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The Impact of Social Security Law on Tort Law

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Social Security versus Tort Law as Instruments to compensate Personal Injuries: A Dutch Law and Economics Perspective

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I. Introduction

1 The central question of this project on the different roles of tort law and social law relates to the differences between both systems as far as their ability is concerned to compensate for personal injury. The comparison between both systems which we will attempt to pursue in this paper will follow the economic analysis of law.

2 The focus which we will take to carry out this comparison between tort law and social law is a focus on personal injury losses caused through accidents. Social security obviously provides for a much wider scope of compensation than merely in cases of personal injury. We will choose to focus on accidents since tort law traditionally is limited to the situation whereby personal injury is the result of a wrongful act following from an accident caused by a third party. For many cases of personal injury outside of the accident sphere, tort law simply does not apply for the simple reason that there is no liable third party who caused the loss. We will therefore focus on cases where a victim suffers personal injury as a result of an accident. The consequence is obviously that damage is caused to the victim, which can take the form of lost income, costs which have to be paid to the health care system (medical bills etc.) and non-pecuniary losses.

3 Moreover, we will pay specific attention to accidents caused in the occupational health sphere, since in those cases there is usually, on the one hand, a wide scope of (worker's compensation and other) social security systems providing for compensation and, on the other hand, the possibility of employers' liability. Moreover, in many Western European countries (such as in the Netherlands), a lot of debate is going on today on the question whether compensation for occupational health diseases should take place via employers' liability or via the social security system. Hence, a focus on this area nicely allows to incorporate some of this recent discussion. Hence, examples from Dutch law will be given, also to show recent evolutions in the changing relationship between social law and tort law in compensating personal injuries.

Obviously, the questionnaire will be followed as far as possible. However, within this paper dealing with an economic approach concerning the relationship between tort law and social law, we cannot literally follow the questionnaire since not all of the issues mentioned in it have been dealt with in economic analysis. Moreover, we will also elaborate on a few issues, which are not mentioned in the questionnaire but which might, from an economic perspective, be crucial to understand the differences between social law and tort law. One of them is the fact that tort law is usually combined with liability insurance. Hence, the insurance aspect should be included as well. Compensation for personal injury can, on the other hand, also be provided via first party (private) insurance instead of social security. Thus, the different functioning of social security versus private insurance needs to be addressed from an economic perspective. In a similar vein, this report will have regard to the difference between first party insurance and liability insurance, which traditionally accompanies tort law.

Given space limits, we will in the scope of this paper especially focus on law and economics aspects and health insurance. However, there are obviously other sections of social security, especially those systems which provide replacement income in case of disability, which are of crucial importance as well. It is, however, within the scope of this paper not possible to provide details on that particular aspect of Dutch social security which relates to replacement income.

This paper is structured as follows: first a few general principles of tort law on the one hand and social security law on the other will be sketched (2); then some attention will be given to differences between providing health care compensation via tort law or via the social security system (3). We then turn to the changing relationship between tort law and social security in the Netherlands, where some recent changes took place in social security law, which had a dramatic effect on the increasing use of tort law (4). This raises the question of possible reforms and alternatives for liability insurance (5). Finally, we discuss the interdependencies between tort law and social security, more particularly via the right of recourse (6).

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1 This text has been finalized in October 2000. Evolution in legislation or case law which occurred after this date could not be taken into account.
II. Principles

Prevention Versus Compensation

7 One of the first questions of the questionnaire relates to significant differences in function between tort law and social security in the field of personal injuries. In that respect we can be rather clear if we address this from an economic perspective: economists assume that tort law is an instrument to deter activities worth to be avoided on efficiency grounds through liability rules. The idea is that the expectation to be held liable ex post will induce potential parties in an accident setting ex ante to take care or to change their activity level. For the economist, the most important goal of tort law therefore is the prevention of accidents.

8 Some have seen here a difference between the legal approach and the economic approach. Whereas economists stress the importance of tort rules as having an ex ante effect on prevention, traditional tort lawyers stress the ex post compensatory function of a tort rule. If one would exaggerate the difference between the traditional economic and the classic legal approach, one would state that the economist is interested in prevention of accidents, whereas the lawyer is interested in victim compensation. However, as is often the case with generalities like these, reality is often more balanced. Some economists (or lawyers writing in the economic tradition of law) also point at the loss spreading function of the tort rules (and therefore implicitly at victim compensation); some lawyers (although there are also differences in legal systems) equally stress the preventive function of tort rules. This is, e.g., the case in Austrian tort law. Moreover, in a brilliant study, Schwartz has demonstrated that tort rules can be considered to serve both the goals of prevention (via deterrence) and of compensation (also often referred to as the corrective justice idea).

9 Notwithstanding these nuances, which somehow reconcile legal and economic thinking concerning the goals of tort law, it should be kept in mind that from an economic point of view liability rules are primarily considered as an incentive system. The idea therefore is that the foresight of being held liable after an accident will encourage a change of behaviour (towards taking precautionary measures) before the accident happens. In this basic framework the fact that a victim may be compensated after an accident is not considered as a goal of tort

2 See I (3).
3 For some of the basic insights in the economic analysis of tort law, see G. Calabresi, The costs of accidents (1970) and S. Shavell, Economic analysis of law (1987).
4 This is, e.g., the case in Calabresi’s notion of secondary costs, which aims at loss spreading.
5 The various goals of tort law have, from a legal perspective, also been elaborated in the famous handbook on Austrian tort law of H. Koziol, Österreichisches Haftpflichtrecht I (5 edn., 1997), pp. 8–13.
7 The economic literature concerning the efficiency of a fault respectively a strict liability rule has been discussed in the previous projects on fault and strict liability.
8 The way the particular system is organised obviously differs a lot and is dependent upon the particular legal system. See for principles of social security and for an introduction to the social security systems in Europe D. Peters, Introduction in the basic principles of social security (1993) and D. Peters et al., Introduction into the social security law of the Member States of the European communities (1993).
9 See question I (2).
that personal injury was caused. However, also in social security prevention of harm is increasingly stressed as being important. However, the payments made under social security schemes cannot be considered as having mainly a preventive goal. Traditional social security still focuses on compensation of losses.

Combined Use in Practice

Although the starting points are therefore different (torts: deterrence; social security: compensation), the economic literature has indicated that if one would have pure systems relying totally on either tort or social security the systems would have to take care of compensation issues respectively prevention of accidents as well. We mean the following: even in a system which would primarily rely on torts one will notice that the tort system (which economically serves the goal of deterrence) will be complemented with systems of insurance to meet the second goal (compensation). Thus, a potential tortfeasor could take out liability insurance coverage which might (if the injurer is found liable) serve the interests of the victims as well, since it provides a guarantee against the insolvency of the potential injurer. Moreover, under a pure tort system victims (who would fear that they would receive no compensation) could choose to take out first party insurance coverage to cover for personal injury losses. This is, by the way, what obviously often happens in practice: many potential victims will take out accident insurance coverage to provide (additional) coverage in case they are personally injured. Hence, the deterrence oriented tort system might be combined with (liability or first party) insurance schemes to serve the goal of compensation.

The same applies, however, for a system whereby automatic compensation (irrespective of the behaviour of the beneficiary) would take place under social security. If such a perfectly working social security compensation mechanism would exist whereby all potential victims would be guaranteed compensation for their personal injuries, some system other than tort (assuming that this would not exist) would be needed to guarantee that those who may have an influence on the accident risk behave properly. The systems which are then advocated to be combined with social security are systems of safety regulation. Thus, the model then assumes that victims are compensated via social security.

10 The principle that social security provides compensation irrespective of the behaviour of the beneficiary may well be different in some legal systems; one can imagine cases where compensation under social security is denied if, e.g., the personal injury was caused intentionally.

Byrthis is combined with ex ante government regulation which is enforced via administrative or criminal law. Regulation not tort law, then serves the goal of deterrence.

This is a model which has been advocated by many economists: they have often argued that if society wishes to reach the goals of both deterrence of accidents and compensation of victims for personal injury, it could choose between on the one hand a tort system (for deterrence) + insurance systems (for compensation) or on the other hand a system of regulation (for deterrence) + social security (for compensation). This combination of private and public regulation of safety has especially been advocated by Skogh. In practice, of course, a combined variety of all of these instruments of deterrence and compensation exists, although the focus on each of the particular instruments may change per society and over time. However, as we will demonstrate with the example of the Netherlands, all of the systems (torts, insurance, regulation and social security) are interrelated and mutually influence each other. Hence, one can expect that, e.g., if the government would withdraw from the compensation of personal injury via social security, victims would be forced to make an increasing use of tort law and insurance to meet this same goal.

That these relationships may change can be illustrated by the example of employers liability in the Netherlands.

Example: Employers Liability

In the Netherlands, in case of an occupational disease, traditionally social security provided limited compensation of lost income and took care of expenses for the health care system. This corresponded with the traditional view that it is social security which takes care of the “Existenzsicherung”. In addition to the Dutch social security system, tort law traditionally played a role in case of occupational diseases, albeit a modest one. Victims (employees suffering from an occupational disease) only used tort law to receive compensation for the top of their income (the part which was not covered by social security) and to get coverage for non-pecuniary loss. These were precisely the types of damage not covered under social law. Prevention of occupational diseases was to a large extent guaranteed through health and safety regulation, imposing specific safety duties on the employer.


