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Contributory Negligence In Europe

Huib Drion*

THE DUTCH LAW OF TORTS is for the greater part contained in Sections 1401-1416 of the Civil Code (*Burgerlijk Wetboek*) of 1838. That civil code is mainly a translation of the *Code Napoléon*, although there are many significant differences. The basic sections (1401-1405) are almost literal translations of Sections 1382-1386 of the French Civil Code in its original form. But some important new provisions dealing with claims for wrongful death and personal injuries (Sections 1406 and 1407) and less important ones, dealing with insult, defamation and libel (Sections 1408-1415), have been added.

One does not, however, know the Dutch law of torts by reading the relevant provisions of the *Burgerlijk Wetboek*, as little as one knows the French law of torts by reading Sections 1382-1386 of the *Code Civil*. These codified provisions are only the framework within which the Dutch or the French law of torts have been developed by the courts and by authors, in the same way as the American Constitution provides the framework within which American constitutional law was and is still being developed by the courts.

This is well illustrated by the law relating to contributory negligence. Neither the Dutch Civil Code, nor its French example, contains a provision on contributory negligence. The entire law on this subject is judge made law, as it is in the countries of the common law.

Before entering into a discussion of this judge made law, a few more preliminary remarks of a more general nature may be useful for the American reader. In the first place it should be kept in mind that the legal system of the Netherlands has no jury, neither in civil nor in criminal cases. Therefore, this sometimes invoked impediment to a free development towards a system of comparative negligence has not played a part in the development of Dutch law. Secondly, it should be mentioned that no formal principle of "stare decisis" is recognized, the courts not being bound by their own decisions or to those of higher courts, though, of course, a court would not lightly overrule its

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own previous decisions, and still less those of the *Hoge Raad* (the supreme court—at The Hague—which is only concerned with questions of law, not with questions of fact).

It is only since the beginning of this century that problems of contributory negligence started to receive the attention of the authors and the courts. Up to that time the few decisions which dealt with such situations were generally phrased in terms of causality with results fairly similar to those of the common law.

In 1902, the late Professor Paul Scholten of the Town University of Amsterdam published a well known study on problems of causality, an important part of which dealt with problems of contributory negligence.¹ Four years later a student of his, Van Nierop, wrote a doctor's thesis² entirely devoted to these problems under the title (translated): "The Victim's Own Negligence," which is—as the French "faute de la victime"—the usual terminology to indicate contributory negligence situations. In the same year a Leiden thesis on damages also paid particular attention to contributory negligence.³ Both studies defended a system of distribution of loss between actor and defendant, similar to the practice which the French courts had already developed in the course of the 19th century, and also similar to Section 254 of the German Civil Code, which had come into force in 1900.

In 1916 the question of whether the victim's own negligence should be a complete defense to an action in damages, or whether it should only lead to a proportionate reduction of damages, was finally brought before the *Hoge Raad*, which, in conformity with the developments in the neighbouring countries, decided on the second alternative.⁴ The facts were typical for the normal contributory negligence cases: plaintiff had been injured by defendant's railway engine while walking on the unguarded railroad track in one of the harbours of Amsterdam. The employees of defendant had been found negligent, but the accident was also due to the victim's negligent failure to look before crossing the track.

The *Hoge Raad* affirmed the decision of the Court of Ap-

¹ Paul Scholten, *Verzamelde Opstellen*, IV (1954), pp. 47 sqq, 59 sqq, 158 sqq, and 180 sqq.

² H. A. van Nierop, *Eigen schuld van den benadeelde*, proefschrift Amsterdam, 1906.

³ H. R. Ribbius, *Omvang van de te vergoeden schade etc.* Proefschrift Leiden, 1906, pp. 190 sqq.

⁴ 4 Febr. 1916, *Ned. Jur.* 1916, p. 450.

peal that plaintiff's contributory negligence was not a complete bar to his action but would only result in a reduction of damages. The Supreme Court considered "that Section 1401 of the Civil Code imposes upon the person, whose negligence has caused damage, the duty to compensate, and that this legal provision does not prevent, but rather obliges the court, in the event of damage originating from illicit acts (Dutch law refers to tortious liability as liability for illicit acts) of more than one person, to measure the damages in proportion with the extent to which the negligence of each of them has contributed to the causing of said damage." Where, in the subject case, the negligence of defendant's employees had been found to have contributed to the accident to the same extent as plaintiff's negligence, the lower court had rightly decided that defendant should pay half of the damages suffered by plaintiff.

