality problem and is no ground for liability in itself: For each event there must also be a ground for liability for which all requirements (except causal link) have to be met (like for example art. 6:162 DCC).
In practice, in light of art. 6:102 DCC, if the defence in the last sentence of article 6:99 BW (`unless´) cannot be proved successfully, both 'hunters' are jointly and severally liable for the damage and the victim may choose. Normally, in case of joint and several liability, regarding recourse between tortfeasors, each liable person that pays the victim in full has a right of redress based on the same art. 6:102 par. 1 DCC which will be calculated in proportion to the amount the different acts which can be imputed to each of them have contributed to the damage. This of course cannot be applied in 6:99-cases since only one bullet caused the damage; we just do not know who fired it. Because of the lack of the proof in most 6:99-cases, this will mean that in practice that the one who pays the victim in full may not take recourse on the other persons[126].

Group liability: Who carried a gun and fired it?
Next to art. 6:99 DCC, in light of hooligan violence and other group acts of violence, the Dutch legislator introduced a new ground for liability, group liability in art. 6:166 par 1 DCC. This article solves a different type of causality problem. It is not placed in the section on liability for persons and goods since it could entail an act of the person himself within the group or an act of another person; the uncertainty about 'who did what' is the reason the article was introduced. It is intended to solve causality problems for the victim since he or she often cannot prove who did what or who caused damage (compared to art. 6:99 DCC: not every person in the group needs to have ´fired a bullet´, one or more fired one, and the others were just watching and/or not interfering which constitutes a type of unlawfulness). Unlike article 6:99 DCC, it also introduces a specific type of unlawful act and independent ground for liability. Par. 1 states: ´If one out of a group of persons unlawfully causes damage and the risk of thus causing damage should have restrained the persons from their collective conduct, they shall be jointly and severally liable if they can be held accountable for such conduct. 'Such conduct' in this article means the person's collective conduct as such (for example the staying with the group when things got out of hand) and not the conduct that caused the actual damage itself. Therefore, article 6:166 par 1 DCC does not hold a separate exception or exemption from liability in case the accused did not 'fire a bullet'.
Furthermore, par. 2 includes an exception to the general rule of redress under art. 6:102 DCC: As amongst themselves, the group members must contribute in equal shares to the damages unless, in the

[126] Asser/Hartkamp & Sieburgh 6-II 2013/91.

circumstances of the case, fairness requires a different apportionment[127]. This is also justified by the fact that even the group member who did not 'fire a bullet' still could have committed an unlawful act by staying with the group or not evading himself from the group (the aforementioned conduct or the group behaviour which is unlawful). Unlike article 1204 of the project, Dutch law clearly distinguishes between alternative causation (6:99) cases and group liability (6:166) cases.[128] Both have different requirements, and solutions regarding recourse between tortfeasors.

4.2.2. "Alternative causation" and the DES-type of situation

The solutions to the DES type of situations will be studied in both French law (4.2.2.1.) and Dutch Law (4.2.2.2.) before giving some conclusive observations on this issue (4.2.2.3.).

4.2.2.1. in French law

Article 1240 of the reform project extends the solution of the "two hunters-one bullet" situation to another type of case. The solution applies not only to members of a group who act together but also to those who act "for similar purposes". In this last situation, there is no "collective action"; there are only single actions that resemble one another. Typically, a medicine which caused personal injury has been produced by two different producers. It is impossible to identify which drug the victim has been taking given the large span of time which has passed between the purchase/consumption of the drug and the development of the illness. As a result, we know that one of the producers is liable for the damage but it is impossible to determine which one of the two it is.

In this situation, it seems absurd to consider that there was a "collective action", since the two producers are in competition. However, these two producers did act for similar purposes (selling their products to consumers to make a profit). Article 1240 of the project reform recognises the solution given by the *Cour*

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[127] Boonekamp, GS Onrechtmatige daad, art. 6:166 BW, aant. 2 en 7 e.v.

[128] Translations of the articles from P.C. Haanappel and E. Makaay, *NETHERLANDS CIVIL CODE, BOOK 6, 1990, available through* http://ssrn.com/abstract=1737848.

Article 6:99 DCC, English: Where the damage may have resulted from two or more events for each of which a different person is liable, and where it has been determined that the damage has arisen from at least one of these events, the obligation to repair the damage rests upon each of these persons,unless he proves that the damage is not the result of the event for which he himself is liable.

Article 6:99 DCC French: Lorsque le dommage peut être la conséquence de plusieurs événements, chacun étant la responsabilité d'une personne différente, et qu'il est établi que le dommage résulte d'au moins un de ces événements, l'obligation de réparation incombe à chacune de ces personnes, à moins qu'elle ne justifie que le dommage n'est pas la conséquence d'un événement dont elle-même est responsable.

Article 6:166 DCC, English: 1) If a member of a group of persons unlawfully causes damage and if the risk of causing this damage should have prevented these persons from their
collective conduct, they are solidarily liable if the conduct can be imputed to them. 2. Among themselves, they must contribute to the reparation of the damage in equal parts, unless in the circumstances of the case equity requires a different apportionment.

Article 6:166 DCC, French: 1. Si une personne faisant partie d'un groupe cause un dommage de manière illicite et si le risque de causer ainsi un dommage avait dû retenir les membres du groupe d'adopter une telle conduite collective, ceux-ci sont solidairement responsables si cette conduite leur est imputable.
2. Ils contribuent, entre eux, à la réparation du dommage par parts égales, à moins que, en la circonstance, l'équité exige une répartition différente.

de cassation on 24 September 2009[129] and on 17 June 2010[130]. The defendants would be liable *in solidum* except if they can prove that they did not cause the damage. This proof reveals to be a real *probatio diabolica*, because the defendants will never be in a position to prove that their product was not the one taken by the victim. The position of the project reform on this point deserves to be approved as it fully protects the interests of victims.