This resulted in a system whereby victims of an occupational disease received primarily compensation via the social security system to provide some "Existenzsicherung". Tort law could be used – if the specific conditions were met – for that part of the damage which was not covered under social security. Obviously, some interrelationship between those systems could exist in the sense that – again, under specific conditions – the social security system might use tort law in the attempt to recover benefits paid to the victim. This is precisely the issue of recourse which we will discuss below.

It is striking that in this traditional (Dutch, but to some extent European) system, tort law was a luxury system and at the same time of rather limited importance in the compensation of victims. Indeed, only a limited amount of the damage which occurs in society is covered via tort law.\(^{18}\) The largest part of damage was covered either via social security or via private first party insurance. Tort law can be considered a luxury system in the sense that it provides a guarantee of, in principle, full compensation for the damage suffered and even compensation for non-pecuniary loss. That is a luxury, so it has been held in the literature, which the social security system cannot afford.\(^{18}\) Indeed, the essence of an "Existenzsicherung" is that it provides a minimum, but not the "luxury" of full compensation. The economic reason why the social security system cannot guarantee full compensation (including compensation for non-pecuniary losses) are multifold; the costs of full recovery would be high and would lead to higher premiums or an increased pressure on public budgets. In addition, non-pecuniary loss will be different for every individual, whereas social security usually works with more or less fixed, at least standardised, levels of compensation.

Tort Law: Luxury or "Existenzsicherung?"

Therefore, it was held that this "luxury" of tort law can only be provided in exceptional circumstances and when specific conditions are met. Hence, tort law cannot guarantee full compensation to every victim of personal injury, not even to every victim of an accident. It will in most systems be dependent on the behaviour of the injured whether the victim can obtain this full compensation. That again corresponds with the economic insights sketched out above, namely that tort law is, at least in systems where it does not have to provide this social security function, more a system to influence the behaviour of the injured than to provide compensation. As we will indicate below, this is, according to us, a major difference between tort law as it is viewed in the US and tort law as it was traditionally viewed in Europe.

\(^{17}\) This has also been proven empirically (by calculating the specific contribution of tort law compared to social security) by A.R. Bloemenbergen, De invloed van verzekeringen, in: Schade hi- den en schade dragen (1980), pp. 16–17.

Obviously the particular view a system takes on the function of tort law (providing Existenzsicherung or merely luxury system) will have important social consequences as well. If victims are forced to use tort law also to provide this basic "Existenzsicherung", e.g., because social security would not provide this basic coverage, one can understand that victims would in fact be forced to increasingly use tort law and that judges would be tempted towards an expanding scope of liability. If, on the other hand, the "Existenzsicherung" is basically provided via social security, the least one can say is that tort law does not have to be used to provide this basic compensation. Our claim is that in many Western European systems (and more particularly in the Netherlands) the traditional (although maybe implicit) view was that the basic compensation is provided via social security; tort law intervened only if specific conditions (depending upon the behaviour of the injured) were met and usually only for those types of damage not covered under social security. However, although this might have been the traditional approach, at least for compensation of occupational diseases, some changes seem to occur (at least in the Netherlands), which might have an important influence for the way in which tort law is viewed and used.\(^{19}\) These changes in social security have not only occurred in the area of healthcare, but more specifically also within that domain of social security which aimed at providing replacement income in case of disability. As a result of these changes, a full income guarantee is no longer unconditionally provided under social security, which obviously increases the pressure on tort law.

III. Liability and Insurance Versus Social Security: Different Approaches

Different Starting Points

Let us focus once more on the different approaches and starting points of, on the one hand, liability and insurance and, on the other hand, social security. We have now identified in the previous section that it is not sufficient to compare merely tort law with social security law, but that we have to add (first party or third party) insurance to tort, since effectively a tort system will almost always be supplemented with an insurance scheme. Let us, once more, focus more closely on the different approaches of tort and social security to allow us to address briefly some of the questions in II and III of the questionnaire: subsequently we can address how compensation for health care costs can be provided either through tort law (and private insurance) or via social security.

Tort Law

The basis of tort law (and in that respect it is clearly different than social security), is that the occurrence of damage as such is not enough. Even recently the Dutch Supreme Court clearly stated that:

\(^{19}\) Above we have implicitly answered some of the questions in III of the questionnaire concerning the relationship between tort law and social security law, more particularly concerning the issue whether social security replaces tort law or vice versa.
"The mere fact that a certain act took place which resulted in damage for another party does not necessarily imply that a claim on compensation exists on the basis of tort." 20

24 Some other element needs to be added in order to grant the victim a right to compensation of his damage. Traditionally this was "fault" although there is a clear tendency in many legal systems towards strict liability. 21 In the literature it is claimed that usually some sort of negligence on the side of the injurer is required as the basis for liability in tort. 22 The idea of a necessary shortcoming may be highly implicit in regimes of strict liability, but may nevertheless be present there as well. A basic rule in tort law is that if the victim can prove that the loss was caused by this wrongful (in the sense of a shortcoming) act of the injurer he can, in principle, claim full compensation on the basis of tort law. This full compensation would only be reduced (to some extent) if the victim himself also contributed to the loss. The essential ideas of liability law are therefore that the victim has a claim on full compensation on his loss if a causal relationship can be proven with a wrongful act. 23

Social Security 24

25 The starting point of social security is different: social security provides compensation (e.g., of lost income or health care expenses) irrespective of the cause of the illness or disability. Contributory negligence of the claimant, in principle, does not exclude a claim for compensation in social security law. However, whereas in tort law the principle is full compensation, social security usually provides a compensation which is limited in time and in amount: Existenzsicherung. Moreover, in social security the financial situation of the victim might play a role in deciding upon the amount of compensation. These redistributitional elements are, again, contrary to the basic approach of tort law: a victim is, if the specific conditions of tort law are met, entitled to full compensation irrespective of his personal wealth. 25

26 These very basic insights allow us to provide some answers to a few questions addressed in the questionnaire, more particularly concerning questions from III and IV. Indeed, fault traditionally does not play a role in social security systems: a victim can claim compensation under social security without having the need to prove the fault of a third party. That is different in tort law, where traditionally a fault, but at least a wrongful act will have to be proven. Moreover, under social security the victim will only need to prove a certain condition (e.g., illness or unemployment) and that this condition meets the statutory requirements for compensation. It is not necessary to prove a causal link between this condition (which gave rise to a loss) and the act of a third party (which is typically a requirement of tort law). A typical feature of Dutch social security and more particularly the payments which are based on disability (the so-called WAO) are considered as a so-called "risque social". The basic idea in the Netherlands is therefore that if someone has lost his capacity to work, social security (in that particular case the so-called WAO) will provide replacement income, irrespective of the cause of the disability. Tort law, on the other hand, provides - in principle - full compensation, both of pecuniary and of non-pecuniary loss (although the amount and scope may obviously differ in the legal systems), whereas social security systems traditionally only cover pecuniary loss (and even then usually limited in time and as far as the amount is concerned). Contributory negligence, on the other hand, almost never plays a role in social security systems (except perhaps in extreme cases of intentional acts by the victim), whereas in most tort law systems contributory negligence of the victim may lead to a reduction of the claim on the part of the victim.

24 For the principles of social security law see also S. Kloos/G. Venk (supra note 21) pp. 196–198.
26 This is further developed in M. Faure, The applicability of the principles of private insurance to social healthcare insurance seen from a law and economics perspective, [1998], The Geneva Papers on Risk and Insurance, 265–293.
27 See question II.4 of the questionnaire.

Financing: Private Insurance Versus Social Security

Let us now address the question of how private (liability) insurance differs from social security as far as the financing of those systems is concerned. 26 We will address this question by looking at basic differences between private insurance and social security as far as the financing of health care is concerned.
In this respect we should stress once more that although most of this analysis refers to one aspect of social security (this being the provision of healthcare), most of what is mentioned below applies also to other aspects of social security, which are at least as important (such as the provision of replacement income in case of disability, the Dutch WAO). Before addressing some of the features of private and social insurance in more detail, we shall briefly review the basic characteristics of both systems. Even this brief comparison will indicate how difficult it may be to apply principles of private insurance to social insurance schemes.\(^\text{28}\)

Risk Premium Versus Income Dependent Premiums

Indeed, private insurance starts from the simple assumption that a demand for insurance arises from risk-averse individuals. These risk-averse individuals demand insurance cover, which is provided by insurers on competitive insurance markets. They aggregate similar but non-related risks into risk pools and are able to accept these risks because they can spread them over a large number of cases. To control moral hazard\(^\text{29}\) and adverse selection, the insurer distinguishes risks according to the individual risk posed by the particular insured party. Hence, a system of risk differentiation is applied whereby narrow risk pools are construed in such a way that the premium charged corresponds with the risk posed by the average insured in that particular pool. An important feature of private insurance is, hence, that the price charged, i.e. the premium, corresponds with the risk.

