CONTRACTUAL AND NON-CONTRACTUAL OBLIGATIONS
IN ENGLISH LAW

Systematic analysis of the English law of obligations in the comparative context of the Netherlands Civil Code
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Systematic analysis of the English law of obligations in the comparative context of the Netherlands Civil Code

CONTRACTUELE EN NIET-CONTRACTUELE VERBINTEISSEN IN HET ENGELESE RECHT

Systematische analyse van het Engelse verbintenissenrecht in het rechtsvergelijkend perspectief van het Nederlands Burgerlijk Wetboek

PROEFSCHRIFT

ter verkrijging van de graad van doctor
aan de Rijksuniversiteit Limburg te Maastricht,
op gezag van de Rector Magnificus, prof. mr. M.J. Cohen,
volgens het besluit van het College van Dekanen,
in het openbaar te verdedigen
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Geoffrey Howard Samuel

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PREFACE

The aim of this book is to describe the systematic aspects of the law of obligations in the Common Law tradition in the comparative context of the Netherlands Civil Code. A central area of English private law is presented from the viewpoint of a jurist trained in the Continental tradition of Civil Law and the essential principles and internal logic of the law of obligations in the European tradition of the codified systems is compared with the structure, outlook and concepts of the English law of contract, together with associated remedies, and, in outline, the law of torts and quasi-contract.

Jac Rinkes produced Chapters four to eight, Geoffrey Samuel Chapters nine to thirteen; Chapter one to three, Chapters fourteen and fifteen, as well as the coherence of the book as a whole are the joint responsibility of both authors.

Jac Rinkes
Rijksuniversiteit Limburg
Geoffrey Samuel
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March 1992
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Jac Rinkes & Geoffrey Samuel
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XXIX
1 PRELIMINARY REMARKS

§ 1 THE ENGLISH LAW OF OBLIGATIONS

1. The term law of obligations is increasingly being used in England to describe the law of contract, tort and restitution and as a term of convenience it presents few problems. As a term of art, however, its fundamental connection to the Civil law Tradition gives rise to a number of problems for anyone who might want to employ it as an analytical tool within the common law tradition. For in Roman law and the modern Codes the idea of a law of obligations goes well beyond a mere category; it represents a central part of a coherent system of legal thought which actually makes rational sense only when related to all the other parts of the system. Accordingly unless the system as a whole is understood in all its implications some of the subtleties of the Continental notion of a law of obligations can easily be missed.

The point of this preliminary observation is not to play off one legal tradition against another - Civil law and Common law each have their own strengths and weaknesses. The observation is given simply as a warning. The term law of obligations is one of several Continental categories that legal theorists in England use in order to provide a bird’s eye view of the ground covered by private law or a model for the presentation of private law1 and the term is used in this survey for this purpose. It is also useful as a means of presenting a large chunk of the common law in a way that will make it digestible to Continental jurists and to students of law. However this survey will also suggest that on occasions it is not necessarily a suitable term for the English lawyer.

A second and more mundane remark which must be made at the outset of this survey of contractual and non-contractual obligations in English law is that space will not allow for a detailed treatment either of all the material that theoretically could fall within a law of obligations or of all the central constituent parts (contract, tort and restitution) themselves. The aim of the survey is to examine English law more from the position of a jurist from the Continental legal traditions. Thus the paradigm obligation and the central part of this survey will be the law of contract; the non-contractual obligations will be examined, but not in the depth that will convey their true richness. The only way in which the full richness of the common law can be appreciated is by recourse to the cases themselves.

1 Stein, p.125.
Finally, it must be observed that the comparisons with Continental legal systems are used in the context of the aim of this survey. Much attention is given to the Netherlands Civil Code, although the contents of the Code are not dealt with in full. The Netherlands Civil Code provides a systematic approach to the law of obligations. The drafters of the Code undertook extensive studies in comparative law and so the new rules and innovations in the Netherlands Civil law are influenced by comparative considerations. The Code, therefore, may provide for a satisfactory comparative context for the presentation of the English law of obligations.

2. The question of what it is to have knowledge of contractual and non-contractual obligations in the common law is by no means an easy one and not just because the term common law is ambiguous in itself. It is difficult because the question of when one person can obtain against another person a legal remedy raises a complex issue of how the law is applied. Is it a question of knowledge of a rule which will then be applied to the factual situation in hand? In other words, is knowledge of the law simply a question of learning legal propositions (rules and principles) together with logic? Or is it also a question of knowing a mass of particular factual situations which can then be used to aid problem-solving in law? Several cases suggest that knowledge of the law is also a question of knowing factual situations which give rise to a remedy. But what does this mean? In liability questions, following Lord Oliver perhaps the most that can be attempted is a broad categorisation of the decided cases according to the type of situation in which liability has been established in the past in order to found an argument by analogy. Lord Oliver is referring here to a duty of care problem, but is his methodology of more general application? Could it be said that the whole of the law of tort is a matter of reasoning by analogy? If so, this would suggest that legal reasoning and legal knowledge is not a matter of just learning legal rules; it is a matter of knowing a range of factual patterns. It is a matter of comparing the facts of the problem in hand with those of the precedents. However the problem with this approach is that it is seen as belonging to the past and not only in general scientific thinking, but also, specifically, in English law in that it is associated with the days of the forms of action. English law is


4 Caparo Industries v Dickman [1990] 2 AC 605, 635.
said to have buried this kind of approach. The modern approach is one in which the courts are supposed to look at the substance of legal complaints and not to their form. Legal actions are no longer determined by their form but by their causes. In Continental thinking these causes are focused around a person’s legal rights, legal remedies being a second matter belonging to the law of procedure (ubi ius ibi remedium); in turn these rights are defined in terms of systematised codes of legal propositions. Learning the law accordingly consists of knowing these propositions and applying them via syllogism. Furthermore, in Continental law procedural rules are contained in separate codes of procedure.

3. That said, however, the main objective of this book is to describe as systematically as possible the English law of obligations in the context of the structure, outlook and concepts of the Netherlands Civil Code, probably the most modern Civil Code in the codified systems. In other words, the comparative context for structuring the English law of obligations will be derived mainly from this Code. This survey is not based on the praeumptio similitudinis of both the English and the Netherlands law of obligations, but is set out as a reflection on legal thinking and legal reasoning in respect to the notion 'law of obligations' in both English and Netherlands private law in the perspective of a European ius commune. Within this context, one of the subjects of this book is the question whether the Common Law approach to the law of obligations is substantially different from the approach the Netherlands legislator has adopted. Much attention will be given to English case law, although the cases will not be discussed in full.


The (new) Netherlands Civil Code is subdivided as follows:

Book 1. Law of Persons and Family law (including the law of matrimonial property);
Book 2. Juristic (Legal) persons (Companies, etc.);
Book 3. Patrimonial law in General (provisions applicable to all subsequent books);
Book 4. Law of Succession;
Book 5. Property and Real Rights (Rights in re);
Book 6. General Part of the Law of Obligations;
Book 7. Specific Contracts (Sale of Goods, Agency, insurance law, etc.);

Originally, a Book 9 on the Law of Intellectual Property was envisaged. This project has been abandoned8; Books 1 and 2 have been in force since 1970 and 1976 respectively and Books 3, 5 and 6 have entered into force on January 1st, 1992. The revision of the Law of Succession (Book 4) is not yet ready. The (old) Civil Code provisions of the law of Succession are for the time being incorporated in the Civil Code in Book 4. Parts of Book 7 (including Sale of Goods and Agency) have entered into force on January 1st, 19929. Book 8 has been in force since April 1st, 1991. As of January 1st, 1992, the remaining provisions of the (old) Civil Code which have not yet been revised are incorporated in Book 7A, comprising several specific contracts which were regulated in the (old) Book 4 of the Civil Code of 1838 such as maatschap (partnership), overeenkomsten tot het verrichten van arbeid (employment contracts) and huur en verhuur (landlord and tenant law).

The system of the Netherlands Civil Code still reflects the systematic approach found in the Institutes of Justinian10, although not as much as the Netherlands Civil Code of 183811 (now revised). In this survey, only a very small part of the systematic Netherlands law of obligations is presented, focusing on general rules and concepts.

7 See Haanappel & Mackaay, p. XV. Sections (articles) of the books mentioned are presented as [Book]:[section], e.g. s. 6: 162 (section 162 of Book 6). The books are subdivided in titels (titles) and afdelingen (subtitles, divisions). Subtitles or divisions are presented as [Book]:[Title]:[Subtitle], e.g. s. 6.1.11 (subtitle 11 of Book 6, Title 1); Title 3.11 means Book 3, Title 11.
8 It is doubtful whether the project for Book 9 will be reviewed. The subject matter concerned (in part imbedded in international law) is not suitable to be incorporated in full in a codification of private law, cf. Mon. Nieuw BW A-1 (Hartkamp), p.25.
9 J de Boer, Uitvoerige wetgesciedenis van Boek 7 Nieuw Burgerselijk Wettboek, WPNR 5982.
10 Feentra, p. 12.
11 Cf I Kleih, Structure of the Netherlands civil code, in: Introduction to Dutch law for foreign lawyers, (Deventer, 1978), Ch. 6.
5. The influence of EC-law on the law of obligations is rapidly increasing. In the area of product liability and - in the near future - product safety, supply of services\textsuperscript{12} and unfair contract terms in consumer contracts, EC-law will provide new rules and concepts. On May 26, 1989, the European Parliament adopted a draft resolution regarding the development of a (uniform) European private law\textsuperscript{13}. In this respect, the findings of the Commission Lando can play an important role\textsuperscript{14}. However, important as these developments may be, the aim of this survey does not allow full treatment of the implications of EC-law for the future of the (European?) law of obligations\textsuperscript{15}. And the question whether - apart from political problems - a truly uniform European private law might be a realistic proposition will not be discussed\textsuperscript{16}. Nevertheless, the perspective of a European \textit{ius commune} cannot be disregarded when discussing systematic aspects of the law of obligations in England and the Netherlands. \textit{Auslandsrechtskunde}\textsuperscript{17} may be the threshold of comparative law\textsuperscript{18} but the appreciation of the differences of the legal families in Europe should nowadays be set in a different context. Thus, the comparative aspect of this survey is implicitly aimed at the search for a foundation of a European law of obligations.

\textsuperscript{12} Cf. Europe Agency nr.5589 and 5591, see \textit{Tijdschrift voor Consumentenrecht} 1992, p.19-20 (HAG Temmink).


\textsuperscript{16} See e.g. JHA Lokin & WJ Zwaal, \textit{Hoofdstukken uit de Europese Codificatiegeschiedenis} (Groningen, 1986), p.362-363 and FJA van der Velden, o.c., p.28.

\textsuperscript{17} M Rheinstein, \textit{Einführung in die Rechtsvergleichung} (München, 1987), p.22.

\textsuperscript{18} See in this respect GR de Groot, \textit{Vergelijk allet en behoudt het goede} (Deventer, 1989), p.3-4. And see ThM de Boer, \textit{Vergelijkendoorwijs: de inspiratie van buitenlands recht}, WPNR 6033 (1992), p.39-48. Behalve door taal, materiaal, tijd en soortelijke \textit{faits accomplis} die de reikwijdte van het onderzoek beperken, wordt de keuze van de te onderzoeken rechtsstelsels voornamelijk bepaald door het doel van de vergelijking (p.46); De Boer is geneigd de rechtvergelijking vooral te gebruiken om het eigen recht een spiegel voor te houden: in de weerkasting van buitenlands recht komen eigen oplossingen in een nieuw licht te staan, waarin hun verdiensten en tekortkomingen zich scherper aftekenen en mogelijkheden tot verandering en verbetering zichtbaar worden.
§ 2 FORMULATION OF THE THESIS

6. This book deals with the structure, outlook and concepts of the English law of obligations in comparison with the systematic structure of the law of obligations in the Continental (European) codified systems. In this respect, much attention will be given to the systematic aspects of the (new) Netherlands Civil Code, perhaps the most modern codification of private law.

Traditionally, one of the main obstacles to assimilation of Common Law and Continental legal systems is rooted in the difficulties the English law of obligations presents to foreign jurists. The Civil Law tradition has provided the European jurist with the notion of a system of rules logically and coherently arranged, especially in the law of obligations. The law of obligations does not exist in form in English law, although the term itself is often used as a model for the presentation of English private law. The main thesis of this book is that the absence of a general theory of obligations and of rights in English legal science is not necessarily an obstacle for the rapprochement between English law and the codified systems. The systematic and post-axiomatic approach that the Netherlands legislator has adopted in the Netherlands Civil Code indicates that logic and hierarchical consistency of the law of obligations are no longer ends in themselves when it comes to applying this area of law to real life factual situations. The Netherlands Civil Code has an 'open' structure and contains many open-ended rules and 'vague' norms. Therefore, the image of the judges as les bouches qui prononcent les paroles de la loi, determining the facts and finding the law through syllogism based on rigid statutory provisions is disappearing. The interpretation of the rules of law in the Netherlands law of obligations is to a great extent case-orientated (ius in causa positum) and no longer exclusively based on abstract statutory rules, generally formulated.

The need for argumentative legal reasoning in legal doctrine and in case law is undisputed; however, the theoretical basis for such legal reasoning should be debated. The Common Law has developed and perfected, via the actio (forms of action), a legal science based on the semi-concrete science of empirical experience. This book will indicate that the Common Law of obligations is perhaps capable of being reduced to a systematic set of legal propositions and legal institutions even if this system is by no means coherently developed in terms of a strict logic and hierarchical consistency between legal subjects and legal objects. Therefore, it will be argued that the absence of a general theory of obligations and of rights in English legal

19 See e.g., Cooke & Oughton, p.41-45.
20 Cf. Ch. 15.
24 Cf. Ch. 15.
25 On which see generally, Sacco.
science is, in effect, not necessarily an obstacle to the rapprochement mentioned, and legal doctrine should focus on the systematic and dogmatic aspects of legal reasoning determined by the rules and facts of law as well as by the values, motives and goals of the jurist applying the law.

7. Whether a more systematic legal science, at some future date, might emerge in the Common Law of obligations is uncertain. The necessity of such a development in the context of the convergence and divergence of the Civil Law and the Common Law and the Europäisierung der Rechtswissenschaft is questionable, even assuming that jurists succeeded in developing a truly European and transnational legal science. Legal traditions should not be played off against each other - Civil law and Common law each have their own strengths and weaknesses - and appreciation of the differences of the legal families in Europe at the level of l'esprit scientifique could lead to a common discours scientifique that, in its turn, could provide suitable ground for further exploitation of 'European private law' in the context of the influence of EC-law. Coing has defended the need for European legal science, stating that the harmonizing influence of EC-law and of other international developments, important as it is, will not be sufficient for a legal doctrine capable of solving all problems European lawyers will encounter in the near future. In Coing's opinion, European legal science is not impossible: all European legal systems are pervaded by the basic values of the European culture and, since the 19th Century, have been submitted to similar developments in economic and commercial law. National private law is influenced by uniform international private law, EC-law (harmonizing private law in the Member-States) and indirectly by the need to interpret national private law in conformity with EC-law, whenever substantive EC-rules are involved. Apart from this, contemporary problems such as consumer protection are common to all European legal systems. In this respect, the role of comparative legal science is very important, especially from an epistemological point of view.