However, the main issue with regards to this question has been left without answer. The project determines that all members of an identified group acting for similar purposes will be held liable *in solidum*. But what happens then? The question of the contribution to the debt has not been properly dealt with. Two recent decisions of the Tribunal of Nanterre on 10 April 2014[131] considered that all the producers of a medicine called DES were liable *in solidum*. However, once the victim was awarded with the damages by one producer, the final repartition of the debt between the tortfeasors was determined according to their respective market shares[132]. These two decisions aside, the final repartition of the debt between the tortfeasors is generally recognised to be equal. Article 1265 of the reform project, which deals with the effects of civil liability in case of multiple tortfeasors, proposes the following delineation: when the tortfeasors are all negligent, their liability is shared according to the gravity of their negligence; when all the tortfeasors act without negligence, their liability is equally shared; finally, when a tortfeasor is negligent and another is not, the faulty tortfeasor supports the final burden of the debt alone. As can be observed, the reform project stays silent on the question of possible use of the "market share" doctrine at the stage of contribution to the debt[133].

As it is, the project reform seems to implicitly refuse this "doctrine", but a clear-cut stand on this point could be expressly adopted so that any further debate is closed.

4.2.2.2. In Dutch law:

Art. 6:99 DCC was incorporated in the new Dutch Civil Code in 1992 and was applied also to the supreme court in the famous DES-case[134]. The daughters could not prove which medicine from which manufacturer their mother took, nor could they identify all the manufacturers that had placed the medicine

[129] Cass, civ. 1, 24 septembre 2009, n°08-16.305, Bull. civ. I,n°187.
[130] Cass, civ. 1, 17 juin 2010,n°09-67.011, Bull. civ. I, n°137.
[131] Two decisions: TGI Nanterre, ch. 2, 10 avril 2014, n°12/12349 and n°12/13064, JCP. G., n°20, 19 mai 2014, 575, obs. C. QUEZEL-AMBRUNAZ.
[132] This solution introduced by the Tribunal (unconfirmed) is an adaptation of the American decision Sindell v. Abbot Laboratories, 26 Cal. 3d 588 (1980). Contrary to the Sindell case, the Tribunal of Nanterre did not apply the market share liability rule at the level of the awards of damages to the victim (at this level, the Tribunal decided to apply the rule of liability in solidum) but applied the rule at the next stage (recourses between tortfeasors).
[133] A solution prescribing all members to be equally liable at the stage of final repartition of the debt does not seem necessarily equitable: why would the "innocent" but unidentified member be held liable for the same amount than the "guilty" but equally unidentified member? However, the same could be said about the use of the market share doctrine at this stage: the company which has the biggest market share will always be considered as more liable than another whose market share is smaller even though the company which has the smaller market share could be the one whose product caused the damage. Such a solution is based on the probability of exposure to risk by the companies. The chances are that the victim purchased the product whose availability was easier, and generally the bigger the market share is, the more available the product is. This "formula" does not necessarily represent the reality.
[134] HR 9 oktober 1992, NJ 1994/535, m.nt. Brunner.

on the Dutch market. In the literature, this last aspect created discussion on whether the 6:99 approach - although not yet codified at the time - could yet be applicable[135]. In the first and second instance, liability was rejected but the supreme court followed the 6:99 approach. A suggested approach of market share responsibility was not accepted by the supreme court. Brunner in his case note under this judgement, points out that regarding the recourse between manufacturers, market share could play a role under art. 6:102 DCC because one could then include the probability that the medicine of this manufacturer caused the damage[136]. In the end, this approach was not put to the test, since the case was settled by the use of introduced collective settlement mechanisms in the Netherlands under art. 7:907 and 7:908 BW which included the settlement agreement to be approved by the court. Producers and insurers created a fund of €38 million to compensate the victims. According to this agreement, every victim had a right to an amount of damages from €225 to a maximum of € 125,000[137].
There has been discussion in Dutch literature whether the 6:99-approach may still be maintained under the product liability directive which entails maximum harmonization[138]. Since the directive leaves the causation to national law, there are arguments in favour of maintaining this approach, also under the product liability directive.

4.2.2.3. Concluding observations :

The question of "alternative causation" always proves to be challenging because these cases do not fall into the constricted exceptions previously mentioned (section 1). This means that imputation is determined according to the general principle, that is to say directly through causation: the person who caused the damage is the person who is held liable. However here comes the difficulty: in these scenarios it is impossible to determine what caused the damage: whether it is bullet 1 or bullet 2, or whether it is drug 1 or drug 2, these cases are cases in which specific causation (as opposed to theoretical, general causation) cannot be determined as such. This issue of causation reflects on imputation. This explains why this issue is referred to as a question of "alternative causation" and not "alternative imputation" *per se*.