It will be noticed that in this decision the *Hoge Raad* tried to give a legal basis to the system of apportionment of damages in conformity with the general tort rules of the Civil Code. In order to do that it was necessary to consider the plaintiff's negligence as an "illicit act," in the same way as defendant's negligence was an "illicit act" within the meaning of Section 1401. Moreover, the court apparently assumed that as between joint tortfeasors there should be contribution, though such contribution between joint tortfeasors is as little provided for by our Code as is apportionment in case of the plaintiff's contributory negligence, and though at that time the principle had not even yet been adopted by the courts. That was not done until 1925 by a decision of the *Hoge Raad* concerning an inland water collision.⁵

Though the decision was praised from the point of view of material justice, its reasoning was criticized. In its later decisions the *Hoge Raad* has stuck to the system of apportionment, but without trying any more to explain it on the basis of the articles of the Civil Code.⁶

Much of the earlier discussions on the problems of contributory negligence had been directed towards the question—the practical value of which may be doubted—of whether apportionment of damages should be based on the *degree of negli-*

⁵ 30 Oct. 1925, Ned. Jur. 1926, p. 157.

⁶ 29 Nov. 1929, Ned. Jur. 1930, p. 293, annotated by E. M. Meijers.

gence of each of the parties or on the extent to which the negligence of each of them has *contributed* to the damage. The latter principle was applied in the 1916 decision. But in a 1946 decision⁷ the *Hoge Raad* used a terminology which was more in accord with an apportionment based on the seriousness of the faults committed by each of the parties. In neither of these decisions, however, was the choice made essential for the result. Those who favor the 1916 solution generally do so in view of the cases of liability without fault, where the absence of fault on the part of the defendant should not lead to the plaintiff's contributory fault becoming a complete defense. Certainly, the decision of 1946 should not be read as to necessitate such conclusions. No liability without fault was involved in that case. Section 31 of the "*Wegenverkeerswet*" (Road Traffic Act), which imposes an increased liability—partly without fault—upon the owner of a motor vehicle in the event of injuries or damage to persons or property which are not taking part in motorized traffic, expressly allows the court to reduce the damages in case of contributory negligence, thus clearly assuming that contributory negligence is not necessarily a complete defense against an action based on liability without (proven) fault.

But whenever the fault of one of the parties is mitigated by special circumstances such as the tender age or insanity of one of the parties, or by the "agony of the moment," such circumstances should probably be taken into account in deciding upon the apportionment. This is clearly more in conformity with the system of 1946 (degree of fault).

In a system of apportionment of damage there is less need for the legal refinements of the "last clear chance" rule with its variations. That does not mean, however, that in practice the evidence of a last clear chance for the defendant to avoid the accident would be irrelevant in those legal systems which have adopted the principle of apportionment. That principle does not set aside the legal rules of causality, which, in the Netherlands, are fairly similar to those prevailing in the common law countries: for a negligent act to be held the cause of an accident, it is necessary that that accident was not an improbable consequence of such negligent act. Where the defendant had a "last clear chance" to avoid an accident and recklessly failed to use the op-

⁷ 12 Apr. 1946, *Ned. Jur.* 1946, nr. 232.

portunity, the ensuing accident would often not be a probable consequence of plaintiff's own negligence, in which case there would be no place for distributing the loss between plaintiff and defendant.

On still another ground the defendant in a "last clear chance" case may sometimes be burdened with the entire loss, notwithstanding some negligence on the part of the plaintiff having contributed to the accident. In a number of decisions the courts have held that if plaintiff's negligence was very small as compared with the tort committed by defendant, the latter will have to pay the full damages. This is especially true in case of intentional torts, such as fraud,⁸ but the principle is also applied to cases of serious negligence. Thus where a carpenter had very imprudently failed to take the necessary safety measures after sawing through the wooden balustrade of a balcony, he could not, in mitigation of his liability, invoke plaintiff's slight negligence of forgetting for a moment that the balustrade was no longer intact.⁹

The question of whose negligence may be imputed to the plaintiff for the purpose of distributing the loss between him and the defendant has until recently received curiously little attention in the Netherlands.¹⁰ The first case coming before the *Hoge Raad* was hardly a normal case of imputed negligence, both plaintiff and defendant being vicariously liable—on different grounds—for the tortious acts of the one person through whose negligence the damage was caused. While piloting defendant's ship in the harbor of Rotterdam, a compulsory pilot employed by the City of Rotterdam had caused the ship to damage an underwater telephone cable owned by the City of Rotterdam. According to Dutch law the shipowner is liable for the negligence of the pilot, and on that basis he was sued by the City. But the action failed since the vicarious liability of Rotterdam for its servant was said to prevail over the shipowner's vicarious liability for the pilot used on the ship.¹¹ Apart from the special

⁸ H. R. 11 March 1938, Ned. Jur. 1939, nr. 128.

⁹ H. R. 11 Febr. 1955, Ned. Jur. 1955, nr. 218.

