Regres : een onderzoek naar het regresrecht van particuliere en sociale schadedragers

Summary and conclusions

1. Introduction

Chapter 1: Background

When a party is faced with high costs as a result of the wrongful conduct of another person, various legal and social schemes provide responses aimed at covering loss or injury suffered. Liability law may grant the wronged party, i.e. the injured party or its surviving dependants, a right to compensation. In addition, First-party private and social security insurers may provide compensation. Dutch liability law does not permit that wronged parties that have collected First-party insurance payments, also recover damages from the wrongdoer or that person's liability insurer. This would turn the wronged party's plight into a bonanza. The money received from First-party insurers compensates the wronged party for the damage sustained. This extinguishes that party's right to claim damages from the wrongdoer. It goes without saying that these First-party payments do not make the loss disappear; it merely has been shifted to the injured party's insurers.
However convenient this transfer of loss may be to the wronged party, it fails to definitively remedy the loss. This explains why Dutch insurance companies have been given statutory rights of recovery against the wrongdoer for virtually all compensation paid out by them to the wronged party. These statutory rights of recovery are mainly the result of numerous legislative bills introduced by the Ministry of Social Affairs and adopted by Parliament over the past ten years.
Until 1993, the prevailing view in the Netherlands was that recovery action brought by social security insurers against Third-party insurers was not efficient, because it constituted robbing Peter to pay Paul. The government has changed its policy, however. As a result of having to shoulder heavy social burdens, it came to view recovery as an instrument for recouping social security benefits from persons liable under private law. Departing from the principle that 'he who causes damage, must pay for it', the government now even offers small subsidies and bonuses to those national health funds, private and public employers and other health insurers that successfully recover First-party payments. The principle underlying the new policy raises the question of the limits of civil liability. After all, making the wrongdoer pay could potentially lend support to any extension of civil liability law: 'Have you suffered economic loss or are you faced with high benefit or insurance

pay-outs? The person who has caused the damage, must pay for it!' This cannot be the idea, of course. So, where then do we draw the line with regard to this new policy?

Chapter 2: Thesis Question

The study intends to research the way in which central government makes use of statutory recovery rights for legal-political reasons. Although a few years ago, abolition of statutory recovery rights seemed imminent, nowadays these rights form part of a new policy line intended to promote that the costs of compensation facing the social security funds, are ultimately borne by the wrongdoer himself. Employers, health insurers and national health funds are even promised a financial incentive, if they pursue an active recovery policy. However, this departure from traditional policy raises a number of questions. To what extent is connecting to civil liability law, premised on the principle that the wrongdoer must pay the damage caused by him or her, irrespective of the proceeds of recovery, desirable and permissible? Herein lies the central problem of this study:

'*What consequences does extension of recovery to First-party payments, as propaga*ted by the government through the principle 'He who causes the damage, must pay for it', have for the civil liability of the wrongdoer?'

The study is primarily concerned with positive law and consists mainly of an examination of decided cases and literature research. Three basic principles have been selected as the theoretical framework for a normative analysis. Firstly, extension of civil liability law to include parties seeking recovery requires dogmatic underpinning; such recovery must mesh with the statutory framework of civil liability law. Secondly, it must be convincing and consistent as to its purposes (functionality) and, thirdly, these purposes must be guaranteed at the level of execution (implementability).

2. Statutory Framework

How the System Works

In Chapters 2, 3, and 4, the outlines of this statutory framework are sketched in the light of the above principle. Statutory recovery regulations are based on the premise that First-party payments, such as those paid out to injured parties or their dependants by their own private and social security insurers and employers, releases the wrongdoer from his or her obligations towards these parties. This is founded on the view that the wronged party cannot be compensated for the same damage more than once; there can only be single compensation for the damage sustained.

