UTRECHT JOURNAL OF
INTERNATIONAL AND EUROPEAN LAW

Mothers of Srebrenica: Causation and Partial Liability under Dutch Tort Law

RESEARCH ARTICLE

RIANKA RIJNHOUT

]u[ubiquity press

ABSTRACT

This article explains the Dutch theory of partial liability and why the application of this theory benefited the plaintiffs in the case of Mothers of Srebrenica from a tort law perspective. Partial liability is a theory under Dutch law to redeem causal uncertainties, and therefore functions as an exception to the main rule of sufficient degree of proof of a condicio sine qua non (CSQN) between the wrong and the damage, justified by legal justice and reasonableness. Loss of a chance is one variation of partial liability and was applied in the case Mothers of Srebrenica. The theory of lost chance essentially makes it possible to establish liability to a proportion, notwithstanding the causal uncertainty between the wrong and the original damage which would have resulted in a denial of the claim under tort law.

CORRESPONDING AUTHOR:
Rianka Rijnhout
Utrecht University, NL
r.rijnhout@uu.nl

KEYWORDS:
Causation; loss of a chance; partial liability; tort and human rights

TO CITE THIS ARTICLE:
Rianka Rijnhout, 'Mothers of Srebrenica: Causation and Partial Liability under Dutch Tort Law' (2021) 36(2) *Utrecht Journal of International and European Law* pp. 127–140. DOI: *https://doi.org/10.5334/ujiel.543*

1. INTRODUCTION

In July 1995, thousands of Bosnian Muslim males ('Bosniac males') were killed by Bosnian Serb forces in the Srebrenica genocide. At the time, the Dutch armed troops ('Dutchbat') were present in Srebrenica to ensure peace as part of the United Nations Protection Force. The relatives of Bosniac males filed several civil claims to hold the United Nations and the Netherlands accountable. Central in this paper is the case of the *Mothers of Srebrenica* and the civil liability of Dutchbat and The Netherlands.[1] In 2019 the Dutch Supreme Court held that the State was indeed liable under Dutch tort law, though its liability was limited to 10%.[2] The aim of this article is to explain the Dutch theory of partial liability and why the application of this theory benefited the plaintiffs from a tort law perspective. The main argument is that national courts are confronted with an extra system for addressing wrongs when applying Dutch tort law in a human rights context, which results in combining two different liability systems – human rights law and tort law.[3] These are not aligned in the sense that the one focusses on the assessment of violations of rights while for the other focusses on compensation. Therefore, from a human rights perspective, a partial liability of 10% might be surprising in case of violation of the fundamental right to life, while from a tort law perspective, the theory of partial liability actually creates the possibility of compensation notwithstanding uncertainty about the causal link between the wrong and the damage.

The next section of this paper provides an explanation of the relevant facts and the essence of the case's outcome with regard to partial liability. Section 3 gives an in-depth description of both Dutch tort law and the law of evidence. This is followed by the theories of partial liability which are explained in section 4. The fifth section explains that partial liability is not equally recognised in all European jurisdictions. Next, a connection with human rights law will be made on the subjects 'causation' (section 6) and 'the right to an effective remedy' (section 7). To finalise the description of the compensation to relatives of the Bosniac males killed during the Srebrenica genocide, section 8 explains the offer for out-of-court settlement by the Dutch government in the aftermath of the Supreme Court decision. The main conclusions follow in section 9.

2. THE CASE OF THE MOTHERS OF SREBRENICA AND PARTIAL LIABILITY

On 19 July 2019 the Dutch Supreme Court held that Dutchbat acted wrongfully in not offering the approximately 350 Bosniac males who were still inside the Dutchbat compound in Srebrenica on 13 July 1995 a choice of whether to remain in the compound. As a result, the State violated articles 2 and 3 of the European Convention on Human Rights ('ECHR').[4] These males were part of a bigger group of approximately 7,000 Bosniac males who were killed in the Srebrenica genocide. The wrong committed by Dutchbat was negligently omitting to give an explanation about the real risk of inhumane treatment during the evacuation by the Bosnian Serb forces and therefore, consequently, not offering the approximately 350 Bosniac males a choice to stay at the compound. Dutchbat's other alleged wrongs were denied by the court. It is important to explain that, from a tort law perspective, Dutchbat was not the primary tortfeasor: the Bosniac males were killed by Bosnian Serb forces. Dutchbat had acted unlawfully as a secondary tortfeasor[5] in a very specific manner: by not providing the men with a choice to remain behind in the compound in a situation of uncertainty. As a result, the causality question that arose, and needed to be answered in establishing liability, was highly complex: would the result have been any different if Dutchbat had warned the Bosniac males in the compound about their prospects if they went with the evacuation busses, and offered them the choice to remain in the compound? The burden of proof fell upon the plaintiffs, the Mothers of Srebrenica. They needed to prove with a reasonable degree of certainty that the result would have been different had they been given the choice.[6] In other words, the benchmark for liability is not absolute certainty, but a reasonable degree of certainty.

The District Court held that it was 'determined with a sufficient degree of certainty' that the Bosniac males in the compound would have survived had Dutchbat not cooperated in their deportation.[7] The Court of Appeal held that it was too uncertain that the men would have survived had they stayed.[8] Generally, this finalises the legal debate because of a lack of sufficient proof, and results in a denial of the claim. However, the Court of Appeal pulled a proverbial rabbit out of the hat. The court held that it could not establish that the 'chance of survival was so small as to be negligible'.[9] The question of whether causation existed was tweaked into a question of so-called partial liability in the sense of the loss of a chance, and thereby, by exception, secured the plaintiffs' claim. According to the Court of Appeal the lost chance of survival was 30%, therefore liability was established at a proportional 30%.[10] The Supreme Court limited the chance of survival, and therefore the resulting liability, to 10%.[11]

3. GENERAL RULES OF DUTCH (TORT) LAW AND THE BURDEN OF PROOF

3.1. INTRODUCTION

Understanding the outcome in the case of *Mothers of Srebrenica* from a tort law perspective, requires an explanation of Dutch tort law and the burden of proof. The aim of this section is to explain that the outcome of the case *Mothers of Srebrenica* essentially concerned

an exception to the main rule that a plaintiff in general needs to prove a causal connection between the wrong and the damage to a sufficient degree of certainty. First, the claims of the plaintiffs in *Mothers of Srebrenica* will be explained (3.2). Second, the general rules of Dutch tort law and how human rights law affects decision-making in this area of law, will be explained in section 3.3. Third, section 3.4 explains the general rules of the burden of proof and how partial liability relates to the proof of a causal connection between the wrong and the damage.

3.2 THE PLAINTIFFS' CLAIMS

The plaintiffs requested a declaratory judgment. For this contribution the two relevant requests were that the Court of Appeal:

> 'II. rules that the State (...) acted wrongfully to the women referred to in 1 through 10 as well as the surviving relatives whose interests the Association promotes; (...)
> IV. orders the State (...) to pay damages to the women referred to in 1 through 10 for the loss and suffering sustained, to be assessed and settled in accordance with the law, making an advance payment for such damages in the amount of € 25,000 per person;'[12]

Claim II concerns the confirmation of a wrong, therefore the acknowledgement that the State was responsible for the death of the mothers' next of kin.[13] The fourth claim differs from the second. Essentially, because the words 'orders' and 'pay damages' were used by the plaintiffs, the court had to render a decision on the tort law liability of the state. The reasons for relying on tort law are two-fold. First, in extracontractual situations, tort law offers the main possibility for financial redress. Secondly, if human rights are violated then plaintiffs are forced to rely on tort law (extracontractual liability law) for compensation.[14]

3.3 GENERAL RULES OF DUTCH TORT LAW AND THE INFLUENCE OF HUMAN RIGHT LAW

Two types of torts exist under Dutch law: fault and strict liability. The mothers' claim concerned a fault liability claim under Art. 6:162 Dutch Civil Code. Establishing fault liability requires (claim IV), apart from a wrong (claim II, here: a violation of Art. 2 and 3 ECHR in relation to the duty of care), also the attribution of the wrong, damage, causation and a protected interest. For this particular case meeting the causation criterion is essential, because, if a wrong exists, then the wrong will be attributed to the State, and both damage and a protected interest exist.[15] It must be noted that under Dutch tort law two causation questions can arise. First, it must be established that the wrong is a *condicio sine qua non* ('*CSQN*'), as a prerequisite for the damage. This *CSQN* criterion is a requirement in establishing the liability of the alleged tortfeasor. Secondly, in assessing the damages, the question of the scope of causation rises: is it fair and reasonable to attribute the damage to the potentially liable party? This question of remoteness is labelled as a question of legal causation under Dutch tort law.