In the context of the thesis of this book, the relationship between substantive law and civil procedure in the Common Law and Continental Legal systems is important. The emphasis of English law is as much on the nature of the legal action as upon the right. This means that the role of the judge in the English law of obligations is not so much one where he must categorize the facts to apply the law, but one where he must decide, after the parties themselves have categorized the facts, whether these facts disclose a cause of action which will generate the remedy claimed. In the Civil Law

26 H Coing, Europäisierung der Rechtswissenschaft, NJW 1990, S.937-941.
29 See generally, Sacco. The epistemological perspective of comparative legal science will be discussed in Ch. 15.
tradition, the distinction between the rules of civil procedure and the substantive rules applicable is dogmatic and apparently rather rigid. Nevertheless, when dealing with, for instance, the distribution of the burden of proof and the way the de facto situation is judged, the interaction between the rules of civil procedure and the substantive rules applicable in the Continental law of obligations is easily underestimated. The Common law and the Civil Law systems seem to be converging when it comes to the relevance of facts in legal reasoning. In the context of this book, the role of the judge vis-à-vis the facts stated by the parties in civil proceedings will be discussed, comparing English and Netherlands legal doctrine.

8. Legal reasoning and legal categories in both the Common Law and the Civil Law systems present complicated questions when dealing with the systematic structure of the law of obligations. An alternative approach to rights and interests could be found in the use of 'meta-category'-concepts such as 'duty' and 'obligation'\(^\text{30}\). Technical rules are vital to an understanding of the law of obligations, but these rules must often be understood in a wider category context, combining legal reasoning with legal technics. These questions will be raised not so much to enter upon a discussion of the relationship between law and philosophy or law and economics as to show that even in the Common Law it is not possible to escape from the role of legal categories in legal reasoning.

This book is set out as a reflection on legal thinking and legal reasoning in respect to the notion 'law of obligations' in both English and Netherlands private law in the context of the development of a - possible - European *ius commune*\(^\text{31}\). The importance of comparative law in general and of foreign legal materials when studying the law as it develops is undisputed in the perspective of a European legal science. In this respect, a bias in comparative law towards the law of obligations may contribute to European legal science: for in the law of obligations, the influence of EC-law is

\(^{30}\) These categories are not statutorily defined in the Netherlands law of obligations, cf. nr. 55. The implications of theoretical concepts such as 'duty' and 'obligation' in the English law of obligations will be discussed in Ch. 14 and 15.

\(^{31}\) Harmonization of law is not - and should not be - an aim in itself; therefore the question whether a European *ius commune* is desirable in the context of the single market cannot easily be answered, cf. R. Buxbaum & X Hopt, *Legal harmonization and the business enterprise revisited*, in: *European Business Law* (Berlin - New York, 1991) p.411: *The diversity within the legal regime of a European Community, a diversity of history, language, Lebensweil, and system, is greater than the diversity within the legal regime of that civil society known as the United States. Values and goals of peace, prosperity, liberty, equality, mutual tolerance, and openness to the 'external' world are expressed, inter alia, in law. Whether harmonization or divergence of particular laws serves these goals, however, is an issue as specific as it is critical [...] there is no single solution to that problem.*
substantial. And the inroads EC-law makes into the national law of obligations will inevitably lead to further harmonization in the context of comparative law. Some issues of comparative law such as the question of constitutionalisation of private law are not explicitly dealt with. And while dealing with the systematic structure of the English law of obligations in comparison with the Netherlands Civil Code, this book will not focus primarily on formal rules, institutions and procedures but on legal reasoning in the English law of obligations in the comparative context of the Netherlands Civil Code.

As to the method adopted in this book we should like to adhere to Coing’s remark that the study of foreign legal systems should preferably start out from legal methodology, case-orientated analysis and legal reasoning.

32 Cf. the Preliminary remarks; notwithstanding the importance of other branches of the law, cf. Markesinis, o.c., p.20.
33 The recent Francovich and Boniacci v Italy case (Court of Justice of the European Communities November 18, 1991, case C-6/90 and C-9/90) illustrates the influence of Community law on national legal systems. The court holds that Il a lieu de rappeler tout d’abord que le traité CEE a créé un ordre juridique propre, intégré aux systèmes juridiques des États membres et qui s’impose à leurs juridictions, dont les sujets sont non seulement les États membres, mais également leurs ressortissants et que, de même qu’il porte des charges dans le chef des particuliers, le droit communautaire est aussi destiné à engendrer des droits qui entrent dans leur patrimoine juridique; ceux-ci naissent non seulement lorsqu’une attribution explicite en est faite par le traité, mais aussi en raison d’obligations que le traité impose d’une manière bien définie tant aux particuliers qu’aux États membres et aux institutions communautaires; and that, ainsi qu’il découle d’une jurisprudence constante, il incombe aux juridictions nationales chargées d’appliquer, dans le cadre de leurs compétences, les dispositions du droit communautaire, d’assurer le plein effet de ces normes et de protéger les droits qu’elles confèrent aux particuliers. Furthermore, it y a lieu de constater que la pleine efficacité des normes communautaires serait mise en cause et la protection des droits qu’elles reconnaissent serait affaiblie si les particuliers n’avaient pas la possibilité d’obtenir réparation lorsque leurs droits sont liés par une violation du droit communautaire imputable à un État membre. Therefore, the droit communautaire impose le principe selon lequel les États membres sont obligés de réparer les dommages causés aux particuliers par les violations du droit communautaire qui leur sont imputables. See the Proceedings of the Court No 20/91, p.4-10 and A Baras, Damage against the state for failure to implement EC Directives, New Law Journal November 22 1991, p.1584-1585/1604.
34 Markesinis, l.c.
36 Coing (1990), p.940: Es müssen die juristischen Methoden studiert werden, welche in den einzelnen Ländern vorherrschen (...). In diesem Zusammenhang ist es notwendig, nicht nur die in der Wissenschaft vorherrschenden Methoden...
Our hope is to have produced a book which can contribute to this goal in that especially legal methodology and legal reasoning in both the Common law and the Civil law will be discussed. The importance of case-orientated analysis should not be underestimated but in the context of the Netherlands Civil Code this survey focuses first and foremost on methodological and theoretical aspects of the English and Netherlands law of obligations. In this, we hope to appeal to Continental lawyers interested in the Common Law, to Common lawyers interested in the codified systems and to anyone interested in acquiring legal knowledge in the context of a European legal tradition, or perhaps even a European *ius commune*.

2 INTRODUCTION

§ 1 GENERAL REMARKS

9. The Continental jurist who tries to understand English law through the genera and species framework of the Institutes of Justinian, which has characterised the ius civile from Gaius to the modern Codes, will end up both encouraged and frustrated. The jurist will be encouraged both by the existence of the species of contract, tort and quasi-contract and by the use of the generic term law of obligations by some senior judges. But the jurist will become very frustrated if an attempt is made to locate these species and the genus within a coherent and logical framework of rights conforming to the traditional pattern of iura in rem and iura in personam legal relationships. English law simply does not think in terms of rights (les droits subjectifs) nor does it even have a coherent notion of the distinction between rights and interests.

There are a number of reasons why English law refuses to conform to the logic of the Civil Codes. First, and most obviously, because English private law has not been codified; it is, like French administrative law, an area of caselaw. However this is really only part of the problem. A more basic difficulty is that the common lawyer has historically thought more in terms of remedies rather than rights and the reason for this is that, unlike the Civilian systems, the common law never progressed to an axiomatic stage of legal science. It remains rooted in an inductive stage and thus even today the nature of the claim can be of the utmost importance (cf. Ch. 2 § 5).

A second reason is that there has never been a clear distinction in English law between actions in rem and in personam. English judges have, like the old Roman jurists, looked for their answers to legal problems in the 'circumstances of the case' (in causa ius esse positum) viewed in the context of their own previous decisions (stare decisis). But these previous decisions

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1 See e.g., Mosch v Lep Air Services Ltd [1973] AC 331, 346 (Lord Diplock).
3 See e.g., P Banda, Administratief procesrecht (Zwolle, 1989), p.12.
5 Zimmermann, pp.xi-xii.
have been guided by a selection of remedies that have not been shaped by the
Roman forms of action. English lawyers traditionally thought more in terms
of trespass and debt than in terms of a set of remedies which rigidly
distinguished between real and personal relations and this has resulted in a
system of remedies which at one and the same time use ideas from the law of
property and the law of obligations.

A third reason is that the distinction between substantive law and legal
procedure is not so clearly drawn in the English legal process as it is in the
Continental systems (cf. Ch. 3). Whether or not a plaintiff is entitled to a legal
remedy can sometimes be influenced as much by the way a case has been
presented - that is to say it can turn on the presentation of evidence and
nature of the action - as by any pre-existing substantive legal relationship or
legal rule. And thus in order to understand the functioning of a law of
obligations in England it is always necessary to consider, at one and the same
time, rules which in Continental law would be separated into codes of rights
and codes of procedure. English legal method, in other words, consists as
much in knowing how to sue as in knowing what are the legal rights of the
client.

This distinction between knowing how and knowing what, when put
alongside the other points of difference between the Common law and Civil
law, itself provides a central focal point for examining the notion of a law of
obligations in that it raises a question about legal science and legal knowledge.
In the Civil law tradition the law of obligations is no longer a matter of
procedural knowledge but is now very much a question of declarative or
propositional knowledge; property rights (iura in rem) are to be clearly
distinguished from personal rights (iura in persona). If such a dichotomy is
not recognised in the Common law this gives rise to a general question that
will always be just beneath the surface of any discussion of Common law and
Civil law. If English law uses a scientia iuris that is quite different to the one
to be found in the Civil Code is there really much point in attempting to
make the categories and concepts of English law - categories and concepts
forged in the world of practice rather than in the university - conform to the
logic of the Civilian mind?

10. Perhaps this general question can be put into a more specific context.
A better understanding of the English law of obligations from a comparative
perspective inevitably leads to the question whether the pursuit of a set of
general principles of European contract law is a realizable objective. The

7 Milson, p.263.
8 See e.g., Ward v Tesco Stores [1976] 1 All ER 219.
9 See e.g., Esso Petroleum Co Ltd v Southport Corporation [1954] 2 QB 182
(CA), [1956] AC 218; Rigby v Chief Constable of Northamptonshire [1985] 1
WLR 1242.
10 Cf. Ch. 11 and 12.
discussion about a European *ius commune* traditionally draws a distinct line, dogmatically and rigidly, between the Common law and the Continental legal systems\(^{11}\). Apart from the obstacles to assimilation of Common law and Continental legal systems, three basic developments can be recognized in European contract law\(^{12}\). First, and most basically, the national private law systems in Europe present the framework for the development of a European *ius commune*. Secondly, European legal developments (harmonization and unification) set bounds to the development of national private law. The importance of the single European market is clear; legal developments which are not in conformity with European law (EC-Directives, etc.) will ultimately lose their momentum. Thirdly, the interaction between national private law and European law will, in the end, lead to new perspectives for the development of European private law\(^{13}\). In this respect, it should be noted that Community law regulates a conglomerate of reciprocal rights and duties between the Community and its subjects, being either States or private natural or ‘legal’ persons, or between these subjects *inter se*.

Among the many interesting developments in this field are the Convention on the law applicable to contractual obligations (Rome, 1980) and the Civil Jurisdiction and Enforcement Convention (1968). The Convention on the law applicable to contractual obligations, albeit in part a codification of private international law in regard to contractual obligations, will contribute to the unification of European procedural and private law\(^{14}\). And the Convention on jurisdiction and enforcement of judgments in civil and commercial matters is a *sui generis* element of Community law\(^{15}\). Be this as it may, the main objective of this present work is to illustrate that, despite obstacles and diverging ideas about the desirability of a possible European *ius commune*, the relevance of comparative law and the perspectives that foreign legal materials can offer can hardly be overestimated when studying the law as it develops\(^{16}\), for the search for a *ius commune* involves an appreciation of what it is to have knowledge of a European law of obligations. The development of European private law within the framework of the EC Treaty


\(^{16}\) GJW Steenhoff, *Naar een Europese privatrecht?* Impulsen vanuit de rechtsvergelijking, in: Recht als norm en als aspiratie (Nijmegen, 1986) p. 101; and see *Law Commissions Act 1965* s.3(1)(f).
and the Single European Act\textsuperscript{17} based on the concept of a common market as defined by the Court in a consistent line of decisions involves the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market\textsuperscript{18}. From a comparative perspective, [enthalten] gerade die Zivilrechtsordnungen einen hohen Anteil an gemeingültigen Doktrinen und Problemlösungen, die in die strukturschiedlichen kontinentalen und angelsächsischen Rechtsumassen als Grundvorschriften eingegangen sind. Daher ist das Privatrecht mit diesen Teilen eine bevorzugte Requisitenkammer für die Entwicklung des öffentlichen Rechts, und eben das ist auch im Völkerrecht der Transformationsgrund\textsuperscript{19}, albeit that the obstacles presented by structural differences in manifestation seemingly dictate eine teleologische Vergleichung der prästrukturellen Prinzipien [Ideen]\textsuperscript{20}. However problems of legal science should be addressed (cf. Ch. 15) before endeavouring a teleological analysis of doctrines and legal solutions in different legal systems. Thus, it should be stressed: [that] ... übernommen werden nicht zufällig übereinstimmende Einzelrechtsätze der nationalen Rechtsordnungen, sondern den nationalen Einzelrechtsstätzen zugrunde liegende abstrakte Rechtsprinzipien, die als Ausdruck der Gerechtigkeit in jeder Rechtsordnung und damit auch im Völkerrecht gelten müssen. Solche abstrakte Rechtsprinzipien sind etwa pacta sunt servanda, Treu und Glauben, der Gedanke des Ausgleichs von widerrechtlichen Schäden und ungerechtfertigten Bereicherungen, die Grundsätze der Rechtshändigigkeit und der Rechtskraft, der Vertrauenssicher und die Rechtssicherheit. Furthermore Juristen der verschieden Mitgliedstaaten der Europäischen Gemeinschaft reden häufig einander vorbei, weil die Grundlagen der Rechtsordnungen verschieden sind\textsuperscript{21}.