If a person has received compensation on grounds other than civil liability law, his or her right to compensation is extinguished. As a result, the wrongdoer would escape unscathed, were it not for First-party recovery action brought against him or her. This ensures that the burden of compensation will ultimately rest on the wrongdoer. The legal framework, of which the recovery provisions form a part, is, in effect, quite straightforward: what binds the wrongdoer and the party seeking recovery is that they owe the same debt to the wronged party. In *his or her* relation with the wronged party, the wrongdoer is liable for damage already compensated for by the party seeking recovery on the grounds of *that party's* relation with the wronged party. This is referred to as debt concurrence: First-party payments made to the wronged party by the party seeking recovery at the same time release the wrongdoer from his or her obligation towards the wronged party. Through recovery, the wrongdoer ultimately bears the financial burden in all cases, although he or she has been released from the obligation owed to the wronged party.

Chapter 3: Immediate Reason for Seeking Recovery

This chapter examines cases in which, as a result of First-party payments, the principle that the wrongdoer must pay for the damage caused by him is frustrated. It commences with an inventory of those First-party payments that release the wrongdoer from his or her compensation obligation. On the basis of the inventory, the rules effecting the release of the wrongdoer, are subdivided into three regimes: the regime for First-party payments that avoid that the wronged party will have to face the damage, such as continued wage payments in case of incapacity to work. Secondly, First-party payments which are intended to compensate for damage that does fall within the wronged party's estate (compensation, for instance private insurance payments and social security benefits). Thirdly, there is the regime for payments that have neither of the above effects, such as non-compensatory gifts, which constitute benefit. The effect of the first two types of payments is generally that the wrongdoer is discharged from his or her obligation to compensate the wronged party for the corresponding part of the damage and, as a result, the wronged party is no longer entitled to compensation (for that part) by the wrongdoer. With regard to the third category of First-party payments, there is no such concurrence and recovery is not an option: non-compensatory payments received by the wronged party from third parties cannot properly be regarded as an alternative for compensation owed by the wrongdoer. The most important conclusion that could be drawn from the inventory was that First-party payments only have a discharging effect where they are *intended* to prevent or compensate precisely that damage for which the wrongdoer is liable.
Claims for compensation of loss of support by dependants of a deceased, on the grounds of Article 6:108, par. 1, Dutch Civil Code (BW), fall within a somewhat stricter concurrence regime. The Netherlands Supreme Court has held that all First-party payments received by dependants will diminish their claim. The differen-

ce with injury cases is that all First-party payments release the wrongdoer, in principle, and therefore also payments which, according to their nature or purpose, in actual fact do not redress loss of support. First-party payments under a mortgage-related life insurance for the benefit of surviving dependants are deducted from the total claim, irrespective of whether housing costs are claimed. This does not correspond with the principle that, in order for First-party payments to have full releasing effect, they must be concurrent and match the compensation obligation of the wrongdoer. At issue here is the question as to whether in the event of death First-party payments are intended to defray housing costs as such, or compensate for loss of support. In the author's view, the purpose of the First-party payment ought to determine the answer to this question, as in physical injury. Only those First-party payments that can be characterised as (part) compensation for costs of living, such as payments on the grounds of an ordinary or mortgage-related life insurance, the Surviving Dependants Act (*Nabestaandenwet*), maintenance provided by a new partner and so on, will exclusively have to be set off with claimed costs of living. Conceivably, the Netherlands Supreme Court may take this approach in the future. It does seem to take on board the criticism regarding the difference with physical injury.

The Relation between Benefit Deduction and Recovery

The second part of this chapter is dedicated to more practical matters. Recovery actions are often brought within a different relation from the one in which the recovery has its cause. The body which must (exclusively) decide whether or not the wrongdoer is discharged of his or her obligation owed to the wronged party, is, in principle, another than the body that assesses the merits of the recovery action. A range of factors, such as developments with regard to the injured party's health, the way in which proceedings are conducted, and lack of information on the part of the parties involved, make it very likely that the outcome of the two proceedings will be dissimilar. This may result in smaller or larger sums being deducted for any benefit enjoyed by the wronged party and in the wrongdoer ultimately having to pay too much or too little compared to the total amount of damages. The most important conclusion here is that itemisation of damage is really indispensable to achieve a fair outcome in recovery proceedings. This not only reduces the risk of dual payment in the event of independent recovery rights, it also keeps things simpler, leaving aside the requirement to assess the congruence between First-party payments and the head of compensation in question. First-party payments can only be set off, where these match the damage for which wrongdoer is liable, according to their nature and in relation to the period in which the damage was suffered. The First-party payment is then exclusively deducted from the amount of the specific head of compensation entered. If the wrongdoer is obliged to pay compensation for loss of income in the second and third year of illness, the relevant disability benefit payments is deducted from this debt and from this debt alone.