The insurer often charges a higher premium than the fair price. This depends upon his market position and upon the administrative costs. Depending upon the degree of risk aversion of the insured party and the premium charged, the individual demands insurance cover for specific risks to which he is averse.

Social security in general differs from the situation sketched above in many respects.\(^\text{30}\) Health care is provided, at least as far as basic needs are concerned, either totally free of charge or with a modest deductible to almost all citizens. The legal systems may differ with respect to who can benefit from social security and with respect to the payment system. In some countries health care is simply provided for free; in other countries the patient must pay, but can recover the expenses from his insurer or, in other cases, the (social) insurer pays the costs of the health care system directly.\(^\text{31}\) Within a social security system, equal access to the health care system (to a smaller or larger extent) is usually essential. In addition, the price of social security is usually charged by withholding the premium from the wages of all employed workers. A part of the premium is therefore usually paid by the employed individual himself; in addition, the employer usually contributes substantially.\(^\text{32}\)

In addition to withholding the premium at the source, it should also be mentioned that the amount of the premium to be paid for social security is generally income-dependent. Hence, although there may be large differences between countries, some essential features of health care systems as provided through social insurance seem to be consistent: contrary to the situation under private insurance, there is no risk differentiation, but a principle of solidarity between good and bad risks.\(^\text{33}\) In addition, the premium is not dependent upon risk, but upon income.

Moral Hazard

A central question, whether health care is provided through private insurance or via the government, is how an artificially high demand for health care can be avoided with insurance cover. Moral hazard is precisely the problem: the demand for a certain service (in this case health care) increases because the price for the service is reduced or eliminated. In a classic paper on moral hazard, Arrow pointed out that the demand for health care increases as soon as full insurance cover is available.\(^\text{34}\) Moral hazard does not occur only on the demand side. Given asymmetric information, the physician often determines what services and how much of them are needed. This may cause a moral hazard problem on the supply side as well. Here we focus on the victim demanding health care. The extent to which the moral hazard problem plays a role depends upon the elasticity of demand for the particular service. If demand is totally inelastic and hence not dependent upon the price level, there will be no moral hazard at all. If demand is, however, elastic, insurance cover will lead to a decrease in the marginal cost of medical care and hence a moral hazard emerges.\(^\text{35}\)

Risk Differentiation

The traditional answer is that there are basically two possible remedies for moral hazard: either the behaviour of the insured party is controlled by a corresponding adaptation of the premium or by partially exposing the insured party to risk, for example, through a deductible or through an upper limit on

\(^{28}\) It is indeed not possible to give a list of attention to these principles within the scope of this paper; we can merely point to a few of the most important characteristics.

\(^{29}\) See below.


\(^{31}\) The way the system is organised may be dependent upon the particular legal system. For an introduction to the social security system in Europe see D. Pieters (ed.), Introduction into the Social Security Law of the Member States of the European Community (1993).

\(^{32}\) From an economic perspective, one can of course argue that in fact the employer's contribution to the premium is also charged to the employee in the form of reduced salary.


cover.\(^{36}\) Considering the first potential remedy, advanced in traditional insurance economics, one might argue that there should be some link between the risk, which an insured party poses, and the premium paid. In theory, this would mean that the premium should be higher the more the health care system is used. In insurance economics theory, such an individual would then be classified as belonging to a high-risk group. Through such an individualisation of the risk, the insured party would then behave as if he were not insured at all and moral hazard would be avoided.

35 Observing the premium-setting practice of social security systems, it is immediately clear that the way premiums are charged in social security does usually not correspond with this traditional insurance economics answer to the moral hazard problem. First, the premium charged will usually be income dependent and not dependent upon the risk posed. Individual risk differentiation seems, therefore, impossible. Second, the idea of a strong differentiation of risks seems to collide with the idea of solidarity between good risks and bad risks, which underlies many systems of social security.\(^{37}\) In practice, risk differentiation would indeed mean that high-risk individuals would have to pay more premiums than low-risk individuals. From a policy perspective, the social security minister might not want to charge some individuals higher premiums just because they had become ill. Moreover, the insurance economics idea of a risk-related premium seems to collide with the income redistributive goals of social security.\(^{38}\)

36 The question of course arises whether this conflict between the insurance economics need of risk differentiation to control moral hazard, on the one hand, and solidarity between good risks and bad risks in social security, on the other hand, leads to insurmountable problems. The problem is obviously not that persons who get ill rely on the (private or social) health care system; the problem is more that some people might be inclined to visit their general practitioners too often or purchase too much medicine if this can be obtained at no cost. In order to answer the question of whether there is a serious moral hazard problem, it is useful to distinguish between small and large risks. For large risks, such as surgery, the price elasticity of demand might be small. It is unlikely that anyone wants surgery just for fun; one can, therefore, assume that the number of operations would not increase drastically from the moment that the price fell.\(^{39}\) This might be different in the case of visits to a general practi-
Health Care Insurance Via the Private Market or Government Provision?

Private Insurers Versus Bureaucracies

A difference can obviously be made between social insurance which is, in most Western European systems, provided by government intervention (the social law referred to in the project) and private insurance provided by insurance companies operating in a competitive market. Although the social security systems in Western Europe were very generous (largely for historical and political reasons), some systems seem, once more, to have made the traditional distinction, which we discussed before, between smaller risks and larger risks. Apparently, for example in Belgium for self-employed workers, larger risks are covered via government-provided social insurance whereas smaller risks can be covered on the private insurance market. Moreover, this social insurance is generally compulsory whereas private insurance for smaller risks is optional. However, this need not necessarily always be the case. In some countries, for instance in the Netherlands, low-income groups can purchase additional insurance for the smaller risks via (government financed) health care funds.

The choice between social insurance and private (first party) insurance is obviously closely linked to the choice between tort law and social law.

On the choice between government-provided or private market insurance, an economist would usually refer to the theory of bureaucracies to argue that government-owned operations that are not exposed to competitive pressures have little incentive for efficient production and might therefore be more expensive than private insurance companies providing the same product. Generally, one could therefore argue that insurance cover could be provided by the private market, even if it were to be decided that these risks should be subject to compulsory insurance. There are indeed many examples of compulsory insurance where the cover is not provided through social insurance or government-owned institutions but through private insurance companies. This, however, assumes that private insurance markets are sufficiently competitive. In that case insurance theory predicts that a diversified supply of different insurance policies will be provided at competitive premiums. Only if the private insurance market were not capable of covering certain risks or would provide inefficient results, for example because of a high degree of market concentration, is there an argument for government intervention. Another argument in favour of government intervention could be that certain risks could be uninsurable on the private market, say, because of an inurable problem of adverse selection. If the government could gather information on the risk at lower costs than insurance companies, this would be an argument for government provided insurance.

This shows that, in arguing that private insurers are in principle better than bureaucratic institutions in providing cover at competitive premiums, there is a strong case for private health care insurance, even if the provision of insurance should, for reasons mentioned above, in some cases be made compulsory. However, the flipside of introducing compulsory insurance is that the policy maker becomes dependent upon the private insurance market to insure these risks. As long as the market is competitive and sufficient cover is provided, this should not in itself be a problem. However, some risks might be uninsurable on the private market. One could, therefore, argue that they should not be insured at all, but in that case there could be suboptimal results because of the free-rider problem, since these people would be treated anyway in public hospitals. Hence, even for compulsory insurance provided by the private market, there might be a case for the government to provide insurance for those categories that could not obtain insurance cover on the regular market. Obviously, providing such cover for people who could not otherwise obtain insurance is not the same as providing a general social insurance scheme. In addition, even if the government intervenes to provide cover for this remaining category, risks...

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45 In a similar vein, the Netherlands Scientific Council for Government Policy argued in a 1994 report “Belang en beleid” (Interest and Policy) that the public sector lacks the incentive which the private sector has to reduce the volume of health care costs (see M.W. Diikshoorn, Ontwikkelingen in de WAO, [1996] Vezekerting, 82–86).


So far we have considered the choice between insurance via the private market or government provision, assuming that health care insurance can be provided via the private market, with risk-based premiums, taking into account general principles of insurance, more specifically risk differentiation. From this point of view we have argued that government intervention is not necessary as long as insurance is provided in a competitive market and that moral hazard as well as adverse selection can be controlled. The problem is, once more, that social security policy apparently often aims at income redistribution as well. Therefore social security schemes are often not risk based, but income dependent. This inevitably collides with the insurance principle that the premium should correspond with the real risk; this income redistributive goal can probably only be realised through government intervention. Leaving this redistributive goal aside, there are fewer arguments for health care insurance via the government than via the private market. From this it follows that the question of whether government intervention is necessary can only be answered when the aim of social security policy has been clarified. This choice inevitably incorporates a normative element. If income redistribution is considered to be the aim of social security, it is obviously not possible to accomplish risk differentiation at the same time.