The first question is central in the case of *Mothers of Srebrenica*: was the wrong a *CSQN* for the damage? This judgement differs from the follow-up proceedings for the determination of damages ('to be assessed and settled in accordance with the law') as requested by the plaintiffs. Those proceedings are concerned with the assessment of damages. The principal action brought before the Supreme Court also concerned the establishment of liability to pay damages; hence, the court is allowed to decide about the existence of a causal connection, in the sense of the wrong being a *CSQN* for the damage, while the debate about legal causation can continue in follow-up proceedings.[16]

How does human rights law affect Dutch tort law? The ECHR has direct effect in the Dutch legal order and can be used to set aside conflicting domestic law as per Arts. 93 and 94 of the Dutch Constitution. Consequently, if a violation under the ECHR exists, then a tort law 'wrong' exists because the law has been violated. Instead of framing a human rights violation as an infringement of the law, sometimes courts use ECHR rights to draw the conclusion that unwritten rules are infringed.[17] The result is comparable: a wrong exists which consists of either a violation of the law or a violation of an unwritten rule. To establish liability the other requirements, described above, also need to be fulfilled.

3.4 THE BURDEN OF PROOF

In principle the burden of proof under Dutch tort law falls upon the plaintiffs. (Art. 150 Dutch Civil Procedure Code). It is required that the plaintiffs prove to a reasonable degree of certainty that (1) the Dutchbat/State acted wrongfully and (2) the wrong is a *condicio sine qua non* for the damage.

Regarding the second question, highly complex sub-questions arose in the *Mothers of Srebrenica* case. First, how probable was it that the individual Bosniac males would have chosen to stay in the compound if they were given adequate warnings and the choice to stay behind? Second, how likely was it that the males would have been discovered by the Bosnian Serb forces, and consequently what would have been a safe period before their discovery? Third, what would have been the probable response of the Bosnian Serbs when discovering the men in the compound? Fourth, if the Bosnian Serb forces left the males in the compound in peace, how likely would their chances of survival have been? The plaintiffs needed to prove to a reasonable

degree of certainty that a *CSQN* existed. While the District Court was of the opinion that it had been 'determined with a sufficient degree of certainty' that the Bosniac males in the compound would have survived if Dutchbat had not cooperated in their deportation,[18] the Court of Appeal held that it was too uncertain that the men would have survived had they remained.[19] Hence, there was a lack of proof that a *CSQN* existed and therefore the claim was denied. However, as described in section 2, the Court of Appeal tweaked the question of whether the wrong was a *CSQN* for the damage into a question of so-called partial liability for the loss of a chance, and so, by exception, secured the plaintiff's claim. Partial liability is a legal instrument under Dutch tort law to redeem causal uncertainty and to prevent an unjustified denial of a claim. It is important to notice that partial liability offers an exception to the main requirement of *CSQN* and is therefore less about regular decision-making regarding causation under tort law.

4. PARTIAL LIABILITY: A SUBSTANTIVE LAW APPROACH TO CAUSAL UNCERTAINTIES

4.1 INTRODUCTION

The next step is to navigate through the different instruments under Dutch law to redeem causal uncertainty, of which partial liability is one example. In specific situations the Dutch law of evidence or substantive tort law offers opportunities to redeem this uncertainty. The main aim of this section is to explain that partial liability for the loss of a chance of survival was indeed the appropriate theory under Dutch law to redeem the uncertainty in the *Mothers of Srebrenica* case. Section 4.2 clarifies the Dutch patchwork of opportunities to redeem causal uncertainty. Partial liability in the sense of proportional liability will be explained in section 4.3. Section 4.4 deals with the rule of loss of a chance, which was applied in *Mothers of Srebrenica*.

4.2 DUTCH LAW OFFERS A PATCHWORK OF OPPORTUNITIES TO REDEEM CAUSAL UNCERTAINTY

Dutch law offers quite a patchwork of opportunities to redeem causal uncertainty. The factual contexts all have the idea that a *CSQN* cannot be proven to a sufficient degree in common. It is important to point out that these opportunities are not the main rule; generally when a *CSQN* cannot be proven a claim will be denied. However, exceptions to the main rule exist in order to prevent an unreasonable outcome of denial of a claim in the interests of justice. The specific factual context guides which opportunity exists. Dutch law distinguishes for example: alternative causation, hypothetical causation, cooperating causation, and the implausibility of causality.[20] Consequently, Dutch evidence law offers opportunities such as shifting the burden of proof and presuming the presence of a *CSQN* therefore placing the onus of having to adduce counter-evidence on the shoulders of the defendant. Substantive tort law opportunities also exist: joint and several liability, liability to the extent of the probability of causation – proportional liability, and the loss of a chance.[21] Some opportunities aim at creating the possibility of full liability, for instance shifting the burden of proof, presuming the presence of a *CSQN* and joint and several liability. Others aim at creating a possibility for partial liability such as proportional liability and the loss of a chance. These varieties of partial liability mean that some liability can be established because of the existence of real probabilities instead of mere uncertainties.[22] These former theories will be explained in-depth, but only after noticing that partial liability offers a solution in the phase of establishing liability, and in principle does not concern the assessment of damages. Hence, this type of liability needs to be distinguished from, for instance, contributory negligence or the question of legal causation.[23]

4.3 PARTIAL LIABILITY (1): THEORY OF PROPORTIONAL LIABILITY

The theory of proportional liability can be applied if multiple potential causes exist but it is impossible to prove which factor caused the damage. This theory can only be applied under very specific factual circumstances: one or more causes must fall within the sphere of risk of the potentially liable party or parties, and one or more potential causes must fall within the plaintiff's sphere of risk.[24] Thus, at least one potential cause needs to be non-tortious.

The Dutch landmark decision is *Nefalit/Karamus*.[25] A former employee who had worked with asbestos claimed damages because he suffered from lung cancer. One difficulty existed: it could not be established that the wrongful act of the employer was a *CSQN* for the damage as a result of cancer (Art. 7:658 *DCC*). The cause of the lung cancer could have been the inhaling of asbestos dust, but also the fact that the plaintiff was a heavy smoker, or simply because of genetic factors. Therefore, different acts could have been the cause of the damage, of which several were non-tortious. The Supreme Court decided in general that if there was a very small possibility that the damage to the plaintiff's health had been caused by the wrongful act of the defendant, his claim should be denied. However, when that possibility is very high, the claim should be allowed. As regards the 'grey area' of neither a very small nor a very high possibility, the Supreme Court decided that, considering the rationale of the norm which was breached – to prevent damage to the health of employees and the nature of the wrongful act – it would be contrary to reasonableness and fairness to either leave the risk on the side of the employee, or

on the side of the employer. The Supreme Court held (translation, *RR*):

> 'Also in view of the starting points that underlie Articles 6:99 and 6:101 [DCC], it has to be accepted that, when an employee suffers damage that, considering the possibilities in percentage terms, could have been suffered both because of the wrongful act of his employer and his duty to protect the health of his employees, and because of circumstances that could be attributed to the employee himself, without the possibility of ascertaining in how far the damage is a consequence of one of these circumstances, the judge could allow the claim by the employee; however, damages should then be decreased in proportion to (and with a reasoned estimation) the extent to which the circumstances that increased the damage should be attributed to the plaintiff.'[26]

In other words, under certain circumstances a judge can decide to hold the defendant proportionally responsible, i.e. for the part which he is indeed responsible and not with regard to the circumstances that fall within the plaintiff's sphere of risk.