Finally, the Netherlands Supreme Court has left some room for reducing a claim submitted by a wronged party, by taking off First-party insurance payments even where the wronged party does not receive these payments in the end through his or her own fault. The author does not see any convincing grounds for denying the wronged party his or her claim for damages against the wrongdoer. The defence, open to the wrongdoer in actions brought by the wronged party, that the wronged party missed out on social insurance benefits as a result of his or her own carelessness or malicious intent, ought not be accepted in recovery proceedings. Where it is still uncertain whether any advantage will be enjoyed by the wronged party, the author suggests that the First-part insurer seeking recovery submit to the court a (provisional) administrative decision by which such social security benefit was granted, or, if that is not yet possible under the circumstances, to award the claim for recovery conditionally, by analogy with Article 6:105 BW.

Chapter 4: the Limits of the Statutory Framework

In Chapter 4, the author examines the set of legal rules that ensure that the wrongdoer is confronted with the total extent of the damage caused by him or her. First, the regulations governing recovery of First-party payments are discussed, in relation to each head of compensation. In part as a result of recent amendments to social security law, there is much confusion in these special areas. The author attempts to provide clarity on these points: the reader is referred here to the dissertation itself. In addition to this, under current law some parties providing payments of a releasing nature are not (yet) entitled to recovery. From the principle put forward by the government in relation to recovery of First-party payments, or in any case from the way in which it is construed, broadening the right of recovery so as to include these parties follows logically, apart from the consequences for the volume of damages. The author discusses the desirability of a right of recovery in relation to municipal benefits and allowances under the Disability Allowances Act (*Wet voorzieningen gehandicapten*): payments tied to (wage) compensation rules; non-mandatory continued payment of wages by the employer; and supplementary benefits under the Allowances Act (*Toeslagenwet*). In the area of death-related loss, there are no rights of recovery for life insurers, pension funds and employers. Academics and practitioners alike call for a more transparent and more consistent and uniform set of mutual recovery rules. Unlike the mutual recovery rights of co-debtors, there is as yet no general theoretical framework for the recovery rights discussed here: what are their characteristics, how are they organised systemically and how do they relate to other rights (of recovery)? These points are discussed in the second part of this chapter. The most important conclusion is that, together, the recovery rights discussed here are a category in their own right, separate from recovery or other actions under civil liability law. According to the author, a prerequisite for the exercise of these rights is the *unilateral* civil liability of the wrongdoer. They may be defined as a statutory obligation owed by the person liable

(the wrongdoer) to reimburse all those who have footed the bill of the damage other than on the grounds of their own liability. The author advocates the introduction of a single uniform and general law of recovery, of which this aspect should be a part.

3. The Purposes of Recovery

Chapter 5: Historical Origins

The principle that the wrongdoer must pay for the damage he or she has caused is the key argument supporting the framework outlined here. However, it offers few concrete indications for possible questions of interpretation. It fails to address, for instance, such questions as the limits of recovery action taken against employers or family members of the injured person and the problem of priority if the recovery claim concurs with the claim brought by the wronged party. In order to involve the legal-political aims of recovery actions in providing an answer to such questions, the role of the principle must be further investigated. Attention is therefore paid in Chapter 5 to the historical origins of recovery rights. First, the background and development of the statutory recovery rights under discussion are outlined, from the old Accidents Act (*Ongevallenwet*) to more recent developments, such as the earlier referred to set of incentives introduced by the government in the recent past. A pivotal role is allocated here to the debate on the social significance under private law. Departing from the principle that he who causes damage, mustof recovery rights for social security insurers. The 'Peter-Paul' argument put forward by Bloembergen against a right of recovery for national insurers has weighed in heavily. In his view, the result of such entitlement will be that certain groups of insured pay premiums and subsequently their respective insurers seek recovery from each other, incurring high administration costs in the process. In consequence, the group benefiting from lower social security premiums would in large part coincide with the group carrying the burden through higher statutory liability premiums.