Financing Health Care Schemes

A political hot issue, closely connected to the choice between the private market and regulation, is obviously the way a health care scheme should be financed. Within a classic model of private insurance the answer is relatively simple. In this case, a risk-averse consumer will purchase (by choice or compulsorily) health care insurance from a competitive insurance market and pay a corresponding premium, related to his demand for insurance and to the individual risk he poses. Essential to private insurance is the fact that the premiums charged must correspond to the risk, not only to control moral hazard, but also to guarantee that funds will be available when the insured manifests itself. The premiums paid will in principle be reserved to account for future risks. An insurer is under a contractual obligation to fulfill his contractual duties vis-à-vis his insured party. Hence, he will have to bear the consequences of bad risk calculations that can bring himself into trouble afterwards. A private insurer, in principle, does not have the possibility, say, of lowering the compensation due to the insured party or of increasing premiums for all existing insured parties. The final consequence of bad calculations may be the traditional market sanction of bankruptcy.

Cover under social insurance basically comes from a different angle. Social security systems, as they have been developed since Bismarck’s initiative in the late 19th century, assume that a minimum of social services, including health care, is delivered to those who could not afford to purchase insurance cover themselves. Again, this cover for low-income classes, which may be deemed necessary from a policy perspective, could be provided if the government, for example, provides the cover itself for this remaining category. However, in many cases the principle of solidarity between good risks and bad risks will lead to income-dependent premium setting. This then inevitably leads to the question of whether such income-dependent premium setting can be reconciled with the insurance economics goal of avoiding moral hazard. As we indicated above, this may be problematic, given the different starting points of the two systems. Unlike private insurers, the government providing the social insurance is not under a contractual duty to compensate the insured fully. Since the income of the social health care system is not risk related, there is a chance that at some moment the amounts reserved may not be sufficient to pay for the health care scheme. In that case, no bankruptcy follows but the government may either lower the payments due (through regulatory intervention) or look for additional sources of funding (say, from general income tax revenues). This shows the basic difference between the finance of private and social insurance schemes. An important consequence is that the shift from social to private insurance would not necessarily be negative for the insured; the government can always reduce the social insurance benefits unexpectedly because of budget constraints, whereas an insurer is bound to his contractual duties. Some scholars indeed argue that a shift to a privatised system has the advantage for the insured parties of reducing political risk.

Summary

Comparison between the way social security and private insurance are financed highlighted a number of other different principles underlying private and social insurance. E.g., social security systems seem to be relying on income dependent premium setting, whereas private insurance, in principle, is based on a system where premiums are related to risk in order to provide a reserve for future claims. The simple reason is that, unlike the case of social insurance, private insurers cannot rely on governments to cope with their deficits. If a private insurer would not relate premiums to risk he may be subject to the market sanction of bankruptcy.

This shows that not only tort law and social security have different starting points, but that the same applies - not surprisingly - to the related insurance.

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45 O. Mitchell/S. Zehles (supra note 27) p. 11.
46 As we have shown above under 2.
47 If an insurer did so, he would be in a disadvantageous competitive position.
schemes: social insurance versus private insurance. Notwithstanding the differences between both systems, there seem to be some similarities as well, or at least the systems seem to approach each other. One example is the idea of equal access to health care services, underlying many social security systems. This idea is obviously not carried through all the way. There certainly is equal access for basic medical needs in most legal systems, but in many countries individuals can purchase additional coverage according to their own demand and pay a supplementary (risk related) premium. Similarly, within private insurance a debate is going on today whether the principles of risk differentiation can be carried through in all respects. Cousy has often advocated that insurance companies should take ethical principles into account as well. These may lead them to accept some solidarity between good and bad risks. These ethical principles, in other words, impose certain limits on a very detailed risk differentiation. Wils has also pointed out that a detailed risk differentiation may conflict with basic human rights if, for example, risks are differentiated according to gender or sexual preferences. A basic difference between social and private insurance is obviously that the policy maker wants to achieve income redistributive goals through the financing of the health care system. This, however, obviously may have a price as far as the efficiency of the system is concerned.

Today many also advocate a combination of limited social insurance schemes, providing basic medical treatment, financed by income dependent premiums with the possibility of purchasing additional insurance on the market according to the preferences and demands of the particular individual. Hence, it is not always necessary to make a strict choice between private or social (health care) insurance, but a combination of systems is possible. In that respect one could obviously think of a compulsory social insurance scheme for the larger risks (where the above discussed model hazard problem does not play an important role) and the possibility of private insurance for the smaller risks.


IV. The Relationship Between Tort and Social Security: A Changing Landscape

Pressures on Social Security

We already indicated that the traditional way that tort law was used, compared to social security, was in fact as an exceptional system. Only a limited part of the damage occurring in society as a result of accidents was compensated via tort law. A much larger part was compensated via social security. Tort law only intervened in specific circumstances (wrongfulness with the injurer) and for particular types of damage: top of the income and non-punitive loss. Effectively, tort law was in that respect more or less replaced by social security, e.g., in the field of occupational health. In the Netherlands, such a system existed under the accidents at work act of 1901: this provided employees with social security and granted immunity for liability to employers. Such a system is still in place in many legal systems. A legislative change later allowed claims against the employer, but they were effectively rarely used. The simple reason was that social security still granted compensation for the basic needs. Victims therefore, e.g., in the Netherlands, only used tort law in exceptional cases. However, several changes have occurred recently, in Europe in general and more particularly in the Netherlands as far as the financing of damage caused through accidents at work is concerned. This follows from a general debate on the reform of social insurance in Western Europe.

In many legal systems it is now felt that the health insurance schemes that were developed a few decades ago have come under increasing pressure. The increasing costs of health care systems (and of social insurance in general) have led to a variety of proposals. In some legal systems it is noticeable that the government has progressively withdrawn from providing all-inclusive social insurance schemes and prefers to rely more heavily on market solutions and private insurance. This behaviour obviously fits in with the deregulation wave that hit Western European politics in the 1980s.

57 T. Hartlieb (opera note 10) p. 29.
58 Sec Mr. p. 1 of the questionnaire.
As a consequence of this deregulation – for example in the Netherlands – an increasing use of the liability system is advocated, so that tort law could be used more often to compensate accident victims, thereby releasing the social security system from this heavy burden. In that debate, attention has also been paid to the role of private insurance as an alternative to social insurance. The question therefore arises of how to find a proper balance between the two systems.

Importance for the Scope of Liability

Hence, one can notice that some recent changes have occurred in social security, not only in the Netherlands, but in many Western European systems, which might have had an important influence on the scope of liability of enterprises.

Our basic assumption is that for a long time victims in Western Europe, contrary to their American counterparts, did not have many incentives to bring a liability suit, since the social security system in many Western European countries provided for a relatively wide coverage of many expenses that a victim incurs when an accident happens. Partially as a result of international conventions and European Directives, many countries have elaborated systems of compulsory first party insurance covering medical expenses. In addition, lost income is often taken care of as well. Depending upon the legal system, this is usually mandatory if one is employed and on a voluntary basis for self-employed individuals. In some cases even property losses are insured, depending upon the type of accident. Due to this relatively elaborated first party insurance system, a large part of the damage to victims was taken care of already. Victims individually therefore only had incentives to sue an insurer in tort for the part of the damage that was not taken care of via the first party insurance scheme. This could in some cases be property loss, or the higher part of one’s income which would not be compensated and – mostly – compensation for so-called pain and suffering for which no first party insurance is available.

Therefore, if one wishes to analyse the scope of liability in a particular legal system, one should also take into account the extent to which damage is already compensated for via other (private or public) compensation mechanisms, which remove the need to use the tort system. In addition, if one wishes to analyse possible evolutions in the scope of liability one should also address possible changes in social security law. We shall discuss the Dutch case as an example to illustrate how changes in the social security system can influence the amount to which enterprises will have to intervene in order to provide compensation for potential victims. Obviously, the power of one state to change its social security system is limited by its duty to fulfill its obligations under European and international law.

A very much related question is whether the first party insurers mentioned above or social security organisations have a right of redress against the insurer after having compensated the victim. One can also understand that if, e.g., a health care insurer were not subrogated in the rights of the victim for the amounts paid in health care, this would seriously limit the scope of liability of the insurer. From an economic perspective this may obviously endanger the incentives of the insurer for prevention. By the same token, proposed changes to increase the scope of redress for social insurers would obviously expand the scope of enterprise liability. Since again a broad discussion is taking place in the Netherlands on this topic, we will discuss under 6 the Dutch case as an example of how changes in the relationship between social security law and tort law via the right of redress may affect the scope of enterprise liability.

Recent Changes in the Netherlands

In Social Security...

Since it is not possible to discuss workers’ compensation issues at great length in this paper, we will discuss a few recent changes in Dutch law that illustrate the tendency of deregulation in this area, which seems to be typical for the policy in the nineties in many Western European legal systems. Generally, the recent Dutch changes aim at increasing the individual responsibility of an employer, inter alia for the costs associated with absence from work of his employees. The basic idea is that by making employers feel the financial consequences of absence from work directly, this will increase their incentives for an effective prevention policy. One can understand that many of these recent changes have been highly debated in the Netherlands. The most important reason is that these changes are initiated on the basis of ideas to make employers individually liable for social security payments. These ideas obviously contrast sharply with the traditional basic notion in Dutch social security law – that social security is based on the idea of “risicobezigheid”.


