Catholic University of Leuven

Faculty of Law

Academic year 2015-2016

Compartmentalisation and the principle of full compensation

Can't see the wood for the trees in the 21st century

Supervisor: I. SAMOY

Master's thesis, submitted by
Pieter GILLAERTS
as part of the final examination
for the degree of
MASTER OF LAW

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SUMMARY

Living together inevitably brings about several risks of suffering a loss. In general, everyone has to bear his own loss, unless there's a good reason to shift it to someone else. Tort law shifts the loss on the basis of the responsibility of the author of the loss. It involves a balancing of interests, where the interest of the innocent victim prevails over the interest of the guilty person. The result is the principle of full compensation: the sufferer has to be fully compensated. Yet, society has become more complex and so has the weighing of interests. Strict liabilities have been introduced. The idea is that the person creating a risk is responsible for the resulting loss. For example, the employer is responsible for his employees. Strict liabilities can do more than just shifting the loss. They can also spread it. Furthermore, strict liabilities contain limitations to the compensation.

Belgian tort law is faced with a major incoherence today. On the one hand, it proclaims the absolute principle of full compensation. Yet, on the other hand, different legal actors such as the legislator and the judge have tried to find solutions for unfair situations resulting from this principle of full compensation. Today, judges moderate on improper ground for lack of an appropriate tool to moderate. Furthermore, the principle of full compensation itself is utopian, for example when compensating for the pain someone has suffered. This thesis has transcended the fragmentation and compartmentalisation and has taken a bird’s-eye view. It has suggested a coherent framework so that the link between the principle of full compensation and the deviations is clear.

The deviations are all motivated by the aim of ensuring fairness. Sometimes, a legislative intervention is needed to tackle a problem of unfairness in a collective way. Yet, on other occasions, the adjustment should happen on an individual basis. Whenever granting a full compensation in a particular case would be unfair, the judge should moderate the compensation. A statutory provision can contain the necessary modalities to prevent abuse of this competence to moderate. The use of an open norm based on fairness allows to anticipate to a certain extent and to be open for future developments. Finally, the introduction of the duty for the judge to moderate the compensation if granting a full one would be unfair, results in a fundamental change of Belgian tort law. Fairness would then be used in an active way. Judges would then use fairness on their own initiative as a stepping stone for assessing the scope of the compensation.

ACKNOWLEDGMENTS

The pen is mightier than the sword

Despite disturbing events, whether far away or alarmingly close, courage is to be found in the everyday effort of people around the globe to improve the world around them, step by step. Inspired by the proverb that the pen is mightier than the sword, I believe in the strength of convincing people through ideas and dialogue. The topic of this thesis concerns everyone, since we are confronted with the increasing number of risks of suffering in loss in society. This thesis hopes to contribute to the improvement of the legal system for the better of the people in it.

No man is an island

At the end of two years of hard work and thorough research, it's time to call it a day. Looking back on the journey from the very first idea to the final reading, I wish to express my gratitude to those who have travelled with me. First and foremost, I would like to thank my supervisor prof. dr. Samoy for the constructive talks, kind words and excellent coaching during the whole process of writing this thesis. Furthermore, I want to extend my thanks to prof. dr. Allemeersch and my fellow students of the Research Master in Leuven and Tilburg for their guidance, words of advice and the pleasant moments of entertainment.

Birds of a feather flock together

Writing a thesis and completing a research master affects more people than solely the researcher. Therefore, I am grateful for the loving support of my family and my life companion. You have been my rock.

Finally, I am grateful for the unforgettable moments spend with my friends in- and outside the law library. You have managed to create a cosy atmosphere in the *living* and I am convinced that lasting friendships have been made over the past years.

TABLE OF CONTENT

LIST OF ABBREVIATIONS

LEGISLATION

- BCC: Belgian Civil Code of the 21st of March 1804 (*original title: "Burgerlijk Wetboek"*), *BS* 3 september 1807, no. 1804032153
- DCC: Dutch Civil Code of the 22nd of November 1991 (*original title: "Burgerlijk Wetboek"*), *Stb*. 1991, 600
- FCC: French Civil Code of the 21st of March 1804 (*original title: "Code civil"*), available at the following web address: https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721
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"C'est la matière qui, de nos jours, est peut-être la plus fréquemment appliquée; c'est donc logiquement celle qui devrait nous offrir les solutions les plus stables et les plus incontestées.

Et pourtant, c'est en matière de responsabilité civile que règne, à tout point de vue et pour toute source du droit – loi, doctrine, jurisprudence, l'anarchie la plus complète, atteignant même – disons le franchement – un degré qui ne se rencontre dans aucune partie du Code.

Pour la plupart des questions qui se posent, ce ne sont, non seulement en ce qui concerne les difficultés de détails, mais même quant aux principes qui dominent toute la matière, qu'incertitudes, controverses et même contradictions."

(H. DE PAGE, *Traité élémentaire de droit civil belge*, II, *Les incapables. Les obligations*, Brussel, Bruylant, 1964, no. 901)

INTRODUCTION

1. ILLUSTRATION – In the summer of 2007, a truck drove down the highway. The truck driver hesitated too long in deciding whether to take the exit. As a result, he lost control over his vehicle and the truck smashed into a row of piles, supporting a bridge over the highway. Due to both the speed and the weight of the truck, one of the piles was completely destroyed. Given some concerns about the stability of the bridge, the local authorities had no choice but to temporarily support the bridge and shut down the highway.[1]

2. LOTS OF LOSSES – This road accident caused a significant amount of loss,[2] although the driver's fault wasn't necessarily equally severe. There can be numerous losses resulting from the driver's brief moment of hesitation. Firstly, the bridge may need replacement. The company for which the truck driver was operating, can be held liable for the truck driver. One can easily imagine that the costs of building a new bridge over the highway could lead the company to reorganise or even to go bankrupt. Secondly, many road users heading for their holiday destination were unforeseeably delayed. In Belgium, every person suffering a loss due to a tort can file for compensation[3]. There is no *a priori* limitation of the possible claimants, since the theory of the relative wrongful conduct (*theorie van de relatieve onrechtmatigheid)* is not accepted by the Belgian Court of Cassation (*Hof van Cassatie*).[4] Thirdly, employees driving to work were hindered, which resulted in an economic loss. There's also no limitation at the level of the loss or protected interests so that even pure economic loss will be fully compensated for.[5] If a causal link between the losses and the driver's fault can be proven, one can claim

[1] TVP, "Ongeval Brusselse ring: slachtoffer is 28-jarige man uit Bornem", *De Standaard* 30 juni 2007, http://www.standaard.be/cnt/b17726693070630.

[2] To avoid any terminological confusion between "damage(s)" and "damages", the term "loss" will be used rather than "damage" and the term "compensation" (in line with "the principle of full *compensation*") instead of "damages". Furthermore, "loss" hints at a broader meaning than "damage" in the sense that a loss of a chance ("*verlies van een kans*") or pure economic loss, for example, are included, whereas "damage" seems to point more to damaging a physically existing good without the possibily of restoration. *See* in a similar sense: M. BURKETT, "Loss and Damage", *Climate Law* 2014, issue 4, (119) 120-121.

[3] This thesis will use the term "compensation" in a broad sense, including both reparation in kind and by equivalent. It means the same as indemnification and reparation *sensu lato*. This broad meaning corresponds to the intention of the legislator: *Cf. infra*, no. 27. *See* for the difference between compensation in kind and compensation by equivalent*:* W. VAN GERVEN, *Verbintenissenrecht*, 2015, 462.

[4] R. DEKKERS *et alii*, *Handboek*, 2007, no. 240, 131; D.-M. PHILIPPE, "La théorie de la relativité aquilienne" in X. (ed.), *Mélanges Roger O. Dalcq. Responsabilités et assurances*, Brussel, Larcier, 1994, (467) 467; S. STIJNS, *Verbintenissenrecht*, *1*bis, 2013, no. 50, 41; P. VAN OMMESLAGHE, *Traité*, II, 2013, no. 831, 1221. *See* for some important judgments: T. VANSWEEVELT, *Buitencontractueel aansprakelijkheidsrecht en (aansprakelijkheids)verzekeringrecht*, Antwerpen, Maklu, 2013, 47-51.

[5] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 63, no. 97.

compensation. Furthermore, there is no limitation at the level of causality either, since factual and legal causality coincide.[6]

3. ABOVE ALL: FULL COMPENSATION – The above-mentioned example illustrates just how much loss can occur due to a tort.[7] Just as the introductory example illustrates, whenever a minor fault causes a loss (or a multitude of losses) of a sizeable scope, the relation between the nature of the fault and the duty to fully compensate the victim can become disproportionate.[8] The sum could go beyond what can be perceived as being *fair and just*. However, Belgian common[9] tort law generally does not grant the judge any discretionary power to adjust the amount of the compensation. The reason lies within the reigning fundamental principle of full compensation: *"the complete loss, nothing but the loss has to be compensated for."*[10]

4. QUESTIONING THE PRINCIPLE – The absolute nature of this principle can, however, be doubted. First, modern times have brought about countless risks of loss[11] so that a strict application of the principle seems problematic. Second, there's a growing mosaic of divergent systems for compensation,[12] such as collective sources of compensation.[13] Whenever the idea of a (major) fault fades and the bilateral relation between the two parties has shifted towards the intervention of a risk bearer, *i.e.* an insurer, for example in case of road accidents, there's a shift in justice. The retributive justice has been replaced by distributive justice in the aftermath

[6] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 72, no. 108; R. DEKKERS *et alii*, *Handboek*, 2007, 141, no. 255; S. STIJNS, *Verbintenissenrecht, 1*bis, 2013, 109; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, no. 1224, 765.

[7] *See*: Toelichting bij Art. 6.1.9.12a. (nu: 6:109) in C.J. VAN ZEBEN and J.W. DU PON with the cooperation of M.M. OLTHOF, *Parlementaire geschiedenis*, 1981, 404.

[8] N. SIMAR and L. DE ZUTTER, "L'évaluation du dommage", 1999, (1) no. 39, 22; D. SIMOENS, "Beschouwingen over de schadeloosstelling voor welzijnsverlies, tevens aanleiding tot de vraagstelling: integrale, genormeerde of forfaitaire schadeloosstelling?" in M. VAN DEN BOSSCHE (ed.), *De indicatieve tabel. Een praktisch werkinstrument voor de evaluatie van menselijke schade*, Gent, Larcier, 2001, (79) 80-81, no. 2; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 20, no. 27. *Comp.* for France: G. VINEY and P. JOURDAIN, *Traité de droit civil*, 2011, no. 58-1, 159.

[9] 'Common' is used in the sense of 'general', without any relation to common law.

[10] J. RONSE, *Schade en schadeloosstelling (onrechtmatige daad)*, 1957, no. 230, 211; J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, no. 230, 173. *Similarly* for France: H. GROUTEL, "Droit français", 2012, (107) 108. *Comp.* the French formula "*le préjudice doit être réparé dans son intégralité, sans perte ni profit pour aucune des parties*", *see*: Cass. Crim. 24 février 2009, n° 08-86.956, *RCA* 2009, n° 129; Cass. Crim. 22 septembre 2009, n° 08-88.181, *D.* 2009, 2551.

[11] W. VAN GERVEN, "De invloed van verzekering", 1962, (777) 789, no. 19. France: L. GRYNBAUM, *Rép. civ. Dalloz* 2004, *v° Responsabilité du fait des choses inanimées*, 4-5, no. 4; Y. LAMBERT-FAIVRE and S. PORCHY-SIMON, *Droit du dommage corporel*, 2011, no. 433, 491. The Netherlands: G.H.A. SCHUT, "De aard van de aansprakelijkheid en van de schade", *RM Themis* 1978, (380) 403.

[12] H. BOCKEN, "Les indemnisations sans égard à la responsabilité: rapport de synthèse" in J.-L. FAGNART (ed.), *Les indemnisations sans égard à la responsabilité civile*, Brussel, Kluwer, 2001, (89) 91, no. 2.

[13] J.-L. FAGNART, "Rapport introductif" in J.-L. FAGNART (ed.), *Les indemnisations sans égard à la responsabilité civile*, Brussel, Kluwer, 2001, (1) 12, no. 18.

of the industrialisation and the increasingly dangerous risks related to it.[14] The basis of private or social insurances and other forms of collectivisation of compensation is precisely distributive justice.[15] Third, not having an *a priori* limitation of claimants could be a threat to the viability of a liability system, since it does not help to keep the floodgates of liability shut.[16] One could even state that the principle in itself is arbitrary due to the sovereign margin of appreciation for the judge, which allows every judge to use his own criteria for the evaluation of the loss and the compensation.[17] According to FAGNART, a victim can get a much higher compensation for the same loss depending on the particular judge.[18] His critique, however, seems to be directed at the way of evaluation rather than at the principle of full compensation itself.[19]

5. DEVIATIONS FROM THE PRINCIPLE – In Belgium, previous decades have brought along a variety of alternative systems for compensation, characterised by their deviation of the principle of full compensation. Fixed sums have been introduced by the legislator and amounts of compensations have been capped. Also the taboo on standardisation has been broken.[20] Yet, many of the deviant systems do not exclude the possibility of filing for compensation on the basis of common tort law.[21] Still, by introducing these divergent systems, the legislator has added to a compartmentalisation of Belgian tort law, whereas a more coherent system should be preferred. Furthermore, one should realise that tort law itself constitutes an exception to the adagio "*the loss lies where it falls*"[22], so that the exception should at least be coherent as to its

[14] *Cf. infra*, no. 65; G. PIGNARRE, "La responsabilité : débat autour d'une polysémie" in *La responsabilité civile à l'aube du XXI^e siècle : bilan prospectif, Responsabilité civile et assurances* 2001, special issue 6*bis*, (10) 13, no. 14, 2°.

[15] J.-L. FAGNART, "Rapport introductif" in J.-L. FAGNART, *Les indemnisations sans égard à la responsabilité civile*, Brussel, Kluwer, 2001, (1) no. 24, 14. France: M. MEKKI, "Les fonctions de la responsabilité civile à l'épreuve des fonds d'indemnisation des dommages corporels", *Petites affiches* 2005, issue 8, (3) no. 24.

[16] W.V.H. ROGERS, J. SPIER and G. VINEY, "Preliminary observations" in J. SPIER (ed.), *The limits of liability. Keeping the Floodgates Shut*, Den Haag, Kluwer Law International, 1996, (1) 3.

[17] Yet, the judge can limit the arbitrariness and inequality by adequately giving his reasons in the decision, despite the very loose case law of the French Court of Cassation: M. BACACHE-GIBEILI, *Traité de droit civil*, V, 2016, no. 601, 719-720, with reference to case law of the French Court of Cassation.

[18] J.-L. FAGNART, "La réparation des dommages dans le projet de Code de la consommation" in X, *Le droit de la consommation en mouvement : examen critique des propositions de la Commission d'étude pour la réforme du droit de la consommation / Consumentenrecht in beweging : critische analyse van de voorstellen van de Studiecommissie tot hervorming van het consumentenrecht*, Louvain-la-Neuve, UCL. Centre de droit de la consommation, 1998, (137) no. 12, 146.

[19] H. COUSY, "Commentaar - Commentaire" in X, *Le droit de la consommation en mouvement : examen critique des propositions de la Commission d'étude pour la réforme du droit de la consommation / Consumentenrecht in beweging : critische analyse van de voorstellen van de Studiecommissie tot hervorming van het consumentenrecht*, Louvain-la-Neuve, UCL. Centre de droit de la consommation, 1998, (173) no. 11, 183.

[20] D. SIMOENS, "Recente ontwikkelingen", 2004, no. 94, 231-322.

[21] The coordination between the deviant systems and common Belgian tort law will only be addresses in so far as it addresses the exclusion of the latter by filing for compensation within the deviant system.

[22] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 6, no. 5; S. STIJNS, *Verbintenissenrecht*, *1*bis, 2013, 33, no. 41; L. CORNELIS, "Verkeerd verbonden" in F. MOEYKENS (ed.), *De Praktijkjurist XVI*, Gent, Story Publishers, 2010, (165) 180, no. 12; T. VANSWEEVELT and B. WEYTS, *Handboek*

main principle and deviant systems. Although these alternative systems are at least symptomatic for the inadequacy of the principle of full compensation, the straw that breaks the camel's back was the recently introduced competence for the Council of State (*Raad van State*) to assess the civil claim for compensation. According to the new legal text, the Council of State can take into account all circumstances of public and private importance[23], thus allowing the Council to moderate. This clearly constitutes a deviation from the principle of full compensation.

6. PROBLEM: COMPARTMENTALISATION – The firm and absolute nature of the principle of full compensation seems to have lapsed into a fragmented and incoherent image of division through numerous exceptions, such as capped amounts of compensation or *ex aequo et bono* appreciations. The transition to a new system is both near and necessary so that the exceptions can be integrated into common Belgian tort law. The building blocks for the reformed system are already implicitly present in the deviant systems so that this thesis will take their importance into account.

7. AIM OF THE RESEARCH – The aim is not to eliminate the principle of full compensation as the basis principle but rather to adjust its absolute character so that the exceptions are integrated into the framework of the fundamental principle of full compensation. One should avoid erosion of a fundamental pillar of Belgian tort law. The main research question of this thesis is the following: *how should the coherence between the systems which allow for deviations from the principle of full compensation, and Belgian common tort law be improved, in light of the compartmentalisation of that tort law*? The hypothesis is that the principle of full compensation needs to be adapted in order to be more in line with the reasons underlying the deviant systems.

8. FURTHER DELINEATION – This thesis will not focus on the issue of what constitutes a loss, neither will it concentrate on the calculation of the loss caused. The central theme is the consequent step: the (scope of the actual) compensation. In order to avoid being dependant on the existence or absence of a legal act, the goal of the thesis is to examine a selection of deviant systems in search of a common principle and to provide suggestions to increase coherence with common Belgian tort law. The discussion on punitive damages falls outside the scope of this thesis, since the focus lies on the integration of the deviant systems, which mostly limit the

buitencontractueel aansprakelijkheidsrecht, 2009, no. 34, 25. The Netherlands: C.J.M. KLAASSEN, *Risico-aansprakelijkheid*, 1991, 7; G.H.A. SCHUT, *Onrechtmatige daad*, 1997, 2; J. SPIER *et alii*, *Schadevergoeding*, 2015, no. 7, 6; R.C. VAN DER WERFF, *Verbintenissenrecht* in kern*zaken burgerlijk recht*, Deventer, Kluwer, 2008, 126.

[23] Art. 11*bis* CouncSt-Law. *Cf. infra*, Part III, Chapter I, Section III, Subsection II.

compensation rather than extend it.[24] Contributory negligence will not be examined either, because the fault plays an explanatory role and therefore does not really deviate from the principle of full compensation in the same way as the other systems do.[25] Finally, the thesis will only focus on limitations of the principle of full compensation at the level of the compensation itself, *i.e.* once the fault, loss and causality has been dealt with. Although limitations at these prior stages may limit or even exclude the final compensation, they are not the focal point of this thesis. By searching for a corrective mechanism at the final step, prior impurities can be remedied. Further research on possible limitations in these prior steps (fault, loss and causality) might be useful in addition to the findings of this thesis.

9. RESEARCH QUESTIONS – Key to a proper delineation of the research is the research question, which also determines the appropriate methodology.[26] "*Questions go before methods*".[27] The central research question stated above is a normative one, therefore in need of criteria (*cf. infra*, no. 22) to answer it adequately. The central question can be answered by first answering several sub research questions. First, the meaning of the principle of full compensation will be determined, based on the reasons given for its introduction. Second, an answer will be given to the question whether the historical reasons for the principle of full compensation are still valid today. Afterwards, the categories of Belgian systems for compensation for tort allowing for deviations from the principle of full compensation will be established. Consequently, the fourth research question assesses the reasons for the introduction of a selection of deviant systems in each category and the standards applied to determine the scope of the compensation in those systems. Then, it can be determined whether the coherence between the systems which allow for deviations from the principle of full compensation, and

[24] *See* for a discussion on punitive damages: C. CAUFFMAN, "Naar een punitief Europees verbintenissenrecht? Een rechtsvergelijkende studie naar de draagwijdte, de grondwettigheid en de wenselijkheid van het bestraffend karakter van het verbintenissenrecht", *TPR* 2007, 799-873; T. HARTLIEF, "Heeft het aansprakelijkheidsrecht (de) toekomst?", *TPR* 2007, 1651-1732; L. MEURKENS and E. NORDIN (eds.), *The power of Punitive Damages. Is Europe Missing Out?*, Antwerpen, Intersentia, 2012, xxvi+553 p.; I. VRANCKEN, "*Punitive damages* in het buitencontractueel aansprakelijkheidsrecht", *TBBR* 2014, issue 9, 426-448. *See* the recent doctoral thesis: E. NORDIN, *De schadevergoeding in het aansprakelijkheidsrecht: tussen compensatie en handhaving*, Antwerpen, Universiteit Antwerpen, Faculteit Rechten, 2014, 398 p. *See alsof* for the Netherlands: S.D. LINDENBERGH, "art. 6:106 BW" in *GS Schadevergoeding*, 2015, no. 1.8 with extensive references.

[25] *See* for the role of the fault of the victim: B. WEYTS, *Fout van het slachtoffer in het buitencontractueel aansprakelijkheidsrecht*, Antwerpen, Intersentia, 2003, xxiii+564 p. The Netherlands: ASSER (HARTKAMP/SIEBURGH), *De verbintenis in het algemeen*, 2013, no. 107 *et seq.*; A.L.M. KEIRSE and R.H.C. JONGENEEL, *Eigen schuld en mede-aansprakelijkheid* in *Monografieën Privaatrecht*, Deventer, Kluwer, 2013, 17 *et seq.*; S.D. LINDENBERGH, W.J.G. OOSTERVEEN and N. FRENK, "commentaar op art. 6:101 BW" in *Tekst & Commentaar Burgerlijk Wetboek*, 2015; J. SPIER, *Schadevergoeding: algemeen, deel 3* in *Monografieën Nieuw BW, B36*, Deventer, Kluwer, 1992, 1-22.

[26] J.-M. SMITS, "Rethinking methods in European private law" in M. ADAMS and J. BOMHOFF (eds.), *Practice and Theory in Comparative Law*, Cambridge, Cambridge University Press, 2012, (170) 184.

[27] M. ADAMS and J. GRIFFITHS, "Against 'comparative method'", 2012, (279) 279.

the Belgian common tort law should be improved, in light of the compartmentalisation of Belgian tort law. The hypothesis is that this is the case so that the next question searches for common reasons or a common principle based on the reasons identified for the introduction of the selected deviant systems. Finally, the seventh research question will provide a comparative perspective and examines how the principle of full compensation operates in French and Dutch tort law with regards to its limitations at the level of the compensation, compared to Belgian tort law.

10. RESEARCH METHODS – Since every question calls for its own methods to answer it, every research question will require a different method. These methods will be clarified in the following paragraphs.

11. FIRST QUESTION (EXPLANATORY) – The historical meaning of the principle of compensation will be established on the basis of a legal-historical interpretation, using the preparatory works described in meticulous detail by authors like LOCRÉ in *verbatim* reproductions. By examining the preparatory works, the risk of deriving the meaning solely from a text with perhaps a bad choice of words or a grammatical mistake can be avoided. The text is a result of the French, Napoleonic *Code civil*, so that it seems only logical to examine the French text.

12. SECOND QUESTION (EVALUATIVE) – Consequently, the historical reasons will be analysed on the basis of their validity today, mainly seen from an internal perspective. The reasons will be tested against the background of the evolution made by Belgian tort law since 1804. For reasons of feasibility, the answer to the question will be based mainly on overviews on the general evolution and tendencies of Belgian tort law by Belgian authors in separate articles or in introductions to standard books on tort law and compensation.

13. THIRD QUESTION (DESCRIPTIVE) – The establishment of categories ensures the feasibility of the research. Listing all deviant systems would go beyond the scope of this thesis. Important deviant systems have been introduced throughout the 20th and the beginning of the 21st century. Hence, no specific period can be analysed, since it would risk missing out on a category of deviant systems introduced earlier or later on. In addition, it is useful to observe both older and younger systems, because they have their own advantages. The older systems might have firm reasons if they have not been changed over the last decades. The younger systems are an indication of the current line of thought of the societal actors, such as the legislator.

14. FOURTH QUESTION (1): SYSTEM SELECTION – Since it is impossible to examine all deviant systems in each (sub) category, a selection will have to be made. On the basis of which systems are discussed by the leading authors on the principle of full compensation in Belgian tort law and on the basis of preliminary research, a limited number of systems will be selected. The assumption is that frequently discussed systems are the most relevant ones or constitute a clear example. The selected systems do not need to be fully representative, since the main goal of the research is to increase coherence without claiming a complete integration of all deviant systems. The selection does allow the research to take into account deviations which were important enough to be noted by Belgian doctrine. The categories should be exhaustively listed, but the selected systems within those categories are only illustrative.

15. FOURTH QUESTION (2): SYSTEM ANALYSIS (EXPLANATORY) – The reasons for having introduced a rule can generally be found in the preparatory works. It is a legal-historical interpretation. If the reasons for introducing a deviant system aren't present in the preparatory works, which seems highly unlikely, or if the reasons given in the preparatory works are unclear or ambiguous, a database search on that system can clarify the reason. The risk of relying solely on the preparatory works is that the real underlying motives are not mentioned in those works. The only way to overcome this risk is to conduct a database search on the literature on each system, limited to searching for the reasons given for the introduction of the system.

16. FIFTH QUESTION (EVALUATIVE) – Common sense can provide an answer to the fifth sub research question whether the coherence between both should be increased. The more divergent the identified reasons for the principle and the deviant systems, the more likely it is that the coherence should be increased. Statements made in Belgian doctrine on (principle of full) compensation in Belgian tort law add an expert view to the evaluative framework for this question. CORNELIS has, for example, noticed an image of division.[28] Over fifty years ago, VAN GERVEN already suggested an adaptation of Belgian tort law.[29] Hence, the hypothesis is that the coherence should be increased, because of a compartmentalisation of Belgian tort law due to the deviant systems.

17. SIXTH QUESTION (EVALUATIVE) – The evaluative criterion is communality. If the reasons given for one system are identical or similar to the reasons given for another system, they are common reasons. It is likely that different systems will not have identical reasons for their

[28] L. CORNELIS, *Beginselen van het Belgische aansprakelijkheidsrecht. Deel I*, Antwerpen, Maklu, 1989, no. 354, 581.
[29] W. VAN GERVEN, "De invloed van verzekering", 1962, (777) 789, no. 19. *Cf. infra*, no. 117.

introduction. However, the assumption in this thesis is that they will have at least one element in common or that at least one underlying principle can be found. The aim of this question is to find an element or a principle common to as many of the examined deviant systems as possible. Only this way, the element of communality will serve the final goal of the research: finding a way to increase the coherence between the deviant systems and common Belgian tort law. The hypothesis is that the principle of fairness will constitute the general criterion to deviate and will have been particularised in the deviant systems.

18. SEVENTH QUESTION (COMPARATIVE-DESCRIPTIVE) – The seventh question is intertwined with several others so that *mutatis mutandis* the same method will be applied. The comparative nature of this question calls for a justification of the selection of legal systems, as well as a clarification on the comparative law method. The choice for the Belgian legal system doesn't need a separate section. The choice is obvious in light of the (advantage of having a certain level of) familiarity with the system as researcher, the purpose of the research and practical reasons such as access to sources and the required linguistic knowledge.

19. COMPARATIVE PERSPECTIVE – The hypothesis is that Belgian tort law needs to be adapted. This feeling of dissatisfaction has led to wondering whether other legal systems may have produced a better solution.[30] The examination of French and Dutch law aims at finding a greater variety of solutions.[31] Therefore, this research will constitute a "*better-law comparison*".[32] One should be cautious as the underlying conceptions are not really identical even though the denoted reality is the same.[33] Well aware of the fact that the *tertium comparationis* is no fully neutral or objective choice[34], the principle of full compensation as *tertium comparationis* does allow the research to look into the relevant parts of Dutch and French law so that its use is justified in light of the aim of the research. Both the Dutch and the French legal system adhere to the principle of full compensation.[35] The method will be national

[30] K. ZWEIGERT and H. KÖTZ, *Comparative law*, 1998, 34.
[31] *Cf.* K. ZWEIGERT and H. KÖTZ, *Comparative law*, 1998, 15.
[32] R. MICHAELS, "Functional Method" in M. REIMANN and R. ZIMMERMAN, *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2006, (339) 342.
[33] K. LEMMENS, "Comparative law as an act of modesty: a pragmatic and realistic approach to comparative legal scholarship" in M. ADAMS and J. BOMHOFF (eds.), *Practice and Theory in Comparative Law*, Cambridge, Cambridge University Press, 2012, (302) 306; M. VAN HOECKE, *Epistemology and Methodology of Comparative Law*, Oxford, Hart, 2004, 175.
[34] N. JANSEN, "Comparative Law and Comparative Knowledge" in M. REIMANN and R. ZIMMERMAN, *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2006, (305) 314.
[35] France: Cass. Civ. 3ième 10 mars 2016, n° 15-10.897, 15-16.679, *JurisData*, n° 2016-004124; Cass. Civ. 2ième 28 octobre 1954, *JCP-G* 1955, II, 8765, note J. MAZARS; M. BACACHE-GIBEILI, *Traité de droit civil*, V, 2016, 715, no. 596; I. BESSIERES-ROQUES, C. FOURNIER, H. HUGUES and F. RICHE, *Précis d'évaluation du dommage corporel*, Paris, L'Argus, 1997, 63; P. BRUN, *Responsabilité civile extracontractuelle*, 2014, 398, no. 592; M. FABRE-MAGNAN, *Droit des obligations*, II, 2013, 417-418; H. GROUTEL, "Droit français", 2012, (107) 107; J. JULIEN,

and external comparative law.[36] Furthermore, it is explicit, applied and micro-comparative law.[37] Given the fact that this paper aims at identifying the limitations of the (abstract) principle of full compensation in tort law, the dogmatic method[38] is unable to answer the main research question. Otherwise, the research would risk missing limitations which are not laid down in a statute. By analyzing French and Dutch doctrine, the law in action can be taken into account as well.[39] The functional assumption is that the selected legal systems are faced with similar problems and solve them in different ways, though often with similar results.[40] Additionally, tort law is regarded as a good field for comparative research, given the similarity of "*the real-world problems*".[41]

20. FRENCH LAW – The legal basis for the principle of full compensation in Belgian tort law is Art. 1382 BCC. It stems from the Napoleonic *Code civil*, which is still being used in France.

Droit des obligations, 2012, no. 302, 215; F. LEDUC, *Fasc. 201*, 2014, no. 46; M. LE ROY, *L'évaluation du préjudice corporel : expertises, principes, indemnités*, Paris, Litec, 2007, 3, no. 3; J. PECHINOT, "Droit français", 2012, (126) 126; M. PÉRIER, *J.-Cl. Civil Code, Art. 1382 à 1386* and *J.-Cl. Responsabilité civile et Assurances, Fasc. 202-1-1*, 2015, no. 58; G. VINEY and P. JOURDAIN, *Traité de droit civil*, 2011, no. 57, 154. *See also*: C. COUTANT-LAPALUS, *Le principe de réparation intégrale en droit privé*, Aix-en-Provence, Presses universitaires d'Aix-Marseille, 2002, 591 p. The Netherlands: HR 17 januari 1964, *NJ* 1964, 322, note L.J. HIJMANS VAN DEN BERGH and *S&S* 1964, 15; HR 28 mei 1999, no. 16853, no. C97/332HR, *NJ* 1999, 510, concl. AG HARTKAMP; HR 12 juni 2015, no. 14/02087, ECLI:NL:HR:2015:1600, *NJB* 2015, issue 25, 1668; P. ABAS, *Rechterlijke matiging*, 2014, no. 19, 34; ASSER (HARTKAMP), *De verbintenis in het algemeen*, 2000, no. 409a, 320, no. 415, 331, no. 492, 430 and no. 493, 431; ASSER (HARTKAMP/SIEBURGH), *De verbintenis in het algemeen*, 2013, no. 32; E. BAUW, *Onrechtmatige daad*, 2015, no. 82, 111; A.R. BLOEMBERGEN, *Schadevergoeding*, 1965, no. 84, 117; A.R. BLOEMBERGEN and S.D. LINDENBERGH, *Schadevergoeding*, 2001, no. 48, 68 (pointing out that Art. 6:109 DCC explicitly contains the principle of full compensation); H.A. BOUMAN and G.M. TILANUS-VAN WASSENAER, *Schadevergoeding*, 1998, no. 20, a, 32 (for injury); H.A. BOUMAN and A.J.O. BARON VAN WASSENAER VAN CATWIJCK, *Schadevergoeding*, 1991, no. 19, 31; P. DE TAVERNIER, "Droit néerlandais", 2012, (329) 331; T. HARTLIEF, "De meerwaarde van het aansprakelijkheidsrecht", 2003, (1) 17; S.D. LINDENBERGH, *Schadevergoeding*, 2014, 12, no. 11; S.D. LINDENBERGH, "afdeling 6:10 BW" in *Groene Serie Schadevergoeding*, 2015, no. 1.5, a; S.D. LINDENBERGH, "art. 6:95 BW" in *Groene Serie Schadevergoeding*, 2015, no. 3.2; G.H.A. SCHUT, *Onrechtmatige daad*, 1997, 152; J. SPIER *et alii*, *Schadevergoeding*, 2015, no. 196, 243; A.J. VERHEIJ, *Onrechtmatige daad*, 2005, no. 43, 150. *See also*: U. MAGNUS, "Comparative Report on the Law of Damages" in U. MAGNUS (ed.), *Unification of tort law: damages*, The Hague, Kluwer Law International, 2001, (185) 188, no. 21.

[36] W. DEVROE, *Rechtsvergelijking*, 2012, 34-35, nos. 44, 46 and 48.

[37] G. DANNEMANN, "Comparative law: study of similarities or differences", 2006, (383) 387-388; W. DEVROE, *Rechtsvergelijking*, 2012, no. 38, 32-33, 33, no. 40 and no. 42, 34; F. GORLÉ, G. BOURGEOIS, H. BOCKEN, F. REYNTJENS, W. DE BONDT and K. LEMMENS, *Rechtsvergelijking*, Mechelen, Kluwer, 2007, 2; R. HYLAND, "Comparative Law" in D. PATTERSON (ed.) *A Companion to Philosophy of Law and Legal Theory*, Cambridge, Blackwell, 1996, (184) 184. *See also:* J.C. REITZ, "How to Do Comparative Law", *American Journal of Comparative Law* 1998, (617) 618-620.

[38] *See:* W. DEVROE, *Rechtsvergelijking*, 2012, 38, no. 56.

[39] *See:* W. DEVROE, *Rechtsvergelijking*, 2012, 39, no. 58; V.V. PALMER, "From Lerotholi to Lando: Some Examples of Comparative Law Methodology", *American Journal of Comparative Law* 2005, Vol. 53(1), (261) 264; R. POUND, "Law in Books and Law in Action", *American Law Review*, 1910, Vol. 44(1), (12) 12 *et seq*.; J.C. REITZ, "How to Do Comparative Law", *American Journal of Comparative Law* 1998, (617) 629-630.

[40] *See* K. ZWEIGERT and H. KÖTZ, *Comparative law*, 1998, 34.

[41] M. SIEMS, *Comparative Law*, Cambridge, Cambridge University Press, 2014, 28.

The text of that legal provision has remained unaltered to the present day.[42] As a result, Belgian and French tort law have an identical legal provision, both in terms of origin and literal wording. If the principle of full compensation as laid down in Art. 1382 FCC would differ, the logical explanation is a difference in interpretation between Art. 1382 FCC and its Belgian twin.[43] Furthermore, the greater amount of French doctrine and case law allows for a better understanding of the Belgian system. By looking at how the French conception of the rule, a different meaning can be found, which could be useful in answering the main research question. If an alternative interpretation in French tort law would result in a more coherent system of tort law, it seems plausible that that same alternative interpretation could work in Belgian tort law, given the identical foundation of the rule. In addition, it is possible that similar deviations arose in French law so that it is at least inspiring to see how these deviations relate to Art. 1382 FCC. Lastly, the ongoing French reform of civil liability law can provide an interesting prespective on how to modernise tort law. The reform has currently reached the stage of the public consultation.[44]

21. DUTCH LAW – The second legal system for the comparison is Dutch tort law. This choice is almost evident, given that several authors when discussing the principles of full compensation and the appreciation *in concreto* in Belgian tort law have referred to Dutch law.[45] Furthermore, two differences with the Belgian system and the French system make it worthwhile to dive into the principle of full compensation in Dutch tort law. First, there is a legal competence for the judge to moderate the legal duty to compensate for the loss caused (Art. 6:109 DCC). Second, Dutch tort law adheres to the theory of the relative wrongful conduct (Art. 6:163 DCC) and has a different view on causality (Art. 6:98 DCC).[46] That way, there are already several limitations

[42] The Catala-project does not propose a moderation other than a contractual one or in case the victim neglects its duty to restrict the loss: P. CATALA, *Rapport sur l'avant-projet de réforme du droit des obligations (Articles 1101 à 1386 du Code civil) et du droit de la prescription (Articles 2234 à 2281 du Code civil)*, 22nd of September 2005, 208 p., available at http://www.ladocumentationfrancaise.fr/rapports-publics/054000622-rapport-sur-l-avant-projet-de-reforme-du-droit-des-obligations-articles-1101-a-1386-du; English version available at: http://www.henricapitant.org/node/73. The recent *"avant-projet de loi – réforme de la responsabilité civile"* doesn't provide for a moderation of a compensation for tort either. It is freely accessible at http://www.textes.justice.gouv.fr/textes-soumis-a-concertation-10179/consultation-publique-sur-la-reforme-de-la-responsabilite-civile-28936.html.

[43] *Cf.* the most similar cases logic: R. HIRSCHL, "Case Selection in Comparative Constitutional Law", *American Journal Of Comparative Law* 2005, Vol. 53(1), (125) 133 *et seq*.

[44] *See* for further information: http://www.textes.justice.gouv.fr/textes-soumis-a-concertation-10179/consultation-publique-sur-la-reforme-de-la-responsabilite-civile-28936.html.

[45] *Cf. infra*, nos. 79 and 133.

[46] But also other techniques such as the moderation of the compensation exist to limit the scope of Dutch tort law: P. VAN SCHILFGAARDE, "Afgeleide aansprakelijkheid" in STICHTING GROTIUS ACADEMIE (ed.), *Aansprakelijkheid: gronden en grenzen* in *Kluwer Rechtswetenschappelijke Publicaties*, Deventer, Kluwer, 2001, (25) 26.

to "*keep the floodgates shut*", which is not the case in Belgian tort law.[47] Hence, the Dutch legal system serves as a "*laboratory*".[48] The (new) Dutch Civil Code is a very young one, especially compared to the Belgian and French Codes. Thus, it will reflect a more modern view, which will also be laid down in the preparatory works and discussions. The assumption is that although Belgium does not have a general statutory competence for the judge to moderate the scope of the compensation, as is the case in the Netherlands, the law in action will lead to similar practical results (*praesumptio similitudinis*), namely the granting of a compensation with a moderation in case of disproportionate results. This assumption operates as a heuristic principle.[49]

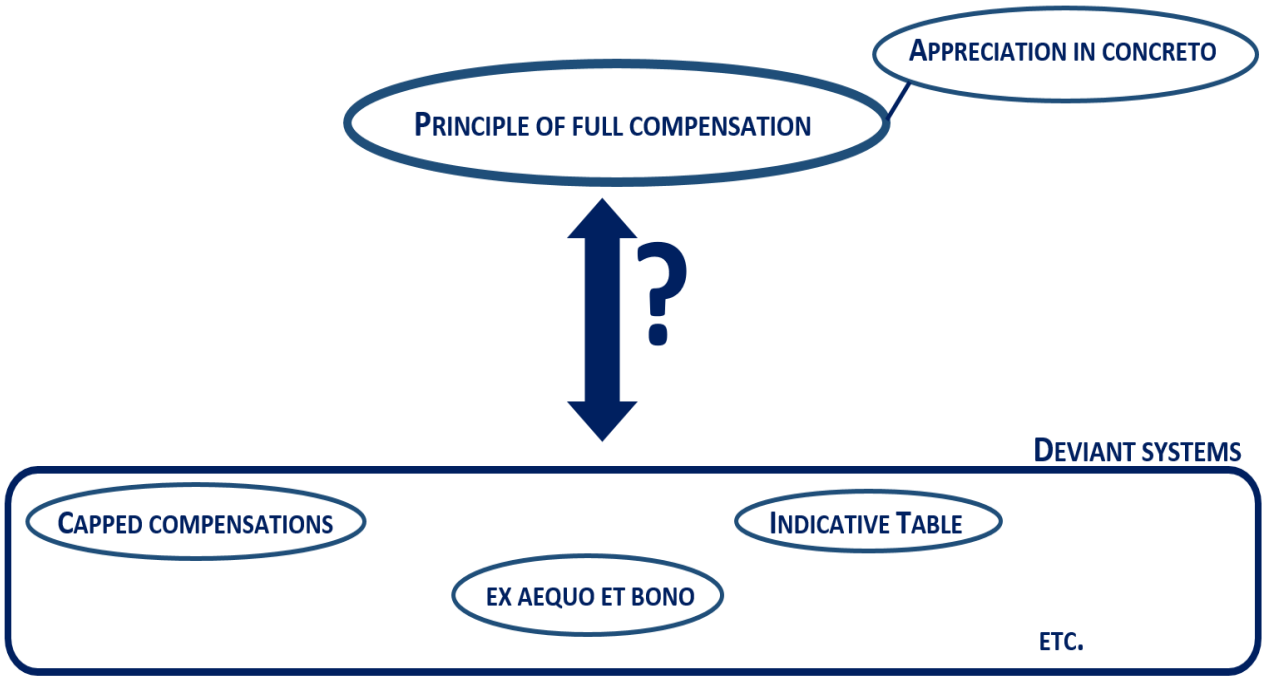
22. MAIN RESEARCH QUESTION (NORMATIVE) – Finally, the main research question can be answered. The criteria used to evaluate possible ways of integrating the deviant systems into common Belgian tort law are coherence, effectiveness and equality. Coherence means whether the modification establishes a link between the principle or *ratio* common to the deviant systems (third, fourth, sixth and seventh sub research questions) and the motives underlying the common system which are still valid today (first, second and seventh sub research questions). Effectiveness is an additional criterion which refers to whether or not the modification could operate in practice. Here, the mechanisms used in French and Dutch law will be of great importance (seventh sub question) and will enable an operationalisation of the criterion of effectiveness. The final criterion is equality. Equal situations should be dealt with in the same way. It relates to the wish to avoid situations similar to the problem of Art. 11*bis* CouncSt-Law.[50]

23. DESIGN OF THE THESIS – First, the historical meaning of the principle of full compensation will be established through grammatical and historical analysis (Part I). Consequently, the meaning of the principle is determined *anno* 2016 by means of the evolution of compensation law and a principled analysis, as well as by examining the doctrinal and jurisprudential point of view (Part II). After a categorisation of the deviant systems, they will be analysed (Part III). After having assessed the issues of compartmentalisation and coherence, a common principle or denominator can be searched and a new framework (see Figure 1) for

[47] *See* J. SPIER (ed.), *The limits of liability. Keeping the Floodgates Shut*, Den Haag, Kluwer Law International, 1996, xiii+162 p.
[48] G. DANNEMANN, "Comparative law: study of similarities or differences", 2006, (383) 398.
[49] G. DANNEMANN, "Comparative law: study of similarities or differences", 2006, (383) 388 and 395-396; R. HYLAND, "Comparative Law" in D. PATTERSON (ed.) *A Companion to Philosophy of Law and Legal Theory*, Cambridge, Blackwell, 1996, (184) 190; K. ZWEIGERT and H. KÖTZ, *Comparative law*, 1998, 40.
[50] *Cf. infra*, no. 132.

the deviant systems can be established (Part IV). The comparative insights will be integrated in the sketched design. As a prior remark, one should notice the list of abbreviations mentioned above. Furthermore, with regard to the manner of notation used in the footnotes and the bibliography, this thesis will adhere to the standards of the "*Juridische verwijzingen en afkortingen. Interuniversitaire Commissie Juridische Verwijzingen en Afkortingen*" (available at: http://www.legalworld.be/legalworld/table_of_content.aspx?LangType=2067). Proper names will not be translated so that city names, e.g. when citing courts or tribunals, will remain in the original language (Dutch or French).

FIGURE 1: SCHEMATIC BLUEPRINT OF THESIS DESIGN



PART I: ESTABLISHING THE MEANING OF THE PRINCIPLE OF FULL COMPENSATION

"Parmi les 'mythes' fondateurs du droit de la responsabilité civile, le principe de réparation intégrale du dommage figure assurément en bonne place." [51]

24. SEARCH FOR MEANING – Art. 1382 *et seq.* BCC constitute the legal basis of common Belgian tort law. With regard to the notion of compensation, however, the legislator maintains complete silence.[52] No definition has been given by the legislator. Art. 1382 BCC merely points out that the person liable for the loss bears the duty to compensate for that loss.[53] As was stated before, Art. 1382 BCC appears to provide little information on the scope of the compensation at hand. Although it's clear that both doctrine and case law agree on the existence of the principle of full compensation,[54] it's necessary to take a step back and examine the principle in its historical setting. The aim of this first part is not to come up with an extensive analysis of the historical-societal embedding of the *Code Civil*. Otherwise it would result in too much overlap with Part II, where he evolutionary aspect is dealt with. Rather the text of Art. 1382 BCC, unaltered since 1804, will be grammatically interpreted (Chapter I). Consequently, the preparatory works will offer a broader embedding (Chapter II) so that the historical meaning of the principle of full compensation can be determined (Chapter III).

CHAPTER I: GRAMMATICAL INTERPRETATION

25. INTERPRETATION OF THE TEXT – Art. 1382 BCC reads as follows: "*Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer*."[55] At first glance, it's clear that causing a loss leads to a duty to compensate. In setting out the motivation for the rule, M. TREILHARD has unambiguously stated that *"it is a necessary*

[51] F. LEDUC and P. PIERRE, "Introduction" in F. LEDUC and P. PIERRE (eds.), *La réparation intégrale en Europe: études comparatives des droit nationaux*, Brussel, Larcier, 2012, (19) 19. *See also*: P.-A. IWEINS, "États généraux du dommage corporel. Réparation intégrale : mythe ou réalité ?", *Gaz.Pal.* 2010, 1198.
[52] J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, 162, no. 219; N. SIMAR and L. DE ZUTTER, "L'évaluation du dommage", 1999, 5, no. 1; D. SIMOENS, *Schade en schadeloosstelling*, 1999, no. 10, 21; A. VAN OEVELEN, "La modération de la réparation du dommage", 1996, (65) no. 2, 65; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, no. 1054, 665.
[53] J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, 162, no. 219; P. VAN OMMESLAGHE, *Traité*, II, 2013, no. 1118, 1649.
[54] *Cf. infra*, Part II, Chapter III.
[55] "Every human act which causes damage to someone else, obliges the person by whose fault that damage was caused to compensate for that damage." (*own translation*) It should be noted that for the purpose of this section the absence of an act is considered to be an act itself which can give rise to liability in tort.

consequence of his tort".[56] Yet, a more thorough analysis is needed to examine the scope of the compensation. According to RONSE, it clearly stems from the preparatory works that a claim for compensation for tort gives rise to a full (integral) compensation.[57] Although the focus of this thesis will direct us to the last phrase of Art. 1382 BCC, it is useful to analyse some other components first, as that examination will indicate the necessity of a limitation to (tort liability via a limitation to) the principle of full compensation.

26. OPENNESS AND FULL COMPENSATION – Firstly, one might notice the use of multiple indefinite pronouns. It doesn't matter which human act exactly is concerned ("***Tout** fait*…"), as long as it has caused a loss, no matter which kind of loss, ("…***un** dommage*…"). Hence, these wide terms are indicative for the vast openness of the Belgian system of tort law. As argued in the introduction, the absence of limitations at the level of the fault or the loss (as well as at the level of causality), can lead to situations of great injustice and unfairness. The openness present in the preparatory works can no longer hold its stance in the 21st century, which will be clarified by answering the second research question further on.

27. WIDE NOTION – Secondly, bearing in mind the absence of prior limitations, the legal provison ends by stating that the obligation at hand is "*le réparer*". The complementary personal pronoun "*le*" refers directly and entirely to the loss caused. No limitations are listed within Art. 1382 BCC. Therefore, the analysis of the structure of the provision confirms doctrinal statements that the legislator in 1804 had the intention of granting the widest possible meaning to the notion of compensation.[58]

28. "*RÉPARER*" – Thirdly, attention is drawn to the use of the word "*réparer*". The Civil Code does not provide the legal subject and by extension the legal practice with a definition or further elaboration which would refine the intended interpretation of the term.[59] Of course, the legal textual lacuna may be overcome by interpreting "*réparer*" in its ordinary meaning.[60] According to the French dictionary Larousse[61], the contemporary interpretation of "*réparer*" would be "to compensate for loss caused". Compensation is linked to an act of balancing, a

[56] M. TREILHARD, "Exposé de motifs" in J.-G. LOCRÉ, *Legislation civile, commerciale et criminelle*, VI, *Code civil. Livre troisième*, Brussel, Librairie de jurisprudence de H. Tarlier, 1836, 276, no. 9.
[57] J. RONSE, *Schade en schadeloosstelling (onrechtmatige daad)*, 1957, no. 231, 211; J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, no. 231, 173.
[58] R.O. DALCQ, *Traité*, II, 1962, no. 4140, 741; N. SIMAR and L. DE ZUTTER, "L'évaluation du dommage", 1999, (1) 5, no. 5; A. VAN OEVELEN, "La modération de la réparation du dommage", 1996, (65) no. 2, 66.
[59] J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, 162, no. 219 and no. 230, 172.
[60] Cass. 15 mei 1941, *Pas.* 1941, I, 192, *in fine*; J. RONSE, *Schade en schadeloosstelling (onrechtmatige daad)*, 1957, no. 230, 210; J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, no. 230, 173.
[61] Accessible via: http://www.larousse.fr/dictionnaires/francais.

recovery from an imbalance. Yet, our main interest lies in the meaning of the word "*réparer*" two centuries ago. The *Dictionnaire de l'Académie française* states in both its 5th and 6th edition (dating from 1798 and 1835 respectively)[62] that in a moral sense the word "*réparer*" means "*effacer, faire disparaître* (to erase, to wipe out)". Here again, the connection is present with the idea of restoring a balance and making up for something so that its consequences can be erased. This is connected with the etymological interpretation of the word "*réparer*", namely the Latin word *"reparare*", which means "*to recover, to repair*".[63] The word "*réparer*" itself therefore already orders a full compensation.[64]

29. NOT "*DOMMAGES-INTÉRÊTS*" – Fourthly, the meaning of "*réparer*" can be determined on the basis of the terminological contrast with the legal provisions on contractual liability. If we take Art. 1146 BCC as an example, we notice the use of the terms "*dommages et intérêts*" instead of "*réparer*". Moreover, the term "*réparer*" does not occur even once in the section on contractual liability. This indicates a distinct meaning of "*réparer*", as opposed to "*dommages et intérêts*". The assumption is that the notion of balancing by compensation already referred to would constitute that distinct, particular meaning.

CHAPTER II: HISTORICAL INTERPRETATION VIA THE *TRAVAUX PRÉPARATOIRES*

30. PREPARATORY WORKS – The examination of the wordings of the legal provision, the absence of certain structures, namely limitations, and the comparison with the formula applied in the legal provisions on contractual liability thus seem to signal a clear intention of the legislator to opt for the principle of full compensation. However, the true *ratio legis* might be slightly different than what is suggested by the textual frame. For that reason, it's advisable to take a step back and to set about the task of contextualization. RONSE has already stated that the principle of full compensation clearly stems from the statements made during the preparatory works.[65] That's why is makes sense to inquire into these preparatory works.

31. *EXPOSÉ DES MOTIFS* – In his *exposé des motifs*[66], M. TREILHARD stated that the compensation constitutes a necessary consequence of the tort. The author of the loss would

[62] Accessible via : http://artflx.uchicago.edu/cgi-bin/dicos/pubdico1look.pl?strippedhw=r%C3%A9parer.
[63] M. PHILIPPA, F. DEBRABANDERE, A. QUAK, T. SCHOONHEIM and N. VAN DER SIJS, *Etymologisch woordenboek van het Nederlands*, Amsterdam, Amsterdam University Press, 2007, v° *repareren*.
[64] R.O. DALCQ, *Traité*, II, 1962, no. 4140, 741.
[65] *Cf. supra*, no. 25.
[66] *Exposé de motifs* par M. TREILHARD in LOCRÉ, *Législation civile, commerciale et criminelle*, VI, *Code civil. Livre troisième*, Brussel, Librairie de jurisprudence de H. Tarlier, 1836, 276, no. 9.

offer compensation of his own accord, if he were fair, as he would claim compensation in case he suffers a loss himself caused by someone else: "*Il offrirait lui-même cette réparation, s'il était juste, comme il l'exigerait d'un autre s'il avait éprouvé le dommage*". Particularly the conditional phrase is interesting, as it seems to link the system of tort liability with justice. Part II will assess this element of justice.

32. *RAPPORT* – BERTRAND DE GREUILLE seems to take a societal approach to the basic principle of tort law in his *rapport*[67]: *"Tout individu est garant de son fait; c'est une des premières maximes de la société."*[68] It follows that everyone is obligated to compensate for any loss resulting from that act. Here again, the text uses the word "*réparer*", which we have already analysed.[69] The principle of (full) compensation is firmly stated: "*Ce principe* […] *n'admet point d'exception."*[70] BERTRAND himself reflects upon the absolute nature of the principle and wonders whether this might not lead to injustice, especially considering the possibility to be held liable even in the absence of the intentional causing of harm. Justification, according to BERTRAND, is to be found within "*ce grand principe d'ordre public*"[71]. Public order dictates that the law cannot balance between he who errors, and he who suffers. The law has to order the former to compensate for the loss suffered by the latter. Yet, the honour of the author of the loss should be preserved. Nevertheless, it's not exaggerated to impose monetary sacrifices ("*sacrifices pécuniaires*") for the *entire* indemnification. The latter quite literally affirms the principle of full compensation.

33. *DISCOURS* – After having reiterated the mantra of Art. 1382 BCC, TARRIBLE continues on the path of DE GREUILLE in his *discours*.[72] The basic rule is said to warrant the preservation of any kind of society and to be full of wisdom. When balancing the interest of the sufferer of the loss and the interest of the author of the loss, a sudden cry of justice is uttered, demanding compensation by the author. All forms of loss are subjected to the uniform rule of compensation equal to the loss suffered. The core message is given towards the end of the *rapport*: *"Le dommage, pour qu'il soit sujet à réparation, doit être l'effet d'une faute ou d'une imprudence de la part de quelqu'un : s'il ne peut être attribué à cette cause, il n'est plus que l'ouvrage du*

[67] *Rapport* par M. BERTRAND DE GREUILLE in LOCRÉ, *Législation civile, commerciale et criminelle*, VI, *Code civil. Livre troisième*, Brussel, Librairie de jurisprudence de H. Tarlier, 1836, 280, no. 9.
[68] *Own translation: "Every individual is responsable for his actions; it's one of the primary societal maxims."*
[69] *Cf. supra*, no. 28.
[70] *Own translation: "This principle can't bear any exception."*
[71] *Own translation: "that great principle of public order".*
[72] *Discours* par M. TARRIBLE in LOCRÉ, *Législation civile, commerciale et criminelle*, VI, *Code civil. Livre troisième*, Brussel, Librairie de jurisprudence de H. Tarlier, 1836, 287, no. 19.

sort, dont chacun doit supporter les chances".[73] It refers to the fundamental point of departure that *the loss lies where it falls*[74] so that "*chacun doit supporter les chances.*"[75] Tort law constitutes an exception to that rule, justified by fault or negligence, according to TARRIBLE. The legal order substantially based on the principle of non-interference in one's private sphere requires a particular ground of justification to allocate a loss to a certain individual rather than to someone else. Tort law is based on such a particular ground of justification: the weighing of interests between the innocent victim suffering a loss without having been able to avoid so, on the one hand, and the author of the loss being (even slightly) guilty or negligent, on the other hand. Of course, the result is a demand for compensation of to the account of the latter, given the preference for the victim.[76] As will be elaborated in Part II, society has evolved and so has tort law. Inevitably, this will have consequences as to the absolute nature of the principle of full compensation defended by the preparatory works.

CHAPTER III: THE HISTORICAL MEANING OF THE PRINCIPLE

34. INDIVIDUAL AND SUBJECTIVE FAULT LIABILITY – Two features of tort liability, as it was introduced in 1804, follow from the wordings of the preparatory works and the grammatical interpretation of Art. 1382 BCC. First, the drafters speak of the author of the loss, thereby focusing on the individual rather than on a group. This choice for individual liability makes sense. The society was characterised by its traditional nature so that socio-economic relations mainly existed between individuals, as did conflicts.[77] Furthermore, liability insurance had not entered the picture yet.[78] Accidents were considered to be a matter merely between the parties involved.[79] The subjective nature of the liability becomes apparent in the sense that the focus is on the (faulty) behaviour of the tortfeasor (as compared to the objective criterion of the *bonus pater familias*).[80] Secondly, the basis for tort liability was a fault by the author of the loss, even

[73] *Own translation: "In order to give rise to compensation, the loss has to be the result of a fault or carelessness of someone else: if it can't be attributed to such cause, it's no more than destiny at work, where everyone must try his luck."*
[74] *See* T. HARTLIEF, *Ieder draagt zijn eigen schade*, Deventer, Kluwer, 1997, 76 p.
[75] A. BENABENT, *Droit des obligations*, 2014, 382-383, no. 529.
[76] J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, 175-178, nos. 235-237; W. VAN GERVEN, "De invloed van de verzekering op het verbintenissenrecht", *RW* 1962, issue 14, (777) 777-778, no. 2; T. VANSWEEVELT and B. WEYTS, "Het buitencontractueel aansprakelijkheidsrecht", 2008, (108) 117, no. 16; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 12, no. 16.
[77] G. VINEY, *Traité de droit civil. Introduction à la responsabilité*, Paris, LGDJ, 2008, 22, no. 15.
[78] T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 11, no. 14; T. VANSWEEVELT and B. WEYTS, "Het buitencontractueel aansprakelijkheidsrecht", 2008, (108) 116, no. 14.
[79] D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (1961) no. 2, 1964.
[80] L. CORNELIS, *Beginselen van het Belgische aansprakelijkheidsrecht. Deel I*, Antwerpen, Maklu, 1989, no. 215, 358; H. DE PAGE, *Traité*, II, 1964, 867-868, no. 906; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 11, no. 15; T. VANSWEEVELT and B. WEYTS, "Het

the slightest fault.[81] The economic views of liberalism had led to this fault liability, which was based on both human freedom and justice and oriented towards the privileged protection of the sufferer's interests.[82] The choice for fault as the basis for tort liability was tied up with a moralizing effect.[83] Immoral behaviour was sanctioned through liability.[84] "[*I*]*l place une responsabilité morale qui doit redouble la vigilance des hommes chargés du dépôt sacré de l'autorité, et qui préviendra ainsi plus de désordres qu'elle n'en aura à réparer.*"[85]

35. ABSOLUTE PRINCIPLE – To conclude, the principle of full compensation was meant to be absolute. Given the findings of the grammatical analysis and the preparatory works, it is beyond doubt that no moderation has been envisioned as to the scope of the compensation in 1804. The culpable tortfeasor had to compensate for the entire loss suffered by the innocent victim. Whether this strong moral view on tort liability is still desirable today, leads us into Part II and

buitencontractueel aansprakelijkheidsrecht", 2008, (108) 116, no. 15. France: P. LE TOURNEAU, *Dalloz action - Droit de la responsabilité et des contrats*, 2014, no. 51. The Netherlands: E.F.D. ENGELHARD and G.E. VAN MAANEN, *Aansprakelijkheid voor schade*, 2008, no. 33, 49.

[81] R.O. DALCQ, "Sources et finalité du droit de la responsabilité civile ou de la responsabilité pour faute à la responsabilité objective" in X., *Responsabilité professionnelle et assurance des risques professionnels*, Brussel, Larcier, 1975, (19) 38; H. DE PAGE, *Traité*, II, 1964, no. 933, 918-919; P. VAN OMMESLAGHE, *Traité*, II, 2013, no. 800, 1137; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 11, no. 15; T. VANSWEEVELT and B. WEYTS, "Het buitencontractueel aansprakelijkheidsrecht", 2008, (108) 116, no. 15. France: P. BRUN, *Responsabilité civile extracontractuelle*, 2014, 97, no. 150; Y. BUFFELAN-LANORE and V. LARRIBAU-TERNEYRE, *Droit civil*, 2014, 552, no. 1504 *et seq*. and 699, no. 1835; P. JOURDAIN, *J.-Cl. Civil Code, Art. 1382 à 1386, J.-Cl. Responsabilité civile et Assurances, J.-Cl. Notarial Répertoire, v° Responsabilité civile, Fasc. 120-10*, 2011, no. 2; P. JOURDAIN, *J.-Cl. Civil Code, Art. 1382 à 1386, J.-Cl. Responsabilité civile et Assurances, J.-Cl. Notarial Répertoire, v° Responsabilité civile, Fasc. 123*, 2014, no. 2 and 59; J. JULIEN, *Droit des obligations*, 2012, 227, no. 319; Y. LAMBERT-FAIVRE and S. PORCHY-SIMON, *Droit du dommage corporel*, 2011, no. 438, 495; P. MALAURIE, L. AYNÈS and P. STOFFEL-MUNCK, *Les obligations*, 2007, no. 24, 13; H. & L. MAZEAUD and A. TUNC, *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle*, I, Paris, Éditions Montchrestien, 1965, 53, no. 45 *et seq*.