§ 2 HISTORICAL CONSIDERATIONS

11. The difficulties the English law of obligations presents to foreign jurists are, as should be evident, rooted in the particular history of the common law and it is impossible to understand any modern aspect of English law without some appreciation of these historical factors. Unlike the Continental systems, English law was not a system that developed rationally in the university law faculties where professors always had close hand a copy of the Corpus Juris Civilis. It was a law of practice, conceived and born during the era of feudalism. Thus in its formative period the common law was structured

\begin{itemize}
  \item[18] See Pellis, o.c., p.373 fn. 5.
\end{itemize}
around two empirical focal points - land and procedural practice. This procedural practice was, in turn, determined by a centralised royal system of justice which used administrative writs, rather than rationalized categories, to determine the forms of legal action. These writs, originally, were little more than models of sets of facts to which a plaintiff had to match the facts of his own complaint in order to succeed; if they did not match then he had no action.

With the decline of feudalism these focal points became more diffuse; but they did not disappear in that the common law continued to think in terms of property and procedural forms of action. New 'rights' only became recognised as a result of gradually expanding remedies (actions on the case) and notions of property (trespass). The way in which these remedies were expanded was by means of analogy: if the structure of the facts in the plaintiff's case matched the structure of the model then an action might be available 'on the case' so to speak. Epistemologically speaking the common law was preparing itself to move from a descriptive to an inductive stage of legal science (cf. Ch. 15 § 4).

This expansion was helped considerably by the rise of the Court of Chancery which not only injected new remedies into private law (cf. Ch. 4 § 3) but established a separate system of law known as Equity. This separate system was to exist independently of the common law until 1875 and even after this date the two systems were fused only at the level of procedure. All the same Equity opened up a channel by which Romano-Canonical ideas and procedures could find their way into English law; and by the eighteenth century English private law was open to more formal influences from the Continent. These influences, as we shall see (cf. § 4), were relatively strong in the mid-nineteenth century and, accordingly, this period is central to an understanding not only of the modern English law of obligations, but also of any epistemological basis upon which a new ius commune might be developed (cf. Ch. 15 § 6).

12. The revision of the Netherlands Civil Code has taken a considerable amount of time (from 1947 onwards). Hartkamp has described the processes that, ultimately, have led to the revised Civil Code; the outdated old Civil Code had been adapted on a number of socially weighty subjects but a total adaption of the law of property and of the law of obligations to modern standards - general revision - was unsuccessful until recently. Gaps in the

22 Milsom, pp.82-88.
23 Milsom, pp.33-36.
24 Milsom, pp.79-81.
26 Zimmermann, pp.554-556.
development of private law were filled by partial changes, by separate statutes, and for the greater part, by judge-made law. As Hartkamp points out, the Netherlands law of delict (unlawful acts) was almost entirely created by the courts.

13. One of the advantages of this time lapse (1947-1992) was the possibility of interaction between the drafts and judge-made law especially of the Hoge Raad, the Netherlands 'Cour de Cassation', assisted by legal science. The drafts influenced judge-made law; and court decisions compelled the legislator to reconsider proposals and newly developed ideas. Furthermore, legal scholarship paid much attention to the drafts: Hartkamp holds that 'the coming into existence of the revised Civil Code of the Netherlands may well be called a common effort of the Netherlands legal community as a whole'.

In the English legal system judges still determine or interpret what the law is and the influence of English legal scholarship on legal concepts and on the theoretical development of the law is quite modest (cf. Ch. 15 § 1). The importance of doctrine seems, however, to be increasing despite legal traditions. In the Netherlands, Schoordijk is one of the most distinguished scholars pleading for an innovative and creative role of legal doctrine.

Of course the influence of legal doctrine on the development of the law in England is different from the Continental legal systems; but even on the Continent, where the whole tradition of law is bound up with the university law faculty, la doctrine is not beyond controversy. Von Savigny describes in his System I § 14 Juristenrecht under the heading wissenschaftliches Recht: Wer das Recht zu seinem Lebensberuf macht, [wird] durch seine größere Sachkenntnis mehr als Andere auf das Recht Einfluß haben. Koschaker

31 See also W Snijders, Schoordjks vermogensrecht in het algemeen naar Boek 3 en de vrijheid van de exequat, NJB 1987, p.1315-1318.
32 See H Kötz, Scholarship and the courts: a comparative survey, in: Comparative and Private International Law, Fs 3H Merryman (Berlin, 1990), p.183-195; examining what we, if any, is made by the courts in selected legal systems of legal doctrine as a source of arguments and ideas, as a restatement of the law as it stands, or as a mine of proposals about how the law should be (p.184).
Kötz conclusion (p.195-196) is that further research is necessary, taking into account a great number of factors including the social prestige of legal academics and their role in legal education (better read when dead?).
34 Von Savigny, o.c., p.49.
condemns this classification as 

wenig glücklich35. Although von Savigny is not implying that legal doctrine is a specific attribute of the law, and thinks of legal scholars as Träger der Rechtsentwicklung und Rechtsfortbildung, Koschaker would like to stress more strongly that legal scholars can never make law themselves. This observation is, of course, justified but the revision of the Netherlands Civil Code gives support to the opinion that legal doctrine should not be underestimated as an important factor in the modern law-making process. If one chooses to describe the development of the law from the perspective of the different legal actors, searching for the 'maker of the law',36 in a specific period, the coming into existence of the Netherlands Civil Code endorses the view that the development of the law towards a unified and uniform legal system is nowadays closely connected to the interaction between the different groups of lawyers practising the law. In this respect, modern codification bypasses the question as to which group of legal actors is the most influential, a question historically bound up with the development of the state itself37.

It would be going too far, however, to state that the Civil Code revision as such was beyond controversy38. Many lawyers advocated the abandonment of the project, leaving the law to develop as it might. Nevertheless, the Netherlands Civil Code is regarded as a lucid and flexible 'restatement' of private law in the Netherlands. Transitory law39 and anticipatory interpretation of the law by the Hoge Raad40 will, no doubt, facilitate the adaption of the legal community to the changes made by the Netherlands legislator. The revision of the Netherlands Civil Code focuses on the increasing certainty of the rule of law which can be derived from a systematic and modern codification of civil law41.

37 Spoormans & Jettinghof, p.332.
39 See WPNR (1991) 6007 and RS Meijer e.a., Capita Overgangsrecht NBW, predixiezen, uitgebracht voor de Vereniging voor Burgerlijk Recht (Leiden, 1991). Transitory law is regulated in a special Act, the so-called Overgangswet nieuw Burgerlijk Wetboek.
41 Mon. Nieuw BW A-1 (Hartkamp), p.10-13; Hartkamp argues (p.13) that partial revision and judge-made law cannot replace the advantages of total revision of the Civil Code when it comes to certainty in the law. In his opinion, a consistent rule of law can only be reached through clearly arranged statutory rules. And the legislator can (and should) address the problems of civil law in
The rôle and importance of the judges in interpreting the law will not be diminished under the new Code. The Code contains many 'open' rules together with open-ended concepts, and one of the most important of these in respect to the law of obligations is the role of *bona fides* (rules of good faith, *redelijkheid* en *billijkheid* as the Code labels it) in legal relationships. In view of these essential features of the revision of Netherlands private law, the revised Civil Code provides a systematic description of the law without rigid or positivistic elements (cf. Ch. 5 § 1). New developments in the law such as consumer protection are for the greater part integrated in the new Code, but projects like the French *Code de la consommation* (Commission Calais-Auloy) are not envisaged; consumer protection is an essential part of the new Civil Code.

§ 3 CAUSES OF ACTION

14. Blackstone’s *Commentaries on the Laws of England* (1765-70) form the most important landmark of eighteenth century Continental influence on the common law. These commentaries were, quite simply, an analysis of English law along the lines of Justinian’s *Institutes*. As such they laid the foundation for conceiving English law as a system of subjective rights rather than objective remedies and this made the common law more adaptable to the commercial reforms that Lord Mansfield was initiating during the same period. By the nineteenth century the traditional forms of action were appearing increasingly unsuitable for the new industrial age, and there was pressure to move to a system of causes of action where it would be sufficient for a litigant simply to plead in his statement of claim the facts.

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42 See AS Hartkamp, *Westwetleg en rechtstoepassing na de invoering van het nieuwe Burgerlijk Wettelijk Wetsboek* (Deventer, 1992), p.24-26: the existing legal doctrine in the Netherlands in respect to the freedom of the judge vis-à-vis the codified Civil law is confirmed in the texts themselves and in the commentaries. Nevertheless, the freedom of the judge should be set in a different context because the Netherlands Civil Code has explicitly accepted the principle that the judge can set aside - on the basis of unwritten rules of law - any contractual or legislative provisions applicable to the relationship between the parties to a contract (see also nr.32).


45 Aliysh, *Rise and Fall*, pp.120-124.

The change from a system of forms of action to a system of causes of action was not, however, achieved by means of a codification of rights. It was achieved by legislative action aimed at procedural reform. By no longer insisting that a procedural label - 'debt', 'trespass', 'case', 'nuisance' or whatever - had to be attached to the plaintiff's claim from the outset, the way was open for an approach which looked to the substance of an action within a generalised procedural form. Facts were increasingly required to be categorized in terms of their cause rather than in terms of their form.

15. The basis of a cause, as opposed to a form, of action is to be found in the nature of the concepts used by jurists. In a system of forms of action the emphasis is on concepts geared to knowing how to sue rather than to knowing what is the law applicable to this particular factual situation. In other words the emphasis is more upon the pleadings and the way the case is presented than upon any inherent normative situation arising out of the facts themselves. Thus in the early part of the nineteenth century, before the great procedural reforms, much of the law of obligations was simply 'haphazard'. With the abolition of the forms of action the emphasis shifted to concepts reflecting a more normative system of legal thought. This, it must be said, did not entail an abandonment of the ex facto ius oritur approach; but it did involve the use of concepts such as fault, promise and damage which are, at one and the same time, both descriptive and normative (cf. Ch. 15). Accordingly, although a cause of action, like the old form of action, might be "used as a convenient and succinct description of a particular category of factual situation which entitles one person to obtain from the court a remedy against another person", the concepts themselves belong to a system of knowledge that is rather different from that associated with the forms of action.

In fact the change created a number of difficulties. In particular, owing to there being no university tradition of legal rationalization in England, categories from the Continent had to be imported in order to give a semblance of organization to a mass of case law which had been arranged around formal remedies. The remedial categories of 'debt' and 'damages' found themselves replaced by the substantive categories of 'contract' and 'tort'. Yet such a transformation did not always work smoothly. Some debt actions, and many damages claims, could not be accommodated by 'contract'; and while the non-contractual damages actions could be put under the general rubric of 'torts' (cf. nr. 61), the non-contractual debt claims proved - and are still proving (cf. nr. 158) - troublesome.

47 Common Law Procedure Act 1852 s. 3.
49 P Dubouche, Sémiotique juridique: introduction à une science du droit (PUF, 1990), pp.144-145.
51 Weir, Complex Liabilities, para.67.
Moreover contract itself suffered from playing host to two quite different forms of action. The action for damages founded upon breach of promise (assumptio) was, historically, an action founded upon a wrong: the action for debt, on the other hand, was closer to - indeed it had once been one and the same as - the action for detinue and deminue was the nearest remedy that England had, until 1977 when it was abolished to an actio in rem. The action in debt, then, was one founded upon a 'right' rather than a 'wrong'. The modern English law of contract thus consists of both 'wrongs' and 'rights' and this can sometimes have an important bearing on the actual operation of the internal rules of contract law. Furthermore it gives rise to an important difference between a contractual liability action for damages and a debt action for a specific sum of money (cf. Ch. 4 § 1).

Grotius adopted in his Inleidinge tot de Hollandse Rechtsgeleertheid (c. 1520) the Institutes system of personae, res and actiones for his analysis of the laws of Holland. This systematic approach to the law is based on the abstract theoretical concept of the subjective right (le droit subjectif). The Netherlands Civil Code of 1838, though substantially based on the French Code Civil, follows the systematic classification of the Institutes, thus connecting the Code Civil-based subject-matter to Grotius' Inleidinge. In the law of obligations, the classification of the sources of obligations in the Netherlands Civil Code of 1838 is not connected to the Institutes via Grotius but mainly through different links, of which the Code Civil is the most important.

However the notion of an 'action' does not form part of the modern Civil Codes, not just because procedure has been recognised as being something separate from substantive law (cf. Ch. 3 § 1, nr. 23), but because the notion of the subjective right (le droit subjectif) had, by the eighteenth century, become the leading conception in private law. Differences of action were, for the post-Enlightenment lawyers, simply discussions about different kinds of right. Ubi ius ibi remedium.

§ 4 PROPERTY AND OBLIGATIONS

16. Another difficulty that arose from the nineteenth century imposition of Roman law categories on the common law actions was that modern Continental legal science did not always accord with the empirical orientations of English legal thought. In particular the notions of ius in rem and ius in personam did not accord with a legal system which treated most claims as

52 Ibid., para.8.
53 Tone (Interference with Goods) Act 1977 s2(1).
54 Fennira, p.130-131.
proprietary in nature and obligatory in form. In some ways this failure to separate rigidly the real from the personal right will be less of a problem for the French jurist whose own Code has abandoned the separation when it comes to the sale of moveable property. Thus the French lawyer will have little difficulty in understanding the English rule that a contract for the sale of goods can itself pass title unless the parties agree otherwise. Moreover the ability of a 'seller' to retain ownership in goods sold suggests that the common lawyer can distinguish between ownership and conveyance as well as any Netherlands lawyer.

But the position is not so simple. English law has never defined ownership as such and has given legal expression to the idea of dominium only indirectly through a number of remedies many of which belong, in form, to the law of obligations. There is, in other words, no separate revindication action in English law expressing the idea of an absolute legal relationship between person and thing - between legal subject and legal object. This means that interference with moveable property rights not only is a matter for the English law of torts, but can involve rules from the law of contract. For the common law has no equivalent of the rule that en fait de meubles, la possession vaut titre and so it is contract that sometimes has to do the work of the law of property (cf. Ch. 8 § 7).

17. The leading concept in Netherlands property law (as in French and German law) is ownership. In Netherlands Sale of Goods law, property is acquired by a transfer (s. 3: 80). Transfer of property requires levering (delivery) pursuant to a valid title by the person who has the right to dispose of the property (s. 3: 84) and a contract for the sale of goods is a valid title, providing the property is described in a sufficiently precise manner. The seller is obliged (by statute, s. 7: 9) to transfer the ownership of the thing sold and to supply the goods. The Dutch expression levering (translated here as delivery) in s. 3: 84 should be distinguished from the narrower expression aflevering (the supply of goods) as mentioned in e.g., s. 7: 9. For levering consists of both a goedereenrechtelijke (zakelijke) overeenkomst and a leveringshandeling, whereas aflevering has to do with the supply of the object (transfer of possession, cf. s. 3: 90 for chattels). A goedereenrechtelijke

56 Zimmermann, pp.271-272; Sacco, pp.87-103.
58 Clough Milly Ltd v Martin [1985] 1 WLR 111.
59 See on eigendomsvoorbehoud (retention of title) in Dutch law, compared to English law EH Hondius, in: Contract Law and Practice (o.c.), p.174.
60 See generally Milsom, pp.243-282, 366-379.
62 WM Kleijn, The law of property, Introduction to Dutch law for foreign lawyers, Ch 8.
63 Levering of immovable property and other registered property is dealt with in s. 3: 89, requiring a notarial deed intended for the transfer of the property and drawn up between the parties, followed by its entry in the public registers.
\textit{overeenkomst} is a multilateral legal act by which the transferor declares to transfer the \textit{good} (property, cf. s. 3: 1) to the \textit{vermogen} (patrimonium) of the receiver pursuant to a \textit{rechtsplicht} (legal duty) to that effect, and the other party accepts this declaration\textsuperscript{64}. And the formalities for the supply of the property (the leveringshandeling) vary according to the nature of the property to be transferred\textsuperscript{65}.