Sickness Pay

Both with respect to workers' compensation and safety at work, two important changes have taken place since 1994, and other recent developments merit further discussion. As far as workers' compensation is concerned, since 1 January 1994 an employer is forced to pay his employee 70% of his salary for a period of 6 weeks. Recently, this system was even further changed since the Dutch government decided to completely privatise the workers' compensation scheme at the beginning of 1996. The duty to pay the salary has now been extended to 52 weeks and an employer can purchase insurance coverage against the risk of having to continue to pay the salary of his employee. The fact that the employer purchases insurance coverage is again criticised since it is held that this might precipitate the incentives for an effective control of the employees by the employer, for which the system was introduced in the first place. Notice that insurers claim that it is hardly possible to effectuate an adequate control of employers, as was suggested would be the result of the regulation. In addition to the expected incentive effect, an important argument for this new legislation was obviously that the government expected savings of up to 600 million Dutch guilders from the new privatised system in 1998.

It is not immediately clear what the consequences of these recent changes will be for the scope of liability. Obviously, this privatisation means that the costs of providing workers' compensation are no longer borne by the social security system (and hence redistributed to the society at large), but are shifted to the individual employer. This duty to pay the salary exists irrespective of any liability. In principle, the employee is still compensated, so that one could argue that his incentives to use the liability system for compensation remain in principle unchanged. However, there is one change which may affect the need of victims to use the tort system for compensation, i.e., the salary is only paid up to 70% unless the employer agreed to pay more. If the inability to work is therefore caused by a tort, a victim still has incentives to sue for the remaining 30% and obviously always for pain and suffering. Moreover, we should add that, as was mentioned above, the duty imposed upon the employer to pay the salary of the employee is limited up to 52 weeks. After the 52 weeks, the employee falls within the "classic" social security system, although the replacement payments are now seriously reduced. After the first year of illness (paid by the employer) the employee who is still ill will fall into the already mentioned WAO. Depending upon the applicable system, this will provide some (although limited) compensation for lost income, but it is also limited in time. Hence, as a result of all of these changes, tort law has again become important, more particularly for the long lasting income damage. Indeed, after a certain period of WAO, some employees in the Netherlands might end up with a relatively low amount of social security benefits, which is barely enough to live. That obviously explains the increasing importance of the tort system, more particularly for lost income in case of long lasting diseases.

Safety at the Workplace

A second evolution concerns the safety at the workplace. The Dutch Health and Safety at Work Act (Arbeidsomstandighedenwet) has also undergone several changes since 1 January 1994. Especially important are in this respect plans that have been launched by a commission that proposes a total deregulation of the Safety at Work Act. A commission, chaired by Kortmann, proposed replacing the existing regulations aiming at safety at the workplace through a civil liability in tort to prevent accidents at work. The Safety at Workplace Act should - in the newly deregulated system - consist of only a few basic principles, supported by civil liability. Although these proposals have been seriously criticised, and it is thus not clear whether these ideas will be politically viable, it does not seem entirely unlikely that some system of deregulation, introducing a generalised duty of care for the employer, will be introduced.

Although the future development with respect to these revolutionary ideas is still unclear, it is obvious that a far reaching deregulation of the Safety at the Workplace Act, aiming at an increased use of the civil liability system, may increase the scope of liability. In that case the changes will not be caused by an evolution in the tort system itself, but by external factors that force victims to make an increased use of possibilities already available within the tort system. Again, it should be stressed that all these recent legislative changes we just described lead to a reduction of the scope of social security. This is more particularly important as far as the changes in the Dutch WAO (providing re-

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72 For further details see S. Klose/G. Vork (supra note 21) pp. 207-208.
73 Indeed, the employer still has a right of redress for the amounts he paid to his employee against a liable third party on the basis of art. 6:107 a BW.
74 In practice, a 100% compensation is often still provided, based on Collective Labour Agreements.
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placement income in case of disability) are concerned. As a result of these changes, social security payments become more limited in scope and in time, which may increase the incentives for victims to use the tort system.

... and in Tort Law

62 The amazing fact is hence that at the political level in the Netherlands, some voices were heard that victims (of accidents at work) should increasingly use the tort system, since this was then considered as a means to reduce the pressure on the social security system. Apparently, politicians were at the time (beginning of the 1990s) not aware (or neglected) the fact that a reduced social security coverage might not only lead to an increased use of the tort system, but could even expand beyond the reasonable (insurable) abilities of this tort system. Indeed, in addition to the mentioned changes in the social security system (and maybe partially as a result of them), victims of accidents at work increasingly used the tort system to obtain compensation. Hence, the decrease of social security protection was paralleled by a development in tort law in the Netherlands towards increased victim protection and an expanding employers' liability for occupational diseases.

63 This can easily be demonstrated by looking at case law. The Dutch legislator in 1997 changed the employers' liability, introducing a reversal of the burden of proof concerning the fault of the employer (see art. 7:658 BW). In addition, there are many tendencies in case law towards increased victim protection in case of employers' liability. More particularly, the Dutch Supreme Court also reversed the burden of proof in case of causal uncertainty concerning the precise time when an employee had inhaled a fatal asbestos crystal, resulting in asbestosis. In a well-known Supreme Court case, Cijouw v. De Schelde, a victim of asbestosis could not prove at what time he had been in contact with the fatal asbestos fiber that caused his disease. The determination of this moment was crucial for the case since Cijouw had worked for the defendant firm for several years, but in a first period the employer could not have known that he had to take measures to protect his employees against asbestos and thus could not be liable. The Supreme Court shifted the uncertainty concerning causation to the enterprise by holding that it was presumed that the employee had been in contact with the fatal asbestos fiber during the second period of his employment with the defendant. This presumption could have been rebutted if the defendant had been able to prove that it was not during the second period in which Cijouw was employed by the defendant that he was in contact with the fatal fiber. Obviously, this would have been practically impossible for the employer.

Moreover, the contributory negligence defence in case of employer's liability was severely reduced as a result of the case law of the Supreme Court. It has, inter alia, been decided that there can only be a reduction of the employer's liability in case of gross negligence on the side of the employee. Moreover, it was decided that gross negligence had to be interpreted as intent or wilful recklessness. This wilful recklessness can only be accepted if it is clear that the employee in his conduct immediately preceding the accident was actually aware of the reckless character of his behaviour. In other words, the contributory negligence defence almost lost its contents in the context of employers' liability. Moreover, although formally an employer's liability is still based on negligence, the scope of liability and the duty of care have been expanded in such a way that some claim that employers liability in the Netherlands is actually based on strict liability, even though this is, according to case law, not formally the case yet.

As a result, the finding of liability, the burden of proof, causation as well as the interpretation of contributory negligence, all tend towards an increased victim protection and in favour of an increased employer's liability. The employee is not only protected against the dangers at work, but even against himself. Some have claimed that such a tendency is contrary to the fundamental principle of liability law.

The Best of Both Worlds

It is, hence, important to note that apparently several tendencies run in the same direction: social security coverage has been increasing in the Netherlands (as far as damage resulting from occupational diseases is concerned) and the scope of employer's liability has been increased through case law. The same is, moreover, true for other fields of liability. A result of this development is that the traditional difference between tort law and social security might become smaller.

The traditional idea was that social security would provide for an easy compensation (with a low threshold), but also for a limited amount, whereas full compensation could only be awarded when the more complex conditions of 83 See on this reduced burden of proof for the injured employee Dutch Supreme Court 10 December 1999, [2000] Nederlands Jurisprudentie, 211.
88 So T. Hartlieb (supra note 13) pp. 43-44.
liability under tort law were met. Victims of accidents now seek "the best of both worlds" within tort law: they seek the low threshold for compensation of social security, to be combined with full compensation under tort law. Indeed, as a result of the mentioned developments within liability law employees now can claim compensation from the employer in tort on the basis of very low thresholds (which were customary in social security), but with high compensation (typical for torts). This happens, moreover, in a period wherein social security protection reduces and therefore the need for victims to seek tort law even increases. This evolution may, however, lead to problems at the insurance level. Traditional tort law and liability insurance have not been developed as mechanisms which should guarantee full compensation to all victims of accidents. One problem is that tort law is now expanded or combined with pleas in favour of no fault compensation schemes whereby often the question who should finance this expanded protection seems to be neglected. The future will probably show that victims and policymakers will have to make a choice between either an automatic compensation which can be warranted through no fault compensation schemes (social security, first-party insurance or compensation fund), but then the damages awarded are necessarily limited (and the question still has to be answered how incentives for prevention can be given) or to rely still on tort law with its full compensation for a necessarily limited number of victims.

Towards a "Claims Culture"?

Hence, the question whether reforms have been considered in the Netherlands, which influence the relationship between tort and social security, certainly has to be answered in the affirmative. The reduction of the scope of social security certainly has lead to an increasing demand on tort law. Interestingly enough, this has recently lead to worries of the Dutch government, which has indeed noticed the risk of a "claims culture" developing in the Netherlands.