[82] D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (1961) 1965-1968, nos. 3-4; R. SPILMAN, *Sens et Portée de l'Évolution de la Responsabilité civile depuis 1804*, Brussel, Palais des Académies, 1955, 60. France: Y. BUFFELAN-LANORE and V. LARRIBAU-TERNEYRE, *Droit civil*, 2014, 700, no. 1839; P. JOURDAIN, *J.-Cl. Civil Code, Art. 1382 à 1386, J.-Cl. Responsabilité civile et Assurances, J.-Cl. Notarial Répertoire, v° Responsabilité civile, Fasc. 120-10*, 2011, no. 115.

[83] T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 11, no. 15; T. VANSWEEVELT and B. WEYTS, "Het buitencontractueel aansprakelijkheidsrecht", 2008, (108) 116, no. 15. France: M. BACACHE-GIBEILI, *Traité de droit civil*, V, 2016, 4-5, no. 7; J. CARBONNIER, *Droit civil*, IV, *Les Obligations*, Paris, Presses Universitaires de France, 2000, no. 220, 402; J. FLOUR, J.-L. AUBERT and É. SAVAUX, *Droit civil. Les obligations*, II, *Le fait juridique*, Paris, Dalloz, 2011, no. 66, 77; P. JOURDAIN, *J.-Cl. Civil Code, Art. 1382 à 1386, J.-Cl. Responsabilité civile et Assurances, J.-Cl. Notarial Répertoire, v° Responsabilité civile, Fasc. 120-10*, 2011, no. 1; J. JULIEN, *Droit des obligations*, 2012, 200-201, no. 283; Y. LAMBERT-FAIVRE and S. PORCHY-SIMON, *Droit du dommage corporel*, 2011, 15, no. 20.

[84] That way, tort law played (and still plays) a preventive role as well. France: J. FLOUR, J.-L. AUBERT and É. SAVAUX, *Droit civil. Les obligations*, II, *Le fait juridique*, Paris, Dalloz, 2011, no. 66, 78.

[85] P.A. FENET, *Recueil complet des travaux préparatoires du Code civil*, XIII, Paris, Imprimerie de Marchand du Breuil, 1827, 491. *Own translation*: *"it puts in place a moral liability which redoubles the vigilance of those charged with keeping the sacred deposit of authority, and which will that way prevent more disorders than it will need to compensate."*

its central question whether the principle of full compensation in its absolute nature can be accepted in 21st century Belgian tort law.

PART II: THE PRINCIPLE OF FULL COMPENSATION *ANNO* 2016

> *"Elke evolutie van het recht is een poging om een leemte te vullen tussen de bestaande regelgeving en nieuwe behoeften die zijn ontstaan door de maatschappelijke evolutie en die niet langer kunnen worden opgelost aan de hand van de geldende normering."* [86]

36. EVALUATION AFTER TWO DECADES – The reasons for adopting the principle of full compensation in 1804 might be no longer valid *anno* 2016. Therefore, it's necessary to determine to what extent the historical motivation still makes sense today. The answer will clarify which reasons should be taken into account when integrating the deviant systems into common Belgian tort law. Firstly, a brief overview of the evolution of Belgian tort law will be given to set the scene (Chapter I). Secondly, a principled analysis will provide a more in-depth analysis (Chapter II). Finally, the current perspective in Belgian doctrine and case law will be examined (Chapter III). Preliminary research has already found that no new reasons for the principle of full compensation can be revealed by exploring the relevant literature, so the assumption is that the current meaning of the principle can be established by evaluating to what extend the absolute principle of full compensation is useful in the 21st century.

CHAPTER I: FROM MONO- TOWARDS MULTIPILLARED COMPENSATION LAW

37. A NEW KIND OF SOCIETY - Evidently, our Belgian society has evolved since 1804. The then mainly traditional society knew far less risks and instances of loss. Moreover, losses were less severe than they can and tend to be nowadays. The change has been brought about by the industrialisation and mechanisation of our society, by the increased (population) density and by the development of the welfare state.[87] At the end of the 19th century, fault liability appeared to

[86] V. VERVLIET, *Professionele risico's*, 2007, 11, no. 11.

[87] R. ANDRÉ, "De evolutie van het recht van de burgerlijke aansprakelijkheid", *RW* 1981-82, (2639) 2642; H. BOCKEN, "Van fout naar risico", *TPR* 1984, (329) no. 2, 329; A. SÉRIAUX, "L'avenir de la responsabilité civile. Quel(s) fondement(s) ?" in *La responsabilité civile à l'aube du XXIe siècle : bilan prospectif, Responsabilité civile et assurances* 2001, special issue 6*bis*, (58) no. 2, 1; R.O. DALCQ, *Traité de la responsabilité civile*, I, *Les causes de responsabilité*, Brussel, Larcier, 1967, 110, no. 19; R. DEKKERS, "L'évolution du droit civil belge depuis le Code Napoléon", *Revue Juridique du Congo (Numéro Spécial)*, 1965, (7) 19; H. DE PAGE, *Traité*, II, 1964, no. 930, 913-914 and 915, no. 931; M. FAURE and R. VAN DEN BERGH, *Objectieve Aansprakelijkheid, Verplichte Verzekering en Veiligheidsregulering*, Antwerpen, Maklu, 1989, no. 193, 194; D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (1961) 1970-1971, nos. 7-8 (with references); D. SIMOENS, "Ongevallenrecht: grensgebieden van aansprakelijkheid, verzekering en sociale verzekering" in M. STORME and H. BOCKEN (eds.), *Verbintenissenrecht*, Gent, Storme, 1984, (417) 417-418, no. 2; D. SIMOENS, "De indicatieve tabel", 2012, (71)

be unsatisfactory for the many victims of industrial accidents and accidents involving modern technology.[88] Besides a fault, the creation of hazards became increasingly seen as a ground for liability.[89] The individual and subjective liability was unsuited to deal with loss caused in the absence of a fault.[90] Tort law evolved through the introduction of strict liabilities, a collective approach and the decline of subjective and individual liability. The importance of tort law itself has also increased, given its scaling-up.[91]

38. INTRODUCTION OF STRICT LIABILITIES – Over the years, fault liability[92] has been complemented by strict liability so that even in the absence of any fault, liability rose for the creator of a risk as to the loss resulting from that risk.[93] The core idea of the theory of risk is

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74, nos. 7-8; W. VAN GERVEN, *Verbintenissenrecht*, 2015, 334; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 12, no. 17 and no. 33, 23; T. VANSWEEVELT and B. WEYTS, "Het buitencontractueel aansprakelijkheidsrecht", 2008, (108) 117, no. 17 and no. 33, 127; V. VERVLIET, *Professionele risico's*, 2007, 115-116, nos. 150-152. *See also* for France: M. BACACHE-GIBEILI, *Traité de droit civil*, V, 2016, 7, no. 12; A. BENABENT, *Droit des obligations*, 2014, no. 530, 383; P. BRUN, *Responsabilité civile extracontractuelle*, 2014, 99, no. 153; Y. BUFFELAN-LANORE and V. LARRIBAU-TERNEYRE, *Droit civil*, 2014, 551, no. 1497; R. CABRILLAC, *Droit des obligations*, 2012, no. 219, 195; O. DESCAMPS, *Les origines de la responsabilité pour faute personnelle dans le code civil de 1804*, Paris, LGDJ, 2005, 4-5; F. EWALD, *L'Etat providence*, 1986, 606 p.; M. FABRE-MAGNAN, *Droit des obligations*, II, 2013, 62; Y. LAMBERT-FAIVRE and S. PORCHY-SIMON, *Droit du dommage corporel*, 2011, no. 21, 51; P. MALAURIE, L. AYNÈS and P. STOFFEL-MUNCK, *Les obligations*, 2007, no. 26, 14; P. MALINVAUD, D. FENOUILLET and M. MEKKI, *Droit des obligations*, Paris, LexisNexis, 2014, no. 561, 440; R. SAVATIER, *La théorie des obligations*, 1979, no. 218, 272; G. SCHAMPS' analysis in G. SCHAMPS, *La mise en danger: un concept fondateur d'un principe general de responsabilité. Analyse de droit compare*, Brussel, Bruylant, 1998, 605, no. 22; F. TERRÉ, P. SIMLER and Y. LEQUETTE, *Droit civil. Les obligations*, Paris, Dalloz, 2009, 685-686, no. 673; G. VINEY, *Traité de droit civil. Introduction à la responsabilité*, Paris, LGDJ, 2008, 26-28, no. 17. *See* similarly for the Netherlands: M. FAURE and T. HARTLIEF, *Nieuwe risico's en vragen van aansprakelijkheid en verzekering*, Deventer, Kluwer, 2002, 11; T. HARTLIEF and R.P.J.L. TJITTES, *Verzekering en aansprakelijkheid* in *Serie recht en praktijk – 79*, Deventer, Kluwer, 1994, 3; J.M. VAN DUNNÉ, *Verbintenissenrecht*, 2004, 469-472; G.E. VAN MAANEN, *Onrechtmatige daad*, Deventer, Kluwer, 1986, 195; A.J. VERHEIJ, *Onrechtmatige daad*, 2005, no. 7, 12.

[88] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, no. 11, 9; I. BOONE, *Verhaal van derde-betalers op de aansprakelijke*, Antwerpen, Intersentia, 2009, no. 17, 18 ("risk societies"). France: M. FABRE-MAGNAN, *Les obligations*, Paris, Presses Universitaires de France, 2004, 664.

[89] F. WERRO and E. BÜYÜKSAGIS, "The bounds between negligence and strict liability" in M. BUSSANI and A.J. SEBOK (eds.), *Comparative Tort Law. Global Perspectives*, Cheltenham, Edward Elgar Publishing, 2015, (201) 207. *See also*: C.H.W.M. STERK, *Verhoogd gevaar in het aansprakelijkheidsrecht*, Deventer, Kluwer, 1994, 299.

[90] D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (1961) no. 5, 1968.

[91] D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (1961) 1978-1979, no. 16. *See also* for France: Y. BUFFELAN-LANORE and V. LARRIBAU-TERNEYRE, *Droit civil*, 2014, 562, no. 1535 *et seq.*; P. MALAURIE, L. AYNÈS and P. STOFFEL-MUNCK, *Les obligations*, 2007, no. 26, 14; A. SERIAUX, "L'avenir de la responsabilité civile. Quel(s) fondement(s) ?" in *La responsabilité civile à l'aube du XXI^e siècle : bilan prospectif, Responsabilité civile et assurances* 2001, special issue 6*bis*, (58), 59, no. 7. Insurance is an important factor in the expension of tort law: A. TUNC, "Responsabilité civile et assurance" in X, *Hommage à René Dekkers*, Brussel, Bruylant, 1982, (343) 346.

[92] *Cf. supra*, no. 34.

[93] R. ANDRÉ, *Les responsabilités*, Brussel, Bureau d'etudes R. André, 1981, no. 249, 339; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, no. 18, 12; T. VANSWEEVELT and B. WEYTS, "Het buitencontractueel aansprakelijkheidsrecht", 2008, (108) no. 18, 117. *See* for France: O. BERG, "Le dommage objectif" in J.-S. BORGHETTI, O. DESHAYES and C. PERES (Comité d'organisation), *Études offertes à Geneviève Viney. Liber amicorum*, Paris, LGDJ, 2008, (63) 63; *See* for a similar remark concerning the Netherlands: J.E. FESEVUR, "Aansprakelijkheid wegens onrechtmatige daad vanuit een Spinozistische optiek" in J.M. VAN BUREN-DEE, F.W. GROSHEIDE, P.A. KOTENHAGEN-EDZES and M.J. KROEZE (eds.), *Tussen de polen van*

burdening the activity which creates the risk.[94] In that regard, Art. 1362, first paragraph of the French Catalat-project[95] is illustrative: "*Notwithstanding particular provisions, the operator of an abnormally dangerous activity, even lawful, is liable for the loss resulting from this activity. (own underlining)*"[96] There is also an idea of distributive justice present in the introduced strict liabilities.[97] The Belgian legislator has not shied away from the creation of an entire spectrum of strict liabilities.[98] Whenever the activity was intrinsically bound up with an elevated risk, a strict liability has been imposed on the creator of the risk.[99] The *ratio* was clear: exposing others to elevated risks out of self-interest leads to bearing the losses caused to others by those risks.[100]

39. BALANCING INTERESTS – The introduction of strict liabilities preserved a balance between the interests of the victims and the authors of activities considered to be risky.[101] The clash of interests has been replaced by a balancing of interests.[102] Firstly, victims no longer need to prove the existence of a fault in case of strict liability, thus eliminating an important impediment and reducing the costs.[103] Yet, the danger remained of being confronted with an insolvent person held liable. Therefore, generally speaking, the introduction of a strict liability

bescherming en vrijheid. Aspecten van aansprakelijkheid, Antwerpen, Intersentia, 1998, (1) 3-4; C.J.M. KLAASSEN, *Risico-aansprakelijkheid*, 1991, 255; J.M. VAN DUNNÉ, *Verbintenissenrecht*, 2004, 166; J.H. WANSINK, "Onverzekerbare aansprakelijkheid, 2000, (407) 409.

[94] D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (1961) 1972-1973, no. 10. France: P. BRUN, *Responsabilité civile extracontractuelle*, 2014, no. 164, 104; Y. BUFFELAN-LANORE and V. LARRIBAU-TERNEYRE, *Droit civil*, 2014, no. 1510, 554; M. FABRE-MAGNAN, *Droit des obligations*, II, 2013, 63-64; P. MALAURIE, L. AYNÈS and P. STOFFEL-MUNCK, *Les obligations*, 2007, 13, no. 25. The Netherlands: T. HARTLIEF, *Ieder draagt zijn eigen schade*, Deventer, Kluwer, 1997, no. 2, 12.

[95] *Cf. supra*, footnote 42.

[96] *Own translation. Original text: "Sans préjudice de dispositions spéciales, l'exploitant d'une activité anormalement dangereuse, même licite, est tenu de réparer le dommage consécutif à cette activité." See*: A. GUÉDAN-LÉCUYER, "Vers un nouveau fait générateur de responsabilité civile : les activités dangereuses" in J.-S. BORGHETTI, O. DESHAYES and C. PERES (Comité d'organisation), *Études offertes à Geneviève Viney. Liber amicorum*, Paris, LGDJ, 2008, 499-509.

[97] P. LE TOURNEAU, *Rép. civ. Dalloz* 2001, *v° Responsabilité (en général)*, 13, no. 50.

[98] H. BOCKEN, "Van fout naar risico", *TPR* 1984, 329-415; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 12-13, no. 18; T. VANSWEEVELT and B. WEYTS, "Het buitencontractueel aansprakelijkheidsrecht", 2008, (108) no. 18, 117; B. WEYTS, "Objectieve aansprakelijkheid" in X, *Aansprakelijkheid, aansprakelijkheidsverzekering en andere schadevergoedingssystemen. XXXIIIe Postuniversitaire Cyclus Willy Delva 2006-2007*, Mechelen, Kluwer, 2007, (371) 414. *See also*: D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (1961) 1974-1976, no. 13. *Similarly* for the Netherlands: M. FAURE and T. HARTLIEF, *Nieuwe risico's en vragen van aansprakelijkheid en verzekering*, Deventer, Kluwer, 2002, 14; C.H.M. JANSEN, *Onrechtmatige daad*, 2009, no. 5, 8.

[99] *See also*: C.H.W.M. STERK, *Verhoogd gevaar in het aansprakelijkheidsrecht*, Deventer, Kluwer, 1994, 299.

[100] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, no. 11, 9.

[101] T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, no. 18, 12; T. VANSWEEVELT and B. WEYTS, "Het buitencontractueel aansprakelijkheidsrecht", 2008, (108) no. 18, 117. *See also* for the Netherlands: C.H.W.M. STERK, *Verhoogd gevaar in het aansprakelijkheidsrecht*, Deventer, Kluwer, 1994, 1; J.M. VAN DUNNÉ, *Verbintenissenrecht*, 2004, 465.

[102] D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (1961) 1974, no. 12.

[103] R.J. VAN DER BERGH, "Rechtseconomische kanttekeningen" in STICHTING GROTIUS ACADEMIE (ed.), *Aansprakelijkheid: gronden en grenzen* in *Kluwer Rechtswetenschappelijke Publicaties*, Deventer, Kluwer, 2001, (111) 123.

has been accompanied by a mandatory liability insurance. Strict liabilities laid down in statutes offer the advantage of enabling a better financial risks assessment by insurers.[104] Secondly, the scale should not tip entirely in favour of the victim, as that would herald the end of entrepreneurship and free initiative.[105] Moreover, insurance companies require something to hold on to, a value to base their calculations on.[106] Hence, the legislator has deviated from the principle of full compensation by capping several items of loss.[107] The system which was fairly consistent in 1804, has degenerated over time into an incoherent tangle of deviations from the principle of full compensation.[108]

40. EXAMPLES OF STRICT LIABILITY – All sorts of strict liability have been created by the Belgian legislator.[109] Firstly, some risks were considered to be societal risks, given the frequent occurrence of those risks. Efficient systems for compensation regardless of fault were set up, such as the system for compensation of weak road users (Art. 29*bis* WAM[110]). Secondly, several sectors have dealt with risks by installing strict liability, such as the groundwater extraction[111]. Thirdly, some risks had to be handled on an international level by means of international regulation and harmonisation. An example is the strict liability for loss caused by nuclear plants.[112]

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[104] *See* E. BAUW's remark in X, *Verslag van de op 14 juni 1996 te Amsterdam gehouden algemene vergadering over: De uitdijende reikwijdte van de aansprakelijkheid uit onrechtmatige daad*, Deventer, Tjeenk Willink, 1996, 26. J. SPIER nuances at *idem*, 59.

[105] The regime of the *Code civil* is a balancing act: P. VAN OMMESLAGHE, "Le Code civil en Belgique aujourd'hui: le droit des obligations" in D. HEIRBAUT and G. MARTYN (eds.), *Napoleons nalatenschap/Un héritage Napoléonien*, Mechelen, Kluwer, 2005, (195) 212-213. *See also*: T. HARTLIEF, "Op weg naar een Europees aansprakelijkheidsrecht?", *TPR* 2002, issue 2, (945) no. 1, 945.

[106] R. SPILMAN, *Sens et Portée de l'Évolution de la Responsabilité civile depuis 1804*, Brussel, Palais des Académies, 1955, 124-125. *Cf. infra*, no. 59. *See also*: N. FRENK, "Utopische wetgeving en verzekerbaarheid", *Aansprakelijkheid, Verzekering & Schade* 2016, (108-117) no. 5; J.H. WANSINK, "Onverzekerbare aansprakelijkheid, 2000, (407) 407.

[107] B. DUBUISSON, "De la légèreté de la faute au poids du hasard", *RGAR* 2005, (14009[1]) 14009[6], no. 19.

[108] T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 18-19, no. 25; T. VANSWEEVELT and B. WEYTS, "Het buitencontractueel aansprakelijkheidsrecht", 2008, (108) 122-123, no. 25.

[109] *See*: T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, no. 18, 13-14 and no. 25, 18; T. VANSWEEVELT and B. WEYTS, "Het buitencontractueel aansprakelijkheidsrecht", 2008, (108) no. 18, 118 and no. 25, 123.

[110] Wet van 21 november 1989 betreffende de verplichte aansprakelijkheidsverzekering inzake motorrijtuigen, *BS* 8 december 1989, no. 1989011371, 20122; H. VANDENBERGHE *et alii*, "Aansprakelijkheid uit onrechtmatige daad", 2000, (1551) no. 4, 1562.

[111] Wet van 10 januari 1977 houdende regeling van de schadeloosstelling voor schade veroorzaakt door het winnen en het pompen van grondwater, *BS* 8 februari 1977, no. 1977011005, 1471.

[112] Verdrag van Parijs van 29 juli 1960 inzake wettelijke aansprakelijkheid op het gebied van de kernenergie; Aanvullend Verdrag van Brussel van 31 januari 1963; Protocol van Parijs van 16 november 1982; Wet van 22 juli 1985 betreffende de aansprakelijkheid op het gebied van kernenergie, *BS* 31 augustus 1985, no. 1985011261, 12561.

41. COLLECTIVE APPROACH – Whereas the drafters of the *Code civil* envisioned a system of individual liability,[113] the legislator has sometimes taken a more collective approach by setting up collective systems for compensation.[114] The focus changed from active security and sanctioning guilty behaviour, to passive security (the protection against others) and the extensive covering of needs. The new mentality marked a collectivisation.[115]

42. DECLINE OF SUBJECTIVE AND INDIVIDUAL LIABILITY – Case law has remained severe in judging the existence of a fault and still adheres to the adagio "*In lege Aquilia et culpa levissima venit*".[116] The result of the objectification is the erosion of the notion of guilt (and thus fault).[117] Collectivisation through insurance has led to the decline of the individual character of tort liability.[118] For some legal subjects, one could speak of a decline of the individual liability because of the introduced immunities.[119] A qualified fault is required for their liability so that

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[113] *Cf. supra*, no. 34.

[114] T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 14, no. 19; T. VANSWEEVELT and B. WEYTS, "Het buitencontractueel aansprakelijkheidsrecht", 2008, (108) 119, no. 19.

[115] B. DUBUISSON, "Les immunités civiles ou le déclin de la responsabilité individuelle: coupables mais pas responsables" in B. DUBUISSON and P. HENRY (eds.), *Droit de la responsabilité. Morceaux choisis*, Brussel, Larcier, 2004, (69) no. 1, 73; D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (1961) no. 18, 1979-1980. *See also* for France: Y. BUFFELAN-LANORE and V. LARRIBAU-TERNEYRE, *Droit civil*, 2014, 566, no. 1552; R. CABRILLAC, *Droit des obligations*, 2012, no. 227, 199; P. JOURDAIN, "Du critère de la responsabilité civile" in J.-S. BORGHETTI, O. DESHAYES and C. PERES (Comité d'organisation), *Études offertes à Geneviève Viney. Liber amicorum*, Paris, LGDJ, 2008, (553) 553-554; J. JULIEN, *Droit des obligations*, 2012, 316-317, no. 421. *Similarly* in the Netherlands: L.J.A. DAMEN, "Moet pech weg? Alle pech voor risico van de overheid?" in C.P.M. CLEIREN, R.M.G.E. FOQUÉ, J.L.M. GRIBNAU, R.M. VAN MALE and P.A.M. MEVIS (eds.), *Voor risico van de overheid?* in *SI-EUR*, part 13, Arnhem, Gouda Quint, 1996, (17) 30-31, no. 6, with reference to the Dutch saying "*Pech moet weg*".

[116] *Own translation:"In the Aquilia Law* [tort law]*, the slightest fault engages liability". See*: H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 90, no. 144; H. DE PAGE, *Traité*, II, 1964, 917- 918, no. 932.

[117] D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (1961) 1982-1984, no. 21; W. VAN GERVEN, "Overzicht en tendensen aansprakelijkheidsrecht", 1972, (267) 294. France: Y. BUFFELAN-LANORE and V. LARRIBAU-TERNEYRE, *Droit civil*, 2014, 563, no. 1537 and 700, no. 1840. The authors even speak of "*la dénaturation*".

[118] T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 17-18, no. 24; T. VANSWEEVELT and B. WEYTS, "Het buitencontractueel aansprakelijkheidsrecht", 2008, (108) 122, no. 24. France: M. BACACHE-GIBEILI, *Traité de droit civil*, V, 2016, 7-8, no. 13; A. BENABENT, *Droit des obligations*, 2014, 386, no. 534; R. CABRILLAC, *Droit des obligations*, 2012, no. 227, 198; O. DESCAMPS, *Les origines de la responsabilité pour faute personnelle dans le code civil de 1804*, Paris, LGDJ, 2005, 475; M. FABRE-MAGNAN, *Droit des obligations*, II, 2013, 462-463; P. MALAURIE, L. AYNÈS and P. STOFFEL-MUNCK, *Les obligations*, 2007, 15, no. 27; G. VINEY, *Le déclin de la responsabilité individuelle* in *Bibliothèque de droit privé*, Vol. LIII, Paris, LGDJ, 1965, no. 149, 143. The Netherlands: J.H. WANSINK, "Onverzekerbare aansprakelijkheid, 2000, (407) 414.

[119] B. DUBUISSON, "Les immunités civiles ou le déclin de la responsabilité individuelle: coupables mais pas responsables" in B. DUBUISSON and P. HENRY (eds.), *Droit de la responsabilité. Morceaux choisis*, Brussel, Larcier, 2004, (69) no. 47, 127; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, no. 20, 15; T. VANSWEEVELT and B. WEYTS, "Het buitencontractueel aansprakelijkheidsrecht", 2008, (108) no. 20, 119. *See*, for example the immunity in case of industrial accidents, *cf. infra*, nos. 102 and 104.

their slightest fault will no longer give rise to a duty for them to compensate for the resulting loss.

43. CONCLUSION: MULTIPLE PILLARS INSTEAD OF ONE – Although tort liability could be seen as the main source of indemnification two centuries ago, it can longer be considered to be the only significant pillar for indemnification. Social security, damage funds and all sorts of insurances have obtained a much more important role, as they are usually better in safeguarding compensation than tort liability.[120] They don't offer a full compensation, but tort law will often assume the role of a complementary source of indemnification.[121] The evolution from a monopillared towards a multipillared tort law suggests that Belgian tort law is no longer pinned down to the moralising idea of "*faute oblige*", *i.e.* the idea that the tortfeasor is obliged on the basis of his fault (guilt) to carry the burden of the loss. The following chapter will assess this evolution from a principled angle, which will allow a conclusion on how the principle of full compensation should be approached in the 21st century and its consequences with regard to the need for a competence for the judge to moderate.

CHAPTER II: THE ABSOLUTE PRINCIPLE OF FULL COMPENSATION AS A MATTER OF PRINCIPLES ITSELF

44. A MATTER OF PRINCIPLES – Starting from the legisprudential[122] principle of temporality,[123] the absolute principle of full compensation in Belgian tort law will be evaluated by EHRENZWEIG's examination of the shift from "*faute oblige*" to "*assurabilité oblige*". The shift concerns the question who should carry the burden of a loss. The answer can be based on guilt ("*faute oblige*"), wealth ("*richesse oblige*"), insurance ("*assurance oblige*") or the fact that one ought to have taken out insurance ("*assurabilité oblige*"). The resulting importance of both guilt and risk is consequently reframed in FLETCHER'S paradigms of reciprocity and

[120] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 6, no. 5 and 13, no. 22. *See also* for France: V. BOST-LAGIER, "Réparation intégrale et solidarité nationale", *Petites Affiches* 2005, issue 187, (16) 16 *et seq.*; Y. BUFFELAN-LANORE and V. LARRIBAU-TERNEYRE, *Droit civil*, 2014, 566, no. 1551; P. MALAURIE, L. AYNÈS and P. STOFFEL-MUNCK, *Les obligations*, 2007, 15-16, no. 28. *Similarly* for the Netherlands: H.A. BOUMAN and A.J.O. BARON VAN WASSENAER VAN CATWIJCK, *Schadevergoeding*, 1991, no. 6, 11; S. KLOSSE, "Meerwaarde van alternatieve (vergoedings)systemen" in T. HARTLIEF and S. KLOSSE (eds.), *Einde van het aansprakelijkheidsrecht?*, Den Haag, Boom Juridische uitgevers, 2003, (77) 77; R.A. SALOMONS, *Schadevergoeding: zaakschade* in *Monografieën Nieuw BW, B38*, Deventer, Kluwer, 1993, 4-5, no. 2, b.

[121] T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 15-16, nos. 21-22; T. VANSWEEVELT and B. WEYTS, "Het buitencontractueel aansprakelijkheidsrecht", 2008, (108) 120-121, no. 21-22.

[122] Legisprudence is a legal theory of legislative law-making, by contrast to jurisprudence.

[123] The principle of temporality dictates that limitations to a subject's freedom require an ongoing justification over time. It's insufficient that an imposed rule is justified upon its introduction. It has to remain justified over time to preserve its legitimacy.

reasonableness. The interplay comes down to VAN ROERMUND's justice as the politics of alterity.[124] The conclusion of the evaluation of the principle of full compensation will reinforce our plea for a competence for the judge to moderate the amount of the compensation.

Section I: THE RAVAGES OF TIME

45. PRINCIPLE OF FULL COMPENSATION – The slightest negligence can result in disproportionate amounts of loss.[125] However, the Belgian judge can't adjust the amount of the compensation.[126] The reigning fundamental principle of full compensation dictates that the only criterion to determine the scope of the compensation is the amount of the loss caused, thus ignoring other elements like the severity of the fault or the parties' financial capacity.[127] According to the preparatory works of the *Code civil,* the absolute nature of the principle of full compensation is based on the tortfeasor's guilt, put against the victim's innocence.[128] Yet, countless risks of loss have risen.[129] Industrialisation has created new dangers and today's interconnectivity potentially includes a rapid increase of loss.[130] Besides guilt, risk creation has become important.[131] Furthermore, there's a growing mosaic of divergent systems for compensation,[132] each allowing for a deviation from the principle of full compensation but not at all in a coherent way.[133] Therefore, the absolute nature of the principle will be assessed to determine whether it still stands from a principled angle or whether a competence to moderate is preferable.

46. STARTING POINT: *Legisprudence* as a rational theory of legislation provides the preferred angle. Deviating from the principle that the loss lies where it falls, tort law as an external

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[124] Alterity, derives from the Latin word *alter* ("*other* (of two)") means "otherness" ("*het anders-zijn*"). The difference between something and the radically other element creates a dynamic based on that difference. *Comp*. F. FLEERACKERS, *Het Recht van de Filosoof*, Gent, Larcier, 2009, 211 *et seq.*

[125] *Cf. supra*, no. 3.

[126] *Cf. supra*, no. 3 and *cf. infra*, no. 133.

[127] *Cf. infra*, nos. 77 and 117.

[128] *Discours* par M. TARRIBLE in LOCRÉ, *Législation civile, commerciale et criminelle*, VI, *Code civil. Livre troisième*, Brussel, Librairie de jurisprudence de H. Tarlier, 1836, 287, no. 19. *Cf. infra*, no. 33. R.O. DALCQ, *Traité de la responsabilité civile,* I, *Les causes de responsabilité*, Brussel, Larcier, 1967, 109, no. 17. France: M. FABRE-MAGNAN, *Droit des obligations*, II, 2013, 62. The Netherlands: G.H.A. SCHUT speaks of the principle "no liability without guilt": G.H.A. SCHUT, *Onrechtmatige daad*, 1997, 22 *et seq.*

[129] P. SCHOLTEN, *Schadevergoeding buiten overeenkomst en onrechtmatige daad*, Amsterdam, Scheltema & Holkema, 1899, 12-13; W. VAN GERVEN, "De invloed van verzekering", 1962, (777) 789, no. 19. *Cf. supra*, no. 4.

[130] *Cf. supra*, no. 37.

[131] Both are crucial in mapping the field of tort law: G.E. VAN MAANEN, "Enkele algemene thema's" in J. SPIER, T. HARTLIEF, A.L.M. KEIRSE, G.E. VAN MAANEN and R.D. VRIESENDORP (eds.), *Verbintenissen uit de wet en schadevergoeding*, Deventer, Kluwer, 2012, (1) no. 8, 5.

[132] H. BOCKEN, "Les indemnisations sans égard à la responsabilité: rapport de synthèse" in J.-L. FAGNART (ed.), *Les indemnisations sans égard à la responsabilité civile*, Brussel, Kluwer, 2001, (89) 91, no. 2.

[133] *Cf. supra*, nos. 5-6.

limitation is subject to ongoing legitimation.[134] The principle of temporality[135] is highly important. The principle of full compensation dates back to 1804, making the time dimension crucial. The legislator is boundedly rational so that he can't foresee the entire future.[136] That's why the evolution of Belgian tort law needs to be considered. Does the external limitation still hold after two centuries?

[134] L.J. WINTGENS, "Legisprudence as a New Theory of Legislation", *Ratio Juris*, 2006, (1) 10; L.J. WINTGENS, *Legisprudence: practical reason in legislation*, Farnham, Ashgate, 2012, 270.
[135] L.J. WINTGENS, "Legisprudence as a New Theory of Legislation", *Ratio Juris*, 2006, (1) 13-15; L.J. WINTGENS, *Legisprudence: practical reason in legislation*, Farnham, Ashgate, 2012, 267 *et seq.*
[136] L.J. WINTGENS, *Legisprudence: practical reason in legislation*, Farnham, Ashgate, 2012, 113 and 269.

Section II: FAUTE N'OBLIGE PLUS? THE PRINCIPLE OF SMALLEST HARM

47. FROM *FAUTE* TO *ASSURANCE* – EHRENZWEIG's attempt to systematise the evolution of the law of compensation[137] has been picked up and refined by several Belgian authors.[138] The starting point has remained the same. The evolution is considered an ongoing transition from the principle of loss shifting through fault to the principle of loss spreading through insurance, *i.e.* from *"faute oblige"* to *"assurance oblige"* and even "*assurabilité oblige*".[139] After an assessment of the notions loss shifting and loss spreading, the transition will be examined.

48. LOSS SHIFTING – Whereas the historical principle of private law is that everyone who suffers a loss, should bear the loss, tort law constitutes an exception.[140] Liability shifts the loss from the sufferer to the liable author of the loss.[141] The financial burden is merely shifted from the victim to the person liable.[142] It's a balancing act between two principles: "*que personne ne reporte sur un autre la charge de ce qui lui arrive*" and "*qu'il est interdit de nuire à autrui.*"[143]

49. LOSS SPREADING – Loss shifting should be distinguished from loss spreading, realised by insurances, social security or damage funds.[144] Loss spreading indicates that the financial burden isn't placed upon the person liable but rather on a compensation fund, *i.e.* a separate capital intended for financing certain types of loss or certain benefits. Hence, insurance is based on the cornerstone of loss spreading.[145] It allows for a relocation of the loss, whereas the loss would lie where it falls in the absence of a fault according to the traditional view. The reason is simple: the shift will put the burden on an individual, though mostly a group or legal entity, less

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[137] A.A. EHRENZWEIG, "A comparative study", *Law.Cont.Probl.* 1950, 445-455.
[138] D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, 2025-2036; A. TUNC, "Logique et politique dans l'élaboration du droit, spécialement en matière de responsabilité civile" in X. (ed.), *Mélanges en l'honneur de Jean Dabin*, Brussel, Bruylant, 1963, I, 317-339; W. VAN GERVEN, "De invloed van de verzekering op het verbintenissenrecht", *RW* 1962, issue 14, 777-792; W. VAN GERVEN, "Overzicht en tendensen aansprakelijkheidsrecht", 1972, 267-303.
[139] D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (2025) 2025, no. 27. *Similarly* for France: P. MALINVAUD, D. FENOUILLET and M. MEKKI, *Droit des obligations*, Paris, LexisNexis, 2014, no. 561, 440.
[140] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 6, nos. 4-5 and 8, no. 9; D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (1961) 1964, no. 2; W. VAN GERVEN, "De invloed van de verzekering op het verbintenissenrecht", *RW* 1962, issue 14, (777) 777-778, no. 2; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 5, no. 5; T. VANSWEEVELT and B. WEYTS, "Het buitencontractueel aansprakelijkheidsrecht", 2008, (108) 110, no. 5.
[141] D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (1961) 1963, no. 1; W. VAN GERVEN, "De invloed van de verzekering op het verbintenissenrecht", *RW* 1962, issue 14, (777) 777, no. 2.
[142] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 6, no. 6; D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (1961) 1963, no. 1.
[143] F. EWALD, *L'Etat providence*, 1986, 68. *Own translation*: *"that nobody passes on to another the burden of what happens to him"* and *"it's prohibited to cause a loss to someone else"*. Note that these principles are just another formulation of the loss lies where it falls and the rule of Art. 1382 BCC.
[144] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 6-7, no. 7.
[145] *Cf. infra*, no. 56.

harmed by carrying the burden than the victim.[146] Risk distribution, however, can be interpreted in three ways: the broadest spreading possible, burdening those ablest to pay or burdening the loss creating enterprises.[147] These different interpretations will be implicitly present throughout in the examination of the transition.

Subsection I. Faute oblige

50. *FAUTE OBLIGE* – The first stage of the transition is the level of mere loss shifting.[148] Tort law is then governed by retributive justice.[149] The shift is justified on a moral ground: the tortfeasor's guilt. Everyone bears responsibility for one's actions.[150] EHRENZWEIG speaks of the general fault[151] dogma.[152] Any interference by the law in the absence of a fault would effect "*an unjustifiable shift of loss between innocent parties [own underlining]*."[153] Otherwise, according to the preparatory works of the *Code civil*, it's merely fate.[154] Yet, one's feeling of fairness and distributive justice differs depending on the severity of the fault (and thus on the level of guilt).[155] In case of a severe fault, shifting the loss towards the author of the loss seems fair and just. Yet, the weighing of the parties' interests is far more difficult if the fault is (very) small. Particularly when the loss encountered is of a substantive quantity, it seems less obvious to shift the loss to the tortfeasor. Applying the fault paradigm – thus ignoring possible liability insurance – the tort claim could ruin the tortfeasor. Even his slightest negligence can't shield him from enormous, disproportioned claims, given the preference for the innocent victim.[156]

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[146] D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (1961) 1964, no. 2; W. VAN GERVEN, "De invloed van de verzekering op het verbintenissenrecht", *RW* 1962, issue 14, (777) 778-779, no. 3.
[147] G. CALABRESI, "Some thoughts", 1961, (499) 499.
[148] F. EWALD, *L'Etat providence*, 1986, 67.
[149] C.J.H. BRUNNER, *Aansprakelijkheid naar draagkracht*, Deventer, Kluwer, 1973, 5.
[150] *Rapport* par M. BERTRAND DE GREUILLE in LOCRÉ, *Législation civile, commerciale et criminelle*, VI, *Code civil. Livre troisième*, Brussel, Librairie de jurisprudence de H. Tarlier, 1836, 280, no. 9; H. DE PAGE, *Traité*, II, 1964, no. 930, 914.
[151] Although the notion "*fault*" rather means "*guilt*".
[152] A.A. EHRENZWEIG, "A comparative study", *Law.Cont.Probl.* 1950, (445) 445.
[153] A.A. EHRENZWEIG, "A comparative study", *Law.Cont.Probl.* 1950, (445) 445. Also the statement of R.J. POTHIER is illustrative: "[…] *le fait qui forme le délit ou quasi-délit, est un fait condemnable*." R.J. POTHIER, *Traité des obligations*, I, Paris, Letellier, 1805, 82, no. 117.
[154] *Discours* par M. TARRIBLE in LOCRÉ, *Législation civile, commerciale et criminelle*, VI, *Code civil. Livre troisième*, Brussel, Librairie de jurisprudence de H. Tarlier, 1836, 287, no. 19. *Cf. supra*, no. 33.
[155] W. VAN GERVEN, "De invloed van de verzekering op het verbintenissenrecht", *RW* 1962, issue 14, (777) 778, no. 3 and 785, no. 14; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 20, no. 27; T. VANSWEEVELT and B. WEYTS, "Het buitencontractueel aansprakelijkheidsrecht", 2008, (108) 124, no. 27. France: R. SAVATIER, *Comment repenser la conception française actuelle de la responsabilité civile*, Paris, Dalloz, 1975, 4, no. 5.
[156] J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, 117-178, no. 237. Fault is related to guilt in his perspective. *Cf. supra*, no. 33.

51. NATIONAL OR INDIVIDUAL ECONOMY – EHRENZWEIG argues from an economic perspective that the fault paradigm only goes for the national economy.[157] Indeed, if a loss occurs within a national economy, it results in a reduction of existing values. It doesn't matter where the loss is situated, since its occurrence is simply a decrease of the total value. The reasoning differs when focusing on individual economies. It appears that interference by the law can do more in that respect than rather focusing on guilt and prevention. Assuming that the individual loss is measured by both the quantity and the quality of the satisfaction impaired or by the marginal utility of the assets affected, different allocations of losses will then result in different total amounts of these losses as the total sum can be magnified or reduced by allocating the losses to persons more or less capable of bearing them. One could add that the allocation of losses also serves a preventive goal.[158] One can imagine that the preventive effect also differs from one person to another.

52. PRINCIPLE OF THE SMALLEST HARM – Let us now consider the impact of the presence of strict liabilities, which are not based on the notion of guilt but on the risk created. Who then should carry the burden of any loss due to the risk: the risk creator or those who have the financial capacity to bear the loss? The principle of the smallest harm dictates a search for the superior risk bearer, being who's confronted with the smallest disadvantage due to the loss. The idea is that the superior risk bearer can shift the loss to his larger individual wealth or to the capital of a group through the creation of an artificial person or through insurance.[159] The realms of "*richesse oblige*" and "*assurance oblige*" emerge. The assumption is that such loss distribution creates utility through the superior risk/loss bearer.[160] SIMOENS frames the search for this superior bearer as the depersonalisation of the duty to compensate and the increasing objection against burdening individual capital.[161] The liability insurance is a key factor in this depersonalisation process.[162] One could also take the view of NIEUWENHUIS, who distinguishes

[157] A.A. EHRENZWEIG, "A comparative study", *Law.Cont.Probl.* 1950, (445) 446.
[158] T. HARTLIEF, "De meerwaarde van het aansprakelijkheidsrecht", 2003, (1) 11.
[159] D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (2025) 2026, no. 27; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, no. 24, 18; T. VANSWEEVELT and B. WEYTS, "Het buitencontractueel aansprakelijkheidsrecht", 2008, (108) 122, no. 24.
[160] G.P. FLETCHER, "Fairness and utility", 1972, (537) 547. *See also*: T. HARTLIEF and R.P.J.L. TJITTES, *Verzekering en aansprakelijkheid* in *Serie recht en praktijk – 79*, Deventer, Kluwer, 1994, 16.
[161] D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (1961) 1987-1988, no. 24.
[162] M. FAURE and R. VAN DEN BERGH, *Objectieve Aansprakelijkheid, Verplichte Verzekering en Veiligheidsregulering*, Antwerpen, Maklu, 1989, no. 126, 138; D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (1961) 1989-1990, no. 26. *Similarly* in the Netherlands: T. HARTLIEF and R.P.J.L. TJITTES, *Verzekering en aansprakelijkheid* in *Serie recht en praktijk – 79*, Deventer, Kluwer, 1994, 2; F.T. OLDENHUIS, *Onrechtmatige daad: aansprakelijkheid voor personen* in *Monografieën BW, B34*, Deventer, Kluwer, 2014, 5.

between three competing perspectives in tort law.[163] Tort law could aim for a maximisation of wealth, a just distribution of wealth or play the *zero sum game*, which only concerns the shifting of loss or negative wealth. From this point of view, "*faute oblige*" comes down to the latter perspective, whereas the other ones move away from "*faute oblige*" and relate to the EHRENZWEIG's principle of the smallest harm.

Subsection II. Richesse oblige

53. *RICHESSE OBLIGE* – EHRENZWEIG refers to UNGER's viewpoint that the relative financial capacities of the parties should be taken into account in case of strict liability.[164] A basic principle of tort law should be "*richesse oblige*": "*demjenigen wird der beiderseits unverschuldete Schaden aufgebürdet, welcher ihn nach seiner Vermögenslage leichter trägen kann*."[165] The strongest shoulders must bear the heaviest burdens.[166] From an economic perspective, one may be inclined to follow UNGER's reasoning. The legal application, however, cannot lead to the suggestion that wealthy people should bear any loss accidentally suffered by someone less wealthy, not to say poor.[167] Yet, in some cases of strict liability the principle of the smallest harm is being applied to an ever greater extent. The rudimentary strict liabilities of incompetent persons or for loss due to animals or dangerous things left aside, the primary aim of several "negligence"[168] liabilities has become an equitable distribution of risk rather than public and private deterrence.[169] Although the application of the principle of the smallest harm in the sense of "*richesse oblige*" makes sense in certain cases, one may feel hesitant to adopt it as a general liability ground, since it could hamper private initiative. Yet, the law and practice of progressive taxation has had to deal with similar resistance and has successfully overcome it.[170] Tort claims against innocent tortfeasors-entrepreneurs have been favoured for the reason that these entrepreneurs are able to shift their losses to the public by altering, *i.e.* increasing,

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[163] J.H. NIEUWENHUIS, "Ambitieus aansprakelijkheidsrecht" in STICHTING GROTIUS ACADEMIE (ed.), *Aansprakelijkheid: gronden en grenzen* in *Kluwer Rechtswetenschappelijke Publicaties*, Deventer, Kluwer, 2001, (41) 41.
[164] A.A. EHRENZWEIG, "A comparative study", *Law.Cont.Probl.* 1950, (445) 446.
[165] J. UNGER, *Handeln auf eigene Gefahr*, Jena, Gustav Fischer Verlag, 1904, 140. *Own translation:"the burden of loss which is not mutually due, is placed upon the person who can better bear it based on his financial capacity."*
[166] G.H.A. SCHUT, *Onrechtmatige daad*, 1997, 28.
[167] A.A. EHRENZWEIG, "A comparative study", *Law.Cont.Probl.* 1950, (445) 446. G.H.A. SCHUT admits that "*richesse oblige*" could play on some occasions in determining the scope of the compensation, but not the liability itself: G.H.A. SCHUT, *Onrechtmatige daad*, 1997, 28.
[168] At least in name, though less in nature because they are based on risk creation rather than on guilt.
[169] *Cf.* F. EWALD, *L'Etat providence*, 1986, 352: "*A la responsabilité pour faute devrait maintenant se substituer la responsabilité conçue comme répartition des risques*." *Own translation:* "*Liability conceived as the redistribution of risks should now replace fault liability.*"
[170] A.A. EHRENZWEIG, "A comparative study", *Law.Cont.Probl.* 1950, (445) 448.

their prices.[171] All on the condition that the actual loss distribution isn't hindered, *e.g.* by competitive conditions.[172] CALABRESI's allocation-of-resources theory recommends that costs allocated to an enterprise should be closely associated with it.[173]

54. EXAMPLE – By means of illustration, one could consider the employer's liability for his employees,[174] which enables the application of the rules of fault liability to "*the unavoidable causation of harm by hazardous enterprise*"[175] or its "*inherent danger*".[176] Imagine an entrepreneur who opens a bakery and hires three employees. They all have to work quite hard and swift for the material profit of the entrepreneur-employer. Imagine that one of the employees accidently (and inevitably) loses a fingernail in a roll, resulting in physical harm for the customer buying and consuming that roll. Should the employee be to blame for it? Should he be the only one liable in tort? A mere application of fault liability will only concentrate on whether or not that employee or the employer have committed a fault (and consequently are guilty of creating the loss). Yet, should the reasoning end there?

55. *PROFIT OBLIGE*[177] – One might feel reluctant to engage in such a limited reasoning in this case. If the employee hasn't committed a fault under the general fault dogma, the employer in the given example won't be guilty either. Opening and running a bakery isn't a forbidden activity, although it implies the creation of certain entrepreneurial risks.[178] Imposing liability on the entrepreneur-employer can then be rationalised under the principle of the smallest harm. The loss for the employer due to his liability is reduced by the profit gained or envisioned by the risky enterprise.[179] In that regard, it will be smaller than the loss for the victim if the basic

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[171] *See also*: A.J. VERHEIJ, *Onrechtmatige daad*, 2005, no. 7, 15.

[172] G. CALABRESI, "Some thoughts", 1961, (499) 505; A.A. EHRENZWEIG, "A comparative study", *Law.Cont.Probl.* 1950, (445) 448.

[173] G. CALABRESI, "Some thoughts", 1961, (499) 500 *et seq*., particularly 514.

[174] D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (2025) 2027, no. 28.

[175] A.A. EHRENZWEIG, "A comparative study", *Law.Cont.Probl.* 1950, (445) 446.

[176] F. EWALD, *L'Etat providence*, 1986, 238 *et seq*.

[177] The profit theory is one of the important theories of risk. Another one is the danger theory, whereby the creation of a certain danger justifies one's liability, *see*: C.J.M. KLAASSEN, *Risico-aansprakelijkheid*, 1991, 10-11. *Similarly* in France: R. CABRILLAC, *Droit des obligations*, 2012, no. 220, 185; N. DEJEAN DE LA BÂTIE, *Aubry & Rau: Droit civil français*, VI-2, *Responsabilité délictuelle*, Paris, Librairies Techniques, 1989, no. 4, 6; M. FABRE-MAGNAN, *Les obligations*, Paris, Presses Universitaires de France, 2004, 665; M. FABRE-MAGNAN, *Droit des obligations*, II, 2013, 63-64; C. GUETTIER, P. LE TOURNEAU, C. BLOCH, A. GIUDICELLI, J. JULIEN, D. KRAJESKI and M. POUMAREDE, *Droit de la responsabilité et des contrats. Régimes d'indemnisation*, Paris, Dalloz, 2014, 45-46, no. 51; R. SAVATIER, *La théorie des obligations*, 1979, 273, no. 219; P. LE TOURNEAU, *Rép. civ. Dalloz* 2001, *v°* *Responsabilité (en général)*, 13, no. 50. *Comp.* in the Netherlands: A.J. VERHEIJ, *Onrechtmatige daad*, 2005, no. 7, 15.

[178] F. EWALD speaks of "*dommages sociaux*": F. EWALD, *L'Etat providence*, 1986, 90.

[179] *Similarly*: H. DE PAGE, *Traité*, II, 1964, no. 930, 914-915; P. VAN OMMESLAGHE, *Traité*, II, 2013, no. 801, 1135-1139. France: M. FABRE-MAGNAN, *Droit des obligations*, II, 2013, 63; J. JULIEN, *Rép. civ. Dalloz* 2005, *v°* *Responsabilité du fait d'autrui*, no. 102, 25; R. SAVATIER, *Traité de la responsabilité civile en droit français*, I, Paris, LGDJ, 1951, 349, no. 274; R. SAVATIER, *Comment repenser la conception française actuelle de la*

principle of *the loss lies where it falls* were to play.[180] Hence, wealth or economic gain have become reasons for loss shifting (*richesse/profit oblige*).[181] A complementary angle could focus on the "*pouvoir*" of the entrepreneur as to the employees, which entails a duty to safeguard their security or to indemnify loss which is not caused by the employees' fault.[182]

Subsection III. Assurance oblige

56. *ASSURANCE OBLIGE* – The spread of liability insurance has had a tremendous impact on the application of the principle of the smallest harm. Key to the logic of insurance is that besides shifting the loss, it also spreads this loss.[183] In that sense, one could agree with EWALD that insurance is rather the practice of a certain rationality than of compensation.[184] Liability insurance allows loss distribution within a community of risk, larger than the economic sphere of an entrepreneur and thus far less vulnerable to competitive conditions which may hamper a shift of loss by price adjustment.[185] The burden is shifted to a larger community and distributed amongst its members, because they suffer less from that burden.[186] An insurance company will shift the loss to its group of contribution payers, which constitutes the first spreading of the loss. Often these payers will shift the burden of their contributions via overhead expenses and price increases to the entire entity of consumers, thus creating a second loss spreading.[187] Should

responsabilité civile, Paris, Dalloz, 1975, 4, no. 6. The Netherlands: E.F.D. ENGELHARD and G.E. VAN MAANEN, *Aansprakelijkheid voor schade*, 2008, 3-4; J.M. VAN DUNNÉ, *Verbintenissenrecht*, 2004, 229-230.

[180] A.A. EHRENZWEIG, "A comparative study", *Law.Cont.Probl.* 1950, (445) 447; D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (2025) 2027, no. 28.

[181] W. VAN GERVEN, "De invloed van de verzekering op het verbintenissenrecht", *RW* 1962, issue 14, (777) 780, no. 6. France: A. BENABENT, *Droit des obligations*, 2014, 384-385, no. 532; F. TERRÉ, P. SIMLER and Y. LEQUETTE, *Droit civil. Les obligations*, Paris, Dalloz, 2009, 694, no. 685.

[182] F. EWALD, *L'Etat providence*, 1986, 109 ("*noblesse oblige*") and 245; R. SAVATIER, *La théorie des obligations*, 1979, no. 233, 290.

[183] H. DE PAGE, *Traité*, II, 1964, no. 930, 915; D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (2025) 2025, no. 27; D. SIMOENS, "De indicatieve tabel", 2012, (71) 101-102, no. 120; W. VAN GERVEN, "De invloed van de verzekering op het verbintenissenrecht", *RW* 1962, issue 14, (777) 779, no. 4; W. VAN GERVEN, "Overzicht en tendensen aansprakelijkheidsrecht", 1972, (267) 394-295; W. VAN GERVEN, *Verbintenissenrecht*, 2015, 329; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 9, no. 12; T. VANSWEEVELT and B. WEYTS, "Het buitencontractueel aansprakelijkheidsrecht", 2008, (108) 114, no. 12. The Netherlands: T. HARTLIEF, "De meerwaarde van het aansprakelijkheidsrecht", 2003, (1) 23; T. HARTLIEF and R.P.J.L. TJITTES, *Verzekering en aansprakelijkheid* in *Serie recht en praktijk – 79*, Deventer, Kluwer, 1994, 3; G.H.A. SCHUT, *Onrechtmatige daad*, 1997, 29. *See also*: remark of Prof. MEIJERS in C.J. VAN ZEBEN and J.W. DU PON with the cooperation of M.M. OLTHOF, *Parlementaire geschiedenis*, 1981, 421. *See also*: J.H. WANSINK, "Assurance oblige: de maatschappelijk verantwoord handelende verzekeraar in de 21e eeuw", *Aansprakelijkheid, Verzekering & Schade* 2003, issue 2, 45-52.

[184] F. EWALD, *L'Etat providence*, 1986, 173. *See also*: P. BRUN, *Responsabilité civile extracontractuelle*, 2014, 99-100, no. 154.

[185] A.A. EHRENZWEIG, "A comparative study", *Law.Cont.Probl.* 1950, (445) 448-449.

[186] D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (2025) 2025-2026, no. 27.

[187] G. CALABRESI, "Some thoughts", 1961, (499) 500-501; W. VAN GERVEN, "De invloed van de verzekering op het verbintenissenrecht", *RW* 1962, issue 14, (777) 779, no. 4; W. VAN GERVEN, "Overzicht en tendensen aansprakelijkheidsrecht", 1972, (267) 295; W. VAN GERVEN, *Verbintenissenrecht*, 2015, 329.

liability then be imposed on the basis of insurance rather than wealth? The suggestion of "*assurance oblige*" comes to light.[188] The logic of insurance allows for a refinement of wealth as a criterion for the shift of loss, since it brings about an intertemporal and interpersonal loss spreading.[189] In that regard, holding on to an absolute principle of full compensation denies the marginal utility of money,[190] present in CALABRESI's spreading-of-losses justification.[191]

57. DETERRENCE V. DISTRIBUTION – Protection by liability insurance, especially for the guilty injurer, seems to undermine the idea of deterrence through fault liability. Indeed, the insurance logic undoes or at least limits the preventive effect of a genuine fault liability,[192] thus potentially encouraging certain individuals to behave more recklessly.[193] "*L'assurance pousse la crime.*"[194] However, many fault liabilities are not oriented towards the tortfeasor's guilt so that their primary rationale, *i.e.* the equitable distribution of loss, isn't impaired by the existence of liability insurance. Quite the contrary: liability insurance safeguards the rationale more effectively. Consequently, it has been recognised as lawful and even been made compulsory in many countries.[195] Insurance plays a role whenever a strict liability is limited to the same amount as for which one is obligated to take out insurance. Liability is then designed for the purpose of the insurance.[196]

58. FIRST PARTY INSURANCE – One should be aware of the fact that besides liability insurances, there are also first party insurances. Whilst liability or third party insurances cover

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[188] A.A. EHRENZWEIG, "A comparative study", *Law.Cont.Probl.* 1950, (445) 449. *See also*: J.H. NIEUWENHUIS, "Redactionele kanttekeningen: Assurance oblige", *RM Themis* 1978, issue 5, 209-211.

[189] D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (2025) 2028, no. 29; A. TUNC, "Logique et politique dans l'élaboration du droit, spécialement en matière de responsabilité civile" in X. (ed.), *Mélanges en l'honneur de Jean Dabin*, Brussel, Bruylant, 1963, I, (317) 335, no. 17; W. VAN GERVEN, "De invloed van de verzekering op het verbintenissenrecht", *RW* 1962, issue 14, (777) 781, no. 6.

[190] T. KEREN-PAZ, *Torts, Egalitarianism and Distributive Justice*, Hampshire, Ashgate, 2007, 69.

[191] G. CALABRESI, "Some thoughts", 1961, (499) 517 *et seq.* He also points to the effect of social dislocations (p. 518).

[192] I. EBERT, "Tort law and insurance" in M. BUSSANI and A.J. SEBOK (eds.), *Comparative Tort Law. Global Perspectives*, Cheltenham, Edward Elgar Publishing, 2015, (144) 150; T. HARTLIEF and R.P.J.L. TJITTES, *Verzekering en aansprakelijkheid* in *Serie recht en praktijk – 79*, Deventer, Kluwer, 1994, 11.

[193] W. VAN GERVEN, "De invloed van de verzekering op het verbintenissenrecht", *RW* 1962, issue 14, (777) 780, no. 5 and 788, no. 17; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 9, no. 12; T. VANSWEEVELT and B. WEYTS, "Het buitencontractueel aansprakelijkheidsrecht", 2008, (108) 114, no. 12. France: A. BENABENT, *Droit des obligations*, 2014, no. 536, 387; J. JULIEN, *Droit des obligations*, 2012, 203, no. 287; R. SAVATIER, *La théorie des obligations*, 1979, no. 223, 280. The Netherlands: J. SPIER *et alii*, *Schadevergoeding*, 2015, 10, 9a.

[194] F. EWALD, *L'Etat providence*, 1986, 185. *Own translation: "Insurance boosts crime." See also*: remarks by Mr. VAN DER FELTZ and Prof. MEIJERS in C.J. VAN ZEBEN and J.W. DU PON with the cooperation of M.M. OLTHOF, *Parlementaire geschiedenis*, 1981, 425.

[195] A.A. EHRENZWEIG, "A comparative study", *Law.Cont.Probl.* 1950, (445) 449; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, no. 23, 17; T. VANSWEEVELT and B. WEYTS, "Het buitencontractueel aansprakelijkheidsrecht", 2008, (108) 121, no. 23.

[196] D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (2025) 2028, no. 29.

situations in which the insured is held liable for a loss, first party insurances are taken out to cover situations in which the insured has suffered the loss. First, one may already fear the *effect of Matthew*[197]: mainly wealthy individuals will have access to and will take out first party insurances, whilst the less fortunate will have to cope with the compensation claim themselves.[198] If a person suffers a loss but is indemnified by such first party insurance, should he be able to recover twice by a shifting of loss to the person liable for it, on top of the shift and spreading of the loss through his first party insurance? In cases of traditional fault liability, a denial of the supplementary shift of loss towards the author of the loss would lead to an unjustifiable windfall for the tortfeasor. In case of a strict liability, primarily aimed at risk distribution, one is less inclined to opt for this additional shift of loss. The loss will already be distributed amongst persons sharing similar risks of injury so that a second distribution among other persons sharing similar risks of liability appears more questionable.[199] So, it has become clear that there are two paths to distribution, which can be combined but result in overlap. Potential risks can be gathered on the side of either the object of the risk or the risky activity.[200] The former will put the burden of paying contributions on the group of the sufferers, whereas the latter will put it on the group of the authors of the loss.[201]

59. LIMITATION COMPENSATION – The consequence of opting for a system of optimal loss spreading through maximised insurance is self-evident. Insurance contributions would increase globally. Moreover, the system – put to its extreme form – shuts the door to efficiently calculating the contributions. For these reasons, a system of "*assurance oblige*" should also contain a limitation of the compensations to be paid by the insurance company.[202]

Subsection IV. Assurabilité oblige

60. *ASSURABILITÉ OBLIGE* – Although logical under the principle of the smallest harm, it seems unfair to predicate liability on the sole fact that an insurer has agreed to assume it. It would discriminate between plaintiffs injured by insured defendants and those injured by

[197] It refers to a verse in the biblical Gospel of Matthew (25:29), pertaining to Jesus' parable of the talents.
[198] T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 20, no. 27; T. VANSWEEVELT and B. WEYTS, "Het buitencontractueel aansprakelijkheidsrecht", 2008, (108) 124, no. 27.
[199] A.A. EHRENZWEIG, "A comparative study", *Law.Cont.Probl.* 1950, (445) 450.
[200] W. VAN GERVEN, *Verbintenissenrecht*, 2015, 329. The Netherlands: T. HARTLIEF, "De meerwaarde van het aansprakelijkheidsrecht", 2003, (1) 23-24.
[201] W. VAN GERVEN, "De invloed van de verzekering op het verbintenissenrecht", *RW* 1962, issue 14, (777) 779, no. 4.
[202] I. BOONE, *Verhaal van derde-betalers op de aansprakelijke*, Antwerpen, Intersentia, 2009, no. 516, 490; W. VAN GERVEN, "De invloed van de verzekering op het verbintenissenrecht", *RW* 1962, issue 14, (777) 779, no. 4. *See also* for the Netherlands: J.M. VAN DUNNÉ, *Verbintenissenrecht*, 2004, 657.

defendants who are not.[203] But shouldn't there be a liability for a risky activity when the actor could be expected to take out insurance for any loss resulting from it? Hence, not the actual existence of liability insurance matters, but rather whether the defendant can be reasonably expected to have taken out insurance.[204] Thus, the stage of "*assurabilité oblige*" is reached. With it comes the question how to balance between plaintiffs and defendants, illustrated by the following example of a plain passenger suffering from a loss due to the flight.[205] On the one hand, one might expect the operator of the plane to have taken out liability insurance, thus allocating the loss to the operator. On the other hand, however, the passenger himself could have taken out first party insurance so that one has to decide on the preferability of either first party or third party insurances. In other words, one has to decide whether there should be a community of risk between all passengers or between all operators. It's about "*who should in fairness pay the premium.*"[206] Inevitably, the reasonable expectability and availability of liability insurance will be of great importance to answer that question.[207] Whenever one is obligated to take out insurance, one can be held liable for the loss which is or should have been covered by that insurance. The criterion thus is the binding nature of the insurance, rather than its availability.[208] In case of insurance, the insurer will carry the loss, creating more distributive justice, whereas non-insurance will lead to burdening the person who ought to have taken out insurance.[209] But who ought to take out insurance? VAN GERVEN suggests a duty to take out insurance not only when legally obligated, but also in case of activities abnormally increasing risks for society or for unusually fragile objects.[210] RONSE refers to the insurable loss and the reasonable foreseeability of the risk.[211]

[203] A.A. EHRENZWEIG, "A comparative study", *Law.Cont.Probl.* 1950, (445) 450; W. VAN GERVEN, "De invloed van de verzekering op het verbintenissenrecht", *RW* 1962, issue 14, (777) 781, no. 6.
[204] A.A. EHRENZWEIG, "A comparative study", *Law.Cont.Probl.* 1950, (445) 450-451; D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (2025) 2028, no. 30; W. VAN GERVEN, "De invloed van de verzekering op het verbintenissenrecht", *RW* 1962, issue 14, (777) 781, no. 6. *See also*: A A.J. VERHEIJ, *Onrechtmatige daad*, 2005, no. 7, 15.
[205] A.A. EHRENZWEIG, "A comparative study", *Law.Cont.Probl.* 1950, (445) 451.
[206] A.A. EHRENZWEIG, "A comparative study", *Law.Cont.Probl.* 1950, (445) 451.
[207] A.A. EHRENZWEIG, "A comparative study", *Law.Cont.Probl.* 1950, (445) 553; D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (2025) 2028, no. 30.
[208] D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (2025) 2028-2029, no. 30.
[209] W. VAN GERVEN, "De invloed van de verzekering op het verbintenissenrecht", *RW* 1962, issue 14, (777) 786, no. 14.
[210] W. VAN GERVEN, "De invloed van de verzekering op het verbintenissenrecht", *RW* 1962, issue 14, (777) 787, no. 15.
[211] J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, 178, no. 237.