Reservation of title of ownership is possible (s. 3: 92); the seller is obliged to supply the thing sold which means, in this case, to bring the thing under the control of the buyer. The Netherlands Civil Code describes possession as \textit{detentio} (custody) of property for oneself (s. 3: 107). Ownership is defined (s. 5: 1) as the most comprehensive right which a person can have in respect of a thing and this right attaches to the thing itself. In respect to this 'thing', the owner is entitled to all powers that are not denied him either because of the rights of third parties or by statutory restrictions\textsuperscript{66}. In Netherlands law, the possessor of a chattel is presumed to be the owner ('title-holder', s. 3: 109 and 3: 119)\textsuperscript{67} and statutory prescription is given to third parties, purchasing in good faith, who 'en fait de meubles' (chattels) purchase from a non-owner (s. 3: 86) (cf. Ch. 8 § 7). If the owner loses his property through theft, he has the right to claim it from the possessor (\textit{reindicatio}) within three years after the theft. No remedy is granted, however, if the possessor is a consumer who has purchased the chattel from a professional vendor (auctions exempted). The rule does not apply, either, to money or negotiable instruments (cf. nr. 46). The exact interpretation of the rules applicable has caused substantial problems, especially with regard to the provisions of s. 3: 87. This section contains an additional requirement for the application of s. 3: 86 in respect to the general duty to inquire described in the rule of ' bona fides' in s. 3: 11. Anyone who purchases a chattel from a non-owner and who claims the protection of s. 3: 86 within three years after the purchase, has the duty to disclose information necessary to trace the identity of the previous holder.

Rights relating to Netherlands patrimonial law in general are divided in rights which are absolute (enforceable against anyone) or relative

\footnotesize{(records) kept for that purpose. Entries regarding registered property are submitted to s. 3.1.2 of the Netherlands Civil Code (s. 3: 16-31). Public registers are kept for entries concerning the legal status of registered property (s. 3: 16).

\textsuperscript{64} Cf. Asser-Beekhuis I, \textit{Zevenrechtk"{a}lgenem deel} (Zwolle, 1985), nr. 286-288.

\textsuperscript{65} Cf. s. 3: 89 for registered property, s. 3: 90-92 for moveable property (chattels) not being registered property, s. 3: 93 (rights payable to bearer or order), s. 3: 94 (other rights to be exercised against one or more specifically determined persons), s. 3: 95 (other cases than those provided for in s. 3: 89-94) and s. 3: 96 (shares in property).

\textsuperscript{66} Statutory rules and rules of unwritten law, cf. s. 5: 1 sub 2.

\textsuperscript{67} See on the presumption of ownership based on possession \textit{vis-\`{a}-vis} the continuance of ownership previously obtained (except when proof of the contrary is accepted) \textit{Ontvanger v. Bokma-Wesela}, NJ 1991, nr. 465.
(enforceable against specific persons). The division is characterized, though not rigidly, by the difference in enforceability. Hybrid species are possible: for example relative rights concerning specific duties related to registered property (immovables) are transferable on the basis of the law or via a specific contract (s. 6: 251 and 6: 252). Absolute rights are governed by Book 3 and Book 5 of the Netherlands Civil Code. Relative rights are described as rights (actions) a person can enforce against someone (a specific person) with whom a juridical relationship (an obligation) exists. The most important sources of these relative rights (based on obligations) are the wederkerige overeenkomst (cf. contract, Ch. 6) and onrechtmatige daad (cf. delict, 'unlawful' or 'illicit' act, cf. Ch. 11-13). Ownership can be contrasted by rights less encompassing, such as servitudes, superficies, usus, etc., but it must be distinguished from possession and detentio (custody). The owner is he who is truly entitled to the property; the possessor is, generally speaking, the person who, factually, occupies the position of the owner.

68. The exercise of physical control for oneself without being the owner is labelled possession and detentio; physical control in the interest of someone else is just labelled detentio or detentio sec. 69.

18. The distinction between actiones in rem and actiones in personam 70 is used by Gaius, 71 although the difference between actiones in personam and actiones in rem for the analysis of the law (personae, res and actiones) and, subsequently, for the division of iura in rem and actiones in rem is not explicitly mentioned by him. 72 The Netherlands Civil Code brings a change in the system of codification of patrimonial law in that Book 3 of the Code deals with patrimonial law in general; it contains not only rules for the concept of a juridical act (validity, reliance, ordre public, etc.) but also rules that protect persons who, in good faith, rely on the appearance of a valid consent, rules for procurement, conversion and partial nullity, defects of consent, etc. To a great extent, the most important provisions regarding corporeal and incorporeal property are considered to be equivalent: rules relating to both categories are brought together in Book 3. 73 Subjects which have since Roman law been treated traditionally as part of the law of property have been

68 In the translation of Haanappel & Mackay: Possession is the fact of detaining property for oneself (s. 3: 107). Bezet (possession) en houderschap (detentio, custody) are factual concepts, and the interpretation of these concepts is largely based on verkeersopvattingen (prevailing opinions in society), cf. Hartkamp, Compendium, p.97. Note also Weir's comment: The owner is entitled to a thing, whether he has it or not; the possessor has it, whether he is entitled to it or not. Proudhon, the revolutionary, put the point in a neat but nasty way: the husband owns, the lover possesses (Casebook, p.421).

69 Kleijn, o.c.

70 The expressions ius in rem and ius in personam were not used until the time of the glossators and post-glossators. Roman law had no concept of le droit subjectif; they talked in terms of actiones in rem etc.

71 Institutes, 4, 2-3.

72 Feenstra, p. 11.

73 See Hartkamp, p. XVII.
transferred to Book 3 and this book contains, therefore, provisions on transfer of corporeal and incorporeal rights, rights in rem which can have as their object both corporeal and incorporeal things, general definitions of 'possession', 'property' and 'things' and related provisions (e.g. public registers for the registration of immubles). The provisions of Book 3 are applicable to all patrimonial law (patrimonium).

19. The Netherlands Civil Code has a system of hierarchical levels, a pattern of general rules preceding more detailed rules. The law of property may have two or more levels (Book 3 and Book 5) and consequently relevant rules for contractual matters can be found in Book 7 (specific contracts, Sale of Goods etc.), Book 3 (legal relationships, volonteé, consent, etc.) and Book 6 (law of obligations in general). The courts are instructed, moreover, to apply, as far as possible, several provisions of the Code by way of analogy in cases not directly governed by them74. And so although the Civil Code does not contain a general part governing the entire Civil Law (as the German Bürgerliches Gesetzbuch does), applicability of general parts of the Code on legal matters even outside the patrimonial law is assured where necessary75.

The first paragraph of Book 3 of the Netherlands Civil Code gives several definitions. When dealing with the law of obligations, the definitions of goede trouw (the rules of good faith, bona fides) and redelijkheid en billijkheid (the rules of reasonableness and fairness) are very important, despite being defined in a very abstract way76. If bona fides is necessary for any legal effect, it is lacking not only if the person concerned knew the facts or rights requiring his good faith, but also if he should have known given the circumstances. Impossibility in the investigation of the facts or rights does not prevent a person who should have doubted these from being judged as someone who should have known these facts or rights (s. 3: 11). Reasonableness and fairness (justice), redelijkheid en billijkheid, as it is called, has to be interpreted in respect to generally accepted principles of the law, prevailing legal convictions and the interests of society, as well as the personal interests in case (s. 3: 12). Abuse of rights (cf. Ch. 12 § 6) is defined in s. 3: 13, whereas s. 3: 14 expressly rules that any right in private law is unenforceable if it contravenes written or unwritten rules of public law.

Furthermore, Book 3 of the Netherlands Civil Code lays down rules for the creation of legal relations (rechtshandelingen). These rules cover the requirement of volonteé (wil and verklaring) for legal relations (s. 3: 33), problems of mentally disturbed persons creating legal relations without the statutory required volonteé (s. 3: 34) and the principles of reliance and

74 Through the so-called schakelbepalingen (transition articles), cf. Ch. 5 § 10.
75 Hartkamp, p. XIX-XX. See for instance the transition articles in s. 3: 51, s. 3: 78, s. 3: 326, s. 6: 216 etc.
76 See on the development of the concept of good faith in legal theory IF O'Connor, Good faith in international law (Dartmouth, 1991), p.17-34.
misrepresentation (s. 3: 35 and 36). Legal relations are voidable in cases of fraud, threat or abuse of circumstances (s. 3: 44). And duwaling (s. 6: 228, cf. misrepresentation, mistake) can make an overeenkomst (contract) voidable.

§ 5 EQUITY

20. In English law, the solving of substantive legal questions at the level of procedure was, and still is, helped considerably by the existence of equitable remedies. These remedies, developed in the early days of the Court of Chancery, were formulated to mitigate, inter alia, the inconvenience caused by the common law recognising, with few exceptions, only the monetary remedies of debt and damages. Equity, as we shall see (cf. Ch. 4 § 3), introduced a range of specific remedies77.

Probably the best way of viewing the relationship between these equitable remedies and the substantive common law of property and obligations is to see it in the same way as the modern Roman lawyer might see the relationship between the Law of Things (de rebus) and the Law of Actions (de actionibus) in Gaius’ Institutes. Just as all the law concerning property and obligations is not to be found only in Books II and III (de rebus) - one must also look at Book IV (de actionibus) - so in English law one must look to the law of actions in order to gain the full picture of English private law. Some property rights are expressed only through equitable remedies such as injunction and estoppel (cf. Ch. 4 § 3); and some general principles of law - for example unjust enrichment (cf. Ch. 11 § 4) and abuse of rights (cf. Ch. 13 § 7) - find expression in England only through the granting or withholding of a remedy. Thus the substantive right to a debt might be defeated in equity by the granting of a remedy like estoppel designed, inter alia, to combat abusive behaviour (cf. Ch. 7 § 3). ‘Ubi remedium ibi ius’.

§ 6 REMEDIES AND RIGHTS

21. Some of the principles attaching to the equitable remedies have now become, or are becoming, well established general rights. The rights of a beneficiary under a trust (cf. Ch. 4 § 3), for example, is an area of equity which is as substantive in form as any area of the common law; and there are today English textbooks78 on Restitution which attempt to give substance to an area of law which has traditionally been part of the law of actions (cf. Ch.

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11 § 3). All the same, the idea that English lawyers are increasingly seeing their law through the perspective of 'subjective rights' (les droits subjectifs) can in many ways be misleading; for it is not in accordance... with the principles of English law to analyse rights as being something separate from the remedy given to the individual. Rights are to be understood only in the positive legal sense of being legal entitlements or claims deduced from causes of action. And so in the ordinary case to establish a legal or equitable right you have to show that all the necessary elements of the cause of action are either present or threatened.

What, then, are causes of action? The answer to this question was given by Diplock L. J. in 1965: 'A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.' The importance of this observation lies in the fact that the emphasis of English law remains as much on the nature of the legal action as upon the right, and this means that the role of the judge in the English law of obligations is not so much one where he must categorize the facts to apply the law, but one where he must decide, after the parties themselves have categorized the facts, whether these facts disclose a cause of action which will generate the remedy claimed. In other words the technique involves analogy as much as the syllogism (cf. Ch. 15 § 1). Moreover the emphasis on remedies also means that within the law of obligations the rules surrounding causes of action (contract, torts etc.) are to be separated from those attaching to the remedy itself (damage, specific performance etc.; cf. Ch. 4 § 2 and 3).

This distinction between remedies and rights is, in English law, not simply a reflection of the difference between procedure and substance (cf. Ch. 3) in that the action remains an active legal institution which functions alongside the institutions of legal subject (persona) and legal object (res). Accordingly the English law of obligations is in a not dissimilar position to that of classical Roman law where obligations and actions were also treated together; condicio and vindicatio find themselves alongside contract and delict. This means that the notion of a legal remedy cannot be classified either under procedural law or under substantive law; it occupies a position mid-way between the two and this is one reason why the concept of an

80 Ibid., p. 1129.
82 Cf. Nouveau Code de Procédure Civile art. 12.
85 Digest 44.7 de obligationibus et actionibus.
86 See e.g., Digest 44.7.25.
'interest' - a concept that specifically attaches to the institution of the actio\textsuperscript{87} - can play an important creative role in English law\textsuperscript{88}. No doubt a division between substantive and procedural law can be made in the Common law, yet it would be wrong to think that this dichotomy necessarily gives much insight into the function of legal remedies. The interrelationship of personae, res and actiones belongs to a formative era of legal science (cf. Ch. 15 § 2) and in this respect the Common law might be a useful object of research for those keen to establish the historical foundation of scientia iuris.

§ 7 GENERAL PLAN

22. The emphasis on fact and on remedies will be reflected in the general plan of this survey by the fact that the survey will deal with the English law of actions before (Chap. 4), and not after, the general discussion of the law of obligations (Chap. 5). The law of obligations itself will be centred around the law of contract (Chaps. 6-10), with torts (Chaps. 12-13) and unjust enrichment (Chap. 11) being treated in outline under non-contractual obligations; however this brief treatment will include a look at how English law deals with abuse of rights (cf. Ch. 13 § 7) and with problem-solving in general (cf. Ch. 14 and 15). Attention will also be given to those questions of classification which are of importance to the Continental jurist; and so the English attitude to the distinction between legal acts and legal facts (cf. Ch. 3 § 2 and nr. 82), between civil and commercial law (cf. Ch. 5 § 7) and between ius publicum and ius privatum (cf. Ch. 5 § 8) will be examined before the survey of the law of contract. The role of legal concepts in legal reasoning is discussed in Chapter 15.