¹⁰ The most extensive discussion is to be found in Hofmann, *Nederlands Verbintenissenrecht*, 8ste druk, II (1959, by H. Drion and K. Wiersma), pp. 167-170.

¹¹ H. R. 18 June 1943, Ned. Jur. 1943, nr. 483.

problem raised in this case, the imputation of the servant's negligence to his master in an action for damages suffered by the master was accepted by the Court as a matter of course. The same had already been done by the lower courts in a number of cases, without any discussion of the question, especially in motor vehicle collision cases. It seems probable that some lower courts—without giving a thought to it—have even imputed to a passenger claiming damages from the negligent driver of a colliding automobile, the contributory negligence of his own driver, without any vicarious liability on the part of the passenger for the acts of his driver.

Imputing to a plaintiff, in an action for damages, the negligence of another, is in fact to make an exception to the principle—also applicable in Dutch law—that where damage has been caused by the negligence of two persons, each of them can be held liable by the victim for the entire damage, subject (in Dutch law) to an action for contribution between the tort-feasors. For the victim, the general principal has the advantage that he has not to sue all tort-feasors and that he is not exposed to the risk of one of them being unable to pay or being immune from an action in the plaintiff's country. That advantage, and the related disadvantage for the tort-feasor against whom the action is brought, may become less justified, if the third person had been acting in some relationship with the plaintiff, *e.g.*, a master-servant relationship. In these cases it may be reasonable to impute the third person's negligence to the plaintiff.

Two questions arise in this connection: (1) should the negligence of persons for whom the plaintiff would be vicariously liable if such negligence caused damage to third persons, always be imputed to the plaintiff in an action for damages *against* a third person? and, (2) should negligence of other persons never be imputed to a plaintiff, unless the plaintiff would have been vicariously liable, if an action would have been brought *against* him?

Both questions are answered in the affirmative in Section 485 of the American Restatement of the Law of Torts. In Dutch law such a general answer does not seem possible.

With respect to the first question it has repeatedly been held that the servant's negligence for which the master is vicariously liable should be imputed to the master in his action for damages

against a third person.¹² But a general rule for all cases of vicarious liability has never been expressed by the courts. In a recent decision the *Hoge Raad* has clearly rejected the existence of such a general rule.¹³ This decision involved a collision between a towed ship and a third ship, which collision was due to faults committed by the third ship and by the tug. According to Section 538 of the Commercial Code (*Wetboek van Koophandel*), the owner (reder) of the towed ship is, in case of a collision between the towed ship and another ship caused by negligence of the tug, jointly liable with the owner of the tug for damage suffered by such other ship. In this case damage was claimed by the owner of the tow from the owner of the other ship. The latter invoked Section 538, arguing that according to this provision the tug's negligence should be imputed to the owner of the tow, but the *Hoge Raad* rejected that view: "From the legislator's view that the owner of the tow should be jointly liable for this damage with the owner of the tug, no conclusions may be drawn with respect to damage caused to a towed ship in case of a collision; the liability for such damage, therefore, must be determined in conformity with the general law." What is the reason, in this case, that no conclusions could be drawn from the towed ship's liability for negligence of the tug with respect to damage caused to the towed ship, whereas such conclusion is actually drawn, as a matter of course, from the master's vicarious liability for the acts of his servants? One explanation might be, that the main rationale for the master's liability for the acts of his servants is to protect the victims of torts committed by people who are acting in the service of somebody else against the chance, certainly not academic, of the servant's insolvency. The same rationale does not seem to have played a part in the making of Section 538. As has been pointed out before, the main justification of the principle of imputed negligence as an exception to the rule that each of the joint tortfeasors is liable for the entire damage, is that in master-servant situations (and in similar situations), it is reasonable that the master should bear the risk of the servant's

¹² See the explicit decision of the Court of Appeal ("Gerechtshof") of 's-Hertogenbosch of 14 Apr. 1953, Ned. Jur. 1953, nr. 675. In a decision of 30 Oct. 1957, Ned. Jur. 1958, 549, the Court of Appeal of The Hague refused to reduce the damages in view of the tortious conduct of plaintiff's own servants, but that involved a case of an intentional tort (the receiving of converted goods).

¹³ H. R. 25 May 1962, Rechtspraak van de Week 1962, p. 202.

insolvency or of his practical immunity from action, rather than the third person whose negligence, combined with that of the servant, caused the damage. That justification might be less evident in the tug and tow case. It is at least not borne out by the rationale for the tow's liability for faults on the part of the tug.