Subsection V. Situation of Belgian tort law

61. BELGIAN TORT LAW: MORE THAN *FAUTE OBLIGE* – The basic tenor of Belgian tort law is that of "*faute oblige*".[212] According to the preparatory works, Art. 1382 BCC contains the *evident*[213] rule of fault liability.[214] Yet, the shift towards "*richesse oblige*" is clear on some occasions.[215] The most obvious example is Art. 1386*bis* BCC, which deals with compensating for loss caused by mental patients.[216] The traditional view based on fault (and guilt) would let the loss lie with the victim in such cases, because the mental patient can't be held personally liable by lack of power of discernment. However, the legislator has not considered this to be just, so that Art. 1386*bis* BCC authorises the judge to impose on the mental patient a duty to fully or partially compensate the loss. The judge decides on both the existence and the scope of that duty and acts according to fairness and in light of the circumstances and the parties' state, including their financial capability. Furthermore, wealth has played a role in the establishment of particular tort systems which focus on categories of sufferers and tortfeasors, such as the Law on industrial accidents (particularly in case of non-insurance by the employer).[217] Also the liabilities for animals and the collapse of buildings (Art. 1385 and 1386 BCC) seem to rely on the idea of risk creation.[218] Art. 1384 BCC is said to contain presumptions of profit: who profits from the activity, should carry the burdens as well, for example the claims for compensation (*profit oblige*).[219] The French counterpart of that provision, namely Art. 1384, §1 FCC, tends to be analysed from the perspective of risk (in case of goods) or *pouvoir* (in case of persons).[220]

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[212] W. VAN GERVEN, "Overzicht en tendensen aansprakelijkheidsrecht", 1972, (267) 293; W. VAN GERVEN, *Verbintenissenrecht*, 2015, 327-329.

[213] A notion which refers to the influence of natural law reasoning. *See*: O. DESCAMPS, *Les origines de la responsabilité pour faute personnelle dans le code civil de 1804*, Paris, LGDJ, 2005, 462-463.

[214] P. CONTE, *Rép. civ. Dalloz* 2002, *v° Responsabilité du fait personnel*, 2, no. 2; F. EWALD, *L'Etat providence*, 1986, 33 and 68; B. FAGES, *Droit des obligations*, Paris, LGDJ, 2011, no. 382, 365.

[215] H. DE PAGE speaks of a mixture of fault and risk: H. DE PAGE, *Traité*, II, 1964, no. 933, 920.

[216] D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (2025) 2027, no. 28; W. VAN GERVEN, "De invloed van de verzekering op het verbintenissenrecht", *RW* 1962, issue 14, (777) 780, no. 6; W. VAN GERVEN, "Overzicht en tendensen aansprakelijkheidsrecht", 1972, (267) 294. *Cf. infra*, no. 127.

[217] D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (2025) 2027-2028, no. 28.

[218] D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (1961) 1969, no. 6. France: H. & L. MAZEAUD and A. TUNC, *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle*, I, Paris, Éditions Montchrestien, 1965, no. 85, 86.

[219] W. VAN GERVEN, "Overzicht en tendensen aansprakelijkheidsrecht", 1972, (267) 293; W. VAN GERVEN, *Verbintenissenrecht*, 2015, 335. France: R. SAVATIER, *La théorie des obligations*, 1979, no. 233, 289. *See also* for the Netherlands: F.T. OLDENHUIS, *Onrechtmatige daad: aansprakelijkheid voor personen* in *Monografieën BW*, *B34*, Deventer, Kluwer, 2014, 43-45, nos. 35 and 37.

[220] A. CATHELINEAU, *J.-Cl. Civil Code, Art. 1382 à 1386, J.-Cl. Responsabilité civile et Assurances, J.-Cl. Notarial Répertoire, v° Responsabilité civile, Fasc. 150-1*, 2013, nos. 29-33; M. FABRE-MAGNAN, *Droit des obligations*, II, 2013, 405; Y. LAMBERT-FAIVRE and S. PORCHY-SIMON, *Droit du dommage corporel*, 2011, no. 447, 507 and 510-511, no. 451, with references to the relevant doctrinal analyses; C. RADE, *J.-Cl. Civil Code, Art. 1382 à 1386, J.-Cl. Responsabilité civile et Assurances, J.-Cl. Notarial Répertoire, v° Responsabilité civile, Fasc. 140*, 2011, no. 33 (condition of authority in case of liability for other persons).

62. INFLUENCE OF INSURANCE – Also insurance has influenced (Belgian) tort law. People are more inclined to claim compensation due to the insurance, *e.g.* among family members or against an otherwise insolvable party.[221] This tendency doesn't affect the fault paradigm.[222] Some authors, however, even claim that the existence of insurance affects the determination of the scope of the compensation or the presence of a fault. This is hard to prove, yet consistent with human psychology.[223] Nevertheless, it seems clear that by ensuring the indemnification, the preventive and deterrent nature of the compensation is weakened. This duality is characteristic for tort law.[224]

63. INSURANCE IN REGULATIONS – Furthermore, some regulations have dealt with the role of insurance. Two views are to be reckoned with: the perspective of the risky activity (indirect insurance) and the perspective of the object of risk (direct insurance).[225] Indirect insurance comes down to liability insurances. The most known example is the legally obligated liability insurance for motor vehicles.[226] Other systems, such as the liability in case of industrial accidents (in case of insurance by the employer), lean towards "*assurance oblige*", although subrogation mechanisms revert to the fault paradigm. In direct insurance, both subrogation, *e.g.* in case of fire insurance, and accumulation of compensations, *e.g.* in case of pensions, play a role. Hence, the author of the loss will not benefit from his insurance: the fault paradigm (indirectly) remains.[227]

64. CONCLUSION – One may conclude that the fault paradigm still stands. But sometimes it evokes a sense of injustice. Imagine a cyclist negligently hitting a playing child, causing permanent harm. He will be paying compensation for his entire life, despite the disproportionate relationship between his negligence and the loss. The feeling of unfairness gets stronger if the cyclist is poor and the child has wealthy parents, more capable of carrying the loss. A

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[221] I. EBERT, "Tort law and insurance" in M. BUSSANI and A.J. SEBOK (eds.), *Comparative Tort Law. Global Perspectives*, Cheltenham, Edward Elgar Publishing, 2015, (144) 145; F. EWALD, *L'Etat providence*, 1986, 190; D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (2025) 2031, no. 32.
[222] W. VAN GERVEN, "De invloed van de verzekering op het verbintenissenrecht", *RW* 1962, issue 14, (777) 782, no. 8.
[223] D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (2025) 2030-2031, no. 32; A. TUNC, "Logique et politique dans l'élaboration du droit, spécialement en matière de responsabilité civile" in X. (ed.), *Mélanges en l'honneur de Jean Dabin*, Brussel, Bruylant, 1963, I, (317) 324, no. 8; W. VAN GERVEN, "De invloed van de verzekering op het verbintenissenrecht", *RW* 1962, issue 14, (777) 782, no. 8.
[224] D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (1961) 1965, no. 2. France: G. VINEY, *Le déclin de la responsabilité individuelle* in *Bibliothèque de droit privé*, Vol. LIII, Paris, LGDJ, 1965, 3, no. 2.
[225] W. VAN GERVEN, "De invloed van de verzekering op het verbintenissenrecht", *RW* 1962, issue 14, (777) 782, no. 9.
[226] W. VAN GERVEN, *Verbintenissenrecht*, 2015, 335 and 337.
[227] W. VAN GERVEN, "De invloed van de verzekering op het verbintenissenrecht", *RW* 1962, issue 14, (777) 782-784, nos. 10-12.

competence for the judge to moderate would be beneficial in such cases.[228] It's related to corrective justice.[229] The aforementioned yet ongoing transition towards "*assurance/assurabilité oblige*" and the principle of the smallest harm seem to underlie the feeling of injustice in cases of minor (or even no) guilt.

[228] W. VAN GERVEN, "De invloed van de verzekering op het verbintenissenrecht", *RW* 1962, issue 14, (777) 788-789, nos. 18-19.
[229] H. ULRICHTS, *Schaderegeling*, 2013, 273, no. 31; A. WYLLEMAN, "Wie zonder "fout" is", 2002, (1619) 1621, no. 7.

Section III: FAULT, RISK AND ALTERITY

65. GUILT V. RISK – The evolution from "*faute oblige*" onwards has been described as the transition from retributive to distributive justice: how to divide the scarce resources for compensation?[230] The redistribution of negative wealth via liability is said to exclude corrective justice as well.[231] Corrective justice implies that liability should consider the actions taken instead of the wealth or other characteristic of the compensator.[232] Yet, one wants to restore the balance within the tort relationship,[233] but one may also prefer a distribution of the loss. Both are just, or to be more precise: their interaction[234] is just.[235] On the one hand, both the victim and the tortfeasor can be seen as belonging to the same community. On the other hand, the victim as the other can never be fully reduced to the community standards to which it apparently belongs. We draw on VAN ROERMUND's insights on law: "*Law* […] *allows, on its own accord, something in it to count against the identity of this society, even if no other could enforce this challenge*".[236] The search by different legal actors for solutions to unfair situations due to the principle of full compensation are an expression of the urge for Belgian tort law to allow at its own initiative an element of alterity. However, both guilt and risk should be observed in a wider framework, provided by FLETCHER and discussed in this final section.

66. PRIOR SIMILARITY – Two paradigms are to be distinguished: the paradigm of reciprocity and the paradigm of reasonableness. They relate to the tension between individual autonomy and the increasing concern for the public welfare. The wealth-shifting mechanism of tort has to insulate individual interests against community demands.[237] Despite their conflicting

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[230] D. SIMOENS, "Beschouwingen over de schadeloosstelling voor welzijnsverlies, tevens aanleiding tot de vraagstelling: integrale, genormeerde of forfaitaire schadeloosstelling?" in M. VAN DEN BOSSCHE (ed.), *De indicatieve tabel. Een praktisch werkinstrument voor de evaluatie van menselijke schade*, Gent, Larcier, 2001, (79) 100, no. 37; D. SIMOENS, "Recente ontwikkelingen", 2004, (277) 323, no. 98. *See also* in the Netherlands: J.H. NIEUWENHUIS, "Ambitieus aansprakelijkheidsrecht" in STICHTING GROTIUS ACADEMIE (ed.), *Aansprakelijkheid: gronden en grenzen* in *Kluwer Rechtswetenschappelijke Publicaties*, Deventer, Kluwer, 2001, (41) 41-42. *See also* on retributive (corrective) and distributive justice: I. ENGLARD, *The philosophy of tort law*, Aldershot, Dartmouth, 1993, 11-16.

[231] G.P. FLETCHER, "Fairness and utility", 1972, (537) 547.

[232] G.P. FLETCHER, "Fairness and utility", 1972, (537) 547, footnote 40, with reference to Aristotle's *Ethica Nicomachea*.

[233] E.F.D. ENGELHARD and G.E. VAN MAANEN, *Aansprakelijkheid voor schade*, 2008, 9.

[234] Note that many fault liabilities have been corrected by risk elements and various strict liabilities have been limited by fault elements so that a clear distinction between both would be a superseded view: C.C. VAN DAM, *Aansprakelijkheidsrecht. Een grensoverschrijdend handboek*, Den Haag, Boom Juridische uitgevers, 2000, no. 1004, 293.

[235] *See also*: R. SCHWITTERS, "Aansprekend aansprakelijkheidsrecht", *NJB* 2012, issue 19, 1390-1396.

[236] B. VAN ROERMUND, *Legal Thought and Philosophy. What Legal Scholarship is About*, Cheltenham, Edward Elgar, 2013, 112.

[237] G.P. FLETCHER, "Fairness and utility", 1972, (537) 566-569.

application, both paradigms have a similar function.[238] Two types of risk are distinguished. Firstly, there are risks which represent a violation of individual interests. Secondly, there are so-called background risks[239] which must be borne as part of group living. The difference then lies in the test for filtering out the latter so that tort law can deal with the former.

67. PARADIGM OF RECIPROCITY: FIRST STEP – The paradigm of reciprocity involves a two-step-approach.[240] First, the victim's entitlement to recover is analysed.[241] The question is determined solely based on the activities of both the victim and the risk creator. A victim is entitled to recover for injuries resulting from nonreciprocal risks, *i.e.* risks "*greater in degree and different from those created by the victim and imposed on the defendant*."[242] It becomes clear why contributory negligence plays a role under the fault paradigm: it can restore reciprocity. Yet, this will not always be the case. Reciprocity requires searching for balance in mutually affecting risk creation[243] or guilt. That way, the aforementioned difference in one's feeling of fairness and distributive justice depending on the severity of the fault can be explained in terms of (non)reciprocity.[244] Disproportionate relationships between the fault (and the corresponding level of guilt) and the resulting loss can thus be solved via the reciprocity test. The acceptable level of risk depends on the particular arena of interaction.[245]

68. FAULT/STRICT LIABILITY – Furthermore, the paradigm of reciprocity applies to both traditional tort liability[246] and strict liability.[247] Strict liability could be redefined as the acknowledgement by the legislator of a nonreciprocal risk by the risk creator. Thus, the paradigm of reciprocity supports both the old and newer forms of liability, adding to its durability. The final difference lies within the specific level of risk creation and an associated,

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[238] G.P. FLETCHER, "Fairness and utility", 1972, (537) 543.
[239] In the same sense, F. WERRO and E. BÜYÜKSAGIS speak of residual risk: F. WERRO and E. BÜYÜKSAGIS, "The bounds between negligence and strict liability" in M. BUSSANI and A.J. SEBOK (eds.), *Comparative Tort Law. Global Perspectives*, Cheltenham, Edward Elgar Publishing, 2015, (201) 211. *Comp. supra*, no. 40 (societal risks).
[240] G.P. FLETCHER, "Fairness and utility", 1972, (537) 540-542.
[241] G.P. FLETCHER, "Fairness and utility", 1972, (537) 543-551.
[242] G.P. FLETCHER, "Fairness and utility", 1972, (537) 542. G.H.A. SCHUT refers to Unger's statement "*erhöhte Gefahr, erhöhte Haftung*": G.H.A. SCHUT, *Onrechtmatige daad*, 1997, 27. This idea is at the heart of G. SCHAMPS' analysis in G. SCHAMPS, *La mise en danger: un concept fondateur d'un principe general de responsabilité. Analyse de droit compare*, Brussel, Bruylant, 1998, xxvii+1140p. Also the proposed Article 1362 in the *Avant-projet Catala* is linked to this idea: A. GUÉDAN-LÉCUYER, "Vers un nouveau fait générateur de responsabilité civile : les activités dangereuses" in J.-S. BORGHETTI, O. DESHAYES and C. PERES (Comité d'organisation), *Études offertes à Geneviève Viney. Liber amicorum*, Paris, LGDJ, 2008, (499) 499.
[243] *Similarly* in France: M. FABRE-MAGNAN, *Droit des obligations*, II, 2013, 62-63; H. LALOU, *Traité*, 1962, no. 123, 78.
[244] *Cf. supra*, no. 50.
[245] G.P. FLETCHER, "The search for synthesis in tort theory", *Law and Philosophy* 1983, (63) 81.
[246] FLETCHER speaks of negligence and intentional battery. Following the fault paradigm of EHRENZWEIG, both are unified under the common denominator of fault as a traditional basis for liability.
[247] G.P. FLETCHER, "Fairness and utility", 1972, (537) 549.

defined community of risk. Of course, defining these communities of risk can be difficult, particularly given the increased complexity and interdependence of modern society. Insurance could help locate and define the community. The other side of the coin is that the community itself can determine whether a duty for insurance exists, thus setting the (non)reciprocity of a certain risk.

69. FAIRNESS – All these manifestations of the paradigm of reciprocity are founded on the same principle of fairness: "*all individuals in society have the right to roughly the same degree of security from risk.*"[248] Notice that it concerns a passive security, *i.e.* protection against acts by others.[249] Of course, the more an individual is secured from risks not autonomously created by himself, the more he is free. The distribution of risk (or security from it) is linked with the distribution of freedom. JOHN RAWLS' first principle of freedom comes to mind: "[*E*]*ach person participating in a practice, or affected by it, has an equal right to the most extensive liberty compatible with a like liberty for all*."[250] Reformulated in view of the security from risks, the principle becomes the right to the maximum amount of security compatible with a like security for all.[251] Background risks ought to be accepted by the community, whereas additional risks break the balance brought by the reciprocity of the background risks. Therefore, the latter give rise to a claim for compensation in order to restore the disturbed balance.

70. PARADIGM OF RECIPROCITY: SECOND STEP – The second step for the paradigm of reciprocity is to determine whether the risk creator should pay the compensation or could be excused.[252] Excusing a particular defendant signifies that no rational, fair basis exists to distinguish between the author of the loss and others. It depends on expectations of the ability to avoid risks in given circumstances. These expectations are not merely instrumental to the social utility of risk taking. Excusing the defendant doesn't affect the victim's entitlement to recover. If there's no reason for singling out the defendant, who ought to indemnify? Insurance can be of great importance here, as it allows a distribution across the community from which the defendant cannot be singled out. The condition is that the community of risk of the insurance coincides with that of the loss creating risk. Mandatory insurances in particular industries then constitute an example of ensuring this match. If the defendant hasn't participated in that risk community through insurance, he will no longer be excused as the refusal of taking out

[248] G.P. FLETCHER, "Fairness and utility", 1972, (537) 550.
[249] D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (1961) 1971-1972, no. 9. *Comp. supra,* no. 41.
[250] J. RAWLS, "Justice as fairness", *The Philosophical Review* 1958, (164) 165; J. RAWLS, *A theory of justice (revised edition)*, Oxford, Oxford University Press, 1999, 53.
[251] G.P. FLETCHER, "Fairness and utility", 1972, (537) 550.
[252] G.P. FLETCHER, "Fairness and utility", 1972, (537) 551-556.

insurance in contrast to other participants in the same or a similar risk singles out the defendant. The practical consequence of introducing insurances is the need for calculability so that compensations should be limited. Moreover, (too) high premiums involve the danger of the *effect of Matthew*.[253]

71. JUSTICE FOR ALL – Underlying the paradigm of reciprocity is an idea of justice, not solely for the sufferer of the loss, but for the author of the loss or risk creator as well. Losses are fairly distributed in a way that is just for both parties, namely through the two-step-approach: "[*j*]*ustice to the plaintiff is ensured by recognizing compensation for the consequences of being subjected to an excessive risk; justice to the defendant is ensured by recognizing the role of excuses defeating liability.*"[254]

72. PARADIGM OF REASONABLENESS – The second paradigm rejects the bifurcation of the questions of entitlement to compensation and duty to pay. Both questions are answered by the criterion of commitment to the community's welfare. It's a balancing of costs and benefits so that liability is connected to the maximisation of social utility.[255] The second principle of justice of RAWLS seems to relate to this paradigm: "*inequalities are arbitrary unless it is reasonable to except that they will work out for everyone's advantage and provided the positions and offices to which they attach, or from which they may be gained, are open to all*."[256] The latter condition, however, seems to refer to excuses under the first paradigm. If such beneficial position is open to everyone, the person occupying the position at the moment cannot be singled out merely on the basis of that occupation. Moreover, it reminds us of a *caveat*. By merely protecting a small privileged part of all losses, tort law could produce inequality.[257] In the paradigm of reasonableness, excuses have been replaced by justifications.[258] Where the former focusses on the actor's personal circumstances and his capacity to avoid the risk, the latter only wonders whether the risk is – on balance – socially desirable. The paradigm of reasonableness involves the figure of the reasonable man, *i.e.* the *bonus pater familias*.[259] Belgian tort law seems to include both paradigms in its fault notion, since the fault can be either behaviour

[253] *Cf. supra*, no. 58.
[254] G.P. FLETCHER, "The search for synthesis in tort theory", *Law and Philosophy* 1983, (63) 81.
[255] G.P. FLETCHER, "Fairness and utility", 1972, (537) 542 and 557.
[256] J. RAWLS, "Justice as fairness", *The Philosophical Review* 1958, (164) 165; J. RAWLS, *A theory of justice (revised edition)*, Oxford, Oxford University Press, 1999, 53.
[257] P.S. ATIYAH, *The Damages Lottery*, Hart Publishing, 1997, 32; E.F.D. ENGELHARD and G.E. VAN MAANEN, *Aansprakelijkheid voor schade*, 2008, 9.
[258] G.P. FLETCHER, "Fairness and utility", 1972, (537) 557 *et seq*.
[259] E.F.D. ENGELHARD, *Regres*, Deventer, Kluwer, 2003, 203; G.P. FLETCHER, "Fairness and utility", 1972, (537) 560. G.H.A. SCHUT speaks of the objectification of guilt: G.H.A. SCHUT, *Onrechtmatige daad*, 1997, 27.

deviating from the reasonable man standard (paradigm of reasonableness) or the violation of a specific legal norm,[260] where we have seen that such a rule can sometimes be redefined as the acknowledgement by the legislator of a nonreciprocal risk of the risk creator (paradigm of reciprocity). Furthermore, the stage of "*assurabilité oblige*" appealed to the *reasonable* expectability and availability of liability insurance.[261] Finally, the paradigm of reasonableness can be linked to legislative interventions capping compensation or installing immunities. The underlying *ratio* is that the social usefulness of the activity outweighs the right of the victim to (full) compensation. That way, the lack of a competence to moderate compensation conflicts with the paradigm of reasonableness.

[260] *See* for example*:* T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 126 *et seq*.
[261] *Cf. supra*, no. 60.

Section IV: A PLEA FOR A COMPETENCE TO MODERATE

73. ALTERITY AND TEMPORALITY – In my view, both the paradigm of reciprocity and the paradigm of reasonableness should play a role in assessing the scope of a compensation and thus regarding the principle of full compensation. That's why a possibility to moderate and consequently to deviate from the principle of full compensation should exist, particularly by means of a competence for the judge to moderate. Although the legislator is always able to limit compensations by introducing new rules to that end, societal complexity and rapid developments seem to call for a case-by-case assessment. It will allow a fair and just balancing of the involved interests, which has become much more complicated than the simple finding that an innocent sufferer should be preferred over a guilty tortfeasor. By allowing the interaction between both paradigms, Belgian tort law would embody VAN ROERMUND's alterity[262] so that the influence of societal changes over time is taken into account. That way, we end where we started our plea for a competence for the judge to moderate the amount of loss, namely the legisprudential principle of temporality.

74. CONSEQUENCES FOR THE PRINCIPLE OF FULL COMPENSATION – It is clear now that one must do away with the absolute nature of the principle of full compensation on a principled account. Moreover, one can come to the same conclusion based on the findings of the analysis of the preparatory works. Based on the statements made by BERTRAND DE GREUILLE in the preparatory works, it is clear that when weighing the interests of the author of the loss and those of the victim, society should prefer the latter.[263] The introduction of strict liabilities, however, has detached the liability of the creator of the risk from the presence of a fault of this person so that the balancing act from the preparatory works is considerably affected. Clinging on to the absolute principle of full compensation therefore shows a lack of awareness of the societal evolutions throughout the past two centuries. The scaling-up of tort law, the rise of multiple risks and the decline of the subjective, individual liability calls for a reconsideration of the nature of the principle of full compensation. The moral clash of interests in 1804 has been transformed into a complex balancing of interests, which increasingly goes beyond the mere relation between the sufferer and the author of the loss.

[262] B. VAN ROERMUND, *Legal Thought and Philosophy. What Legal Scholarship is About*, Cheltenham, Edward Elgar, 2013, 107 *et seq*.
[263] *Cf. supra*, no. 32.

CHAPTER III: DOCTRINAL AND JURISPRUDENTIAL VIEW ON FULL COMPENSATION AND *IN CONCRETO* APPRECIATION OF LOSS

75. PERSPECTIVE *ANNO* 2016 – Starting from the historical point of view *anno* 1804, the analysis in the previous chapter has brought the analysis into the 21st Century. Before the deviant systems can be closely examined, one should be aware of the current perspective on (full) compensation and an *in concreto* appreciation of the loss in Belgian doctrine and case law. This third chapter will provide that present-day perspective.

76. NOTION OF COMPENSATION – Compensation has been defined by Belgian case law and doctrine as more than merely restoring the situation *ex ante*, namely the situation in which the victim was situated before the tort. The aim of the compensation is to restore the balance, which has been broken due to the tort. Therefore, compensation rather means putting the victim in the hypothetical situation in which the victim would be if the tort had not been committed, as best as one can and at the expense of the author of the loss.[264] In practice, it's nearly always impossible to undo the tort. Thus, the compensation should lead to a situation approximating the original state of affairs for the victim.[265] The compensation is the legal consequence of the

[264] Cass. 5 mei 2011, *Arr.Cass.* 2011, 1272, concl. HENKENS and *RGAR* 2012, no. 14.846, note N. ESTIENNE; Cass. 13 april 1995, *Arr.Cass.* 1995, I, 423; Cass. 15 mei 1941, *Pas.* 1941, I, 192; L. CORNELIS and Y. VUILLARD, "Le dommage" in *Responsabilités. Traité théorique et pratique*, *Titre I, Dossier 10*, Brussel, Kluwer, 2000, 5, no. 4; R.O. DALCQ, *Traité*, II, 1962, 741, no. 4139; D. DE CALLATAŸ and N. ESTIENNE, *La responsabilité civile. Chronique de jurisprudence 1996-2007*, Vol.2, *Le dommage*, Brussel, Larcier, 2009, 57; R. DEKKERS *et alii*, *Handboek*, 2007, no. 310, 176; E. DIRIX, *Schade*, 1984, no. 27, 33; E. DIRIX, "Abstracte en concrete schade", *RW* 2000-2001, issue 36, (1329) 1329; J.-L. FAGNART, *Examen de la jurisprudence concernant la responsabilité civile 1968-1975*, Brussel, Larcier, 1976, 98, no. 119; J. RONSE, *Aanspraak*, 1954, 236, no. 335; J. RONSE, *Schade en schadeloosstelling (onrechtmatige daad)*, 1957, no. 230, 210; J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, no. 220, 163; N. SIMAR and L. DE ZUTTER, "L'évaluation du dommage", 1999, (1) 5, no. 1 en no. 2, 5; D. SIMOENS, *Schade en schadeloosstelling*, 1999, no. 9, 20-21; S. STIJNS, *Verbintenissenrecht, 1*bis, 2013, 100, no. 127; W. VAN GERVEN, *Verbintenissenrecht*, 2015, 463; A. VAN OEVELEN, "Enkele recente ontwikkelingen", 2007, (327) no. 10, 343; P. VAN OMMESLAGHE, *Traité*, II, 2013, no. 1117, 1647; J. VIAENE, *Evaluatie van de gezondheidsschade*, in J. VIAENE, J. VAN STEENBERGE en D. LAHAYE (eds.), *Schade aan de mens*, III, Berchem, Kluwer, 1976, 506 *et seq. Similarly* in France: Cass. Civ. 2ième 9 juillet 1981, *Bull. civ.* 1981, II, n° 156; M. BACACHE-GIBEILI, *Traité de droit civil*, V, 2016, no. 597, 716; A. BÉNABENT, *Droit des obligations*, 2014, no. 695, 511; P. MALINVAUD, D. FENOUILLET and M. MEKKI, *Droit des obligations*, Paris, LexisNexis, 2014, no. 757, 593. *Similarly* in the Netherlands: HR 18 januari 2002, *NJ* 2002, 158; HR 5 december 2008, *NJ* 2009, 387; ASSER (HARTKAMP), *De verbintenis in het algemeen*, 2000, no. 410, 322 and no. 415, 330; J.M. BARENDRECHT, E.J. KARS and E.J. MORÉE, "Schade en schadeberekening in het algemeen" in J.M. BARENDRECHT, H.M. STORM and D.D. BREUKERS (eds.), *Berekening van schadevergoeding*, Zwolle, W.E.J. Tjeenk Willink, 1995, 16 *et seq.*; A.R. BLOEMBERGEN and S.D. LINDENBERGH, *Schadevergoeding*, 2001, 17, no. 11; H.A. BOUMAN and G.M. TILANUS-VAN WASSENAER, *Schadevergoeding*, 1998, no. 20, b, 33; P. DE TAVERNIER, "Droit néerlandais", 2012, (329) 331; F. DE VRIES, *Wettelijke limitering*, 1990, no. 33, 25; C.J.M. KLAASSEN, *Schadevergoeding*, 2007, no. 5, 5; S.D. LINDENBERGH, *Schadevergoeding*, 2014, no. 6, 8; G.H.A. SCHUT, *Onrechtmatige daad*, 1997, §30, 152.

[265] P. VAN OMMESLAGHE, *Traité*, II, 2013, no. 1117, 1648.

loss that has been caused by the tort.[266] The author of the loss has the duty to fully compensate the victim for the losses suffered.[267]

77. COMPENSATION EQUALS LOSS – Regarding the scope of the compensation, the loss constitutes the only criterion for the compensation.[268] The principle of full compensation in Belgian tort law has been phrased by RONSE as follows: *"The complete loss, nothing but the loss has to be compensated for."*[269] Consequently, there can be no compensation for non-existing loss, nor double compensation for the same loss and neither a compensation the amount of which exceeds the loss actually suffered or has a different purpose than to compensate for the loss.[270] The Court of Cassation has reiterated the principle of full compensation over the last decades.[271] If one would grant a compensation which is larger than the amount of the loss actually caused, the victim would benefit from the compensation in such a way that it would bring about an enrichment without a cause. On the other hand, granting the victim of the tort a compensation which is smaller than the loss he incurred, would imply that the victim – at least to some extent – has to bear his losses himself.[272] In order to avoid *under*compensation or *over*compensation the compensation needs to be just and appropriate.[273] It can be noted here that Art. 6:100 DCC[274], which contains the rule of the imputation of benefits

[266] *Comp. Supra*, nos. 25 and 31.
[267] B. DUBUISSON, N. ESTIENNE and D. DE CALLATAŸ, "Droit belge", 2012, (171) 171; R. DEKKERS *et alii*, *Handboek*, 2007, no. 309, 175; E. DIRIX, *Schade*, 1984, no. 27, 32; J.-L. FAGNART, "Droit belge" in F. LEDUC and P. PIERRE (eds.), *La réparation intégrale en Europe: études comparatives des droit nationaux*, Brussel, Larcier, 2012, (195) 195; S. STIJNS, *Verbintenissenrecht, 1*bis, 2013, 100, no. 126.
[268] R. DEKKERS *et alii*, *Handboek*, 2007, no. 309, 175; H. DE PAGE, *Traité*, 1964, 1064, no. 1021; E. DIRIX, *Schade*, 1984, no. 30, 34; J. RONSE, *Schade en schadeloosstelling (onrechtmatige daad)*, 1957, 216, no. 238; J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, no. 230, 173; N. SIMAR and L. DE ZUTTER, "L'évaluation du dommage", 1999, (1) no. 38, 21; D. SIMOENS, *Schade en schadeloosstelling*, 1999, no. 10, 22; A. VAN OEVELEN, "Enkele recente ontwikkelingen", 2007, (327) nos. 10-11, 343-344. France: M. BACACHE-GIBEILI, *Traité de droit civil*, V, 2016, no. 597, 716; R. CABRILLAC, *Droit des obligations*, 2012, nos. 338-339, 281; F. LEDUC, *Fasc. 201*, 2014, no. 48; P. LE TOURNEAU, *Responsabilité civile professionnelle*, Paris, Dalloz, 2005, 2.29, 63. The Netherlands: ASSER (HARTKAMP), *De verbintenis in het algemeen*, 2000, no. 415, 331; A.R. BLOEMBERGEN, *Schadevergoeding*, 1965, no. 87, 121.
[269] J. RONSE, *Schade en schadeloosstelling (onrechtmatige daad)*, 1957, no. 230, 211; J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, no. 230, 173.
[270] E. DIRIX, *Schade*, 1984, 33, no. 28 (with references to judgments of the Court of Cassation).
[271] Cass. 23 december 1992, *Arr.Cass.* 1992, 1466 and *Pas.* 1992, I, 1406; Cass. 19 november 2003, *Arr.Cass.* 2003, no. 578; Cass. 18 november 2011, no. C.09.0521.F, www.juridat.be.
[272] J. RONSE, *Schade en schadeloosstelling (onrechtmatige daad)*, 1957, no. 230, 211; J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, no. 230, 173; D. SIMOENS, *Schade en schadeloosstelling*, 1999, no. 10, 22; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, no. 1054, 665.
[273] J. RONSE, *Schade en schadeloosstelling (onrechtmatige daad)*, 1957, no. 230, 211; J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, no. 230, 173; W. VAN GERVEN, *Verbintenissenrecht*, 2015, 462; A. VAN OEVELEN, "Enkele recente ontwikkelingen", 2007, (327) no. 10, 343. *Similarly* for France: Cass. Civ. 2ième 4 février 2016, n° 10-23.378, 171, *JurisData*, n° 2016-001630.
[274] *See*: S.D. LINDENBERGH, W.J.G. OOSTERVEEN and N. FRENK, "commentaar op art. 6:100 BW" in *Tekst & Commentaar Burgerlijk Wetboek*, 2015.

("*voordeelstoerekening*"),[275] aims precisely at preventing overcompensation by taken into account the benefits for the victim of the loss creating event in so far as this is reasonable.[276] In that perspective, it's part of the calculation of the loss.[277] However, the rule of the imputation of benefits could also be considered as an element of the determination of the compensation,[278] in which case the loss doesn't comprise the benefits so that less than the entire loss is compensated for by application of the rule.[279] Although this rule leads to reducing the compensation, the benefits gained compensate for that reduction so that the end result isn't necessarily a deviation from the principle of full compensation.[280] The loss and the benefit should result from the same event and correspond to each other as regards their nature.[281] The judge enjoys a considerable freedom not to take the benefits (fully) into account.[282]

78. APPRECIATION *IN CONCRETO* – The principle of full compensation implies an appreciation *in concreto* of the loss suffered by the victim.[283] An appreciation *in concreto* takes

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[275] ASSER (HARTKAMP), *De verbintenis in het algemeen*, 2000, 374, no. 442; ASSER (HARTKAMP/SIEBURGH), *De verbintenis in het algemeen*, 2013, no. 99; E. BAUW, *Onrechtmatige daad*, 2015, no. 82, 111; A.R. BLOEMBERGEN and S.D. LINDENBERGH, *Schadevergoeding*, 2001, no. 12, 18; H.A. BOUMAN and G.M. TILANUS-VAN WASSENAER, *Schadevergoeding*, 1998, no. 35. *See* for a thorough examination: A.T. BOLT, *Voordeelstoerekening bij de begroting van de schadevergoeding in geval van onrechtmatige daad en wanprestatie*, Deventer, Kluwer, 1989, xiii+287 p.

[276] ASSER (HARTKAMP), *De verbintenis in het algemeen*, 2000, no. 443, 374-375; ASSER (HARTKAMP/SIEBURGH), *De verbintenis in het algemeen*, 2013, no. 99; H.A. BOUMAN and A.J.O. BARON VAN WASSENAER VAN CATWIJCK, *Schadevergoeding*, 1991, 75-76, no. 35; S.D. LINDENBERGH, *Schadevergoeding*, 2014, 19, no. 14; A.J. VERHEIJ, *Onrechtmatige daad*, 2005, no. 48, 168. *See* on the role of the reasonableness: C.J.M. KLAASSEN, *Schadevergoeding*, 2007, 92, no. 79.

[277] A.T. BOLT, *Voordeelstoerekening bij de begroting van de schadevergoeding in geval van onrechtmatige daad en wanprestatie*, Deventer, Kluwer, 1989, 10; A.J. VERHEIJ, *Onrechtmatige daad*, 2005, no. 48, 168.

[278] C.J.M. KLAASSEN, *Schadevergoeding*, 2007, no. 75, 87.

[279] A.T. BOLT, *Voordeelstoerekening bij de begroting van de schadevergoeding in geval van onrechtmatige daad en wanprestatie*, Deventer, Kluwer, 1989, 10.

[280] A.R. BLOEMBERGEN, *Schadevergoeding*, 1965, 119, no. 85, b. *See also*: HR 18 december 1963, *NJ* 1964, 100, note N.J.P.

[281] P.C. KNOL, *Vergoeding letselschade*, 1986, §33, 90; S.D. LINDENBERGH and I. VAN DER ZALM, *Schadevergoeding*, 2015, no. 51, 110.

[282] HR 1 februari 2002, *NJ* 2002, 122; S.D. LINDENBERGH and I. VAN DER ZALM, *Schadevergoeding*, 2015, no. 8, 14; J. SPIER *et alii*, *Schadevergoeding*, 2015, no. 225, 285-286; A.J. VERHEIJ, *Onrechtmatige daad*, 2005, no. 48, 168.

[283] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, no. 342, 207; J. BOGAERT, *Praktijkboek schadebegroting. De Indicatieve Tabel 2008-2009*, Brugge, Vanden Broele, 2008, 7; R.O. DALCQ, *Traité*, II, 1962, 742-743, nos. 4140-4143; H. DE PAGE, *Traité*, 1964, 970, no. 961; W. PEETERS, "De Indicatieve Tabel anno 2012" in A. DE BOECK, I. SAMOY, S. STIJNS en R. VAN RANSBEECK (eds.), *Knelpunten in het buitencontractueel aansprakelijkheidsrecht*, Brugge, die Keure, 2013, (55) 57; J. RONSE, *Schade en schadeloosstelling (onrechtmatige daad)*, 1957, no. 230, 210-211; N. SIMAR, "L'évaluation judiciaire des indemnités" in *Responsabilités. Traité théorique et pratique*, *Titre V*, *Dossier 51*, Diegem, Kluwer, 1999, 4-5, nos. 1-2; D. SIMOENS, *Schade en schadeloosstelling*, 1999, no. 10, 23; W. VAN GERVEN, *Verbintenissenrecht*, 2015, 463; A. VAN OEVELEN, "La modération de la réparation du dommage", 1996, (65) no. 3, 66; A. VAN OEVELEN, "Enkele recente ontwikkelingen", 2007, (327) no. 11, 344; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 666, no. 1055. France: M. BACACHE-GIBEILI, *Traité de droit civil*, V, 2016, no. 601, 718; F. LEDUC, *Fasc. 201*, 2014, no. 47. The Netherlands: J.L.P. CAHEN, *Nederlands burgerlijk recht*, 2002, no. 87, 80; C.J.M. KLAASSEN, *Schadevergoeding*, 2007, no. 9, 8; S.D. LINDENBERGH, *Schadevergoeding*, 2014, no. 36, 37; S.D. LINDENBERGH, "art. 6:97 BW" in *Groene Serie Schadevergoeding*,

into account the circumstances typical of the victim. For example, the wage of the victim *in concreto* will be the reference for determining the scope of the compensation instead of the wage of a person of reference.[284] The judge will simply and solely consider the loss caused, ignoring other elements.[285] Only the value of the interest *in concreto* for the victim is of importance, not the absolute value, *i.e. in abstracto,* of the harmed interest.[286] This is called the rule of objective compensation.[287] Yet, some authors have noted that the every judge has his own definition of what the principle of full compensation entails so that the principle of the appreciation *in concreto* of the loss should be nuanced. For example, it is unclear why different life tables are being used in different cases.[288] In case of loss yet to suffer, abstraction and hypotheses seem somewhat inevitable.[289]

79. FAR FROM SELF-EVIDENT - The principle of full compensation and the appreciation *in concreto* of the loss are all but self-evident.[290] This becomes very clear in a comparative perspective. Many authors draw a comparison with Dutch law.[291] Dutch law provides for a statutory power for the judge to moderate the legal obligation to compensate for a loss.[292] According to some Belgian authors, this competence to moderate is a quite practical means to temper the principle of full compensation whenever its application would lead to unfairness. In addition, it relates to corrective justice.[293] Also Swiss law is sometimes brought into the debate,

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2015, no. 27; J. SPIER, T. HARTLIEF, G.E. VAN MAANEN and R.D. VRIESENDORP, *Verbintenissen uit de wet en Schadevergoeding*, Deventer, Kluwer, 2009, no. 207, 244-245.

[284] Cass. 13 april 1995, *Arr.Cass.* 1995, I, 423; H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, no. 342, 207; E. DIRIX, "Abstracte en concrete schade", *RW* 2000-2001, issue 36, (1329) 1329, no. 1; E. DIRIX, *Schade*, 1984, 31, no. 24.

[285] T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 666, no. 1055. *Cf. supra*, no. 77 and *cf. infra*, no. 117.

[286] E. DIRIX, *Schade*, 1984, 31, no. 24; J. RONSE, *Aanspraak*, 1954, 260, no. 373 *et seq.*; J. RONSE, *Schade en schadeloosstelling (onrechtmatige daad)*, 1957, 220, no. 244 *et seq.*

[287] R.O. DALCQ, *Traité*, II, 1962, no. 4149, 744; J. RONSE, *Schade en schadeloosstelling (onrechtmatige daad)*, 1957, no. 230, 211; J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, no. 230, 173; N. SIMAR and L. DE ZUTTER, "L'évaluation du dommage", 1999, (1) 23, no. 40; A. VAN OEVELEN, "La modération de la réparation du dommage", 1996, (65) no. 2, 66; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 666, no. 1055.

[288] D. SIMOENS, *Schade en schadeloosstelling*, 1999, 5, no. 2, D.; D. SIMOENS, "Recente ontwikkelingen", 2004, (277) 323; H. ULRICHTS, *Schaderegeling*, 2013, no. 32, 277-278. *See also for* France: H. GROUTEL, "Droit français", 2012, (107) 116.

[289] H.A. BOUMAN and A.J.O. BARON VAN WASSENAER VAN CATWIJCK, *Schadevergoeding*, 1991, no. 19, 32. Hence the possibilty to postpone a judgment *ex* Art. 105, §1 DCC.

[290] T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 666, no. 1055.

[291] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, no. 333, 204; E. DIRIX, *Schade*, 1984, no. 30, 35; J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, no. 262, 197; D. SIMOENS, *Schade en schadeloosstelling*, 1999, no. 10, 21; H. ULRICHTS, *Schaderegeling in België*, Mechelen, Kluwer, 2010, no. 31, 273; A. WYLLEMAN, "Wie zonder "fout" is", 2002, (1619) 1621, no. 7.

[292] Art. 6:109 DCC.

[293] H. ULRICHTS, *Schaderegeling*, 2013, no. 31, 273; A. WYLLEMAN, "Wie zonder "fout" is", 2002, (1619) 1621, no. 7.

given the legal competence to moderate in all cases of loss.[294] Swiss law has served as an example for Art. 6:109 DCC, which contains the Dutch competence to moderate.[295] After having established a selection of deviant systems, the next part will examine those systems with an integrated comparative perspective, focusing on Dutch and French law.

[294] REDACTIERAAD, "Herziening van het Belgisch Burgerlijk Wetboek", *TPR* 1966, (517) 535
[295] P. ABAS, *Rechterlijke matiging*, 2014, no. 15, 25.

PART III: CATEGORISATION AND ANALYSIS OF DEVIANT SYSTEMS

"Tot voor kort was het aansprakelijkheidsrecht een rustig bezit, stevig gegrondvest op de artikelen 1382 en vgl. B.W." [296]

80. FEASIBILITY - As already stated, it's a hopeless task to list all deviant systems.[297] Therefore, the establishment of categories ensures the feasibility of the research. This part will provide that categorisation. At the same time, it will list the deviant systems which have been selected for further analysis. The assumption is that frequently discussed systems are the most relevant ones or constitute a clear example.[298] There is no claim of representativeness. The categories should be exhaustively listed, but the selected systems within those categories are only illustrative.

81. MAIN DIVISION – Explorative research leads to the conclusion that different legal actors have created deviations from the principle of full compensation. One might assume that the various legal actors will have different reasons for these deviations. Common sense then dictates that the main division is based on the distinction between legal actors: legislator, judge and other legal actors.[299] Contractual deviations are left aside, because they are based on agreement among the parties rather than being imposed by the legislator or the judge. The parties are not confronted with a limitation of the compensation but instead have chosen to limit the compensation themselves. Furthermore, an analysis of contractual deviations is less suited for the research in this thesis.

82. DEVIATIONS BY THE LEGISLATOR – The first category is the largest one and contains the deviant systems set up by the legislator. Preliminary research on the principle of full compensation has identified the several subcategories within of this first main category of deviant systems. The first subcategory covers the rules introducing a capped compensation, *i.e.* setting the maximum amount of the compensation. The statutes on professional liability come to mind. The capped liability of the notary will be the *species* for the capped professional

[296] H. BOCKEN, "Wat wij zelf doen, doen wij beter?", *TPR* 1991, (277) 277, no. 1. *Own translation: "Until recently, liability law was a quiet possession, firmly grounded on the Articles 1382 et seq. BCC."*
[297] *Cf. supra*, no. 13.
[298] *Cf. supra*, no. 14.
[299] *This is partly similar to the division mentioned by* A.R. BLOEMBERGEN, *Schadevergoeding*, 1965, 118, footnote 5.

liabilities as a *genus*. Another example can be found in the capped compensation for the victim of an industrial accident. Whereas the capped liability of the notary forms a quite recent example, the rules on compensation in case of industrial accidents is an older one. Still, the latter deserves to be analysed since it is considered to be have been a catalyst in the rise of liabilities based on risk rather than fault.[300] The second subcategory covers the rules introducing a franchise. Here, the law on defective products constitutes a good example. The third subcategory contains rules by means of which the legislator has allowed the judge to consider other elements than merely the loss in determining the scope of the compensation. The prototype of this category is the recently introduced Art. 11*bis* CouncSt-Law. Art. 1386*bis* BCC also belongs to this subcategory and is important because of the underlying notion of fairness. Finally, a statutory competence to moderate, whether general or particular, constitutes a clear legislative deviation from the principle of full compensation so that this system should be examined as well.

83. DEVIATIONS BY THE JUDGE – The second category includes the deviant systems which constitute a judicial exception to the principle of full compensation. It refers to the practice of taking into account other elements than the scope of the loss in determining the amount of the compensation, namely when judging *ex aequo et bono*. The appreciation of moral loss will be examined in particular. Futhermore, the doctrine of the prohibition of abuse of the law will be dealt with to look at how civil judges nowadays handle an instrument allowing them to moderate, which was moreover created by case law itself.

84. DEVIATIONS BY OTHERS – The third category includes initiatives taken by others than the legislator or the judge in a single case. The system in this category will be the indicative table. The indicative table has been the initiative of the National union of the magistrates of first instance and the Royal union of the justices of the peace and the Police court judges. Thus, it is neither the initiative of the legislator nor of an individual judge in a particular case.

85. ANALYSIS PER CATEGORY – There are several ways in which a legislator, a judge or other legal actors can deviate from the principle of full compensation in Belgian tort law and the corresponding principle of the appreciation *in concreto* of the loss.[301] This part will

[300] H. DE PAGE, *Traité*, II, 1964, no. 934, 920; D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (1961) no. 13, 1974; W. VAN GERVEN, "De invloed van de verzekering op het verbintenissenrecht", *RW* 1962, issue 14, (777) no. 11, 781. France: P. BRUN, *Responsabilité civile extracontractuelle*, 2014, 99, no. 153; M. FABRE-MAGNAN, *Droit des obligations*, II, 2013, 62-63; J. JULIEN, *Droit des obligations*, 2012, 201, no. 284.
[301] J. RONSE, *Schade en schadeloosstelling (onrechtmatige daad)*, 1957, 121, no. 233; J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, no. 230, 173 and 174, no. 233.

consequently deal with the selected deviant sytems introduced by the legislator (Chapter I), by the judges themselves (Chapter II) and by others (Chapter III).

CHAPTER I: DEVIATIONS BY THE LEGISLATOR

86. LEGISLATIVE DEVIATIONS – Since the principle of full compensation lies within the backbone legal provision of Belgian tort law, namely Art. 1382 BCC, deviations from that principle by the legislator are even more remarkable than those by other legal actors. Legislative deviations imply the existence of a genuine reason for the legislator to create law contrary to the existing body of legislation. This chapter will first assess three types of legislative deviations: capped liabilities (Section I), the introduction of a franchise (Section II) and the possibility of considering other elements than the scope of the loss in determining the scope of the compensation (Section III). At the end of the chapter, the strongest form of legislative deviation from the principle of full compensation is dealt with: a statutory competence for judges to moderate the scope of the compensation (Section IV). However, it could also be qualified as a mixed deviation because the law provides the competence to deviate but it's the judge who ultimately decides whether or not to do so. Since the basis is laid down in statutory law, this deviation is dealt with here as a legislative deviation. Besides the possibility of a general competence to moderate, some particular competences to moderate in the field of agreed moratory interests will be examined, since no general competence to moderate exists in Belgian tort law.

87. EXPLICIT CAPPING POSSIBILITY – As a preliminary remark, one could notice that Dutch law explicitly contains the possibility to cap liability in order to avoid compensations exceeding the limits of what can reasonably be covered by insurance.[302] That way, the adjustment of caps due to quickly changing conditions is facilitated.[303] Art. 6:110 DCC[304] seems to be an expression of "*assurabilité oblige*".[305] According to DE VRIES, however, the provision mustn't be interpreted in such a radical way. To justify a limitation, it's insufficient to merely point to the fact that a certain liability ground would go beyond the limits of insurability. There should also be an actual reason for the limitation.[306] Art. 6:110 DCC constitutes an instrument to

[302] Art. 6:110 DCC; ASSER (HARTKAMP), *De verbintenis in het algemeen*, 2000, no. 504, 441; ASSER (HARTKAMP/SIEBURGH), *De verbintenis in het algemeen*, 2013, no. 188-189; E. BAUW, *Onrechtmatige daad*, 2015, no. 82, 111; A.R. BLOEMBERGEN and S.D. LINDENBERGH, *Schadevergoeding*, 2001, no. 12, 18; P. DE TAVERNIER, "Droit néerlandais", 2012, (329) 337; T.E. DEURVORST, "Artikel 110" in *GS Schadevergoeding*, 2011, no. 4.
[303] H. STOLL, "Chapter 8. Consequences of liability: remedies" in A. TUNC (ed.), *International Encyclopedia of Comparative Law*, XI, *Torts*, Part 2, Tübingen, J.C.B. Mohr (Paul Siebeck), 1986, (1) 138, no. 159.
[304] *See* for a thorough examination of this provision: F. DE VRIES, *Wettelijke limitering*, 1990, 268 p.;
[305] *Cf. supra*, no. 60. *See*: J. SPIER *et alii*, *Schadevergoeding*, 2015, 329, no. 263.
[306] F. DE VRIES, *Wettelijke limitering*, 1990, 48-49, nos. 61-62.

prevent too heavy liability burdens, similar to Art. 6:109 DCC.[307] The difference seems to be that the latter is a more individual measure than Art. 6:110 DCC.[308] Both can nevertheless be applied at the same time.[309] The underlying idea of Art. 6110 DCC is that minor faults sometimes cause great losses.[310] Insurance can avoid unfair results and liability burdens, but some liabilities are difficult to take out insurance for. Put to the extreme, some socially desirable activities might be compromised.[311] In practice, Art. 6:110 DCC has been used only sparingly.[312] Even if it is used, the judge can still correct the limitation whenever it is unfair and unjust on the basis of Art. 6:2 DCC.[313]

Section I: CAPPED LIABILITIES

88. COMPENSATION *IN ABSTRACTO* – One could depart from a compensation *in concreto* through the use of fixed amounts and a compensation *in abstracto*, *i.e.* by evaluating the loss *in abstracto*. As a result, it would render full compensation for the loss impossible. Dutch law explicitly offers the possibility for an appreciation *in abstracto*, which is more established in the Netherlands[314] than in Belgium but nevertheless remains the exception in practice.[315] The flood of all kinds of strict liability in Belgian law is said to have led to abandoning the principle of full compensation, considering the capped compensation they introduce.[316] This mosaic of deviant systems creates an image of division.[317] Also in French and Dutch law capped amounts of compensation have been introduced on several accounts,[318] particularly in the field of

[307] J. SPIER *et alii*, *Schadevergoeding*, 2015, 325, no. 258.
[308] T. HARTLIEF and R.P.J.L. TJITTES, *Verzekering en aansprakelijkheid* in *Serie recht en praktijk – 79*, Deventer, Kluwer, 1994, 41.
[309] J. SPIER *et alii*, *Schadevergoeding*, 2015, 325, no. 258.
[310] T.E. DEURVORST, "Artikel 110" in *GS Schadevergoeding*, 2011, no. 14; just as Art. 6:109 DDC. *Comp. supra*, no. 3.
[311] T.E. DEURVORST, "Artikel 110" in *GS Schadevergoeding*, 2011, no. 1. *Similarly* in France: G. VINEY and P. JOURDAIN, *Traité de droit civil*, 2011, no. 58-1, 159-160.
[312] P. ABAS, *Rechterlijke matiging*, 2014, 10, no. 7; T.E. DEURVORST, "Artikel 110" in *GS Schadevergoeding*, 2011, no. 12; N. FRENK, "Utopische wetgeving en verzekerbaarheid", *Aansprakelijkheid, Verzekering & Schade* 2016, (108-117) no. 3.2; S.D. LINDENBERGH and I. VAN DER ZALM, *Schadevergoeding*, 2015, no. 8, 15; J. SPIER *et alii*, *Schadevergoeding*, 2015, 330, no. 264.
[313] T.E. DEURVORST, "Artikel 110" in *GS Schadevergoeding*, 2011, no. 1.
[314] F. STEVENS, "Schadebegroting in het transportrecht: concreet, abstract of eigen recept?", *Tijdschrift Vervoer & Recht* 2015, issue 2, (50) 54, no. 15.
[315] J. SPIER, T. HARTLIEF, G.E. VAN MAANEN and R.D. VRIESENDORP, *Verbintenissen uit de wet en Schadevergoeding*, Deventer, Kluwer, 2009, no. 208. It should even be considered more as an aid than as a legal rule: ASSER (HARTKAMP/SIEBURGH), *De verbintenis in het algemeen*, 2013, no. 38.
[316] T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, no. 18, 12 and no. 25, 18.
[317] L. CORNELIS, *Beginselen van het Belgische aansprakelijkheidsrecht. Deel I*, Antwerpen, Maklu, 1989, no. 354, 581.
[318] France: M. BACACHE-GIBEILI, *Traité de droit civil*, V, 2016, 724-727, no. 606; J.-F. BARBIÉRI, *J.-Cl. Civil Code, Art. 1382 à 1386*, *J.-Cl. Responsabilité civile et Assurances*, *J.-Cl. Notarial Répertoire, v° Responsabilité civile, Fasc. 203*, 2015, no. 53; P. CONTE, *Rép. civ. Dalloz* 2002, *v° Responsabilité du fait personnel*, 49, no. 273;

transport law.[319] DE CALLATAŸ and ESTIENNE have stated that Belgian law doesn't distinguish between forms of loss deserving a full compensation and other forms, held to be less important, which only give rise to a limited, reduced compensation.[320] The following examples allow to question such a statement to the extent that it would go beyond what is generally the case in Belgian tort law. As far as the field of nuclear energy is concerned, for example, the scope of the compensation at the expense of the operator is capped at 297.472.229, 73 euros by Art. 7 of the Law concerning the legal liability in the field of nuclear energy.[321] Two other examples will be analysed in this section. First, the more recent example of the capped professional liability of a notary operating through a company will be examined (Subsection I). Second, the capped compensation for the victim of an industrial accident is studied (Subsection II).

Subsection I. Capped liability of the notary

89. PROFESSIONAL LIABILITY – The capped liability of the notary exercising his duties in a professional partnership will be examined as a *species* for the *genus* professional liabilities – for reasons of feasibility. Notwithstanding that limited angle, it is useful to frame the *species* within the *genus*. That's why this subsection will start by briefly looking at the general evolution of professional liability and the embedding of the recently capped professional liability of the notary in that historical trend.

90. HONOUR, GUARANTEE OR LIMITED LIABILITY – The view on professional liability has changed over the past two centuries.[322] Whereas professional liability was inconceivable in 19th

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COUR DE CASSATION, ORDRE DES AVOCATS AU CONSEIL D'ÉTAT ET À LA COUR DE CASSATION, INSTITUT DES HAUTES ÉTUDES POUR LA JUSTICE (IHEJ), ÉCOLE NATIONALE SUPÉRIEURE DE SÉCURITÉ SOCIALE (EN3S) AND CENTRE DES HAUTES ÉTUDES DE L'ASSURANCE, *Les limites de la réparation du préjudice*, Paris, Dalloz, 2009, 83; H. GROUTEL, "Droit français", 2012, (107) 111; F. LEDUC, *Fasc. 201*, 2014, no. 75 (limitations for economic reasons); J. PECHINOT, "Droit français", 2012, (126) 129; J. TRAULLÉ, *L'éviction de l'article 1382 du Code Civil en matière extracontractuelle* in *Bibliothèque de droit privé*, CDLXXVII, Paris, LGDJ, 2007, no. 46, 48; G. VINEY and P. JOURDAIN, *Traité de droit civil*, 2011, 693 *et seq*. The Netherlands: A.R. BLOEMBERGEN, *Schadevergoeding bij onrechtmatige daad*, Deventer, Utrecht, no. 86, 120; A.R. BLOEMBERGEN and S.D. LINDENBERGH, *Schadevergoeding*, 2001, no. 12, 17; P. DE TAVERNIER, "Droit néerlandais", 2012, (329) 337; G.H.A. SCHUT, *Onrechtmatige daad*, 1997, §30, 152.

[319] France: M. BACACHE-GIBEILI, *Traité de droit civil*, V, 2016, no. 606, 726; J.-F. BARBIÉRI, *J.-Cl. Civil Code, Art. 1382 à 1386, J.-Cl. Responsabilité civile et Assurances, J.-Cl. Notarial Répertoire, v° Responsabilité civile, Fasc. 203*, 2015, no. 60 *et seq*. The Netherlands: P. DE TAVERNIER, "Droit néerlandais", 2012, (329) 337; N. FRENK, "Utopische wetgeving en verzekerbaarheid", *Aansprakelijkheid, Verzekering & Schade* 2016, (108) no. 3.1.

[320] D. DE CALLATAŸ and N. ESTIENNE, *La responsabilité civile. Chronique de jurisprudence 1996-2007*, Vol.2, *Le dommage*, Brussel, Larcier, 2009, 57.

[321] Law of the 22nd of July 1985 concerning the legal liability in the field of nuclear energy (*own translation*, original title: Wet van 22 juli 1985 betreffende de wettelijke aansprakelijkheid op het gebied van de kernenergie), *BS* 31 augustus 1985, no. 1985011261, 12561; N. SIMAR and L. DE ZUTTER, "L'évaluation du dommage", 1999, (1) 31, no. 54; A. VAN OEVELEN, "La modération de la réparation du dommage", 1996, (65) no. 8, 69.

[322] *See* on the evolution of the professional liability: R.O. DALCQ, "Responsabilités professionnelles : évolution générale" in H. COUSY and H. CLAASSENS (eds.), *Professionele aansprakelijkheid en verzekering*, Antwerpen,

century, it became part and parcel of a profession in the 20th century. The background of this evolution is the changed state of mind. Exercising a profession such as the notary in the 19th century was seen as a sort of kind return and the exercise of a profession was motivated by honour and honour alone. Besides cases of severe fault or deceit, there would be no (personal) professional liability.[323] Alongside a new century comes an altered view on the exercise of a profession. Realising that professional errors do occur, personal liability became a crucial guarantee[324] and even a deontological obligation,[325] followed by an obligation to take out professional liability insurance.[326] Although partnerships became more common among those who exercised a profession in the second half of the 20th century,[327] it's only in the 21st century that a limitation of their liability turned out to be possible. Up till then, professional practitioners were obligated to opt for a partnership in which they remained personally liable for professional errors, together with the partnership itself.[328] The introduction of the capped liability of the notary exercising his duties in a partnership fits in with a broader tendency to allow the exercise of professions in a partnership with limited liability.[329]

91. INSURING CAPPED LIABILITY – Two important themes run across the rise of these new rules governing professions: the duty to take out insurance, both for the artificial person and the natural person, and the legal capping of the liability, linked to the idea of insurability or the prevention of an overly heavy liability burden.[330] The following paragraphs will address the particular situation of the liability of the notary,[331] where both themes can be found as well.

Maklu, 1991, (13) 19-23; K. GEENS, "De evolutie van de aansprakelijkheid van de persoon en de structuur als waarborg" in X, *Verslagboek Notarieel Congres 2009. Zekerheid voor de toekomst*, Gent, Larcier, 2009, 325-331; I. SAMOY, "Beperking professionele aansprakelijkheid", 2015, (123) 123 *et seq.*

[323] I. SAMOY, "Beperking professionele aansprakelijkheid", 2015, (123) 123-124, no. 2.