In this book, our main objective is to present the English law of obligations in a comparative context. Some attention must be given, therefore, to the theory of law and comparative law. The historical differences between Roman, Germanic and 'Anglo-American' legal traditions are substantial\textsuperscript{89} and so the comparative legal context of this book does not embark from the praesumptio similitudinis. Despite the differences between legal cultures, however, comparative law can provide a better understanding of foreign legal systems. In order to reach some conclusions about the (an) English law of obligations, the comparative context is not as much an account of similar or comparable legal concepts as, first and foremost, a reflection on legal thinking and legal reasoning in both the Common law and the Civil law tradition, réalisant à nouveau, comme il est déjà arrivé fréquemment dans l'histoire, une synthèse entre les positions divergentes, qu'a pu prendre à une certaine époque la

\textsuperscript{87} See Nouveau Code de Procédure Civile art. 31.
\textsuperscript{88} See e.g., Jackson v Horizon Holidays Ltd [1975] 1 WLR 1195.
\textsuperscript{89} See (i.a.) B Großfeld, Rechtsmethoden und Rechtsvergleichung, Rabels Zeitschrift (55), 1991, p. 4-16.
science juridique dans tels et tels pays. All the same, the book will attempt to formulate some comparative conclusions in the hope of providing some kind of basis for harmonization of legal ideas; it will, in other words, attempt to address some of the difficulties facing anyone wishing to think in terms of a ius commune with regard to the Law of Obligations.

Finally, attention must be given to the problems of translating legal expressions, rules and thoughts. The business of legal translation (apart from practical difficulties) relies not only on the readers knowledge of the law and legal system of their own countries but also, to a great extent, on familiarity with foreign legal systems. The draft of Book 6 of the Netherlands Civil Code and of the commentary was translated by order of the Minister of Justice of the Netherlands in 1977. The translation of the new Netherlands Civil Code by Haanappel & Mackay (1990), firmly based in the Quebec bilingual 'mixed' jurisdiction, proved helpful, but not conclusive in some respects. Given the aim of this book and in view of the problems of legal translation, some concepts are best left untranslated.

92 Book 6 The law of obligations, Leyden (1977).
3 SUBSTANTIVE LAW AND PROCEDURE

§ 1 SUBJECTIVE RIGHTS AND CIVIL PROCEDURE

23. When one turns to Netherlands law one sees that legal science makes a distinction between formal rules of civil procedure and actiënrecht, substantive rules of civil procedure. The actiënrecht are rules ensuring that rights can be realised in the courts and they are concerned with remedies to uphold rights, such as the remedy for the defence against a claim, the remedies to enforce execution, plus rules for evidence in general and the material rules for giving evidence, as well as the binding force of a judgment. Formal rules of civil procedure are rules concerned with the technical (procedural) aspects of legal proceedings, as well as with execution and enforcement of judgments. In the Netherlands law one should distinguish the material right, that is to say le droit subjectif or the claim of creditor, the competence to enforce such rights in court (the ius agendi or right to claim), and the procedural means to exercise this competence, the remedy or actio. However, even the distinction between formal and substantive rules of civil procedure is difficult when dealing with rules for evidence and statutes of limitation. The concept of substantive rules of civil procedure is usually connected with the remedy itself, the competence to bring a claim before the courts, together with the rule point d'intérêt, point d'action. Even if rights can only become apparent through legal proceedings, this does not necessarily mean that in Netherlands law rights can only exist through remedies. In Netherlands law, rechtsmiddelen, remedies against a judgment such as appeal, rekest-civil, and cassatie form a closed system based on the doctrine lites finiri oporter and are to be found in the Wetoek van Burgerlijke Rechtsvordering.

24. The rules for giving evidence are, together with the formal rules for civil procedure, codified in the Wetoek van Burgerlijke Rechtsvordering (Code of Civil Procedure); a code of the substantive civil procedure (rechtsvorderingen) can be found in the Netherlands Civil Code (Title 3.11, s. 3:296-326, Des actions en justice). Remedies in general are dealt with in s. 3:296: a judgment to ensure compliance is given against the person who is under a duty to give, to do or to refrain from doing something towards another person, on the demand of the person entitled to this duty. Statute, the nature of the duty or a rechtshandeling (cf. nr. 60) can stipulate differently (s. 3:296-1). And the provisions dealing with enforcement of un titre exécutoire (s.

2 Burgerlijke Rechtsvordering (i.e.).
3 See K v B, RvD 1991, nr. 152.
3:297-301), declaratory judgments (s. 3:302), the point d’intérêt, point d’action rule (s. 3:303)\(^4\) together with the conjunction between the right of action (remedy) and the right itself (s. 3:304)\(^5\), the competence of arbitrators to exercise the same powers as granted to the judge in these provisions unless the parties agree otherwise (s. 3:305)\(^6\), and the statute of limitations (s. 3:306-325) are laid down in the code. The rules of Title 3.11 of the Netherlands Civil Code apply mutatis mutandis to areas of the law outside the patrimonial law, allowing for the nature of the judicial relationship (dans la mesure où la nature du rapport juridique ne s’y oppose pas, cf. s. 3:326). The point d’intérêt, point d’action rule can be interpreted as 'no cause of action exists if the claimant has no interest in the procedural remedy', for example claiming an injunction forbidding certain behaviour that has already taken place\(^7\), whereas the rule that no cause of action exists without sufficient (self-)interest is laid down in s. 3:296 in connection with s. 3:303\(^8\).

In Netherlands law, remedies in civil law are opposed to remedies in penal or administrative law. The remedies in administrative law are formally dealt with in several statutes such as, for example, the Wet Arob\(^9\). The division between these remedies becomes rather blurred when dealing with remedies in civil law, administrative or public law, and becomes most apparent when a person claims a right vis-à-vis a public body exercising a public duty. This problem is usually reduced to questions of competence of the civil or administrative courts. In 1987 the Netherlands Hoge Raad has held the civil courts to be competent to judge a case of non-performance of a contract for the supply of gas based on a (public law-) statutory relationship between the supplier and the municipality of Nieuwegein\(^10\), although it is not possible to bring before a civil court either the question of a public law enforcement order or, for example, the question of the lawfulness of a decision of a public body refusing to change tariffs\(^11\).

In principle, however, a decision of an administrative court can be the cause of a damages action before a civil court (cf. Ch. 13 § 2); but the competence and admissibility of damages actions before civil and

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4 In Dutch: Zonder voldoende belang komt niemand een rechtswoning toe.
5 In the French translation of Hannapel & Mackay (p. 140) l’action en justice ne peut être séparé du droit qu’elle sert à protéger.
6 Arbitration is codified in s. 1020-1076 of the Wetboek van Burgerlijke Rechtsvordering.
7 Cf. J van Baars Point d’intérêt, point d’action (Amsterdam 1971).
9 The Wet administrative rechtpraak overheidsbepalingen, providing for legal (judicial) protection against administrative decisions.
administrative courts is intricate\textsuperscript{12}. The general rule is that the civil court is not competent if an exclusive administrative legal remedy exists with sufficient safeguards for the citizen. Even if this remedy is not used \textit{de facto}, the procedure before a civil court is nevertheless barred, whilst the fact that the use of the remedy in an administrative procedure would have led to the annulment of the public law decision or order, is irrelevant\textsuperscript{13}. Only in very forcible and conclusive circumstances is the application of this rule of formal legality (\textit{forme le rechtskracht}) set aside\textsuperscript{14}.

25. In English law there is no formal distinction with respect to monetary remedies between public and private law: debt and damages actions based on contract or tort are \textit{prima facie} available for and against public bodies in the same way as they are available in the private sector\textsuperscript{12} (Ch. 5 § 8; Ch. 13 § 2). And this means that there is no formal difference either between \textit{la responsabilité administrative} and \textit{la responsabilité civile} or between administrative and private contracts\textsuperscript{15}. However alongside the monetary remedies of debt and damages the Common Law also developed, from early days, a number of specific remedies, the prerogative writs, designed to deal with what today we would call judicial review\textsuperscript{17} and these administrative law remedies have always stood in contrast to the civil claims for money\textsuperscript{18}. The prerogative writs have now been amalgamated into a general remedy of judicial review\textsuperscript{19} - a remedy governed by its own procedural process\textsuperscript{20} - with the subsequent result that a 'private law' monetary remedy launched against a public body will be procedural struck out as constituting an abuse of process if the court is of the view that the legal issue in question is one involving 'public' rather than 'private' rights\textsuperscript{21}. This does not mean that the private individual who suffers no special damage (and thus has no legitimate interest to bring an \textit{actio} in private law) has no remedies to vindicate the public interest; if the individual is keen on protecting what might be called a 'class interest' there exists the possibility of a relator action whereby individuals or groups commence an action via the office of the Attorney-General\textsuperscript{22}. These relator actions can be important remedies in cases of public nuisance\textsuperscript{23}, but

\begin{itemize}
  \item Asser-Hartkamp III, p.239.
  \item But see now: \textit{Derbyshire CC} v \textit{Times Newspapers} (1992) The Times 20 February.
  \item \textit{In re Norway's Application} [1990] 1 AC 723.
  \item JH Baker, \textit{An Introduction to English Legal History} (Butterworths, 3rd ed., 1990), pp.155-175.
  \item \textit{Supreme Court Act} 1981 s.31.
  \item \textit{Rules of Supreme Court Ord.53}.
  \item \textit{O'Reilly} v \textit{Mackman} [1983] 2 AC 237.
  \item See generally \textit{Gouriet} v \textit{Union of Post Office Workers} [1978] AC 435.
  \item See e.g., \textit{Att-Gen} v \textit{PYA Quarries Ltd} [1957] 2 QB 169.
\end{itemize}
they do not, and cannot, assume the general role of a class action\textsuperscript{24}; the nearest procedural process that English law has to the American class action is a representative action which is quite limited in scope\textsuperscript{25}. Furthermore English law has no equivalent to the Netherlands and French idea of granting standing to certain bodies representing consumer class interests\textsuperscript{26}; the nearest it gets to this institutional arrangement is to grant standing to local authorities for the promotion or protection of the interests of the inhabitants of their area\textsuperscript{27}.

In one sense, then, it is possible to distinguish between public and private procedures, remedies and rights\textsuperscript{28}. Moreover there are a number of other procedural rules and remedies where the public and private distinction can be of relevance: for example it may be that English law has not developed any general damages remedy for harm caused by maladministration\textsuperscript{29}, but if a public official does commit any existing tort or other statutory wrong which a court considers amounts to a serious abuse the court has a common law power to award exemplary damages - that is to say damages designed to punish rather than to compensate\textsuperscript{30}. Judicial review actions themselves are also useful in preventing a public body from utilising their private law rights and remedies in a way that would amount to an abuse of power. Thus a local authority cannot exercise its property\textsuperscript{31} or contractual rights\textsuperscript{32} with the same freedom as a private person; equally a private person cannot expect the breach of a public duty always to give rise to a right to damages in private law\textsuperscript{33}. Much will depend upon the nature of the harm and the nature of the interest affected\textsuperscript{34}.

Some remedies continue to cause classification problems. Habeas Corpus is, these days, mainly a public law remedy\textsuperscript{35}, but in the last century it also had an important role in family (child custody) cases\textsuperscript{36}; and many of the equitable remedies (injunction and account for example) have a role in

\textsuperscript{25} R Tur (1982) 2 LS 135.
\textsuperscript{26} Cappelletti, supra, pp.286-287.
\textsuperscript{27} Local Government Act 1972 s.222. And see Financial Services Act 1986 s.6; SIB v Panelli (No 2) [1991] 3 WLR 857.
\textsuperscript{28} Cf. Weir, Common Law System, paras.128-129.
\textsuperscript{29} Dunlop v Woolwich Municipal Council [1982] AC 158.
\textsuperscript{30} Bradford City Council v Arow [1991] 2 WLR 1377.
\textsuperscript{31} Wheeler v Leicester City Council [1985] AC 164.
\textsuperscript{32} R v Lewisham London Borough Council, ex p. Shell (UK) [1988] 1 All ER 938.
\textsuperscript{33} Yuen Kun Yiu v Att-Gen of Hong Kong, ex p. 1988] 1 AC 175.
\textsuperscript{34} Murphy v Brentwood District Council [1991] 1 AC 398.
\textsuperscript{36} See e.g., In re Alicia Race (1857) 26 LJQB 169; Ex p. Ann Turner (1872) 41 LJQB 142.
both public and private law. The relationship between damages actions and criminal prosecutions is, at the level of procedure, quite straight-forward, but at the level of fact it can give rise to conceptual problems: a victim of a crime cannot use the criminal process itself to obtain damages - although the courts do have limited powers to make compensation orders - yet the facts which constitute a crime may also constitute a tort (cf. Ch. 12 § 5) thus allowing the victim to use the civil courts to obtain compensation. In addition to the law of tort there is also a statutory scheme of compensation for personal injury arising out of a crime and the existence of this scheme may well have an indirect influence on the extent and nature of the duty owed to individual citizens by certain government bodies.

26. In Netherlands Civil Procedure, s. 48 of the Wetboek van Burgerlijke Rechtsvordering is of the utmost importance. The rule of s. 48, enacted in 1837, deals with two principles of procedural law; on the one hand the principle of the autonomy of the parties in legal proceedings, and on the other the rule that judges are not to be restricted in the application of the law, a rule which is in part expressed in the doctrine ius curia novit. Via the reception of Roman law, s. 48 is linked with the Justinian maxim ut quae desunt advocatis partium, iudex suppleat; after the reception of Roman law, legal doctrine and jurisprudence accepted the unwritten rule rechtsgronden mag (moet) de rechter aanvullen, feitelijke gronden niet. The adage iura novit curia was based on the fiction that judges were supposed to know the law, although this adage was, according to Kaser, unromisch and information about the applicable law presented by (or on behalf of) the parties was important owing to the complexity of the sources of law. The ius commune maxim iura novit curia 'means to say generally, that the parties need prove facts only, while the judge must himself know the rules of law which are to be

37 See e.g., Supreme Court Act 1981 s.31(2).
38 See e.g., Black v Yates [1991] 3 WLR 90.
40 See e.g., Murphy v Culhane [1977] QB 94. And note Civil Evidence Act 1968 s.11, 13.
44 Burgerlijke Rechtsvordering (loose-leaf edition, Deventer), p. I-768; see also GJ Boom & FSP van der Wal, De rol van de rechter (Deventer, 1990) and JMChorus, De liddelijkheid van de rechter (Deventer, 1987).
45 Cf. Vriesendorp, o.c. p.3 and 35, quoting C.2.10((11)).1.
46 Vriesendorp, o.c., p.35.
applied (...) but this knowledge also finds support through information by the parties.

The autonomy of parties in legal proceedings results in the freedom of parties to decide the contents and scope of their litigation. Article 48 states in (XIXth century) Dutch: *De regters moeten bij hunne beraadslagingen van ambitswege de regtsgronden aanvullen welke niet door partijen mogten zijn aangevoerd* (judges are obliged *ex officio* to raise, when deciding, any legal grounds parties may not have put forward). In art. 48 Wethoek van Burgerlijke Rechtsvordering the expression *rechtsgronden* is closely connected to the term *recht* in art. 99 Wet op de Rechterlijke Organisatie (Judicial Organisation Code). This article contains the rule that the Hoge Raad can quash acts, judgments, sentences and orders *wegens schending van het recht* (that violate, infringe the law). The scope of the litigation is governed by the *dagvaarding*, but nevertheless the judge can take into account facts that are established in the course of the proceedings, although the principle will continue to be applicable that the facts sustaining the *fundamentum petendi* provide a cause of action.