The second decision of the Supreme Court regarding the theory of proportional liability was the case of *Fortis/Bourgonje*.[27] In essence, the scope of the theory of proportional liability was questioned. The Supreme Court decided that this theory could not be generally accepted throughout liability law in its entirety. The theory of proportional liability is an exception to the rule that there must be a *CSQN* between someone's wrongful act and the damage suffered by the plaintiff. The judge should exercise restraint when applying the rule of proportional liability, and if he does apply this rule he should justify his decision according to the rationale of the norm which is breached, the nature of the wrongful act, and the nature of the damage suffered.[28] However, the theory of proportional liability should not be limited, according to the Supreme Court, to cases similar to *Nefalit/Karamus*. In general, the Supreme Court decided that (translation, *RR*):

> '[A judge can choose to hold the defendant partly liable] especially when the liability [the wrong] of the tortfeasor is definite, the possibility of a *CSQN* between the wrong and the damage is not very small, and the rationale of the norm breached, and the nature of the wrongful act, justifies the application of proportional liability.'[29]

In the case of *Fortis/Bourgonje* the Supreme Court declined to apply proportional liability because it concerned the duty of an asset manager to warn his client and the rationale of this duty is to prevent pure economic loss. Under Dutch tort law liability for pure economic loss is possible, but it tends to offer less protection in comparison to for instance personal injury (Art. 6:98 DCC). Also, the Supreme Court held that the possibility that the client would have listened to this warning and thereby would have sold his shares would not have been very great.[30]

The theory of proportional liability was recently applied by the District Court of The Hague in a human rights case.[31] The facts of the case were as follows. The plaintiff's son died after being shot while sitting in a car at an Iraqi checkpoint. The Iraq Stabilization Force was responsible for keeping order. The Dutch State made troop contributions to this Force. Dutch military personnel were present at the checkpoint and one of them, Lieutenant A, shot at the car potentially resulting in the son's death. However, one or more members of the Iraqi Civil Defence Corps (ICDC) also shot at the car. It was held by the court that all acts of the ICDC can be attributed to The Netherlands.[32] Lieutenant A did not act wrongfully; therefore, his use of a weapon fell within the plaintiff's sphere of risk.[33] The District Court ruled that the use of weapons by one or more of the ICDC military was unlawful, and that this wrong fell within the sphere of risk of the Dutch State. It was however impossible to prove who had caused the death of the son: the lawful use of a weapon by Lieutenant A or the unlawful use of weapons by one or more of the ICDC military personnel. The court established the proportional liability of the Dutch State to be 30%.[34]

Proportional liability must be distinguished from alternative causation, another instrument to redeem causal uncertainty under Dutch law (section 4.2), for which the Dutch legislature introduced a combination of shifting the burden of proof and joint and several liability (full liability, Art. 6:99 *DCC*). Alternative causation concerns the situation in which it is certain that the damage was caused by an unlawful act or omission, but which unlawful act precisely caused all of the damage remains uncertain. An example is the following: two persons throw a stone at a third person, both persons therefore acted wrongfully, but because the third person was only struck by one stone, he cannot prove who actually threw the stone that caused the damage. Both persons who threw a stone are in principle liable in full. The stone-throwing person can only prevent liability if they can prove that the damage had not been caused by the specific stone they threw.[35] This example differs from the Iraqi shooting, because in the former hypothetical situation *all* potential causes can be linked to a wrong; a non-tortious potential cause is lacking. Precisely this detail justifies the difference between full and partial liability under Dutch tort law. It also shows that, indeed, the type of uncertainty guides the solution offered by Dutch tort law and the law of evidence.

4.4 PARTIAL LIABILITY (2): THEORY OF THE LOSS OF A CHANCE

The second theory for establishing partial liability is the loss of a chance. This theory was applied in the case of the *Mothers of Srebrenica* by the Court of Appeal after deciding that the *CSQN* had not been sufficiently proven. The central probability, or uncertainty, when applying the theory of the loss of a chance differs from the central probability when applying the theory of proportional liability. The uncertainty is not which circumstance or act caused the actual damage. Rather, the central uncertainty is whether the result would have been better in the hypothetical situation had the party responsible refrained from committing the wrong.[36] In determining whether damage exists a comparison must be made between the hypothetical situation that would have arisen without the wrong and the situation that came into being after the wrong. Bloembergen therefore distinguished three elements of damage: causal, hypothetical and comparative elements.[37] Since uncertainty occurs in determining the damage, the lost chance of a better result, or 'success', is considered to be the damage.[38] Hence, if the plaintiff claims compensation for the loss of a chance, he claims a fundamentally different type of damage as compared to a claim based on the actual consequences of the wrong.[39] Sieburgh argued that this does not exclude the possibility that proportional liability and the loss of a chance can be applied in the same cases.[40] Additionally, comparable to the theory of proportional liability, the theory of the loss of a chance offers an opportunity to award damages in a situation in which the underlying/original *CSQN* cannot be sufficiently proven, although liability will be partial.[41]

The case of *Baijings/H.* was the first landmark decision by the Supreme Court on the loss of a chance.[42] The case concerned a lawyer who wrongfully failed to lodge an appeal. When a lawyer makes a mistake, for example, by failing to lodge an appeal within the given time frame, the damage can be assessed according to a chance that the outcome in the case would have been successful had the mistake not been made. The Supreme Court allowed the claim. Ever since this Supreme Court case, more and more lower courts have used the lost chance approach.[43] The Supreme Court ruled that the theory of the loss of a chance is not restricted to mistakes by lawyers, and has applied this theory, for example, in the case of the liability of an investment consultant,[44] neglecting to amend a zoning plan,[45] and wrongful delay in medical treatment.[46] The case of *Mothers of Srebrenica* concludes this list: in cases of human rights violations, the theory of loss of a chance can be applied.[47]

The Supreme Court explicitly held that a court is not obliged to exercise restraint comparable to cases in which the rule of proportional liability might be applicable. In other words, when applying the rule of the loss of a chance, a court does not have to first consider how applying this rule is justified according to the rationale of the norm which is breached, the nature of the wrongful act, and the nature of the damage suffered.[48] The rationale of this difference is, according to the Supreme Court, that the *CSQN* between the lost chance and the wrong can be determined in conformity with the general rules of the law of evidence.[49] However applying the theory of the loss of a chance is not without any restrictions. The test is the following. The judge should consider, by estimating the good and poor chances, whether the chance of a better result ('success') was a real possibility, thus not too small, and therefore not negligible.[50] This explains the phrase used by the Court of Appeal in the *Mothers of Srebrenica* case:

> 'The Court of Appeal cannot establish either, however, that the men's chance of survival was so small as to be negligable [*sic. RR*: negligible].'[51]

And the Supreme Court:

> 'All in all, it must be ruled that the chance that the [Bosniac males, *RR*], had they been offered the choice of remaining in the compound, could have escaped the Bosnian Serbs, was indeed small, but not negligible.'[52]

Notwithstanding causal uncertainty, liability was determined to be 10%, which was considered to be the lost chance of obtaining a better result because of the wrong committed by Dutchbat. Therefore, a remedy was offered by the Supreme Court, although the *CSQN* between the actual consequences and the wrong was too uncertain.

Reviewing the specific facts of the case, applying the theory of loss of a chance of a better result was indeed the adequate theory in establishing liability in *Mothers of Srebrenica*. The main argument being that it was clear which chain consisting of all wrongful acts resulted in the genocide, but it is uncertain whether the outcome of the chain of acts would have been any different had Dutchbat not acted wrongfully.

The current application of the theory of proportional liability and the loss of a chance respectively has been criticised in legal literature. The criticism does not often concern the possibility of partial liability under Dutch law when uncertainty about a *CSQN* exists,[53] but rather the distinction between the scope of application.[54] A judge should exercise restraint in applying proportional liability, but not in applying the loss of a chance. The main criticism being that both theories in essence aim to solve the same problem, namely the impossibility of proving a *CSQN*.[55] Also, the concept of damage and *CSQN* are related, since damage is a causal concept. As Bloembergen has convincingly argued: damage, an adverse change, cannot be determined without silently or expressly accepting

that it is caused by an act or omission. Hence, two forms of argumentation can be used. Either one argues that damage exists and asks the question of what caused the damage. Or one asks the question of whether damage exists, because it is uncertain whether, without the wrong, the very same outcome would have occurred.[56] A rhetorical question, which I also tend to raise, can here be raised as to how a distinction between the scope of application of the theory of proportional liability and that of the loss of a chance can be justified from the perspective of these argumentations.[57]

5. PARTIAL LIABILITY IS ACCEPTED IN SOME OF THE OTHER EUROPEAN JURISDICTIONS

Partial liability offers an exception to the main rule that the wrong needs to be a *CSQN* for the damage. The existence of the theory is rather exceptional from a European comparative perspective. This topic will be dealt with in this section, mainly to make transparent that partial liability not only offers an exception to the main rules of Dutch tort law, but that it also entails a rather exceptional mechanism from a European comparative perspective.

In 2017 Infantino and Zervogianni published extensive comparative research into causation in Europe.[58] Rapporteurs from sixteen jurisdictions participated in the project. They studied different factual contexts and connected causal uncertainties, as well as solutions to redeem uncertainties under national laws were compared, amongst others proportional liability (hypotheticals 6 and 7) and the loss of a chance (hypothetical 17). Their study makes clear that partial liability is also accepted in some other jurisdictions, although this is not generally so.

To start with, proportional liability in cases of multiple causality when one possible cause is non-tortious is an exceptional mode of liability. A limited number of jurisdictions apply proportional liability. In addition to the Netherlands, Austria also applies this theory.[59] Some other jurisdictions allow for proportional liability, but limit its scope of application to very specific wrongs or situations.[60] The other jurisdictions adopt an all-or-nothing approach. In these jurisdictions a defendant is either fully liable or not at all liable for the plaintiff's loss, although the harshness of the decision can be tempered with other legal mechanisms such as a relaxation of the standard of proof or decreasing the compensation.[61] Several jurisdictions do not deviate from the all-or-nothing approach and compensation will be denied. From this perspective, the Dutch theory of proportional liability is quite exceptional and offers a solution based on the principle of reasonableness and fairness in order to reach a fair result instead of denying the claim.