A claims culture is, according to the Dutch government, a culture in which citizens would claim against each other regularly and for high amounts to obtain compensation of damage. The government indicates a few factors, which may have contributed to such a claims culture and examines some of the instruments, which could be used to counter the trend.

In this respect attention is also given to the relationship between tort law and social law. The Dutch government indicates that the reduction of social security coverage may have led to an increasing need to use tort liability. In addition, the Dutch government realises that the attitude of the government towards generalised compensation (also of victims, e.g., of floods) may have given support to the impression that damage suffered must in principle always be compensated. Indeed, it has been indicated in Dutch literature that automatic compensation funds providing compensation, e.g., for damage suffered as a result of floods, may precisely give rise to such a claims culture. Also, the literature has warned that a deregulation and privatisation in and of social security may lead to an increasing use of tort law. Indeed, it was claimed that the reduction of social security led to a situation whereby tort law becomes important for the "Existenzienschutz" also in the Netherlands. That the government withdraws from social security in the domain of primary compensation of, e.g., healthcare costs and income losses, will inevitably lead to an increasing use of tort law.

The Dutch government in fact realised that to some extent it had itself caused the increasing use of tort law. It is, e.g., remarkable that some years ago a discussion took place concerning the deregulation of the safety at work act. In that respect it was even suggested to repeal the whole body of safety regulation and to replace it by tort liability. At that time apparently a lot of attention was paid to the potential blessings of tort law, whereas only now the other side of the medal (an increasing claims culture) is addressed.

It is in that respect remarkable that a lot of attention is paid to the fear of an "American claims culture", but the Dutch government apparently neglects the fact that the high claims culture in the US may to a large extent be due precisely to the fact that victims of torts in the US have to use tort law for the "Existenzsicherung" whereas that was until recently not the case in the Netherlands. In an earlier paper we claimed that the difference in the level of social security between Europe and the United States is probably one of the most important causes for a difference in "claims culture" between both systems. One can notice that there is a rising number of claims as a result of a deregulation and privatisation in the field of social security. It has thus been argued that a
remedy should probably primarily be looked for in a reform of social security rather than in reforms of tort law.\textsuperscript{101}

There is, hence, undoubtedly in the Netherlands today a problem in tort law as a result of an increase of claims. The main reason for this increase is probably the fact that Dutch victims today, as opposed to about ten years ago, are now also forced to use tort law to cover primary needs. This corresponds with the claim made by George Priest that the American tort and insurance crisis was to a large extent due to the fact that third-party liability insurance and tort law were increasingly used to cover primary needs, for which the tort system would not be suited.\textsuperscript{102} One can indeed notice, on the one hand, certain developments within liability law, which seem to conflict with traditional starting points of tort law and which are caused by the idea that all damage should be compensated at all costs, combined with reduced social security. The result is a paradox: a "socialisation" of tort law takes place, combined with a "privatisation" of social security.

Some Dutch scholars are less pessimistic concerning this increasing claims culture (e.g., Bergkamp argues that less social security does not necessarily lead to more claims in tort law).\textsuperscript{103} However, legal doctrine and the trade unions clearly indicate that victims are, as result of withdrawing social security, undoubtedly forced to make an increasing use of tort law.\textsuperscript{104} By the way, even the Dutch government realises that less social security may lead to an increase of claims.\textsuperscript{105} Bergkamp has equally argued that from a public policy point of view it would make no difference whether compensation is paid via tort law or via social security. This is, according to us, a serious misunderstanding. Tort law and social security are, as we have claimed in this paper, different systems which are not automatically interchangeable. A problem of reduced social security in a time where the thresholds for tort law are equally reduced is that increasing claims based on tort law and liability insurance may indeed endanger the insurability.\textsuperscript{106}

Insurers have argued that this increasing use of tort law for compensating primary needs may lead to unpredictable claims and hence to uninsurability. Insurers already defended themselves against claims culture in the Nether-

\textsuperscript{101} See also L. de Leede, Meer aandacht voor beropschriften, [1998] Nederlands Juristenblad, 779–780.


\textsuperscript{104} See in this respect among others B. de Vroom (ed.), Betwiste zekerheden, Reacties op de nieuwste richtsnoeren in Nederland (1998), p. 14 and the conclusion of attorney general J. Spier in the case Rouwhoff/Eternit (number C98E220) of the Dutch Supreme Court under 4.4.3.

\textsuperscript{105} See the letter of the Dutch government to the Chamber of Representatives 1998–99, 266–67, number 1, pp. 2–3.


\textsuperscript{107} For a detailed overview of all the areas where an expanding tort liability could be noticed in the Netherlands see A.T. Boel/J. Spier (eds.), De uitbreidingen rechtspraak van de aansprakelijkheid uit onrechtmatige hand (1996). For the insurance consequences see J. Spier/O. Haazen, Amerikaanse voorbeelden en de nieuwe aansprakelijkheidsverzekering voor bedrijven en beroepen, [1996] Nederlands Juristenblad, 45–50.


\textsuperscript{109} There is, therefore, much criticism concerning the tendency towards claims-made coverage; see, e.g., S. Klosse/G. Vok, supra note 21) pp. 216–217.

\textsuperscript{110} For a detailed overview of all the areas where an expanding tort liability could be noticed in the Netherlands see A.T. Boel/J. Spier (eds.), De uitbreidingen rechtspraak van de aansprakelijkheid uit onrechtmatige hand (1996). For the insurance consequences see J. Spier/O. Haazen, Amerikaanse voorbeelden en de nieuwe aansprakelijkheidsverzekering voor bedrijven en beroepen, [1996] Nederlands Juristenblad, 45–50.

sons, many have been pleading for alternatives to the traditional tort system in order to compensate occupational diseases. We briefly discuss three alternatives, which have received a lot of attention lately.110

Compensation Funds

76 A first option which has been advanced on many occasions in the Netherlands is the introduction of a compensation fund.111 Compensation funds are now often advanced in the Netherlands in cases where victims have difficulties in obtaining compensation via the tort system. As far as the occupational health problem is concerned, we point at pleadings by the former Minister of Justice De Ruiter for the creation of an asbestos fund.112 These proposals of De Ruiter have finally led to the erection of an institute for asbestos victims: this institute will help and assist victims in their claims against employers. Although this asbestos fund hence today only has a limited scope, it fits into a general tendency in the Netherlands to plea in favour of compensation funds replacing tort law especially in cases of mass torts. We have, however, been rather critical towards this development and have argued that if compensation funds would function according to the same principles of efficiency and justice as tort law, similar problems would arise.113

77 One particular type of fund has received attention in the debate on compensation of asbestos victims, being an advance payment fund. Such a fund would advance payments to victims to remedy the long duration of civil procedures, also given the relatively short life expectation of most asbestos victims.114 In that case the compensation fund could still use tort law to claim compensation from the liable employer.

78 Although there is hence debate on the usefulness of compensation funds in the Netherlands, it is unlikely that these will fully replace employers’ liability for occupational diseases.

Social Security

79 It has also been suggested that the current crisis in Dutch tort liability should be remedied by undoing the source of all problems, being the deregulation and

privatisation of social security. The remedy seems straightforward if one believes that it was mainly the result of changes in social security that the scope of liability was expanded. However, expanding liability obviously has more sources than merely changes in social security. Moreover, it seems politically unfeasible in a time where Western European governments believe more in liberalisation and privatisation than in regulation to plead in favour of expanding social security schemes. Moreover, there are many criticisms which could be formulated concerning an expansion of social security as well. In fact: the introduction of privatisation and market forces in social security was as such obviously not a bad idea. It is only surprising that the government did apparently not realise that a privatisation of social security would inevitably lead to a higher pressure on the compensatory function of tort law. Therefore, nowadays pleases are formulated to introduce a third instrument which can rely on the market forces of private insurance, but may constitute an alternative for liability insurance.

First Party Insurance
A Tempting Alternative

An alternative which is often advocated in the Netherlands today to replace liability insurance is a first party insurance. The major difference between liability insurance and first party insurance is well-known. Liability insurance is a third party insurance, whereby the insurer covers the risk that his insured (the employer in case of employers’ liability) will have to compensate a third party (the employee). A first party insurance is based on the principle that the insurer compensates the victim directly. This first party insurance is now advanced by many in the Netherlands as an attractive alternative to the crisis of liability insurance. E.g., in the field of environmental liability, Dutch insurers have totally moved away from liability insurance and replaced liability policies by first party coverage. A similar discussion takes place concerning personal injury.115 Some have proposed to change the employers’ liability to a system of compulsory first party insurance to the benefit of employees.116

Whether such a first party insurance can generally be considered as an efficient alternative for third party liability cannot be answered that generally. This depends to a large extent on the details of such a proposal and more particularly on the question whether the first party insurance is combined with the liability of the employer or not. The underlying principle in a first party insurance is that the insurance—in principle—pays as soon as damage occurs, provided that the victim can prove that his damage has been caused by the insured risk, irrespective of the fact whether there is liability of a third party (the employer).