The rules of substantive civil procedure (*rechtsvorderingen, des actions en justice*) in the Netherlands Civil Code are themselves closely connected with the notion of *subjectief recht* (*le droit subjectif*). A code of substantive civil procedure can be found in s. 3, 11 (cf. nr. 102). In the original draft for the Netherlands Civil Code, it was deemed necessary to incorporate the *rechtsvorderingen* in Book 3, despite theoretical difficulties regarding the dichotomy between rules of formal and of substantive civil procedure (cf. nr. 38). It was held that a *droit subjectif* has a separate and autonomous function irrespective of the *action en justice*. Nevertheless, *rechtsvorderingen* belong in the Civil Code because of the significance of an *action en justice* for anyone who has a *droit subjectif* and the incorporation of the natural obligation (cf. nr.44) in the law of obligations helps sustain this view. In addition to this, the enforcement of *rechtsmiddelen* sometimes presupposes the competence of the judge in civil litigation to create an obligation and

Cf. Vriesendorp, p.4 and ibid., fn. 4.


Cf Meijers, Ontwerp voor een Nieuw Burgerlijk Wetboek, Toelichting eerste gedeelte (Boek 1-4), p.11: De rechtsvorderingen, die aan iemand toekomen, hangen zo nauw met de subjectieve rechten samen [...] .


Als zijnde middelen tot handhaving van rechten en bevoegdheden, PG Boek 3, p.893-894.

PG Boek 3, p.893.
accordingly such competence ought to be incorporated in the Civil Code (e.g., the competence to impose damages on a daily basis in case of non-compliance). That said, it must be stressed that the term *subjectief recht* is not used in s. 3. 11 because this would limit the scope of application of this title and this applies, for instance, to the possibility in Netherlands law that one can obtain a *rechtswijdering* against a person who has a suspended (conditional) obligation (s. 3: 296-2), although it is uncertain whether in the intermediate period a *subjectief recht* of the person entitled to the obligation exists in full.\(^\text{54}\)

The difference between rights and legal facts in Netherlands law is incorporated in the objective of s. 48, codifying the rule that the judges are under a statutory duty to investigate *ex officio* whether the facts stated in the *dagvaarding* (warrant to appear, writ) give rise to a cause of action based on applicable statutory provisions. Leaving aside the question of the parties stated applicability of a specific rule of law, the judge has to apply the law to the facts advanced by the parties, or to facts known to him through his personal knowledge or observation, although the interested party has explicitly to invoke legal effects such as *wilsgebreken* (defects of the will, cf. nr. 102), prescription, or the fact that the case is *res judicata*.\(^\text{55}\) Moreover the rule of s. 48 holds both a negative and a positive task for the judge. This rule prohibits the judge from trying to supplement *ex officio* facts stated by the parties, and these facts comprise legal facts as well as legal effects claimed; this 'negative' task is based on the autonomy of the parties in civil litigation. More positively, the judge applies written or unwritten rules of law and gives a judicial qualification of the facts irrespective of the presumptions of the parties.\(^\text{56}\)

In the principle of *lijdelijkheid* lies the recognition of the power of a specific person to have free control of his right and this freedom reflects the nature of such a right.\(^\text{57}\) The autonomy of the parties has as its complement the *lijdelijkheid* (the autonomy) of the judge as expressed in s. 48, and this is usually described in the context of the principles of the Netherlands law of Civil Procedure. Yet whenever the autonomy of the parties as a principle of civil procedure is discussed, legal doctrine in the Netherlands is not impartial; it is a matter of dispute whether proper litigation would be impossible without the principle of the autonomy of the parties in legal proceedings and furthermore several statutory provisions have made inroads into the autonomy of the parties and the *lijdelijkheid* of the judge.\(^\text{58}\)

\(^{54}\) Cf. PG Boek 3, p.895.
\(^{55}\) Veegens *et al.*, p.244.
\(^{56}\) Vriezen, p.86-87.
\(^{58}\) Burgerlijke Rechtsvordering (loose-leaf edition, Deventer), Introduction.
In principle, judges in the Netherlands are passive (lijdelijk) in civil proceedings in order to reflect the autonomy of the parties as mentioned 59. This does not mean, however, that once litigation is sub iudice, judges should not apply procedural and substantial legal rules. As far as the rules for giving evidence are concerned, judges are free to formulate questions of proof or to hear the parties, with the one restriction that no evidence may be demanded on facts undisputed between the parties. Causes of action should be distinguished from legal grounds: legal facts are those facts constituting a cause of action based on legal grounds through judicial reasoning. This reasoning, leading to a judicial decision, is based on the legal facts put forward by the parties, the interpretation of the law and the application of the law to the facts stated. These tasks are for the judges, and can be grouped as legal grounds for a decision in Netherlands law, based on the facts and legal facts the parties to litigation have brought to the attention of the judge. In civil judgments, judges are not bound by any qualification that the parties have given to the facts constituted, nor to any conclusions of the parties as to the applicability of certain statutory provisions, although the decision has to be sustained by a valid qualification of the facts stated. The judges are not allowed, however, to supplement or complement the legal facts themselves, thus changing for instance a damages action based on a contractual obligation to a unjust enrichment claim. Judges are under the statutory duty in s. 48 of the Wetboek van Burgerlijke Rechtsvordering to examine ex officio, and irrespective of any legal considerations that the parties have presented, whether the facts pleaded in the process sustain the claims made. This principle is inapplicable only if it is held that the claimant wishes the court to decide his claim exclusively and explicitly on the basis of a specific statutory provision. The duty of the judge based on s. 48 is meant to protect the parties and this duty takes precedence even if, for instance 60, the claimant based his claim on a statutory provision which he misinterprets and upon which he proceeded after the opposite party has pointed out that it was wrong and the court, subsequently, is of the same opinion. If the described conduct were to lead to the inapplicability of other statutory provisions this would make an inequitable inroad into the protection given to the parties in civil proceedings by s. 48 and such conduct ought not to lead to the conclusion that the claimant would like the court to decide his case exclusively on the statutory provision he brought forward. In the opinion of A-G Hartkamp this conclusion

See generally JE Bosch-Boesjes, Lijdelijkheid in geding (Deventer, 1991). Bosch-Boesjes argues that the Dispositieinstelling (see nr. 28) is a fundamental principle of Netherlands civil (and administrative) procedure (p.237). In that respect, the judge is lijdelijk. But the lijdelijkheid of the judge is not fundamental to other aspects of the procedure, albeit that it is an essential feature of civil procedure that the parties determine the scope of their litigation. Generally speaking, the lijdelijkheid of the judge is not a fundamental principle of Netherlands civil procedure (Bosch-Boesjes, p.237-238).

would nevertheless be inevitable, but the Hoge Raad has held differently given the underlying principle of art. 48 Rv (protection of the parties). The freedom, autonomy and equality of the parties in civil proceedings should be protected, and neither the negative nor the positive aspects of art. 48 Rv should work against the legitimate interests of the parties.

The duty of the judges to supplement legal grounds is limited to coercive - ius cogens - legal provisions; ius dispositivum will not be applied ex officio and can be set aside by the parties to a contract. Coercive legal provisions include rules of public order (jurisdiction, competence of the courts, persona standi in iudicio, ius standi, etc.) and for example the recognised principles for good government policy (cf. Ch. 5 § 8) and the European Convention for the Protection of Human Rights and Fundamental Freedoms. In addition to these rules, judges may supplement facts of common knowledge as if they were legal grounds, such as facts of experience, and any decision and deductions a reasonable thinking person might make. These rules are incorporated in art. 176 and 177 of the Wetboek van Burgerlijke Rechtsvordering.

61 Hartkamp held that [Van Dulmen heeft dus in beide instanties naar het oordeel van de feitenrechter uitdrukkelijk zijn vordering beperkt tot de door hem als gevolg van de handelwijze van de Stichting geleden immateriële schade. Onder deze omstandigheden zou de rechtbank m.i. in strijd met art. 48 Rv hebben gehandeld, immers buiten het petitum zijn gegaan zoals dit ook in hoger beroep was gehandhaafd, door schadevergoeding toe te kennen terzake van schadeposten die naar haar - in cassatie niet bestreden - oordeel op materiële schade betrekking hadden. And: Het zou anders zijn geweest [...] indien Van Dulmen naar het oordeel van de feitenrechter verzoek had gevoerd van door hem geleden schade, deze kwalificerend als immateriële schade [...] in dat geval had de rechter de schade anders kunnen - en op grond van art. 48 Rv ook moeten - kwalificeren (NJ 1991, nr. 598: Conclusion A-G Hartkamp, nr. 12).


63 RW Holzhauer Personal knowledge of the judge, in: Netherlands reports to the XIIIth International Congress of Comparative Law, 1986; see also BBJM ten Berge, BWN de Waard and MSE Wullfrait-van Dijk, Civil and administrative procedures in the Netherlands: comparisons and future changes, in: Netherlands reports to the XIIIth International Congress of Comparative Law, 1990.

64 Burgerlijke Rechtsvordering (Loose-leaf ed., Deventer), see p. 1-369-377: art. 176 reads Tenzij uit de wet anders voortvloeit, mag de rechter slechts die feiten of rechten aan zijn beslissing ten grondslag leggen, die in het geding te zijner kennis zijn gekomen of zijn gesteld en die overeenkomstig de voorschriften van deze en de volgende afdelingen zijn komen vast te staan. Feiten of rechten die door de ene partij zijn gesteld en door de wederpartij niet of niet voldoende zijn bevestigd, moet de rechter als vaststaand beschouwen, behoudens zijn bevoegdheid bewijzen te verlangen, zo vaak aanvaarding van de stellingen zou leiden tot een rechtsgevolg dat niet ter vrede bepaaling van partijen staat. Feiten of omstandigheden van algemene bekendheid alsmede algemene ervaringsregels mogen door de rechter aan zijn beslissing ten grondslag worden gelegd, ongeacht of ze zijn gesteld, en behoeven geen bewijs; art. 177 reads: De partij die zich beroept op rechtsgewogen van door haar gestelde feiten of rechten, draagt de bewijslast van die feiten of rechten, tenzij uit enige bijzondere regel of uit de eisen
27. In French law, the Nouveau Code de Procédure Civile stipulates: le juge tranche le litige conformément aux règles de droit qui lui sont applicables. Il doit donner ou restituer leur exacte qualification aux faits et actes litigieux sans s’arrêter à la dénomination que les parties en auraient proposée (art. 12 s. 1 and 2). The third section of article 12 (le juge peut relever d’office les moyens de pur droit quel que soit le fondement juridique invoqué par les parties) was annulled by a decision of the Conseil d’Etat in 1979.65 As far as facts are concerned, the French judge can take measures of his own accord (d’office) in order to advance the inquiry and he can request that the parties provide further explanation. His decision must be founded on the facts brought forward in the proceedings, but it can also be based on aspects of the case sub judice that the parties have not pleaded. As far as the application of the law is concerned, the judge has to give the exact qualification of the facts and acts in dispute, even though this might differ from the qualifications the parties to the litigation have proposed. The judge ‘finds’ the legal grounds leading up to his decision, bypassing any qualification the parties provided for a cause of action, and has the power to invite parties not only to explain certain facts, but also to set forth legal explanations.66 If the judge wants to invoke a different legal basis for his decision, he is statutorily obliged to inform the parties and to offer them the opportunity to respond.67 In the Netherlands, a similar provision has been advocated.68

28. In German law, judges are obliged ex officio to test and check all circumstances or facts brought for or against the truth of the statements of the parties in legal proceedings.69 A provision similar to the Netherlands art. 48 Wetboek van Burgerlijke Rechtsvordering does not exist in German law, and Vriesendorp describes the role of the judge in this respect as een actieve rechter die de ‘Sach- und Streitstand’ in een discussie met partijen aan de orde stelt.70 Full evidence exists if the judge is personally convinced of the truth of the facts stated, and he has to give in his judgment the concrete

van redelijkheid en billijkheid een andere verdeling van de bewijslast voortvloeit. See on the assessment of the weight of evidence e.g. JLM Elders, Waardering van bewijs (Deventer, 1990).


67 See Art. 16 Nouveau Code de Procédure Civile.


70 Vriesendorp, o.c., p.105.
circumstances leading to his decision\textsuperscript{71}. Any decision about the evidence of facts brought forward rests on the specific abilities of the judge and his \textit{durch die Lebenserfahrung bedingte Einstellung}\textsuperscript{72}. Both parties in civil legal proceedings are under the duty to adhere to the rules of \textit{bona fides (Treu und Glauben, good faith)}, especially in their statements and when formulating the cause of action, taking into account the effectiveness and economy of their \textit{Prozeß}\textsuperscript{73}. Civil legal proceedings serve the enforcement of private rights; and so, given the principle of freedom of contract in establishing these rights, parties should be free to determine the scope of their case before the judge. The \textit{ZPO} still respects this liberal principle, nowadays perhaps even to a greater extent than in the past decades\textsuperscript{74}. This party-autonomy before the courts is called the \textit{Verhandlungsmaxime}\textsuperscript{75}, or preferably the \textit{Beibringungsgrundsatz}, expressing the rule that parties determine the course of the legal proceedings (\textit{das Verfahren}), while the power to formulate a cause of action is called \textit{der Verfügungsgrundsatz}, or \textit{Dispositiongrundsatz}\textsuperscript{76}. The legal proceedings themselves and the deliberations leading to the judgment are not for the parties to deal with: \textit{die Prozeß- und Entscheidungs-voraussetzungen sind der Parteiverfügung weisgehend entzogen}. The so-called \textit{Beibringungsgrundsatz} has the effect that the parties can decide which cause of action (factual situation, \textit{Tatsachenstoff}) is brought before the court, and the judges should not deal with facts (\textit{Tatsachen}) the parties have not put forward. Furthermore a judgment may not rest on facts the parties mutually agreed not to bring before the court. The principle of the \textit{Beibringungsgrundsatz} is paramount, although this does not mean that the court cannot, for example, bring to the attention of the parties a specific term of the contract they have

\textsuperscript{71} § 286 s. 1 i.f. \textit{ZPO}: \textit{In dem Urteil sind die Gründe anzugeben, die für die richterliche Überzeugung leitend gewesen sind.}

\textsuperscript{72} Baumbach (Hartmann), § 286 2A-D (p.873); the judge has, moreover, to stay awake during the session: § 286 2B.

\textsuperscript{73} Baumbach (Hartmann), Grundz. § 128, 2.

\textsuperscript{74} Baumbach (Hartmann), Grundz. §128 3A-C.

\textsuperscript{75} Bosch-Boesjes describes (p.10-13) the theoretical implications (introduced by Gönder) of the dichotomy \textit{Dispositionsmaxime/Inquisitionsmaxime} on the one hand and the dichotomy \textit{Verhandlungsmaxime/Untersuchungsmaxime} on the other. The first theoretical model deals generally with the position of the parties and the judge in (civil) procedure; the second model focuses on the question who is responsible for the factual basis of the litigation (and the decision). The \textit{lijkheids (autonomy)} of the judge as described in s.48 of the Netherlands \textit{Wetboek van Burgerlijke Rechtsvordering} is determined by the distribution of competence between the parties and the judge in litigation. And this distribution can be different according to the type of litigation, as well as to the various stages of the procedure (Bosch-Boesjes, p.13).