[324] A. RENIERS, "Groot nieuws: de aansprakelijkheid van notarissen kan eindelijk worden beperkt!", *Nieuwsbrief Notariaat* 2014, issue 16, (1) 1.

[325] K. GEENS, "De evolutie van de aansprakelijkheid van de persoon en de structuur als waarborg" in X, *Verslagboek Notarieel Congres 2009. Zekerheid voor de toekomst*, Gent, Larcier, 2009, (325) no. 2, 327.

[326] I. SAMOY, "Beperking professionele aansprakelijkheid", 2015, (123) 124, no. 3.

[327] Notaries nowadays also tend to cooperate more: L. WEYTS, *Algemeen deel: De Notariswet* in *Reeks Notarieel Recht*, Mechelen, Kluwer, 2015, no. 5, 19.

[328] I. SAMOY, "Beperking professionele aansprakelijkheid", 2015, (123) 124-125, nos. 4-5.

[329] *See* for this embedding in the broader evolution: K. RONSIJN and I. SAMOY, "De nieuwe wettelijke regeling voor de burgerlijke professionele aansprakelijkheid van de notaris", *Not.Fisc.M*. 2014, issue 10, (242) 242-244, nos. 2-11; I. SAMOY, "Beperking professionele aansprakelijkheid", 2015, (123) 125-133; I. SAMOY and K. RONSIJN, "Professionele aansprakelijkheid notaris", 2015, (47) 62-66.

[330] I. SAMOY, "Beperking professionele aansprakelijkheid", 2015, (123) 130-133, nos. 15-21.

[331] *See* on the origin of the liability of the notary: C. VANHALEWYN and A. MICHIELSENS, "De burgerlijke aansprakelijkheid en de notariële praktijk", *Notarius* 1981, extra issue 2, (1) 11-12, nos. 15-17.

92. PIVOTING POINT OF 2014 – The professional liability of the notary is regulated in the Law on the office of notary.[332] Before the legislative intervention in 2014, a notary could make use of a professional partnership to exercise his duties under the conditions of the (old) Art. 50 of the Law on the office of the notary. Yet, the notary remained severally liable with the professional partnership for professional errors without prejudice to a redress from the partnership to the notary.[333] It was one of the last intellectual professions subject to unlimited liability.[334] Since the Law of the 25th of April 2014[335], this is no longer the case.[336] At present, the notary is able to limit his professional liability in a double way by exercising one's duties in a professional partnership.

93. LIMITED LIABILITY – Firstly, the notary is no longer severally liable. His liability is limited to his contribution, according to the new Art. 50, §4, paragraph 1 of the Law on the office of the notary. Secondly, and more interesting within the context of this thesis, the liability of the notarial partnership itself has been limited. The legislator has introduced a legal cap of 5 million euros.[337] The size of the compensation which can be received, is thus limited to the maximum amount of 5 million euros. This applies to every case of loss separately.[338] This is clearly a deviation from the principle of full compensation, contrary to the French legal system which still adheres to that principle with regard to the liability of the notary,[339] albeit with an obligation to take out insurance for the notary's professional liability.[340] Whereas the several

[332] Law of the 16th of March 1803 (25 ventôse of the year XI) on the office of notary (*original title*: "*Wet van 16 maart 1803 op het notarisambt*"), *BS* 16 maart 1803, no. 1803031601.
[333] (old) Art. 50, §1, a) of het Law on the office of the notary.
[334] As noticed in the preparatory works: Wetsontwerp houdende diverse bepalingen betreffende Justitie, *Parl.St.* Kamer 2013-14, no. 53K3149/001, 113.
[335] Law of the 25th of April 2014 containing various provisions on Justice (*original title*: "*Wet van 25 april 2014 houdende diverse bepalingen betreffende Justitie*"), *BS* 14 april 2014, no. 2014009199, 39045.
[336] *See* (new) Art. 50, §4 of het Law on the office of the notary, as changed by Art. 133 of the Law of the 25th of April containing various provisions on Justice.
[337] (new) Art. 50, §4, paragraph 2 of het Law on the office of the notary. The legislator considers this maximum amount to be high: Wetsontwerp houdende diverse bepalingen betreffende Justitie, *Parl.St.* Kamer 2013-14, no. 53K3149/001, 118. This seems true, given the statements made by the Minister of Justice in the Comission for Justice that the cases of loss mostly concern amounts below one million euros and that the highest case of loss up till then added up to 2 million euro: Verslag namens de commissie voor de justitie bij het wetsontwerp houdende diverse bepalingen betreffende Justitie en het wetsvoorstel tot wijziging van het Wetboek van Strafvordering inzake de bijstand van de advocaat bij het eerste verhoor, *Parl.St.* Kamer 2013-14, no. 53K3149/005, 56.
[338] Verslag namens de commissie voor de justitie bij het wetsontwerp houdende diverse bepalingen betreffende Justitie en het wetsvoorstel tot wijziging van het Wetboek van Strafvordering inzake de bijstand van de advocaat bij het eerste verhoor, *Parl.St.* Kamer 2013-14, no. 53K3149/005, 56.
[339] J. DE POULPIQUET, *J.-Cl. Civil Code, Art. 1382 à 1386* and *J.-Cl. Responsabilité civile et Assurances, Fasc. 420-60*, 2015, no. 28; J. DE POULPIQUET, *J.-Cl. Notarial Formulaire, v° Responsabilité notariale, Fasc. 1*, 2015, no. 12.
[340] Art. 13 Décret n° 55-604 du 20 mai 1955 relatif aux offices publics et ministériels et certains auxiliaires de justice, *JORF* 22nd of May 1955; Art. 8 Arrêté du 28 mai 1956 relatif à la garantie professionnelle des notaires, *JORF* 8th of June 1956; J.-F. PILLEBOUT, *J.-Cl. Notarial Formulaire, v° Notariat, Fasc. 10*, 2015, no. 23. *See also*: T. SANSÉAU, *J.-Cl. Notarial Formulaire, v° Responsabilité notariale, Fasc. 8*, 2014, no. 9.

liability of the notary (and consequently the victim's entitlement to full compensation) was the rule before the legislative intervention in 2014, it now only comes into play in case of violations committed by the notary with a fraudulent purpose or with the aim of causing a loss, notwithstanding the right of redress of the partnership on the notary.[341] It stems from the statutory text that the double limitation of the notary's liability only applies to notaries exercising their duties in a notarial partnership. That way, a notary exercising his duties as a natural person, *i.e.* without a notarial partnership, cannot benefit from the double limitation.[342] He remains liable for his professional errors without any cap so that the principle of full compensation is respected in that situation. As a result, the legislator has made a distinction between two situations, with respect for the principle of full compensation in one of them though not in the other. This calls for a closer look at the motives mentioned in the preparatory works for introducing the double limitation and thus a distinction. One can already see that notaries are of course encouraged to exercise their duties in a partnership. According to NICAISE, the notary exercising his duties as a natural person will disappear.[343]

94. REASONS FOR THE LIMITATION – The reasons for the introduction of the double limitations are well laid down in the preparatory works.[344] The legislator explicitly embeds the liability of the notary in the broader tendency of new regulations for intellectual professions.[345] According to the preparatory works, the amounts related to the professional liability of intellectual professions increase more and more. The resulting problem is the insurance of that liability, the cost of which increases proportionally. This economic argument becomes inescapable if willing to maintain the insurability of the risk to the client's interest. Given the occasionally very high amounts of the transactions for which the professional is consulted, the risks of professional liability increase correspondingly, rendering them uninsurable at the expense of the client's guarantee.[346] For that reason, the legislator wished to cap the liability of the notary and found the use of a partnership a valuable[347] and even indispensable instrument

[341] (new) Art. 50, §4, paragraph 2 *in fine* of het Law on the office of the notary. This is an obvious clarification: Wetsontwerp houdende diverse bepalingen betreffende Justitie, *Parl.St.* Kamer 2013-14, no. 53K3149/001, 118.
[342] I. SAMOY and K. RONSIJN, "Professionele aansprakelijkheid notaris", 2015, (47) no. 51, 68.
[343] P. NICAISE, "De evolutie van de aansprakelijkheid van de persoon en de structuur als waarborg" in X, *Verslagboek Notarieel Congres 2009. Zekerheid voor de toekomst*, Gent, Larcier, 2009, (333) 340.
[344] Wetsontwerp houdende diverse bepalingen betreffende Justitie, *Parl.St.* Kamer 2013-14, no. 53K3149/001, 112 *et seq. See also* on those reasons: I. SAMOY and K. RONSIJN, "Professionele aansprakelijkheid notaris", 2015, (47) 68-69, no. 51; I. SAMOY, "Beperking professionele aansprakelijkheid", 2015, (123) 132-133.
[345] Wetsontwerp houdende diverse bepalingen betreffende Justitie, *Parl.St.* Kamer 2013-14, no. 53K3149/001, 113.
[346] Wetsontwerp houdende diverse bepalingen betreffende Justitie, *Parl.St.* Kamer 2013-14, no. 53K3149/001, 114.
[347] The limitation of one's liability is an important reason for opting for a partnership: M. WYCKAERT, "De uitoefening van een cijferberoep in het kader van een rechtspersoon: de gevolgen vor de rechtspersoon, zijn

in doing so.[348] The notary's liability would be limited in line with the limitations already present for other intellectual professions while maximising the guarantees for third persons in case of professional errors. That way, it also fits in with the SME[349]-plan of 2012, seeking to enable limiting civil liability through use of a partnership for the exercise of one's duties.[350] Besides the interests of the notary himself, the legislator takes into account the interests of third parties. He does this not only by keeping the notary's professional liability insurable so as to limit the costs, but also by taking into account the greater trust of those third parties in artificial persons than in natural persons.[351] The former are perceived to offer more guarantees and security, banning any confusion regarding what belongs to the private or professional property.

95. OBLIGATORY LIABILITY INSURANCE – The double limitation is interwoven with an obligatory liability insurance for the notarial partnership.[352] On the one hand, there is an absolute limitation, *i.e.* the cap of 5 million euro, to ensure insurability of the activity and on the other hand, the consequences for the personal property of the notary are limited, still providing a guarantee for third parties by means of an obligatory insurance.[353] The statutory text itself indicates the intertwinement. Art. 50, §4, third paragraph of the Law on the office of the notary doesn't impose the duty to take out insurance for at least 5 million euro, at least not literally imposing that minimum amount. Instead it refers to "*the maximum determined in the second paragraph*"[354], thus expressing the intended equivalence of both amounts. Also the notary is obligated to take out insurance for the same minimum amount of 5 million euros.[355] In line with one of the aforementioned central themes of the new rules concerning professional liabilities, the legal obligation to take out insurance applies to both the notary exercising his duties as a natural person and the notary doing so in a notarial partnership.[356] Since the access

vennoten, zijn bestuurders en zijn vertegenwoordigers" in IBR, IAB and BIBF (eds.), *De nieuwe aansprakelijkheidsregeling voor economische beroepen: "rechtspersonen en natuurlijke personen*, Antwerpen, Intersentia, 2013, (7) 8.

[348] Wetsontwerp houdende diverse bepalingen betreffende Justitie, *Parl.St.* Kamer 2013-14, no. 53K3149/001, 114.

[349] small and medium-sized enterprises.

[350] Wetsontwerp houdende diverse bepalingen betreffende Justitie, *Parl.St.* Kamer 2013-14, no. 53K3149/001, 114.

[351] Wetsontwerp houdende diverse bepalingen betreffende Justitie, *Parl.St.* Kamer 2013-14, no. 53K3149/001, 117.

[352] The link plainly stems from the preparatory works: Wetsontwerp houdende diverse bepalingen betreffende Justitie, *Parl.St.* Kamer 2013-14, no. 53K3149/001, 12 and 118; Verslag namens de commissie voor de justitie bij het wetsontwerp houdende diverse bepalingen betreffende Justitie, *Parl.St.* Senaat 2013-14, no. 5-2443/3, 5.

[353] *Similarly*: I. SAMOY, "Notaris kan aansprakelijkheid beperken via vennootschap", *Juristenkrant* 2014, issue 291, (1) 1.

[354] Art. 50, §4, third paragraph of het Law on the office of the notary.

[355] Art. 34*ter* of het Law on the office of the notary.

[356] Wetsontwerp houdende diverse bepalingen betreffende Justitie, *Parl.St.* Kamer 2013-14, no. 53K3149/001, 12.

to a notarial partnership is open to everyone under the same conditions, the legislator believes to act according to the Belgian Constitution, as interpreted by the Belgian Constitutional Court, and to avoid discrimination.[357] It should be noted that the duty for a notary to taken out insurance is not a new one following the new regulation of 2014. Since 1999, the notary was already obligated to take out insurance, regardless of whether he exercised his duties in a partnership or not.[358] The minimum amount was 2.5 million euros.[359] Before 1999, there was merely a deontological obligation.[360] After the introduction of a duty to take out insurance rather than the possibility to do so, the minimum amount has thus increased over the years. According to SAMOY and RONSIJN, this evolution of the duty to take out insurance is embedded in shifts within the field of tort law.[361] The compensatory function of tort law is ever more emphasised. The existence of a liability insurance is often essential to guarantee an actual compensation for the victim.[362]

96. LIABILITY IN TORT? – The legislator doesn't distinguish between liability in tort and contractual liability and simply strives for a limitation of *the* professional liability of the notary. For the purpose of this thesis, that doesn't pose any direct problem, since the aim is to deduct the reasons for having introduced a deviation from the principle of full compensation in the case of the notary's professional liability. Yet, one should be aware that new rules have important consequences for the qualification of the relationship between the notary and its client.[363] This complex issue, however, falls outside the scope of the present study.

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[357] Wetsontwerp houdende diverse bepalingen betreffende Justitie, *Parl.St.* Kamer 2013-14, no. 53K3149/001, 115-116.

[358] Art. 91, first paragraph, 1° and 2° and second paragraph of het Law on the office of the notary, *iuncto* Art. 1 and 18 of the Regulation of the National Chamber of notaries for the organisation of the notarial accounting of the 9th of October 2001, approved by Royal Decree of the 9th of March 2003, *BS* the 1st of April 2003; L. WEYTS, *Algemeen deel: De Notariswet* in *Reeks Notarieel Recht*, Mechelen, Kluwer, 2012, 343, no. 184. According to H. CASMAN, there was no legal though only a deontological obligation: H. CASMAN, "De beroepsaansprakelijkheid van de notaris. Enkele recente ontwikkelingen" in H. VANDENBERGHE (ed.), *De professionele aansprakelijkheid*, Brugge, die Keure, 2004, (185) 217, no. 88.

[359] A. RENIERS, *De burgerlijke notariële aansprakelijkheid herbekeken*, Brugge, die Keure, 2010, 166, no. 256; I. SAMOY and K. RONSIJN, "Professionele aansprakelijkheid notaris", 2015, (47) 71, no. 54; P. VANLATUM and S. VANDER EECKEN, "Notariaat en verzekeringen. De verzekering van het notariaat. Een 'zachte" noodlanding" in VERENIGING NEDERLANDSTALIGE LICENTIATEN EN MASTERS IN HET NOTARIAAT (ed.), *Notariële figuranten: Verslagboek VLN-Congres 4 december 2010*, Mechelen, Kluwer, 2010, (71) 74.

[360] A. RENIERS, *De burgerlijke notariële aansprakelijkheid herbekeken*, Brugge, die Keure, 2010, 166, no. 256; A. RENIERS, "Groot nieuws: de aansprakelijkheid van notarissen kan eindelijk worden beperkt!", *Nieuwsbrief Notariaat* 2014, issue 16, (1) 2.

[361] I. SAMOY and K. RONSIJN, "Professionele aansprakelijkheid notaris", 2015, (47) 71, no. 56.

[362] H. COUSY, "Het 'noblesse oblige' van het vrij beroep: van aansprakelijkheid naar verzekering", *TPR* 2004, (89) 98 and 102-104; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, no. 6, 6.

[363] *See* on this matter: K. RONSIJN and I. SAMOY, "De nieuwe wettelijke regeling voor de burgerlijke professionele aansprakelijkheid van de notaris", *Not.Fisc.M.* 2014, issue 10, (242) 247, no. 26 *et seq*.; I. SAMOY and K. RONSIJN, "Professionele aansprakelijkheid notaris", 2015, (47) 72 *et seq.*

97. MODERATION AS AN ALTERNATIVE? – One might wonder whether the legislator couldn't have taken a different angle to deal with the issue of professional liability. The idea of a general competence to moderate such as Art. 6:109 DCC[364] comes to mind. Dutch authors have considered this possibility when dealing with professional liability.[365] No wonder, since the professions of a doctor or a notary, for example, involve considerable risks.[366] But one could take sides with DE VRIES, who argued that trade or business requires something more than merely the hope of having the judge applying Art. 6:109 DCC. More certainty is needed.[367] The answer given by BRUNNER heads directly into the direction taken by the Belgian legislator when addressing the issue of professional liability of the notary. He states that the entrepreneur has two options to limit his liability.[368] The first option is to exercise his profession in a partnership. The second option is taking out adequate liability insurance. Of course, both options are not exclusive. If we consider the incentive given by the Belgian legislator to notaries to opt for a partnership and bear the obligatory liability insurance in mind, it corresponds to the suggestions made by BRUNNER. It seems that the Belgian legislator has provided more legal certainty to both entrepreneurs and insurance companies by setting the limit himself instead of relying on the decision of the judge in the particular case. With regard to the tort liability of the notary towards third parties, suggestions have been made in Dutch doctrine to apply Art. 6:110 DCC[369] in order to limit the amounts of the possible compensation.[370] So far, the Dutch government hasn't used the provision, given the possible objections such as the deviation from the principle of full compensation.[371] Still, the notary is obligated to sufficiently take out insurance for patrimonial loss and, with regard to the risk of professional liability, it should at least cover the amount of 25 million euros per claim.[372] It thus seems that only the actual limitation of the

[364] *Cf. infra*, Section IV, Subsection I.
[365] *See* references in T.E. DEURVORST, "Artikel 109" in *GS Schadevergoeding*, 2011, no. 108.
[366] T.E. DEURVORST, "Artikel 109" in *GS Schadevergoeding*, 2011, no. 108.
[367] F.J. DE VRIES, "Vrijtekening van beroepsaansprakelijkheid", *Ars aequi* 1995, issue 3, (186) 191.
[368] C.J.H. BRUNNER, *Aansprakelijkheid naar draagkracht*, Deventer, Kluwer, 1973, 16 *et seq. See also*: W.J. SLAGTER, "Verandering van rechtsvorm of exoneratieclausule?", *Maandblad voor Ondernemingsrecht en rechtspersonen (TVVS)* 1995, (93) no. 2.
[369] *Cf. supra*, no. 87.
[370] T. HARTLIEF, "De notariële beroepsaansprakelijkheid en haar verzekering. Spannende tijden voor het notariaat?", *Weekblad voor Privaatrecht, Notariaat en Registratie* 2004, issue 6586, (575) no. 10.
[371] T. HARTLIEF, "De notariële beroepsaansprakelijkheid en haar verzekering. Spannende tijden voor het notariaat?", *Weekblad voor Privaatrecht, Notariaat en Registratie* 2004, issue 6586, (575) no. 10.
[372] Art. 15 Verordening beroeps- en gedragsregels 2011 (by the Royal Notary Professional Association), taken on the basis of Art. 61, §2 Wet van 3 april 1999, houdende wettelijke regeling van het notarisambt, mede ter vervanging van de Wet van 9 juli 1842, Stb. 20, op het Notarisambt en de Wet van 31 maart 1847, Stb. 12, houdende vaststelling van het tarief betreffende het honorarium der notarissen en verschotten (Wet op het notarisambt), *Stb*. 1999, 190; W.G. HUIJGEN and A.J.H. PLEYSIER, *De wetgeving op het notarisambt*, Deventer, Kluwer, 2001, no. 46, 163; J.C.H. MELIS, revised by B.C.M. WAAIJER, *De Notariswet*, Deventer, Kluwer, 2012, no. 27.2.5, 416. *See* on the history of the Dutch Law on the Notary: D.T. BOKS, *Notariële aansprakelijkheid. Enkele aspecten van de civielrechtelijke aansprakelijkheid van de notaris*, Deventer, Kluwer, 2002, 5-18. *See* on

notary's liability was a bridge too far for the Dutch government in comparison with the Belgian legislator.

the further limitation of the insurance: M.L. HENDRIKSE, *Weekblad voor Privaatrecht, Notariaat en Registratie* 2000, 460-463.

Subsection II. Liability for industrial accidents

98. DELINEATION – The first Law on industrial accidents dates back to the beginning of the previous century. Therefore, the context will be important. However, this subsection will not provide an extensive historical overview. Instead, the problems within the historical setting will be sketched before focusing on the reasons for having introduced the Law(s) on industrial accidents. Given the particular angle of this thesis, this subsection will zoom in on the relationship between the victim-employee and the employer-causer of the loss, thus leaving aside the issue of third parties causing loss. The hierarchy between the Law(s) on industrial accidents and common tort law will only be touched upon from that perspective, which comes down to the civil immunity of the employer. That way, the delineation of the examination of the liability for industrial accidents can allow for a focus on the deviation from the principle of full compensation.

99. PROBLEMS[373] – Industrial accidents brought along several difficulties. In case of an industrial accident, the victim's claim for compensation would have to be brought against either his employer or one of his co-workers, which could threaten the enterprise's social climate.[374] Moreover, common tort law failed to adequately deal with the changing society in the 19th century.[375] It didn't protect the victim of an industrial accident against the risk of insolvency of the person held liable and the furnishing of proof was far from easy.[376] According to the preparatory works of the Law of the 10th of April 1971, the evidentiary problems resulted in granting practically no compensations to employees.[377] People had the idea that it seemed quite unfair to leave the victims of industrial accidents to their own devices.[378]

100. FIRST LAW ON INDUSTRIAL ACCIDENTS[379] – These problems were addressed by the Law of the 24th of December 1903, which created a regime based on strict liability.[380] The

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[373] *See* on the societal context of the 19th century as a catalyst and the run-up towards the Law on industrial accidents: V. VERVLIET, *Professionele risico's*, 2007, 11-76.
[374] N. SIMAR and L. DE ZUTTER, "L'évaluation du dommage", 1999, (1) 45, no. 303.
[375] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, no. 396, 244; V. VERVLIET, *Professionele risico's*, 2007, 116-118, nos. 153-156.
[376] N. SIMAR and L. DE ZUTTER, "L'évaluation du dommage", 1999, (1) 45, no. 304; N. SIMAR and J. TINANT, "Les accidents du travail", 2001, (57) 59. *See also*: MvT bij wetsontwerp over de vergoeding van schade door arbeidsongevallen, *Parl.St.* Kamer 1900-01, no. 123, 1. *Similarly* in France: H. LALOU, *Traité*, 1962, 734, no. 1304.
[377] MvT bij ontwerp van arbeidsongevallenwet, *Parl.St.* Senaat 1969-70, no. 328, 1.
[378] V. VERVLIET, *Professionele risico's*, 2007, 77, no. 93.
[379] *See* on the parliamentary history of the Law on industrial accidents: V. VERVLIET, *Professionele risico's*, 2007, 78-80, nos. 95-102.
[380] N. SIMAR and L. DE ZUTTER, "L'évaluation du dommage", 1999, (1) 45, no. 305; N. SIMAR and J. TINANT, "Les accidents du travail", 2001, (57) 59; V. VERVLIET, *Professionele risico's*, 2007, no. 94, 77 and 118-121, nos. 157-161.

employer's liability had made way for a professional risk[381], namely "*the risk to which the victim is exposed due to his professional activity or due to the natural, technical or human environment in which he is placed*".[382] The risks of the working environment has replaced the fault as the foundation for the compensation for industrial accidents.[383] The idea was that the employer benefited from the use of dangerous machines, so why not hold him liable for loss caused by that machinery?[384] The notion of "*profit oblige*" shimmers through. Since the victim no longer has to prove his employer's fault for the employer to be held liable, the principle of full compensation would place a heavy burden on the employer. In order to avoid a too heavy burden, the legislator introduced a fixed compensation instead of a full compensation so as to lighten the burden of the automatic liability.[385] The underlying idea, however, was that industrial accidents were caused just as much by employees' faults as by employers' faults,[386] which still seems to hold on to the notion of "*faute oblige*".

101. HISTORICAL COMPROMISE – The main goal of the Law of 1903 was preserving social peace[387] and improving the relation between employers and employees.[388] It was achieved by balancing the interests of both groups.[389] On the one hand, the professional risk shouldn't be carried by the employees alone. They should be entitled to some compensation without the costs and insecurity of lengthy legal proceedings. Yet, the employers had to be protected against the burden of unfixed compensations. The underlying idea is the "*bloc du risque*".[390] Industrial accidents are seen as an inherent risk to the employment contract that have to be divided among

[381] Verslag door M. VAN CLEEMPUTTE bij wetsontwerp over de vergoeding van schade door arbeidsongevallen, *Parl.St.* Kamer 1900-01, no. 302, 4 and 7. *Similarly* in France: Y. BUFFELAN-LANORE and V. LARRIBAU-TERNEYRE, *Droit civil*, 2014, 555, no. 1512; H. LALOU, *Traité*, 1962, no. 1308, 737.

[382] N. SIMAR and L. DE ZUTTER, "L'évaluation du dommage", 1999, (1) 45, no. 306. *Own translation, original text: "c'est-à-dire celui auquel la victime est exposée soit en raison de son activité professionnelle, soit en raison du milieu naturel, technique ou humain dans lequel elle se trouve placée". Similarly*: V. VERVLIET, *Professionele risico's*, 2007, 80, no. 103.

[383] MvT bij ontwerp van arbeidsongevallenwet, *Parl.St.* Senaat 1969-70, no. 328, 1; V. VERVLIET, *Professionele risico's*, 2007, 80, no. 103.

[384] V. VERVLIET, *Professionele risico's*, 2007, no. 94, 77.

[385] N. SIMAR and J. TINANT, "Les accidents du travail", 2001, (57) 59; V. VERVLIET, *Professionele risico's*, 2007, no. 94, 77.

[386] V. VERVLIET, *Professionele risico's*, 2007, no. 94, 77 and 147-148, no. 198.

[387] Note that the principle of full compensation itself has sometimes been linked to the goal of social peace: C. LIENHARD, "2nde partie: Le principe de réparation intégrale et ses conséquences en droit interne", *Gaz.Pal.* 2010, (1213) 1213.

[388] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, no. 399, 247; V. VERVLIET, *Professionele risico's*, 2007, 81, no. 105.

[389] V. VERVLIET, *Professionele risico's*, 2007, 81, no. 105. *See* also: MvT bij wetsontwerp over de vergoeding van schade door arbeidsongevallen, *Parl.St.* Kamer 1900-01, no. 123, 2.

[390] MvT bij wetsontwerp over de vergoeding van schade door arbeidsongevallen, *Parl.St.* Kamer 1900-01, no. 123, 2-3; V. VERVLIET, *Professionele risico's*, 2007, no. 106, 81. *See* for a link between a similar block of risks and distributive justice: J.H. NIEUWENHUIS, "Eurocausaliteit. Agenda voor het Europese debat over toerekening van schade", *TPR* 2002, issue 4, (1695) no. 32, 1727.

both parties – employers and employees – according to "*fairness and humanity*"[391]. Thus, the economic tenability of the compensations was safeguarded, the demands of fairness and reasonableness were met and the number of lawsuits between employers and employees was reduced.[392] Both the idea of fairness and economic interests supported the introduction of a fixed compensation.[393] In France, a similar balancing of the interests of both the employers and the employees is present in the regime installed by the Law of the 9th of April 1898 regarding the liability for industrial accidents.[394] On the one hand, the victim could obtain compensation even in the absence of (having to prove) a fault of the employer, on the other hand, the employers gained immunity in the form a fixed amounts for the compensation due.[395] The regime has been integrated in the Social Security Code (Art. 411-1 *et seq.*) but the principle has remained the same: a strict liability in exchange for only limited compensation and immunity, albeit with some exceptions.[396]

102. LAW OF 1971 – The Law of 1903 was enriched by the Law of the 10th of April 1971 on industrial accidents[397], which introduced the duty for the employer to take out insurance for industrial accidents[398] and organised a direct claim[399] to the benefit of the victim against the

[391] MvT bij wetsontwerp over de vergoeding van schade door arbeidsongevallen, *Parl.St.* Kamer 1900-01, no. 123, 2.
[392] V. VERVLIET, *Professionele risico's*, 2007, no. 106, 82.
[393] MvT bij wetsontwerp over de vergoeding van schade door arbeidsongevallen, *Parl.St.* Kamer 1900-01, no. 123, 9; V. VERVLIET, *Professionele risico's*, 2007, no. 122, 92.
[394] *Own translation, original title*: "Loi du 9 avril 1898 concernant les responsabilités dans les accidents du travail", *JORF* 10th of April 1898, 2209.
[395] A. BOUILLOUX, "Histoire de la réparation des accidents du travail et des maladies professionnelles, le passage au forfait" in I. SAYN (ed.), *Le droit mis en barèmes?*, Paris, Dalloz, 2014, (149) 153; P. BRUN, *Responsabilité civile extracontractuelle*, 2014, no. 799, 545; J.-J. DUPEYROUX, M. BORGETTO and R. LAFORE, *Droit de la sécurité sociale*, Paris, Dalloz, 2015, no. 814, 623; M. FABRE-MAGNAN, *Droit des obligations*, II, 2013, 280-281; P. JOURDAIN, *J.-Cl. Civil Code, Art. 1382 à 1386*, *J.-Cl. Responsabilité civile et Assurances*, *J.-Cl. Notarial Répertoire, v° Responsabilité civile, Fasc. 123*, 2014, no. 57; J. JULIEN, *Droit des obligations*, 2012, 320, no. 426; M. KEIM-BAGOT, *De l'accident du travail à la maladie : la métamorphose du risque professionnel*, Paris, Dalloz, 2015, no. 71, 58; H. LALOU, *Traité*, 1962, no. 1308, 736; H. & L. MAZEAUD, J. MAZEAUD and F. CHABAS, *Leçons de Droit civil*, II, Vol. I, *Obligations. Théorie générale*, Paris, Montchrestien, 1991, no. 381, 335; C. RADÉ, *Droit du travail et responsabilité civile* in *Bibliothèque de droit privé*, CCLXXXII, Paris, LGDJ, 1997, 42, no. 64; G. VINEY and P. JOURDAIN, *Traité de droit civil*, 2011, 696, no. 311.
[396] P. BRUN, *Responsabilité civile extracontractuelle*, 2014, 545-546, no. 799; J.-P. CHAUCHARD, *Droit de la sécurité sociale*, Paris, LGDJ, 2010, no. 584, 465; M. FABRE-MAGNAN, *Droit des obligations*, II, 2013, 281; P. MORVAN, *Droit de la protection sociale*, Paris, LexisNexis, 2015, 151-152, no. 172; X. PRÉTOT, *Droit de la sécurité sociale*, Paris, Dalloz, 2015, 196.
[397] *Own translation, original title: "Arbeidsongevallenwet van 10 april 1971"*, *BS* 24th of April 1971, no. 1971041001, 5201.
[398] Art. 49 of the Law on industrial accidents of the 10th of April 1971. *See*: Verslag bij het wetsontwerp op de arbeidsongevallen, *Parl.St.* Kamer 1970-71, no. 887, 6.
[399] Although the notion is criticised from a terminological point of view: V. VERVLIET, *Professionele risico's*, 2007, 125, footnote 625.

insurer.[400] In the period between 1930 and 1971, taking out insurance was optional though the consequences and guarantees to the employees' benefit differed depending on whether the employer had taken out insurance.[401] Most employers had taken out insurance before 1971 so that the introduction of the compulsory insurance was seen as confirming the already existing situation.[402] Since the Law of 1971, the strict liability of the employer has been replaced by a duty to take out insurance and the employer's civil immunity is now justified by the payment of the premiums by the employer and by the desire of social peace keeping in the enterprise.[403]

103. THREE PILLARS – According to VERVLIET, three pillars can be identified as to the Law(s) on industrial accidents.[404] The strict liability of the employer constitutes the first pillar. The second pillar is the fixed compensation for the victims of industrial accidents. The third and final pillar should prevent the victim from obtaining full compensation by means of a claim based on common tort law. To that end, the employer is protected by a civil immunity. Within the setting of this thesis, the second and third pillars obviously should be considered the most interesting ones and they shall be further examined in the following paragraphs.

104. LIMITED LIABILITY…– The counterbalance to the guarantees given to the employees, victims of industrial accidents, is to be found within the second and third pillar, *i.e.* the limitation of both the employer's liability and the compensation granted to the victim.[405] Apart from the legal subrogation *ex* Art. 10 of the Law of the 24th of December 1903 and the limitation of the categories of claimants *ex* Art. 6 of the Law of the 24th of December 1903, the most significant limitation of the employer's liability was his civil immunity. In exchange for the certainty of receiving a (fixed) compensation, employees renounced their entitlement to compensation based on common Belgian tort law. Bearing in mind the idea of safeguarding social peace, this is logical. Only in case of intentional harm, Art. 21 of the Law of the 24th of December 1903 imposed the applicability of common tort law rules. Nowadays, Art. 46, §1 of the Law of the 10th of April 1971 on industrial accidents upholds the civil immunity of the

[400] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 245, no. 396; N. SIMAR and L. DE ZUTTER, "L'évaluation du dommage", 1999, (1) 45, no. 307; N. SIMAR and J. TINANT, "Les accidents du travail", 2001, (57) 59; V. VERVLIET, *Professionele risico's*, 2007, 124-125, no. 165.
[401] V. VERVLIET, *Professionele risico's*, 2007, 85-88, nos. 111-113. *See also*: MvT bij wetsontwerp over de vergoeding van schade door arbeidsongevallen, *Parl.St.* Kamer 1900-01, no. 123, 4.
[402] MvT bij ontwerp van arbeidsongevallenwet, *Parl.St.* Senaat 1969-70, no. 328, 29.
[403] V. VERVLIET, *Professionele risico's*, 2007, 126, no. 166 and no. 220, 165.
[404] V. VERVLIET, *Professionele risico's*, 2007, 83, no. 108 *et seq.* and 123, no. 162 *et seq.*
[405] N. SIMAR and J. TINANT, "Les accidents du travail", 2001, (57) 69; V. VERVLIET, *Professionele risico's*, 2007, 88-93, nos. 114-123.

employer,[406] based on an *a contrario* reasoning, but it contains more exceptions to the employer's civil liability than merely intentionally inflicted harm.[407]

105. …AND LIMITED COMPENSATION – By virtue of the Law on industrial accidents, victims of an industrial accident receive a fixed compensation instead of a full one, in order to compensate for leaving the idea of an employer's fault.[408] As a result, it constitutes a deviation from the principle of full compensation.[409] Both under the Law of 1903 and under the Law of 1971, there is a ban on accumulation of compensations so that the victim is not allowed to claim compensation twice for the same item of loss, namely on the basis of the Law on industrial accidents and on the basis of common Belgian tort law.[410] In the relation between the victim-employee and the employer who caused the loss, this means that the victim is dependent on the Law on industrial accidents for the scope of the compensation. As already stated, the compensation is not a full one but a fixed compensation. The limitation of the compensation contrasts with the Dutch perspective, laid down in Art. 7:658 DCC[411], particularly the second paragraph. The employer is (contractually) liable towards his employee with regard to the loss, without any further limitation, suffered in the exercise of his duties, unless the employer can prove his compliance with the obligations[412] in Art. 7:658, §1 DCC or in case the loss was to a significant extent caused by the employee's intention or deliberate recklessness. Thus, either the employer ends up paying a full compensation or nothing at all. It's "*all or nothing*".[413] Also

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[406] I. BOONE, "De verschillende belangen van slachtoffers en regresnemers: uitgangspunt voor een verschillend aansprakelijkheidsrecht?", *TPR* 2003, (929) no. 15, 942.

[407] *See* on these exceptions: V. VERVLIET, *Professionele risico's*, 2007, 164, no. 218 and 174, no. 237 *et seq.*

[408] N. SIMAR and L. DE ZUTTER, "L'évaluation du dommage", 1999, (1) 45, no. 308; N. SIMAR and J. TINANT, "Les accidents du travail", 2001, (57) 69; D. SIMOENS and J. HUYS, *Arbeidsongevallen*, Hasselt, Postuniversitair centrum Limburg, 1980, 47; V. VERVLIET, *Professionele risico's*, 2007, 147, no. 197.

[409] B. DUBUISSON, N. ESTIENNE and D. DE CALLATAŸ, "Droit belge", 2012, (171) 177; J.-L. FAGNART, "Droit belge", 2012, (195) 202; T. PAPART, "Droit belge" in F. LEDUC and P. PIERRE (eds.), *La réparation intégrale en Europe: études comparatives des droit nationaux*, Brussel, Larcier, 2012, (218) 220; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, no. 1084, 689.

[410] Art. 21, second paragraph of the Law of the 24th of December 1903 Art. 46, §2, second paragraph of the Law of the 10th of April 1971 on industrial accidents; H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, no. 399, 246; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 689-690, no. 1084; V. VERVLIET, *Professionele risico's*, 2007, 89-90, no. 118, 134, no. 177 and 149-150, no. 200.

[411] *See* for a general examination: M. FAURE and T. HARTLIEF, *Nieuwe risico's en vragen van aansprakelijkheid en verzekering*, Deventer, Kluwer, 2002, 24-34; J. SPIER *et alii*, *Schadevergoeding*, 2015, 219-241.

[412] Hence, it's considered a fault liability instead of a strict liability, *see*: A.T. BOLT and J. SPIER, with the cooperation of O.A. HAAZEN, *De uitdijende reikwijdte van de aansprakelijkheid uit onrechtmatige daad. Preadvies*, Zwolle, W.E.J. Tjeenk Willink, 1996, §3.2, 91; J. SPIER *et alii*, *Schadevergoeding*, 2015, no. No. 188, 225, with references to case law of het Hoge Raad.

[413] A.E. KRISPIJN and P. OSKAM, "Werkgeversaansprakelijkheid: Brengt de recente rechtspraak ons een stap verder?", *Tijdschrift voor Vergoeding Personenschade* 2008, issue 3, (83) 88 and 94; J.H. WANSINK, "Onverzekerbare aansprakelijkheid, 2000, (407) 410; Y.R.K. WATERMAN, *De aansprakelijkheid van de werkgever voor arbeidsongevallen en beroepsziekten*, Den Haag, Boom Juridische uitgevers, 2009, 139.

the rule *ex* Art. 6:170, §1 DCC contains no limitations.[414] It states that the employer for which the employee fulfils his duties, is liable for loss caused by the employee's tort on the condition that the likelihood that the tort would be committed, has been increased by the employee's duties and that the employer had control over the wrongful conduct pursuant to the legal relationship between both parties.[415] Yet, while Belgium limits the compensation with regard to both the items of loss and the amounts, Dutch law might not need such particular limitations because of the general competence to moderate *ex* Art. 6:109 DCC.[416]

106. LIMITATION OF THE ITEMS OF LOSS – Although the compensations have been raised throughout the 20th century, there is still no full compensation due to limitations as to both the amount and the items of loss which can be compensated for.[417] The preparatory works of the Law of 1971 allege that the principle of full compensation is adhered to while at the same time stating that a fixed calculation for the amount is followed.[418] Obviously, the use of fixed elements, whether by means of a fixed amount or by using them to base the calculation of the compensation on, deviates from the appreciation *in concreto* and the principle of full compensation. Firstly, not all items of loss can be compensated for under the Law on industrial accidents.[419] The loss resulting from the inability to work[420] or the death[421] caused by the accident ("*the material professional loss*") are compensated for.[422] Also some costs believed to be necessary due to the accident are compensated for.[423] These include the costs for medical care[424], prostheses and orthopaedic appliances[425], relocation costs[426] and costs for a funeral and

[414] *See*: J. SPIER *et alii, Schadevergoeding*, 2015, 94-95, no. 87.
[415] M. HAENTJENS and E. DU PERRON, "Liability for Damage Caused by Others under Dutch Law" in J. SPIER, *Unification of Tort Law: Liability for Damage Caused by Others*, The Hague, Kluwer Law International, 2003, (171) 176, no. 21.
[416] In principle regardless of the liability ground, the provisions of section 6.1.10 DCC determine the content and the scope of the duty to compensate: S.D. LINDENBERGH, *Arbeidsongevallen en beroepsziekten* in *Monografieën Privaatrecht*, Deventer, Kluwer, 2009, 123, no. 52.
[417] N. SIMAR and J. TINANT, "Les accidents du travail", 2001, (57) 69; V. VERVLIET, *Professionele risico's*, 2007, no. 198, 148.
[418] Verslag bij ontwerp van arbeidsongevallenwet, *Parl.St.* Senaat 1970-71, no. 215, 3.
[419] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, no. 398, 245; E. CLAEYS-LEBOUCQ, "Overzicht van rechtspraak. Arbeidsongevallenrecht (1966-1970), *TPR* 1971, (267) 297, no. 47; W. VAN EECKHOUTTE, *Handboek Belgisch Socialezekerheidsrecht. Editie 2009*, Mechelen, Kluwer, 2009, 145, no. 264.
[420] Art. 22-25*ter* of the Law of the 10th of April 1971 on industrial accidents.
[421] Art. 12-21 of the Law of the 10th of April 1971 on industrial accidents.
[422] D. SIMOENS and J. HUYS, *Arbeidsongevallen*, Hasselt, Postuniversitair centrum Limburg, 1980, 47-48.
[423] V. VERVLIET, *Professionele risico's*, 2007, 148-149, no. 199.
[424] Art. 28-32*bis* of the Law of the 10th of April 1971 on industrial accidents.
[425] Art. 26 of the Law of the 10th of April 1971 on industrial accidents.
[426] Art. 33 of the Law of the 10th of April 1971 on industrial accidents.

repatriation in case of a deadly industrial accident.[427] Not all items of loss, however, qualify for compensation.[428] Damage to the victim's goods, for example, will not be compensated for.[429]

107. LIMITED AMOUNTS – Even if the item of loss can be compensated for under the Law on industrial accidents, the compensation granted will not always fully compensate for that particular item of loss. The compensations are fixed, except for medical costs, relocation costs and the prostheses.[430] For example, one could think of the compensation for temporary or permanent inability to work. They are fixed on the basis of the victim's limited basic wage,[431] which is believed to reflect his economic value on the general labour market.[432] Thus, the principle of full compensation has been set aside by a system of fixed compensations.[433]

[427] Art. 10 and 11 of the Law of the 10th of April 1971 on industrial accidents.
[428] N. SIMAR and J. TINANT, "Les accidents du travail", 2001, (57) 69.
[429] V. VERVLIET, *Professionele risico's*, 2007, no. 200, 149.
[430] A. UYTTENHOVE, "Verkeersongevallen en socialezekerheidsprestaties - de sociaalrechtelijke positie van verkeersslachtoffers", *TAVW* 1999, (239) 241; V. VERVLIET, *Professionele risico's*, 2007, no. 199, 149.
[431] I. BOONE, "De verschillende belangen van slachtoffers en regresnemers: uitgangspunt voor een verschillend aansprakelijkheidsrecht?", *TPR* 2003, (929) no. 7, 936.
[432] C. PERSYN, "Problemen bij de samenloop van vergoedingsregelingen: het gemene recht, arbeidsongevallen en ziekteverzekering", *RW* 1990-91, (273) 274; N. SIMAR and J. TINANT, "Les accidents du travail", 2001, (57) 73; A. VAN OEVELEN *et alii*, "Overzicht van rechtspraak", 2007, (933) 1342; V. VERVLIET, *Professionele risico's*, 2007, no. 199, 149.
[433] N. SIMAR and J. TINANT, "Les accidents du travail", 2001, (57) 70.

Section II: FRANCHISE IN THE LAW ON PRODUCT LIABILITY

108. FRANCHISE – Having examined the capped liabilities in the previous section, this second section will focus on another important example of a deviation from the principle of full compensation, namely the franchise in case of damage due to defective products.[434]

109. DEFECTIVE PRODUCTS – In today's consumer society, the importance of liability for losses due to defective products should not be underestimated.[435] Even at the European level, attention was given to the issue of unsafe products. The resulting Directive 85/374/EEG[436] ordering a "*liability without fault*"[437] was implemented in Belgian law by the Law on Product Liability.[438] It has introduced a system of strict liability[439] of the manufacturer for loss resulting from defective products.[440] The liability is no longer founded on guilt but on risk and the distribution of the burden of the loss.[441] The European legislator seems to be aware of the

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[434] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, nos. 336-337, 206; W. VAN GERVEN, *Verbintenissenrecht*, 2015, 462; P. VAN OMMESLAGHE, *Traité*, II, 2013, no. 1117, 1648-1649.

[435] *Similarly*: H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 190, no. 307. France: J. JULIEN, *Droit des obligations*, 2012, no. 402, 298-299.

[436] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, *Publ.L.* 7th of August 1985, 29-33. *See* for a general examination and evaluation: M. FAURE, "Productaansprakelijkheid in België en Europa: Quo vadis?" in E. DIRIX (ed.), *Liber amicorum Jacques Herbots*, Deurne, Kluwer, 2002, 111-130; M. FAURE and W. VANBUGGENHOUT, "Produktenaansprakelijkheid", 1987-88, 1-14 and 33-49. France: Y. MARKOVITS, *La Directive C.E.E. du 25 juillet 1985 sur la responsabilité du fait des produits défectueux* in *Bibliothèque de droit privé*, CCXI, Paris, LGDJ, 1990, 415 p.

[437] Second consideration Council Directive 85/374/EEC.

[438] *See* for a general examination of the Law on Product Liability: H. BOCKEN, "Buitencontractuele aansprakelijkheid voor gebrekkige producten" in X, *Bijzondere overeenkomsten. XXXIVste Postuniversitaire Cyclus Willy Delva 2007-2008*, Mechelen, Kluwer, 2008, (335) 357-380; H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 194-202, nos. 313-328; I. DEMUYNCK, "De bescherming van de consument", 2003, (7) 32-59; M. FALLON, "La loi du février 1991", 1991, 465-473; P. HENRY and J.-T. DEBRY, "La responsabilité du fait des produits défectueux : derniers développements" in B. DUBUISSON and P. HENRY (eds.), *Droit de la responsabilité. Morceaux choisis*, Brussel, Larcier, 2004, 129-196; E. MONTERO and J.-P. TRIAILLE, "La responsabilité du fait des produits en Belgique après l'adoption de la loi du 25 février 1991", *DCCR* 1990-91, 678-715; D. VAN DE GEHUCHTE, *Productaansprakelijkheid*, 2000, 27-75; T. VANSWEEVELT, "De Wet produktenaansprakelijkheid", 1992, 96-122 and 184-216; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 479-551; J. VERLINDEN, "Twintig jaar productaansprakelijkheid", 2005, (29) 31-40.

[439] The doctrinal qualification varies, *see*: I. DEMUYNCK, "De bescherming van de consument", 2003, (7) no. 116, 51, with references; T. VANSWEEVELT, "De Wet produktenaansprakelijkheid", 1992, (96) 98-99, no. 4; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, no. 782, 499 and references in footnote 2433. France: J. CALAIS-AULOY, "Existe-t-il en droit français plusieurs régimes de responsabilité du fait des produits ?" in J.-S. BORGHETTI, O. DESHAYES and C. PERES (Comité d'organisation), *Études offertes à Geneviève Viney. Liber amicorum*, Paris, LGDJ, 2008, (201) 202. The Netherlands: G.M.F. SNIJDERS, "Productenaansprakelijkheid, twintig jaren later" in P.F.A. BIERBOOMS, H. PASMAN and G.M.F. SNIJDERS (eds.), *Aspecten van aansprakelijkheid*, Den Haag, Boom Juridische uitgevers, 2005, (249) 250; J.M. VAN DUNNÉ, *Verbintenissenrecht*, 2004, 684. *Contra*: G. DE GEEST, "Schuldloze aansprakelijkheid" in N.F. VAN MANEN and R.H. STUTTERHEIM (eds.), *Honderd jaar billijkheid*, Nijmegen, Ars Aequi Libri, 1999, (79) 87.

[440] Art. 1 Law on Product Liability.

[441] MvT bij ontwerp van wet betreffende de aansprakelijkheid voor produkten met gebreken, *Parl.St.* Kamer 1989-90, no. 1262/1, 3.

societal change already addressed at the beginning of Chapter I of Part II of this thesis and considers the proposed regime to be "*a fair apportionment of the risks inherent in modern technological production*".[442] For reasons of fairness, the onus of proof should not fall on the victim.[443] From the particular perspective of this thesis, the Law on Product Liability is not only interesting given the importance of product liability but also because of the introduced franchise to be reckoned with when compensating. This section will focus on the reasons for the introduction of the franchise and the implications regarding the scope of the compensation.[444] As a preliminary remark, one should note that the Law on Product Liability constitutes permissive law.[445] Whoever suffers a loss which falls within the scope of the Law on Product Liability, can still claim compensation on the basis of common Belgian tort law.[446] Still, it will be clear that once the Law on Product Liability is applied, the principle of full compensation is deviated from.

110. ARTICLE 11 LAW ON PRODUCT LIABILITY – The scope of the Law on Product Liability is to a large extent limited as a result of Art. 11 Law on Product Liability,[447] which determines which loss can be compensated for.[448] Not every loss is to be compensated for within the framework of the Law on Product Liability. Harm to persons should be distinguished from damage to goods as only the second category will prove to be limited in terms of the

[442] Second consideration Council Directive 85/374/EEC.
[443] M. FAURE and W. VANBUGGENHOUT, "Produktenaansprakelijkheid", 1987-88, (1) 5, no. 9.
[444] *See* for a general examination of the Law on Product Liability: H. BOCKEN, "Buitencontractuele aansprakelijkheid voor gebrekkige producten" in X, *Bijzondere overeenkomsten. XXXIVste Postuniversitaire Cyclus Willy Delva 2007-2008*, Mechelen, Kluwer, 2008, (335) 357-380; H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 194-202, nos. 313-328; I. DEMUYNCK, "De bescherming van de consument", 2003, (7) 32-59; M. FALLON, "La loi du février 1991", 1991, 465-473; P. HENRY and J.-T. DEBRY, "La responsabilité du fait des produits défectueux : derniers développements" in B. DUBUISSON and P. HENRY (eds.), *Droit de la responsabilité. Morceaux choisis*, Brussel, Larcier, 2004, 129-196; E. MONTERO and J.-P. TRIAILLE, "La responsabilité du fait des produits en Belgique après l'adoption de la loi du 25 février 1991", *DCCR* 1990-91, 678-715; D. VAN DE GEHUCHTE, *Productaansprakelijkheid*, 2000, 27-75; T. VANSWEEVELT, "De Wet produktenaansprakelijkheid", 1992, 96-122 and 184-216; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 479-551; J. VERLINDEN, "Twintig jaar productaansprakelijkheid", 2005, (29) 31-40.
[445] *See* Art. 13 Law on Product Liability. Yet, one should take into account the case law of the Court of Justice of the European Union. *See*: HvJ C-183/00, *María Victoria González Sánchez t. Medicina Asturiana SA*, *Jur.* 2002, I, 3901.
[446] M. FALLON, "La loi du février 1991", 1991, (465) 467, no. 11; R. STEENNOT, "Overzicht van rechtspraak. Consumentenbescherming 2003-2007", *TPR* 2009, issue 1, (229) 518, no. 395; T. VANSWEEVELT, "De Wet produktenaansprakelijkheid", 1992, (96) no. 3, 97; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, no. 781, 497; J. VERLINDEN, "Twintig jaar productaansprakelijkheid", 2005, (29) no. 5, 31.
[447] *See* on this provision: T. VANSWEEVELT, "Commentaar bij art. 11 Wet 25 februari 1991" in *Comm.Bijz.Ov.* 2002, 7 p.
[448] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 195, no. 315.

compensation.[449] The corresponding Art. 6:190, §1 DCC and Art. 1386-2 FCC in Dutch and French law contain the same distinction.[450]

111. HARM TO PERSONS – According to Art. 11, §1 of the Law on Product Liability, all harm to persons qualifies for compensation, for example a loss of income or costs of treatment.[451] This may come as no surprise since the intention of the Directive's drafters was particularly to protect consumers' physical integrity against unsafe products.[452] Hence, also Art. 6:190, §1, a. DCC and Art. 1386-2 FCC contain no limitations to the scope of the compensation in case of physical harm or death. One could wonder why the compensation of moral loss is explicitly mentioned in the statutory provision. The Directive left the case of moral loss to the national legislator[453] for lack of a European consensus on its definition[454] and the Belgian legislator has explicitly opted for allowing for a compensation of moral loss.[455] The Dutch legislator hasn't made it equally explicit but extrapatrimonial loss linked to injury is included.[456] Art. 6:106 DCC will govern the compensation of that extrapatrimonial loss.[457]

112. POSSIBLE LIMITATIONS – No limitations have been introduced for the compensation of personal injuries so that its compensation is unlimited, without any supplementary requirement or franchise.[458] Art. 16 of the European Directive did enable the member states to limit the

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[449] MvT bij ontwerp van wet betreffende de aansprakelijkheid voor produkten met gebreken, *Parl.St.* Kamer 1989-90, no. 1262/1, 20; I. DEMUYNCK, "De bescherming van de consument", 2003, (7) 46-48, nos. 101-107; J.H. HERBOTS, C. PAUWELS and E. DEGROOTE, "Overzicht van rechtspraak. Bijzondere overeenkomsten (1988-1994)", *TPR* 1997, (647) no. 159, 765; E. MONTERO and J.-P. TRIAILLE, "La responsabilité du fait des produits en Belgique après l'adoption de la loi du 25 février 1991", *DCCR* 1990-91, (678) 688-89, no. 27; T. VANSWEEVELT, "De Wet produktenaansprakelijkheid", 1992, (184) 184, no. 44; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 518, no. 814; J. VERLINDEN, "Twintig jaar productaansprakelijkheid", 2005, (29) 45, no. 25.

[450] France: M. BACACHE-GIBEILI, *Traité de droit civil*, V, 2016, 872, no. 727 *et seq.*; M. FABRE-MAGNAN, *Droit des obligations*, II, 2013, 327; J. JULIEN, *Droit des obligations*, 2012, 306, no. 409; J. REVEL, *J.-Cl. Civil Code, Art. 1386-1 à 1386-18, Fasc. 20*, 2015, no. 14; A. SERIAUX, *Manuel de droit des obligations*, Paris, Presses Universitaires de France, 2014, no. 151, 199. The Netherlands: J. SPIER *et alii*, *Schadevergoeding*, 2015, 149-151, no. 144; C.J.J.M. STOLKER, "Artikel 190" in *GS Onrechtmatige daad*, 2011, nos. 2, 5 and 8; A.J. VERHEIJ, *Onrechtmatige daad*, 2005, no. 39, 136.

[451] *See*: C. VAN SCHOUBROECK, F. VERHOEVEN, M. WASTIAU and E. LAES, "Proeve van ontwerp Belgische aanpassingswet aan de EEG-richtlijn inzake Productaansprakelijkheid" in H. COUSY and H. CLAASSENS (eds.), *Produktaansprakelijkheid. Veiligheid en verzekering*, Antwerpen, Maklu, 1987, (25) 34.

[452] M. FAURE and W. VANBUGGENHOUT, "Produktenaansprakelijkheid", 1987-88, (1) 12, no. 24; T. VANSWEEVELT, "De Wet produktenaansprakelijkheid", 1992, (184) no. 45, 184; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 518-519, no. 815.

[453] Art. 9 Council Directive 85/374/EEC.

[454] M. FAURE and W. VANBUGGENHOUT, "Produktenaansprakelijkheid", 1987-88, (1) 12, no. 24.

[455] D. VAN DE GEHUCHTE, *Productaansprakelijkheid*, 2000, 46; T. VANSWEEVELT, "De Wet produktenaansprakelijkheid", 1992, (184) no. 45, 184.

[456] J.L.P. CAHEN, *Nederlands burgerlijk recht*, 2002, 175, no. 186; C.J.J.M. STOLKER, "Artikel 190" in *GS Onrechtmatige daad*, 2011, no. 6.

[457] J. SPIER *et alii*, *Schadevergoeding*, 2015, no. 144, 150.

[458] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 195, no. 315; I. DEMUYNCK, "De bescherming van de consument", 2003, (7) no. 102, 46; T. VANSWEEVELT, "De Wet produktenaansprakelijkheid",

manufacturer's liability for serial harm (in the case of harm to persons) to an amount of at least 70 million euros.[459] The Dutch legislator hasn't used this possibility,[460] neither did the French legislator out of loyalty to the principle of full compensation.[461] The Belgian legislator hasn't used it either and the preparatory works explicitly list three reasons for that decision.[462] Firstly, other Belgian systems of strict liability don't have such a cap so that introducing the cap of at least 70 million euros would run counter to our legal tradition. One might wonder whether this argument is still valid today. Secondly, practical difficulties could arise such as how to divide the maximum amount and what to do if victims show up after payment of the first compensations. Thirdly, the effectiveness of such cap is questioned, given the subsidiary nature and the possibility of obtaining full compensation on the basis of common Belgian tort law. Parliamentarians FORET, MUNDELEER and MAHIEU have handed in an amendment[463] to introduce the cap in case of serial harm to persons. They justified the cap by arguing that the limitation of the liability is often the counterbalance to having a strict liability, which implies a heavier burden than guilt-based liability. Moreover, products threaten to become more expensive without the cap and enterprises will not be able to take out insurance.[464] However valid these reasons may seem, the amendment was rejected.

113. DAMAGE TO GOODS – Art. 11, §1 of the Law on Product Liability already announces the limitations which will follow when compensating the damage to goods: *"with reservation of the following provisions, the damage to goods*"[465]. Art. 11, §2 includes several limitations,[466]

1992, (184) no. 45, 184; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 519, no. 816. France: M. BACACHE-GIBEILI, *Traité de droit civil*, V, 2016, no. 728, 873.

[459] J. GHESTIN, "La directive communautaire du 25 juillet 1985 sur la responsabilité du fait des produits défectueux", *D.* 1986, chron., (135) 141-142. Allegedly, the (West-)German tradition of the limited *Gefährdungshaftung* (strict liability) is the underying reason: F. DE VRIES, *Wettelijke limitering*, 1990, no. 111, 92.

[460] T.E. DEURVORST, "Artikel 110" in *GS Schadevergoeding*, 2011, no. 13, a.; W.H. VAN BOOM and C.J.M. VAN DOORN, "Productaansprakelijkheid en productveiligheid" in E.H. HONDIUS and G.J. RIJKEN (eds.), *Handboek Consumentenrecht*, Zutphen, Uitgeverij Paris, 2006, (261) 267.

[461] C. CAILLE, *Rép. civ. Dalloz* 2003, *v° Responsabilité du fait des produits défectueux*, no. 36, 6; G. VINEY and P. JOURDAIN, *Traité de droit civil*, 2011, no. 314, 699.

[462] MvT bij ontwerp van wet betreffende de aansprakelijkheid voor produkten met gebreken, *Parl.St.* Kamer 1989-90, no. 1262/1, 6; Verslag bij het wetsontwerp betreffende de aansprakelijkheid voor produkten met gebreken, *Parl.St.* Kamer 1989-90, no. 1262/5, 3; Verslag bij het ontwerp van wet betreffende de aansprakelijkheid voor produkten met gebreken, *Parl.St.* Senaat 1990-91, no. 1136-2, 3.

[463] Amendement (FORET, MUNDELEER and MAHIEU) op het wetsontwerp betreffende de aansprakelijkheid voor produkten met gebreken, *Parl.St.* Kamer 1989-90, no. 1262/2, 1-2.

[464] *See also*: Verslag bij het wetsontwerp betreffende de aansprakelijkheid voor produkten met gebreken, *Parl.St.* Kamer 1989-90, no. 1262/5, 8 and 14.

[465] *Own translation, original text: "onder voorbehoud van de hiernavolgende bepalingen, de schade toegebracht aan goederen."*

[466] I. DEMUYNCK, "De bescherming van de consument", 2003, (7) 47-48, nos. 104-107; E. MONTERO, "Les produits défectueux dans un écheveau de responsabilités" (note to Luik 7 november 2005), *TBBR* 2006, (624) no. 7, 626; J. VERLINDEN, "Twintig jaar productaansprakelijkheid", 2005, (29) 45, no. 26.

similar to those in Art. 6:190 DCC.[467] One should note, however, that the reasoning of granting a full compensation for damage to goods (as is the case for harm to persons) has been suggested in the past as well.[468]

114. CONSUMPTION WITHIN THE PRIVATE SPHERE – The first limitation is that damage to goods, other than the defective product itself, can only be compensated when an objective and subjective criterion are met: the damaged item should be ordinarily intended for private use or consumption and the victim should have mainly used it for his own private use or consumption.[469] In light of the general aim of the European Directive, *i.e.* the protection of the (private) consumer, this makes sense,[470] although according to VANSWEEVELT and WEYTS the equality among sufferers of a loss is lost due to this precondition.[471] Art. 1386-2 FCC, however, does not contain this limitation so that damage to professional goods is compensated for in French law, contrary to Belgian law.[472]

115. DEFECTIVE PRODUCT EXCLUDED – The second limitation also concerns the range of goods, the damage of which can give rise to compensation claims. According to Art. 11, §2, second paragraph of the Law on Product Liability, damage to the defective product itself does not lead to a claim for compensation.[473]

116. FRANCHISE – The third and final limitation is the most interesting one for the purpose of this thesis. It concerns the scope of the compensation for the aforementioned damage to (a limited range of) goods. Art. 11, §2, third paragraph of the Law on Product Liability and Art.

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[467] J. SPIER *et alii*, *Schadevergoeding*, 2015, no. 144, 150-151.

[468] *See* the proposed Art. 148 in T. BOURGOIGNIE, *Propositions pour une loi générale sur la protection des consommateurs : rapport de la commission d'étude pour la réforme du droit de la consommation (Ministère des affaires économiques. Administration de la politique commerciale)*, Brussel, Administration de l'information économique, 1995, 243.