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[135] J.H. Nieuwenhuis, 'Alternatieve causaliteit en aansprakelijkheid naar marktaandeel' in: Produktenaansprakelijkheid, Preadvies VBR 1987.
[136] HR 9 oktober 1992, NJ 1994/535, m.nt. Brunner onder 6. See also A.J. Akkermans, Proportionele aansprakelijkheid bij onzeker causaal verband. Een rechtsvergelijkend onderzoek naar wenselijkheid, grondslagen en afgrenzing van aansprakelijkheid naar rato van veroorzakingswaarschijnlijkheid , Deventer: W.E.J. Tjeenk Willink 1997, p. 356 en 366; C.J.M. J.M. van Dunné,Verbintenissenrecht , Deel 2. Onrechtmatige daad. Overige verbintenissen, Deventer: Kluwer 1997, p. 277 e.v.; L. Dommering-van Rongen, Productaansprakelijkheid , Deventer: Kluwer 2000, p. 160 e.v.; N. Frenk, 'Toerekening naar kansbepaling', NJB 1995, p. 487-488; A.S. Hartkamp, conclusie bij HR 9 oktober 1992, NJ 1994, 535; E.H. Hondius, noot bij HR 9 oktober 1992, TvGR 1993, 54; C.J.M. Klaassen & A.A. van Rossem, 'DES-tijd(s), en hoe nu verder?', RMThemis 1994, p. 4-22; Stolker, GS Onrechtmatige daad, art. 6:188 BW, aant. 9; J.H. Wansink, 'Het Des-arrest in het perspectief van verzekerbare slachtofferbescherming', A&V 1993, p. 6-12.
[137] Hof Amsterdam 1 juni 2006, TvGR 2006, 42; LJN AX6440.
[138] 'Franken' 2014 (T&C BW), art. 6:188 BW, aant. C with reference to ECJ 25 april 2002, C-154/00 (Commission/Greece) and C-52/00 (Commission/France) and C-183/00 (Sanchez/Medicina Asturiana S.A.); ECJ 10 januari 2006, C-402/03 (Skov/Bilka), ECJ 14 maart 2006, C-177/04, NJ 2006, 465, m.nt. MRM, ECLI:NL:XX:2006:AX6163; and ECJ 5 july 2007, C-327/05 (Commission/Denmark).

In order to tackle this challenge, multiples solutions could be put forward:

-the victim is barred from recovering compensation.

-all the defendants are held liable *in solidum*, except if they can prove that they did not cause the damage.

-all the defendants are held liable according to the risk they exposed the victims to: in case of medicines, the determination of the victim's exposure to risk depends on the market share of the producers.

-all the defendants are held liable *in solidum*, but the final repartition of the debt between all the defendants is determined according to their market-share.

The French reform project chose the second solution. Dutch law follows the second solution in alternative causation (6:99) cases (but differs in 6:166 cases: there is no 'except-clause'). There are advantages to the second solution: the burden of uncertainty is equally shared by all defendants who could *all* have caused the damage. The burden of uncertainty is not carried by the victim as would have been the case if solution 1 would have been favoured.

The third solution seems more just for the defendants since the one who has the biggest market share is the most likely to have caused the damage. As such it seems fair to hold them liable according to the amount of risk they exposed the victim to. However, in cases where a company is failing, this means that the victim will not be able to recover the damages due by the failing company. This means that the victim can only partially recover damages. Given the usually large span of time between the exposure to risk and the manifestation of damage, the possibility for the company to have disappeared in between is significant. In fact, this scenario happens quite frequently. As such the third solution should not be implemented as it does not fully protect the victims' interests.

The fourth solution tackles the disadvantage of the third solution as the victim will always be fully compensated. However, it is at the stage of recourse between defendants that the problem of a company failing could be raised. Instead of putting the burden of a company failing on the victim (as did solution 3), solution 4 prefers putting it on the defendants. This is a better solution but is still not quite acceptable since the company which may well have not caused any damage could potentially pay for all damages. However this problem also exists under solution 2 favoured by Dutch law in 6:99 cases and the reform project: the defendants are liable *in solidum*, but it is entirely possible that the defendant who would have paid the victim in full will not be able to recover for half of what they paid because the other company would no longer exist.

As such, we need to accept that in cases of "alternative causation" there is no solution which keeps a good balance between the victim's and the defendant's interests. This means that the law needs to decide which interest they need to protect the most. Without the shadow of a doubt, the victim's interest is clearly favoured both in French and Dutch law. As such, solutions 1 and 3 need to be put aside as they do not fully protect the victim's interest. In contrast, both solutions 2 and 4 seem better on that front. They present the same disadvantage for the remaining defendant in case the other(s) have either disappeared or failed. Solution 4 is interesting because it tries to be more just for the defendants sharing the burden of damages according to the amount in which they exposed the victims to risk whereas solution 2 shares this burden equally among the defendants.

In conclusion, the reform project should choose between solutions 2 and 4. What may tip the balance is the fact that the use of the "market-share" doctrine creates great difficulties: the need to define the relevant market, and to determine the market share of each company at the time of the drug's purchase. This may mean the need to determine the market share of companies which no longer exist and to determine their market-share 10, 20, 30 years ago. These difficulties may explain why the reform project implicitly rejected any use of the "market-share" doctrine and chose solution 2 (as did Dutch Law under 6:99). This solution needs to be approved. However the reform project should clearly say that the burden of the final re-partition is equally shared among all defendants.

4.3. Conclusion

Modifier le premier alinéa de l'article 1239 comme suit:

"La responsabilité suppose la démonstration d'un lien de causalité entre le fait litigieux et le dommage. Ce dommage peut ensuite être imputé au responsable conformément aux dispositions de la section II."

Modifier l'alinéa 1er de l'article 1245 comme suit:

"Peut être imputé le dommage causé par autrui dans les cas et aux conditions posées par les articles 1246 à 1249."

5. Proportionality [Prof. dr. Alex-Geert Castermans]

5.1. Uncertain causes, uncertain losses.

We would like to elaborate a bit further on Dutch law, distinguishing the establishment of a ground of liability and the assessment of the amount of damages to be paid, as presented in paragraph 4.1.2.2 . Both under tort law and under contract law the victim has to state (and when disputed, prove) that if the unlawful act was not committed or unlawful omission omitted, the damage would not have occurred (condicio sine que non). If all the other requirements are met, liability is established. Then, the amount of damages is to be determined.