That such an effect will occur as a result of mutual recovery action taken by social security insurers seems convincing to a degree. From this it does not follow, however, that such recovery rights must be abolished. According to the author, the importance of the 'Peter-Paul' argument is that it pinpoints the debate on the question of whether it makes sense to have insurers incur costs for transactions that cancel each other out. The government has taken the view that the 'Peter-Paul' argument overlooks the allocating role of recovery: it serves to render the costs of the damage-causing act more visible. In addition to this, the government asserts that it values the aspect that revenues derived from recovery contribute toward its policy of easing the tax and premium burden. This reasoning does not convince the author. Although recovery may have advantageous budgetary consequences,

such advantages are only relevant to the Ministry of Social Affairs; the money, after all, has to come from somewhere. Furthermore, the government points at the importance of making visible the total extent of the damage caused by the wrongdoer (allocation). However, this is insufficiently supported by argument. What is more, it does not become clear why exposing the costs of damage-causing conduct is limited to making visible the costs of damage-causing *wrongful* conduct under civil liability law.

Chapter 6: Observing Fairness in Reallocating Loss

Chapter 6 deals with the purpose of recovery in the case of private and social security insurers, The principle that 'he who causes damage, must pay for it' is viewed from various angles. Recovery claims do not, either directly or indirectly through premium reduction, have an impact on the interests of the individual wronged party. However, reallocation of damage is also based on fairness. As regards the question as to who should bear the loss, the rules governing First-party recovery primarily aim at promoting fair assessment of the interests of the parties involved. They reflect a collective perception of what is fair, regardless of the quality of the parties invoking the rules.
A more common approach, however, is to examine the function or purpose of subrogatory and recovery actions from the perspective of wealth maximisation through a law-and-economic analysis of liability law. This approach seems to highlight the relevance of recovery for prevention: the level of care to be observed by a (potential) wrongdoer can only be maintained optimally, if that person is confronted with the overall costs accountable to him or her. An often-heard objection is that the costs of administering recovery actions are too high, but this can be called into question for a number of cases now. Recovery by private and social security insurers is mainly sought from Third-party insurers. In these cases, recovery has added value, in principle, in the sense that the potential wrongdoer's Third-party insurer is confronted with the overall costs of the wrongdoer's conduct, thus forming an incentive for the insurer to take measures which will reflect the costs of recovery in the premium, for instance, by charging risk-related premiums or premium adjustment. It is doubtful, however, whether these measures will suffice from an economic perspective. It is also possible that lump-sum collective settlements agreed between insurers negatively affect Third-party insurer's individual premium response. There is the danger that no or less accurate accounts are kept. Whereas prevention could clearly be an attractive effect of the establishment of liability through subrogatory or recovery actions, the author hesitates to view prevention as the key factor in broadening or, as the case may be, restricting liability. It is one thing to find an attractive effect, but another to promote such effect as the true goal of liability rules. Subrogatory and recovery rights should not be granted to First-party insurers for the sake of prevention alone. The added value of the law-and-economics approach is, however, that it provides an insight into

the positive and negative side effects of recovery on prevention. The more intrinsic function of recovery is found elsewhere, according to the author. Within the relevant statutory framework, civil liability law is a system of loss allocation on the basis of fairness. This satisfies a collective need for ensuring that the actual events and the violation of the applicable concrete norms of conduct will have an effect in law. Recovery puts a price tag on wrongful conduct; it is the response of the legal order to such conduct, thus contributing to a result that better satisfies our sense of justice, although not primarily at the familiar level of the individual damage claim.