110 See for the discussion of these alternatives also S. Klosse/G. Venk (supra note 21) pp. 214–217.
The advantage of a first party insurance is obviously that the transaction costs are relatively low and that risk differentiation will be a lot easier. The reason is simply that the insurer covers directly the risk of the insured. It is therefore much easier for the insured to signal particular circumstances to the insurer than with liability insurance. The problem with traditional liability insurance is the fact that the insurer is insuring the risk that his insured (the employer) will harm a victim (the employee), of which the properties are unknown ex ante to the insurer. Under first party insurance the insurer, in principle, directly covers the victim.

First Party Versus Direct Insurance

82 The first party insurance which is now proposed in the Netherlands is not a traditional first party insurance, since this would mean that the employer would himself take out insurance coverage without any involvement of the employer. It is more a direct insurance, meaning that the employer takes insurance coverage on behalf of his employees who can directly claim on the basis of the policy. A crucial question in this respect is obviously the relationship with liability law. The ideas put forward in the Netherlands tend to endorse a replacement of the liability system in case compulsory direct insurance (e.g., for occupational health) was introduced. Thus, it would amount to a system of partial immunity for employers’ liability, but on the other hand there would be a duty of employers to purchase direct insurance for employees.

83 Such a scheme can, in principle, have advantages for both parties. We already mentioned that employees complain about lengthy procedures and uncertain outcomes, whereas employers and their insurers equally dislike these uncertainties, since they endanger the predictability of the risk. These uncertainties can, to some extent, be remedied in a system whereby the liability issue does not have to be solved any longer since the insurer of the employer obliges himself to cover the personal injury of an employee who becomes victim of an occupational disease. Hence, in such a direct insurance scheme the insurer will only have to calculate the probability that occupational diseases might occur to victims of a certain employer; the question whether the employer can be held liable for a disease becomes irrelevant in a direct insurance scheme. However, a question that still has to be settled is obviously whether the personal injury suffered by the victim is actually caused by an occupational disease. This question is obviously important because the insurance should only cover so-called “risques professionnels”. Causation questions can therefore not be totally avoided.

84 Another issue which still will have to be settled is the rule the employer will still have incentives for prevention of occupational diseases without the deterrent effect of the tort system. Many have warned that no-fault schemes without liabil-
that he exercises recourse on the liability insurer. But the latter would optimally differentiate risks and would thus incorporate this increased risk (as a result of recourse) in the policy conditions of the insured insurer. This could, theoretically, mean that the exercise of a recourse against a liability insurer would amount to an increase in premium or the imposition of other policy conditions to increase prevention of accidents. Others have also argued that a right of recourse of social security agencies is necessary to reach a correct allocation of costs. If there were no right of recourse of the social security agency, this would lead to underdeterrence and the injured (and his insurer) would not be fully exposed to the risk they are creating. There is, again, an adverse effect on cost allocation.

If one therefore believes in the starting point of economic analysis (being that tort law provides incentives for prevention), then a right of recourse can only be considered as the logic conclusion and a necessary addendum to tort law. Obviously, this only holds true if one can presume that tort law itself still has a preventive effect. If, e.g., in the traffic liability situation one would argue that tort liability has no deterrent effect any longer, then it would make no sense to base a right of recourse on the idea of prevention either. The problem is in fact whether in some cases insurers are held liable under tort (precisely because of victim compensation reasons) also in situations where tort liability can hardly be expected to affect their incentives. In those cases one can also have doubts about the effectiveness of recourse.

In the words of Calabresi: a right of recourse seems at first blush necessary to reach an optimal reduction of primary accident costs. However, it may well be that these effects on prevention are doubtful whereas the exercise of recourse can lead to high tertiary costs. If it were obvious that the tertiary (administrative) costs are unreasonably high compared to the (doubtful) benefits in the field of deterrence, the exercise of the right of recourse would lead to a social loss.

The Administrative Costs Involved: Some Dutch Estimates

The question concerning the extent of these administrative costs therefore arises. The questionnaire also rightly asks for figures concerning the impact of social security and tort, as well as on the transaction costs. It is obviously always difficult to get a precise indication of the costs of recourse. However, some indication can nevertheless be given. It is held that in the Netherlands 95% of all recourse actions for personal injury occur in traffic liability situations. This allows us to provide some image of the costs of recourse. Bloem-

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121 Here the question put in question III 5 will hence be answered, which is whether the social security agency has a right of recourse against the person who caused the injury.
Economics Perspective

If this data concerning the administrative costs for recourse in the Netherlands is correct, then the exercise of recourse hardly seems efficient. It would only be efficient if there were a countervailing benefit in the form of deterrence. However, if one regards the way in which the bonus/malus system in traffic accident cases functions in the Netherlands, this deterrent effect is highly doubtful. In many cases the exercise of a right of recourse will have no effect on premiums. In the words of Bloembergen; the injurer will never notice that recourse has been exercised in his wallet. Currently, recourse actions in the Netherlands therefore seem merely to lead to high administrative costs without clear compensating benefits.

Recourse in the Netherlands: Recent Evolution

Before addressing reform tendencies aimed at coping with these inefficiencies in the Netherlands, it seems interesting to first provide a brief overview of some tendencies concerning the changes in the right of redress, which might affect the exposure of a liability insurer to liability.

Importance of the Right of Redress

In the right of redress, the civil liability and social security systems come together. The right of redress concerns the possibility of (social) insurers to recover from the injurer the amounts they have paid to the victim. The scope of this possible redress will obviously have an important bearing on the total scope of liability. In the Netherlands, for instance, it is generally the rule that in so far as the victim has received rent from a (social) insurer, the amount that the victim can claim from the insurer will be deducted. This, however, does not benefit the injurer, since the insurer who paid the victim can exercise a right of redress for the amounts paid to the victim. This would mean that it would make no difference for an injurer or his liability insurer whether they have to pay the victim himself or his insurer. In theory, the total amount of damages to be paid by the injurer should be equal in both cases. This, however, is theory. In practice the right of redress is often limited.

Restrictions

Indeed, in practice the scope of the right of redress is often not as large as the original rights of the victim. Problems in exercising the right of redress exist, for instance, when the injurer belongs to the same family as the victim. Although the normal tort rules apply in principle between family members, Dutch law generally excludes a right of redress in that particular case. This restriction is not only typical for the situation in the Netherlands, but applies, as well.

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129 See M. Faure (supra note 107) p. 55.
130 129 These amounts have been estimated empirically by Bloembergen in 1973 (A.R. Bloembergen, Nederlands Juristenblad, 1966) and can be found in an Advice of the Social Economic Council (for a critical analysis see T. Hartlieb/E.E. van Maanen, Regress bij volkoverzekering, de dader hoeft het gedaan, [1994] Nederlands Tijdschrift voor Burgerlijk Recht, 75-78).
132 For an overview of the recourse rights in the Netherlands see W.H. van Boom (supra note 106), and see T. Hartlieb/P.J.L. Tjitses (supra note 104) pp. 69-111.
133 M. Faure (supra note 107) p. 56.
135 See generally, also with reference to the situation in other European countries, S.B. de Haan/T. Hartlieb (supra note 113) and S.J.A. Mulder, Schending (1985).
for instance, also in Germany and France. Since redress is not possible within a family, one can say that the injurer and his insurer benefit from this restriction.

Similar restrictions exist, for instance, when the insurer is an employer or a colleague of the victim/employee. In that particular case a right of redress is also excluded according to Dutch law. Once more, this restriction is not typically Dutch. It also applies, for instance, in France. This restriction is obviously highly important in cases of enterprise liability. It excludes a right of redress in many work related accident situations. The Dutch government is, by the way, contemplating to withdraw this restriction, in order to enlarge the scope of the right of redress.

Another restriction on this right of redress is indeed typically Dutch. According to this rule, the liability rule on the basis of which the (social) insurer wants to sue the injurer is decisive for knowing whether a right of redress exists or not. If the action against the injurer is brought under the classic tort rules, no problem exists and the right of redress can be executed. However, if the liability of the injurer is based on strict liability under the new Dutch Civil Code, a right of redress cannot be based on that same strict liability rule but can only be based on the general negligence rule (art. 6:162 BW).

Expanding the Right of Redress

These examples show that although in theory the position of the (social) insurer executing a right of redress is the same as the position of a victim, this is not at all the case in practice. To a large extent, liability insurers benefit from these restrictions on the right of redress. They will have to pay less to the social insurers seeking redress than they would have had to pay to the victims directly. In the Netherlands, a debate was recently launched on expanding the right of redress of social insurers. The expansion of this right of redress is based on the idea that the right of recourse will have a positive effect on prevention of accidents and will lead to an adequate allocation of accident costs. Recently, a right of redress was introduced in art. 6:107a BW for the employer who is forced to pay the wages of his employee during his absence because of illness. In other countries, for instance Belgium and France, the employer already possesses a right of redress under common tort rules. Expanding the right of redress obviously increases the scope of liability for injurers and their insurers. Moreover,

in the Netherlands the administration is also considering abrogating the restrictions on the right of redress discussed above in cases of work-related accidents. Indeed, in this respect we can refer to the fact that the Dutch government contemplates to abolish the exclusion of a right of redress against a colleague.