In recent years the Dutch Supreme Court had to deal with uncertainty with regard to the cause of a loss and uncertainty with regard to the loss itself. The first type of uncertainty lead to the introduction of proportional liability, based on equity. The second type has to do with the recovery of a perte d'une

chance. The reasoning of the Supreme Court may inspire the French lawmaker to distinguish both types of uncertainty and to lead the debate on the way how to deal with these uncertainties.

5.2. Multiple causes and proportional liability

The party that claims damages, must state and eventually prove the causal connection between the tort or breach of contract on the one hand and damage on the other hand.

'To prove' means that the claimant must convince the court that the tortious behavior or the breach of contract is – or sufficiently probably is, that is: beyond reasonable doubt – the condicio-sine-qua-non for the damage.[139] Then, in principle, the claimant may ask for full compensation.

Yet, in case various causes may possibly have caused the damage, another line of reasoning has been developed. For example in the case of Karamus who suffered from long cancer. The disease could have been caused by

(1)violation of the employer's duty of care with regard to working with asbestos,
(2)Karamus smoking cigarettes for 28 years to the least or
(3)combination of these two.

Medical proof could not be delivered. Neither cause was a sufficiently probable condicio-sine-qua-non. Yet it was established by one of the Dutch Courts of Appeal that the employer's negligence had to be regarded as the cause of the cancer, as this had created a risk in a substantial way; yet the liability was limited to 55% which was supposed to be the risk that the employer's negligence had created, taking into account Karamus smoking habits which are to be attributed to Karamus (that created a risk of 45%).

The Dutch Supreme Court agreed with the Court of appeal, referring to the principles that are at the heart of article 6:99 CC and 6:101 CC.[140]

Article 6:99: Where the damage may have resulted from two or more events for each of which a different person is liable, and where it has been determined that the damage has arisen from at least one of these events, the obligation to repair the damage rests upon each of these persons, unless he proves that the damage is not the result of the event for which he himself is liable.

Article 6:101, paragraph 1: Where circumstances which can be imputed to the victim have contributed to the damage, the obligation to repair is reduced by apportioning the damage between the victim and the liable person in proportion to the degree in which the circumstances which can be imputed to each of them, have contributed to the damage. The apportionment may vary or the obligation to repair can either be completely extinguished or not apportioned at all, if equity so requires due to the different degree of gravity of the faults committed or any other circumstances of the case.

[139] Groene Serie Schadevergoeding, art. 6:98 BW, at 15.2 (R.J.B. Boonekamp).
[140] HR 31 maart 2006, NJ 2011, 250 note T.F.E. Tjong Tjin Tai (Nefalit/Karamus).

If either cause or a combination of causes created a risk at such a substantial rate and thus either cause could have been the cause of the disease, a court may find for liability of the employer and at the same time reduce his liability in accordance to the risk that was created by the employee himself. The result is that uncertainty about the condicio-sine-qua-non may be overcome, while at the same time the defendant may not be held accountable for the entire amount of damages, given the risk that has been created by the claimant.

The Nefalit/Karamus case is regarded as a fine example of the so called *proportional liability.* Yet is not embedded easily in the system of contractual and non-contractual liability in the Dutch Code Civil. In this system (1) establishing a ground for liability and (2) assessing the amount of damages the defendant ought to pay, are to be distinguished clearly. Is proportional liability a matter of establishing a ground for liability (is Nefalit liable anyhow, given Karamus suffered from cancer) or a matter of assessing the amount of damages Nefalit ought to pay? The Supreme Court's decision indicates that it is the latter, given the references to the articles 6:99 and 6:101 Code Civil, which both concern the assessment of damages. Yet, the uncertainty in the case has to do with the ground for liability as well: did Nefalit as an employer contributed to Kefalit's illness anyhow?

A new case which was presented to the Supreme Court could have given the answer.

L is 30 weeks pregnant, when her car is hit by another car, whose driver made a mistake. A few months later her newborn son appeared to have permanent brain injury. What is the cause of this injury, the car accident (for which the driver is responsible) or is it an injury caused when Mme L gave birth to her son, as the driver's insurer puts forward. The Court of Appeal marked both the car accident and the postnatal problems as possible causes of the brain injury, assessing that the risk that one of them caused at 50%/50%, the average of what several experts had reported. Then the Court of Appeal argued – on the basis of article 6:101 – that equity required that the driver – in fact: his insurance company – was liable for 60%, due to the gravity of the injury, the violation of a traffic norm and the fact that the driver was insured.

The Supreme Court agreed with the establishment of 'proportional liability', because it is a case in which one cannot be sure whether the damage is caused by the violation of a norm (either contractual or non-contractual) by the defendant or somebody whom he is responsible for, or by a cause for which the claimant is responsible, or by a combination of both, while the chance that the violation of the norm is in fact the condicio-sine-qua-non neither very small nor very large.[141] In such a case one has to take into account the purpose of the violated norm (in this case: to prevent injuries and health problems) and the nature of the norm (in Netherlands traffic and safety norms are considered very important). These are arguments to serve as a basis for a solution to the problem of condicio-sine-qua-non: it would be unacceptable according to reasonableness and fairness to let either party fully bear the consequences of the uncertainty. In such a case courts have to assess an educated guess of the chance that the damage was caused by each of the possible causes.

[141] HR 14 december 2012, NJ 2013/236, paragraph 4.2.