Secondly, other countries accept the approach of the loss of a chance, as applied in the case of the *Mothers of Srebrenica*. For example, Denmark, France, Italy, Portugal and Spain all accept this approach, while this approach has not been adopted in other jurisdictions. As Infantino and Zervogianni have made clear: 'European legal systems are far from uniform on this issue',[62] not only as regards whether this approach is allowed, but also:

> 'the specific approach followed may (...) depend upon the particular setting. The type of injury involved, the gravity of the ensuing losses, the degree of (un)certainty of the (actual and alternative) sequence of events, and the ability of the persons involved in the accident to foresee and prevent its occurrence are all factors that might influence how courts would address lost chance cases.'[63]

The Dutch Supreme Court allows a broad application of this theory, although it limits the scope to chances that reflect a real, rather than negligible, possibility. Thus, the chance must not be too small. Further, Dutch tort law allows damages to be awarded regardless of the type of loss and its gravity, and also when comparatively small chances are lost. However, these damages are only partial, notwithstanding causal uncertainty. From this perspective, Dutch law benefitted the plaintiffs in the case of *Mothers of Srebrenica*.

6. HUMAN RIGHTS AND PARTIAL LIABILITY

6.1. INTRODUCTION

From a human rights law perspective, the outcome of partial liability might be uncommon. Causation and causal uncertainty are however topics that have been decided upon by the European Court of Human Rights, and a requirement under the ECHR. Both topics will be touched upon. First, the European Court of Human Rights case law under Art. 6 about the denial of a claim under national tort law because of causal uncertainty will be described (6.2). Second, an overview of the interpretation of the concept of causation under Art. 41 ECHR, just satisfaction, will be given (6.3).

6.2 CAUSAL UNCERTAINTY UNDER NATIONAL LAW AND ART. 6 ECHR

As far as I can determine, partial liability in cases of causal uncertainty has not yet been the subject of legal debate at the European Court of Human Rights.[64] That should come as no surprise: few European jurisdictions have created the possibility of partial liability to redeem causal uncertainty, let alone have rendered a judgment in a human rights case applying this theory. However, the European Court of Human Rights has dealt with causal uncertainty as such under Art. 6 ECHR.

The European Court of Human Rights has dealt with domestic cases concerning causal uncertainty and the weighing of evidence. The case of *Dimitar Yordanov v. Bulgaria* provides an example. In this case a Bulgarian state enterprise operated an open coal mine. To extract the coal from the mine it made use of explosions. The plaintiff lived in his house nearby, although it was legally forbidden to live and be present in that particular zone. However, the expropriation order against the plaintiff was annulled due to a mistake for which the state was responsible. The plaintiff continued living in his house. Eventually, his house collapsed and he claimed damages under tort law. His claim was denied by the national civil court because the plaintiff failed in offering sufficient proof of the causal connection between the detonations at the mine and the damage to his house. The plaintiff filed a claim at the European Court of Human Rights arguing that his right to a fair trial was violated. The plaintiff's claim was dismissed under Art. 6 ECHR:

> 'The Court has said on numerous occasions that it is not called upon to deal with errors of fact or law allegedly committed by the national courts, as it is not a court of fourth instance, and that it is not called upon to reassess the national court's findings, provided that they are based on reasonable assessment of the evidence (...). Thus issues such as the weight attached by the national courts to given items of evidence or to findings or assessment submitted to them for consideration are not normally for the Court to review (...).'[65]

One exception exists:

> 'The Court may entertain a fresh assessment of evidence where the decision reached by national courts can be regarded as arbitrary or manifestly unreasonable.'[66]

In principle, it is not common to review the weight attached to evidence by national courts or their assessment of the evidence.[67] Since partial liability, comparable to the relaxation of the standard of proof by national judges, aims at bypassing the general weighing of evidence as regards the *CSQN* between the wrong and the damage, it would be quite surprising if the European Court of Human Rights were to decide to change its starting point under Article 6 because it concerns a question of liability instead of evidence. The question is whether the outcome of the 10% partial liability is regarded as arbitrary or manifestly unreasonable. This 10% has been well explained by the Supreme Court,[68] and from a tort law perspective this outcome is considered an exception to the main rule justified by legal justice and reasonableness. Under the general rules of evidence the claim would have been denied, nevertheless some compensation has been offered.

6.3 CAUSATION AS A REQUIREMENT UNDER THE ECHR

If the European Court of Human Rights has held that a violation of a right exists, the court has the possibility, if claimed by the plaintiff, to offer just satisfaction.[69] Kellner and Durant have analysed the causation criterion under Art. 41 ECHR. Just satisfaction can take different forms from the mere finding of a violation to damages based on equity.[70] If damages are appropriate, the Court seems to apply a *CSQN* approach in deciding what damages should be awarded, but as explained by Kellner and Durant:

> 'one cannot but notice that detailed explanations of the decision on causation are rare.'[71]

It is particularly not clear how damages are assessed in deciding on compensation for pecuniary damage. Compensation for non-pecuniary damages seems to be less problematic, because these damages are often justified by deciding that the violation resulted in stress, anxiety, and other similar harms. As Kellner and Durant put it: 'This is due to the fact that the Court assumes that some violations a priori cause non-pecuniary damage.'[72] These authors also explain that, in limiting liability by applying the causation criterion – that one should interpret as legal causation under domestic law – the court employs several concepts, such as a 'clear causal link', a 'direct causal link' and a 'sufficient causal link'. These concepts do 'not seem to carry any autonomous meaning', as illustrated by their analysis of certain decisions.[73] From a domestic perspective the lack of clear causation concepts is rather surprising, but this is quite understandable from the perspective of Art. 41 ECHR. As the court explained in *Georgia v. Russia:*

> 'Nor is it the Court's role to function akin a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred.'[74]

It is understandable that the court denies the idea that it functions as a tort law mechanism, also because it is not possible to define one tort law system in Europe.[75] Every European country applies its own tort law. What in my opinion is less understandable is the focus on flexibility and decision-making in individual cases, because, as shown, it results in legal uncertainty. It should be possible to create a system that offers both flexibility and (more) legal certainty, for instance by applying the Principles of European Tort law. These principles are a result of an

in-depth comparative study, which resulted in a flexible system for liability based on what European national systems have in common.[76]

What this section clarifies is that the ECHR focusses on protecting against risks to human life and, as a consequence, the European Court of Human Rights has an important task in assessing violations of those human rights, irrespective of whether damages should be awarded. Tort law, on the other hand, is a compensatory system which aims at shifting losses onto wrongfully acting parties that caused the resulting damage and it therefore discusses the outcome of and the causal relation to the wrong. As Turton puts it, under human rights law it is essential 'to secure the respect for life', while under tort law 'the causation requirement (...) reflects the interpersonal responsibility at stake there'.[77] Because of fundamental differences between the starting points of Dutch tort law and human rights law, Emaus has argued that a new legal concept should be introduced in Dutch civil law: 'the concept of a breach of a fundamental right'.[78] This modern civil law obligation would contribute to protecting an individual against risks to human life on a national level, without using the benchmarks for individual compensation under Dutch tort law.

7. AN EFFECTIVE REMEDY AND JUST SATISFACTION UNDER HUMAN RIGHTS LAW

The starting point that the protection against risks to human life is the central focus of human rights law, and at the same time clarifies the struggle of national courts to interlace Dutch tort law with human rights law, can be clarified by explaining the application of Art. 13 ECHR, the right to an effective remedy. This right is also especially relevant for *Mothers of Srebrenica*, because in the context of wrongs committed up to 1 January 2019 it was in principle impossible for national courts to award damages for non-pecuniary loss of family members in wrongful death cases under Dutch tort law. National courts do have this possibility for wrongs committed after 1 January 2019, because since then, so-called affectionate loss is considered to be a legally relevant head of damage. Because the violation in *Mothers of Srebrenica* was committed before this date, the national courts in principle could not award this compensation under Dutch tort law. This would however be considered a violation of Art. 13 in conjunction with Art. 2 of the European Convention of Human Rights. It is established through case law under Art. 13 in conjunction with Art. 2 of the Convention that national law should offer the prospect of compensation for the non-pecuniary losses of relatives, because the lack of this compensation would have a negative bearing on any application for legal aid and resorting to the courts to assess the merits of the case.[79] The lack of this particular effective remedy for relatives in cases in which an arguable claim exists, results in a violation and just satisfaction for non-pecuniary damage would have been offered under Art. 41 ECHR.[80] Dutch courts struggled with this inconsistency. This paragraph finalises my main argument that national court are confronted with an extra system for addressing wrongs when applying Dutch tort law, which results in combining liability systems that are not aligned in the sense that the one focusses on the assessment of violations of rights while for the other compensation is central, by describing the contradicting case law under Dutch tort law.