\textsuperscript{76} Or \textit{Dispositionsmaxime}. In the codified systems, this principle of civil procedure is generally accepted although not always explicitly. The French NCPC codified this \textit{principe dispositif} (i.a.) in art. 1: \textit{Seules les parties introduisent l’instance hors le cas où la loi en dispose autrement. Elles ont la liberté d’y mettre fin avant qu’elle ne s’éteigne pas par l’effet du jugement ou en vertu de la loi}, (see Bosch-Boesjes, p.11).
overlooked. The court is bound by the facts undisputed between the parties\textsuperscript{77}, but, in principle, this applies only to the facts stated in the cause of action and not to any legal qualifications thereof by the parties\textsuperscript{78}.

Historically, the \textit{Verhandlungsmaxime} and the \textit{Untersuchungsmäxime} were principles intended to remove any inequality between the parties in civil litigation and the judge had to secure this goal. A decision by a third and impartial party (the judge) ought adequately to replace an unequal situation in which a person could take the law in his own hands. The \textit{Untersuchungsmäxime} gave the judge the \textit{Fragerecht} (the right to question the parties) and the power to deal directly with the parties, thus securing equality directly \textit{ex officio}. The \textit{Verhandlungsmaxime}, as opposed to the \textit{Untersuchungsmaxime}, was aimed at removing any inequality between the parties by way of compulsory legal counsel, and this was presumed to be necessary in order to make sure that the judge was duly asked to decide on the exact legal problem or question the parties had intended to bring before the court. Furthermore, this principle restrained the freedom of the parties in civil proceedings by imposing prescribed forms, time limits and formalities\textsuperscript{79}. The \textit{Verhandlungsmaxime} deals with the factual truth in a more restricted sense. Parties are free to submit the facts and acts in dispute to the judgment of the court, and the court is bound to the propositions that have been put forward (\textit{judex judicat secundum allegata partium}). The German law of civil procedure is based on the \textit{Verhandlungsmaxime} and the \textit{Wahrheitspflicht} (the duty to adhere to the truth) is very important. This does not imply, however, that a general duty exists to disclose information to the other party. It is a question of burden of proof the rules of which are to be found in substantive law. There is a principle that a party to civil proceedings is not obliged to provide his opponent with the information necessary to win the case\textsuperscript{80}.

\textsuperscript{77} Baumbach (Hartmann), Grundz. §128 3A-C.
\textsuperscript{78} Baumbach (Hartmann), Grundz. § 128 3C (p. 480): Das Gericht ist aber nur an den reinen Tatsachenvortrag gebunden, nicht an eine etwa übereinstimmende rechtfertige Beurteilung beider Parteien.
\textsuperscript{79} R von Boneval Faure, p. 95.
However, in certain cases a specific additional burden of proof rests on the opposite party, especially when the party who claims a cause of action cannot proceed with his claim without further information from his opponent; and in German case law, the duty to provide information to the party claiming a cause of action exists if the right of the claimant is opaque due to circumstances beyond his fault. This doctrine is applicable if eine besondere rechtliche Beziehung besteht (a special juridical relationship exists between the parties) and the claimant cannot reasonably be expected to procure the necessary information himself whereas the opposite party can very well disclose the information.

29. In the Common law the role of the judge is much more passive than in Continental systems. It is for the parties to advance the facts and the law and, according to the House of Lords at any rate, it is the task of the court simply to decide particular cases between particular litigants; there is no duty either to rationalize the law or to search for some independent truth. Indeed too many interruptions by a judge during the examination and cross-examination of the witnesses by the parties' lawyers will in itself be a ground for an appeal. Furthermore it has been held by the House of Lords that a case ought to be decided in accordance with the pleadings; thus a party may be prevented from raising new points of law at the trial or on appeal, although the actual position is by no means clear in that, according to the procedural rules themselves, a party is supposed only to plead the facts and this suggests that the theoretical position in England is not so different from


This special juridical relationship exists if the facts provide a cause of action but the exact scope of the claim is uncertain: Die Rechtsprechung billing einen Auskunftsanspruch lediglich dann zu, wenn der Berechtigte in entschuldiger Weise über den Umfang seines Rechts im Ungewissen ist, er sich die zur Vorbereitung und Durchführung seines Anspruchs notwendigen Auskünfte nicht auf zumutbare Weise selbst zu beschaffen vermag, der Verpflichtete sie unschwer geben kann und zwischen dem Berechtigten und Verpflichteten eine besondere rechtliche Beziehung besteht. Dafür hat sie im allgemeinen für erforderlich erachtet, daß der Leistungsanspruch dem Guinde nach besteht und nur der Anspruchsinhalt offen ist, NJW 1990, Lc.

185 Jones v National Coal Board [1957] 2 QB 55.
187 Jolowicz, p.147.
that of France\textsuperscript{88}. The real problem for the comparatist is to be found in the comparison itself of a trial with \textit{le procès}. The notion of a trial is closely bound up with the institution of the jury and because jurors were, until the modern age, often illiterate the idea of written evidence and a dossier was impractical; instead the emphasis was on an oral process in which the jurors were directly exposed to the witnesses\textsuperscript{89}. The jury has now largely disappeared from private law\textsuperscript{90} but its spirit remains\textsuperscript{91}; not only does the judge have to play two quite distinct roles - he must decide questions of fact (jury) and questions of law (judge)\textsuperscript{92} - but substantive law itself must often be understood in terms of these two functions. The operation of precedent, for example, depends upon a clear distinction being maintained between the two separate roles of the trial judge and this point is sometimes poorly understood in the law of obligations\textsuperscript{93}.

30. Schoordijk qualifies the distribution of the burden of proof as a policy decision of the judge, and the rules of reasonableness and fairness (bona fides) govern the relationship between parties in civil litigation\textsuperscript{94}. Now one of the most important objectives of the modern Continental law of civil procedure is to facilitate the search for the factual truth in order to realize subjective rights\textsuperscript{95}. And, it might be argued, this can be done by eliminating obstacles such as rigid rules for giving evidence, formal rules for the distribution of the burden of proof and rules giving specific evidential value to certain facts. However it has been said that this aim should be achieved through the rule that facts stated should be proven\textsuperscript{96}, but this does not solve the questions regarding the burden of proof itself, especially in those situations where the rules of reasonableness and fairness dictate that in the distribution of this \textit{onus probandi} a possible inequality between the parties in civil litigation ought to be taken into account. Such inequality can exist whenever one of the parties is a specialist or possesses specific knowledge and the other party is not able to assess his propositions in the context of the factual truth. In the interest of the litigants, efficiency in legal proceedings should be attained through interpretation of the cause of action aimed at deciding the actual points of dispute between the parties; whenever necessary further inquiries by the judge

\textsuperscript{88} Jolowicz, p.78; and see \textit{Drane v Evangelou} [1978] 1 WLR 455.
\textsuperscript{89} Jolowicz, p.141.
\textsuperscript{90} \textit{Ward v James} [1966] 1 QB 273.
\textsuperscript{91} Jolowicz, pp.12-13.
\textsuperscript{92} Jolowicz, p.138.
\textsuperscript{93} \textit{Qualcast (Wolverhampton) Ltd v Haynes} [1959] AC 743.
\textsuperscript{95} Cf. English law: \textit{Air Canada v Secretary of State for Trade} [1983] 2 AC 394, 438: the task of the court is to do - justice between the parties ... There is no higher or additional duty to ascertain some independent truth.
\textsuperscript{96} TJ Dorhout Mees, JALM Loeff, AD Belinfante, TY Boltjes, \textit{Richtlijnen voor de herziening van het Burgerlijk Procesrecht en de Rechterlijke Organisatie} (s-Gravenhage, 1948), p.16-17.
are to be implied. Rijken has argued that the possibility of calling up the parties (comparitie) should be used more often in order to give more detailed information about the facts whenever the cause of action brought forward is too opaque. The rules of proper civil proceedings can bring this about and, given the circumstances, the interests of a specific party have to be protected either by asking for further evidence, or by offering a party the possibility to discuss or contest certain facts the judge uses for evidence.

The positions of the parties should be made sufficiently clear and Vranken proposes several theoretical approaches to the interpretation of the rules mentioned. First, it could be argued that judges ought to pay attention to the way in which the opposing party in civil litigation reasonably might have interpreted statements etc. by the other party, and this development parallels the increasing role of the rules of reasonableness and fairness in civil procedure. The function of the rules of reasonableness and fairness in patrimonial law is, accordingly, reflected in the law of civil procedure. Secondly, the principles of fair play, equality and audiatur et alteram partem lead to the doctrine that every party should have a proper opportunity to comment on the important issues in the case sub iudice. In this respect, the influence of art. 6 of the European Human Rights Convention has been substantial. A third possible theoretical approach is to be found in the maxim that the parties themselves decide the scope of their litigation (cf. nr. 28) and that this maxim has to be respected in the relationship between the parties and the judge. All the same, when set in the development of the law of civil procedure and combined with the traditional separation of questions of fact and questions of law (cf. nr. 31), the autonomy of the parties and equality in litigation ultimately present the framework for the application of written and unwritten rules of law.

When dealing with consumer protection (cf. nr. 12), new rights for consumers often require new procedural mechanisms and perhaps even a new approach to procedures. Generally speaking, the autonomy and equality
of the parties in civil litigation are presumed to be safeguarded by the law (substantive law and procedural law), but the complexity of the law may become a source of new imbalances\(^\text{102}\). Further legal intervention might alleviate this problem\(^\text{103}\), but as the law develops towards a more post-axiomatic stage (cf. Ch. 15), using open-ended concepts and 'vague' rules, the interpretation of the role of the judge in the perspective of statutory provisions such as art. 48 Wethoek van Burgerlijke Rechtsvordering can offer the desired safeguards. A quantitative analysis of the Hoge Raad decisions and decisions of the Gerechtshoven (Courts of Appeal) in the Netherlands\(^\text{104}\) shows that 'vague' norms and rules of law are of the utmost importance in the practice of legal decision-making by the Gerechtshoven\(^\text{105}\); decisions by the Gerechtshoven deal, for the most part, with vague rules and norms, such as redelijkheid en billijkheid (goede trouw) reasonableness and fairness, onrechtmatig (illicit) and onzorgvuldig (without reasonable care). This means that from a legal point of view all the courts do is to sum up a number of facts and circumstances, qualifying these as giving rise to a cause of action under the rules mentioned; even reasoning by analogy and an appeal to precedents do not occur often\(^\text{106}\), and this assessment has lead to a plea for an extension of the possibilities the Hoge Raad has for controlling the qualification of facts by lower courts\(^\text{107}\). From a strictly theoretical point of view, precedent is no formal source of law in the same way as codes, statutes and sometimes customary law, and this has led Kottenhagen to argue that, in the Continental European legal systems, a doctrine of binding precedent may lead to the desired certainty of the law\(^\text{108}\). Kottenhagen holds that, despite

\[\ldots\text{ on the other} \]\n
\text{Presumably law is corrective and remedial in intent; it is designed to restore or promote a desired balance. But as it becomes differentiated, complex and maze-like in order to do this with increasing autonomy and precision, the law itself becomes a source of new imbalances. Some users become adept in dealing with it; those with other advantages find that those advantages can be translated into advantages in the legal arena. There arise new differences in access and competence - thus law itself can amplify the imbalances that it set out to correct, cf. M Galanter, Afterword: Explaining Litigation, Law and Society (Winter, 1975), p.363.}\n
\[\ldots\text{ presumely}\]\n
\[\ldots\text{ presumption}\]\n
\text{HJ Snijders, Rechtsvinding door de Burgerlijke Rechter (Deventer, 1978).}\n
\[\ldots\text{ presumption}\]\n
\text{Snijders, p.225.}\n
\[\ldots\text{ presumption}\]\n
\text{See RJP Kottenhagen, Van precedent tot precedent (Arnhem, 1986), and RJP Kottenhagen & MC Kaptijn, Toegankelijkheid van Rechtspraak (Arnhem, 1989), proposing a scheme to improve the accessibility of Netherlands published and unpublished case law (p.99-117). This improvement could bridge the gap between theory and practice of legal decision-making in the Netherlands as described by Snijders (1978).}\n
\[\ldots\text{ presumption}\]\n
\text{Cf. Snijders, p.225, supporting GJ Wiarda's plea for more control by the Hoge Raad on the qualification of facts.}\n
\[\ldots\text{ presumption}\]\n
\text{RJP Kottenhagen, Van Precedent tot Precedent (Arnhem, 1986), p.311-312.}\n
\[\ldots\text{ presumption}\]\n
44
the fact that in these systems, precedents have only persuasive authority, a
doctrine of binding precedent could be founded on the so-called 'case-norm' -
doctrine (Fallnorm-theory). In this doctrine, positive law (defined as the given
crude form of objective law) is - conditionally - binding in similar future
cases, unless this precedent can be proved wrong, outdated, etc. 109

In our view, the position of the Hoge Raad with regard to the
distinction between questions of law and questions of fact (cf. nr. 31) provides,
in combination with the legislative approach to the law of obligations in the
Continental legal systems, sufficient ground for the assumption that the
modern law of obligations is part of an abstract system of legal relations
flowing between abstracted notions of legal subjects and legal objects. That
said, it must be stressed that it is primarily the duty of the judge (iust in caus a
positum) to safeguard the autonomy and the equality of the parties in civil
proceedings, as well as to qualify the case of action in the perspective of his
statutory duty to apply the law within the boundaries that the rule of law
provides. When dealing with 'open-ended rules' and when accounting for the
decisive role of specific circumstances of the case there is an implication that
reasoning by analogy and reference to precedents should be used whenever
possible. The grounds stated in the motivation of the judgment should focus
on the statutory rule applicable in close connection with other arguments; and
the way the Netherlands Civil Code is drafted (cf. nr. 8) shows that the
modern law of obligations re-emphasises the need for argumentative legal
reasoning in case law (cf. Ch. 15).

§ 2 QUESTIONS OF FACT AND QUESTIONS OF LAW

31. The traditional separation of questions of law from questions of fact is
an essential and firmly established feature of the legal inquiry in both civil and
common law jurisdictions, and one can assume, therefore, that legal inquiries
differ from factual inquiries because legal inquiries are governed by the
demand to find a decision based on normative criteria, transcending the bare
fact-finding process. 110 Jackson observes that the crucial question is not what
as a matter of theory should be classified as questions of fact and questions
of law, but what the law classifies as questions of fact and questions of
law. 111 This observation seems helpful, although some legal theorists claim
that even sentences containing such words as 'legal right' and 'legal duty' do

109 Kottenhagen (o.c.), p.312.
110 JD Jackson, Questions of Fact and Questions of Law, in: Facts in Law (ed. by
W Twining), Archiv für Rechts- und Sozialphilosophie 1983, Beilheft nr. 16,
p.85-87.
111 Jackson, o.c., p.87; and see M Troper, The fact and the law, and F Rigaux, The
concept of fact in legal science, in: Law, Interpretation and reality (ed. by P
not express statements of fact\textsuperscript{112} and sometimes even deem legal decisions about statements of the parties\textsuperscript{113} erroneous from logical and philosophical points of view\textsuperscript{114}.