4. The Liability Regime governing Recovery

Chapter 7: Norms of Civil Liability

Recovery is intended to reallocate losses on the basis of a collective sense of fairness in attributing liability. Viewed from this perspective, the principle that the person who causes damage, must pay for it, can be appreciated. However, in the event of recovery the principle is frustrated by the civil liability regime on a number of points. Chapter 7 is about the extent to which parties seeking recovery may invoke rules of civil liability law and the relevant legal constructions: subrogation or independent recovery, limited by the extent of the wronged party's claim (maximum damages). The connection to the nature and extent of liability, as determined by the maximum damages rule, may cause problems in the event of either subrogation or independent recovery. The bottlenecks in establishing civil liability and determining its extent are discussed here. In the stage in which civil liability for wrongful conduct is determined, not all grounds for civil liability may be invoked by those seeking recovery. The Temporary Recovery Rights Regulation (*Tijdelijke Regeling Verhaalsrechten*) seems outdated and the author advocates that it be abolished. However, caution must be taken here in picking the arguments for such abolition: that this is to result in inequality under the law is not a valid argument, in the author's view. An overriding objection is that abolition is at odds with the principle that the person who causes the damage, must pay for it. The significance attached to this objection depends, however, on the aim or function ascribed to the principle. The same norms should apply for determining the extent of the liability in the case of recovery as apply in actions brought by the wronged party against the wrongdoer (Chapter 6.1.10 BW). However, different rules do apply to recovery actions. In the case of recovery, special regimes govern contributory negligence, benefit deduction, mitigation, and damages for mental distress.

Chapter 8: The Legal Character of the Right of Recovery

Without exception, the premise is that the person who has caused the damage must not be brought in a more (dis)advantageous position as a result of recovery as he would have been placed in vis-à-vis the wronged party itself. In Chapter 8, the author explains how the special legal character of the right of recovery and the potential plurality of creditors are putting this premise under pressure. If the parties seeking recovery were to enjoy the same rights and powers as the wronged party, the wrongdoer would certainly be put in a more disadvantageous position in the event of recovery.
The author discusses the gross/net issue in detail. The judgments rendered by the Netherlands Supreme Court in the matter seem rather rigid. This holds true in particular for cases of temporary incapacity to work, in that courts tend to award claims on a net basis. A more flexible regime with respect to capping the amount of damages to be awarded were to be preferred. The position of private employers and the State as employer, also in view of the changing status of public servants in social security law, is met with criticism.
There is confusion over the prescription regime governing recovery. The author proposes a general regime for all recovery regulations, which would remove the one remaining objection against the decision by the Supreme Court. Other points of discussion are the regime for compensation of out-of-court costs incurred by parties seeking recovery; contributory negligence on the part of parties seeking recovery; and the factoring in of financial advantage enjoyed by the party seeking recovery. The reader is referred here to the relevant sections of the dissertation.

Chapter 9: Exercise of the Right of Recovery

Chapter 9 discusses a number of special issues that have raised questions in the light of the above. First, there is the actual exercise of the right of recovery. Recovery action must be efficient, without overlooking, however, the purposes for which recovery is intended. In order to reduce the administrative costs of bringing recovery claims incurred by First-party insurers, the applicable rules have been standardised and simplified. Recovery is now sought on the basis of agreements between social security insurers and Thirst-party insurers. A fine example is provided by the Recovery Law Agreement 2001 (*Convenant Verhaalsrecht*) and the less recent TICA agreement on recovery of social security benefits. Important arrangements have been made under these Agreements: claims for recovery will be settled out of court and tricky technical problems such as the gross/net issue have been resolved. The ordinary civil liability defences do apply here, in relation to, for instance, culpability, contributory negligence and prescription. The NORA arrangement also works well. The author is more critical about the tendency to settle claims through annual lump-sum deals. This is a recent development, which is backed by the government. In the author's view, the aim of submitting recovery claims

is more than enforcement of civil liability rules as such. It also requires concrete application of norms of conduct and the parties' awareness of these norms.
A second point that requires attention in relation to the exercise of the right of recovery is the availability of alternative civil liability actions beyond the limits of statutory recovery regulations, such as separate actions in tort. The author does not object to these, in principle, although such actions may be without their problems.