According to the Supreme Court the judge has to establish – by way of an educated guess – the percentage of liability, on the basis of equity. For this reason, proportional liability should be applied in a restricted way. A further enlargement of this liability of (the insurer of) the driver, again on the grounds of equity as laid down in article 6:101 CC, should be rejected.[142] Above all, the Supreme Court rejects the argument of the claimants that proportional liability is in itself an application of article 6:101 CC.[143] For this last reason, there is room for applying article 6:101 CC once proportional liability has been established, but only to reduce the liability of the defendant, if there are reasons to do so and these reasons have not been taken into account in establishing proportional liability.[144]

Thus, it is clear that establishing proportional liability is not a matter of assessing the damages. Accepting a cause as a condicio-sine-qua-non for a percentage is a matter of establishing a ground for liability, maximizing the liability of the defendant in an absolute way.[145]

5.3. Proportional liability and perte d'une chance

A third case shows how proportional liablity and the theory of a perte d'une chance relate to eachother.

H was partner in an accountancy firm. He left the firm, receiving an exit-fee. B, his tax advisor, advised him how to spent the fee in a 'taxfriendly way'. It turned to be an improper advise, resulting in a breach of contract. H claimed for damages. B argued that H would have had to pay the same amount of damages if he had advised him correctly. The Court of Appeal found that it was not certain whether B would have met the conditions for a tax-friendly way to spent the exit-fee, assessing the chance he would at 60 pecent. B was to be held liable for this percentage.

B argued that there were no good reasons to establish proportional liability. The Supreme Court did not follow his line of reasoning.[146] The cause of the damages was not uncertain. There was a clear breach of contract. There was no doubt that H would have followed B's proper advise and would have done his upmost to meet the conditions for a tax-friendly way to spent the exit-fee. Thus, the breach of contract was the one and only cause for the 'perte d'une chance' that H would have met the conditions for a tax-friendly way to pent the exit-fee. The condicio-sone-qua-non for this loss of chance was absolutely certain. Therefore it was not necessary to apply the test for proportional liability on the basis of equity.

The Supreme Court furthermore reasons that damages in the form of a perte d'une chance can only be assessed if there is a condicio-sine-qua-non-connection between the breach of a contract or a tort and the

[142] HR 14 december 2012, NJ 2013/236 note S.D. Lindenbergh, paragraph 4.3.
[143] HR 14 december 2012, NJ 2013/236, paragraph 5.3.
[144] HR 14 december 2012, NJ 2013/236, paragraph 4.4.
[145] Advocate-General Hammerstein in his advise to the Supreme Court, sub 2.3.2; and a bit more cautious sub 2.3.6.
[146] HR 21 december 2012, NJ 2013/237 met annotatie van S.D. Lindenbergh, paragraph 3.6.

loss of the chance for success'.[147] The meaning of this reasoning is debated. It is suggested that the Supreme Court intended to explain the idea and purpose of both proportional liability (the cause is uncertain) and the theory of the loss of a chance (the loss is uncertain). The Supreme Court did not intend to exclude the liability for perte d'une chance in cases of proportional liability. For example in the case of a victim of a car accident who fells ill afterwards, the causes of the illness may be sufficiently uncertain (car accident or the victim's state of health), while the chance of recovery may be influenced by the accident.[148]

5.4. Food for thought

The French lawmaker is advised to consider proportional liability as established in Dutch case law and to set guidelines to distinguish proportional liability and the imputation of circumstances to the claimant while assessing the amount of damages to be awarded.

The instrument of proportional liability may be used on the ground of equity, where the cause of a loss is uncertain. Given the chance that a party may be held liable where she may in fact not have caused the loss, it should be used in a restricted way. Once the percentage of liability is set, the amount of damages to awarded mat be lowered with a view to circumstances that can be imputed to the claimant and have not been taken into account assessing the proportional liability.

Finally, proportional liability is to be distinguished from the recovery of a perte d'une chance. Where the loss itself is uncertain, damages may be awarded in the form of a perte d'une chance. If the cause of this loss is not uncertain – and there is no doubt about the responsible party is – there is no reason to apply the theory of the perte d'une chance in a restricted way.

6. Transition law in the *Avant-Projet* [T. Vancoppernolle[149]]

6.1. Introduction: the importance of transition law

Transition law (*droit transitoire*) is sometimes described as "throw-away law"[150]. It is, nevertheless, highly important. Good transition rules avoid confusion (and legal proceedings) concerning the intertemporal application of new acts. In addition, public support for a new act may to some extent depend on its intertemporal application. It is therefore crucial that the legislator reflects upon the

[147] HR 21 december 2012, NJ 2013/237, r.o. 3.5.3.
[148] A.G. Castermans and P.W. den Hollander, 'Omgaan met onzekerheid. Proportionele aansprakelijkheid, artikel 6:101 BW en de leer van de kansschade, Nederlands Tijdschrift voor Burgerlijk Recht 2013, p. 185-195 referring to HR 14 december 2012, NJ 2013/236, paragaph 4.4.
[149] PhD Fellow of the FWO (Research Foundation Flanders) – Centre for Methodology of Law, KU Leuven Law Faculty.
[150] This expression ("*wegwerprecht*") was used in the Parliamentary Records on the Dutch Transition Act. See: W.H.M. REEHUIS and E.E. SLOB (eds.), *Invoering boeken 3, 5 en 6. Overgangsrecht* in *Parlementaire geschiedenis van het Nieuwe Burgerlijk Wetboek*, Deventer, Kluwer, 1991, 18.

transition system for new Acts, and preferable that he expresses his views by means of transition clauses.[151] This is particularly true for large-scale reforms, such as the *Ordonnance n° 2016-131 portant réforme du droit des contrats, du régime général et de la preuve des obligations* and the *Avant-projet de loi portant réforme de la responsabilité civile*. Unfortunately, and contrary to (the final version of) the *Ordonnance n° 2016-131*, the *Avant-projet* does not contain any transition clauses. This report will therefore highlight the main issues to be considered when drafting such clauses and give guidelines for doing so.