[469] Art. 11, §2, first paragraph Law on Product Liability; P. STORM, "Een gebrekkig product", *TVVS* 1985, (241) 243; T. VANSWEEVELT, "De Wet produktenaansprakelijkheid", 1992, (184) 185-186, nos. 46-48; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 519-521, nos. 817-819. The Netherlands: Art. 6:190, §1, b. DCC; J.L.P. CAHEN, *Nederlands burgerlijk recht*, 2002, 175, no. 186; J. SPIER *et alii*, *Schadevergoeding*, 2015, no. 144, 150; C.J.J.M. STOLKER, "Artikel 190" in *GS Onrechtmatige daad*, 2011, no. 10; R.C. VAN DER WERFF, *Verbintenissenrecht* in kern*zaken burgerlijk recht*, Deventer, Kluwer, 2008, 155.

[470] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 195, no. 315.

[471] T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 521, no. 820.

[472] M. BACACHE-GIBEILI, *Traité de droit civil*, V, 2016, no. 729, 875; C. CAILLE, *Rép. civ. Dalloz* 2003, *v° Responsabilité du fait des produits défectueux*, 5, no. 33.

[473] T. VANSWEEVELT, "De Wet produktenaansprakelijkheid", 1992, (184) 187-188, no. 50; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 522-523, no. 822. France: M. BACACHE-GIBEILI, *Traité de droit civil*, V, 2016, no. 727, 872. The Netherlands : J. SPIER *et alii*, *Schadevergoeding*, 2015, no. 144, 150.

6:190, §1, b. DCC both fixe a franchise of 500 euros.[474] The franchise for the compensation of damage to goods constitutes a deviation from the principle of full compensation.[475] The European legislator intended to prevent too many lawsuits.[476] *De minimis non curat praetor*. Yet, the resistance of certain member states against granting compensation for damage to goods on the basis of the Directive will have played a role as well.[477] Despite disagreement on the interpretation of the franchise's range in the Directive,[478] the Belgian legislator – along with the majority in Belgian doctrine[479] – has considered it to be a deductive franchise ("*aftrekfranchise*").[480] Whenever a loss falls within the scope of the Law on Product Liability, an important question will thus be whether the loss to goods exceeds the amount of 500 euros. For example, a damage worth 150 euros cannot be compensated for under the Law on Product Liability.[481] The Dutch legislator has taken a different perspective on the nature of the franchise. It is considered to be a threshold franchise ("*drempelfranchise*") so that the entire loss is compensated on the condition that it amounts to at least the franchise.[482] The French legislator at first hadn't even introduced a franchise. After being condemned for this by the Court of Justice of the European Union in 2002,[483] Art. 1386-2 FCC was changed so that damage to goods is compensated for in as far as it exceeds an amount fixed by decree.[484] Art. 1 of the

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[474] *See* Art. 9 Council Directive 85/374/EEC. This franchise is compulsory: P. HENRY and J.-T. DEBRY, "La responsabilité du fait des produits défectueux : derniers développements" in B. DUBUISSON and P. HENRY (eds.), *Droit de la responsabilité. Morceaux choisis*, Brussel, Larcier, 2004, (129) 152-155, nos. 19-21 with reference to HvJ C-154/00, *Commissie t. Griekenland*, *Jur.* 2002, I, 3879 and HvJ C-52/00, *Commissie t. Frankrijk*, *Jur.* 2002, I, 3827.

[475] H. BOCKEN, "Buitencontractuele aansprakelijkheid voor gebrekkige producten" in X, *Bijzondere overeenkomsten. XXXIVste Postuniversitaire Cyclus Willy Delva 2007-2008*, Mechelen, Kluwer, 2008, (335) 364, no. 36; H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 195, footnote 757 and no. 336, 206; M. FALLON, "La loi du février 1991", 1991, (465) 471, no. 30; T. VANSWEEVELT, "De Wet produktenaansprakelijkheid", 1992, (184) no. 97, 213; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, no. 1084, 690.

[476] Ninth consideration Council Directive 85/374/EEC.

[477] M. FAURE and W. VANBUGGENHOUT, "Produktenaansprakelijkheid", 1987-88, (1) no. 26, 13.

[478] M. FAURE and W. VANBUGGENHOUT, "Produktenaansprakelijkheid", 1987-88, (1) no. 26, 13.

[479] J.-L. FAGNART, "La directive du 25 juillet 1985 sur la responsabilité du fait des produits", *CDE* 1987, (3-68) 16; L. CORNELIS, "Aansprakelijkheid voor gevaarlijke stoffen", *RW* 1987-88, (1137) 1147.

[480] The statutory text is clear: "(…) *after deduction of a franchise of 500 euro*". *See*: M. FALLON, "La loi du février 1991", 1991, (465) no. 13, 468; D. VAN DE GEHUCHTE, *Productaansprakelijkheid*, 2000, 49; T. VANSWEEVELT, "De Wet produktenaansprakelijkheid", 1992, (184) 186187, no. 49; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, no. 821, 522. *See* for an application of the franchise: Rb. Brugge, 30 oktober 2000, *RW* 2001-02, 1182; Vred. Gent 2 mei 1997 and 5 september 1997, *AJT* 1999-2000, 461.

[481] Luik 7 november 2005, *TBBR* 2006, 620, note E. MONTERO.

[482] A.L.M. KEIRSE, "Richtlijn 1985/374/EG inzake de aansprakelijkheid voor producten met gebreken" in A.S. HARTKAMP, C.H. SIEBURGH, L.A.D. KEUS, J.S. KORTMANN and M.H. WISSINK (eds.), *De invloed van het Europese recht op het Nederlandse privaatrecht*, Deventer, Kluwer, 2014, (33) 52-53; J. SPIER *et alii*, *Schadevergoeding*, 2015, no. 144, 151; C.J.J.M. STOLKER, "Artikel 190" in *GS Onrechtmatige daad*, 2011, no. 11.

[483] HvJ C-52/00, *Commissie t. Frankrijk*, *Jur.* 2002, I, 3827.

[484] M. BACACHE-GIBEILI, *Traité de droit civil*, V, 2016, no. 729, 875-876; P. BRUN, *Responsabilité civile extracontractuelle*, 2014, no. 747, 509; M. FABRE-MAGNAN, *Droit des obligations*, II, 2013, 326-327; J. JULIEN,

Decree of the 11th of February taken for the application of Art. 1386-2 of the civil code has fixed that amount at 500 euros.[485]

Droit des obligations, 2012, 306, no. 409; Y. LAMBERT-FAIVRE and S. PORCHY-SIMON, *Droit du dommage corporel*, 2011, 819, no. 757; J. REVEL, *J.-Cl. Civil Code, Art. 1386-1 à 1386-18, Fasc. 20*, 2015, no. 14.

[485] Décret n°2005-113 du 11 février 2005 pris pour l'application de l'article 1386-2 du code civil, NOR JUSC0520040D. Applied in: Cass. Civ. 1re 3 mai 2006, *RCA* 2006, comm. n° 303.

Section III: CONSIDERING MORE THAN MERELY THE LOSS

117. OTHER ELEMENTS THAN THE LOSS – Other standards than the mere loss could be used in determining the scope of the compensation, such as the gain or the advantage for the author of the loss, received by his tort. We already pointed at Art. 6:100 DCC which does allow the Dutch judge to take into account the benefits gained by the sufferer of the loss due to the tort.[486] The amount of the compensation could also vary depending on the level of guilt of the author of the loss. Prevailing Belgian law does not allow the judge to adjust the compensation to the minor nature of the fault.[487] Consequently, both the most severe fault and the smallest one give rise to a duty to compensate for the damage caused.[488] Nonetheless, judges have sometimes taken the severity of the fault or the level of guilt into consideration, for example in cases of an evaluation *ex aequo et bono* of the compensation.[489] Moreover, it seems highly unlikely that – judging in fairness – the civil judge will never consider the financial capacities of the parties or the existence of insurance.[490] Their sovereign margin of appreciation cannot be ignored, according to French doctrine.[491] The scope of the compensation could also relate to the financial capacity of the parties.[492] Although an adjustment of the compensation to the situation of the parties is

[486] *Cf. supra*, no. 77.
[487] Cass. 10 oktober 1949, *RW* 1949-50, 745; R.O. DALCQ, *Traité*, II, 1962, 744, no. 4146 en 4149; R. DEKKERS *et alii*, *Handboek*, 2007, no. 309, 175; H. DE PAGE, *Traité*, 1964, no. 907, 2°, 869 en 1064, no. 1021; E. DIRIX, *Schade*, 1984, no. 30, 34; J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, 174, no. 233 en no. 269, 202-203; N. SIMAR and L. DE ZUTTER, "L'évaluation du dommage", 1999, (1) no. 39, 22; D. SIMOENS, *Schade en schadeloosstelling*, 1999, no. 10, 23; A. VAN OEVELEN, "La modération de la réparation du dommage", 1996, (65) no. 5, 67; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 666, no. 1055. *Similarly* in France: M. BACACHE-GIBEILI, *Traité de droit civil*, V, 2016, no. 597, 716. *Similarly* in the Netherlands: A.R. BLOEMBERGEN, *Schadevergoeding*, 1965, 121, no. 87, a.
[488] R.O. DALCQ, *Traité*, II, 1962, 744, no. 4146; E. DIRIX, *Schade*, 1984, no. 30, 34; J.-L. FAGNART, *Examen de la jurisprudence concernant la responsabilité civile 1968-1975*, Brussel, Larcier, 1976, 97, no. 118; J. RONSE, *Schade en schadeloosstelling (onrechtmatige daad)*, 1957, no. 268, 237; D. SIMOENS, *Schade en schadeloosstelling*, 1999, no. 10, 23.
[489] R.O. DALCQ, *Traité*, II, 1962, 744, no. 4147; N. SIMAR and L. DE ZUTTER, "L'évaluation du dommage", 1999, (1) no. 39, 22; H. ULRICHTS, "Schadevergoeding wegens morele schade", 2015, (107) no. 5, 111 (with references to judgments); I. VRANCKEN, "*Punitive damages* in het buitencontractueel aansprakelijkheidsrecht", *TBBR* 2014, issue 9, (426) no. 8, 430, with references. *Cf. infra*, no. 147. France: F. LEDUC, *Fasc. 201*, 2014, nos. 90-91, with references; M. PÉRIER, *J.-Cl. Civil Code*, *Art. 1382 à 1386* and *J.-Cl. Responsabilité civile et Assurances*, *Fasc. 202-1-1*, 2015, no. 55. No wonder that this is noted as a decisive factor in deciding whether or not to moderate: P. ABAS, *Rechterlijke matiging*, 2014, no. 12, 18.
[490] W. VAN GERVEN, "Overzicht en tendensen aansprakelijkheidsrecht", 1972, (267) 294-298. *See also* for France: J. PECHINOT, "Droit français", 2012, (126) 131.
[491] I. BESSIERES-ROQUES, C. FOURNIER, H. HUGUES and F. RICHE, *Précis d'évaluation du dommage corporel*, Paris, L'Argus, 1997, 63; P. BRUN, *Responsabilité civile extracontractuelle*, 2014, 399, no. 593; H. GROUTEL, "Droit français", 2012, (107) 114-115; F. LEDUC, *Fasc. 201*, 2014, no. 52; G. VINEY and P. JOURDAIN, *Traité de droit civil*, 2011, no. 62, 177 *et seq*. *See also*: T. IVAINER, "Le pouvoir souverain du juge dans l'appréciation des indemnités réparatrices", *D.* 1972, chron., 7-12.
[492] J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, 174, no. 233 en no. 265, 199.

not allowed, nor in Belgium,[493] neither in the Netherlands[494] or France[495], the rise of liability insurances seem to have had an influence.[496] Instead of being confronted with the author of the loss, rather negligent than malicious, courts are now dealing with insurance companies. As a result, they tend to be more pitiless.[497] In Belgian and Dutch law, the fact that the author of the loss has insured himself cannot influence the compensation either.[498] Over fifty years ago, VAN GERVEN already suggested that this should be changed.[499] He stated that the replacement of guilt as the main foundation for liability by compulsory insurance could contribute to the adaptation of Belgian tort law. However, he added that the compulsory insurance as the sole ground for liability should be avoided, since it would lead to carelessness and a lack of responsibility. Whenever guilt (fault) would remain the ground for liability, a judicial competence to moderate would perhaps constitute a useful innovation.

118. TWO DEVIANT SYSTEMS – The third section of this chapter focusses on legislative interventions enabling the judge to consider other elements than merely the loss in determining the scope of the compensation. First, the important legal exception to the principle of full compensation in Art. 1386*bis* BCC will be analysed, which concerns the compensation for loss caused by a mental patient.[500] Secondly, the recently introduced Art. 11*bis* CouncSt-Law is examined.

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[493] E. DIRIX, *Schade*, 1984, no. 30, 34; J. RONSE, *Aanspraak*, 1954, 278, no. 399; N. SIMAR and L. DE ZUTTER, "L'évaluation du dommage", 1999, (1) 23, no. 40 en no. 43, 24-25; D. SIMOENS, *Schade en schadeloosstelling*, 1999, no. 10, 22; A. VAN OEVELEN, "La modération de la réparation du dommage", 1996, (65) 67, no. 4; A. WYLLEMAN, "Wie zonder "fout" is", 2002, (1619) 1621, no. 7.

[494] ASSER (HARTKAMP), *De verbintenis in het algemeen*, 2000, no. 415, 331; A.R. BLOEMBERGEN, *Schadevergoeding*, 1965, no. 87, 121; P.C. KNOL, *Vergoeding letselschade*, 1986, §30, 79; J.M.M. MAEIJER, *Matiging van schadevergoeding*, 1962, 77 *et seq*; M.H. WISSINK and W.H. VAN BOOM, "The Netherlands", 2001, (143) 145, no. 15.

[495] M. BACACHE-GIBEILI, *Traité de droit civil*, V, 2016, no. 597, 716.

[496] N. SIMAR and L. DE ZUTTER, "L'évaluation du dommage", 1999, (1) 24, no. 42.

[497] R.O. DALCQ, *Traité*, II, 1962, 744, no. 4149; N. SIMAR and L. DE ZUTTER, "L'évaluation du dommage", 1999, (1) 24, no. 42. *Cf. supra*, no. 52 on the depersonalisation process.

[498] E. DIRIX, *Schade*, 1984, no. 30, 34; J. RONSE, *Aanspraak*, 1954, 287, no. 409; J. RONSE, *Schade en schadeloosstelling (onrechtmatige daad)*, 1957, no. 273, 242; L. SCHUERMANS, "Perspectieven in het verzekeringsrecht", *RW* 1977-78, (2249) 2262; D. SIMOENS, *Schade en schadeloosstelling*, 1999, no. 10, 23; D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (2025), 2028 *et seq.*; A. VAN OEVELEN, "La modération de la réparation du dommage", 1996, (65) 68, no. 6; A. WYLLEMAN, "Wie zonder "fout" is", 2002, (1619) 1621, no. 7. The Netherlands: T. HARTLIEF, "Het verzekeringsargument in het aansprakelijkheids- en schadevergoedingsrecht" in T. HARTLIEF and M.M. MENDEL (eds.), *Verzekering en maatschappij*, Deventer, Kluwer, 2000, (373) 375.

[499] W. VAN GERVEN, "De invloed van verzekering", 1962, (777) 789, no. 19.

[500] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, no. 333, 204; R.O. DALCQ, *Traité*, II, 1962, no. 4145, 743; E. DIRIX, *Schade*, 1984, no. 30, 35; J.-L. FAGNART, "Le régime juridique", 2000, 9, no. 6; N. SIMAR and L. DE ZUTTER, "L'évaluation du dommage", 1999, (1) 23, no. 40 *et seq.*; D. SIMOENS, *Schade en schadeloosstelling*, 1999, no. 10, 22; W. VAN GERVEN, *Verbintenissenrecht*, 2015, 462; A. VAN OEVELEN, "La modération de la réparation du dommage", 1996, (65) no. 9, 70; P. VAN OMMESLAGHE, *Traité*, II, 2013, no. 1117, 1648-1649; A. WYLLEMAN, "Wie zonder "fout" is", 2002, (1619) 1621, no. 7.

*Subsection I. Article 1386*bis *BCC*

119. SETTING THE SCENE – Art. 1386*bis* BCC immediately follows the Art. 1382 till 1386 BCC, which form the backbone of common Belgian tort law, though it is listed under a separate heading. According to Title IV*bis* BCC, the rule of Art. 1386*bis* BCC concerns the "*compensation for loss caused by abnormal persons*".[501] The phrase "*abnormal persons*" refers to the fundamental problem of situations in which a person causing a loss is mentally incapable. For the victim, this implies that, as far as the personal liability of the causer of the loss is concerned, the mental patient cannot be held liable on the basis of the Art. 1382-1383 BCC because he lacks the power of discernment ("*schuldbekwaamheid*").[502] French case law has looked for solutions, for example by accepting the liability of mental patients in case of a fault prior to their state of mental incapacity.[503] Yet, a legislative intervention was needed to deal with the concern of indemnifying the victim,[504] as has been the case in Belgian law.

120. LEGISLATIVE INTERVENTION – Before 1935, the application of common Belgian tort law, *i.e.* Art. 1382-1386 BCC, occasionally resulted in cases in which the victim of wrongful conduct had to bear the loss by lack of personal liability of the causer of the loss, in the absence of the power of discernment of that person. Not all such cases were in accordance with one's sense of justice.[505] Imagine, for example, a poor victim who is unable to recover its loss and is denied compensation because the perfectly solvable causer of the loss lacks the power of discernment. This is perceived to be unfair.[506] That's why the legislator intervened in 1935 by the Law of the 16th of April 1935 on the compensation of loss caused by the mentally ill or abnormal persons[507]

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[501] *Own translation, original text: "Vergoeding van de schade door abnormalen veroorzaakt".*

[502] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 154, no. 154; H. COUSY and D. DROSHOUT, "Liability for Damage Caused by Others under Belgian Law" in J. SPIER, *Unification of Tort Law: Liability for Damage Caused by Others*, The Hague, Kluwer Law International, 2003, (37) 46, no. 11; R. KRUITHOF, "Aansprakelijkheid geesteszieken", 1980, (10.179) no. 4, 10.179[2]; G. SCHAMPS, "La réparation des dommages causés par les déments", *JT* 2004, (306) 306, no. 1; S. STIJNS, *Verbintenissenrecht*, *1*bis, 2013, no. 62, 51; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 155, no. 214. France: Cass. Civ. 2ième 11 mars 1965, *D.* 1965, 575, note P. ESMEIN and *RTD civ.* 1965, 811, note R. RODIERE; M. BACACHE-GIBEILI, *Traité de droit civil*, V, 2016, no. 138, 155. *Similarly* in the Netherlands before the new Civil Code: C.H.J. BRUNNER and J. PAUWELS, *Preadviezen. De invloed van geestelijke gestoordheid op privaatrechtelijke gebondenheid en aansprakelijkheid*, Zwolle, W.E.J. Tjeenk Willink, 1974, 29.

[503] Cass. Civ. 2ième 15 décembre 1965, *D.* 1966, 397, note R. RODIERE.

[504] M. BACACHE-GIBEILI, *Traité de droit civil*, V, 2016, no. 140, 158. *See also*: W. VAN GERVEN, J. LEVER and P. LAROUCHE, *Cases, Materials and Text on National, Supranational and International Tort Law*, Oxford, Hart Publishing, 2000, 354.

[505] F. SWENNEN, "Aansprakelijkheid van en voor geestesgestoorden" in *Comm.Bijz.Ov. Verbintenissenrecht* 2003, issue 56, 29, no. 34.

[506] G. POTVIN, *La responsabilité civile des déments et des anormaux*, Brussel, Bruylant, 1937, 7.

[507] Law of the 16th of April 1935 on the compensation of loss caused by the mentally ill or abnormal persons (*original title:* "*Wet op de vergoeding van de door de krankzinnigen en abnormalen veroorzaakte schade*"), *BS* the 18th of April 1935, 2559.

by introducing a new provision.[508] The *ratio* is obviously the fairness of granting a compensation in some cases of loss due to a mental patient.[509] Art. 1386*bis* BCC states the following:

"*When a loss is caused to another person by someone who is mentally disturbed so that it results in the annulment or severe impairment of his power of judgment or the control over his actions, the judge can order him to pay the entire compensation or a part of the compensation he would be held liable for, if he controlled his actions. The judge decides on the basis of fairness, taking into account the circumstances and the situation of the parties.*"[510]

Thus, despite the lack of power of discernment, the legislator has provided the judge with the possibility of granting a partial or full compensation to the victim.[511] The provision constitutes a form of strict liability,[512] a liability cut loose from the notion of guilt and based on considerations of fairness.[513]

121. ALTERNATIVE SOLUTION: DUTCH AND FRENCH SYSTEM – At first sight, it might appear strange that the Dutch legal system in its new Civil Code, which is far more recent than the Belgian one, hasn't limited the liability of mental patients in the same way as the Belgian legislator has done. The Dutch legislator intended to develop a clear system mainly in the interest of adding to legal certainty.[514] Art. 6:165, §1 DCC explicitly states that the liability of

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[508] R. KRUITHOF, "Aansprakelijkheid geesteszieken", 1980, (10.179) 10.179[5 verso], no. 19; G. SCHAMPS, "La réparation des dommages causés par les déments", *JT* 2004, (306) 306, no. 3; S. STIJNS, *Verbintenissenrecht, 1*bis, 2013, no. 63, 51; P. VAN OMMESLAGHE, "La réforme de la loi de défense sociale et l'article 1386bis du Code civil", *RDPC* 1999, (483) no. 2, 469; B. WEYTS, "Schade veroorzaakt door geestesgestoorde minderjarigen: aansprakelijkheids- en verzekeringsvraagstukken" in CENTRUM VOOR BEROEPSVERVOLMAKING IN DE RECHTEN (ed.), *Jongeren, psychiatrie en recht*, Antwerpen, Intersentia, 2007, (109) 112, no. 4.

[509] H. DE PAGE, *Traité*, 1964, no. 916, 885; R. KRUITHOF, "Aansprakelijkheid geesteszieken", 1980, (10179) 10179/5 *verso*, no. 19; N. SIMAR and L. DE ZUTTER, "L'évaluation du dommage", 1999, (1) no. 41, 23; D. SIMOENS, *Schade en schadeloosstelling*, 1999, no. 63, 118; A. VAN OEVELEN, "La modération de la réparation du dommage", 1996, (65) no. 9, 70. *See also*: H. STOLL, "Chapter 8. Consequences of liability: remedies" in A. TUNC (ed.), *International Encyclopedia of Comparative Law*, XI, *Torts*, Part 2, Tübingen, J.C.B. Mohr (Paul Siebeck), 1986, (1) no. 168, 145.

[510] *Own translation, original text: "Wanneer aan een ander schade wordt veroorzaakt door een persoon die lijdt aan een geestesstoornis die zijn oordeelsvermogen of de controle over zijn daden tenietdoet of ernstig aantast, kan de rechter hem veroordelen tot de gehele vergoeding of tot een gedeelte van de vergoeding waartoe hij zou zijn gehouden, indien hij de controle van zijn daden had. De rechter doet uitspraak naar billijkheid, rekening houdende met de omstandigheden en met de toestand van de partijen."*

[511] Antwerpen 16 februari 1998, *AJT* 1998-99, 134 and *TBBR* 2000, 466; H. VANDENBERGHE, "Recente ontwikkelingen", 2007, (45) 60, no. 21; H. VANDENBERGHE *et alii*, "Recente ontwikkelingen", 2004, (47) 59, no. 23; H. VANDENBERGHE *et alii*, "Aansprakelijkheid uit onrechtmatige daad", 2000, (1551) no. 37, 1692.

[512] S. STIJNS, *Verbintenissenrecht, 1*bis, 2013, no. 63, 51; H. VANDENBERGHE *et alii*, "Aansprakelijkheid uit onrechtmatige daad", 2000, (1551) no. 37, 1691.

[513] Pol. Brugge 13 januari 2000, *RW* 2000-01, 1140; R.O. DALCQ, *Traité*, II, 1962, 2325; H. DE PAGE, *Traité*, II, 1964, 885-886, no. 916A; G. POTVIN, *La responsabilité civile des déments et des anormaux*, Brussel, Bruylant, 1937, 18-19; F. SWENNEN, "De logische seconde", 2000, (386) 389, no. 4; F. SWENNEN, "Aansprakelijkheid geestesgestoorden", 2003, no. 35, 30.

[514] C.H.M. JANSEN, *Onrechtmatige daad*, 2009, no. 40, 60.

the author of the loss isn't hindered by the fact that the act (to be considered as doing something) of the person at least 14 years of age was committed under the influence of a mental or physical shortcoming. Despite the lack of power of discernment of the mental patient, he can be held liable.[515] Yet, this liability is less wide than *prima facie* appears to be the case. First, the strict liability is limited to persons aged 14 years or older and solely for actions which can be seen as doing something.[516] Hence, the mental defect is still a defence in case of omissions.[517] Second, the liability can be moderated on the basis of Art. 6:109 DCC, whereby the mental shortcoming of the author of the loss can constitute a ground for moderation to be taken into account among other circumstances.[518] It thus appears that Dutch law has no need for deviating from general tort law in the case of mental patients since judges already have the instrument of moderation at their disposal to prevent unfair situations. Since Belgian law doesn't have a similar legal competence for the judge to moderate, *ad hoc* interventions such as Art. 1386*bis* BCC appear inevitable. Yet, from that perspective, it seems odd that the French legislator has introduced a provision similar to Art. 6:165 DCC, without having simultaneously included a competence to moderate the compensation. The old Art. 489-2 FCC, introduced in 1968[519] and following jurisprudential developments,[520] stated that "*the author of a loss who was mentally incapacitated at the time of the wrongful act, is not less obligated to compensate for that loss*."[521] Since 2007,[522] the text can new be found unaltered in Art. 414-3 FCC. It's clear that the French legislator has thus opted for a solution which is principally the exact opposite of the Belgian one.[523] Since the text doesn't refer to liability but merely to compensating the loss, one

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[515] C.J.M. KLAASSEN, *Risico-aansprakelijkheid*, 1991, 247.
[516] C.H.M. JANSEN, *Onrechtmatige daad*, 2009, no. 46, 63.
[517] M. HAENTJENS and E. DU PERRON, "Liability for Damage Caused by Others under Dutch Law" in J. SPIER, *Unification of Tort Law: Liability for Damage Caused by Others*, The Hague, Kluwer Law International, 2003, (171) 175, no. 16.
[518] C.H.M. JANSEN, *Onrechtmatige daad*, 2009, 60-61, no. 40 and 64-65, no. 46. *See also*: C.J. VAN ZEBEN and J.W. DU PON with the cooperation of M.M. OLTHOF, *Parlementaire geschiedenis*, 1981, 660 referring to Voorlopig verslag van de vaste Commissie voor privaat- en strafrecht uit de Tweede Kamer, at 638.
[519] Law of the 3rd of January 1968 on the reform of the law of incapacitated adults (*original title: "Loi n°68-5 du 3 janvier 1968 portant réforme du droit des incapables majeurs"*), *JORF* 4th of January 1968, 114. *See* on this provision: P. LE TOURNEAU, "La responsabilité civile des personnes atteintes d'un trouble mental", *D.* 1971, I, n° 2401; R. SAVATIER, "Le risque, pour l'homme, de perdre l'esprit et ses conséquences en droit civil", *D.* 1968, chron., 109-116; G. VINEY, "Réflexions sur l'article 489-2 du Code civil", *RTD civ.* 1970, 251-267. *See* furthermore the references in P. JOURDAIN, *J.-Cl. Civil Code, Art. 1382 à 1386, J.-Cl. Responsabilité civile et Assurances, J.-Cl. Notarial Répertoire, v° Responsabilité civile, Fasc. 121-10*, 2015, nos. 20-23.
[520] P. CONTE, *Rép. civ. Dalloz* 2002, *v° Responsabilité du fait personnel*, 7-8, nos. 29-31.
[521] *Own translation, original text: "Celui qui a causé un dommage à autrui alors qu'il était sous l'empire d'un trouble mental n'en est pas moins obligé à réparation."*
[522] Law of the 5th of March 2007 on the reform of the legal protection of adults (*original title: "Loi n° 2007-308 du 5 mars 2007 portant réforme de la protection juridique des majeurs (1)"*), *JORF* 7th of March 2007, 4325.
[523] F. GLANSDORFF, "Les conditions de la responsabilité extracontractuelle" in E. VAN DEN HAUTE (ed.), *Le droit des obligations dans les jurisprudences française et belge*, Brussel, Bruylant, 2013, (103) no. 9, 109.

could wonder whether it can actually be considered as the abandoning of the moral element of the fault needed for (personal) liability.[524] The case law of the French Court of Cassation, however, does point firmly into that direction.[525] The French Court of Cassation has clarified that the liability introduced is not a new one so that there is still need for an "*objective*" fault[526] for a mental patient to be held liable.[527] The underlying reason seems to be that compensation should be ensured regardless of whether the author of the loss was mentally incapable.[528] Since Art. 414-3 FCC constitutes an exception to general French tort law, it necessitates a restrictive interpretation.[529]

122. REASONS FOR ITS INTRODUCTION – Let us begin by taking a closer look at the reasons for the introduction of the new provision in Belgian law, stemming from the preparatory works. In the explanatory memorandum of the Law of the 16th of April 1935, the legislator starts by indicating that guilt and risk are no longer as separated as they have been before.[530] Thus, already in 1933 one could find a hint of the evolved relationship between guilt and risk, which was analysed in Chapter II of Part II of this thesis. The legislator continues by saying that it would be unfair to allow a mentally ill person to preserve his property while damaging another one's property. One is tempted to regard such a situation as an abuse of the formal logic.[531] By referring to foreign legislations containing the liability of mentally ill persons or the competence for the judge to grant at least a compensation to the victim, the legislator is convinced that the problem should be solved on the basis of fairness.[532] He even clarifies what needs to be taken into account by the judge: "*the financial situation of both the victim and the causer of the loss, the needs of the causer of the loss and those of his family, in short all factors that regularly*

[524] M. FABRE-MAGNAN, *Droit des obligations*, II, 2013, 101; J. JULIEN, *Droit des obligations*, 2012, no. 318, 225-226.
[525] *See:* P. BRUN, *Responsabilité civile extracontractuelle*, 2014, no. 298, 197; F. CHABAS, "Cent ans de responsabilité civile", *Gaz.Pal.* 2000, (1399) 1400, no. 9; M. FABRE-MAGNAN, *Droit des obligations*, II, 2013, 101-103; P. JOURDAIN, *J.-Cl. Civil Code, Art. 1382 à 1386, J.-Cl. Responsabilité civile et Assurances, J.-Cl. Notarial Répertoire, v° Responsabilité civile, Fasc. 121-10*, 2015, nos. 25-26; J. JULIEN, *Droit des obligations*, 2012, no. 318, 226.
[526] *See*: M. BACACHE-GIBEILI, *Traité de droit civil*, V, 2016, no. 139, 158, with extensive references.
[527] Cass. Civ. 2ième 4 mai 1977, *Bull. civ.* 1977, II, n° 113, *D.* 1978, 393, note R. LEGEAIS and *RTD civ.* 1977, 772, note G. DURRY; Cass. Civ. 2ième 24 juin 1987, *Bull. civ.*, II, n° 137, *Gaz. Pal.* 1988, issue 1, 41 (somm.), note F. CHABAS.
[528] Y. LAMBERT-FAIVRE and S. PORCHY-SIMON, *Droit du dommage corporel*, 2011, no. 438, b), 496-497.
[529] A. SERIAUX, *Manuel de droit des obligations*, Paris, Presses Universitaires de France, 2014, no. 132, 180.
[530] MvT bij het wetsontwerp op de vergoeding van de door krankzinnigen en abnormalen veroorzaakte schade, *Parl.St.* Kamer 1933-34, no. 97, 2.
[531] MvT bij het wetsontwerp op de vergoeding van de door krankzinnigen en abnormalen veroorzaakte schade, *Parl.St.* Kamer 1933-34, no. 97, 2.
[532] MvT bij het wetsontwerp op de vergoeding van de door krankzinnigen en abnormalen veroorzaakte schade, *Parl.St.* Kamer 1933-34, no. 97, 3.

have to be taken into consideration."[533] In case of an substantial amount of loss in comparison with the property of the causer of the loss, the judge ought to have the possibility of granting a merely partial compensation.[534] According to the legislative Commission, it concerns a social risk[535] which ought to be distributed on the basis of fairness.[536] Again the link with the analysis made in Chapter II of Part II becomes apparent: distributive justice comes to the fore. Obviously, this all relates to the scope of the compensation which can be granted on the basis of Art. 1386*bis* BCC. The following paragraph will assess that compensation and its repercussions on the principle of full compensation. Other elements, such as the field of application,[537] will not be further examined, given the focus of this thesis.

123. DETERMINING THE COMPENSATION – The judge has an inviolable freedom of judgment in deciding whether to grant compensation and with regard to the scope of that compensation.[538] Yet, this freedom is not unlimited to the extent that a stage of arbitrariness is reached.[539] According to the Belgian Court of Cassation, the possibility for the judge to grant only partial

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[533] MvT bij het wetsontwerp op de vergoeding van de door krankzinnigen en abnormalen veroorzaakte schade, *Parl.St.* Kamer 1933-34, no. 97, 4. *Own translation, original text: "met de omstandigheden waarin de daad gepleegd werd, met den vermogenstoestand van het slachtoffer en van den aanrichter van de schade, met de behoeften van den aanrichter van de schade, en die van zijn gezin, kortweg met al de factoren die rechtmatig in aanmerking moeten genomen worden".*

[534] Verslag namens de commissie voor de justitie en de burgerlijke en strafrechtelijke wetgeving bij het wetsontwerp op de vergoeding van de door krankzinnigen en abnormalen veroorzaakte schade, *Parl.St.* Kamer 1933-34, no. 187, 10.

[535] *See also*: G. VINEY, *Traité de droit civil. Introduction à la responsabilité*, Paris, LGDJ, 2008, 45-46, no. 27.

[536] Verslag namens de commissie voor de justitie en de burgerlijke en strafrechtelijke wetgeving bij het wetsontwerp op de vergoeding van de door krankzinnigen en abnormalen veroorzaakte schade, *Parl.St.* Kamer 1933-34, no. 187, 7.

[537] *See* on this matter: B. DECLEYRE, "La responsabilité civile des déments et anormaux : analyse critique de l'article 1386*bis* du Code civil", *Ann.dr.Louvain* 2005, issue 65, (355) 371, no. 32 *et seq.*; S. STIJNS, *Verbintenissenrecht, 1*bis, 2013, 51-52, no. 63; F. SWENNEN, "De logische seconde", 2000, (386) 390-397, nos. 5-13; F. SWENNEN, "Aansprakelijkheid geestesgestoorden", 2003, 30-45, nos. 36-55; H. VANDENBERGHE *et alii*, "Overzicht van rechtspraak", 1980, (1139) 1176-1178, nos. 28-29; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 155-159, nos. 215-219.

[538] Cass. 5 juni 1953, *Arr.Cass.* 674 and *RGAR* 1954, 5.293; Cass. 8 februari 1983, *Arr.Cass.* 1982-83, 746, *RW* 1984-85, 1841 and *Pas.* 1983, I, 656; Bergen 20 december 1977, *RGAR* 1978, 9.929; Luik 5 februari 1975, *RGAR* 1975, 9.474; Rb. Namen 18 januari 1990, *RGAR* 1992, 11.975 and *JT* 1990, 197; B. DECLEYRE, "La responsabilité civile des déments et anormaux : analyse critique de l'article 1386*bis* du Code civil", *Ann.dr.Louvain* 2005, issue 65, (355) no. 84, 395; H. DE PAGE, *Traité*, II, 1964, no. 916, A., 885 en C., 889; J.-L. FAGNART, "Droit belge", 2012, (195) 206; R. KRUITHOF, "Aansprakelijkheid geesteszieken", 1980, (10.179) no. 38, 10.179[11]; M. MARCHANDISE, "L'article 1386*bis* du code civil : à victim assure, assureur victim?" (note to Vred. Luik 29 oktober 2004), *JLMB* 2005, issue 28, (1251) no. 3, 1253; T. PAPART, "Responsabilité du fait d'autrui… Vers une responsabilité objective ?" in B. KOHL (ed.), *Droit de la responsabilité*, Luik, Anthemis, 2009, (53) 91-92; N. SIMAR and L. DE ZUTTER, "L'évaluation du dommage", 1999, (1) no. 41, 23; S. STIJNS, *Verbintenissenrecht, 1*bis, 2013, no. 64, 52; F. SWENNEN, "Aansprakelijkheid geestesgestoorden", 2003, 46, no. 56; H. VANDENBERGHE, "Recente ontwikkelingen", 2007, (45) 60, no. 21; H. VANDENBERGHE *et alii*, "Recente ontwikkelingen", 2004, (47) 59, no. 23; H. VANDENBERGHE *et alii*, "Overzicht van rechtspraak", 1980, (1139) 1178-1179, no 30; A. VAN OEVELEN, "La modération de la réparation du dommage", 1996, (65) no. 9, 70; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 159-160, no. 220.

[539] T. DELAHAYE, note to Luik 26 mei 2008, *Forum de l'assurance* 2008, issue 88, (173) 174.

(thus limited) compensation is only to the benefit of the causer of the loss.[540] Nevertheless, the statutory text dictates the criterion on the basis of which the judge needs to decide the case: "*fairness, taking into account the circumstances and the situation of the parties.*"[541] Some judges have taken the view that the victim should be compensated as fully as possible.[542] Even though it seems true that a full compensation is possible under the conditions of Art. 1386*bis* BCC, it seems as plain as the nose on your face that Art. 1386*bis* BCC constitutes a deviation from the principle of full compensation, since the judge is not obligated to grant a full compensation to the victim.[543] The general obligation for a civil judge to grant full compensation is limited in two ways by the provision. Firstly, the judge can simply grant no compensation at all. Secondly, even when he decides to grant compensation, he can order the causer of the loss only to pay a limited compensation. Admittedly, Art. 1386*bis* BCC cannot be equated with the general provisions on compensation from which the principle of full compensation emerges and to which it applies.[544] Yet, the legislative intervention was clearly meant to be an improvement or correction to that system of personal liability, which is shown by the situation of Art. 1386*bis* BCC directly after the Art. 1382-1386 BCC. As a result, it should be seen as a supplementary rule of liability.[545]

124. CRITERIA TO CONSIDER – In addition to the criteria listed by the legislator, doctrine and case law have come up with various interpretations of the phrase "*the circumstances of the case and the situation of the parties*".[546] As a preliminary remark, one should note that judges tend

[540] Cass. 12 september 2006, no. P.06.0718.N, 4, ninth consideration.
[541] *Own translation, original text: "billijkheid, rekening houdende met de omstandigheden en met de toestand van de partijen".*
[542] Rb. Verviers 18 november 1998, *T.Vred.* 1999, 118.
[543] H. BOCKEN, "Van fout naar risico. Een overzicht van de objectieve aansprakelijkheidsregelingen naar Belgisch recht" in M. STORME and H. BOCKEN (eds.), *Verbintenissenrecht*, Gent, Storme, 1984, (329) 343, no. 21; H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 156, no. 245; B. DUBUISSON, N. ESTIENNE and D. DE CALLATAŸ, "Droit belge", 2012, (171) 177; T. PAPART, "Responsabilité du fait d'autrui… Vers une responsabilité objective ?" in B. KOHL (ed.), *Droit de la responsabilité*, Luik, Anthemis, 2009, (53) 92; L. SCHUERMANS, A. VAN OEVELEN, C. PERSYN, P. ERNST and J.-L. SCHUERMANS, "Overzicht van rechtspraak. Onrechtmatige daad – Schade en schadeloosstelling (1983-1992), *TPR* 1994, (851) no. 1.10, 908; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, no. 1084, 689; B. WEYTS, "Schade veroorzaakt door geestesgestoorde minderjarigen: aansprakelijkheids- en verzekeringsvraagstukken" in CENTRUM VOOR BEROEPSVERVOLMAKING IN DE RECHTEN (ed.), *Jongeren, psychiatrie en recht*, Antwerpen, Intersentia, 2007, (109) no. 5, 113.
[544] *Similarly*: T. DELAHAYE, note to Luik 26 mei 2008, *Forum de l'assurance* 2008, issue 88, (173) 174.
[545] L. CORNELIS, *Principes du droit belge de la responsabilité extra-contractuelle*, Brussel, Bruylant, 1991, 29; M. MARCHANDISE, "L'article 1386*bis* du code civil : à victim assure, assureur victim?" (note to Vred. Luik 29 oktober 2004), *JLMB* 2005, issue 28, (1251) no. 1, 1252.
[546] *See* on these different elements which can be taken into account: B. DECLEYRE, "La responsabilité civile des déments et anormaux : analyse critique de l'article 1386*bis* du Code civil", *Ann.dr.Louvain* 2005, issue 65, (355) 369, no. 85 *et seq.*; R. KRUITHOF, "Aansprakelijkheid geesteszieken", 1980, (10.179) no. 38, 10.179[11 and 11 verso]; M. MARCHANDISE, "L'article 1386*bis* du code civil : à victim assure, assureur victim?" (note to Vred. Luik 29 oktober 2004), *JLMB* 2005, issue 28, (1251) 1253-1254, no. 3; T. PAPART, "La responsabilité du fait d'autrui" in

not to analyse *in concreto* the circumstances and the financial situation of the parties but rather limit their motivations to generalities concerning the parties' financial situation.[547] SWENNEN distinguishes between three categories: 1) elements related to the causer of the loss, 2) elements related to the act and 3) the financial situation of the parties.[548]

125. FIRST CATEGORY – The first category focusses on the causer of the loss. The judge could, for example, take into account the level of "guilt", being the extent to which the causer of the loss still had some conscious and free will at the time of the causing of the loss, or the degree of accountability.[549]

126. SECOND CATEGORY – The second category shifts attention to the loss causing act itself. The nature and metaphorical weight of the loss creating act or the loss are mentioned here.[550] Additionally, the importance of the material and moral loss to the victim can play a role.[551] Also the fault of the victim – which would thus normally constitute contributory negligence – is stated as a factor to consider in this category.[552] Yet, it doesn't really seem to relate to the loss causing act but rather to the situation of the victim. Moreover, a correct application of the statutory text already reaches that result. It is said that "*the judge can order him to pay the entire compensation or a part of the compensation he would be held liable for, if he controlled his actions.*" Hence, the maximum amount is the compensation which would be granted if the causer of the loss were to be found personally liable for the loss. In that case, contributory negligence would limit the amount of the compensation so that taken into account the fault of the victim within the framework of Art. 1386*bis* BCC is only logical. Furthermore, even without constituting a fault, the behaviour of the victim can play a role in deciding on the compensation.[553] Finally, the existence of a claim against jointly liable persons could result in

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C. DOYEN, A.-L. DURVIAUX and B. DUBUISSON (eds.), *Droit de la responsabilité*, Luik, ULg. Formation permanente CUP, 1996, (169) 198; T. PAPART, "Responsabilité du fait d'autrui… Vers une responsabilité objective ?" in B. KOHL (ed.), *Droit de la responsabilité*, Luik, Anthemis, 2009, (53) 94.

[547] R. KRUITHOF, "Aansprakelijkheid geesteszieken", 1980, (10.179) 10.179[11 verso], no. 43.

[548] F. SWENNEN, "De logische seconde", 2000, (386) 397-400, nos. 15-17; F. SWENNEN, "Aansprakelijkheid geestesgestoorden", 2003, 46-52, nos. 56-67.

[549] S. STIJNS, *Verbintenissenrecht, 1*bis, 2013, no. 64, 52; F. SWENNEN, "Aansprakelijkheid geestesgestoorden", 2003, 46-47, no. 57.

[550] Luik 24 november 1971, *RGAR* 1972, 8.752; Rb. Kortrijk 5 mei 1939, *RW* 1939-40, 269 and *RGAR* 1940, 3.328; Rb. Namen 18 januari 1990, *RGAR* 1992, 11.975 and *JT* 1990, 197; S. STIJNS, *Verbintenissenrecht, 1*bis, 2013, no. 64, 52; F. SWENNEN, "Aansprakelijkheid geestesgestoorden", 2003, 47, no. 58; H. VANDENBERGHE, "Recente ontwikkelingen", 2007, (45) 60, no. 21; H. VANDENBERGHE *et alii*, "Recente ontwikkelingen", 2004, (47) 59, no. 23; H. VANDENBERGHE *et alii*, "Aansprakelijkheid uit onrechtmatige daad", 2000, (1551) no. 37, 1693. *See* for example: Rb. Namen 18 januari 1990, *RGAR* 1992, 11.975 and *JT* 1990, 197.

[551] Luik 24 november 1971, *RGAG* 1972, 8.752.

[552] F. SWENNEN, "Aansprakelijkheid geestesgestoorden", 2003, 47-48, no. 59. *See* for example: Bergen 20 december 1977, *RGAR* 1978, 9.929; Rb. Namen 18 januari 1990, *RGAR* 1992, 11.975 and *JT* 1990, 197.

[553] Antwerpen 16 februari 1998, *AJT* 1998-99, 134 and *TBBR* 2000, 466.

the fact that the victim will not be able to claim a full compensation from the causer of the loss falling within the scope of Art. 1386*bis* BCC.[554]

127. THIRD CATEGORY – The third and final category relates to the financial situation of the parties, which is regarded as the key element.[555] The starting point is said to be the difference in means between the victim and the author of the loss.[556] Therefore, this deviant rule has been linked to the adagio "*richesse oblige"*.[557] Both the situation of the causer of loss and the situation of the victim are reckoned with.[558] A balancing of their incomes could lead, for example, to a limited postponed of payment.[559] The financial situation of the causer of the loss boils down to his ability to pay.[560] If the financial burden would be too much to bear for the mental patient, the judge can decide not to grant a compensation to the victim.[561] He should be able to have sufficient financial means to pay the costs of his care after having paid the compensation for the loss.[562] Entitlements of the causer of the loss to a wage, social security benefits or similar things are relevant in the analysis.[563] A very important and often even decisive factor is the fact whether or not the parties have taken out insurance.[564] The paradigm "*assurance oblige*" shimmers through. On the one hand, the insurance covering the victim could

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[554] F. SWENNEN, "Aansprakelijkheid geestesgestoorden", 2003, 48, no. 60. *See* for example: Vred. Eeklo 12 januari 1995, *TGR* 1995, 171; Vred. Menen 29 januari 1986, *T.Vred.* 1989, 17.

[555] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 156, no. 245; H. DE PAGE, *Traité*, 1964, no. 916, C., 888; J.-L. FAGNART, "Le régime juridique", 2000, 9, no. 6; F. SWENNEN, "Aansprakelijkheid geestesgestoorden", 2003, 48, no. 61; H. VANDENBERGHE *et alii*, "Overzicht van rechtspraak", 1980, (1139) no. 30, 1180; W. VAN GERVEN, *Verbintenissenrecht*, 2015, 377; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, no. 220, 160.

[556] H. DE PAGE, *Traité*, 1964, no. 916, A., 885.

[557] D. SIMOENS, "Evolutie aansprakelijkheidsrecht", 1980-81, (2025) no. 28, 2027. *Cf. supra*, nos. 53 and 61.

[558] S. STIJNS, *Verbintenissenrecht, 1*bis, 2013, no. 64, 52; H. VANDENBERGHE, "Recente ontwikkelingen", 2007, (45) no. 22, 60.

[559] Rb. Tongeren 15 mei 1995, *RW* 1996-97, 362; H. VANDENBERGHE *et alii*, "Recente ontwikkelingen", 2004, (47) 59, no. 24.

[560] F. SWENNEN, "Aansprakelijkheid geestesgestoorden", 2003, no. 62, 48.

[561] Rb. Hasselt 6 december 1990, *TBBR* 1991, 86.

[562] Brussel 28 oktober 1959, *RGAR* 1962, 6.851 and *Pas.* 1961, II, 68; G. SCHAMPS, "La réparation des dommages causés par les déments", *JT* 2004, (306) 307, no. 6. *Similarly*: L. SCHUERMANS, A. VAN OEVELEN, C. PERSYN, P. ERNST and J.-L. SCHUERMANS, "Overzicht van rechtspraak. Onrechtmatige daad – Schade en schadeloosstelling (1983-1992), *TPR* 1994, (851) no. 1.10, 907.

[563] F. SWENNEN, "Aansprakelijkheid geestesgestoorden", 2003, 48-49, no. 62. *See* for example: Corr. Gent 8 februari 1994, *TGR* 1994, 108; Corr. Nijvel 29 november 1985, *RGAR* 1987, 11.274.

[564] Gent 21 april 1989, *RW* 1989-90, 886, note M. DAMBRE; Rb. Antwerpen 3 oktober 1986, *Pas.* 1987, I, 6; Rb. Brugge 27 januari 2005, *RW* 2006-07, 611; H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 156, no. 245; J.-L. FAGNART, *La responsabilité civile: chronique de jurisprudence 1985-1995*, Brussel, Larcier, 1997, 49; J.-L. FAGNART, "Le régime juridique", 2000, 9, no. 6; L. SCHUERMANS, A. VAN OEVELEN, C. PERSYN, P. ERNST and J.-L. SCHUERMANS, "Overzicht van rechtspraak. Onrechtmatige daad – Schade en schadeloosstelling (1983-1992), *TPR* 1994, (851) no. 1.10, 907; N. SIMAR and L. DE ZUTTER, "L'évaluation du dommage", 1999, (1) no. 41, 24; S. STIJNS, *Verbintenissenrecht, 1*bis, 2013; F. SWENNEN, "Aansprakelijkheid geestesgestoorden", 2003, 73-74, no. 106, with extensive references to case law; H. VANDENBERGHE *et alii*, "Overzicht van rechtspraak", 1980, (1139) no. 30, 1179; A. VAN OEVELEN, "Existe-t-il un principe général de responsabilité extra-contractuelle du fait des personnes dont on doit répondre?", *ERPL* 1993, (229) 238, no. 9; W. VAN GERVEN, *Verbintenissenrecht*, 2015, 377.

lead to the dismissal of the claim for compensation.[565] On the other hand, the fact that the causer of the loss has taken out insurance, can justify ordering him to pay a (full) compensation.[566] Obviously, there can also be elements rendering a moderation of the compensation fair.[567] The importance of the question whether the causer of the loss has taken out insurance, does not imply the impossibility of ordering him to pay a limited[568] or even full[569] compensation in the absence of such insurance, as long as his ability to pay is sufficient. The notion of "*richesse oblige*"[570] doesn't seem to be far away.

128. "PARTIES" – A final remark to be made concerns the scope of the term "*parties*". Besides the causer of the loss and the victim, the insurer and the legal successors of the causer of the loss come to mind. Given the fact that the possibility for the judge to moderate the compensation is only to the benefit of the causer of the loss, his insurer cannot refer to the criterion of fairness *ex* Art. 1386*bis* BCC in order to obtain a moderation of the compensation.[571] As far as the legal successors of the causer of the loss are concerned, it seems that the theory of "*the logical second*" implies that the financial situation of the causer of the loss needs to be considered in case of his death and not the financial situation of his legal successors.[572] Yet, not every decision has adhered to that reasoning.[573] These technical debates, however, are less relevant for this thesis. What matters is what is taken into account in justifying a deviation from the general principle of full compensation. From that angle, the financial capacity of the parties among a variety of possibly relevant factors has proven to be very important.

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[565] F. SWENNEN, "Aansprakelijkheid geestesgestoorden", 2003, no. 63, 49 and 74, no. 109, with references to case law.
[566] Antwerpen 20 december 1989, *De Verz.* 1990, 763; Brussel 2 december 1985, *Verkeersrecht* 1987, 15; Gent 21 april 1989, *RW* 1989-90, 886, note M. DAMBRE; Rb. Antwerpen 3 oktober 1986, *Pas.* 1987, III, 6 and *RW* 1986-87, 2162; Vred. Antwerpen 11 februari 1987, *Pas.* 1987, III, 61; Rb. Hasselt 7 april 1986, *RW* 1986-87, 1757, note T. VANSWEEVELT; F. SWENNEN, "Aansprakelijkheid geestesgestoorden", 2003, no. 106, 74.
[567] Luik 24 maart 1995, *De Verz.* 1995, (423) 428 *a contrario*; F. SWENNEN, "Aansprakelijkheid geestesgestoorden", 2003, no. 62, 49.
[568] Bergen 10 januari 1995, *RGAR* 1997, 12.830[1 verso]; Brussel 8 juni 1988, *JLMB* 1988, 1558, note D.-M. PHILIPPE; Brussel 24 november 1997, *RGAR* 1999, 13.122.
[569] Rb. Tongeren 15 mei 1995, *RW* 1996-97, 362.
[570] *Cf. supra*, no. 53.
[571] Cass. 22 september 2000, *Arr.Cass.* 2000, 489, *RW* 2000-01, 1418, note F. SWENNEN, *AJT* 2000-01, 643 and *RGAR* 2002, 13.469; Luik 26 mei 2008, *Forum de l'assurance* 2008, issue 88, (172) 172, note T. DELAHAYE; W. GELDHOF, "Een geesteszieke huurder en aansprakelijkheid voor brand", *Juristenkrant* 2001, issue 26, (4) 4.
[572] *See* on this matter: S. STIJNS, *Verbintenissenrecht, 1*bis, 2013, 52-53, no. 64; F. SWENNEN, "De logische seconde", 2000, (386) 400-404, nos. 18-22.
[573] Antwerpen 16 februari 1998, *AJT* 1998-99, 134 and *TBBR* 2000, 466.

*Subsection II. Article 11*bis *CouncSt-Law*

129. CIVIL CLAIM BEFORE THE COUNCIL OF STATE – According to Art. 11*bis* CouncSt-Law, introduced by the Law of the 6th of January 2014[574], "*Every requesting or intervening party demanding the annulment* […], *can ask the department administrative case law to grant by means of a judgment a compensation* […], *taking into account all circumstances of public and private interest.*"[575] That way, the legislator has put an end to the obligatory double court procedures, which existed before the legislative intervention in 2014.[576] After having successfully demanded the annulment of a certain regulation before the administrative judge, citizens no longer have to start new legal proceedings before an ordinary (*i.e.* non-administrative) judge.[577] Such a second lawsuit remains possible, though implies additional costs and a serious loss of time.[578] Henceforth, a claimant before the Council of State will now have to decide whether to ask for compensation before that Council or to bring a claim for compensation before the ordinary civil judge in a second lawsuit.[579] A combination of both is out of the question: *electa una via non datur recursus ad alteram*.[580] GOOSSENS and MOLLIN

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[574] Law of the 6th of January 2014 concerning the Sixth State Reform regarding the matters intended in Art. 77 of the Constitution (*original title:* "*Wet met betrekking tot de Zesde Staatshervorming inzake de aangelegenheden bedoeld in artikel 77 van de Grondwet*"), *BS* 31st of January 2014, no. 2014021007, 8718.

[575] *Own translation, original text: "Elke verzoekende of tussenkomende partij die de nietigverklaring* […] *vordert* […], *kan aan de afdeling bestuursrechtspraak vragen om haar bij wijze van arrest een schadevergoeding tot herstel toe te kennen* […]*, met inachtneming van alle omstandigheden van openbaar en particulier belang."*

[576] *See* on this double court procedures: C. MATHIEU, "De nieuwe bevoegdheid van de Raad van State: de schadevergoeding tot herstel. Vraag naar de implementeringswijze, doeltreffendheid en noodzaak", *Jura Falc.* 2013-14, issue 1, (77) 81. According to H. BOCKEN, however, the end did not justify the means: H. BOCKEN, "De kers op de taart? De herziening van artikel 144 van de Grondwet en de Raad van State", *TPR* 2012, issue 1, (7) 12-13, no. 4.

[577] E. BREWAEYS, "Raad van State", 2014, (482) 487, no. 60; I. CLAEYS, "Schadevergoeding wegens een onwettige bestuurshandeling", 2014, (185) 188, no. 2; J. GOOSSENS, "De vervaagde grens", 2014, (275) 290, no. 74; A. MAST *et alii, Belgisch Administratief Recht,* 2014, 1341, no. 1241; S. SOMERS, "Discretionaire bevoegdheid", 2015, (618) 618, no. 1.

[578] F. BELLEFLAMME and J. SOHIER, "Incidence de la reforme (*sic*)", 2014, (39) no. 24, 72; S. BOULLART, "Het bekomen van schadevergoeding bij de Raad van State", *RABG* 2014, issue 7, (482) 482, no. 2; I. CLAEYS, "Schadevergoeding wegens een onwettige bestuurshandeling", 2014, (185) 188, no. 2.

[579] Art. 11*bis*, fourth and fifth paragraphs CouncSt-Law.

[580] Toelichting bij het wetsvoorstel met betrekking tot de Zesde Staatshervorming inzake de aangelegenheden bedoeld in artikel 77 van de Grondwet, *Parl.St.* Senaat 2012-2013, no. 5-2233/1, 6; Adv.RvS 53.933/AV van 27 augustus 2013 bij het wetsvoorstel met betrekking tot de Zesde Staatshervorming inzake de aangelegenheden bedoeld in artikel 77 van de Grondwet, *Parl.St.* Senaat 2012-2013, no. 5-2233/2, 8-9; F. BELLEFLAMME and J. SOHIER, "Incidence de la reforme (*sic*)", 2014, (39) 69-72, no. 23; H. BOCKEN, "Voor het gerecht", 2013, (428) 437, no. 19; S. BOULLART, "Het bekomen van schadevergoeding bij de Raad van State", *RABG* 2014, issue 7, (482) 483, no. 5; E. BREWAEYS, "Raad van State", 2014, (482) 487, no. 61 and 490-191, no. 72; F. GLANSDORFF, "L'indemnité réparatrice", 2014, (474) 477, no. 17; J. GOOSSENS, "De vervaagde grens", 2014, (275) 290, no. 74; S. LUST, "Volle rechtsmacht, substitutie, injunctie en herstel", 2014, (1) no. 75, 43; A. MAST *et alii, Belgisch Administratief Recht,* 2014, 1341, no. 1241; J. SOHIER, "L'action en responsabilité contre des pouvoirs publics : à porter devant les juridictions judiciaires ou, depuis 2014, devant le Conseil d'État?", *RGAR* 2015, issue 1, no. 15.138, 3-4, no. 8; S. VERSTRAELEN, "De burgerrechtelijke gevolgen van de uitspraken van administratieve rechtscolleges: wanneer het doel niet alle middelen heiligt" in J. VELAERS, J. VANPRAET, W. VANDENBRUWAENE, Y. PEETERS (eds.), *De zesde staatshervorming: instellingen, bevoegdheden en middelen*, Antwerpen, Intersentia, 2014, (215) 231-234, nos. 27-31.

speak of "*civil sur administrative ne vaut*" in that regard.[581] Two evaluations need to be made and distinguished: an evaluation of the new possibility to bring a civil claim before the Council of State and an evaluation of that particular civil claim itself.

130. EVALUATION OF THE NEW POSSIBILITY – The possibility for a claimant to bring his civil claim before the Council of State has both advantages and disadvantages. The major advantage is an economic one: saving costs and time.[582] Because the Council of State has already examined the case in the context of the request for annulment and because there is no possibility of appeal[583], it can decide on the case in a relatively swift and final manner.[584] The necessity before the introduction of Art. 11*bis* CouncSt-Law to launch a second lawsuit on order to obtain compensation, was far from expedient.[585] NIHOUL pertinently raised the question on how to explain the need for new legal proceedings after having obtained an annulment before the Council of State to the citizens.[586] The preparatory works reveal the awareness of the legislator of this (economic) disadvantage.[587] Now, the civil claim constitutes a mere extension of the administrative procedure. The preparatory works seem to confirm this point of view as the claim for compensation is regarded as an *accessorium* to the request for annulment.[588] Within twelve months after notification of the decision finding the unlawfulness, the Council of State will decide on the request for compensation.[589] Some authors wonder whether this period will be sufficient to prove the loss truly suffered.[590] Although the workload of the administrative judge increases, time and energy are saved because it would require much more time and energy for another judge unfamiliar with the case to decide upon the civil claim.[591] An imminent risk of

[581] J. GOOSSENS and J. MOLLIN, "Vlinderakkoord kondigt hertekening gerechtelijk landschap aan via artikel 144 Grondwet", *CDPK* 2012, (76) 92.
[582] E. BREWAEYS, "Raad van State", 2014, (482) 487, no. 61; F. GLANSDORFF, "L'indemnité réparatrice", 2014, (474) 478, no. 23 (with some doubts as to the saving of time).
[583] *Cf.* Toelichting bij het wetsvoorstel met betrekking tot de Zesde Staatshervorming inzake de aangelegenheden bedoeld in artikel 77 van de Grondwet, *Parl.St.* Senaat 2012-2013, no. 5-2233/1, 6. A "*point noir*" according to F. GLANSDORFF, "L'indemnité réparatrice", 2014, (474) 478, no. 24.
[584] A. MAST *et alii*, *Belgisch Administratief Recht*, 2014, 1342, no. 1242.
[585] S. LUST, "Volle rechtsmacht, substitutie, injunctie en herstel", 2014, (1) 36, no. 62.
[586] M. NIHOUL, "Il est temps de réformer le contentieux administratif", *CDPK* 2007, issue 4, (721) 724.
[587] Toelichting bij het wetsvoorstel met betrekking tot de Zesde Staatshervorming inzake de aangelegenheden bedoeld in artikel 77 van de Grondwet, *Parl.St.* Senaat 2012-2013, no. 5-2233/1, 6.
[588] Toelichting bij het wetsvoorstel met betrekking tot de Zesde Staatshervorming inzake de aangelegenheden bedoeld in artikel 77 van de Grondwet, *Parl.St.* Senaat 2012-2013, no. 5-2233/1, 6.
[589] Art. 11*bis*, third paragraph CouncSt-Law.
[590] H. BOCKEN, "Voor het gerecht", 2013, (428) 436; S. LUST, "Volle rechtsmacht, substitutie, injunctie en herstel", 2014, (1) 43, no. 73.
[591] Adv.RvS 53.933/AV van 27 augustus 2013 bij het wetsvoorstel met betrekking tot de Zesde Staatshervorming inzake de aangelegenheden bedoeld in artikel 77 van de Grondwet, *Parl.St.* Senaat 2012-2013, no. 5-2233/2, 5. *Similarly*: F. BELLEFLAMME and J. SOHIER, "Incidence de la reforme (*sic*)", 2014, (39) no. 7, 47; J. GOOSSENS, "De vervaagde grens", 2014, (275) 290, no. 74.

the assessment by the Council of State without the possibility of an appeal is the loss of unity in tort law.[592]

131. EVALUATION OF THE CLAIM FOR COMPENSATION – After having examined the new possibility of demanding compensation before the Council of State, a closer look should be taken at the claim for compensation itself. The preparatory works already distinguish between the ordinary civil claim on the basis of Art. 1382 BCC and the civil claim brought before the Council of State on the basis of Art. 11*bis* CouncSt-Law.[593] The claim for compensation before the Council of State is on certain points more restricted than the civil claim brought before the civil judge on the basis of Art. 1382 BCC.[594] The claim before the Council of State should be regarded as an autonomous concept, the particular modalities of which are left to the case law of the Council of State for further elaboration.[595] Art. 11*bis* CouncSt-Law is said to constitute a new ground for liability.[596] Firstly, the possible claimants are limited to requesting and intervening parties as compared to every sufferer of a loss in common Belgian tort law.[597] Secondly, the compensation is limited to a pecuniary one instead of one in kind, besides of course the fact that the annulment decided by the Council of State can in itself constitute a compensation in kind.[598] Thirdly, regarding the fault notion, some clarification is needed as it

[592] H. BOCKEN, "Voor het gerecht", 2013, (428) no. 2, 429, 436-437, no. 18 and 438, no. 20 (questioning whether the lack of a remedy is acceptable in light of the constitutional principles); J. GOOSSENS, "De vervaagde grens", 2014, (275) 292, no. 85.