In a case before the Court of Appeal of The Hague, the court held that Art. 2 had been violated due to non-compliance with safety rules by prison staff which resulted in the fatal stabbing of the imprisoned deceased by a fellow detainee.[81] It also held that the right to an effective remedy for the relatives had been violated because Dutch law lacked a remedy for compensating the non-pecuniary damage of relatives. However, the court denied compensation for the non-pecuniary damage of relatives, arguing that the finding of a violation as such was sufficient to address this violation. The court referred to *Georgia v Russia*[82] to justify its decision, which, in my opinion, is remarkable because that European Court of Human Rights decision concerned the interpretation of Art. 41. First, Art. 41 of the Convention gives the European Court the authority to offer, of its own accord, just satisfaction to the plaintiffs; it is neither considered to be a right under the Convention that should be assessed by the national courts, nor does it set precedents for national courts.[83] Second, as far as I can determine, the European Court itself would certainly have awarded compensation for non-pecuniary loss under Art. 41 on the basis of equity.[84] This ruling shows, in my opinion, how complex it is for national courts to allow exceptions to the law of damages because a human right has been violated, since they are obliged to apply national law to a wider extent and exceptions can set precedents for 'more regular' tort law situations, such as, car accidents or medical mistakes.

However, the District Court of The Hague has decided fundamentally differently in a recent decision.[85] This case concerned a shooting by military personnel in Iraq that caused the death of the plaintiff's son, as described in section 4.3 above. The plaintiff claimed compensation for his non-pecuniary damage because of a violation of Art. 2 in conjunction with Art. 13 ECHR. The District Court held that the right to an effective remedy had indeed been violated. However, it ruled differently regarding the consequences of this violation compared to the Court of Appeal in the case above. It held that the Dutch Constitution prescribes under Arts. 93 and 94 that provisions of international law, which due to their content or nature bind everyone, are directly applicable and set aside conflicting provisions of national law. Hence, the Dutch law of damages cannot be applied

to this case; the violation of art. 13 ECHR, the lack of an effective remedy for relatives, was considered to be a wrong under tort law.[86] That created a loophole in the law, and consequently the District Court decided to rule in accordance with the spirit of Art. 41 ECHR and awarded damages for the non-pecuniary damage suffered by the relative.[87] The court justified its decision by stating that this would have been the result at the level of the European Court of Human Rights and hence this decision would spare the relative the long road towards Strasbourg.[88]

In my opinion, this latest ruling should be the way forward in the Netherlands because it prevents precedents from being set for the general law of damages.[89] In essence, it is in line with Emaus' recommendation to make a distinction between damages for human rights violations and for tort law wrongs. She has however argued that the next formal step to be taken should be removing the legal loophole and creating a new source of obligations under Dutch civil law in order to do justice to the legal framework of human rights law.[90] Introducing this new breach would move the law of obligations towards the idea that violation of fundamental rights should be remedied; an approach familiar from human rights law, but not generally accepted in national tort law systems.

8. OFFER FOR OUT-OF-COURT SETTLEMENT BY THE DUTCH GOVERNMENT

To finalise the insights – up to now – about compensation of the victims of the genocide in Srebrenica, a brief description of the compensation scheme that the Dutch government created in the aftermath of the Dutch Supreme Court decision in *Mothers of Srebrenica* will be given.[91]

This scheme concerns an offer of an out-of-court settlement which aims to prevent the arduous road of a follow-up procedure for the individual determination of damages.[92] One has to realise, first, that calculating wrongful death damages, being the loss of dependency and funeral expenses under Art. 6:108 Dutch Civil Code, is a complex matter, although the personal injury branch generally applies a standardised method for such a calculation.[93] Second, the lump sum offer is limited to 10% compensation, according to the government, because liability is partially established.[94]

The scheme offers a lump sum payment in compensation to:

- Partners married to the deceased, including life partners who lived together for at least three years at the moment of decease and life partners who have a child together with the deceased (widows);
- Minor children of the deceased;
- Children of age of the deceased who were part of the household of the deceased;
- Parents of the deceased;
- Brothers and sisters of the deceased who were minors and part of the household of the deceased.[95]

Widows are offered a lump sum payment of 15.000 Euros (10% of 150.000 Euros) and other plaintiffs a payment of 10.000 Euros (10% of 100.000 Euros).[96] The explanatory notes clarify that these lump sum payments aim at compensating both the pecuniary and non-pecuniary damage of the plaintiffs.[97] They acknowledge that the Dutch law of damages does not allow for the compensation of the non-pecuniary damage of these relatives, but state that in light of recent case law it will offer compensation for non-pecuniary damage.[98] This sentence is quite abstruse, but I assume that it refers to the decision of the District Court of The Hague in 2020, in which it was decided to set aside the Dutch law of damages because it interferes with human rights law.[99]

If a plaintiff accepts the out-of-court settlement, it is regarded as settlement in full, and so the case is finalised.[100] The offer seems to be non-negotiable, but follow-up procedures are still possible, therefore the plaintiffs have a choice between either a settlement or follow-up court proceedings. However, the case has already been lodged before the European Court of Human Rights, which creates an additional dilemma: if a violation is found by the European Court of Human Rights, will the outcome be better, from a monetary perspective, under Art. 41 ECHR, for this particular group of relatives of approximately 350 Bosniac males that were not given the choice to stay at the compound?

9. CONCLUSION

The aim of this article has been to explain the Dutch theory of partial liability and why the application of this theory has benefited the plaintiffs from a tort law perspective. Partial liability is a theory under Dutch law to redeem causal uncertainties and therefore functions as an exception to the main rule of sufficient degree of proof of a *CSQN* between the wrong and the damage, justified by legal justice and reasonableness. Loss of a chance is one variation of partial liability. The question about the certainty of causation is reframed as the question of whether the plaintiff has lost a real chance of obtaining a better result. If so, liability is established in accordance with the lost chance. The theory of lost chance essentially makes it possible to establish liability to a proportion, notwithstanding the causal uncertainty between the wrong and the original damage, which would have resulted in a denial of the claim under tort law. Therefore, it is important to note that this

paper mainly concerned exceptions to the main rule of *CSQN* and was less about regular decisions regarding causation.

This is one example of the way in which Dutch tort law or the law of evidence can prevent an unjustified denial of a claim due to a lack of proof of a *CSQN*. However, the factual context guides which opportunity, or exception to the main rule, exists to redeem the uncertainty. In light of the facts of the case of the *Mothers of Srebrenica*, the theory of the loss of a chance was the appropriate way to redeem causal uncertainty under Dutch law.[101] This theory is not generally accepted in Europe; under other national laws the claim would or might be denied.

When comparing causation under tort law to the ECHR, which some scholars have done, one lesson can be learned. When awarding just satisfaction, by means of damages, it is unclear which causal concept is employed by the European Court of Human Rights. Of course, the Court does not aim to be a mechanism for applying tort law, but by not developing a sound theory uncertainty continues to exist.

At the same time, national judges are confronted with a new system for addressing wrongs when applying Dutch tort law. Conflicts arise when, for example, considering whether an effective remedy exists for the relatives of deceased victims. The way in which judges deal with this matter differs and it illustrates their struggle because case law on human rights violations can set precedent for non-human rights cases.

Both legal layers are not aligned, which is problematic, both from the perspective of human rights law – the assessment of human right violations – and tort law – compensation for damage caused by wrongs. It is also problematic for plaintiffs, because they are confronted with this non-alignment which goes hand in hand with legal uncertainty. Consequently, the relatives of the approximately 350 Bosniac males who were not offered the choice to stay behind at the compound by Dutchbat are confronted with difficult questions from a monetary compensation perspective: should they accept that Dutchbat was only partially liable and accept the out-of-court settlement or should they commence follow-up proceedings? Or indeed should they lodge their claim before the European Court of Human Rights and apply for just satisfaction based on equity? In my opinion it is quite disappointing that the burden of these questions exists and falls upon the victims.

NOTES

1 *Hoge Raad* 19 July 2019, ECLI:NL:HR:2019:1223 (*Mothers of Srebrenica and others*).

2 *Hoge Raad* 19 July 2019, ECLI:NL:HR:2019:1223 (Supreme Court).