6.2. The politics of transition law: conservative or progressive transition policy

Transition law must strike a balance between two fundamental ideas. On the one hand, as Parliament has agreed upon its enactment, the new Act is deemed to be better than the old Act, and should therefore receive a broad intertemporal application. On the other hand, legal subjects must (to a certain extent) be able to rely on the stability of the law, which implies a broad intertemporal application of the old Act. Striking this balance between "innovation" and "legal certainty" is not a merely technical issue, but a matter of policy. Therefore, when drafting transition law, the legislator must first decide whether he wants to pursue either a "conservative" transition policy or a "progressive" one. The chosen policy can then be operationalised by setting the date of entry into force of the new act (6.3.) and by determining its intertemporal application (6.4.).

6.3. Entry into force of the new act

The first aspect of drafting transition law is deciding on which date the new act will enter into force (*entrer en vigueur*). This decision depends on the transition policy pursued. If possible (*i.e.* if the enactment of the new act is not highly urgent), it is preferable that there be a large lapse of time between the date of publication and the date of entry into force, so that the legal subjects have time to prepare for the new act.[152] The Dutch Instructions for Legislation require a minimum of two (and sometimes three) months.[153] The *Ordonnance n° 2016-131* provides a good example: it was published on 11 February 2016, and will enter into force on 1 October 2016 (art. 9, section 1).

[151] See: Instructions for Legislation, https://www.kcwj.nl/kennisbank/aanwijzingen-voor-de-regelgeving, no. 165 (own translation): "*With every enactment of new legislation or modification of existing legislation, it must be considered whether or not transition clauses are in order.*"

[152] This implies that the legislator should expressly determine the date of entry into force, since, according to art. 1, section 1 of the *Code Civil*, new acts which do not specify when they enter into force, do so on the day after their publication.

[153] See: Instructions for Legislation, https://www.kcwj.nl/kennisbank/aanwijzingen-voor-de-regelgeving, no. 174.3.

6.4. Intertemporal application of the new act

6.4.1. Determining intertemporal application by choosing the linking factor

The next step is determining the intertemporal application of the new act. ROUBIER, widely followed by others, distinguishes three so-called "intertemporal functions": retroactivity (*rétroactivité*), immediate effect (*effet immédiat*) and survival of the old act (*survie de la loi ancienne*).[154] In the absence of express transition clauses, a new act is normally not retroactive, but has an immediate effect. In contract law, however, the old Act generally remains applicable to existing contracts. The legislator can nevertheless deviate from these rules, since they are based on art. 2 of the *Code Civil*, which is merely a formal act.

The abovementioned intertemporal functions are, however, vague and abstract concepts. It is therefore sometimes difficult to use them to solve (complex) intertemporal conflicts.[155] Instead, it is better to determine the juristic fact relevant for deciding whether a juristic situation falls within the scope of the old or the new act. By analogy with Private International Law, we could call this relevant fact the "intertemporal linking factor" (*critère de rattachement intertemporel*).

6.4.2. Criteria for choosing the linking factor

Focusing on linking factors in order to solve intertemporal conflicts results in a large spectrum of possible transition rules, varying from conservative to progressive. A linking factor which is situated at an early stage of a legal situation results in a rather conservative transition rule; a linking factor which is situated at the end of a legal situation, results in a rather progressive one. The choice between linking factors therefore depends on the *transition policy pursued*.

However, the freedom to choose between transition policies and linking factors is *limited by fundamental rights*. For instance, art. 7 of the European Convention on Human Rights (as well as art. 8 of the *Déclaration des Droits de l'Homme et du Citoyen*) prohibits the *post factum* application of more severe criminal rules. As "criminal" has a broad meaning in the European Convention on Human Rights,[156] it is possible that the civil penalty of art. 1266 of the *Avant-Projet* falls within the scope of these provisions. In addition, the right to a fair trial (art. 6 of the

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[154] See: P. ROUBIER, *Le droit transitoire (Conflits des lois dans le temps)*, Paris, Dalloz & Sirey, 1960, 590 p.
See also ROUBIER'S Dutch counterpart: L.J. HIJMANS VAN DEN BERGH, *Opeenvolging van rechtsregels*, Utrecht, Drukkerij P. den Boer, 1928, 391 p.

[155] See for instance: J. GHESTIN, G. GOUBEAUX and M. FABRE-MAGNAN, *Traité de droit civil. Introduction générale*, Paris, LGDJ, 1997, 344-346, nos. 386-387.

[156] See: ECtHR 8 June 1976, nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, Engel a.o./The Netherlands ("*In this connection, it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. […] The very nature of the offence is a factor of greater import. […] However, supervision by the Court […] would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring.*").

European Convention on Human Rights) can sometimes prevent the legislator from applying new acts to pending proceedings (let alone finalised ones).[157] Thus, it might be safer if the *Avant-Projet* were not applicable to pending proceedings.[158] Furthermore, in principle, the right to property (art. 1 of the first Protocol to the European Convention on Human Rights) prevents the legislator from interfering with vested rights.[159] Thus, where the *Avant-Projet* abolishes a ground for liability, it cannot be applied to cases in which the right to damages has already come into being. The Dutch Transition Act contains an express provision on this matter, stating (own translation): "*The application of the new Act cannot result in the loss of a pecuniary right which has been vested under the old Act.*" (art. 69, section a).