[593] Toelichting bij het wetsvoorstel met betrekking tot de Zesde Staatshervorming inzake de aangelegenheden bedoeld in artikel 77 van de Grondwet, *Parl.St.* Senaat 2012-2013, no. 5-2233/1, 6.

[594] A. MAST *et alii*, *Belgisch Administratief Recht*, 2014, 1342, no. 1242. *See also*: I. CLAEYS, "Schadevergoeding wegens een onwettige bestuurshandeling", 2014, (185) 191 *et seq.*

[595] Toelichting bij het wetsvoorstel met betrekking tot de Zesde Staatshervorming inzake de aangelegenheden bedoeld in artikel 77 van de Grondwet, *Parl.St.* Senaat 2012-2013, no. 5-2233/1, 7; Adv.RvS 53.933/AV van 27 augustus 2013 bij het wetsvoorstel met betrekking tot de Zesde Staatshervorming inzake de aangelegenheden bedoeld in artikel 77 van de Grondwet, *Parl.St.* Senaat 2012-2013, no. 5-2233/2, 8; E. BREWAEYS, "Raad van State", 2014, (482) 489, no. 68; F. GLANSDORFF, "L'indemnité réparatrice", 2014, (474) 477, no. 21; J. GOOSSENS, "De vervaagde grens", 2014, (275) 291, no. 80. *See also*: S. LUST, "Volle rechtsmacht, substitutie, injunctie en herstel", 2014, (1) 37-38, no. 65; S. VERSTRAELEN, "De burgerrechtelijke gevolgen van de uitspraken van administratieve rechtscolleges: wanneer het doel niet alle middelen heiligt" in J. VELAERS, J. VANPRAET, W. VANDENBRUWAENE, Y. PEETERS (eds.), *De zesde staatshervorming: instellingen, bevoegdheden en middelen*, Antwerpen, Intersentia, 2014, (215) 228-231, nos. 23-26.

[596] I. CLAEYS, "Schadevergoeding wegens een onwettige bestuurshandeling", 2014, (185) 189, no. 3.

[597] Art. 11*bis*, first paragraph CouncSt-Law; I. CLAEYS, "Schadevergoeding wegens een onwettige bestuurshandeling", 2014, (185) 206, no. 21; K. KEMPE and M. VAN SCHEL, "Hervorming van de Raad van State: naar een sneller en efficiënter procesverloop?", *Vastgoed info* 2014, issue 4, (1) 3; S. LUST, "Volle rechtsmacht, substitutie, injunctie en herstel", 2014, (1) 42, no. 70.

[598] Adv.RvS 53.933/AV van 27 augustus 2013 bij het wetsvoorstel met betrekking tot de Zesde Staatshervorming inzake de aangelegenheden bedoeld in artikel 77 van de Grondwet, *Parl.St.* Senaat 2012-2013, no. 5-2233/2, 8; F. BELLEFLAMME and J. SOHIER, "Incidence de la reforme (*sic*)", 2014, (39) no. 15, 57; "Voor het gerecht", 2013, (428) 433, no. 10; E. BREWAEYS, "Raad van State", 2014, (482) no. 69, 489; I. CLAEYS, "Schadevergoeding wegens een onwettige bestuurshandeling", 2014, (185) no. 25, 210; F. GLANSDORFF, "L'indemnité réparatrice", 2014, (474) 477, no. 21; S. LUST, "Volle rechtsmacht, substitutie, injunctie en herstel", 2014, (1) no. 65, 38.

doesn't seem to coincide with the general fault notion in common Belgian tort law.[599] Yet, the most interesting and relevant element within the framework of this thesis is the assessment of private and public interests by the Council of State when deciding on the compensation.[600] The phrase is inspired by Art. 11 CouncSt-Law, according to the preparatory works, although the emphasis is on the compensation of the loss rather than on fairness, which is key to Art. 11 CouncSt-Law.[601] By taking into account all circumstances of private and public interests, the legislator has shamelessly deviated from the principle of full compensation.[602] Although there are the aforementioned restrictions, a demanding or intervening party still has to decide whether to bring her civil claim before the Council of State or to do so before an ordinary civil judge, *i.e.* deciding whether or not to give up the principally full nature of her compensation in exchange for the more convenient way of having the Council of State decide on her civil claim.[603] The Council of State is obligated to balance the private and public interests before determining the scope of the compensation and has to consider *all* circumstances.[604] The legislator justifies the obligation to consider private and public interests by the need to balance the interests of the claimant and the defendant, whereby the latter cannot choose the most advantageous procedural track from his point of view as he's bound by the choice made by the claimant[605], which seems a hardly convincing explanation.[606] According to the advice giving

[599] *See* on this matter: "Voor het gerecht", 2013, (428) 433-434, nos. 10 and 13; I. CLAEYS, "Schadevergoeding wegens een onwettige bestuurshandeling", 2014, (185) 200-204, no. 18; F. GLANSDORFF, "L'indemnité réparatrice", 2014, (474) 475, no. 10 and 478-479, no. 25; S. LUST, "Volle rechtsmacht, substitutie, injunctie en herstel", 2014, (1) 39-40, no. 67. *See also*: Adv.RvS 53.933/AV van 27 augustus 2013 bij het wetsvoorstel met betrekking tot de Zesde Staatshervorming inzake de aangelegenheden bedoeld in artikel 77 van de Grondwet, *Parl.St.* Senaat 2012-2013, no. 5-2233/2, 6-7.

[600] Art. 11*bis*, first paragraph, *in fine* CouncSt-Law; A. MAST *et alii*, *Belgisch Administratief Recht*, 2014, 1342, no. 1242.

[601] Toelichting bij het wetsvoorstel met betrekking tot de Zesde Staatshervorming inzake de aangelegenheden bedoeld in artikel 77 van de Grondwet, *Parl.St.* Senaat 2012-2013, no. 5-2233/1, 7.

[602] F. BELLEFLAMME and J. SOHIER, "Incidence de la reforme (*sic*)", 2014, (39) no. 8, 49; E. BREWAEYS, "Raad van State", 2014, (482) no. 69, 489; F. GLANSDORFF, "L'indemnité réparatrice", 2014, (474) 477, no. 21; J. GOOSSENS, "De vervaagde grens", 2014, (275) 290, nos. 76-77; C. MATHIEU, "De nieuwe bevoegdheid van de Raad van State: de schadevergoeding tot herstel. Vraag naar de implementeringswijze, doeltreffendheid en noodzaak", *Jura Falc.* 2013-14, issue 1, (77) 104; C. MATHIEU, "Raad van State geeft schadevergoedingsbevoegdheid vorm", *Juristenkrant* 2016, issue 322, (8) 8; J. SOHIER, "L'action en responsabilité contre des pouvoirs publics : à porter devant les juridictions judiciaires ou, depuis 2014, devant le Conseil d'État?", *RGAR* 2015, issue 1, no. 15.138, 3, no. 7 and 1-2, no. 3; S. SOMERS, "Discretionaire bevoegdheid", 2015, (618) 619, no. 2; S. VERSTRAELEN, "De burgerrechtelijke gevolgen van de uitspraken van administratieve rechtscolleges: wanneer het doel niet alle middelen heiligt" in J. VELAERS, J. VANPRAET, W. VANDENBRUWAENE, Y. PEETERS (eds.), *De zesde staatshervorming: instellingen, bevoegdheden en middelen*, Antwerpen, Intersentia, 2014, (215) 233, no. 30.

[603] *Similarly*: I. CLAEYS, "Schadevergoeding wegens een onwettige bestuurshandeling", 2014, (185) no. 42, 225; S. LUST, "Volle rechtsmacht, substitutie, injunctie en herstel", 2014, (1) no. 65, 38 and no. 77, 45.

[604] I. CLAEYS, "Schadevergoeding wegens een onwettige bestuurshandeling", 2014, (185) no. 26, 210.

[605] Toelichting bij het wetsvoorstel met betrekking tot de Zesde Staatshervorming inzake de aangelegenheden bedoeld in artikel 77 van de Grondwet, *Parl.St.* Senaat 2012-2013, no. 5-2233/1, 6.

[606] *Similarly*: F. BELLEFLAMME and J. SOHIER, "Incidence de la reforme (*sic*)", 2014, (39) no. 16, 60; H. BOCKEN, "Voor het gerecht", 2013, (428) no. 9, 432; I. CLAEYS, "Schadevergoeding wegens een onwettige

by the Council of State, it's hardly likely that the compensation granted by the Council of State will be significantly lower than those that would have been granted by ordinary judges, since that would imply that litigants won't request compensation before the Council of State.[607] Yet, it seems obvious that even though the difference won't be remarkably big, there's at least an undeniable tension with the principle of full compensation.[608] The Council of State explicitly acknowledges a competence to moderate.[609] The link with Art. 11 CouncSt-Law, present in the preparatory works,[610] and the wordings "all circumstances of public and private importance" point to a competence for the Council to moderate the compensation for reasons of fairness.[611] What else for the Council to base its evaluation on than fairness?[612] Whereas taking into account the private interests heads into the direction of the principle of full compensation, the public interests will amount to lowering the amounts of the compensation granted without any statutory guideline.[613] Given the arrears of the Council of State, one could easily imagine the introduction of standardised amounts of compensation or rather quick appeals to an appreciation *ex aequo et bono,* both deviating from the principle of full compensation.[614] The way in which the Council of State will use its competence to moderate will be important for claimants in deciding where to claim compensation.[615] Especially the elements to be taken into account when determining the scope of the compensation are to be clarified. One of the important circumstances to consider could be the financial consequences of the civil claim for compensation, including the existence of insurance or the insurability of the loss.[616] That way, the concepts of "*assurance oblige*" and "*assurabilité oblige*" analysed in Chapter II of Part II of this Master's thesis, rise to the surface.

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bestuurshandeling", 2014, (185) no. 26, 211; F. GLANSDORFF, "L'indemnité réparatrice", 2014, (474) 478, no. 24; J. GOOSSENS, "De vervaagde grens", 2014, (275) 290-291, no. 78; J. SOHIER, "L'action en responsabilité contre des pouvoirs publics : à porter devant les juridictions judiciaires ou, depuis 2014, devant le Conseil d'État?", *RGAR* 2015, issue 1, no. 15.138, 3, no. 7.

[607] Adv.RvS 53.933/AV van 27 augustus 2013 bij het wetsvoorstel met betrekking tot de Zesde Staatshervorming inzake de aangelegenheden bedoeld in artikel 77 van de Grondwet, *Parl.St.* Senaat 2012-2013, no. 5-2233/2, 8. *Similarly*: F. BELLEFLAMME and J. SOHIER, "Incidence de la reforme (*sic*)", 2014, (39) no. 16, 60-61.

[608] The fact that Art. 11*bis* CouncSt-Law deviates from the principle of full compensation doesn't, however, necessarily violate the principle of equality: S. SOMERS, "Discretionaire bevoegdheid", 2015, (618) 625, no. 20.

[609] Adv.RvS 53.933/AV van 27 augustus 2013 bij het wetsvoorstel met betrekking tot de Zesde Staatshervorming inzake de aangelegenheden bedoeld in artikel 77 van de Grondwet, *Parl.St.* Senaat 2012-2013, no. 5-2233/2, 8.

[610] Toelichting bij het wetsvoorstel met betrekking tot de Zesde Staatshervorming inzake de aangelegenheden bedoeld in artikel 77 van de Grondwet, *Parl.St.* Senaat 2012-2013, no. 5-2233/1, 7.

[611] S. SOMERS, "Discretionaire bevoegdheid", 2015, (618) 619, no. 2.

[612] F. BELLEFLAMME and J. SOHIER, "Incidence de la reforme (*sic*)", 2014, (39) no. 15, 59. *Somewhat similar*: I. CLAEYS, "Schadevergoeding wegens een onwettige bestuurshandeling", 2014, (185) no. 31, 215.

[613] F. GLANSDORFF, "L'indemnité réparatrice", 2014, (474) 478, no. 24.

[614] F. GLANSDORFF, "L'indemnité réparatrice", 2014, (474) 478, no. 24.

[615] J. GOOSSENS, "De vervaagde grens", 2014, (275) 291, no. 79 and 292, no. 87; S. LUST, "Volle rechtsmacht, substitutie, injunctie en herstel", 2014, (1) no. 77, 44.

[616] I. CLAEYS, "Schadevergoeding wegens een onwettige bestuurshandeling", 2014, (185) 212, no. 27.

132. UNEQUALITY – There shouldn't be a difference in compensation based on the court you file for, since it concerns the same civil claim for compensation. As a result, Belgian tort law is *de facto* faced with an inequality. This area of tension with the principle of equality is symptomatic of the lingering disease in Belgian tort law: compartmentalisation at the cost of coherence.[617] A wide array of exceptions has brought along fragmentation and incoherence.

[617] *Similarly* on the problem of inequality due to compartmentalisation in France: F. LEDUC, "L'œuvre du législateur moderne : vices et vertus des régimes spéciaux" in *La responsabilité civile à l'aube du XXI^e siècle : bilan prospectif, Responsabilité civile et assurances* 2001, special issue 6*bis*, (50) 55, no. 22.

Section IV: STATUTORY COMPETENCE TO MODERATE

133. WHAT IF IT RAINS IN AMSTERDAM? – The common legislative basis of Belgian and French tort law, *i.e.* the BCC and the *Code civil*, has resulted in a particular intertwinement between both legal systems. The saying "*if it rains in Paris, it drizzles in Brussels*"[618] is an expression of that relation. But what if it rains in Amsterdam? Belgium might not have a general statutory competence to moderate the scope of the compensation, yet many authors have wisely looked across the Belgian-Dutch border.[619] This section will continue down that road by analysing the Dutch statutory competence for judges to moderate, since a statutory competence to moderate clearly constitutes a (very strong) legislative deviation from the principle of full compensation.[620] In the Dutch legal system, the competence to moderate even constitutes imperative law.[621] Afterwards, Belgian law is brought back to the fore. Although a general statutory competence to moderate the scope of the compensation is absent, the Belgian legislator has provided some particular competences to moderate the interest due in case of arrears of payment.

Subsection I. A general competence to moderate

134. TOWARDS A GENERAL LEGAL BASIS – Only quite recently, the Dutch legislator has introduced a general legal basis in Art. 6:109 DCC, which obliges[622] the judge to moderate[623] if a full compensation would lead to evidently unreasonable consequences ("*kennelijk onredelijke gevolgen*") in the given circumstances.[624] The underlying idea is the (pertinent)

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[618] *Own translation, original text: "Quand il pleut à Paris, il bruine à Bruxelles." See for example*: B. NELISSEN, "Na sluiting Fortisgate (eindelijk) opening voor *separate opinions*?", *RW* 2011-12, issue 29, (1278-1288) 1279, no. 4; S. VAN LOOCK, "De hervorming van het Franse verbintenissenrecht: Le jour de gloire, est-il arrivé?", *RW* 2014-15, issue 40, (1562-1572) 1569.

[619] *Cf. supra*, no. 79.

[620] P. ABAS, *Rechterlijke matiging*, 2014, 9, no. 6; ASSER (HARTKAMP), *De verbintenis in het algemeen*, 2000, no. 415, 331 and no. 492, 430-431; ASSER (HARTKAMP/SIEBURGH), *De verbintenis in het algemeen*, 2013, no. 32 and 176 *et seq.*; P. DE TAVERNIER, "Droit néerlandais", 2012, (329) 331, 337 and 339-340; T.E. DEURVORST, "Artikel 109" in *GS Schadevergoeding*, 2011, no. 41; P.C. KNOL, *Vergoeding letselschade*, 1986, §31, 81; G.H.A. SCHUT, *Onrechtmatige daad*, 1997, §36, 168 *et seq.*; C.J.M. KLAASSEN, *Risico-aansprakelijkheid*, 1991, 316-317. *See also*: remark of Prof. MEIJERS in C.J. VAN ZEBEN and J.W. DU PON with the cooperation of M.M. OLTHOF, *Parlementaire geschiedenis*, 1981, 433. France: D. MAZEAUD, " a) Réforme du droit des contrats", *Revue des contrats* 2010, issue 1, (23) II, 2ième alinéa.

[621] Art. 6:109, §3 DCC; J.L.P. CAHEN, *Nederlands burgerlijk recht*, 2002, no. 99, 99; T.E. DEURVORST, "Artikel 109" in *GS Schadevergoeding*, 2011, no. 167; C.J.M. KLAASSEN, *Schadevergoeding*, 2007, 8, no. 8; A.J. VERHEIJ, *Onrechtmatige daad*, 2005, no. 51, 178.

[622] The competence is not discretionary: T. HARTLIEF and R.P.J.L. TJITTES, *Verzekering en aansprakelijkheid* in *Serie recht en praktijk – 79*, Deventer, Kluwer, 1994, 43; J. SPIER *et alii*, *Schadevergoeding*, 2015, no. 260, 327; A.J. VERHEIJ, *Onrechtmatige daad*, 2005, no. 51, 178.

[623] Moderation is reduction, though not *ad nihil*: P. ABAS, *Rechterlijke matiging*, 2014, no. 3a, 2-4. *Contra*: Rechtbank Haarlem (Kantonrechter) 19 mei 2010, no. 453029 CV EXPL 10-1199, *Prg*. 2010, 156, note P. ABAS.

[624] E. BAUW, *Onrechtmatige daad*, 2015, no. 82, 111; A.R. BLOEMBERGEN, *Schadevergoeding*, 1965, no. 86, 120; A.T. BOLT and J. SPIER, with the cooperation of O.A. HAAZEN, *De uitdijende reikwijdte van de aansprakelijkheid*

realisation that the risks are far greater now than they have been before so that a negligence, which happens to everyone, can suddenly result in a large amount of loss.[625] Although letting the loss lie with the victim seems unsatisfactory, it's sometimes the lesser of two evils.[626] Imagine, for example, the situation in which a full compensation would result in the financial downfall of the person held liable.[627] Hence, the principle of full compensation is limited in light of fairness.[628] For example, it could remedy the problem of overburdening a child which has committed a tort via too high claims for compensation.[629] Furthermore, reference is made to the competence to moderate in Swiss law which seems to work in a very satisfactory way.[630] Before the new DCC in 1992, the legal basis of the competence to moderate was situated in several legal provisions such as Art. 1406[631] and 1407 (old) DCC.[632] The former legal provision read as follows: "*In case of intentional or careless manslaughter, the surviving spouse, the children or the parents of the person struck down, who tend to live of his earnings, have a claim for compensation, to be valued on the basis of the reciprocal state and fortune of the persons, and depending on the circumstances.*"[633] The last phrase is reiterated in Art. 1407, second paragraph (old) DCC, where it relates to the intentional or careless harm or mutilation of someone or even more generally the loss arising from a criminal offence against a person. The reference to the "*state and fortune*", which would now be translated into "*financial capacity*" ("*draagkracht*"),[634] clearly constitutes an example of "*richesse oblige*".[635]

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uit onrechtmatige daad. Preadvies, Zwolle, W.E.J. Tjeenk Willink, 1996, §3.21, 358; P. DE TAVERNIER, "Droit néerlandais", 2012, (329) 339-340; E.F.D. ENGELHARD, *Regres*, Deventer, Kluwer, 2003, 305; S.D. LINDENBERGH and I. VAN DER ZALM, *Schadevergoeding*, 2015, no. 8, 14.

[625] Toelichting bij Art. 6.1.9.12a. (nu: 6:109) in C.J. VAN ZEBEN and J.W. DU PON with the cooperation of M.M. OLTHOF, *Parlementaire geschiedenis*, 1981, 404. ASSER (HARTKAMP/SIEBURGH), *De verbintenis in het algemeen*, 2013, no. 177; T.E. DEURVORST, "Artikel 109" in *GS Schadevergoeding*, 2011, no. 2 and 11a. *Cf. supra*, no. 3.

[626] J.L.P. CAHEN, *Nederlands burgerlijk recht*, 2002, no. 99, 98.

[627] A.J. VERHEIJ, *Onrechtmatige daad*, 2005, no. 51, 177-178.

[628] A.R. BLOEMBERGEN and S.D. LINDENBERGH, *Schadevergoeding*, 2001, no. 12, 18.

[629] G.J. DE GROOT, "Wettelijke verplichtingen tot schadevergoeding" in X., *Capita Nieuw Burgerlijk Wetboek*, Zwolle, W.E.J. Tjeenk Willink, 1982, (325) 352; F.T. OLDENHUIS, *Onrechtmatige daad: aansprakelijkheid voor personen* in *Monografieën BW, B34*, Deventer, Kluwer, 2014, no. 28, 35.

[630] Toelichting bij Art. 6.1.9.12a. (nu: 6:109) in C.J. VAN ZEBEN and J.W. DU PON with the cooperation of M.M. OLTHOF, *Parlementaire geschiedenis*, 1981, 404-405.

[631] *See* on this provision: L.H. PALS, *Onrechtmatige doodslag. Van beperkte naar volledige schadevergoeding*, Deventer, Kluwer, 1983, x+277 p.

[632] P. ABAS, *Rechterlijke matiging*, 2014, 9, no. 6; ASSER (HARTKAMP/SIEBURGH), *De verbintenis in het algemeen*, 2013, no. 176; H.A. BOUMAN and A.J.O. BARON VAN WASSENAER VAN CATWIJCK, *Schadevergoeding*, 1991, no. 16, 26 and no. 23, 41.

[633] *Own translation, original text: "In geval van moedwilligen of onvoorzigtigen doodslag, hebben de overblijvende echtgenoot, de kinderen of de ouders van den nedergeslagene, die door zijnen arbeid plegen te worden onderhouden, eene regtsvordering tot schadevergoeding, te waardeeren naar gelang van den wederzijdschen stand en de fortuin der personen, en naar de omstandigheden."*

[634] H.A. BOUMAN and A.J.O. BARON VAN WASSENAER VAN CATWIJCK, *Schadevergoeding*, 1991, no. 16, 26; C.J. VAN ZEBEN and J.W. DU PON with the cooperation of M.M. OLTHOF, *Parlementaire geschiedenis*, 1981, 418.

[635] *Cf. supra*, no. 53.

135. RELEVANT CIRCUMSTANCES – The Dutch legislator has explicitly listed, though in a non-exhaustive way, three relevant circumstances: the nature of the liability, the legal relation between the parties and their financial capacity.[636] Firstly, with regard to the nature of the liability, one can think of the distinction between fault and strict liability, whereby the latter would result more easily in a moderation than the former.[637] The reason is that the person held (strictly) liable isn't really to blame.[638] Hence, the lesser the blame, the lesser the claim.[639] An example of a strict liability susceptible to moderation is found in Art. 6:165 DCC.[640] Regarding forms of fault liability, the level of guilt or the severity of the fault is considered a relevant factor.[641] Secondly, the legal relation between the parties could play a role. Tort liability generally should lead more often to moderation than contractual liability, because a tortfeasor didn't voluntary committed himself to certain obligations as did the party performing poorly.[642] The third circumstance listed concerns the financial capacity of the parties, such as the existence of insurance coverage.[643] It was already present in the old Art. 1406 and 1407 DCC. It might be the most important circumstance.[644] One should bear the implicit warning of ABAS in mind. The moderation based on the financial capacity of the parties is not founded in some kind of mercy or charity. It's rather a matter of having a sense of reality and an expression of reasonableness.[645] Given the exemplary nature of the enumeration, various other factors can be relevant.[646] In practice, the provision is used a lot more frequently in case of physical harm than damage to goods.[647] Furthermore, the judge can impose certain conditions with regard to the moderation.[648]

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[636] P. ABAS, *Rechterlijke matiging*, 2014, no. 11, 13; ASSER (HARTKAMP/SIEBURGH), *De verbintenis in het algemeen*, 2013, nos. 180-182; T.E. DEURVORST, "Artikel 109" in *GS Schadevergoeding*, 2011, nos. 67 *et seq.*; C.J.M. KLAASSEN, *Risico-aansprakelijkheid*, 1991, 318.
[637] P. ABAS, *Rechterlijke matiging*, 2014, no. 11, 13; C.J.M. KLAASSEN, *Risico-aansprakelijkheid*, 1991, 318. *See also*: remark of Mr. SNIJDERS in C.J. VAN ZEBEN and J.W. DU PON with the cooperation of M.M. OLTHOF, *Parlementaire geschiedenis*, 1981, 454.
[638] J.L.P. CAHEN, *Nederlands burgerlijk recht*, 2002, no. 99, 98.
[639] T.E. DEURVORST, "Artikel 109" in *GS Schadevergoeding*, 2011, no. 91; A.J. VERHEIJ, *Onrechtmatige daad*, 2005, no. 51, 178.
[640] *Cf. supra*, no. 121.
[641] J.L.P. CAHEN, *Nederlands burgerlijk recht*, 2002, no. 99, 98; P. DE TAVERNIER, "Droit néerlandais", 2012, (329) 339.
[642] P. ABAS, *Rechterlijke matiging*, 2014, no. 11, 13-14.
[643] J. SPIER *et alii*, *Schadevergoeding*, 2015, no. 260, 327.
[644] J.L.P. CAHEN, *Nederlands burgerlijk recht*, 2002, no. 99, 98.
[645] P. ABAS, *Rechterlijke matiging*, 2014, no. 11, 15-16.
[646] *See*: P. ABAS, *Rechterlijke matiging*, 2014, 16-19, no. 12; ASSER (HARTKAMP/SIEBURGH), *De verbintenis in het algemeen*, 2013, no. 178 and 183-184; J.L.P. CAHEN, *Nederlands burgerlijk recht*, 2002, no.99, 99; T.E. DEURVORST, "Artikel 109" in *GS Schadevergoeding*, 2011, no. 2.
[647] P. DE TAVERNIER, "Droit néerlandais", 2012, (329) 339.
[648] T.E. DEURVORST, "Artikel 109" in *GS Schadevergoeding*, 2011, no. 142.

136. REASONABLENESS AND FAIRNESS – Art. 6:109 DCC refers to the standard of reasonableness by the criterion of "*evidently unreasonable consequences*", which calls for an examination of the relation between the general standard of reasonableness and fairness *ex* Art. 6:2 DCC,[649] which is an open norm,[650] and Art. 6:109 DCC. The former is seen as the general rule so that Art. 6:109 DCC constitutes a *lex specialis* with regard to Art. 6:2 DCC.[651] As a result, inspiration can be drawn from Art. 6:2 DCC to determine the relevant circumstances in applying the competence to moderate *ex* Art. 6:109 DCC.[652]

137. WHY MODERATE? – The idea behind the competence to moderate is that in certain circumstances it is unreasonable and unfair to put an unbearable burden on a legal subject and it thus stems from a sense of justice.[653] Before the introduced general legal basis for the competence to moderate, judges were tempted to moderate on the basis of improper grounds such as causality or proof whenever the compensation would be unacceptably high but no legal possibility to moderate existed.[654] This seems to correspond to what occurs in Belgian law today when judges take the severity of the fault or the level of guilt into consideration.[655] The DCC explicitly assesses the role of liability insurance in determining the scope of the compensation. Art. 109, §2 DCC sets the lower limit to the amount for which the debtor has taken out insurance[656] or was obligated to do so.[657] The notions of "*assurance oblige*"[658] and "*assurabilité oblige*"[659] clearly shine through. BOUMAN warns that it might seem reasonable *prima facie* to set the lower limit to the amount for which the debtor was obligated to take out insurance, but sometimes the debtor is not to blame for the non-insurance.[660] One might think of the situation in which the insurance contract was terminated due to a fault of the bank itself which should

[649] *See*: W.L. VALK, "commentaar op artikel 2 Boek 6 BW" in *Tekst & Commentaar Burgerlijk Wetboek*, 2015.
[650] S.D. LINDENBERGH, *Schadevergoeding*, 2014, no. 48, 72; V. VAN DEN BRINK, "Redelijkheid en billijkheid en hun overlap met verwante wettelijke bepalingen", *Maandblad voor Vermogensrecht* 2012, (23) 23, no. 1.
[651] HR 2 maart 2001, *NJ* 2001, 584; P. ABAS, *Rechterlijke matiging*, 2014, no. 5, 5; C.J.M. KLAASSEN, *Risico-aansprakelijkheid*, 1991, 317.
[652] P. ABAS, *Rechterlijke matiging*, 2014, no. 5, 7-8.
[653] H.A. BOUMAN and A.J.O. BARON VAN WASSENAER VAN CATWIJCK, *Schadevergoeding*, 1991, no. 23, 41.
[654] H.A. BOUMAN and A.J.O. BARON VAN WASSENAER VAN CATWIJCK, *Schadevergoeding*, 1991, no. 23, 41; H.A. BOUMAN and G.M. TILANUS-VAN WASSENAER, *Schadevergoeding*, 1998, no. 24, a, 40. H.C.F. SCHOORDIJK, *Het algemeen gedeelte van het verbintenissenrecht naar het Nieuw Burgerlijk Wetboek*, Deventer, Kluwer, 1979, 281.
[655] *Cf. supra*, no. 117.
[656] This is said to go back to the decision "Zwaantje van Delft": HR 20 februari 1936, *NJ* 1936, 420, note E.M.M. *See*: P. ABAS, *Rechterlijke matiging*, 2014, 54-55, no. 23; H.A. BOUMAN and A.J.O. BARON VAN WASSENAER VAN CATWIJCK, *Schadevergoeding*, 1991, no. 23, 41-42.
[657] J. SPIER *et alii*, *Schadevergoeding*, 2015, 327-328, no. 261; The fact that insurance was customary is a relevant factor *ex* Art. 6:109, §1 DCC but is not comprised in Art. 6:109, §2 DCC. *See*: ASSER (HARTKAMP/SIEBURGH), *De verbintenis in het algemeen*, 2013, no. 187.
[658] *Cf. supra*, no. 56. *Vgl.* P. ABAS, *Rechterlijke matiging*, 2014, no. 22, 53; T.E. DEURVORST, "Artikel 109" in *GS Schadevergoeding*, 2011, no. 160.1.
[659] *Cf. supra*, no. 60.
[660] H.A. BOUMAN and A.J.O. BARON VAN WASSENAER VAN CATWIJCK, *Schadevergoeding*, 1991, no. 23, 42.

have terminated the insurance contract of a namesake. Although it's true that such cases may occur, it doesn't seem to render the situation unfair if a similar rule would be introduced in Belgian law. If the non-insurance results from someone else's fault, compensation can be claimed by the debtor from that person so that the claim for compensation substitutes the coverage of the insurance which should have been taken out.

138. ABUSE? – If a general competence to moderate exists, one can wonder whether such competence could lead to abuse. In my view, questioning the rightfulness of the use of the statutory competence given to civil judges already implies a distrust of the judiciary in judging the necessity of moderating the amount of the compensation. Moreover, even if some judges would apply the competence while pushing the boundaries of legal creativity, rigid rules on the grounds given for the moderation could suppress malpractice. The stringent rules are necessary since the competence to moderate is casuistic by nature.[661] Principally, the judge will at least have to give his reasons as for which circumstances have justified the moderation and which reductive percentage corresponds to these circumstances.[662] The latter requirement, however, is not met in practice, where one should rather speak of an estimate than an accurate examination.[663] It suffices to give the percentage by which the judge has reduced the compensation.[664] No detailed overview with precise figures is required, thus recognising to a certain extent the influence of the judges' intuition.[665] The judge of the Court of Cassation ("*cassatierechter*") will monitor that the judge who determines the facts on which the case is based ("*feitenrechter*"), shows an appropriate restraint.[666]

[661] P. ABAS, *Rechterlijke matiging*, 2014, no. 14, 21.
[662] T.E. DEURVORST, "Artikel 109" in *GS Schadevergoeding*, 2011, no. 143.
[663] P. ABAS, *Rechterlijke matiging*, 2014, no. 14, 24.
[664] T.E. DEURVORST, "Artikel 109" in *GS Schadevergoeding*, 2011, no. 142.
[665] P. DE TAVERNIER, "Droit néerlandais", 2012, (329) 340.
[666] HR 28 mei 1999, no. 16853, no. C97/332HR, *NJ* 1999, 510, concl. AG HARTKAMP, consideration 3.3.2; P. ABAS, *Rechterlijke matiging*, 2014, no. 14, 21-23; ASSER (HARTKAMP/SIEBURGH), *De verbintenis in het algemeen*, 2013, no. 179; C.J.M. KLAASSEN, *Risico-aansprakelijkheid*, 1991, 317-318; J. SPIER *et alii*, *Schadevergoeding*, 2015, no. 260, 326.

Subsection II. Particular competences to moderate

139. MODERATION OF AGREED MORATORY INTEREST – In a particular situation, the Belgian judge does have a competence to moderate the compensation, despite the absence of a general competence to do so. In case of arrears of payment, thus in case of a monetary debt ("*geldschuld*"), a compensation will be due by means of the obligation to pay a certain interest. In case of the non-performance of an obligation expressed in money, the interest is a moratory one.[667] Although moratory interests are principally fixed *a rato* of the statutory interest,[668] parties can agree on a different moratory interest, since Art. 1153 BCC constitutes permissive law.[669] The result would be a penalty clause.[670] It should be noted in advance that an obligation arising from tort isn't subject to Art. 1153 BCC, because it isn't considered an obligation already from the outset expressed in money.[671] Still, it's interesting to look at the agreed moratory interests, given the introduced competence for the judge to moderate them. Art. 1153, fifth paragraph BCC was introduced in 1998[672] and enables[673] the judge to moderate the interest agreed upon as a compensation for the late performance if that interest clearly exceeds the loss actually suffered as a result of the delay. According to the spirit of the law, it can be argued that the criterion shouldn't be the loss actually suffered but rather the potential loss, as is the case

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667 *See* on the difference between moratory and compensatory interests: B. DE TEMMERMAN, "Interest bij schadevergoeding uit wanprestatie en onrechtmatige daad. Een stand van zaken, tevens aanleiding tot een kritische beschouwing over de grondslagen van het Belgische schadevergoedingsrecht", *TPR* 1999, issue 3, (1277) 1282, no. 3; K. MARCHAND and S. VEREECKEN, "Capita selecta interest" in P. LECOCQ and C. ENGELS (eds.), *Chronique de droit à l'usage des juges de paix et de police 2008/ Rechtskroniek voor de vrede- en politierechters 2008*, Brussel, la Charte, 2008, (311) 313-314, no. 4.

668 Art. 1153, first paragraph BCC.

669 S. STIJNS, *Verbintenissenrecht, 1*, 2005, 179-180, no. 251. *Contrary* to the imperative Art. 6:94 in the Netherlands. *See*: G.T. DE JONG, H.B. KRANS and M.H. WISSINK, *Verbintenissen*recht *algemeen*, Deventer, Kluwer, 2014, 201-203, no. 219.

670 B. DE TEMMERMAN, "Interest bij schadevergoeding uit wanprestatie en onrechtmatige daad: kan de Hollandse nuchterheid bijdragen tot het vinden van een uitweg uit het Belgische labyrint?" in J. SMITS and S. STIJNS (eds.), *Remedies in het Belgisch en Nederlands contractenrecht*, Antwerpen, Intersentia, 2000, (327) no. 14, 339; V. SAGAERT and I. SAMOY, "De wet van 2 augustus 2002", 2002-03, (321) no. 34, 332, with references; I. SAMOY, "De geoorloofdheid van schadebedingen na de wet van 23 november 1998: de figurantenrol van de werkelijk gelden schade en van de nietigheidssanctie", *R.Cass.* 2002, (342) 345, no. 5; I. SAMOY and M. AGUIRRE, "De raakvlakken tussen de contractuele en de buitencontractuele aansprakelijkheid", 2010, (97) 125, no. 65.

671 B. DE TEMMERMAN, "Interest bij schadevergoeding uit wanprestatie en onrechtmatige daad: kan de Hollandse nuchterheid bijdragen tot het vinden van een uitweg uit het Belgische labyrint?" in J. SMITS and S. STIJNS (eds.), *Remedies in het Belgisch en Nederlands contractenrecht*, Antwerpen, Intersentia, 2000, (327) 337-338, no. 12; S. STIJNS, *Verbintenissenrecht, 1*, 2005, 179, footnote 248.

672 Law of the 23rd of November 1998 to change the Civil Code with regard to the penalty clause and the moratory interest (*own translation, original title*: "*Wet van 23 november 1998 tot wijziging, wat het strafbeding en de moratoire interest betreft, van het Burgerlijk Wetboek*"), *BS* 13th of January 1999, 901.

673 Even obliges the judge to moderate, in line with the meaning in the preparatory works: J. HERBOTS, "De nieuwe wet op de schadebedingen: het zogenaamde strafbeding" in S. STIJNS and H. VANDENBERGHE (eds.), *Verbintenissenrecht* in *Themis*, Brugge, die Keure, 2000-2001, (39) no. 27, 51.

for the moderation of penalty clauses *ex* Art. 1231, §1 BCC.[674] The statutory fixation of the amount of the compensation is replaced by a range of judicial fixations.[675] The absolute minimum, however, is the statutory interest.[676] The reason for the introduced competence to moderate is to prevent situations of unfairness in which one party speculates on the non-performance of the other party.[677] It is meant to protect the creditors.[678]

140. MODERATION IN COMMERCIAL TRANSACTIONS – As regards commercial transactions, the judge also has a competence to moderate[679] agreed interests on the basis of the Law of the 2nd of August 2002 concerning the fight against the arrears in payment in commercial transactions.[680] It provides for a regime complementary to Art. 1153 BCC[681] and limits the principle of full compensation.[682] Art. 7 of that law enables the judge to revise agreed interests if there's an obvious unfairness towards the creditor in light of all circumstances. The judge will examine *inter alia* whether the clause creates an obvious disproportion between the rights and duties of the parties at the expense of the creditor or whether the debtor has any objective reasons to deviate from the statutory regime of the Law of the 2nd of August 2002. The judicial

[674] I. SAMOY and M. AGUIRRE, "De raakvlakken tussen de contractuele en de buitencontractuele aansprakelijkheid", 2010, (97) 125, no. 65; S. STIJNS, "Contractualisering van sancties in het privaatrecht, in het bijzonder bij wanprestatie", *RW* 2001-02, (1258) no. 36; S. STIJNS, *Verbintenissenrecht, 1*, 2005, 180, footnote 250. *Contra*: J. HERBOTS, "De nieuwe wet op de schadebedingen: het zogenaamde strafbeding" in S. STIJNS and H. VANDENBERGHE (eds.), *Verbintenissenrecht* in *Themis*, Brugge, die Keure, 2000-2001, (39) 49, no. 21.

[675] B. DE TEMMERMAN, "Interest bij schadevergoeding uit wanprestatie en onrechtmatige daad: kan de Hollandse nuchterheid bijdragen tot het vinden van een uitweg uit het Belgische labyrint?" in J. SMITS and S. STIJNS (eds.), *Remedies in het Belgisch en Nederlands contractenrecht*, Antwerpen, Intersentia, 2000, (327) no. 14, 339.

[676] Art. 1153, fifth paragraph BCC.

[677] Toelichting bij het wetsvoorstel tot wijziging, wat het strafbeding en de moratoire interest betreft, van het Burgerlijk Wetboek (L. WILLEMS), *Parl.St.* Kamer 1997-98, 1373/1, 5.

[678] J. HERBOTS, "De nieuwe wet op de schadebedingen: het zogenaamde strafbeding" in S. STIJNS and H. VANDENBERGHE (eds.), *Verbintenissenrecht* in *Themis*, Brugge, die Keure, 2000-2001, (39) 48, no. 16.

[679] *Contra*: V. SAGAERT and I. SAMOY, "De wet van 2 augustus 2002", 2002-03, (321) 331, no. 33.

[680] *Own translation, original title: "Wet van 2 augustus 2002 betreffende de bestrijding van de betalingsachterstand bij handelstransacties"*, *BS* 7th of August, no. 2002009716, 34281. *See* on this law: V. SAGAERT and I. SAMOY, "De wet van 2 augustus 2002", 2002-03, 321-334; P. WERY, "La loi du 2 août 2002 concernant la lutte contre le retard de paiement dans les transactions commerciales et ses incidences sur le régime des clauses pénales", *JT* 2003, issue 6119, 869-882.

[681] Rb. Dendermonde 21 november 2003, *TBBR* 2005, 225 I. SAMOY and M. AGUIRRE, "De raakvlakken tussen de contractuele en de buitencontractuele aansprakelijkheid", 2010, (97) 127, no. 70.

[682] P. WERY, "La loi du 2 août 2002 concernant la lutte contre le retard de paiement dans les transactions commerciales et ses incidences sur le régime des clauses pénales", *JT* 2003, issue 6119, (869) 876, no. 15.

review is limited.[683] The aim is to prevent abuse of contractual freedom and to provide protection against the position of power of larger parties.[684]

141. ABUSE OF THE LAW – A final instrument to allow the judge to moderate the moratory interest is the doctrine of the prohibition of abuse of the law.[685] The exercise of one's right to claim a certain moratory interest could constitute an abuse of the law.[686] Since this doctrine relates rather to a jurisprudential deviation than a legislative one, the doctrine will be discussed further on.[687]

[683] C. BIQUET-MATHIEU and C. DELFORGE, "Le régime juridique des intérêts – Essai de synthèse" in P. LECOCQ and C. ENGELS (eds.), *Chronique de droit à l'usage des juges de paix et de police 2008/ Rechtskroniek voor de vrede- en politierechters 2008*, Brussel, la Charte, 2008, (239) 287, no. 75; V. SAGAERT and I. SAMOY, "De wet van 2 augustus 2002", 2002-03, (321) no. 32, 330.

[684] V. SAGAERT and I. SAMOY, "De wet van 2 augustus 2002", 2002-03, (321) 329, no. 29; I. SAMOY and M. AGUIRRE, "De raakvlakken tussen de contractuele en de buitencontractuele aansprakelijkheid", 2010, (97) 125-126, no. 67.

[685] I. SAMOY and M. AGUIRRE, "De raakvlakken tussen de contractuele en de buitencontractuele aansprakelijkheid", 2010, (97) 128, no. 74.

[686] Cass. 17 oktober 2008, AR C.07.0214.N, *JT* 2013, issue 6510, 138, note M. MARCHANDISE, M., *Pas*. 2008, issue 10, 2278 and *TBBR* 2011, issue 3, 139. *See*: S. STIJNS, *Verbintenissenrecht*, *1*, 2005, 186-187, no. 262, with references.

[687] *Cf. infra*, Chapter II, Section II.

CHAPTER II: JURISPRUDENTIAL DEVIATIONS

143. DEVIATING JUDGES – Notwithstanding its acceptance, the principle of full compensation will not always be possible to abide by in practice.[688] On some occasions, the judge will have to decide to grant either too much or too little compensation, because the nature of the loss does not lend itself for a just and appropriate compensation.[689] For instance, an object already used by the victim is destroyed. The author of the damage will need to compensate for this lost object, but its precise value is difficult to determine and it is uncertain which coefficient to deduct from the store price in order to take into account the age and wear of the lost object.[690] In such cases, the interest of the victim prevails.[691] In its first and main section, this chapter will assess another example, namely the appreciation *ex aequo et bono* (Subsection I) with particular attention for the compensation of moral loss (Subsection II). The second section will deal with the doctrine of the prohibition of abuse of the law, which constitutes a general instrument to moderate the abusive exercise of rights and serves as a good example of how judges deal with an instrument allowing them to moderate.

Section I: APPRECIATION *EX AEQUO ET BONO* AND MORAL LOSS

Subsection I. Appreciation ex aequo et bono

144. LOSS V. COMPENSATION – Two different phases should be distinguished when assessing a case of loss. On the one hand, there's the determination and estimation of the loss. On the other hand, there is the determination of the compensation. Although in Belgian law the compensation equals the loss,[692] it is important to keep both phases separated.[693] The principle of full compensation governs the second phase, whereas the appreciation *in concreto* of the loss is crucial to the first phase. Evidently, excluding an element from the loss has an impact on the compensation granted. Yet, as already stated, this thesis only focusses on the deviations from the principle of full compensation in that second phase. There is, however, one topic which

[688] H. ULRICHTS even calls it a myth: H. ULRICHTS, *Schaderegeling*, 2013, 268, no. 540.
[689] L. CORNELIS, "Werkelijkheids- en zekerheidsgehalte van schade en schadeherstel" in M. VAN DEN BOSSCHE (ed.), *De indicatieve tabel. Een praktisch werkinstrument voor de evaluatie van menselijke schade*, Gent, Larcier, 2001, (21) no. 17, 36 en br. 20, 38; J. RONSE, *Schade en schadeloosstelling (onrechtmatige daad)*, 1957, no. 235, 213; J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, 175, no. 235.
[690] J. RONSE, *Schade en schadeloosstelling (onrechtmatige daad)*, 1957, no. 235, 213; N. SIMAR and L. DE ZUTTER, "L'évaluation du dommage", 1999, (1) 7, no. 5.
[691] J. RONSE, *Schade en schadeloosstelling (onrechtmatige daad)*, 1957, 176, no. 236; D. SIMOENS, *Schade en schadeloosstelling*, 1999, no. 10, 21.
[692] J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, no. 350, 251; D. SIMOENS, *Schade en schadeloosstelling*, 1999, no. 10, 22. *Cf. supra*, no. 77.
[693] *See* on the difference steps in the judge's reasoning: J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, 251-252, no. 350. *See* on the differences between both phases: S. STIJNS, *Verbintenissenrecht, 1*bis, 2013, 100, no. 126.

bridges both phases in such a way that although it essentially relates to the estimate of the loss, it should be examined in this thesis: the appreciation *ex aequo et bono*. Since this appreciation implies that the different items of loss cannot be fixed as to their amounts, the compensation of the loss can never be a full one. Therefore, the estimate of the loss will *de facto* – though also *de iure* because loss and compensation coincide – constitute the assessment of the scope of the compensation. Furthermore, this topic relates to the deviant system discussed in the next chapter, because the Indicative Table is said to constitute a tool or indication only when the real scope of the loss cannot be proven or estimated, *i.e.* in cases in which generally an appreciation *ex aequo et bono* was accepted.[694] That way, this system forms a *prelude*.

145. ASSESSING THE LOSS – When faced with a situation in which someone has caused a loss to another person who claims compensation for that loss, every judge bears the same primary obligation to assess the loss in an accurate way and to make a precise estimate.[695] He has a free power of judgment in assessing both the existence and the scope of the loss.[696] Yet, it's obvious that not each imaginable case of loss will lend itself to an accurate determination of the loss. Consequently, the rule of the appreciation *in concreto* is often violated, according to ULRICHTS.[697] Whenever impossible to appreciate *in concreto*, the judge can appreciate the loss *ex aequo et bono*.[698] There has been a proliferation in the field of these evaluations *ex aequo et bono*, particularly concerning moral loss, so that the "*idealized image*" of an appreciation *in concreto* should be nuanced.[699] Related to the matter of extrapatrimonial loss, reference must be made to the statements during the discussion on the compensation for weak road users. It was said that a more thorough debate was needed to critically examine the manifold and high compensations for moral loss, across the boundaries of compensations.[700] Inspiration for a legislative improvement may be drawn from Art. 6:97 DCC.[701] It explicitly prescribes that the judge should resort to an estimation when the scope of the loss cannot accurately be determined.[702] The rule already existed before the new DCC.[703] The loss is then determined in

[694] D. SIMOENS, *Schade en schadeloosstelling*, 1999, no. 4B, 8. *See also*: H. ULRICHTS, *Schaderegeling*, 2013, no. 139, 59.
[695] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, no. 348, 210; E. DIRIX, *Schade*, 1984, 32, no. 26; J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, 255-256, no. 356.
[696] J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, no. 351, 252.
[697] H. ULRICHTS, *Schaderegeling*, 2013, 55, no. 130.
[698] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, no. 348, 210.
[699] D. SIMOENS, "Recente ontwikkelingen", 2004, (277) no. 99, 323.
[700] *See*: H. ULRICHTS, *Schaderegeling*, 2013, 268, no. 540.
[701] *See*: S.D. LINDENBERGH, W.J.G. OOSTERVEEN and N. FRENK, "commentaar op art. 6:97 BW" in *Tekst & Commentaar Burgerlijk Wetboek*, 2015.
[702] P. DE TAVERNIER, "Droit néerlandais", 2012, (329) 340.
[703] S.D. LINDENBERGH, "art. 6:97 BW" in *Groene Serie Schadevergoeding*, 2015, no. 20.

fairness, *i.e. ex aequo et bono*.[704] Still, the aim is a full compensation of the loss.[705] Against that background, the provision states that the loss has to be evaluated in a way corresponding the most with its nature.[706] Hence, the judge can opt for an evaluation *in abstracto*.[707] The result is considered to be the minimum.[708] The underlying reason is especially efficiency.[709] Yet, the starting point remains the compensation of the loss actually suffered.[710] The judge enjoys a large freedom by means of the provision of Art. 6:97 DCC.[711]

146. IMPOSSIBLE TO APPRECIATE OTHERWISE – Nonetheless, Belgian judges shouldn't take this alternative way of evaluating the loss as the easy way out of evaluation difficulties. Only as a subsidiary technique of estimating the loss, *i.e.* when an accurate estimate is truly impossible, the appreciation *ex aequo et bono* may come into play.[712] The impossibility to make a precise estimate constitutes a substantial requirement, which has to be found in the decision itself.[713] Yet, the Belgian Court of Cassation can merely test this requirement formally, since the conclusion that an accurate appreciation of the loss is impossible falls within the sovereign power to judge and thus is left to the conscious of the judge who determines the facts on which the case is based.[714]

147. MOTIVATION – The appreciation *ex aequo et bono* of the loss is an appreciation based on fairness. Whenever a judge wants to estimate the loss *ex aequo et bono*, he will need to give

[704] ASSER (HARTKAMP/SIEBURGH), *De verbintenis in het algemeen*, 2013, no. 34. Yet, the terms "*ex aequo et bono*" may be misleading in light of the requirements of the Hoge Raad for reasons stated in the judgment: C.J.M. KLAASSEN, *Schadevergoeding*, 2007, no. 13, 19.
[705] J. SPIER *et alii*, *Schadevergoeding*, 2015, no. 206, 260.
[706] ASSER (HARTKAMP/SIEBURGH), *De verbintenis in het algemeen*, 2013, no. 34; S.D. LINDENBERGH, "art. 6:97 BW" in *Groene Serie Schadevergoeding*, 2015, no. 19, with reference to case law.
[707] Memorie van antwoord aan de Tweede Kamer in C.J. VAN ZEBEN and J.W. DU PON with the cooperation of M.M. OLTHOF, *Parlementaire geschiedenis*, 1981, 339; A.J. VERHEIJ, *Onrechtmatige daad*, 2005, no. 47, 164. *See* for an overview of the case law: S.D. LINDENBERGH, "art. 6:97 BW" in *Groene Serie Schadevergoeding*, 2015, no. 28.
[708] C.J.M. KLAASSEN, *Schadevergoeding*, 2007, no. 11, 14.
[709] J. SPIER *et alii*, *Schadevergoeding*, 2015, no. 208, 262.
[710] S.D. LINDENBERGH, "art. 6:97 BW" in *Groene Serie Schadevergoeding*, 2015, no. 31, a; R. RIJNHOUT and N. STEURRIJS, "Kroniek Schadevergoedingsrecht 2012-2015", *Aansprakelijkheid, Verzekering & Schade* 2015, issue 4, (126) 129, no. 4.1; J. SPIER *et alii*, *Schadevergoeding*, 2015, 261, no. 207; T.J.J. VAN DIJK and J.J. VAN DER HELM, "Een inventarisatie van de in de Nederlandse schaderegeling gehanteerde normen", *Tijdschrift voor Vergoeding Personenschade* 2002, issue 4, (115) 115.
[711] C.J.M. KLAASSEN, *Schadevergoeding*, 2007, no. 6, 6; A.J. VERHEIJ, *Onrechtmatige daad*, 2005, no. 47, 164.
[712] L. DE SOMER, "Begroting van de schade", 2013, (A.IV-1/1) A.IV-1/3; B. DUBUISSON, N. ESTIENNE and D. DE CALLATAŸ, "Droit belge", 2012, (171) 183; D. SIMOENS, *Schade en schadeloosstelling*, 1999, no. 37, 71; W. VAN GERVEN, *Verbintenissenrecht*, 2015, 457-458 and 463.
[713] J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, 255, no. 355.
[714] J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, 255, no. 355, with extensive references to case law. *See* for a similar finding: E. DIRIX, *Schade*, 1984, 45, no. 51. *Similarly* for the Netherlands: S.D. LINDENBERGH, "art. 6:106 BW" in *GS Schadevergoeding*, 2015, no. 3.4.

reasons for that choice in a double way.[715] First, he has to state his reasons why he dismisses the data and information provided for and suggested by the parties[716] for the evaluation and calculation of the loss (and thus of the compensation). Second, the judge also has to explain why the loss cannot be estimated in any other way than *ex aequo et bono*. This double standard is established case law of the Belgian Court of Cassation[717] and is in line with the requirement of the Dutch *Hoge Raad* that the line of reasoning for the estimate should be intelligible.[718] Whenever a judge resorts to an appreciation *ex aequo et bono* of the loss, this particular form of assessing the loss is not only allowed but even obligatory.[719] When the existence of the loss is certain, the judge needs to evaluate the scope of the loss, if necessary by the subsidiary method of an appreciation on the basis of fairness.[720] Finally, the appreciation *ex aequo et bono* still requires providing some leads for that appreciation and the judge has to consider the elements of the loss which influence his assessment.[721] The scope of the compensation needs to be adapted to the particular reality as much as possible. Nonetheless, we already referred to the fact that judges sometimes take the severity of the fault or the level of guilt into consideration when evaluating the compensation *ex aequo et bono*.[722]

Subsection II. Compensating moral loss

148. MORAL LOSS – Especially when the loss cannot be measured in money value in an objective way, the principles of the appreciation *in concreto* and of full compensation are difficult to uphold.[723] Loss without any economic value cannot be simply converted into a

[715] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 210-211, no. 348; L. DE SOMER, "Begroting van de schade", 2013, (A.IV-1/1) A.IV-1/3 and A.IV-3/25; B. DUBUISSON, N. ESTIENNE and D. DE CALLATAŸ, "Droit belge", 2012, (171) 183; L. SCHUERMANS, J. SCHRYVERS, D. SIMOENS, A. VAN OEVELEN and M. DEBONNAIRE, "Overzicht van rechtspraak. Onrechtmatige daad. Schade en schadeloosstelling (1969-1976)", *TPR* 1977, (433) no. 14, 463; L. SCHUERMANS, J. SCHRYVERS, D. SIMOENS, A. VAN OEVELEN and H. SCHAMPS, "Overzicht van rechtspraak. Onrechtmatige daad. Schade en schadeloosstelling (1977-1982)", *TPR* 1984, (511) no. 18, 555; W. VAN GERVEN, *Verbintenissenrecht*, 2015, 458 and 479.

[716] Both claimant and defendant: J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, 254-255, no. 354, with extensive references to case law.

[717] *See* for example: Cass. 16 februari 1956, *Pas.* 1956, I, 622; Cass. 6 maart 1967, *Arr.Cass.* 1967, 840; Cass. 3 november 1982, *Arr.Cass.* 1982-83, 320; Cass. 18 maart 1987, *Arr.Cass.* 1986-87, 944; Cass. 23 oktober 1991, *Arr.Cass.* 1991-92, 180; Cass. 30 maart 1994, *Arr.Cass.* 1994, 340; Cass. 3 maart 2008, *Pas.* 2008, 597; Cass. 22 april 2009, no. P.08.0717.F; Cass. 15 september 2010, no. P.10.0476.F; Cass. 18 april 2011, no. C.10.0548.F; Cass. 17 februari 2012, no. C.11.0451, concl. T. WERQUIN, *JLMB* 2012, 683, note T. PAPART and *RGAR* 2013, no. 14.938, note D. DE CALLATAŸ; Cass. 15 januari 2014, no. P.13.1110.F.

[718] HR 25 oktober 2002, *NJ* 2003, 171; HR 13 juli 2007, *NJ* 2007, 407.

[719] D. SIMOENS, *Schade en schadeloosstelling*, 1999, no. 37, 71.

[720] J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, 256, no. 357. *See* for example: Antwerpen 19 december 1978, *RW* 1978-79, 1795.

[721] J. RONSE *et alii*, *Schade en schadeloosstelling*, 1984, 258-259, nos. 362-363.

[722] *Cf. supra*, no. 117.

[723] E. RIXHON and N. SIMAR, "Introduction : analyse critique du système d'évaluation et d'indemnisation en vigueur – enjeux de la réflexion" in JEUNE BARREAU DE LIEGE (ed.), Luik, 2004, (5) 10; H. ULRICHTS, *Schaderegeling*, 2013, 55, no. 130. Notice, however, that the judge still has to consider the particular situation of

corresponding sum of money.[724] "*Les larmes sont insusceptibles d'évaluation monétaire*".[725] How to compensate in an accurate way the pain felt by the mother of a child ran over by a reckless driver? Or the grief of the owner of a deceased or injured animal?[726] How to compensate for moral loss?[727] Moral or extrapatrimonial loss can be defined as "*the loss which is the result of a harm done to someone's physical or mental well-being, one's affection and physically or emotionally being together with loved ones*".[728] It is "*the joy in life (to be) deprived of and the grief and pain suffered or to be suffered*".[729] To a certain extent, the appreciation will be *in abstracto*.[730] This is inevitable given the transformation of qualitative data (the loss) in

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the victim and not that of a normal or average person so that the appreciation remains *in concreto* in that sense: J. RONSE, *Schade en schadeloosstelling (onrechtmatige daad)*, 1957, 729, no. 1158. France: Y. LAMBERT-FAIVRE and S. PORCHY-SIMON, *Droit du dommage corporel*, 2011, 22, no. 27.

[724] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 61, no. 92; J.-L. FAGNART, "Rapports de synthèse" in J.-L. FAGNART en A. PIRE (eds.), *Problèmes actuels de la réparation du dommage corporel*, Brussel, Bruylant, 1993, (259) no. 7, 266; J.-L. FAGNART, "La compensation du dommage", 2013, (225) 243-245, nos. 38-42; J.-l. FAGNART, "Le régime juridique", 2000, 8, no. 2; D. SIMOENS, "Beschouwingen over de schadeloosstelling voor welzijnsverlies, tevens aanleiding tot de vraagstelling: integrale, genormeerde of forfaitaire schadeloosstelling?" in M. VAN DEN BOSSCHE (ed.), *De indicatieve tabel. Een praktisch werkinstrument voor de evaluatie van menselijke schade*, Gent, Larcier, 2001, (79) no. 17, 88; H. ULRICHTS, "Schadevergoeding wegens morele schade", 2015, (107) 108. *See similarly*: J. SCHRYVERS, "Evaluation et réparation des prejudices extrapatrimoniaux", *RGAR* 1993, (12.168) 12.168[2]; N. VAN DE SYPE, "Morele schade en de begroting ervan" (note to Antwerpen 14 mei 2014), *NJW* 2015, issue 314, (22) 23. France: J.-S. BORGHETTI, "La sanction de la violation par le médecin de son devoir d'information, ou les limites de la réparation intégrale et systématique", *Revue des contrats* 2010, issue 4, (1235) II, 8ième alinéa. The Netherlands: M. FAURE, "Vergoeding van persoonlijk leed: een rechtseconomische benadering" in G. VAN MAANEN (ed.), *De rol van het aansprakelijkheidsrecht bij de verwerking van persoonlijk leed*, Den Haag, Boom Juridische uitgevers, 2003, (85) 92; J. VAN DE BUNT, "Erkenning door fondsen voor immateriële schade" in G. VAN MAANEN (ed.), *De rol van het aansprakelijkheidsrecht bij de verwerking van persoonlijk leed*, Den Haag, Boom Juridische uitgevers, 2003, (249) 251. *See also*: S.D. SUGARMAN, "Tort damages for non-economic losses: Personal injury" in M. BUSSANI and A.J. SEBOK (eds.), *Comparative Tort Law. Global Perspectives*, Cheltenham, Edward Elgar Publishing, 2015, (323) 324; L.T. VISSCHER, "QALY-tijd in de vaststelling van smartengeld bij letsel?", *Tijdschrift voor Vergoeding Personenschade* 2013, 93-101.

[725] *Own translation: "tears are not open to a monetary evaluation"*. X. PRADEL, *Le préjudice dans le droit civil de la responsabilité* in *Bibliothèque de droit privé*, CDXV, Paris, LGDJ, 2004, 296, footnote 1045.

[726] *See* for example: Vred. Brasschaat 23 april 1986, *RGAR* 1987, no. 11.238, note T. VANSWEEVELT; Vred. Kontich 4 mei 1993, *RW* 1994-95, 1132; Rb. Nijvel 7 maart 1997, *TBBR* 1997, 221.