One can therefore conclude that although many European countries traditionally have rights of redress for first party insurers, these rights are always more restricted than the rights the victim himself could exercise against the injurer or his insurer. These restrictions obviously benefit the injurer and his insurer. In case of a tendency to increase this right of redress, the scope of liability will be widened as well.

Collective Recourse

Let us now go back to the question whether this tendency to increase the right of redress can be considered as efficient. We just claimed that theoretically a right of redress can lead to better incentives for prevention of accidents, but that in practice this deterrent effect might be doubtful, since liability insurers rarely effectuate an adequate ex post control after a right of recourse has been exercised. Thus, high administrative costs remain. The question obviously arises whether methods can be developed, which could lead to a reduction of these administrative costs. In that respect we can look at agreements between social security agencies and social or private insurers that regulate the distribution of damages.

Since individual recourse apparently involves a lot of administrative costs, many experts have qualified the way recourse is exercised in the Netherlands as "inefficiently pumping around money". Dutch insurers for that reason were obviously highly in favour of abolishing individual recourse by social security agencies. Obviously, the interests of insurers are divided. Liability insurers who are confronted with high cost recourse actions obviously highly dislike them, whereas first party insurers who can use resource still defend the mechanism. Given the high tertiary (administrative) costs of recourse, Dutch insurers have thought about a system to reduce these administrative costs, aiming at a system which would, on the other hand, still allow an adequate risk spreading (reduction of secondary costs). Therefore, the idea of so-called "collectivisation" of recourse has been launched and to some extent already effectuated in the Netherlands. Collectivisation of recourse is, by the way, not merely a Dutch phenomenon. Van Boom gives examples in Germany and France.

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137 §§ 67 of the Versicherungsvertragsgesetz and §§ 116 of the Sozialgesetzbuch.
138 Art. 121-12 of the Code des Assurances.
139 T. Hartlieb/V.P.J.L. Tijttes (supra note 117) p. 85.
140 Art. 121-12 of the Code des Assurances.
142 See the discussion of this privatisation, which forces employers to continue to pay the wages during one year above § 4.4.
143 This is precisely the question, which is addressed in III.7 of the questionnaire.
144 They can get some support for their point of view from A.R. Bloembergen, [1973] Nederlands Juristenblad, 1066 and A.R. Bloembergen, Nederlands Juristenblad, 695 and 705.
147 See W.H. van Boom (supra note 104) p. 117 and equally S.B. de Haas/T. Hartlieb (supra note 112) p. 7.
The simple idea is that recourse should not take place any longer on an individual, but on a collective basis. This means that part of the compensation which has been paid by social security agencies will be shifted to liability insurers. The advantage of this collective model is that the costs of individual recourse for both parties disappear. There are some experiments with collective recourse in the Netherlands now. From an economic perspective one can obviously criticise "collectivisation" in the sense that this collective recourse has no effect whatsoever on primary cost reduction: the liability insurers pay collectively, without any difference between good and bad risks. However, we noted that in the Netherlands today the individual recourse does not lead to any risk differentiation either. The conclusion is therefore simple: since individual recourse today in the Netherlands does not have a positive effect on the reduction of primary accident costs, the fact that collective recourse does not have this effect either should not bother the policy maker too much. Nevertheless, collective recourse may not affect the precautionary measures taken by an individual injurer, but it can have some other effect on safety. Economists have pointed to the fact that the accident risk can not only be reduced through a more careful behaviour of the potential injurer (higher prevention), but also by reducing the activity level. If collective recourse means that liability insurers of, e.g., car drivers will have to pay a substantial amount to social security agencies, they will pass on this collective recourse as a price to be paid by the car drivers. Hence, collective recourse will lead to higher premiums and may thus have a positive effect in the sense that the activity level of risky activities may be reduced.

Collective recourse, moreover, certainly has a positive influence on secondary accident costs (risk spreading). The compensation paid by social security agencies is now shifted to the liability insurers, and hence to the injurers who caused the risk. Hence, collective recourse leads to an adequate cost allocation since those who caused the risk collectively pay for it. Note, however, that this is only true on the aggregate level. Collective recourse does not guarantee as such an individual risk differentiation in the group of all injurers.

Finally, collective recourse may have a clear advantage also as far as the tertiary accident costs (administrative costs) are concerned. Collective recourse is simple since the liability insurers have to negotiate only once with the social security agency on the amount which will have to be paid by the liability insurers. These costs will be substantially lower than the costs of individual recourse today.

Obviously, collective recourse is now seen in the Netherlands as an ideal model, but some limits and conditions have to be met. First of all, the efficiency of collective recourse is only valid in the particular Dutch context where the current inefficient application of the experience rating (bonus/malus system) in liability insurance does not give incentives for a reduction of primary accident costs. Since apparently 95% of all recourse actions in the Netherlands concerning personal injury take place in cases of traffic liability, this outcome still holds true since in that case there is almost no ex post control as a result of individual recourse. However, in other cases, individual recourse may have an effect on the reduction of primary accident costs (e.g., in the case of liability of companies), provided that the exercise of recourse will also have an influence on policy conditions.

Second, the fact that collective recourse has lower administrative costs is only valid if transaction costs between the collectivity of recourse takers and payers are indeed low. In the particular cases where there are positive experiences in the Netherlands, the groups on both sides (social security agencies and liability insurers) were well organised, which reduced transaction costs. The scenario is totally different if, e.g., one would consider the recourse which an individual employer could exercise on the insurer of a liable third party. Transaction costs for insurers wishing to negotiate with all potentially involved employers would of course be huge. Hence, the diversity of recourse takers may inhibit an effective collective recourse.

Third, it remains necessary that the group of recourse takers which participates is actually large enough. It would not be very useful for liability insurers to make a deal with a relatively small group of recourse takers if there is a continued risk that many others could still exercise individual recourse with all the high administrative costs involved.

Although this collectivisation of recourse is still in an initial phase, it might be an important future development in the Netherlands with important consequences for the relationship between social security and tort law.

VII. Concluding Remarks

Answering the basic question of this project (whether there are fundamental differences between tort law and social security), we have argued, using economic analysis of law and the Dutch examples, that the two systems do indeed have different principles, goals and starting points. Whereas tort law relies on prevention of harm via deterrence, social security stresses prevention of harm as well, but is mostly a system of compensation. Social security provides basic compensation via social security is provided no matter what the cause of the illness.

For a description see S.B. de Haas/T. Hartlieb (supra note 113) p. 23.


The administrative costs of handling claims in tort law in the Netherlands have also been estimated by W.C.T. Weterings, Vergroting van letselbedracht en transactiekosten, een kwalitatieve en quantitative analyse (1999).

For an economic analysis of collective recourse, see M. Faure (supra note 107) pp. 63–65.

So also S.B. de Haas/T. Hartlieb (supra note 113) p. 45.
or disability. Tort law, on the other hand, starts from the principle "the loss lies where it falls" and leads only to a transfer of the loss (from the victim to the injurer) if specific conditions (traditionally fault) are met. These differences equally can be noticed if one regards the financing of both systems. We showed this using the example of compensation of health care. This is basically financed in social security via premiums dependent on income, based on solidarity between good and bad risks. Tort law provides compensation which is basically financed by the injurer or his insurer. Insurance is based on risk spreading, but also on risk differentiation. Essential to private insurance is therefore that risk dependent premiums are charged.

111 Although we could therefore signal important differences between tort law and social security, the systems are also related, among others via the right of recourse where social security agencies can use tort law to obtain recovery of payments made.

112 Notwithstanding these traditional starting points and principles, we sketched that since the 1990s a changing landscape in social security is noticeable in the Netherlands. Pressures on the social security system are especially apparent in the field of replacement income. After one year of sickness pay, paid by the employer, the employee will fall into the so-called WAO which, however, only provides compensation for lost income with serious limits in time and amounts. This reduced scope of social security in the Netherlands is equally accompanied by increasing pressures on liability. We presented the example of employers’ liability to show that more victims claim more compensation at lower thresholds and that the case law seems to go a long way in their direction. The tendency towards an increasing pressure on tort law is also accompanied by an expanding right of redress of social security carriers. Some argue that the result of both tendencies (reduced social security + increased scope of liability) is that victims now want “the best of both worlds”, at least in tort law: they seek the low threshold for compensation of social security to be combined with full compensation under tort law. The result of this development is that the insurability of liability may be endangered. The increasing “claims culture” in the Netherlands already gave rise to changes of the system of coverage by Dutch insurers to a claims-made coverage system. That may be a dangerous tendency since uninsurability (and claims-made coverage systems) may in the end give rise to situations where victims will not be compensated any longer via tort law.

113 The result is that, on the one hand, claims are increasingly based on tort law, also in situations where this does not correspond with the traditional functions of the system. On the other hand, as a result of reduced social security and a risk of uninsurability, the compensatory function of both systems may also be endangered.