As to the question whether negligence may be imputed in situations in which no vicarious liability exists, no clear answer has been given by the courts and it is doubtful whether an unqualified answer is possible. In practice, the problem will most often arise in connection with traffic accidents involving an automobile driven by a person other than the owner, who is not in the employment of the owner, such as a member of the family, a friend or a hirer. There are remarkably few express decisions on this question, though actually the case must frequently have been before the courts, without the issue being raised, it being considered natural that the driver's negligence should be imputed to the owner in an action by the owner for damage to his car. The majority of the express decisions refuses imputation of negligence in the absence of vicarious liability.¹⁴

To the majority view that imputed negligence can only be accepted as the reverse side of vicarious liability, some noncontroversial exceptions must be made, based either on judge made law, or on some express statutory provision. In the first place Dutch law has accepted the exception which is also to be found in American law (*vide* Section 285 of the Restatement of the Law of Torts), that the contributory negligence of a decedent can be invoked against his next of kin in an action for wrongful death.¹⁵

Moreover, Section 31 of the *Wegenverkeerswet* (Road Traffic Act) which imposes liability without proof of negligence upon the owner of a motor vehicle for injuries or damage inflicted upon pedestrians and cyclists, permits the courts to reduce the amount of damages "whenever it is likely that the accident was also caused by the negligence of a person for whom the owner

¹⁴ *Rechtbank Roermond*, 11 June 1942, *Ned. Jur.* 1943, nr. 531, Court of Appeal 's-Hertogenbosch 17 March 1955, *Ned. Jur.* 1955, nr. 596, *Rechtbank Haarlem* 15 May 1956, *Ned. Jur.* 1956, nr. 658. A different view is taken by Court of Appeal 's-Hertogenbosch 14 Apr. 1953, *Ned. Jur.* 1953, nr. 675.

¹⁵ H. R. 3 Febr. 1956, *Ned. Jur.* 1956, nr. 158 (Implied). Similarly Section 846 of the German Civil Code. The other view was taken by the Belgian supreme court ("Cour de Cassation") in two decisions of 15.3. 1961, *Revue crit. de jurisprudence belge* 1962, p. 165, with a critical note by J. Dabin, and by the French courts (see J. Fossereau in 61 *Revue trimestrielle de droit civil* (1963) pp. 7-42).

or possessor [of the motor vehicle] is not liable." Under this provision the concurring negligence of any third person, irrespective of whether he is in any way connected with the plaintiff, can be a factor in mitigation of damages.¹⁶

One exception, which, properly speaking, is not a real exception, should still be mentioned: if husband and wife are married in a system of full matrimonial community of property (which is the rule in Holland) any claim of one of the spouses is automatically part of the community property and the community is liable for all debts of both spouses. Under these circumstances the *Hoge Raad* has held¹⁷ that in case of concurring negligence of one of the spouses and a third person causing damage to the other spouse, the latter's claim against the third person should be reduced with such part as the third person could have reclaimed from the negligent spouse on the basis of contribution between joint tort-feasors. A similar rule seems to be applied in the few states of the U. S. which have a comparable system of matrimonial community of property.

A practical objection against a too generous application of the principle of imputed negligence might be that it results in accidental damages having partly to be borne by the victims themselves, who generally will carry no insurance against such damages, instead of their being shifted to the persons who caused these damages, who more often than the victims will be protected against such risks by way of liability insurance. That means that part of the damages are withdrawn from the system of loss distribution through insurance. It must be added, however, that this kind of argument is more rarely heard on the Continent than in the U. S.

As has been said before, the Dutch law relating to contributory negligence is entirely judge made law, as it is in France and Belgium and in the other countries which have derived their civil codes from the *Code Napoléon*. We have here a good example of the advantage of the more elastic development of judge

¹⁶ Another well known exception, this one restricted to an imputed negligence situation, is offered by Section 4, para. 2 of the Brussels Convention on collisions on sea of 1910, also ratified by the Netherlands and repeated in Section 537 of the Commercial Code: in a case of collision of ships due to faults on both sides, the fault of the carrying ship is to be imputed to the owner of the goods carried by that ship, in an action brought against the other ship.

¹⁷ 20.3. 1959, Ned. Jur. 1959, nr. 181.

made law in the countries with codified laws, at least in the field of the law of torts.

Though the Draft for a new Civil Code, by which the civil law of the Netherlands will be entirely modernized, does have a specific provision on the effect of contributory negligence, it is phrased in such broad terms, that the powers of the courts to develop this part of the law as they think fit, will, if anything, be enlarged thereby. Section 6.1.9.6 of the Draft reads (translated): "When a circumstance, imputable to the party injured, has contributed to the damage, the compensation can, to the extent reasonable, be mitigated or reduced to zero." With such a provision, the courts will have maximum discretion. In fact, the author would, for the sake of clarity and certainty, have preferred a somewhat more elaborate set of rules.