3 See section 6.

4 *Hoge Raad* 19 July 2019, ECLI:NL:HR:2019:1223 (*Mothers of Srebrenica and others*), no. 4.6.9 (see for reasoning: no. 4.6.1–4.6.9).

5 See for terminology: Kirsten Maes, *Secundaire aansprakelijkheid: Een rechtsvergelijkend onderzoek naar de reikwijdte van de zorgplicht van beheerders van private ruimten (dissertation Utrecht)* (Ucall, volume 17, Boom Juridische uitgevers 2020) 42–45.

6 Daan Asser, ***Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Procesrecht. 3. Bewijs (Asser Series,*** Wolters Kluwer 2017) no. 264.

7 District Court of The Hague 16 July 2014, ECLI:NL:RBDHA:2014:8748 (*Mothers of Srebrenica and others*), no. 4.330.

8 Court of Appeal of The Hague 27 June 2017, ECLI:NL:GHDHA:2017:3376 (*Mothers of Srebrenica and others*), no. 68.

9 Court of Appeal of The Hague 27 June 2017, ECLI:NL:GHDHA:2017:3376 (*Mothers of Srebrenica and others*), no. 68.

10 Court of Appeal of The Hague 27 June 2017, ECLI:NL:GHDHA:2017:3376 (*Mothers of Srebrenica and others*), no. 68.

11 *Hoge Raad* 19 July 2019, ECLI:NL:HR:2019:1223 (*Mothers of Srebrenica and others*), no. 4.7.9.

12 Court of Appeal of The Hague 27 June 2017, ECLI:NL:GHDHA:2017:3376 (*Mothers of Srebrenica and others*), no. 4.1.

13 This claim included a request to declare that the United Nations had acted wrongfully. In this contribution the responsibility of the United Nations will not be dealt with.

14 See e.g., Jessy Emaus, 'Damages for fundamental rights violations, Dutch perspectives', in: Ewa Bagińska (ed), *Damages for violations of human rights* (Springer 2016) 242–243.

15 The damages of the relatives are to be assessed under Article 6:108 DCC.

16 Legal opinion Advocate General P. Vlas to *Hoge Raad* 1 February 2019, ECLI:NL:PHR:2019:95, no. 4.95.

17 *Emaus* (n 14), 244–247. See for violation of unwritten rule, recently, e.g., District Court of The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5339 (*Milieudefensie/Shell*) that ordered Shell to reduce its CO2 emissions with net 45% in 2030, compared to 2019 levels.

18 District Court of The Hague 16 July 2014, ECLI:NL:RBDHA:2014:8748 (*Mothers of Srebrenica and others*), no. 4.330.

19 Court of Appeal of The Hague 27 June 2017, ECLI:NL:GHDHA:2017:3376 (*Mothers of Srebrenica and others*), no. 68.

20 Carla Sieburgh, ***Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel II. De verbintenis in het algemeen, tweede gedeelte*** (15th ed Asser Series, Kluwer 2017) no. 76–96. See also: Ivo Giesen, 'The reversal of the burden of proof in the Principles of European Tort Law, a comparison with Dutch tort law and civil procedure rules' (2010) *Utrecht Law Review* vol. 6 issue 1 22; Marta Infantino and Eleni Zervogianni, *Causation in European Tort law* (CCEPL Cambridge University Press 2017), reporting Dutch law by Rijnhout & Giesen.

21 A further solution is sometimes offered by broadening the concept of damage to mere violations of fundamental or personality rights, without resulting in physical or mental injury, Rianka Rijnhout, 'Van bijzonder letsel naar bijzondere normschendingen en *beyond*' (2020) *Verkeersrecht* 194.

22 *Sieburgh* (n 20), nr. 79.

23 *Hoge Raad* 21 February 2012, *Nederlandse Jurisprudentie* 2013, 237, comm. S.D. Lindenbergh (*Deloitte/Hassink*), no. 3.5.2–3.5.3; *Hoge Raad* 14 December 2012, *Nederlandse Jurisprudentie* 2013, 236, comm. S.D. Lindenbergh (*Nationale Nederlanden/S. and L.*), no. 4.3.

24 *Sieburgh* (n 20), no. 81. See *Hoge Raad* 31 March 2006, *Nederlandse Jurisprudentie* 2011, 250, comm. T.F.E. Tjong Tjin Tai (*Nefalit/Karamus*), no. 3.13; *Hoge Raad* 21 February 2012, *Nederlandse Jurisprudentie* 2013, 237, comm. S.D. Lindenbergh (*Deloitte/Hassink*), no. 3.5.2; *Hoge Raad* 14 December 2012, *Nederlandse Jurisprudentie* 2013, 236, comm. S.D. Lindenbergh (*Nationale Nederlanden/S. and L.*), no. 4.2; *Hoge Raad* 7 June

2013, *Nederlandse Jurisprudentie* 2013, 762 (*Lansink/Ritsma I*), no. 4.3.2.

[25] *Hoge Raad* 31 March 2006, *Nederlandse Jurisprudentie* 2011, 250, comm. T.F.E. Tjong Tjin Tai, no. 3.13. This section has already been published in *Infantino and Zervoianni* (n 20), 314–316.

[26] *Hoge Raad* 31 March 2006, *Nederlandse Jurisprudentie* 2011, 250, comm. T.F.E. Tjong Tjin Tai (*Nefalit/Karamus*), no. 3.13.

[27] *Hoge Raad* 24 December 2010, *Nederlandse Jurisprudentie* 2011, 251, comm. T.F.E. Tjong Tjin Tai.

[28] *Hoge Raad* 24 December 2010, *Nederlandse Jurisprudentie* 2011, 251 (*Fortis/Bourgonje*), comm. T.F.E. Tjong Tjin Tai, no. 3.8.

[29] *Hoge Raad* 24 December 2010, *Nederlandse Jurisprudentie* 2011, 251 (*Fortis/Bourgonje*), comm. T.F.E. Tjong Tjin Tai, no. 3.8.

[30] *Hoge Raad* 24 December 2010, *Nederlandse Jurisprudentie* 2011, 251 (*Fortis/Bourgonje*), comm. T.F.E. Tjong Tjin Tai, no. 3.10.

[31] District Court of The Hague 7 October 2020, ECLI:NL:RBDHA:2020:10058.

[32] Cedric Ryngaert, 'Attributing Conduct in the Law of State Responsibility: Lessons from Dutch Courts Applying the Control Standard in the Context of International Military Operations' (2021) 36(2) Utrecht Journal of International and European Law pp. 1–11. DOI: *https://doi. org/10.5334/ujiel.546*.

[33] District Court of The Hague 20 November 2019, ECLI:NL:RBDHA:2019:12231.

[34] District Court of The Hague 7 October 2020, ECLI:NL:RBDHA:2020:10058, no. 3.11.

[35] *Sieburgh* (n 19), 91.

[36] *Hoge Raad* 21 February 2012, *Nederlandse Jurisprudentie* 2013, 237, comm. S.D. Lindenbergh (*Deloitte/Hassink*), no. 3.5.3.

[37] Auke Bloembergen, *Schadevergoeding bij onrechtmatige daad (dissertation Utrecht)* (Kluwer 1965) 14–18.

[38] *Hoge Raad* 21 February 2012, *Nederlandse Jurisprudentie* 2013, 237, comm. S.D. Lindenbergh (*Deloitte/Hassink*), 3.5.3.

[39] *Sieburgh* (n 20), 80a.

[40] *Sieburgh* (n 20), 81d.

[41] *Sieburgh* (n 20), 80a.

[42] *Hoge Raad* 24 October 1997, *Nederlandse Jurisprudentie* 1998, 257 (*Baijings/H*), comm. P.A. Stein. See also *Hoge Raad* 19 January 2007, *Nederlandse Jurisprudentie* 2007, 63 (*Kranendonk Holding/Milieubescherming De Vries and Van der Wiel holding*); *Hoge Raad* 11 December 2009, *Nederlandse Jurisprudentie* 2010, 3 (*Velic/Lemmen*); *Hoge Raad* 22 February 2019, *Nederlandse Jurisprudentie* 2020, 81, comm. A.I.M. van Mierlo.

[43] See *e.g.* Court of Appeal of Arnhem 14 December 1999, *Nederlandse Jurisprudentie* 2000, 742; District Court of The Hague 12 July 2000, *Tijdschrift Vergoeding voor Personenschade* 2000/4, 94 ff. (comm. Giesen); Court of Appeal of The Hague 10 October 2002, *Nederlandse Jurisprudentie* 2003, 99; Rechtbank Amsterdam 28 May 2003, *Nederlandse Jurisprudentie* 2004, 45.