Even though the French *Conseil Constitutionnel* does not recognise the constitutional value of the *principle of the protection of legitimate expectations*,[160] it is nevertheless a good guideline for choosing linking factors.[161] In principle, it prevents the legislator from applying a more severe act to a legal subject who legitimately expected that the old act would remain applicable. Using it as a guideline therefore implies determining to which party each (group of) rule(s) is detrimental, and choosing as a linking factor for that (group of) rule(s) the moment on which that party obtains the legitimate expectation that the old rule will remain applicable.[162]

The application of this criterion implies that the linking factor depends on the *kind of legal situation* governed by the new act.

If the new act concerns extra-contractual liability law, the linking factor is usually the damageable fact (*fait dommageable*) or the coming into being of the damage (*naissance du dommage*). The Dutch Transition Act, for instance, uses the latter as the main linking factor for extra-contractual liability.[163]

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[157] See for instance: ECtHR 9 December 1994, no. 13427/87, Stran Greek Refineries and Stratis Andreadis/Greece; ECtHR 28 October 1999, nos. 24846/94 and 34165/96-34173/96, Zielinski and Pradal and Gonzalez a.o./France.

[158] Compare with: art. 9, section 4 of the *Ordonnance n° 2016-131* (own translation): "*Legal proceedings which have started before the entry into force of this ordinance are continued and judged on the basis of the old Act. […]*" The application of this provision, however, will be rare, since the main linking factor in the *Ordonnance n° 2016-131* is the formation of the contract (art. 9, section 2 – *cf. infra*).

[159] See for instance: ECtHR 9 December 1994, no. 13427/87, Stran Greek Refineries and Stratis Andreadis/Greece; ECtHR 20 November 1995, no. 17849/91, Pressos Compania Naviera S.A. a.o./Belgium; ECtHR 6 October 2005, no. 1513/03, Draon/France; ECtHR 6 October 2005, no. 11810/03, Maurice/France; ECtHR 14 February 2006, no. 67847/01, Lecarpentier a.o./France.

[160] See for instance: Cons. Const. 7 November 1997, no. 97-391 DC.

[161] The Dutch courts are not allowed to test formal acts against the principle of the protection of legitimate expectations either (see: HR 14 April 1989, ECLI:NL:HR:1989:AD5725). Nevertheless, scholars use it as a criterion for drafting and evaluating transition law. See for instance: M.R.T. PAUWELS, *Terugwerkende kracht van belastingwetgeving: gewikt en gewogen*, doctoral thesis Law Tilburg University, 2009, 473 p.; M. SCHUVER-BRAVENBOER, *Fiscaal overgangsbeleid*, Deventer, Kluwer, 2009, 143-232.

[162] This also implies that provisions of the *Avant-Projet* which are a mere codification of the old rules, could in principle receive a very broad intertemporal application, since they are not detrimental to anybody.

[163] Unfortunately, this solution is not expressly described in the Transition Act. It results from the combination of art. 68a (immediate effect) and art. 69, sections a-d (protection of vested rights *sensu lato*). See: H.L. VAN DER BEEK, *Overgangsrecht nieuw Burgerlijk Wetboek*, Deventer, Kluwer, 1992, 210-226.

If the new act concerns contract law, the linking factor is usually the formation of the contract, as is shown in art. 9, section 2 of the *Ordonnance n° 2016-131*.[164] Obviously, the legislator can sometimes deviate from this rule, and choose to apply the new act to existing contracts. This is the case, for instance, in art. 9, section 3 of the *Ordonnance n° 2016-131*, which provides that some of the new provisions are applicable to existing contracts.[165] Another example is art. 182 of the Dutch Transition Act, which provides that the linking factor for contractual non-performance is the moment on which the non-performance has started.[166]

As the *Avant-Projet* contains rules on both contractual and extra-contractual liability, it should be considered whether or not separate transition rules must be created. This will necessarily be the case if the legislator chooses not to apply the new rules on contractual liability to existing contracts. If, however, the legislator chooses to apply these new rules to existing contracts, it would be possible to choose one linking factor for the rules on both contractual and extra-contractual liability, such as the moment of the act which causes the (contractual or extra-contractual) damage.[167]

Lastly, it is important that the *transition rules are clear*. This implies that the transition clauses cover all possible transition questions,[168] without being too complex. It also implies that the transition clauses are precise and accurate. It is not sufficient, for example, that the legislator merely provides that the new act is applicable to existing contracts (as was the case in art. 9, section 3 of the *Ordonnance n° 2016-131 – cf. supra* footnote 17). He must also specify the linking factor (as was the case in art. 182 of the Dutch Transition Act – *cf. supra* footnote 18).

It is also important that the linking factor is accurately defined. For instance, if the legislator chooses the "damageable fact" as a linking factor, he must specify whether that means the damageable act committed by the wrongdoer, the actual accident, the moment on which the damage comes into being, the moment on which the damage manifests itself,…

> The Dutch Transition Act's main linking factor for extra-contractual liability is the moment on which the damage comes into being (*cf. supra*). The Transition Act elaborates on this rule. For instance, if it is unknown when the damage has come into being, art. 173, section 1 provides that

[164] Art. 9, section 2 of the *Ordonnance n° 2016-131* (own translation): "*Contracts concluded before this date remain governed by the old Act.*"

[165] Art. 9, section 3 of the *Ordonnance n° 2016-131* (own translation): "*Nevertheless, articles […] are applicable as from the entry into force of this ordinance.*"

[166] Art. 182 of the Dutch Transition Act (own translation): "*In case of non-performance before the entry into force of the new Act, the new Act is not applicable to the consequences of the non-performance, even if the non-performance continues after the entry into force of the new Act.*"

[167] Unfortunately, the Dutch Transition Act uses different linking factors for contractual liability (art. 182: the moment on which the non-performance has started) and extra-contractual liability (art. 68a *jo.* art. 69, sections a-d: the moment on which the damage has come into being).