[727] J. CARBONNIER, *Droit civil*, IV, *Les Obligations*, Paris, Presses Universitaires de France, 2000, no. 206, 380; A. BERNARD, "Estimer l'inestimable", *RTD Civ*. 1995, (271) 272.

[728] S. STIJNS, *Verbintenissenrecht*, *1*bis, 2013, 105, no. 134; W. VAN GERVEN, *Verbintenissenrecht*, 2015, 460. *Own translation, original text: "schade als gevolg van een krenking van iemands fysiek of psychisch welbehagen, zijn genegenheid en lichamelijk of gevoelsmatig samenzijn met geliefden"*. *See also*: L. CORNELIS, "Actuele tendensen bij de vergoeding van morele schade" in J.-L. FAGNART and A. PIRE (eds.), *Problèmes actuels de la réparation du dommage corporel*, Brussel, Bruylant, 1993, (109) 112-113 no. 2 and no. 6, 124. The Netherlands: C.C. VAN DAM, "Smartegeld in Europees perspectief: het verdriet van Europa", *TvC* 1991, issue 2, (92) no. 4, 95.

[729] R.PH. ELZAS, *Vergoeding Personenschade*, 1999, no. 20, 38. *Own translation, original text: "gederfde en te derven levensvreugde en* […] *geleden en te lijden smart en pijn"*. The Netherlands: S.D. LINDENBERGH, "Verzekerbaarheid van smartengeld" in T. HARTLIEF and M.M. MENDEL (eds.), *Verzekering en maatschappij*, Deventer, Kluwer, 2000, (397) 400.

[730] L. CORNELIS, "Actuele tendensen bij de vergoeding van morele schade" in J.-L. FAGNART and A. PIRE (eds.), *Problèmes actuels de la réparation du dommage corporel*, Brussel, Bruylant, 1993, (109) no. 5, 121. *Similarly* for the Netherlands: Remark of Prof. MEIJERS in C.J. VAN ZEBEN and J.W. DU PON with the cooperation of M.M. OLTHOF, *Parlementaire geschiedenis*, 1981, 419.

quantitive data (the compensation).[731] According to DIRIX, the compensation for moral loss constitutes an outstanding example of an abstract loss estimate.[732] In practice moral loss is thus appreciated *ex aequo et bono*.[733] As KARAPANOU has phrased it: "*Since the actual loss cannot be accurately evaluated but only approximated, the principle of full compensation for pecuniary losses shifts to 'fair compensation' for non-pecuniary losses.*"[734] The appreciation based on fairness is usually less advantageous for the victim.[735] What should then be the purpose of granting compensation for moral loss? The Court of Cassation has stated that the compensation for moral loss "*serves the purpose of alleviating the pain, the sorrow or any other moral grief and repairs the loss to that extent*."[736] It's no more than a symbolic compensation.[737] BOCKEN and BOONE are absolutely right in finding it more realistic[738] and empathic to accept that a compensation for moral loss cannot undo what has been done and that it can only serve the purpose of acknowledging the existence and the scope of the loss suffered.[739] It's the decision holding someone responsible rather than the sum of money awarded that consoles the sufferer of the loss.[740] Still, "*the invaluable should be evaluated and the irreparable repaired.*"[741] As

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[731] N. DEJEAN DE LA BÂTIE, *Appréciation in abstracto et appréciation in concreto en droit civil français* in *Bibliothèque de droit privé*, Vol. LVII, Paris, LGDJ, 1965, no. 384, 289.
[732] E. DIRIX, "Abstracte en concrete schade", *RW* 2000-01, issue 36, (1329) 1334, no. 10.
[733] L. DE SOMER, "Begroting van de schade", 2013, (A.IV-1/1) A.IV-1/4 and 3/22.
[734] V. KARAPANOU, *Towards a Better Assessment of Pain and Suffering Damages for Personal Injuries*, Antwerpen, Intersentia, 2014, 13-14.
[735] L. DE SOMER, "Begroting van de schade", 2013, (A.IV-1/1) A.IV-3/22.
[736] Cass. 20 februari 2006, no. C.04.0366.N, consideration 18. *Own translation, original text: "heeft tot doel de pijn, de smart of enig ander moreel leed te lenigen en in die mate de schade te herstellen". See also*: R. KRUITHOF, "De vergoeding van extra-patrimoniale schade bij inbreuk op andermans lichamelijke integriteit", *De Verz.* 1985, (349) 352; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, no. 1047, 659.
[737] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 61, no. 92. France: D. MAZEAUD, "Les projets français de réforme du droit de la responsabilité civile", *Petites affiches* 2014, n° 52, (8) no. 7.
[738] *See similarly* in France: G. VINEY and P. JOURDAIN, *Traité de droit civil*, 2011, no. 58-1, 158 and 163.
[739] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 213, no. 353; N. VAN DE SYPE, "Morele schade en de begroting ervan" (note to Antwerpen 14 mei 2014), *NJW* 2015, issue 314, (22) 23; A. VAN OEVELEN *et alii*, "Overzicht van rechtspraak", 2007, (933) 1097, no. 37. The Netherlands: J. VAN DE BUNT, "Erkenning door fondsen voor immateriële schade" in G. VAN MAANEN (ed.), *De rol van het aansprakelijkheidsrecht bij de verwerking van persoonlijk leed*, Den Haag, Boom Juridische uitgevers, 2003, (249) 251. *See also*: E.F.D. ENGELHARD and G.E. VAN MAANEN, *Aansprakelijkheid voor schade*, 2008, 17-19, no. 13. *See also*: V. KARAPANOU, *Towards a Better Assessment of Pain and Suffering Damages for Personal Injuries*, Antwerpen, Intersentia, 2014, 15.
[740] J.-L. FAGNART, "La compensation du dommage", 2013, (225) no. 39, 243; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 693, no. 1087. *See* to that extent the judgment of the Court of Appeal of Brussels stating that the decision itself constitutes the compensation: Brussel 3 april 2003, *RGAR* 2004, no. 13.909.
[741] Y. LAMBERT-FAIVRE, "Dommage corporel. Mieux réparer l'irréparable (L'article 25 de la loi du 21 décembre 2006" in J.-S. BORGHETTI, O. DESHAYES and C. PERES (Comité d'organisation), *Études offertes à Geneviève Viney. Liber amicorum*, Paris, LGDJ, 2008, (567) 567. *Own translation, original text: "Il faut donc bien évaluer l'inestimable et réparer l'irréparable." See also*: P. BRUN, "Synthèse des travaux de la matinée", *Gaz.Pal.* 2010, (1221) 1221; S. PORCHY-SIMON, "L'utilisation des barèmes en droit du dommage corporel au regards des principes fondamentaux du droit de la responsabilité civile" in I. SAYN (ed.), *Le droit mis en barèmes?*, Paris, Dalloz, 2014,

indicated above,[742] the Indicative Table will often provide a useful tool in trying to put a number on the irreparable loss and avoiding great inequality.[743] By considering the amounts awarded in previous cases, there's a pursuit of distributive justice.[744] In line with the usefulness of practical instruments like the Indicative Table, some French authors urge for the introduction of official scales, *e.g.* for the evaluation of moral loss, since at present there are none.[745] Yet, this doesn't mean that no guidance is provided in France today. The courts make quasi-constant use ("*aussi constant qu'officieux*")[746] of semi-official scales.[747]

149. FULL COMPENSATION? – Despite the particular nature of moral loss discussed in the previous paragraph, the principle of full compensation is still upheld by official doctrine in Belgium, which is truly ludicrous.[748] As rightly remarked by VINEY and JOURDAIN, it is meaningless to adhere to a full compensation of what has no corresponding pecuniary value.[749] Believing in a full compensation of extrapatrimonial loss is believing in a utopia.[750] Although

(201) 207. *See* for a link with justice: J.-B. PREVOST, "Aspects philosophiques de la réparation intégrale", *Gaz.Pal.* 2010, (1199) 1202.

[742] *Cf. supra*, no. 144.

[743] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 213, no. 353; J.-L. FAGNART, "La compensation du dommage ", 2013, (225) 244, no. 41; N. VAN DE SYPE, "Morele schade en de begroting ervan" (note to Antwerpen 14 mei 2014), *NJW* 2015, issue 314, (22) 23; W. VAN GERVEN, *Verbintenissenrecht*, 2015, 473.

[744] H. ULRICHTS, "Schadevergoeding wegens morele schade", 2015, (107) 108, no. 1.

[745] P. BRUN, "Rapport introductif" in *La responsabilité civile à l'aube du XXI^e^ siècle : bilan prospectif, Responsabilité civile et assurances* 2001, special issue 6*bis*, (4) 7, no. 29; H. GROUTEL, "Droit français", 2012, (107) 116-117; P. PIERRE, "La mise en œuvre de la réparation intégrale", 2012, (46) 55.

[746] C. BLOCH, A. GIUDICELLI, C. GUETTIER, J. JULIEN, D. KRAJESKI, P. LE TOURNEAU and M. POUMAREDE, *Droit de la responsabilité et des contrats. Régimes d'indemnisation*, Paris, Dalloz, 2014, no. 1555, 648.

[747] O. BERG, "Le dommage objectif" in J.-S. BORGHETTI, O. DESHAYES and C. PERES (Comité d'organisation), *Études offertes à Geneviève Viney. Liber amicorum*, Paris, LGDJ, 2008, (63) 65; I. BESSIERES-ROQUES, C. FOURNIER, H. HUGUES and F. RICHE, *Précis d'évaluation du dommage corporel*, Paris, L'Argus, 1997, 189-192; J. DE MOL, *Le dommage psychique*, Brussel, Larcier, 2012, 271 *et seq.*; H. GROUTEL, "Réparation intégrale et barémisation : l'éternelle dispute", *Responsabilité Civile et Assurance* 2006, issue 11, (1) 1; M. MEKKI, "Les fonctions de la responsabilité civile à l'épreuve des fonds d'indemnisation des dommages corporels", *Petites affiches* 2005, issue 8, (3) no. 29; J. PECHINOT, "Droit français", 2012, (126) 132; M. PÉRIER, *J.-Cl. Civil Code, Art. 1382 à 1386* and *J.-Cl. Responsabilité civile et Assurances, Fasc. 202-1-1*, 2015, 47 *et seq.*; M. PÉRIER, *J.-Cl. Notarial Répertoire, v° Responsabilité civile, Fasc. 202-20*, 2014, nos. 232-233; X. PRADEL, *Le préjudice dans le droit civil de la responsabilité* in *Bibliothèque de droit privé*, CDXV, Paris, LGDJ, 2004, nos. 318-319, 379-380; E. SERVERIN, "Le principe de réparation intégrale des préjudices corporels, au risque des nomenclatures et des barèmes" in I. SAYN (ed.), *Le droit mis en barèmes?*, Paris, Dalloz, 2014, (245) 258 *et seq.*; X, *J.-Cl. Civil Code, Art. 1382 à 1386* and *J.-Cl. Responsabilité civile et Assurances, Fasc. 202-40*, 2011, no. 1; X, *J.-Cl. Civil Code, Art. 1382 à 1386* and *J.-Cl. Responsabilité civile et Assurances, Fasc. 202-50*, 2011, no. 1. *See also*: H. ULRICHTS, "Schadevergoeding wegens morele schade", 2015, (107) 1114-115, no. 7.3.

[748] J.-L. FAGNART, "Définition des préjudices non économiques" in JEUNE BARREAU DE LIEGE (ed.), Luik, 2004, (25) 35, no. 9; J.-L. FAGNART, "La compensation du dommage ", 2013, (225) 244, no. 40.

[749] G. VINEY and P. JOURDAIN, *Traité de droit civil*, 2011, 346, no. 152. *Similarly*: M.A. TUNC, "Rapport de synthèse" in A. DESSERTINE (ed.), *L'évaluation du préjudice corporel dans les pays de la C.E.E.*, Paris, Litec, 1990, (333) 335.

[750] J.-L. FAGNART, "Rapports de synthèse" in J.-L. FAGNART and A. PIRE (eds.), *Problèmes actuels de la réparation du dommage corporel*, Brussel, Bruylant, 1993, (259) no. 7, 266; J.-L. FAGNART, "La compensation du dommage ", 2013, (225) 244, no. 40. *Similarly* for the Netherlands: A.R. BLOEMBERGEN, *Schadevergoeding*, 1965, no. 83, 116-117. France: J. PECHINOT, "Droit français", 2012, (126) 130 ("*a fiction*"); G. VINEY and B.

the ideal seems to be the principle of full compensation, one should admit out of intellectual honesty that it cannot constitute an actual, applicable rule in case of moral loss.[751] Thus, it doesn't come as a surprise that during the drafting of the new DCC some members of the Dutch parliamentary Commission for private and criminal law argued that every moral compensation remains arbitrary.[752] If not arbitrary, it's at least approximate.[753]

150. CONSTITUTIONAL ANGLE – The Constitutional Court has assessed the appreciation *ex aequo et bono* of moral loss, thus completely roaming through the topic of this chapter, in its judgment of the 21st of January 2016.[754] The facts of the case are quite simple. Two individuals were caught using forbidden hunting techniques and equipment. During the criminal procedure, the non-profit organisation "Vogelbescherming Vlaanderen" as civil party within the criminal procedure demanded a compensation of 1900 euros for material and moral loss. Given previous judgments of the referring court stating that the civil party could only receive a symbolic moral compensation of one euro, the non-profit organisation asked for a preliminary ruling of the Constitutional Court. The discussion and the preliminary ruling touched upon the issue of the compensation.

151. REFERRING COURT – The referring judge argued that the moral loss could not be estimated on the basis of an amount per bird. Birds belong to nobody. The moral interest of the civil party could only be evaluated as the interest of every citizen. As a result of the equal appreciation of the interest of each citizen in preserving ecological values, the violation of the moral interest could only be symbolically compensated for. Consequently, the preliminary question is whether Art. 1382 BCC violates (among others) Art. 10 and 11 of the Constitution if interpreted as not allowing an artificial person for the protection of a collective interest, like the protection of the environment, to receive a moral compensation for the loss regarding the collective interest that exceeds the symbolic one of one euro, only due to the interest of everyone

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MARKESINIS, *La réparation du dommage corporel. Essai de comparaison des droits anglais et français*, Paris, Economica, 1985, 139, no. 98 ("*a fiction*"); F. MEYER , "La problématique de la réparation intégrale", *Droit social* 1990, (718) 719 ("*illusive*").

[751] J.-L. FAGNART, "Définition des préjudices non économiques" in JEUNE BARREAU DE LIEGE (ed.), Luik, 2004, (25) 36, no. 11; J.-L. FAGNART, "La compensation du dommage ", 2013, (225) no. 42, 245.

[752] Voorlopig verslag van de vaste Commissie voor privaat- en strafrecht uit de Tweede Kamer in C.J. VAN ZEBEN and J.W. DU PON with the cooperation of M.M. OLTHOF, *Parlementaire geschiedenis*, 1981, 372. *See also*: S.D. LINDENBERGH, "art. 6:106 BW" in *GS Schadevergoeding*, 2015, no. 1.7, a. France: J. FLOUR, J.-L. AUBERT and É. SAVAUX, *Droit civil. Les obligations*, II, *Le fait juridique*, Paris, Dalloz, 2011, no. 388, 503; F. LEDUC, "La conception générale de la réparation intégrale", 2012, (31) 42; F. LEDUC, *Fasc. 201*, 2014, no. 66.

[753] H. GROUTEL, "Droit français", 2012, (107) 117.

[754] GwH 21 januari 2016, no. 7/2016. *See*: B. DEBECKER, "Morele schadevergoeding voor verenigingen mag meer bedragen dan 1 euro", *Juristenkrant* 2016, issue 323, 1-2.

in preserving the collective interest, whereas a natural or artificial person for the same loss creating event principally is entitled to a full compensation and *in concreto* appreciation.

152. CONSTITUTIONAL COURT – The Constitutional Court notes that there's a fundamental difference between a citizen and an artificial person for the protection of the environment. The former will – in principle – be unable to claim compensation for loss regarding non-appropriated environmental components, whereas the latter can claim compensation. The moral loss for the environmental organisation is special in several ways. First, it doesn't coincide with the actual ecological loss, *i.e.* the natural loss, but affects the entire society. The goods at hand are *res communes*. Secondly, loss regarding non-appropriated environmental components is generally difficult to evaluate with mathematical precision, since these losses cannot be translated into economic terms. The Constitutional Court reasons along the general rules already discussed in this section. An appreciation *ex aequo et bono* of the compensation[755] means tailoring it as much as possible to the particular reality. The judge has to explain why the loss cannot be appreciated otherwise. Although an accurate appreciation of the loss regarding non-appropriated environmental components is impossible and the moral loss of the artificial person differs from the actual ecological loss, an evaluation of the loss of the environmental organisation *in concreto* is not impossible. The Court even lists elements which could be taken into account: the statutory goals of the organisation, the scope of its activities, the efforts made to realise its goals and the severity of the environmental disturbance. After this assessment, the judge could decide that a moral compensation of one euro is sufficient. Indeed, as DIRIX has noted, such a rather symbolic compensation is not perceived as a violation of the principle of full compensation on the condition that the extrapatrimonial loss is compensated for by means of that compensation.[756] Yet the scope of the compensation cannot *a priori* be limited to that single symbolic euro. One can draw a parallel between this view and the case law of the French Court of Cassation, which prohibits the attribution of a symbolic or fixed compensation inferior to the loss suffered.[757]

153. CONSEQUENCE – What's the constitutional lesson to be learned from this judgment? Although an accurate estimate of a moral loss generally tends to be impossible, the judge cannot leave it at that. He will have to try to find elements to base his evaluation of the scope of the

[755] The Court speaks of the appreciation of the compensation rather than the loss. In the particular case of the appreciation *ex aequo et bono*, both are closely connected as was stated in the beginning of this chapter.
[756] E. DIRIX, *Schade*, 1984, 45, no. 51.
[757] *See* the references listed in F. LEDUC, *Fasc. 201*, 2014, no. 49 and J.-L. FAGNART and M. DENEVE, "Chronique de jurisprudence – La responsabilité civile (1976-1984)", *JT* 1988, (741) 742, no. 133.

compensation on. It's logical that the Court doesn't want to give carte blanche to judges assessing moral loss, since that would lead to complete legal uncertainty and arbitrariness. Whereas the idea of an evaluation *in concreto* can be supported in the sense that the judge needs to link the scope of the compensation to the particular case instead of to the general finding that the loss at hand is moral in nature, the principle of full compensation hasn't entered the picture sketched by the Constitutional Court. Bearing in mind the doctrinal remarks, the absence of the principle of full compensation in the Court's reasoning could imply that the principle of full compensation is indeed a utopia, a noble goal to strive for but in case of moral loss always beyond our reach.

154. *A PRIORI* LIMITATION OF MORAL LOSS – Whereas in Belgian law no *a priori* exclusion of certain types of moral loss is made, the Dutch legal system displays a different point of view as to extrapatrimonial loss.[758] Patrimonial loss is principally fully compensated for, whereas extrapatrimonial loss is only compensated in fairness, which can be seen as a deviation from the principle of full compensation.[759] The point of departure is that moral loss is not to be compensated for, unless provided for by law.[760] Only the sufferer of the loss can claim compensation for moral loss. Thus, it's a closed system.[761] Although French law has no similar system, some authors have suggested a hierarchy in which patrimonial loss is privileged over extrapatrimonial loss.[762]

155. ARTICLE 6:106 DCC: SCOPE – The most important statutory basis for moral loss in Dutch law is Art. 6:106 DCC.[763] It should be noted that the restriction solely concerns the *legal* obligations to compensate the loss, not the contractual ones.[764] Art. 6:106 DCC states that a

[758] *See* for an historic perspective on the law on compensation of non-pecuniary loss in The Netherlands: S.D. LINDENBERGH and T. WALLINGA, "Compensation of Non-Pecuniary Loss in The Netherlands: Past, Present, Predictions", *The Chinese Journal of Comparative Law* 2015, 308-326. *See* for a comparative examination dating from before the new DCC of 1992: R. OVEREEM, *Samrtegeld*, Zwolle, W.E.J. Tjeenk Willink, 1979, 234 p.
[759] J. SPIER *et alii*, *Schadevergoeding*, 2015, 253, no. 202.
[760] Art. 6:95 DCC; ASSER (HARTKAMP), *De verbintenis in het algemeen*, 2000, no. 412, 324; A.R. BLOEMBERGEN and S.D. LINDENBERGH, *Schadevergoeding*, 2001, no. 12, 18; J.L.P. CAHEN, *Nederlands burgerlijk recht*, 2002, 78, no. 85; P. DE TAVERNIER, "Droit néerlandais", 2012, (329) 331 and 337; R.PH. ELZAS, *Vergoeding Personenschade*, 1999, no. 20, 38; S.D. LINDENBERGH, *Schadevergoeding*, 2014, no. 12, 18.
[761] A.J. VERHEIJ, *Vergoeding van immateriële schade*, 2002, 32-33, no. 22; J. SPIER *et alii*, *Schadevergoeding*, 2015, no. 251, 313 *et seq*.
[762] M. BACACHE-GIBEILI, *Traité de droit civil*, V, 2016, 718, no. 600; G. VINEY, P. JOURDAIN and S. CARVAL, *Traité de droit civil. Les conditions de la responsabilité*, Paris, LGDJ, 2013, 52-56, no. 254.
[763] ASSER (HARTKAMP/SIEBURGH), *De verbintenis in het algemeen*, 2013, no. 24; S.D. LINDENBERGH, "art. 6:106 BW" in *GS Schadevergoeding*, 2015, A; S.D. LINDENBERGH and I. VAN DER ZALM, *Schadevergoeding*, 2015, no. 26, 59; J. SPIER *et alii*, *Schadevergoeding*, 2015, no. 247, 309.
[764] Memorie van antwoord aan de Tweede Kamer in C.J. VAN ZEBEN and J.W. DU PON with the cooperation of M.M. OLTHOF, *Parlementaire geschiedenis*, 1981, 333.

victim is entitled to a compensation in three situations.[765] Firstly, compensation will be due if the person liable for the loss intended to cause that loss.[766] One might think of the destruction of an item to which the possessor attached great moral value.[767] Secondly, the victim will be able to claim compensation if he has suffered physical harm, if he has been robbed of his honour or reputation, or if he has been personally affected.[768] For example, psychological loss can be compensated for.[769] Merely psychological loss can give rise to a compensation without the need for physical harm, as long as the sufferer has been personally affected.[770] Merely psychological uneasiness does not give rise to a right to moral compensation.[771] Thirdly, moral compensation can be obtained for sullying the memory of a deceased to the prejudice of the not legally separated spouse, the registered partner or a relative up till in the second remove, on the condition that the harm was done in such a way that the deceased would have been entitled to claim compensation for robbery of his honour or reputation if he would still have been alive.[772]

156. ARTICLE 6:106 DCC: COMPENSATION – Even when the moral loss falls within the scope of one of the three listed situations, the moral loss is not necessarily (fully) compensated for. Csae law has accepted, albeit *contra legem*, that the judge has a discretionary power regarding granting any compensation and the extent of that compensation.[773] Furthermore, according to Art. 106 DCC, the compensation is determined "*in fairness*".[774] It seems that the view of some

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[765] *See*: ASSER (HARTKAMP/SIEBURGH), *De verbintenis in het algemeen*, 2013, nos. 143-146; S.D. LINDENBERGH, "art. 6:106 BW" in *GS Schadevergoeding*, 2015, nos. 2.2 *et seq.* with references to case law; S.D. LINDENBERGH and I. VAN DER ZALM, *Schadevergoeding*, 2015, no. 27; J. SPIER *et alii*, *Schadevergoeding*, 2015, 309-311, no. 248; A.J. VERHEIJ, *Onrechtmatige daad*, 2005, no. 46, 157-164.

[766] Art. 6:106, a. DCC. *Own translation, original text:"indien de aansprakelijke persoon het oogmerk had zodanig nadeel toe te brengen"*.

[767] R.PH. ELZAS, *Vergoeding van Personenschade in Nederland* in *A.J.T. – Memo's*, Gent, Mys & Breesch, 1999, no. 20, 38; J. SPIER *et alii*, *Schadevergoeding*, 2015, no. 248, 309; A.J. VERHEIJ, *Vergoeding van immateriële schade*, 2002, no. 23, 34.

[768] Art. 6:106, b. DCC. *Own translation, original text:"indien de benadeelde lichamelijk letsel heeft opgelopen, in zijn eer of goede naam is geschaad of op andere wijze in zijn persoon is aangetast"*. *See* for the relevant factors for: S.D. LINDENBERGH, "art. 6:106 BW" in *GS Schadevergoeding*, 2015, nos. 4.9, 4.12, 4.15 and 4.17.

[769] R.PH. ELZAS, *Vergoeding Personenschade*, 1999, no. 20, 38; A.J. VERHEIJ, *Vergoeding van immateriële schade*, 2002, no. 23, 34.

[770] HR 23 januari 1998, nr. 16475, ECLI:NL:HR:1998:ZC2551, *NJ* 1998, 366; J. SPIER *et alii*, *Schadevergoeding*, 2015, no. 248, 310. *Contra*: H.A. BOUMAN and A.J.O. BARON VAN WASSENAER VAN CATWIJCK, *Schadevergoeding*, 1991, no. 37, 87 (but aware of the need for clarification through legal development).

[771] A.J. VERHEIJ, *Vergoeding van immateriële schade*, 2002, no. 23, 34.

[772] Art. 6:106, c. DCC. *Own translation, original text:"indien het nadeel gelegen is in aantasting van de nagedachtenis van een overledene en toegebracht is aan de niet van tafel en bed gescheiden echtgenoot, de geregistreerde partner of een bloedverwant tot in de tweede graad van de overledene, mits de aantasting plaatsvond op een wijze die de overledene, ware hij nog in leven geweest, recht zou hebben gegeven op schadevergoeding wegens het schaden van zijn eer of goede naam"*.

[773] HR 27 april 2001, *NJ* 2002, 91, note C.J.H. BRUNNER; S.D. LINDENBERGH and I. VAN DER ZALM, *Schadevergoeding*, 2015, no. 27, 61.

[774] ASSER (HARTKAMP), *De verbintenis in het algemeen*, 2000, no. 466, 405; ASSER (HARTKAMP/SIEBURGH), *De verbintenis in het algemeen*, 2013, 142 *et seq.*; A.T. BOLT and J. SPIER, with the cooperation of O.A. HAAZEN, *De uitdijende reikwijdte van de aansprakelijkheid uit onrechtmatige daad. Preadvies*, Zwolle, W.E.J. Tjeenk Willink,

Dutch authors that extrapatrimonial loss only qualifies for compensation if there is a certain level of severity,[775] is best seen in light of this criterion of fairness. The judge has a discretionary power as regards both the amount of the compensation and the granting of the compensation itself.[776] The relevant factors in deciding the scope of the compensation will depend on the category of Art. 6:106 DCC at hand.[777] The judge has to give his reasons but enjoys a large freedom in choosing the relevant factors.[778] The Dutch Court of Cassation only conducts a limited judicial review so that the evaluation of extrapatrimonial loss to a large extent remains guesswork.[779] For example, the level of guilt could be taken into account.[780] Also the nature and the severity of the harm play an important role.[781] In practice, Dutch civil judges tend to look for guidance in the *Smartengeldbundel*.[782] This can only be encouraged in light of the judgment of the Hoge Raad on the 17th of November 2000, which stated that the judge should also pay attention to the amounts granted by Dutch judges in similar cases.[783]

157. ARTICLE 6:108 DCC – Finally, the "*blockade*" of Art. 6:108 DCC is worth mentioning.[784] It concerns the compensation for the loss of support by the person, deceased due to the tort, for four categories of persons. Victims falling outside these categories won't be able to recover their loss.[785] With regard to the compensation for that loss of support, not only Art. 6:106 DCC but also Art. 6:108 DCC will be important to determine the existence and the scope

1996, §3.19, 346; H.A. BOUMAN and G.M. TILANUS-VAN WASSENAER, *Schadevergoeding*, 1998, no. 37, 80; R.A. SALOMONS, *Schadevergoeding: zaakschade* in *Monografieën Nieuw BW*, *B38*, Deventer, Kluwer, 1993, no. 28; Y.R.K. WATERMAN, *De aansprakelijkheid van de werkgever voor arbeidsongevallen en beroepsziekten*, Den Haag, Boom Juridische uitgevers, 2009, 140-141.

[775] S.D. LINDENBERGH, "art. 6:106 BW" in *GS Schadevergoeding*, 2015, no. 1.13 with references.

[776] HR 27 april 2001, *NJ* 2002, 91, note C.J.H. BRUNNER; C.J.M. KLAASSEN, *Schadevergoeding*, 2007, no. 3, 3; J. SPIER *et alii*, *Schadevergoeding*, 2015, no. 249, 311.

[777] S.D. LINDENBERGH and I. VAN DER ZALM, *Schadevergoeding*, 2015, no. 28, 66.

[778] ASSER (HARTKAMP/SIEBURGH), *De verbintenis in het algemeen*, 2013, no. 142; J.L.P. CAHEN, *Nederlands burgerlijk recht*, 2002, no. 96, 95; S.D. LINDENBERGH, "art. 6:106 BW" in *GS Schadevergoeding*, 2015, no. 3.1; S.D. LINDENBERGH and I. VAN DER ZALM, *Schadevergoeding*, 2015, no. 28, 66.

[779] C.J.M. KLAASSEN, *Schadevergoeding*, 2007, no. 3, 4.

[780] Rechtbank Zwolle 18 maart 1998, no. 70241, *Prg*. 1998, 4991, note P. ABAS, consideration 3.2.

[781] P.C. KNOL, *Vergoeding letselschade*, 1986, §28, 74.

[782] R.PH. ELZAS, *Vergoeding Personenschade*, 1999, no. 20, 39; S.D. LINDENBERGH and I. VAN DER ZALM, *Schadevergoeding*, 2015, no. 28, 67; J. SPIER *et alii*, *Schadevergoeding*, 2015, no. 249, 311; A.J. VERHEIJ, *Onrechtmatige daad*, 2005, no. 46, 156-157. *Cf. infra*, no. 166.

[783] HR 17 november 2000, *NJ* 2001, 215, note A.R. BLOEMBERGEN; S.D. LINDENBERGH, "art. 6:106 BW" in *GS Schadevergoeding*, 2015, no. 3.10.

[784] G. VAN MAANEN, "De rol van het (aansprakelijkheids)recht bij de verwerking van persoonlijk leed. Enkele gedachten naar aanleiding van het experiment in het Veterans Affairs Medical Centre in Lexington USA" in G. VAN MAANEN (ed.), *De rol van het aansprakelijkheidsrecht bij de verwerking van persoonlijk leed*, Den Haag, Boom Juridische uitgevers, 2003, (1) 8-9.

[785] ASSER (HARTKAMP/SIEBURGH), *De verbintenis in het algemeen*, 2013, no. 159; J.L.P. CAHEN, *Nederlands burgerlijk recht*, 2002, no. 98, 97.

of the compensation.[786] If a case falls within the scope of Art. 6:108, §1 DCC, only the loss of support is compensated for, not the moral loss.[787] As a result, Art. 6:108, §1 DCC then "*blocks*" the application of Art. 6:106 DCC. The second paragraph of Art. 6:108 DCC allows for a compensation of costs made for the disposal of the death. Art. 6:108 DCC illustrates the fact that consequential loss ("*schade bij weerkaatsing*") is generally not fully compensated.[788]

[786] G. VAN MAANEN, "De rol van het (aansprakelijkheids)recht bij de verwerking van persoonlijk leed. Enkele gedachten naar aanleiding van het experiment in het Veterans Affairs Medical Centre in Lexington USA" in G. VAN MAANEN (ed.), *De rol van het aansprakelijkheidsrecht bij de verwerking van persoonlijk leed*, Den Haag, Boom Juridische uitgevers, 2003, (1) 9.

[787] J.L.P. CAHEN, *Nederlands burgerlijk recht*, 2002, no. 98, 97; S.D. LINDENBERGH and I. VAN DER ZALM, *Schadevergoeding*, 2015, no. 33, 80; J. SPIER *et alii*, *Schadevergoeding*, 2015, nos. 256-257, 322.

[788] P. DE TAVERNIER, "Droit néerlandais", 2012, (329) 337. *See also*: S.D. LINDENBERGH and I. VAN DER ZALM, *Schadevergoeding*, 2015, no. 12 *et seq.*; H. ULRICHTS, "Schadevergoeding wegens morele schade", 2015, (107) 113-114, no. 7.1.

Section II: DOCTRINE OF THE PROHIBITION OF ABUSE OF THE LAW

158. INTRODUCTION – The doctrine of the prohibition of abuse of the law was jurisprudentially developed[789] and it concerns the liability of a person who causes a loss for a third person by exercising one of his rights[790].[791] In case of an abuse of the law, the judge can moderate the exercise of the right, which might seem to be lawful but is unacceptable under the doctrine.[792] According to BERG, it can "*justify the moderation of a liability which sometimes would otherwise be too severe*".[793]

159. DELINEATION – Mindful of the aim of this thesis, this section will not deal *in extenso* with the doctrine of abuse of the law. The angle taken is to look at a particular sanction for an abuse of the law, namely the reduction. That way, the doctrine allows for an examination of how judges handle a competence to moderate in relation to a certain amount to be reduced. The sanction of such a moderation is situated in the field of contract (liability) law rather than tort law,[794] but it nevertheless provides an interesting application of a moderation by judges which can't go by unnoticed within the specific framework of this thesis. To determine whether the exercise actually constitutes an abuse of the law, one should look at the generic and the particular criteria, established by case law. These will be discussed first to paint a picture of what the doctrine of abuse of the law is about. Second, the sanction of the moderation by way of a reduction will be examined.

160. GENERIC CRITERION – The Belgian Court of Cassation has reiterated over the past decades the generic criterion of an abuse of the law. A situation of an abuse of the law is at hand if the holder of the (contractual) right exercises his right "*in a way which clearly exceeds*

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[789] *See*: J. VELAERS, "Rechtsmisbruik: begrip, grondslag en legitimiteit" in J. ROZIE, S. RUTTEN and A. VAN OEVELEN (eds.), *Rechtsmisbruik*, Antwerpen, Intersentia, 2015, (1) 1, no. 2, *et seq.*

[790] *See* for an examination and further refinement of which rights can give rise to an abuse of the law: S. STIJNS, "Abus, mais de quell(s) droit(s) ? Réflexions sur l'exécution de bonne foi des contrats et l'abus de droit contractuels", *JT* 1990, issue 5533, 33-44, particularly 36-39, no. 2.

[791] T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 173-174, nos. 240-241. *See* for an overview of the scope of application in Belgium and France: P. ANCEL, "L'abus de droit", 2013, (75) 82-91, nos. 6-16. *See also*: A. DE BOECK and F. VERMANDER, "Rechtsmisbruik", 2015, (29) 31, no. 4 *et seq.*

[792] S. STIJNS, "De matigingsbevoegdheid bij misbruik", 2005, (79) 87; S. STIJNS, *Verbintenissenrecht, 1*, 2005, 66, no. 89; S. STIJNS, D. VAN GERVEN and P. WÉRY, "Chronique de jurisprudence", 1996, (689) 704, no. 38.

[793] O. BERG, *La protection des intérêts incorporels en droit de la reparation des dommages. Essai d'une théorie en droit français et allemand*, Brussel, Bruylant, 2006, 226, no. 441. *Own translation, original text: "de justifier la modération d'une responsabilité qui serait, sinon, parfois trop sévère."*

[794] *See* for an examination of the differences of the doctrine of abuse of the law between the fields of contract law and tort law: E. STAES, *Rechtsmisbruik in contractuele en in buitencontractuele aangelegenheden*, onuitg. Masterscriptie Rechten K.U.Leuven, 2014-15, v+105 p., available on: http://p1801-aleph08.libis.kuleuven.be.kuleuven.ezproxy.kuleuven.be/view/action/nmets.do?DOCCHOICE=3261232.xml&dvs=1460294188739~927&locale=nl&search_terms=&usePid1=true&usePid2=true.

the limits of the regular exercise of that right by a careful and caring person".[795] The formula already indicates that the judicial review is limited so that the judge should exercise restraint.[796] Given the fact that it concerns seemingly lawful conduct, namely the exercise of a right one actually possesses, such restraint appears to be appropriate. Remarkably, there is no similar generic criterion in France,[797] although the tautological formula of the MAZEAUD brothers comes close: an abuse of the law means not exercising a right in a normal way, *i.e.* as would be done by a careful and cautious person.[798] The difference lies within the limited nature of the judicial review, which is only present in the Belgian formula.

161. PARTICULAR CRITERIA – The generic criterion is in need of further refinement by means of an accurate determination of the particular facts which are found to constitute an abuse of the law.[799] Otherwise, the Belgian legal landscape of abuse of the law would move into the direction of the French one, marked by an "*extreme diversity of rights and factual situations*".[800] This comes as no surprise since no general theory on abuse of the law exists in France.[801] Although reference is generally made to the criterion of a malicious intention (to cause someone

[795] Cass. 10 september 1971, *Arr.Cass.* 1972, 31, concl. PG GANSHOF VAN DER MEERSCH, *Pas.* 1972, I, 28, note W.G., *JT* 1972, 118, *RCJB* 1976, 300, note P. VAN OMMESLAGHE, *RGAR* 1972, no. 8791, *RW* 1971-72, 321 and *T.Aann.* 1972, 245; Cass. 19 november 1987, *Arr.Cass.* 1987-88, 354, *Pas.* 1988, I, 332, note, and *RW* 1987-88; Cass. 1 februari 1996, *Arr.Cass*. 1996, 139, *Bull*. 1997, 158 and *Pas*. 1996, I, 158; Cass. 11 september 2003, *Arr.Cass.* 2003, issue 9, 1643, *Pas*. 2003, issue 9-10, 1386 and *RW* 2005-06, issue 37, 1463, note E. DE CALUWE; Cass. 10 juni 2004, A.R. C.02.00.39.N, *Arr.Cass*. 2004, issue 6-8, 1031, concl. D. THIJS, *Pas*. 2004, issue 5-6, 996 and *TGR-TWVR* 2005, issue 2, 114; Cass. 6 januari 2006, *Arr.Cass.* 2006, issue 1, 71, *JT* 2007, issue 6254, 91, note P. LECOCQ, *JLMB* 2006, issue 13, 570, note P.-P. RENSON and *Pas*. 2006, issue 1, 71; Cass. 1 oktober 2010, *Pas*. 2010, issue 10, 2470, *RW* 2011-12, issue 2, 142, note S. JANSEN and S. STIJNS, *TBBR* 2012, issue 8, 387, note P. BAZIER and *TBH* 2011, issue 1, 77 (summary by O. VANDEN BERGHE); Cass. 6 januari 2011, concl. A. HENKES, *Pas*. 2011, issue 1, 44, concl. A. HENKES, *TBBR* 2012, issue 8, 388, note P. BAZIER and *TBO* 2011, issue 3, 109, concl. A. HENKES; Cass. 21 maart 2013, *Pas*. 2013, issue 3, 766, *RW* 2014-15, issue 16, 618, *TBBR* 2015, issue 5, 247 and *TBO* 2015, issue 2, 79 note K. SWINNEN. *Own translation, original text: "op een wijze die kennelijk de grenzen te buiten gaat van de normale uitoefening van dat recht door een voorzichtig en bezorgd persoon."*

[796] A. DE BOECK, "Rechtsmisbruik", 2011, 18; A. DE BOECK and F. VERMANDER, "Rechtsmisbruik", 2015, (29) no. 12, 40; S. STIJNS, "Abus, mais de quell(s) droit(s) ? Réflexions sur l'exécution de bonne foi des contrats et l'abus de droit contractuels", *JT* 1990, issue 5533, (33) no. 3.4, 41; S. STIJNS, "De matigingsbevoegdheid bij misbruik", 2005, (79) 87-88; S. STIJNS, *Verbintenissenrecht, 1*, 2005, no. 90, 67; S. STIJNS, "Het verbod op misbruik van contractuele rechten" in S. STIJNS and P. WÉRY (eds.), *Le juge et le contrat – De rol van de rechter in het contract*, Brugge, die Keure, 2014, (75) 98; S. STIJNS and S. JANSEN, "Actuele ontwikkelingen inzake de basisbeginselen van het contractenrecht" in S. STIJNS, V. SAGAERT, I. SAMOY and A. DE BOECK (eds.), *Verbintenissenrecht* in *Themis*, Brugge, die Keure, 2012, (1) no. 41, 35; A. VAN OEVELEN, "Algemene beginselen in het verbintenissen- en contractenrecht" in M. VAN HOECKE (ed.), *Algemene rechtsbeginselen*, Antwerpen, Kluwer Rechtswetenschappen, 1991, (95) no. 39, 143.

[797] P. ANCEL, "L'abus de droit", 2013, (75) 92-93, no. 19.

[798] *See*: P. ANCEL, "L'abus de droit", 2013, (75) no. 18, 92 and no. 20, 93.

[799] Cass. 21 februari 1992, *RW* 1992-93, 568, *T.Not.* 1993, 379, note M.E. STORME and *JLMB* 1992, 1458, note M.E. STORME.

[800] P. ANCEL, "L'abus de droit", 2013, (75) no. 19, 93. *Own translation, original text: "la diversité extrême des droits et des situations de fait"*.

[801] L. CADIET en P. LE TOURNEAU, *Rép. civ. Dalloz* 2008, *v° Abus de droit*, *Sect. 1 Principes, Art. 1. Notion de l'abus de droit, §2 Nécessité d'un abus, B. Critères de l'abus,* 3; A. KARIMI, Les clauses abusives et la théorie de l'abus de droit, Parijs, LGDJ, 2001, 38.

harm without a genuine personal interest),[802] the French Court of Cassation has stated that such intention is no necessary requirement for an abuse of the law.[803] That way, the means used, for example disloyal practices, can result in an abuse of the law.[804] Taking into consideration all circumstances of the particular case,[805] Belgian judges should indicate why a certain exercise of a particular right amounts to an abuse of the law.[806] To that extent, the particular criteria can provide some guidance.[807] These criteria are the following:[808] the exclusive intention to harm,[809] acting without reasonable and sufficient interest[810] while causing a loss,[811] choosing out of different yet equally useful ways in which to exercise one's right the way which is most harmful to the other party or denies the general interest,[812] and the criterion of proportionality,[813] which concerns the question whether the interest served is proportionate when compared to the interest harmed. A fifth criterion concerns the exercise of a subjective right while turning away from the finality of that right.[814] Some authors plead for adding a sixth criterion: betraying someone's

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[802] A. KARIMI, *Les clauses abusives et la théorie de l'abus de droit*, Paris, LGDJ, 2001, 76-77.
[803] Cass. Civ. 2ième 11 septembre 2008, *JurisData* n° 2008-044 975, *JCP* 2008, I, 123, note Ph. STOFFEL-MUNCK; Y. BUFFELAN-LANORE and V. LARRIBAU-TERNEYRE, *Droit civil*, 2014, 706, no. 1859.
[804] Y. BUFFELAN-LANORE and V. LARRIBAU-TERNEYRE, *Droit civil*, 2014, 706, no. 1860. *See also*: C. LARROUMET and S. BROS, *Traité de droit civil*, III, *Les obligations – Le contrat*, Paris, Economica, 2014, 346-347, no. 372.
[805] Cass. 9 maart 2009, *Arr.Cass.* 2009, 762, *Pas*. 2009, 689, concl. J.-M. GENICOT, *TBBR* 2010, 130, note J.-F. GERMAIN and *JT* 2009, 392; Cass. 30 januari 2003, *TBBR* 2004, 405 and *JLMB* 2004, 672; Cass. 17 mei 2002, *Rev.not.b.* 2003, 86 and *JT* 2002, 694; Cass. 15 maart 2002, *RW* 2003-04, 1261 and *JT* 2002, 814.
[806] S. STIJNS, *Verbintenissenrecht, 1*, 2005, no. 91, 67-68.
[807] P. ANCEL, "L'abus de droit", 2013, (75) no. 20, 93.
[808] *See*: A. DE BOECK, "Rechtsmisbruik", 2011, 12-17; A. DE BOECK and F. VERMANDER, "Rechtsmisbruik", 2015, (29) 40, no. 13 *et seq*.; W. DE BONDT, "Redelijkheid en billijkheid in het contractenrecht", *TPR* 1984, (95) no. 22, 122; R. DERINE, "Hinder uit nabuurschap en rechtsmisbruik", *TPR* 1983, (261) 287-288, no. 44; S. STIJNS, "De matigingsbevoegdheid bij misbruik", 2005, (79) 89 *et seq*.; S. STIJNS, *Verbintenissenrecht, 1*, 2005, no. 91, 68-69; S. STIJNS and S. JANSEN, "Actuele ontwikkelingen inzake de basisbeginselen van het contractenrecht" in S. STIJNS, V. SAGAERT, I. SAMOY and A. DE BOECK (eds.), *Verbintenissenrecht* in *Themis*, Brugge, die Keure, 2012, (1) 35, no. 42; S. STIJNS, D. VAN GERVEN and P. WÉRY, "Chronique de jurisprudence", 1996, (689) 707, no. 45; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, 2009, 174-179, nos. 242-247; P. WÉRY, *Droit des obligations*, Vol. 1, *Théorie générale du contrat*, Brussel, Larcier, 2011, 137-139, no. 114. *See also*: F. VAN NESTE, "Misbruik van recht", *TPR* 1967, 339-382.
[809] Luik 29 april 1988, *RGDC* 1988, 263. Although usually related tot the French decision of Colmar 2 mei 1855 (*D.* 1865, 9) and later on Cass. fr. 3 augustus 1915, *D.* 1917, 79, older Belgian decisions already mention this criterion: Gent 27 januari 1854, *Pas.* 1854, II, 233. *Similarly* in the Netherlands: HR 2 april 1937, *NJ* 1937, 639.
[810] S. STIJNS and H. VUYE, "Tendances et réflexions en matière d'abus de droit en droit des biens" in H. VUYE, P. WÉRY, J. KOKELENBERG and F. VAN NESTE (eds.), *Eigendom-Propriété*, Brugge, die Keure, 1996, (97) no. 7.
[811] Cass. 19 november 1987, *Arr.Cass.* 1987-88, 354, *Pas.* 1988, I, 332, note, and *RW* 1987-88; Cass. 30 januari 1992, *Pas.* 1992, I, 475, *JLMB* 1992, 650, *RCJB* 1994, 185, note P.-A. FORIERS, *RW* 1993-94, 1023 and *RRD* 1992, 256; Cass. 15 maart 2002, *RW* 2003-04, 1261 and *JT* 2002, 814; Cass. 17 mei 2002, *Arr.Cass.* 2002, 1306 and *Pas.* 2002, 1169; Cass. 30 januari 2003, *RW* 2005-06, 1219 and *Pas.* 2003, 227.
[812] Cass. 12 juli 1917, *Pas.* 1918, I, 65; Cass. 16 november 1961, *Pas.* 1962, 332 and *RW* 1962-63, 1157; Cass. 16 januari 1986, *Pas.* 1986, I, 602, note, *JT* 1986, 404, *RCJB* 1991, 4, note M. FONTAINE, *RW* 1987-88, 1470, note A. VAN OEVELEN, *RGDC* 1987, 130 and *RRD* 1986, 37.
[813] Cass. 10 september 1971, *Arr.Cass.* 1972, 31, concl. PG GANSHOF VAN DER MEERSCH, *Pas.* 1972, I, 28, note W.G., *JT* 1972, 118, *RCJB* 1976, 300, note P. VAN OMMESLAGHE, *RGAR* 1972, no. 8791, *RW* 1971-72, 321 and *T.Aann.* 1972, 245.
[814] *See*: A. DE BOECK and F. VERMANDER, "Rechtsmisbruik", 2015, (29) 42, no. 16. *See also*: P. VAN OMMESLAGHE, "Abus de droit, fraude aux droits des tiers et fraude à la loi" (note to Cass. 10 september 1971),

inspired and legitimate confidence.[815] The list of (particular) criteria is non-exhaustive,[816] so that adding more particular critaria is possible as long as they don't contradict the generic criterion.

162. MODERATION – If the judge is convinced on the basis of the generic and the particular criteria that an abuse of the law is at hand, he will sanction this clearly excessive exercise of the subjective right by moderating that exercise to its normal proportions.[817] The aim is to annul the effects of the abusive exercise of the right,[818] though not the right itself.[819] Again, this seems only logical, since it is not the right which poses a problem but the exercise of that right. Of course, the denial of the exercise of a right which in practice can only be exercised once, amounts to a situation hardly different from a lapsed right.[820] The doctrine of abuse of the law is said to constitute an adjustment of the law on the basis of fairness.[821] In my view, one could link the doctrine of abuse of the law to the paradigm of reciprocity, already discussed.[822] The fact that everyone has rights and exercises them, accounts for a certain multitude of background risks. The reciprocity, however, is broken in case someone exercises one's right in a way clearly different from the normal or standard way and degree of exercising that right. The freedom for individuals to exercise their rights in (slightly) different ways is reflected in the limited judicial review carried out in case of an alleged abuse of the law. Furthermore, it makes sense in that respect that the Belgian Court of Cassation has stated that "*the judge, to determine the existence*

RCJB 1976, (303) 316, no. 6. Critical: A. DE BERSAQUES, "L'abus de droit" (note to Gent 20 november 1950), *RCJB* 1953, (272) 286-287, no. 22.

[815] S. STIJNS and I. SAMOY, "La confiance légitime en droit des obligations" in S. STIJNS and P. WERY (eds.), *De bronnen van niet-contractuele verbintenissen*, Brugge, die Keure, 2007, (47) 60, no. 22 and 94, no. 83; S. STIJNS, D. VAN GERVEN and P. WERY, "Chronique de jurisprudence", 1996, (689) 707, no. 45. *See also* on the connection with "*rechtsverwerking*": A. VAN OEVELEN, "Enkele actuele knelpunten in het verbintenissenrecht", *RW* 2011-12, issue 1, (55) 57-58, nos. 6-7.

[816] A. DE BOECK and F. VERMANDER, "Rechtsmisbruik", 2015, (29) no. 11, 39; R. KRUITHOF, H. BOCKEN, F. DE LY and B. DE TEMMERMAN, "Overzicht van rechtspraak (1981-1992): Verbintenissenrecht", *TPR* 1994, (171) no. 194, 475; S. STIJNS, D. VAN GERVEN and P. WÉRY, "Chronique de jurisprudence", 1996, (689) 707, no. 45.

[817] S. STIJNS, "De matigingsbevoegdheid bij misbruik", 2005, (79) 92-93; S. STIJNS and I. SAMOY, "La confiance légitime en droit des obligations" in S. STIJNS and P. WÉRY (eds.), *De bronnen van niet-contractuele verbintenissen*, Brugge, die Keure, 2007, (47) 60, no. 23.

[818] Concl. W. GANSHOF VAN DER MEERSCH bij Cass. 10 september 1971, *Pas.* 1972, (31) 37-38; A. DE BOECK, "Rechtsmisbruik", 2011, 20-21; A. DE BOECK and F. VERMANDER, "Rechtsmisbruik", 2015, (29) 46-47, no. 22; S. STIJNS, D. VAN GERVEN and P. WÉRY, "Chronique de jurisprudence", 1996, (689) no. 46, 708; P. VAN OMMESLAGHE, *Droit des obligations*, I, *Introduction – Sources des obligations*, Brussel, Bruylant, 2010, 81 , no. 36. *See* for the approach based on tort law in France: P. ANCEL, "L'abus de droit", 2013, (75) 97, no. 25 *et seq.*

[819] S. STIJNS and I. SAMOY, "La confiance légitime en droit des obligations" in S. STIJNS and P. WÉRY (eds.), *De bronnen van niet-contractuele verbintenissen*, Brugge, die Keure, 2007, (47) 60-61, nos. 23-24.

[820] A. DE BOECK, "Rechtsmisbruik", 2011, 21.

[821] A. VAN OEVELEN, "Algemene beginselen in het verbintenissen- en contractenrecht" in M. VAN HOECKE (ed.), *Algemene rechtsbeginselen*, Antwerpen, Kluwer Rechtswetenschappen, 1991, (95) no. 39, 142; A. VAN OEVELEN, "Woord vooraf" in J. ROZIE, S. RUTTEN and A. VAN OEVELEN (eds.), *Rechtsmisbruik*, Antwerpen, Intersentia, 2015, (v) v.

[822] *Cf. supra*, nos. 67-70.

of an abuse of the law, with regard to the evaluation of the interests at stake, has to take into consideration all circumstances of the case; he has to examine in particular whether the person who has infringed another person's right, hasn't acted maliciously without bothering about the right to be respected, by which he is at fault which deprives him of the ability to invoke the exception of the abuse of power to his advantage."[823] All circumstances will need to be considered so that solely the finding of a fault will be insufficient.[824] Still, it's clear that the victim's fault plays a role in the sense that it impacts the reciprocity already disturbed.[825] The moderation being imposed by the judge in case of an abuse of the law thus appears to be nothing more than tuning down the abusive exercise of a right so that the reciprocity is restored.

163. MATHEMATIC REDUCTION – Given the fact that a claim for compensation for tort capable of being moderated will most likely consist of a certain amount of money to be paid, the most interesting particular sanction[826] for an abuse of the law is the mathematic reduction. Especially the reduction of penalty clauses, such as the clauses determining the moratory interest,[827] comes close to the situation of a pecuniary compensation for tort. The difference between the right itself and the exercise of that right in the given circumstances is illustrated in the reduction of penalty clauses on the basis of the doctrine of abuse of the law. The clause itself might be perfectly valid and not at all excessive, but the exercise in the particular circumstances of the case can nevertheless be clearly unreasonable.[828] The judge will then reduce the amount.[829] Note that the moderation on the basis of the doctrine of abuse of the law differs from the

[823] Cass. (1e k.) 14 november 1997, AR C.96.0375.F, *Arr.Cass*. 1997, 1138, *Bull*. 1997, 1191, *JLMB* 1998, 1423, *Pas*. 1997, I, 1191, *RJI* 1997, 229 and *Rev.not.b*. 1998, 126. *Own translation, original text: "de rechter, om te bepalen of er rechtsmisbruik is, bij de beoordeling van de belangen die in het geding zijn, rekening moet houden met alle omstandigheden van de zaak; dat hij inzonderheid moet nagaan of degene die andermans recht heeft aangetast, niet moedwillig heeft gehandeld zonder zich te bekommeren om het recht dat hij moet eerbiedigen, waardoor hij een fout heeft begaan die hem de mogelijkheid ontneemt om de exceptie van machtsmisbruik in zijn voordeel aan te voeren"*.

[824] A. DE BOECK, "Rechtsmisbruik", 2011, 20; P. VAN OMMESLAGHE, *Droit des obligations*, I, *Introduction – Sources des obligations*, Brussel, Bruylant, 2010, 76-77, no. 32.

[825] *Cf. supra*, no. 67.

[826] *See* for an examination of the different forms of the sanction of moderation for an abuse of the law: S. STIJNS, "De matigingsbevoegdheid bij misbruik", 2005, (79) 92 *et seq.*

[827] *Cf. supra*, nos. 139 and 141.

[828] J. BAECK, "Gevolgen tussen partijen (met inbegrip van de aanvullende en de beperkende werking van de goede trouw)" in *Comm.Bijz.Ov. Verbintenissenrecht* 2006, 11.

[829] S. STIJNS and S. JANSEN, "Actuele ontwikkelingen inzake de basisbeginselen van het contractenrecht" in S. STIJNS, V. SAGAERT, I. SAMOY and A. DE BOECK (eds.), *Verbintenissenrecht* in *Themis*, Brugge, die Keure, 2012, (1) no. 44, 36; A. VAN OEVELEN, "Actuele jurisprudentiële en legislatieve ontwikkelingen inzake de sancties bij niet-nakoming van contractuele verbintenissen", *RW* 1994-95, issue 24, (793) 807-808, no. 33; P. WÉRY, *Droit des obligations*, Vol. 1, *Théorie générale du contrat*, Brussel, Larcier, 2011, no. 488, b), 466, with references to case law. *See* for example: Cass. 18 februari 1988, *Arr.Cass.* 1987-88, 790, *Pas.* 1988, 728, *RW* 1988-89, 1226 and *TBH* 1988, 696, note E. DIRIX; Bergen 21 maart 1990, *TBH* 1991, 234.

competence to moderate *ex* Art. 1231, § 1 BCC,[830] since it only comes into play when the penalty clause is permitted and thus valid under Art. 1231 BCC.[831]

[830] *Cf. supra*, no. 139.
[831] S. STIJNS, "De matigingsbevoegdheid bij misbruik", 2005, (79) 94-95.

CHAPTER III: OTHER DEVIATIONS: INDICATIVE TABLE(S)

165. PRACTICE LOOKS FOR SOLUTIONS – Sometimes neither the legislator nor the individual judge have provided adequate solutions for the problems concerning the principle of full compensation. Belgian legal practice itself has come up with a new instrument to guide the practice of loss compensating losses: the Indicative Table.

166. RISE OF A NEW INSTRUMENT – The rise of the Indicative Table has been described as the most striking evolution in the field of the law of compensation in the past decade.[832] The rise of this new instrument has indeed had an important impact on legal practice in that field. The initiative for the first Indicative Table was taken by the National union of the magistrates of first instance and the Royal union of the justices of the peace and the Police court judges (*"Nationaal verbond van de magistraten van eerste aanleg en het Koninklijk verbond van vrede- en politierechters"*), who assembled a working group to draft this Indicative Table in 1995. The working group consisted of judges, but also of legal academics, insurers, lawyers and actuaries.[833] The initiative was triggered by the fact that sometimes very dissimilar compensations were granted for victims in similar cases, lacking obvious reasons for that divergence amongst language groups as well as amongst the different courts within the jurisdiction of the same court of appeal or even different chambers of the same court.[834] It should be noticed that even before the rise of the Indicative Tables, there was already a similar instrument, namely the list of compensations for the deprivation of use of vehicles ("*lijst van gebruiksdervingsvergoedingen voor voertuigen*").[835] Although its scope of application was more limited, this list is regarded to be a precursor of the Indicative Tables.[836] Across the border, two similar instruments had already arisen in the Netherlands before the introduction of the first Indicative Table in Belgium. Firstly, every three years an overview of previous Dutch judgments is published in a special edition of the Dutch legal journal *Verkeersrecht*, particularly to provide a sort of standardisation with regard to the compensation of moral loss.[837] It goes by

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[832] A. VAN OEVELEN *et alii*, "Overzicht van rechtspraak", 2007, (933) no. 25, 1014.
[833] D. SIMOENS, "Recente ontwikkelingen", 2004, (277) 322, no. 95.
[834] A. BOYEN, "Forfaitaire vergoedingen", 2002, (55) 55 and 58. *See* for an overview of underlying motives of the Indicative Table: B. DE TEMMERMAN and E. DE KEZEL, "Normering in België: de indicatieve tabel", *Tijdschrift voor Vergoeding Personenschade* 2002, issue 4, (103) 103-104.
[835] X, "Indicatieve tabel van de gebruiksderving van voertuigen (op 01.01.1992)", *T.Vred.* 1991, 341.
[836] A. BOYEN, "Indicatieve tabellen van de magistraten", *Con.M.* 2003-05, (57) 59; A. VAN OEVELEN *et alii*, "Overzicht van rechtspraak", 2007, (933) no. 25, 1014. *See* for an overview of older similar tables: W. PEETERS, "De 'Indicatieve tabel' als antwoord op de noden van de praktijk" in M. VAN DEN BOSSCHE (ed.), *De indicatieve tabel. Een praktisch werkinstrument voor de evaluatie van menselijke schade*, Gent, Larcier, 2001, (1) 4-6.
[837] P.C. KNOL, *Vergoeding letselschade*, 1986, §28, 73; A. VAN, "Recente ontwikkelingen op het gebied van de vergoeding van immateriële schade in de praktijk" in P. KOTTENHAGEN-EDZES (ed.), *Immateriële schade: tendensen en wensen*, Anwerpen, Intersentia, 2000, (19), §4, 30.

several names: *Smartengeldboek*, *Smartengeldbundel* or *Smartengeldgids*.[838] The listed amounts are indicative, not binding.[839] Secondly, a standardisation attempt was made by liability insurers, who published a *Smartengeldformule* (moral compensation formula) in 1984. It is not generally applied, which seems only logical since it is intended for cases of limited harm to victims. Yet, the formula is still of value.[840] Apart from these two instruments, there are also implicit standardisations with regard to the compensation of an injured person.[841] Official and imperative scales with regard to the compensation, however, do not exist in Dutch law.[842] Also in France, an instrument similar to the Indicative Table exists. Art. L. 211-23 of the French Code of Insurances[843] provides for the possibility of periodically publishing the compensations determined by court judgments and agreements.[844] The Organisation for the Management of Information on the Motorcar Risk[845] has done so.[846] Also certain compensation funds have published an indicative frame of reference with the average amounts for each item of loss.[847] With regard to the categorisation of the various items of loss, the *"nomenclature Dintilhac*" is inescapable.[848]

167. SEVERAL VERSIONS – Afterwards, a series of Indicative Tables has been drawn up over the last two decades so as to provide legal practice with an indicative list of fixed amounts of compensation, going beyond the scope of the list of compensations for the deprivation of the

[838] P. DE TAVERNIER, "Droit néerlandais", 2012, (329) 341-342; R.PH. ELZAS, *Vergoeding Personenschade*, 1999, no. 20, 39; A. VAN, "Recente ontwikkelingen op het gebied van de vergoeding van immateriële schade in de praktijk" in P. KOTTENHAGEN-EDZES (ed.), *Immateriële schade: tendensen en wensen*, Anwerpen, Intersentia, 2000, (19) §4. *See*: S.D. LINDENBERGH, *Smartengeld*, Deventer, Kluwer, 1998, xv+391 p.

[839] A.J. AKKERMANS, "Normering van schadevergoeding: een inleidend commentaar", *Tijdschrift voor Vergoeding Personenschade* 2002, issue 4, (101) 101; I. GIESEN, "De 'bindendheid' van normen bij normering van schadevergoeding", *Tijdschrift voor Vergoeding Personenschade* 2002, issue 4, (127) 127.