[44] *Hoge Raad* 21 December 2012, *Nederlandse Jurisprudentie* 2013, 237 (*B. & Deloitte/H. and H.&H.*).

[45] *Hoge Raad* 19 June 2015, *Nederlandse Jurisprudentie* 2016, 1 (*Overzee/Zoeterwoude*), comm. T.F.E. Tjong Tjin Tai.

[46] *Hoge Raad* 23 December 2016, *Nederlandse Jurisprudentie* 2017, 133 (*Netvliesloslating*), comm. S.D. Lindenbergh; *Hoge Raad* 27 October 2017, *Nederlandse Jurisprudentie* 2017, 115.

[47] *Hoge Raad* 19 July 2019, ECLI:NL:HR:2019:1223.

[48] *Hoge Raad* 24 December 2010, *Nederlandse Jurisprudentie* 2011, 251 (*Fortis/Bourgonje*), comm. T.F.E. Tjong Tjin Tai, no. 3.8.

[49] *Hoge Raad* 21 February 2012, *Nederlandse Jurisprudentie* 2013, 237, comm. S.D. Lindenbergh (*Deloitte/Hassink*), 3.7.

[50] *Hoge Raad* 21 February 2012, *Nederlandse Jurisprudentie* 2013, 237, comm. S.D. Lindenbergh (*Deloitte/Hassink*), 3.8; *Hoge Raad* 23 December 2016, *Nederlandse Jurisprudentie* 2017, 133 (*Netvliesloslating*), comm. S.D. Lindenbergh, 3.5.5; *Hoge Raad* 27 oktober 2017, *Nederlandse Jurisprudentie* 2017, 115, no. 3.4.2; *Hoge Raad* 22 February 2019, *Nederlandse Jurisprudentie* 2020, 81, comm. A.I.M. van Mierlo., no. 3.3.2; *Hoge Raad* 19 July 2019, ECLI:NL:HR:2019:1223 (*Mothers of Srebrenica and others*), no. 4.7.9.

[51] Court of Appeal of The Hague 27 June 2017, ECLI:NL:GHDHA:2017:3376, no. 68.

[52] *Hoge Raad* 19 July 2019, ECLI:NL:HR:2019:1223, no. 4.7.9.

[53] See however Carla Klaassen, *Causaliteitsperikelen, 'De dader heeft het gedaan maar wie is de dader? Enkele opmerkingen over (het bewijs van) causaliteitsonzekerheid'* (VASR 1, Kluwer 2012) 26–28 about the potential risks of applying the theory of partial liability.

[54] See however Carla Klaasen, 'Kansschade en proportionele aansprakelijkheid: volgens de Hoge Raad geen zijden van dezelfde medaille' (2013) *Aansprakelijkheid, Verzekering & Schade* no. 14; Alex Geert Castermans and Wouter den Hollander, 'Omgaan met onzekerheid' (2013) *Nederlands Tijdschrift voor Burgerlijk Recht* no 21. See also in his case analyses of *Mothers of Srebrenica*, Johan den Hoed, 'Kansschade: een bewogen leerstuk' (2020) *Tijdschrift voor Vergoeding van Personenschade* 103ff.

[55] See *e.g.* Chris van Dijk, 'Causale perikelen: het is moeilijk en zal moeilijk blijven' *Tijdschrift voor vergoeding personenschade* (2013) 71, 74, 81–83; Arno Akkermans, *Proportionele aansprakelijkheid bij onzeker causaal verband. Een rechtsvergelijkend onderzoek naar wenselijkheid, grondslagen en afgrenzing van aansprakelijkheid naar rato van veroorzakingswaarschijnlijkheid (dissertation Tilburg)* (W.E.J. Tjeenk Willink 1997) 248–250; S.D. Lindenbergh, comm. *Hoge Raad* 21 December 2012, *Nederlandse Jurisprudentie* 2013, 237, no. 7–9.

[56] *Bloembergen* (n 37), 14–15.

[57] *Van Dijk* (n 55), 62.

[58] *Infantino and Zervogianni* (n 20).

[59] *Infantino and Zervogianni* (n 20), 634–635.

[60] *Infantino and Zervogianni* (n 20), 635–636.

[61] *Infantino and Zervogianni* (n 20), 737–638.

[62] *Infantino and Zervogianni* (n 20), 644.

[63] *Infantino and Zervogianni* (n 20), 644.

[64] Markus Kellner and Isabelle Durant, 'Causation', in: Attila Fenyves et al (eds), *Tort law in the jurisprudence of the European Court of Human Rights* (Tort and Insurance Law 30, De Gruyter 2011) 485–486, show that under Art. 41 in conjunction with Art. 6 ECHR the court uses the terminology 'loss of (real) opportunities', which could be compared with the domestic theory of the loss of a change. However, in assessing the damages a global award is made.

[65] *Dimitar Yordanov v. Bulgaria* (App no 3401/09) ECHR 6 September 2018, 47.

[66] *Dimitar Yordanov v. Bulgaria* (App no 3401/09) ECHR 6 September 2018, 48.

[67] *Dimitar Yordanov v. Bulgaria* (App no 3401/09) ECHR 6 September 2018, 54.

[68] Advocate General P. Vlas described the legal debate between parties, at the level of the Court of Appeal, about the chance that the Muslim men would have survived had they stayed in the compound, 1 February 2019, ECLI:NL:PHR:2019:95, nr. 4.97.

[69] I focus on the requirement of causation under Art. 41 ECHR because this concerns an extra criterion before damages can be awarded. I do not focus on the element of causation in deciding whether a violation exists, because, from my tort law perspective, this concerns the question of a wrong/violation and not of compensation. See however on this subject: Kellner and Durant (n 61), 449–500; Gemma Turton, 'Causation and risk in negligence and human rights law' (2020) *Cambridge Law Review*, 79(1), 148–176.

[70] *Georgia v. Russia (I)* (App no 13255/07) ECHR 31 January 2019.

[71] *Kellner and Durant* (n 64), 461, 457–464.

[72] *Kellner and Durant* (n 64), 464.

[73] *Kellner and Durant* (n 64), 467–473.

[74] *Georgia v. Russia (I)* (App no 13255/07) ECHR 31 January 2019, 73.

[75] Two important comparative projects formulated a 'draft' for future harmonisation. First, The Principles of European Tort Law aimed at finding common principles that could function as a basis for future harmonisation between member states, European Group on Tort Law, *Principles of European Tort law: text and commentary* (Springer 2005). This research group still continues its comparative work. Second, the Study Group on European Civil Code drafted the Draft Common Frame of

Reference, Non-Contractual Liability Arising out of Damage Caused to Another, Christian Von Bar et al, *Non-contractual liability arising out of damage caused to another* (Principles of European law, vol. 7, Sellier 2009). This project aimed at both offering a legal framework for policy makers and scientific comparative insights for research and teaching purposes.

[76] *European Group on Tort Law* (no 75), 15–16.

[77] *Turton* (n 69), 166–167.

[78] *Emaus* (n 14), 255.

[79] *Keenan v. The United Kingdom* (App no 27229/95) ECHR 3 April 2001, 130–131; *Paul and Audrey Edwards v. The United Kingdom* (App no 46477/99) ECHR 14 March 2002, 99, 101; *Öneryildiz v. Turkey* (App no 48939/99) ECHR 30 November 2004, 147; *Bubbins v. The United Kingdom* (App no 50196/99) ECHR 17 March 2005, 171; *Reynolds v. The United Kingdom* (App no 2694/08) ECHR 13 March 2012, 66–67; *Centre for legal resources on behalf of Valentin Câmpeau v. Romania* (App no 47848/08) ECHR 17 July 2014, 149.

[80] *Bubbins v. United Kingdom* (App no 50196/99), 170. See also *Mozer t. Moldavia and Russia* (App no 11138/10), ECHR 23 February 2016, 208.

[81] Court of Appeal of The Hague 5 November 2019, ECLI:NL:GHDHA:2019:2929.

[82] *Georgia v. Russia (I)* (App no 13255/07) ECHR 31 January 2019.

[83] Elisabeth Steiner, 'Just satisfaction under art. 41 ECHR: A compromise in 1950 – problematic now', in: Attila Fenyves et al (eds), *Tort law in the jurisprudence of the European Court of Human Rights* (De Gruyter 2011) 12; Walter Berka, 'Human rights and tort law', in: Attila Fenyves et al (eds.), *Tort law in the jurisprudence of the European Court of Human Rights* (De Gruyter 2011) 246; Jason Varuhas, *Damages and human rights* (Hart Publishing 2016) 252 ff.