[168] The transition clauses in the *Ordonnance n° 2016-131* mainly concern the changes in contract law, even though the reform had a broader scope.

one should look at the moment on which the damage has been detected.[169] Another example is art. 173, section 2: if the same fact causes damage both before and after the entry into force of the new Act, then the old Act applies to all damage.[170] To be sure, one could debate whether or not the coming into being of the damage is the best linking factor. The precision and accuracy of the Transition Act is, however, praiseworthy.

6.4.3. Other transition clauses

The legislator could also choose to supplement the abovementioned clauses with "substantive" transition clauses, which create a temporary substantive rule for transition situations. Such clauses can be useful in complex and technical reforms.

Another possibility is to provide for "escape clauses", which allow for a deviation from the transition rules if they were to have unjust consequences. For example, art. 75, section 1 of the Dutch Transition Act provides (own translation): "*The new Act is not applicable […] if, given the circumstances, its application is unacceptable according to the standards of reasonableness and equity.*" Such clauses have the advantage of allowing unfair situations to be remedied. On the other hand, they make the outcome of intertemporal conflicts less foreseeable. One should also keep in mind that reasonableness and equity are key concepts in Dutch civil law (see for instance art. 6:2 of the Dutch Civil Code), and that transplanting them to another legal system may therefore involve risks.

[169] Art. 173, section 1 of the Dutch Transition Act (own translation): "*If the applicability of the provisions on liability and damages depends on the question whether the damage has come into being before or after the entry into force of the new Act, and if the answer to this question is unclear, then the decisive factor is whether the damage has been detected before or after the entry into force of the new Act.*"

[170] Art. 173, section 2 of the Dutch Transition Act (own translation): "*The old Act applies to liability for the damage which has come into being or has been detected after the entry into force of the new Act, even as far as its amount is concerned, if this damage results from the same event as a prior damage to which the old Act is applicable. The same goes for the liability for a person's death which occurs after the entry into force of the new Act as a result of an injury which has occurred before the entry into force of the new Act.*"

Annex n°1: Summary of the proposition of modification of the *avant-projet de réforme de la responsabilité civile*

Supprimer le second alinéa de l'article 1233.

Art. 1233
En cas d'inexécution d'une obligation contractuelle, ni le débiteur ni le créancier ne peuvent se soustraire à l'application des dispositions propres à la responsabilité contractuelle pour opter en faveur des règles spécifiques à la responsabilité extracontractuelle.
~~Toutefois, le dommage corporel est réparé sur le fondement des règles de la responsabilité extracontractuelle, alors même qu'il serait causé à l'occasion de l'exécution du contrat.~~

Modifier l'article 1234 comme suit:

Art. 1234
Lorsque l'inexécution d'une obligation contractuelle est la cause directe d'un dommage subi par un tiers, celui-ci ~~ne~~ peut en demander réparation au débiteur ~~que~~ **soit** sur le fondement de la responsabilité extracontractuelle, à charge pour lui de rapporter la preuve de l'un des faits générateurs visés à la section II du chapitre II, **soit sur le fondement de la responsabilité contractuelle, à charge pour lui de rapporter la preuve d'une violation du contrat. Les tiers ne peuvent se voir opposées les clauses du contrat que s'ils agissent sur le fondement de la responsabilité contractuelle.**

Ou bien

Lorsque l'inexécution d'une obligation contractuelle est la cause directe d'un dommage subi par un tiers, celui-ci ne peut en demander réparation au débiteur que sur le fondement de la responsabilité extracontractuelle. Dans l'hypothèse où le tiers rapporterait la preuve de la faute à partir de la seule inexécution du contrat, le débiteur peut lui opposer les clauses de son contrat.

Modifier le premier alinéa de l'article 1239 comme suit :

Art. 1239
"La responsabilité suppose la démonstration d'un lien de causalité entre le fait litigieux et le dommage. Ce dommage peut ensuite être imputé au responsable conformément aux dispositions de la section II."

Modifier l’alinéa 1er de l’article 1245 comme suit :

Art. 1245 al.1er
“Peut être imputé le dommage causé par autrui dans les cas et aux conditions posées par les articles 1246 à 1249.”

Modifier le premier alinéa de l’article 1257 comme suit :

Art. 1257 al. 1er
“Le fait dommageable ne donne pas lieu à responsabilité pour faute lorsqu’il était prescrit par des dispositions législatives ou réglementaires, imposé par l’autorité légitime, ou commandé par la légitime défense. Dès lors qu’il est socialement utile, le fait dommageable ne donne pas non plus lieu à responsabilité pour faute lorsqu’il était autorisé par la loi, ou commandé par un état de nécessité ou la sauvegarde d’un intérêt supérieur.”

Modifier l’article 1263 comme suit :

Art. 1263
"Sous réserve de l'article 16-3 du Code civil [ou 'du présent code'], le juge peut réduire les dommages et intérêts lorsque la victime n'a pas pris les mesures raisonnables propres à éviter l’aggravation de son préjudice."

Ajouter un article 1265 rédigé comme suit :

Art. 1265
"Si la réparation intégrale du dommage cause une difficulté économique sévère pour le débiteur, le juge peut réduire son montant à moins que le débiteur ait causé ce dommage délibérément ou par négligence."

Avant l’article 1268, insérer un article 1267-1 rédigé comme suit :

Art. 1267-1
“Le dommage corporel s’entend des lésions physiques et psychiques pathologiques.”