[840] R.PH. ELZAS, *Vergoeding Personenschade*, 1999, 40, no. 21.

[841] T.J.J. VAN DIJK and J.J. VAN DER HELM, "Een inventarisatie van de in de Nederlandse schaderegeling gehanteerde normen", *Tijdschrift voor Vergoeding Personenschade* 2002, issue 4, (115) 115-117.

[842] P. DE TAVERNIER, "Droit néerlandais", 2012, (329) 341.

[843] Introduced by the Decree of the 18th of March 1988 regarding the codification of legislatove texts concerning the insurances (*original title*: "*Décret n°88-260 du 18 mars 1988 relatif à la codification de textes législatifs concernant les assurances*"), *JORF* 20th of March 1988, 3775.

[844] H. GROUTEL, "Droit français", 2012, (107) 118-119.

[845] *Association pour la gestion des informations sur le risque automobile* (AGIRA).

[846] J. PECHINOT, "Droit français", 2012, (126) 133.

[847] *See*: Y. LAMBERT-FAIVRE and S. PORCHY-SIMON, *Droit du dommage corporel*, 2011, no. 33, 27-28.

[848] *See*: Y. BUFFELAN-LANORE and V. LARRIBAU-TERNEYRE, *Droit civil*, 2014, 605-606, no. 1620; P. BRUN, *Responsabilité civile extracontractuelle*, 2014, 418, no. 621; M. BACACHE, "La nomenclature : une norme ?", *Gaz.Pal.* 2014, issue 361, 7-11; Y. LAMBERT-FAIVRE and S. PORCHY-SIMON, *Droit du dommage corporel*, 2011, 142, no. 127; M. PÉRIER, *J.-Cl. Civil Code, Art. 1382 à 1386* and *J.-Cl. Responsabilité civile et Assurances, Fasc. 202-1-2*, 2015, nos. 6-8; M. ROBINEAU, "Le statut normatif de la nomenclature *Dintilhac* des préjudices", *JCP* 2010, issue 22, 1147-1153; G. VINEY and P. JOURDAIN, *Traité de droit civil*, 2011, no. 108, 262.

use of vehicles.[849] Following the first version of the Indicative Table[850] in 1995, the second version[851] in 1998, the third version[852] in 2001, the fourth version[853] in 2004 and the fifth version[854] in 2008 of the meanwhile generally known Indicate Table were formulated. Nowadays even a sixth Indicative Table[855] has been created in 2012. The aim is not to discuss at length the differences between the various Indicative Tables but to consider their joint impact on legal practice and the way in which they have created a practical deviation from the principle of full compensation in Belgian tort law, *i.e.* their "*dynamics*"[856]. Nonetheless, it should be noticed that throughout the subsequent versions of the Indicative Table, the fixed sums have been increased.[857] In addition, a tendency across the six versions of the Indicative Table has been the introduction of new items of loss and rules on estimating the loss, making the instrument more than a kind of summary of the case law. As a result, legal certainty and the predictability of the compensation to be obtained by a claim for compensation are

[849] A. VAN OEVELEN *et alii*, "Overzicht van rechtspraak", 2007, (933) no. 25, 1014-1015. *See* for an overview of the three generations of Indicative Tables: D. DE CALLATAŸ, "La vie après le tableau indicatif" in B. DUBUISSON (ed.), *Le dommage et sa réparation*, Brussel, Larcier, 2013, (129) 132-139; J.-B. PETITAT, *Kanttekeningen bij de indicatieve tabel*, Gent, Story publishers, 2013, 19-21. *See* for an overview of the evolution of the (first four or three, respectively) Indicative Tables: J. BOGAERT, *Praktijkboek Schadebegroting. De Indicatieve Tabel 2008-2009*, Brugge, Vanden Broele, 2008, 4-6; D. DE CALLATAŸ, "L'évaluation judiciaire des indemnités: tableau indicatif" in J.-L. FAGNART (ed.) *Responsabilités: traité théorique et pratique, Dossier 54*, Diegem, Kluwer, 2002, (6) 7 *et seq.*

[850] X, "Verkeersongevallen: indicatieve lijst der gebruiksdervingen en andere forfaitaire schadevergoedingen (met ingang op 1 januari 1996)", *T.Vred.* 1995, 342-346.

[851] *See* for a published version of the second Indicative Table: X, "Indicatieve Tabel van forfaitaire schadevergoedingen bij verkeersongevallen", *RW* 1998-99, 246-249 and X, "Tableau indicatif des indemnités en droit commun", *RGAR* 1998, 12.992.

[852] *See* for a published version of the third Indicative Table: X, "*Indicatieve tabel (2001)*", *Verkeersrecht* 2001, 290-302, *T.Vred.* 2001, 210-225, *RGAR* 2001, 13.455 and *TAVW* 2001, 166-180; M. VAN DEN BOSSCHE (ed.), *De nieuwe 'Indicatieve tabel': een praktisch werkinstrument voor de evaluatie van menselijke schade*, Brussel, De Boek & Larcier, 2001, 153-175; J. SCHRYVERS, H. ULRICHTS and F. DE WINTER, *Schaderegeling in België (vierde editie)*, Gent, Mys & Breesch, 2001, 69-84.

[853] *See* for a published version of the fourth Indicative Table: X, "De indicatieve tabel (1 mei 2004)", *NJW* 2004, 2-12 and *VAV* 2004, 163-187; W. PEETERS and M. VAN DEN BOSSCHE (eds.), *De behandeling van lichamelijke schadedossiers en tien jaar Indicatieve Tabel – Le traitement de sinistres avec dommage corporel et dix ans de Tableau indicatif*, Brussel, De Boeck & Larcier, 2004, 337-359; J. SCHRYVERS and H. ULRICHTS, *Schaderegeling in België* in *Recht en Praktijk*, issue 36, Mechelen, Kluwer, 2004, 132-155.

[854] *See* for a published version of the fifth Indicative Table: D. VAN TRIMPONT and C. DENOYELLE, "Indicatieve tabel 2008", *NJW* 2008, issue 189, 710-721 and *T.Pol.* 2008, 146-169; D. VAN TRIMPONT and C. DENOYELLE, "Indicatieve tabel. Versie 2008", *VAV* 2008, 381-392.

[855] *See* for a published version of the sixth Indicative Table: W. PEETERS, "De Indicatieve Tabel anno 2012", 2012, 1-35.

[856] D. SIMOENS, "De indicatieve tabel", 2012, (71) 102, nos. 122-123.

[857] J. SCHRYVERS, "Nieuw indicatief tarief letselschade: *semper altius*", *TAVW* 2001, (15) 15; H. ULRICHTS, "Indicatieve tabel 2012 onder de loep", *Juristenkrant* 2013, issue 266, (6) 6.

diminished.[858] Before addressing the impact of the Indicative Tables, the aim of the drafters should be clarified.

168. DRAFTERS' INTENTIONS – In light of the final goal of this thesis, *i.e.* the formulation of a new framework for the deviations from the principle of full compensation, it's crucial to think about the reasons for the introduction of those deviant systems. As for the Indicative Table, the drafters' intentions follow from the problem the instrument was intended to tackle. It provided a practical tool of information and also an answer to the lack of uniformity in compensations for personal injury and it added to more legal certainty, thus speeding up the handling relatively simple cases of loss.[859] To sum up, the Indicative Table was meant to serve as a practical tool for everyone involved in dealing with cases of loss and compensation so that they can be assessed in a good, swift and just manner.[860] The sovereign margin of appreciation for the judge, however, is kept upright, which is emphasised in the preface of the (sixth) Indicative Table.[861]

169. IMPACT OF THE INDICATIVE TABLE – The direct consequence of the Indicative Table's introduction has been the ever growing standardisation of the estimate of personal injury.[862] Moreover, it has drawn attention to the economic consequences of compensations and the need for or the convenience of standardisation.[863] The significance of an economic perspective is supported by the principled analysis made in Chapter II of Part II of this Master's thesis. Especially matters of insurance and insurability should be considered part and parcel of any realistic view on the law of compensation and tort law. In line with the plea for a competence for the judge to moderate the amount of the compensation based on the principles underlying this thesis, the literature on the Indicative Table raises the question of standardisation. In light of the principle of full compensation, it has been called "*nearly blasphemous*" to speak about standardisation of compensations.[864] Although the idea of standardisation and the principle of

[858] G. JOCQUÉ, "De nieuwe indicatieve tabel kritisch bekeken", *RW* 2008-09, issue 27, (1114) 1122, no. 20; G. JOCQUÉ, "Kanttekening. Enkele bedenkingen bij de nieuwe indicatieve tabel", *RW* 2012-13, issue 38, (1519) 1520, no. 10; J.-B. PETITAT, *Kanttekeningen bij de indicatieve tabel*, Gent, Story publishers, 2013, 15.
[859] A. BOYEN, "Forfaitaire vergoedingen", 2002, (55) 57-60; F. HOFMANS, "De Indicatieve Tabel 2012" in K. DE WISPELAERE (ed.), *Verkeersrecht (Reeks Vlaamse Conferentie der Balie Gent)*, Gent, Larcier, 2014, (209) 209; R. SCHMIDT and R. VAN RANSBEEK, "Woord vooraf" in J.-L. DESMECHT, T. PAPART and W. PEETERS (eds.), *Indicatieve tabel 2012 / Tableau indicatif 2012*, Brugge, Die Keure, 2012, (v) v.
[860] A. BOYEN, "Forfaitaire vergoedingen", 2002, (55) 58.
[861] A. BOYEN, "Forfaitaire vergoedingen", 2002, (55) 59; W. PEETERS, "De Indicatieve Tabel anno 2012", 2012, (1) 7.
[862] A. VAN OEVELEN *et alii*, "Overzicht van rechtspraak", 2007, (933) no. 25, 1014.
[863] D. SIMOENS, "Recente ontwikkelingen", 2004, (277) 322, no. 95; A. VAN OEVELEN *et alii*, "Overzicht van rechtspraak", 2007, (933) no. 25, 1015-1016, with multiple references to the relevant literature regarding the first three four versions of the Indicative Table.
[864] D. SIMOENS, "Recente ontwikkelingen", 2004, (277) no. 92, 321.

full compensation are sometimes said not to exclude each other,[865] the influence of the Indicative Table has led to questioning the appreciation *in concreto* of the loss[866] and thus the adherence to the principle of full compensation. In addition, the Indicative Table has rendered the practice of loss compensation more uniform,[867] which was the initial purpose.[868] This goal of course creates a tension with the indicative nature of the Indicative Table.[869] Judges are sometimes explicitly referring to the Indicative Table in their judgments.[870] That way, the question can be raised whether the instrument isn't binding, at least *de facto*.

170. DE FACTO BINDING AND NORMATIVE? – The Indicative Table is not a binding instrument but merely a guiding one.[871] The preface of the sixth version *expressis verbis* states that the indicative nature of the instrument is both the greatest merit[872] of the Indicative Table and in need of emphasis.[873] *"It is neither law nor a binding regulation.*"[874] The preface of the fifth version explains that a careful use of the Indicative Table is only at hand when it's judicially certain that a loss has occurred but its scope cannot be determined with the same certainty.[875] Thus, the instrument relates to the scope of the compensation and not the determination of the loss itself.[876] Furthermore, the presenters of the Indicative Table explicitly invite whoever uses the instrument to remain critical.[877] A logical consequence of the indicative nature of the

[865] M. BARENDRECHT, I. GIESEN and P. KAMMINGA, *Standardisation of Personal Injury Claims: Some preliminary remarks (Discussion Paper No. 2001-01 for meeting at Tilburg University)*, 2001, www.ivogiesen.com/media/1044/standardisation_of_personal_injury_claims1312.pdf, 5.
[866] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 207-208, no. 342; M. VAN WILDERODE, "De indicatieve tabel 2012: indicatief, directief of een gemiste kans …?", *VAV* 2013, issue 1, (3) 15.
[867] A. VAN OEVELEN *et alii*, "Overzicht van rechtspraak", 2007, (933) no. 25, 1016.
[868] H. COUSY, "Een 'indicatieve tabel' voor de evaluatie van menselijke schade", *Aansprakelijkheid, Verzekering & Schade* 2002, (156) 156, no. 2; H. ULRICHTS, "Indicatieve tabel 2012 onder de loep", *Juristenkrant* 2013, issue 266, (6) 6.
[869] J. VAN STEENBERGE, "Kritische bedenkingen bij de Indicatieve tabel" in M. VAN DEN BOSSCHE (ed.), *De indicatieve tabel. Een praktisch werkinstrument voor de evaluatie van menselijke schade*, Gent, Larcier, 2001, (11) 15.
[870] A. VAN OEVELEN *et alii*, "Overzicht van rechtspraak", 2007, (933) no. 25, 1016. *See* for example: Corr. Hoei (7de k.) 17 februari 2013, *RGAR* 2013, issue 10, 15.028.
[871] A. BOYEN, "Forfaitaire vergoedingen", 2002, (55) 60; L. DE SOMER, "Begroting van de schade", 2013, (A.IV-1/1) A.IV-1/5; B. DUBUISSON, N. ESTIENNE and D. DE CALLATAŸ, "Droit belge", 2012, (171) 185; T. PAPART and J.-F. MAROT, "*Travelling sur l'indemnisation du préjudice corporel*" in R. CAPART and J. BOCKOURT (eds.), *Évaluation du dommage, Responsabilité civile et Assurances. Liber amicorum Noël Simar*, Limal, Anthemis, 2013, (57) 59.
[872] As well as its weakness: T. PAPART, "Le bareme indicatif des magistrats", *Con.M.* 2003-05, (67) 76.
[873] W. PEETERS, "De Indicatieve Tabel anno 2012", 2012, (1) 6-7.
[874] W. PEETERS, "De Indicatieve Tabel anno 2012", 2012, (1) 7.
[875] W. PEETERS and J.-L. DESMECHT, "Indicatieve Tabel", *T.Vred.* 2005, issue 10, (556) 556.
[876] L. CORNELIS, "Werkelijkheids- en zekerheidsgehalte van schade en schadeherstel" in M. VAN DEN BOSSCHE (ed.), *De indicatieve tabel. Een praktisch werkinstrument voor de evaluatie van menselijke schade*, Gent, Larcier, 2001, (21) 44, no. 26.
[877] W. PEETERS and J.-L. DESMECHT, "Indicatieve Tabel", *T.Vred.* 2005, issue 10, (556) 573; W. PEETERS, "De Indicatieve Tabel anno 2012", 2012, (1) 7; D. VAN TRIMPONT and C. DENOYELLE, "Tableau indicatif – version 2008" in W. PEETERS (ed.), *De indicatieve tabel herzien*, Brugge, die Keure, 2008, (1) 34.

Indicative Table is the freedom for the judge to use a previous version of the instrument.[878] The view on the Indicative Table as a indicative instrument corresponds to the perspective taken in French doctrine and case law on the use of scales ("*barèmes*"). They can only be referred to as an indication, without being binding for the judge,[879] or when the scale enables the judge to take all circumstances of the particular case into consideration.[880] In that sense, it doesn't come a surprise that the proposed Art. 1270 of the French preliminary sketch on the reform of civil liability[881] clearly refers to the indicative nature of the prescribed medical scale.

171. DEVIATING SYSTEM – Despite its merely indicative nature, it's only logical that as judges tend to refer more to the Indicative Table, its moral authority grows.[882] Particularly in cases of an appreciation *ex aequo et bono* of moral loss – as discussed in the previous chapter, the Indicative Table can provide legal practitioners with a valuable tool in determining the compensation.[883] According to ULRICHTS, lawyers and insurers tend to increasingly hold the Indicative Table to be law in out-of-court negotiations by not allowing an *in concreto* deviation from the listed tariffs.[884] In court, numerous items of loss are also said to be dealt with on the basis of the Indicative Table as a sort of catalogue instead of proving the (scope of the) loss suffered *in concreto*.[885] It has become an instrument with a glance of normativity[886] and its frequent use could raise questions as to the extent to which judges still appreciate the loss *in*

[878] *See for example*: Rb. Antwerpen 17 februari 2014, *T.Verz.* 2015, issue 1, 96.
[879] Cass. Civ. 2ième 11 juillet 1963, *Bull. civ.* 1963, II, n° 388.
[880] Cass. Crim. 9 février 1982, *Bull. crim.* 1982, n° 45; Cass. Crim. 25 juin 1984, *Bull. crim.* 1984, n° 243; Cass. Crim. 9 février 1992, *Bull. crim.* 1992, n° 45; M. BACACHE-GIBEILI, *Traité de droit civil*, V, 2016, no. 601, 718-719.
[881] *Cf. supra*, footnote 42.
[882] A. BOYEN, "Forfaitaire vergoedingen", 2002, (55) 60; K. DUERINCKX, *Aansprakelijkheidsrecht: een overzicht*, Antwerpen, Maklu, 2016, 25.
[883] A. BOYEN, "Forfaitaire vergoedingen", 2002, (55) 61; L. DE SOMER, "Begroting van de schade", 2013, (A.IV-1/1) A.IV-1/4; H. ULRICHTS, "Antwoord op het artikel 'De Indicatieve Tabel 2012: van (te) normerend naar betwist?'", *RW* 2014-15, issue 15, (597) 597. *Similarly*: T. PAPART, "Le bareme indicatif des magistrats", *Con.M.* 2003-05, (67) 73.
[884] H. ULRICHTS, "Waarom blijft wetgever aan de kant?", *Juristenkrant* 2002, issue 41, (12) 12.
[885] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, no. 342, 208; F. HOFMANS, "De Indicatieve Tabel 2012" in K. DE WISPELAERE (ed.), *Verkeersrecht (Reeks Vlaamse Conferentie der Balie Gent)*, Gent, Larcier, 2014, (209) 210. *Similarly*: P. BRONDEL, "Concrete schadevergoeding in gemeen recht" in F. MOEYKENS (ed.), *De Praktijkjurist VIII*, Gent, Academia, 2004, (1) no. 5, 6; B. DE TEMMERMAN and E. DE KEZEL, "Normering in België: de indicatieve tabel", *Tijdschrift voor Vergoeding Personenschade* 2002, issue 4, (103) 112; J. VAN STEENBERGE, "Kritische bedenkingen bij de Indicatieve tabel" in M. VAN DEN BOSSCHE (ed.), *De indicatieve tabel. Een praktisch werkinstrument voor de evaluatie van menselijke schade*, Gent, Larcier, 2001, (11) 17; M. VAN WILDERODE, "De indicatieve tabel 2012: indicatief, directief of gemiste kans", *VAV* 2013, issue 1, (3) 4. Yet, it seems that thorough empirical research on this matter would be needed to make a stonger statement.
[886] G. JOCQUÉ, "De nieuwe indicatieve tabel kritisch bekeken", *RW* 2008-09, issue 27, (1114) 1115, no. 2; T. VANSWEEVELT and B. WEYTS, "De Indicatieve Tabel 2012: van (te) normerend naar betwist?", *RW* 2014-15, issue 7, (243) 245, no. 7.

concreto.[887] According to FAGNART, the Indicative Table is used with much more flexibility in the southern part of Belgium than in the northern one.[888] The Indicative Table itself also seems to deviate from the principle of full compensation by its content. A very clear example is the fact that it is not clear why a certain mortality table is opted for instead of another.[889]

172. POSITION OF THE BELGIAN COURT OF CASSATION – Despite the lack of such intention, the Indicative Table has led to a deviation of the appreciation *in concreto* of the loss[890] and thus of the principle of full compensation.[891] The case law of the Belgian Court of Cassation seems to allow for a standardisation by the use of the Indicative Table,[892] which would be a practical approach.[893] In its judgment of the 11th of September 2009, the Court saw nothing wrong in using the Indicative Table in a supplementary way, *i.e.* after having found that the victim's situation is neither special nor abnormal.[894] This implies the need for future claimants willing to receive a different amount than the one listed in the Indicative Table to prove the abnormal or particular nature of their situation, justifying that different amount. The sovereign margin of appreciation for the judge is consequently limited by the *de facto* influence of the Indicative Table.[895] One has to bear in mind, however, that tables like the Indicative Table are not *de iure* binding according to the Belgian Court of Cassation.[896] In its judgment of the 6th of March 2013[897], the Court quashed a decision which considered a regional (French) table to have a binding nature.

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[887] H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, 207-208, no. 342; M. VAN WILDERODE, "De indicatieve tabel 2012: indicatief, directief of een gemiste kans …?", *VAV* 2013, issue 1, (3) 15.
[888] J.-L. FAGNART, "Droit belge", 2012, (195) 210.
[889] H. ULRICHTS, *Schaderegeling*, 2013, no. 541, 268.
[890] L. BREWAEYS and M. VAN WILDERODE, "Indicatieve tabel 2012: geschikt of ongeschikt bevonden?" in W. PEETERS and M. VAN WILDERODE (eds.), *Evaluatie van de indicatieve tabel 2012 / évaluation du tableau indicatif 2012*, Brugge, die Keure, 2014, (1) 42; G. JOCQUÉ, "Hof van Cassatie baseert zich op de Indicatieve Tabel" (note to Cass. 11 september 2009), *NJW* 2010, issue 214, (26) 26. *Similarly*: H. BOCKEN and I. BOONE, *Inleiding tot het schadevergoedingsrecht*, 2014, no. 342, 207; T. VANSWEEVELT and B. WEYTS, "De Indicatieve Tabel 2012: van (te) normerend naar betwist?", *RW* 2014-15, issue 7, (243) no. 1, 244.
[891] Some authors, however, consider the Indicative Table as a guide in reaching the goal of full compensation: T. VANSWEEVELT and B. WEYTS, "Wederantwoord van de auteurs op de reactie van H. Ulrichts", *RW* 2014-15, issue 15, (598) 598.
[892] G. JOCQUÉ, "Hof van Cassatie baseert zich op de Indicatieve Tabel" (note to Cass. 11 september 2009), *NJW* 2010, issue 214, (26) 26.
[893] D. SIMOENS, "De indicatieve tabel", 2012, (71) 73-74, nos. 5-6.
[894] Cass. 11 september 2009, *NJW* 2010, issue 214, 25, note G. JOCQUÉ and *T.Verz.* 2010, 85.
[895] B. WEYTS, "Actuele ontwikkelingen in het buitencontractueel aansprakelijkheidsrecht" in T. VANSWEEVELT and B. WEYTS (eds.), *Actuele ontwikkelingen in het aansprakelijkheidsrecht en verzekeringsrecht. ICAV I*, Antwerpen, Intersentia, 2015, (1) 11, no. 16; T. VANSWEEVELT and B. WEYTS, "De Indicatieve Tabel 2012: van (te) normerend naar betwist?", *RW* 2014-15, issue 7, (243) 243.
[896] B. WEYTS, "Actuele ontwikkelingen in het buitencontractueel aansprakelijkheidsrecht" in T. VANSWEEVELT and B. WEYTS (eds.), *Actuele ontwikkelingen in het aansprakelijkheidsrecht en verzekeringsrecht. ICAV I*, Antwerpen, Intersentia, 2015, (1) 11-12, no. 17.
[897] Cass. 6 maart 2013, no. P.12.1596.F.

173. CONSEQUENCES *IN CONCRETO* OF AN APPRECIATION *IN CONCRETO* – It is clear that the Indicative Table urges its users to try to appreciate the loss *in concreto,* while at the same time offering a very practical tool resulting in standardisation. Yet, one should consider the implications of insisting on such an appreciation *in concreto*. On the one hand, an appreciation *in concreto* of the loss will lead to a full compensation, but on the other hand, it will take a lot more time to do so in complex cases. Not only will the societal cost be greater in such scenario, because of more judicial arrears, but also the victim will face a long process in order to reach full compensation.[898] Research conducted in the Netherlands among thousand victims of traffic accidents shows that most victims prefer a smooth and just compensation rather than obtaining an utterly precise compensation after years of negotiations and legal proceedings.[899] Hence, it's not necessarily a bad thing to be guided by the Indicative Table as long as there's always the possibility of a more *in concreto* appreciation, justified by the particular or abnormal nature of the loss at hand.

[898] D. SIMOENS, "De indicatieve tabel", 2012, (71) 101, no. 118-119. *Similarly* for the Netherlands: T.J.J. VAN DIJK and J.J. VAN DER HELM, "Een inventarisatie van de in de Nederlandse schaderegeling gehanteerde normen", *Tijdschrift voor Vergoeding Personenschade* 2002, issue 4, (115) 115.
[899] A.R. BLOEMBERGEN and P.J.M. VAN WERSCH, *Verkeersslachtoffers en hun schade*, Deventer, Kluwer, 1973, 84 and 127.

PART IV: FROM COMPARTMENTALISATION OVER COMMUNALITY TO MORE COHERENCE

"Mais il est un autre problème, plus préoccupant et en tout cas plus prégnant : le développement aussi inexorable que désordonné des régimes spéciaux de responsabilité ou d'indemnisation."[900]

174. FROM FRAGMENTATION TO FRAMEWORK – Judging the need for improving coherence involves a comparison between two parts. All pieces of the puzzle should begin to fall into place. The (historical) meaning of the principle of full compensation has been established[901] and brought into the 21st century by assessing the evolution of Belgian tort law and by means of a principled approach.[902] That way, the first part of the comparison has been established. Categorised by the initiating legal actor, a selection of deviant systems has been examined,[903] thus providing the second part of the comparison. This final part will deal with the question whether there's a problem of coherence (Chapter I), before looking for a common principle within the studied deviant systems (Chapter II), which is needed to set up a new and more coherent framework comprising the deviant systems and the principle of full compensation (Chapter III).

CHAPTER I: PROBLEM OF COHERENCE

175. COHERENT OR NOT? – The time has come to confront the reigning principle of full compensation with the results of the analysis of the selected deviant systems. In fact, two problems of coherence are present in today's Belgian tort law. Firstly, the discrepancy is assessed between the evolved societal setting and the absolute principle of full compensation as it was conceived in 1804 (and as it is still presented by today's case law and doctrine). Secondly, the incoherence is stated between the reasons for the absolute principle of full compensation and the reasons for the deviant systems. It will be clear that the deviant systems follow the new path taken in the present-day society, whereas the absolute principle of full compensation is an artefact from simpler times.

[900] P. BRUN, "Rapport introductif" in *La responsabilité civile à l'aube du XXIe siècle : bilan prospectif*, *Responsabilité civile et assurances* 2001, special issue 6*bis*, (4) 6, no. 19.
[901] *Cf. supra*, Part I.
[902] *Cf. supra*, Part II.
[903] *Cf. supra*, Part III.

176. FROM 1804 TO 2016 – In 1804, tort law was characterised by its openness.[904] The wide notion of compensation led to a full compensation as a result of balancing interests.[905] A clear moral dimension was present when conceiving the duty to compensate as a necessary consequence of the tort so that it was only just to grant the innocent victim compensation.[906] Given the underlying moralising idea, the absolute nature of the principle of full compensation didn't pose a problem of injustice.[907] In the traditional society at that time, before the rise of liability insurances, individual and subjective fault liability made sense, resulting in the absolute principle of full compensation.[908] *Anno* 2016 doctrine and case law still adhere to the wide notion of compensation as the legal consequence of the tort and an approximation of the victim's original state of affairs.[909] The compensation should equal the loss, which has to be appreciated *in concreto*.[910] Despite the axiomatic use of these fundamental principles, as if they were the core mantra of Belgian tort law, the reality beyond this idealistic look has become far more complex.

177. EVOLUTION – Over the past two centuries, countless risks have risen and losses have multiplied due to a changing society, resulting in the creation of a wide array of risk-based strict liabilities.[911] The underlying principle is still to balance the involved interests, but the weighing of all interests has become far more complex than preferring the innocent victim above the guilty tortfeasor.[912] The attribution based on strict liabilities isn't the attribution TARRIBLE had in mind in 1804 when the *Code civil* was drafted.[913] Tort law has been influenced by the development of liability insurances and the collectivisation at the expense of the subjective and individual nature of tortious liability, so that tort law has become multipillared.[914] One might regret the maladjusted nature of the absolute principle of full compensation in light of these findings.

178. RETRIBUTIVE AND DISTRIBUTIVE JUSTICE – Central to the multipillared tort law is a modern focus on loss spreading, key to insurance.[915] Belgian law has only just begun the

[904] *Cf. supra*, no. 26.
[905] *Cf. supra*, nos. 27-28.
[906] *Cf. supra*, nos. 31 and 33.
[907] *Cf. supra*, nos. 32 and 34.
[908] *Cf. supra*, nos. 34-35.
[909] *Cf. supra*, no. 76.
[910] *Cf. supra*, nos. 77-78.
[911] *Cf. supra*, nos. 37-38, 40 and 45.
[912] *Cf. supra*, no. 39.
[913] *Cf. supra*, no. 33.
[914] *Cf. supra*, nos. 37, 39 and 41-43.
[915] *Cf. supra*, no. 49.

transition under the principle of the smallest harm from "*faute oblige*" to "*assurabilité oblige*".[916] Nevertheless, it's shifting from retributive justice to distributive justice, in line with the focus on loss spreading.[917] Tortious regimes such as Art. 1386*bis* BCC or liability for industrial accidents show the new path of equitable distribution and allocating entrepreneurial risks.[918] Insurance reinforces the transition towards distributive justice through an intertemporal, interpersonal and equitable loss spreading.[919] The practice of using instruments such as the Indicative Table in determining *ex aequo et bono* the compensation for moral loss show the pursuit of distributive justice.[920] Again, it's clear that postulating the absolute principle of full compensation neglects the additional dimension of distributive justice supported by the rise of liability insurances.

179. BALANCING INTERESTS – Fault and risk are both vital to a modern tort law, because their interaction should be considered to be just.[921] One should preserve the idea of balancing the interests involved, already present in 1804 and maintained in the strict liabilities.[922] The paradigms of reciprocity and reasonableness embody that balancing act.[923] A risk might be nonreciprocal, but that shouldn't always result in the liability of the causer of the loss. Sometimes, a legislative intervention could involve a duty to compensate for reciprocal risks because of the overall balancing of interests. By adhering to the principle of full compensation in an all-or-nothing philosophy, Belgian tort law neglects the necessary differentiations in the just interaction between the paradigms.

180. DEVIANT SYSTEMS – The examined deviant systems are clearly symptomatic for the discomfort common Belgian tort law has to contend with due to its maladjustment to the evolved society. Whilst completely absent in the traditional, moralising view on compensation for tort, the systems introducing a limited compensation, on the other hand, do embody the new emphasis on risks and loss distribution. The capped liability of the notary is linked to the idea of insurability[924] and the historical compromise regarding liability for industrial accidents balances interests based on the notion of a professional risk and the idea of *profit oblige*.[925] The

[916] *Cf. supra*, nos. 61 and 64.
[917] *Cf. supra*, no. 65.
[918] *Cf. supra*, nos. 53, 55 and 61.
[919] *Cf. supra*, nos. 56-57 and 60.
[920] *Cf. supra*, no. 148.
[921] *Cf. supra*, no. 65.
[922] *Cf. supra*, nos. 28 and 39.
[923] *Cf. supra*, nos. 67, 70 and 72.
[924] *Cf. supra*, nos. 91 and 94.
[925] *Cf. supra*, nos. 61 and 100-101.

regime *ex* Art. 1386*bis* BCC is also characterised by the need to take both fault and risk into account and is based on the conception of a social risk.[926] Even systems rooted in European legislation, such as the liability regime for defective products, show awareness of the idea of distributing the burden of the loss.[927] Furthermore, some deviant systems are the upshot of the limits to the principle's operation. Appreciations *ex aequo et bono*,[928] particularly with regard to moral loss,[929] are a fine example. The lack of guidance in those instances which results in problematic situations, is illustrated by the cry for something to hold on to, met by the Indicative Table(s).[930]

181. COMPARTMENTALISATION – Instead of one clear-cut and coherent answer to the evolution of tort law following societal changes, the Belgian legislator has opted for *ad hoc* interventions and solutions. The hypothesis stated at the outset of this thesis[931] is true: the all-or-nothing philosophy of the principle of full compensation has indeed lapsed into a fragmented and incoherent image of division through numerous exceptions by different legal actors. What began as a fairly consistent system in 1804, has degenerated over time into an incoherent tangle of systems deviating from the fundamental principle. The ultimate example of how the *ad hoc* legislative interventions have eroded the principle of full compensation can be found in Art. 11*bis* CouncSt-Law.[932] This rule really is the straw that breaks the camel's back. Belgian tort law is faced with a gaping hole between the fundamental principle of full compensation, which is presented as an absolute one, and all sorts of systems limiting in one way or another the compensation granted to the victim of a tort.

182. (IN)COHERENCE – The result of two centuries of introducing various deviations from the principle of full compensation is that one can no longer see the wood for the trees in the 21st century. In light of the compartmentalisation of Belgian tort law, the coherence between the deviant systems and common Belgian tort law should be improved. The result of the tension and mismatch between the studied deviant systems and the principle of full compensation is that judges and even other legal actors have looked for ways to deal with this wide gap. Although that might have provided some solution or comfort for the particular problem or aspect at hand, the bigger picture is rendered even more complicated. Illustrative, for example,

[926] *Cf. supra*, no. 122.
[927] *Cf. supra*, no. 109.
[928] *Cf. supra*, nos. 145-146.
[929] *Cf. supra*, nos. 148-149.
[930] *Cf. supra*, no. 166.
[931] *Cf. supra*, nos. 6 and 132.
[932] *Cf. supra*, no. 131.

is the finding that judges are nowadays tempted to moderate on improper grounds, taking into account other elements than merely the scope of the loss.[933] Before diving into the question about which should be the thread connecting the deviant systems and the fundamental principle of full compensation, one should first look for coherence within the *prima facie* patchwork of deviant systems.

[933] *Cf. supra*, nos. 117 and 147.

CHAPTER II: SEARCH FOR COMMUNALITY

183. SETTING THE SCENE: BALANCING ACT – The historical point of departure was a balancing act.[934] The innocent victim's interest was weighed against the guilty tortfeasor's interest, so that the balancing act was principally a moral one.[935] Although the moral dimension has been toned down by the rise of risk-based strict liabilities, the deviant systems still express the balancing idea. The capped liability of the notary aims at ensuring the insurability of the liability and emphasises the compensatory function of tort law.[936] The historical compromise found with regard to the liability for industrial accidents constitutes another great example.[937] Another way of indicating the weighing exercise is referring to the situation of the parties, for example in Art. 1386*bis* BCC[938], or requiring the judge to take private and public interests into account, as is the case in Art. 11*bis* CouncSt-Law.[939] Reaching the conclusion that balancing the involved interests is key to the operation of Belgian tort law, this chapter can then embark upon the search for a criterion for the balancing act.

184. *PRIMA FACIE*: DIVERSITY – A first look at the reasons for the introduction of the deviant systems might evoke an image of diversity. The notary's capped liability is embedded in the tendency to regulate intellectual professions. It tries to deal with the increasing amounts regarding intellectual professions and the resulting problem of insurability at the expense of the client's guarantee.[940] The rules for the liability for industrial accidents and the introduction of Art. 1386*bis* BCC have risen from the shortcoming of common Belgian tort law, be it with regard to the particular nature of a working environment or with regard to the loss caused by mental patients.[941] Art. 11*bis* BCC is based on yet another reason, albeit a hardly convincing one, namely the inability of the defendant to choose the most advantageous track from his point of view because he's bound by the claimant's choice.[942] One can add to all these reasons, the impossibility to accurately estimate the loss,[943] providing more guidance to avoid inequalities,[944] preventing excessive use of a right,[945] or the prevention of too many lawsuits.[946]

[934] *Cf. supra*, no. 28.
[935] *Cf. supra*, nos. 32-33.
[936] *Cf. supra*, nos. 91 and 94-95.
[937] *Cf. supra*, no. 101.
[938] *Cf. supra*, nos. 123, 124 and 127.
[939] *Cf. supra*, no. 131.
[940] *Cf. supra*, no. 94.
[941] *Cf. supra*, nos. 99-100 and 119-120.
[942] *Cf. supra*, no. 131.
[943] *Cf. supra*, nos. 145-146 and 148-149.
[944] *Cf. supra*, nos. 166 and 168.
[945] *Cf. supra*, no. 160.
[946] *Cf. supra*, no. 116.

What common ground could possibly be present in the studied deviant systems in the face of this *prima facie* diversity?

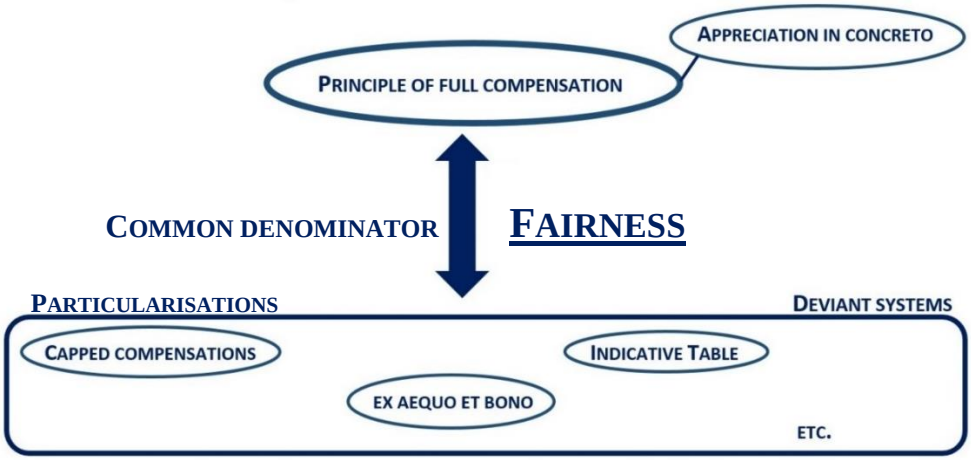
185. COMMON PRINCIPLE OF DEVIATION: FAIRNESS – Despite the *prima facie* diversity, a closer look at the examination of the selected deviant systems reveals that one underlying idea has remained the same since 1804: the idea of fairness.[947] In 1804, granting compensation as a tortfeasor was considered to be just, the response to a sudden cry of justice.[948] Fairness, *i.e.* preventing unfair situations and maintaining a just balance between the involved interests, also constitutes the justification explicitly present in several studied deviant systems. Fairness is sometimes linked to overly heavy evidentiary burdens so that strict liabilities rise introducing limited compensation to safeguard insurability and to prevent too heavy liability burdens. In that regard, one might think of the liability for defective products[949] or the liability for industrial accidents, which combines the economic argument of insurability with the demands of reasonableness and fairness.[950] One may notice the tendency to strongly emphasise the compensatory function of tort law[951] and the link between the compensation and the need to take out insurance.[952] This finding is completely complementary with the described ongoing transition from "*faute oblige*" to "*assurance/assurabilité oblige*".[953] Insurance guarantees the victim's indemnification but brings along the necessity to limit the compensation.[954] Hence, fairness is safeguarded by ensuring compensation without overburdening the system. On other occasions, fairness has been put forward as the explicit criterion to decide on the compensation. One can consider the appreciation *ex aequo et bono* of moral (or other) loss or Art. 1386*bis* BCC in that respect.[955] With regard to Art. 11*bis* CouncSt-Law, the emphasis may well be on the compensation of the loss rather than on fairness, it's still most likely that the Council of State will decide on the basis of fairness.[956] Furthermore, also the doctrine of the prohibition of abuse of the law is a fairness-based adjustment.[957] Lastly, the notion of fairness or justice is key to (the interaction between) the paradigm of reciprocity and the paradigm of reasonableness,

[947] One could note that the fairness of judgments is important enough to be examined in the *Justitiebarometer* of 2010, *see* p. 25 in particular. This barometer regarding the judiciary is available at the following web address: http://www.hrj.be/sites/5023.b.fedimbo.belgium.be/files/press_publications/baro-2010-n_0.pdf.
[948] *Cf. supra*, nos. 31 and 33.
[949] *Cf. supra*, no. 109.
[950] *Cf. supra*, nos. 99-101.
[951] *Cf. supra*, nos. 95 and 119.
[952] *Cf. supra*, nos. 91, 95, 102.
[953] *Cf. supra*, Part II, Chapter II, Section II.
[954] *Cf. supra*, no. 87, 94 and 112.
[955] *Cf. supra*, nos. 120, 122-123 and 147-148.
[956] *Cf. supra*, no. 131.
[957] *Cf. supra*, no. 162.

pleaded for in this thesis.[958] One can thus conclude that, on the basis of the analysis of the selected deviant systems and on a principled account, fairness constitutes the common denominator. It's sometimes necessary to limit the compensation in order to avoid unfair situations. Yet, this might not pose a problem, since it was already pointed out that most victims may prefer a smooth and just compensation rather than obtaining an utterly precise compensation after years of negotiations and legal proceedings.[959]

186. PARTICULARISATIONS – Looking back at the array of reasons for the introduction of the examined deviant systems, one can realise that there's only a *prima facie* diversity. One would get a distorted picture if one were to pass over the underlying continuum provided by the idea of fairness. The seemingly diverse reasons justifying the introduced limitations to the principle of full compensation are in fact particularisations of the general idea of fairness, as illustrated by Figure 2. When BERTRAND reflected upon the absolute nature of the principle of full compensation and wondered whether it could lead to injustice, he had the moral particularisation in mind, namely preferring the innocent over the guilty.[960] Yet, the deviant systems show a variety of particularisations. Whilst the more traditional, fault-based liabilities will lean more towards retributive justice, some more recent risk-based regimes embrace distributive justice.[961] That's why the interaction between the paradigms of reciprocity and reasonableness is crucial.[962] The transition from *"faute oblige*" to "*assurabilité oblige*" is ongoing[963] so that today's tort law should encompass both. The next chapter will design a framework in which both are included.

FIGURE 2: COMMON DENOMINATOR AND PARTICULARISATIONS



[958] *Cf. supra*, nos. 65, 69 and 71-73.
[959] *Cf. supra*, no. 173.
[960] *Cf. supra*, no. 32.
[961] *Cf. supra*, nos. 4, 38, 50, 122 and 148.
[962] *Cf. supra*, no. 65.
[963] *Cf. supra*, nos. 47 and 64.

CHAPTER III: TOWARDS A NEW FRAMEWORK

187. MODERATION – The principled analysis based on the paradigms of reciprocity and reasonableness has shown the need for a competence for the judge to moderate.[964] By allowing the judge to moderate the compensation, Belgian tort law would exchange its all-or-nothing perspective for a more balanced approach. The essential balancing of interests[965] can only be fully guaranteed by nuancing the sharp historical contrast between the guilty tortfeasor and the innocent victim.[966] Fairness calls for the possibility to limit the compensation on some occasions.[967] This final chapter aims at setting up a framework which encompasses these findings.

188. LEGAL ACTOR: LEGISLATOR *AD HOC*? – Before dealing with the content and subtleties of the desirable framework, one has to decide on the legal actor to create such a framework. Two legal actors come to mind: the legislator and the judge in the particular case. If one would opt for the legislator, the *status quo* would be maintained. Whenever deemed necessary, the legislator would intervene in an *ad hoc* manner, just like today's legislator tries to handle the changing societal setting and the resulting tension with common Belgian tort law.[968] Yet, it's clear that the result would be even more compartmentalisation, whereas a more coherent approach is to be preferred.[969] Otherwise, it will depend on the existence of a legislative intervention whether a fair balance of interests can be reached, which is undesirable.[970] Judges are already tempted to moderate on improper grounds.[971]

189. LEGAL ACTOR: JUDGE? – Comparative insights prove to be useful at this point. Given the fact that France and the Netherlands have gone through similar societal changes towards a multipillared tort law, solutions found in French or Dutch law can fit to a large extent the Belgian societal framework.[972] Dutch tort law has had to deal with problems similar to those in today's Belgian tort law. Judges were inclined to moderate on improper grounds in case of unacceptably high compensations in the absence of an appropriate tool to do so.[973] In response to the problems, the Dutch legislator has introduced a general competence for the judge to

[964] *Cf. supra*, no. 73.
[965] *Cf. supra*, nos. 179 and 183.
[966] *Cf. supra*, nos. 32-33.
[967] *Cf. supra*, no. 185.
[968] *Cf. supra*, nos. 5-6.
[969] *Cf. supra*, nos. 6, 132 and 181-182.
[970] *Cf. supra*, no. 8.
[971] *Cf. supra*, nos. 117, 137 and 182.
[972] *Cf. supra*, nos. 37 and 43.
[973] *Cf. supra*, no. 137.

moderate, after the example of Swiss law.[974] Yet, that doesn't imply that the legislator should no longer act with regard to the scope of the compensation. In some instances, a more collective or general intervention is required so that the legislator should introduce a limitation, such as a cap on the compensation. Think, for example, of the capped amounts in transport law[975] or the historical compromise regarding liability for industrial accidents.[976] As for professional liabilities, one might also prefer alongside certain Dutch authors a legislative intervention to provide more certainty.[977] Other cases may call for a more individual measure, if necessary on top of the legislative limitation, so that the judge in the particular case should be able to moderate. Dutch law embodies this distinction by the difference between Art. 6:109 DCC and Art. 6:110 DCC.[978] The advantage of having the possibility of both an *ad hoc* adjustment on the basis of fairness by the judge in a particular case and a legislative intervention is that the legislator isn't always compelled to limit the compensation to avoid unfair situations. He may deem it more desirable to adhere to the principle of full compensation while introducing compulsory liability insurance, as did the French legislator with regard the notary's professional liability.[979] Whenever an individual instance of unfairness would still occur, the judge can adjust the situation on the basis of the competence to moderate. From a principled perspective, the judge could then reason under the paradigm of reciprocity to interact with the legislator's reasoning under the paradigm of reasonableness. Although the legislator has weighed the interests in a just manner, it's always possible that an individual constitutes an exception and can't be singled out. The legislator may also deem it more desirable not to intervene at all. In that regard, one can think of the Dutch "*all or nothing*" rules on liability for industrial accidents, where the existence of the general competence to moderate might explain the absence of a statutory limitation of the compensation.[980] The rejection of the amendment by FORET, MUNDELEER and MAHIEU or the decision not to limit the manufacturer's liability for serial harm within the framework of liability for defective products, constitutes another example.[981] The difference between Art. 1386*bis* BCC and Art. 6:165, §1 DCC illustrates this as well. The *prima facie* wide liability of the latter is no problem given the general competence for the judge to moderate.[982] Furthermore, the legislator can impose a general limitation, which can be adjusted

[974] *Cf. supra*, nos. 79 and 134.
[975] *Cf. supra*, no. 88.
[976] *Cf. supra*, no. 101.
[977] *Cf. supra*, no. 97.
[978] *Cf. supra*, no. 87.
[979] *Cf. supra*, no. 93.
[980] *Cf. supra*, no. 105.
[981] *Cf. supra*, no. 112.
[982] *Cf. supra*, no. 121.

on a case-by-case basis by the judge. The rules on liability for defective products, for example, contain a distinction between full compensation for harm to persons and limited compensation for damage to goods.[983]

190. LEGISLATIVE FRAMEWORK: *EX AEQUO ET BONO* – The decision whether or not to moderate is not completely up to the judge, because the statutory provision designed by legislator can impose certain limits or modalities. One should distinguish between two situations. The first category contains cases involving moral loss or more generally loss which can't be accurately appreciated. For those cases, authors across the examined legal systems have rightly pointed out the utopian nature of the principle of full compensation.[984] The practice of *ex aequo et bono* appreciations provides a good alternative, since it uses the same criterion of fairness which is key to a competence to moderate.[985] It seems useful to follow the Dutch example by introducing an explicit legal basis after the example of Art. 6:97 DCC, holding the possibility to appreciate *ex aequo et bono* when the scope of the loss cannot accurately be determined.[986] In line with the constitutional angle taken regarding moral loss, complete legal uncertainty and arbitrariness should be prevented by adding to the legal provision the explicit requirement to consider the particular circumstances of the case at hand and to indicate the elements relevant for both the decision to appreciate the loss *ex aequo et bono* and the specific amount of compensation granted.[987] That way, the established case law of the Belgian Court of Cassation on the double motivational standard and the requirement of the Dutch *Hoge Raad* are included in the statutory provision.[988] A final addition should be that the judge can be guided by indicative instruments without being bound by them. One can think of the Belgian Indicative Tables, the French semi-official scales or the Dutch *Smartengeldbundel*.[989]

191. LEGISLATIVE FRAMEWORK: MODERATION – The second category logically comprises of cases in which the loss can be accurately estimated. Adhering to the principle of full compensation thus makes sense. Yet, this can't be done in an absolute way.[990] Whenever granting a full compensation would result in clearly unfair situations, the judge should be able to moderate the compensation. More than that, the judge should even be obligated to moderate

[983] *Cf. supra*, nos. 110-116.
[984] *Cf. supra*, no. 149.
[985] *Cf. supra*, nos. 134 and 147.
[986] *Cf. supra*, no. 145.
[987] *Cf. supra*, nos. 147 and 153.
[988] *Cf. supra*, no. 147.
[989] *Cf. supra*, nos. 144, 148, 166 and 170.
[990] *Cf. supra*, no. 187.

in order to reach a fair balance of the involved interests. It's obvious that one can draw a parallel between these findings and Art. 6:109 DCC.[991] The Dutch provision fits in perfectly with the societal framework encountered in this thesis. It's based on the awareness of the rise of potentially huge risks and the possibly equally large compensation resulting from them. Moreover, it aims exactly at bringing about a situation of fairness.[992] However, one mustn't forget that Art. 6:109 DCC bridges tort law and contractual liability law,[993] whereas this thesis is confined to the field of tort law.

192. PRIOR EXPERIENCES – Can we really entrust such an important competence to civil judges? French doctrine has pertinently pointed out that one can't go round the sovereign margin of appreciation of the judge who determines the facts on which the case is based.[994] Still, deciding whether or not to grant compensation and to what extent to do so, is nothing new. Civil judges have prior experiences in dealing with such a competence. For over eighty years, Belgian civil judges have had to judge whether it was fair in a particular case to grant a compensation at the expense of the mental patient on the basis of Art. 1386*bis* BCC. The provision explicitly states that the circumstances of the case at hand, as well as the parties' situation, should be taken into account.[995] Looking at the interpretation given to the provision by Belgian case law, the potentially relevant factors correspond to a large extent to the relevant circumstances under Art. 6:109 DCC.[996] They both relate to weighing guilt and risk, and the importance of insurance. That way, it's evident that the competence to moderate is tied up with the described transition from "*faute oblige*" to "*assurance/assurabilité oblige*".[997] Another prior experience of civil judge as to handling a competence to moderate is their past experience with particular competences to moderate[998] and especially with the doctrine of the prohibition of abuse of the law.[999] On top of that, the latter even seems to mirror the relationship between fairness and its particularisations by means of the further elaboration of the generic criterion in particular criteria for abuse of the law.[1000] To conclude, the desirable framework is a statutory competence to moderate the compensation.

[991] *Cf. supra*, no. 134.
[992] *Cf. supra*, nos. 134, 136 and 137.
[993] *Cf. supra*, no. 129-130.
[994] *Cf. supra*, no. 117.
[995] *Cf. supra*, no. 123.
[996] *Cf. supra*, nos. 124-127 and 135.
[997] *Cf. supra*, Part II, Chapter II, Section II.
[998] *Cf. supra*, nos. 139-141.
[999] *Cf. supra*, Part III, Chapter II, Section II.
[1000] *Cf. supra*, nos. 160-161.

193. OPEN NORM – Phrasing the new legal provision in such a way that it prescribes "*the moderation of the compensation in case a full one would lead to clearly unfair situations*", is choosing for an open norm. As a result, future developments can come within the scope of the provision although they may be unforeseeable at this moment. The open norm allows to anticipate to a certain extent. One may ask whether it's necessary to add specific relevant factors to the text of the new legal provision. Art. 6:109 DCC contains a non-exhaustive list of relevant circumstances.[1001] Art. 1386*bis* BCC prescribes the need to take into account the parties' situation.[1002] In the end, however, it's up to the legislator to determine whether certain factors, *i.e.* particularisations of fairness, are so vital that they should be listed in the statutory provision. Furthermore, one could question the added value of using vague and very general terms. Listing very specific factors, on the other hand, entails the risk of excluding other relevant factors or mistakenly suggesting a hierarchy between the factors. The decision whether or not to set a lower limit linked to liability insurances, similar to Art. 6:109 DCC,[1003] also boils down to a policy choice. After all, tort law can also be used by the legislator as a policy instrument. An example can be found in the capped liability of the notary, which encourages notaries to exercise their duties in a partnership.[1004] Furthermore, Art. 11*bis* CouncSt-Law shows that the legislator doesn't deem it fit to provide exemplary factors. The administrative judge, yet in assessing the *civil* claim, has to consider all circumstances of public and private interest.[1005] It's impossible to find a broader formula.

194. PREVENTING ABUSE – Similarly to Art. 6:109 DCC, the introduction of a general competence to moderate might cause a fear for abuse.[1006] Three elements aim precisely at preventing abuse. Better safe than sorry. Firstly, there's only a limited judicial review, just as for the moderation in commercial transactions[1007] or in the doctrine of the prohibition of abuse of the law.[1008] Secondly, the legal provision should explicitly require the judge to state his motives in deciding to moderate and with regard to the extent of the moderation. The reasons given should be based on the particular circumstances of the case. It's nevertheless true that

[1001] *Cf. supra*, no. 135.
[1002] *Cf. supra*, no. 124.
[1003] *Cf. supra*, no. 137.
[1004] *Cf. supra*, no. 93.
[1005] *Cf. supra*, nos. 129 and 131. *See* for an example of the combination between fairness and the formula "*all circumstances of public and private interest*": Article 28, §2 of the Law of the 13th of March 1973 concerning the compensation for ineffective detention on remand (*own translation, original title*: *"Wet betreffende de vergoeding voor onwerkzame voorlopige hechtenis"*), *BS* 10th of April 1973, 1973031309, no. 4314.
[1006] *Cf. supra*, no. 138.
[1007] *Cf. supra*, no. 140.
[1008] *Cf. supra*, no. 160.

time will tell whether Belgian judges will be as lenient with these requirements as their Dutch colleagues.[1009] Thirdly, given the importance of the particular circumstances of the specific case, the appraisal by the judge is inevitable. Prior experiences have shown that judges are capable of finding a fair balance so that one has to concur with LE TOURNEAU and JULIEN that "*[…] le droit de la responsabilité délictuelle fournit depuis deux siècles l'exemple éclatant de la confiance qui peut être accordée au juge...*"[1010] In his speech at the start of the public consultation on the preliminary sketch concerning the reform of civil liability law, JEAN-JACQUES URVOAS, Keeper of the Great Seal as French Minister of Justice, stressed the trust put in the judges in 1804 and the role of the judges in adjusting the law to the evolving society.[1011]

195. NEW FRAMEWORK – The main research question of this thesis can finally be assessed: "*how should the coherence between the systems which allow for deviations from the principle of full compensation, and Belgian common tort law be improved, in light of the compartmentalisation of that tort law?*" It has become clear that a statutory competence for the judge to moderate the compensation in a particular is to be preferred, leaving aside the possibility for the legislator to intervene in a more general way (*cf. supra*, nos. 188-189). Prior experiences will help the judge to deal with this competence to moderate (*cf. supra*, no. 192). The new legal provision should be divided in three parts. The first part explicitly states the principle of full compensation, building on the wordings of RONSE[1012], the Belgian contemporary doctrinal and jurisprudential notion of compensation[1013] and the suggested Art. 1258 of the French preliminary sketch on the reform of civil liability.[1014] It also contains the possibility of a legislative intervention (*cf. supra*, no. 189), comparable to Art. 6:110 DCC,[1015] albeit without the explicit link with insurability or a non-exhaustive list of criteria. Afterwards, there is a part on the appreciation *ex aequo et bono* and a final part on the actual competence to

[1009] *Cf. supra*, no. 138.
[1010] P. LE TOURNEAU and J. JULIEN, "La responsabilité extra-contractuelle du fait d'autrui dans l'avant-projet de réforme du Code civil" in J.-S. BORGHETTI, O. DESHAYES and C. PERES (Comité d'organisation), *Études offertes à Geneviève Viney. Liber amicorum*, Paris, LGDJ, 2008, (579) 593. *Own translation:* "*for two centuries, tort law provides the manifest example of the trust which can be put in the judge…*"
[1011] J.-J. URVOAS, "Ouverture de la consultation sur la réforme du droit de la responsabilité civile", speech at the start of the public consultation on the preliminary sketch concerning the reform of civil liability law on the 29th of April 2016, available at http://www.justice.gouv.fr/le-garde-des-sceaux-10016/consultation-publique-sur-la-reforme-de-la-responsabilite-civile-28940.html (consulted on the 18th of May 2016), particularly from 01:10 onwards.
[1012] *Cf. supra*, nos. 3 and 77.
[1013] *Cf. supra*, no. 76.
[1014] *"Sous réserve de dispositions ou de clauses contraires, la réparation doit avoir pour objet de replacer la victime autant qu'il possible dans la situation où elle se serait trouvée si le fait dommageable n'avait pas eu lieu. Il ne doit en résulter pour elle ni perte ni profit." Cf. supra*, footnote 42. *See also*: F. TERRE, *Pour une réforme du droit de la responsabilité civile*, Paris, Dalloz, 2011, 192.
[1015] *Cf. supra*, no. 87.

moderate (*cf. supra*, nos. 190-191). The latter part will contain the open norm of fairness formulated as the prevention of clearly unfair consequences of granting a full compensation (*cf. supra*, no. 193). Besides the term "*clearly*", the legal provision contains the requirement for the judge to state his motives in deciding to moderate and with regard to the extent of the moderation, founding them on the particular circumstances of the case (*cf. supra*, no. 194). The proposed statutory provision is numbered Art. 1386*ter* BCC so that it directly follows the core of Belgian tort law and Art. 1386*bis* BCC, which can be seen as a particularisation of the proposed general provision. The proposed provision thus reads as follows:

"*Art. 1386*ter *BCC.*

1. *Notwithstanding limitations to the compensation which are prescribed by law, the compensation has to be aimed at putting the sufferer of the loss as best as one can and at the expense of the tortfeasor in the hypothetical situation in which the sufferer of the loss would be, if the tort had not been committed. In principle, the sufferer of the loss must be fully compensated so that only the complete loss is compensated for.*

2. *If impossible to appreciate the loss accurately, the compensation has to be determined* ex aequo et bono*, taking into account the particular circumstances of the case and indicating the relevant elements both for the decision to appreciate* ex aequo et bono *and for determining the exact amount of the compensation.*

3. *If a full compensation would have clearly unfair consequences, it has to be moderated by the judge, taking into account the particular circumstances of the case and indicating in particular the relevant elements both for the decision to moderate and for the extent of the moderation.*"[1016]

196. FAIRNESS IN A BROADER PERSPECTIVE – The implication of this thesis is allowing fairness to play a greater role at a higher level. Belgian tort law should transcend the

[1016] *Dutch translation:*
"1. Niettegenstaande bij wet voorziene beperkingen van de schadevergoeding, moet de schadevergoeding tot doel hebben de schadelijder zo goed mogelijk en ten laste van de aansprakelijke partij in de hypothetische toestand te plaatsen waarin het zou hebben verkeerd, indien de onrechtmatige daad niet was gepleegd. De schadelijder moet principieel integraal vergoed worden zodat uitsluitend de gehele schade wordt vergoed.
2. Indien een nauwkeurige begroting van de schade onmogelijk is, moet de schadevergoeding ex aequo et bono *worden bepaald, rekening houdend met de specifieke omstandigheden van het geval en met opgave van de relevante elementen zowel voor de beslissing tot begroting* ex aequo et bono *als voor het bepalen van het precieze bedrag van de schadevergoeding.*
3. Indien een integrale schadevergoeding kennelijk onbillijke gevolgen zou hebben, moet ze gematigd worden door de rechter, rekening houdend met de specifieke omstandigheden van het geval en met opgave van de relevante elementen zowel voor de beslissing tot matiging als voor de omvang van de matiging."

particularisations, such as the doctrine of abuse of the law, which are far too limited in scope. Opening up the scope of application of fairness not only constitutes an added value for Belgian tort law, but it also has a fundamental implication. Instead of using fairness merely as a shield raised by a party in the legal proceedings, it should shift from this passive side to the active side, where the judge can *ex officio* use fairness as a stepping stone for his competence to moderate. Today, the active use of fairness is limited to particular instances in which the judge can moderate, such as Art. 1153 BCC.[1017] This development of tort law under the influence of fairness runs parallel to the evolution in Belgian contract law. The fundamental principles of contract law, such as the autonomy of the will, also date back to 1804 but have been corrected over the past two centuries to avoid situation of great unfairness or unreasonableness.[1018] This thesis assessed a similar evolution in Belgian tort law. Although the study has been limited to one particular fundamental principle, namely the principle of full compensation, it's possible and even likely that the same conclusion can be reached for other fundamental doctrines of Belgian tort law. One might think of adjusting the Belgian rules on causality after the Dutch example.[1019] Given the potential impact of fairness on the various doctrines of Belgian tort law, one might be inclined to opt for a general provision by which the principle of fairness is embedded in the BCC. Yet, just as the DCC contains both the general provision of Art. 6:2 DCC and particularisations such as Art. 6:109 DCC,[1020] Belgian tort law would benefit from having more than merely a similar general provision. Particularisations for each individual doctrine or fundamental principle would allow the legislator to take into account its particular nature. Moreover, it could induce the Belgian legislator to take up the challenge of modernising the BCC in a thorough and well thought-out manner. That way, the problem that one can't see the wood for trees would be solved and today's legislator would engage in proverbial forest management.

[1017] *Cf. supra*, no. 139.
[1018] *See, for example*: S. GOLDMAN and S. LAGASSE, "Comment appréhender le déséquilibre contractuel en droit commun ?" in R. JAFFERALI (ed.), *Le droit commun des contrats. Questions choisies*, Brussel, Bruylant, 2016, (71) nos. 1-2, 71-74; S. STIJNS, *Verbintenissenrecht, 1*, 2005, 37-54.
[1019] *See*: ASSER (HARTKAMP/SIEBURGH), *De verbintenis in het algemeen*, 2013, no. 50 *et seq.*
[1020] *Cf. supra*, no. 136.

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