[84] See *e.g. Keenan v. United Kingdom* (App no 27229/95) ECHR 3 April 2001; *Paul and Audrey Edwards v. United Kingdom* (App no 46477/99) ECHR 14 March 2002; *Öneryildiz v. Turkey* (App no 48939/99) ECHR 30 November 2004; *Bubbins v. United Kingdom* (App no 50196/99) ECHR 17 March 2005; *Reynolds v. United Kingdom* (App no 2694/08) ECHR 13 March 2012. See for an analysis: Christa Kissling and Denis Kelliher, 'Compensation for pecuniary and non-pecuniary loss', in: Attila Fenyves et al (eds), *Tort law in the jurisprudence of the European Court of Human Rights* (De Gruyter 2011) 627.

[85] District Court of The Hague 7 October 2020, ECLI:NL:RBDHA:2020:10058.

[86] District Court of The Hague 7 October 2020, ECLI:NL:RBDHA:2020:10058 3.21-3.24.

[87] District Court of The Hague 7 October 2020, ECLI:NL:RBDHA:2020:10058, 3.25.

[88] District Court of The Hague 7 October 2020, ECLI:NL:RBDHA:2020:10058. 3.24-3.25.

[89] Rianka Rijnhout, 'Het EBI-arrest, historisch onrecht, effectieve remedie en de AVG' (2020) *Tijdschrift voor Vergoeding van Personenschade* 1–6.

[90] *Emaus* (n 14), 255–257.

[91] *Kamerstukken II* 2020/21, 26122, no. 49, Bijlage (Annex) 'Civielrechtelijke regeling ter uitvoering van het arrest van de Hoge Raad van 19 juli 2019 inzake Staat/Stichting Mothers of Srebrenica'.

[92] *Kamerstukken II* 2020/21, 26122, no. 49, Bijlage (Annex) 'Toelichting op de Civielrechtelijke regeling ter uitvoering van het arrest van de Hoge Raad van 19 juli 2019 inzake de Staat/ Stichting Mothers of Srebrenica', 1.

[93] De Letselschaderaad, *De Letselschade Richtlijn Rekenmodel Overlijdensschade*, *CONCEPTAANBEVELING HUISHOUDELIJKE HULP (TOEKOMST) (deletselschaderaad.nl)* The Personal Injury Council is a Dutch foundations that makes collaborations and negotiations possible between all stakeholders within the personal injury sector. It aims at preventing unnecessary debates between legal parties in order to protect the interest of personal injury victims.

[94] *Kamerstukken* (n 92), 2.

[95] *Kamerstukken* (n 91), 1.

[96] *Kamerstukken* (n 92), 2.

[97] *Kamerstukken* (n 92), 2.

[98] *Kamerstukken* (n 92), 2.

[99] District Court of The Hague 7 October 2020, ECLI:NL:RBDHA:2020:10058.

[100] *Kamerstukken* (n 92), 3.

[101] Also because the Court of Appeal decided that a causal connection between the wrong and the original damage was *too uncertain*, therefore placing the onus of having to adduce counter-evidence on the shoulders of the defendant would most probably not have helped the plaintiffs, see Legal Opinion P. Vlas, 1 February 2019, ECLI:NL:PHR:2019:95, no. 4.92.

ACKNOWLEDGEMENTS

The author would like to thank Prof. Ivo Giesen for his comments on the draft version of this paper.

COMPETING INTERESTS

The author has no competing interests to declare.

AUTHOR INFORMATION

Dr. R. (Rianka) Rijnhout is Associate Professor at Utrecht University, Utrecht Centre for Accountability Law and program director of the research group Empirical legal research into Institutions for Conflict Resolution.

AUTHOR AFFILIATION

Rianka Rijnhout
Utrecht University, NL

REFERENCES

Akkermans AJ, *Proportionele aansprakelijkheid bij onzeker causaal verband. Een rechtsvergelijkend onderzoek naar wenselijkheid, grondslagen en afgrenzing van aansprakelijkheid naar rato van veroorzakingswaarschijnlijkheid (dissertation Tilburg)* (W.E.J. Tjeenk Willink 1997).

Asser WDH, Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Procesrecht. 3. Bewijs (Asser Series, Wolters Kluwer 2017).

Berka W, 'Human rights and tort law', in: Fenyves A et al (eds), *Tort law in the jurisprudence of the European Court of Human Rights* (De Gruyter 2011). DOI: *https://doi.org/10.1515/9783110260007.237*

Bloembergen AR, *Schadevergoeding bij onrechtmatige daad (dissertatie Utrecht)* (Kluwer 1965).

Castermans AG, and Den Hollander PW, 'Omgaan met onzekerheid' (2013) *Nederlands Tijdschrift voor Burgerlijk Recht* no 21.

Den Hoed J, 'Kansschade: een bewogen leerstuk' (2020) *Tijdschrift voor Vergoeding van Personenschade* 103ff. DOI: *https://doi.org/10.5553/TVP/138820662020023003004*

Emaus JM, Damages for fundamental rights violations, Dutch perspectives', in: Bagińska E (ed), *Damages for violations of human rights* (Springer 2016), 241ff. DOI: *https://doi.org/10.1007/978-3-319-18950-5_11*

European Group on Tort Law, *Principles of European Tort law: text and commentary* (Springer 2005).

Giesen I, 'The reversal of the burden of proof in the Principles of European Tort Law, a comparison with Dutch tort law and civil procedure rules' (2010) *Utrecht Law Review* vol. 6 issue 1 22ff. DOI: *https://doi.org/10.18352/ulr.112*

Infantino M, and Zervogianni E, *Causation in European Tort law* (CCEPL Cambridge University Press 2017). DOI: *https://doi.org/10.1017/9781108289887*

Kissling C, and Kelliher D, 'Compensation for pecuniary and non-pecuniary loss', in: Fenyves A et al (eds), *Tort law in the jurisprudence of the European Court of Human Rights* (De Gruyter 2011). DOI: *https://doi.org/10.1515/9783110260007.579*

Klaassen CJM, *Causaliteitsperikelen*, 'De dader heeft het gedaan maar wie is de dader? Enkele opmerkingen over (het bewijs van) causaliteitsonzekerheid' (VASR 1, Kluwer 2012).

Klaasen CJM, 'Kansschade en proportionele aansprakelijkheid: volgens de Hoge Raad geen zijden van dezelfde medaille' (2013) *Aansprakelijkheid, Verzekering & Schade* no. 14.

Kellner M, and Durant IC, 'Causation', in: Fenyves A et al (eds), *Tort law in the jurisprudence of the European Court of Human Rights* (Tort and Insurance Law 30, De Gruyter 2011). DOI: *https://doi.org/10.1515/9783110260007.449*

Maes KL, *Secundaire aansprakelijkheid: Een rechtsvergelijkend onderzoek naar de reikwijdte van de zorgplicht van beheerders van private ruimten (dissertation Utrecht)* (Ucall, volume 17, Boom Juridische uitgevers 2020).

Rijnhout R, 'Het EBI-arrest, historisch onrecht, effectieve remedie en de AVG' (2020) *Tijdschrift voor Vergoeding van Personenschade* 1ff. DOI: *https://doi.org/10.5553/TVP/138820662020023001001*

Rijnhout R, 'Van bijzonder letsel naar bijzondere normschendingen en *beyond*' (2020) *Verkeersrecht* 194ff.

Sieburgh CH, Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel II. De verbintenis in het algemeen, tweede gedeelte (15th ed. Asser Series, Kluwer 2017).

Steiner E, 'Just satisfaction under art. 41 ECHR: A compromise in 1950 – problematic now', in: Fenyves A et al (eds), *Tort law in the jurisprudence of the European Court of Human Rights* (De Gruyter 2011). DOI: *https://doi.org/10.1515/9783110260007.3*

Turton G, 'Causation and risk in negligence and human rights law' (2020) *Cambridge Law Review* 79(1) 148ff. DOI: *https://doi.org/10.1017/S0008197319000898*

Varuhas JNE, *Damages and human rights*, (Hart Publishing 2016).

Van Dijk C, 'Causale perikelen: het is moeilijk en zal moeilijk blijven' (2013) *Tijdschrift voor vergoeding personenschade* 61ff.

Von Bar C et al., *Non-contractual liability arising out of damage caused to another* (Principles of European law, vol. 7, Sellier 2009). DOI: *https://doi.org/10.1515/9783866538658*

TO CITE THIS ARTICLE:
Rianka Rijnhout, 'Mothers of Srebrenica: Causation and Partial Liability under Dutch Tort Law' (2021) 36(2) *Utrecht Journal of International and European Law* pp. 127–140. DOI: *https://doi.org/10.5334/ujiel.543*

Submitted: 07 April 2021 Accepted: 07 April 2021 Published: 16 July 2021