The role of facts in Continental legal reasoning is usually limited to decisions regarding the burden of proof. In principle, the burden of proof lies on the party claiming a specific legal remedy (\textit{obligatio ad ehibendum}), but specific rules can distribute it differently. Moreover, given the circumstances and thus given a certain \textit{de facto} situation - the attribution of the burden of proof can vary \textit{ex aequo et bono}. The development of legal theory generates abstract reasoning; legal thinking in the systematic approach of most Continental legal cultures tends, therefore, to underrate the importance made by the exact presentation of facts\textsuperscript{115}. However, the importance of the facts stated by anyone who claims that these facts disclose a cause of action is perhaps best illustrated when dealing with exclusion and limitation clauses. The Netherlands Hoge Raad has laid down rules regarding the question whether an exclusion or limitation clause is enforceable in a contractual relationship (cf. Ch. 9 § 3)\textsuperscript{116}, the use of exclusion or limitation clauses in contracts involving consumers is limited because these clauses are presupposed to be unreasonably onerous (s. 6: 237), and any party claiming applicability of such clauses has the duty to state and, if necessary, establish (prove) the circumstances (facts) that support the claim. This rule applies especially if the clauses are invoked against a 'weaker party' such as a consumer. The connection between the facts and all relevant circumstances of the case has to be firmly established, and judges should not assume too quickly \textit{ex officio} the existence of an imbalance between the parties or a discrepancy in the expertise of the parties when deciding that an appeal on an exclusion and limitation clause contravenes the rules of reasonableness and fairness\textsuperscript{117}.

The interaction between the distribution of the burden of proof on the one hand and the material rules applicable on the other is in Continental law often uncertain if one looks primarily at the substantive rules of private law. The outcome of a procedure is, therefore, not always predictable. Moreover, the importance of written and unwritten rules of reasonableness and fairness in the Netherlands law of obligations (cf. nr. 74) oblige the judge to protect, and, if necessary, to remove any inequality between the parties in civil

\begin{itemize}
\item \textsuperscript{112} See e.g. Eaglesfield \textit{v} Marquis of Londonderry (1876) 4 Ch D 693, 708.
\item \textsuperscript{113} \textit{R v Sunair Holiday Ltd} [1973] 2 All ER 1233, commented by AR White, \textit{Fact in the Law}, in: Facts in Law (o.c.), p.116-119.
\item \textsuperscript{114} See RS Summers, contesting these views in Comment on Alan White's \textit{Fact in the Law}, in: Facts in Law (o.c.), p.120-126.
\item \textsuperscript{115} Schoorl, p. 568.
\item \textsuperscript{116} See Rijken, \textit{Exonereatieclausules}, 1985.
\item \textsuperscript{117} \textit{Kiajs v Van der Ende}, NJ 1991, nr. 396 (cf. nr. 127).
\end{itemize}
proceedings. In particular the legal provisions that give the courts the freedom to take into account all relevant circumstances of the case, imply that the doctrines of the Verhandlungsmaxime and the Untersuchungsmaxime prove wanting in the context of statutory provisions such as s. 48 of the Wetboek van Burgerlijke Rechtsvordering or art. 12 of the French Nouveau Code de Procédure Civile.

Special attention should be given to the position of the Netherlands Hoge Raad vis-à-vis facts. When dealing with cassatie in burgerlijke zaken the distinction between facts and law becomes rather blurred, despite the fact that the Hoge Raad does not review factual decisions and interpretations of lower courts. The discussion in Netherlands legal cassatie doctrine focuses on the difficult, if not impossible, difference between on the one hand the determination of the facts and, on the other hand, the legal qualification and the subsumption of these facts under a specific rule of law. It has been argued that the Hoge Raad should be able to control (to some extent) the qualification of facts by lower courts, but this principle has not been accepted in Netherlands case law. Nevertheless the Hoge Raad has not adhered explicitly to any theory regarding the difference between questions of fact and questions of law and does not explain why certain decisions of lower courts are marked as questions of fact and not of law. The decisions of the Hoge Raad reveal that questions of fact in cassatie concern themselves not only with the assessment of the facts, but also with the decision whether or not a certain rule of law is applicable on the facts assessed, providing the rule employs 'undetermined' concepts which give the judge a certain amount of freedom when applying the rule - the, not unlimited, freedom to take into account the specific circumstances of the case (cf. nr. 74). The distinction

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118 The assessment of the facts is therefore of the utmost importance in order to determine the 'just' decision given the interpretation of the law. See AS Hartkamp, Wetsuitleg en rechtstoeapassing na de invoering van het nieuwe Burgerlijk Wetboek (Deventer, 1992), p.26-27: [dat] een regel in het algemeen tot redelijke resultaten kan leiden, doch dit in een bepaalde geval niet doet en [er niets tegen is] om te zeggen dat een bepaling in het algemeen geldt, doch in een concreet geval niet wordt toegepast because [de] vrijheid van de rechter om, zonodig tegen de letter van de wet in, een in concrete bilijk resulatant te bereiken, onomwonden door de wetgever is erkend.

119 Id. Bosch-Bocsjes (o.c.), p.13.
122 Veegens e.a., p.188-190, 192.
123 Veegens e.a., p.196. Cf. P Abas, De betekenis van de feiten (Arnhem, 1985), p. 21: (...) dat de Hoge Raad, wanneer hij wil tot een oordeel wordt geroepen, veelal aan de lagere rechter de ruimte laat om met inachtneming van bepaalde maatstaven tot een bestissing te komen. Wanneer de lagere rechter er blijft van geef die maatstaven te hebben aangelegd, acht de Hoge Raad de bestissing al snel aanvaardbaar, hoe die ook uitvalt. In our view, Abas seems to underestimate the possibilities the Hoge Raad has when deciding whether it will judge the qualification of the facts.
between prohibited supplementation of the casatiemiddelen and the duty to complement legal grounds brought forward in the context of the objections embodied in the middelen is unclear\(^{124}\).

Judges will decide upon the *de facto* situation, giving attention to principles as reasonableness and fairness and fair play, distributing the burden of proof\(^{125}\) and, indirectly, deciding the case as they go along\(^{126}\). The decisive factor in this respect is the nature of the rule of law involved and, especially in the field of the interpretation of contracts and *wilsverklaringen* (respective declaration of the intentions of the parties), the answer to the questions whether parties have agreed upon a contract, what the contents of a contract are and how contracts should be interpreted; and these questions are nowadays of a mixed factual and legal disposition\(^{127}\). Sometimes the law burdens one of the parties with the duty to prove certain facts and circumstances: for instance, where an employee who sues his employer for neglecting his (statutory) duty of care for safety, the employee has to state, and if necessary prove, that the employer was negligent in respecting safety standards. This - difficult - *onus probandi* is complemented by an equally difficult duty on the employer to prove why he resists this claim. The employer's onus of proof in cases involving the liability of employers for accidents in labour-yards and the like, is expressly specified by the Hoge Raad\(^{128}\).

The distinction between questions of fact and questions of law is, as we have seen (cf. nr. 29), of importance in English law. This is the result however not of any theory regarding the role of an appeal court - the Court of Appeal and the House of Lords can in theory decide questions of fact as well as law\(^{129}\) - but of the need to distinguish between the roles of judge and jury. The jury may now have largely disappeared from the law of obligations (defamation remains an important exception)\(^{130}\), but the fact and law dichotomy continues to be reflected not only in the procedural duties of the judge, but in the substantive law itself. Thus causation in the law of obligations (cf. Ch. 13 § 3) is both a factual and a legal question each question in turn being governed by a different test\(^{131}\). But what if the factual causal question is equally balanced: ought the court to find in favour of the defendant on the ground that the plaintiff has not actually proved his or her

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124 Veegens e.a., p. 284-286; sec s. 419-1 Wetboek van Burgerlijke Rechtsvordering.
125 Cf. nr. 19 and art. 176 and 177 Wetboek van Burgerlijke Rechtsvordering.
126 Cf Schoordijk, p 613-614.
127 See Veegens e.a., p.196-197 and 215-218, cf. EH Hondius, Kw/BW 1990/4, p.132.
128 Janssen v Nefobas BV NJ 1990, nr. 573, And see Werner v Willos-Feijenoord, Kort Geding 1992, nr. 70.
129 Jolowicz, pp.158-159.
130 Supreme Court Act 1981 s. 63.
case? In deciding such a factual question an appeal court will in truth be secreting a normative (legal) principle with the result that factual and legal questions become inextricably intermixed revealing in turn just how substantive law can both develop in the interstices of procedure and arise out of fact (ex facto ius oritur).

§ 3 LEGISLATION

32. From the historical perspective one characteristic of the English law of obligations is becoming manifestly clear: the structure is the work neither of any university nor of any reforming legislature. It is the work of law in practice - the work of judges, of practitioners and of those in the administrative bureaucracies. Yet in the nineteenth century the role of the courts as lawmakers began to be usurped by a Parliament keen to haul the legal system into the age of industrial capitalism and to make the legal process more amenable to ideas which favoured the bourgeoisie rather than the feudalists. As a result the written word increasingly replaced the ratio decidendi of precedent as the main source of law. However this legislative revolution never directly interfered with the substantive structure of the law of obligations. Indeed it did much to confirm the categories of 'contract', 'tort' and 'debt'.

But if statutes did not actually alter the basic conceptual structure of the law of obligations, they have certainly altered on occasions the substantive law. Thus there are Acts which make alterations to rights by reversing a common law rule, by introducing a new action for a new range of plaintiffs, by establishing statutory defences to certain common law claims and by giving the court more discretion in allocating responsibility or liability in certain situations. And the way that this kind of legislation operates can be similar to that of a new line of cases: the traditional conceptual ideas are usually retained but rearranged, added to or subtracted from in order to produce the desired results. Legislation, it might be said,

133 Sir H Maine, Early Law and Custom (John Murray, 1890), p.389.
136 See e.g., County Courts Act 1984 s.15.
137 See e.g. Law Reform (Personal Injury) Act 1968 s.1(1).
139 See e.g., Civil Aviation Act 1982 s.76(1).
140 See e.g., Law Reform (Frustrated Contracts) Act 1943; Law Reform (Contributory Negligence) Act 1945; Civil Liability (Contribution) Act 1978.
operates at the same conceptual and factual levels as the cases themselves\textsuperscript{141}.

The results of this approach are twofold. First the legislator cannot easily function at the level of principle: it can only function effectively via positive rules which the courts will enforce strictly within the limits of the language utilised. Thus the courts could never use section 2 of the \textit{Animals Act 1971} as the basis for a general institutional liability for dangerous things\textsuperscript{142}. Sometimes Parliament does try to work at more abstract levels by using the concept of ‘duty’, but this notion is usually trapped within fairly narrow factual situations\textsuperscript{143}. One might add that the structure of statutes does not help either; sections often meander between the legal worlds of fact, law and procedure and there is little regard for any schematic classification of rights.

Secondly, the legislator is not in a good position to try to give any shape to English law as a whole. It is of course true that there is today a multitude of statutes establishing and regulating whole areas of economic life and a piece of legislation like the \textit{Sale of Goods Act 1979} does try to codify an area along Continental lines\textsuperscript{144}. But because of the lack of partnership between judge and draftsman, together with the general tradition of English lawyers to think about facts rather than principles, the courts often find themselves operating at a level which will not encourage the tackling of problems in any rational or schematic way. Moreover the use of opaque language in many statutes simply mitigates against rationalisation by placing legislation beyond the comprehension of many lawyers let alone ordinary citizens keen to grasp the structure and policy of any particular area\textsuperscript{145}. Until 1965, the English legislator had officially never even considered a possible codification of English private law\textsuperscript{146}.

It is perhaps a little unreasonable to blame just the legislator for the narrow and descriptive nature of legislative rules: for part of the problem undoubtedly lies with the epistemological development of English law itself. As we shall see (cf. Ch. 15 § 1), the tendency of the Common law is to attach rules more to specific things, or classes of things, and to specific people, or classes of people, than to any notion of a legal institution in the sense of a legal subject and a legal object; and consequently one should not be surprised by a legislator who, in its own interest, perpetuates a particular scientific tradition. What is perhaps to be regretted is that English judges have not been able to escape from their own historical methodology when it comes to the

\textsuperscript{141} For a recent example of statutory interpretation and its relation with the existing common law see: \textit{Merlin v British Nuclear Fuels plc} [1990] 2 QB 557.

\textsuperscript{142} \textit{Read v J Lyons & Co} [1947] AC 156.

\textsuperscript{143} See e.g., \textit{Merlin v British Nuclear Fuels plc} [1990] 2 QB 557.

\textsuperscript{144} Zimmermann, pp.336-337.

\textsuperscript{145} Clarence-Smith [1980] SLR 14.

\textsuperscript{146} RC van Caeneghem, \textit{Geschiedkundige inleiding tot het privaatrecht} (Gent 1985), p.176.
interpretation of statutes; but this, also, is part of the descriptive tradition. English judges have never really been able to interpret statutes through the use of institutions - that is to say they have always treated for example an animal as an animal rather than as a dangerous res - and consequently the Common law courts have not been able to develop the law via analogy with existing statutes. When invited to develop a liability for dangerous things on an analogy with dangerous animals, the House of Lords remarked that it was not their job to rationalise the law of England and that arguments based on legal consistency are apt to mislead for the common law is a practical code adapted to deal with the manifold diversities of human life. Bachelard might well have said of this kind of rationality that it is a science too close to the facts.

33. In Continental law, the position of the legislator vis-à-vis its function in structuring the law seems beyond doubt. According to van Roermund, any system of positive legal rules presupposes legality, albeit based on - grossly simplifying - ideology (French), morality (German) or pragmatic deliberations (English), and the same applies to the notion that the making of the law is rooted in contemporary society, reflecting old and new rules. Codification and recodification sometimes lead to a logistic and positivistic approach; but nowadays the rapid changes of society require detailed laws which have an open mind to future developments, respecting the task of practitioners and establishing a reasonable (workable) set of legal rules for society as a whole. The law, therefore, cannot be learnt from legislation alone, disregarding legal practice and legal theory. The legislator gives the rules, the judges decide, audite et alteram partem. The outcome of any exercise in statutory interpretation is, of course, determined by a variety of factors. The Civil law experience suggests that statutory regulation is no obstacle to judicial lawmaking and when added to the increasingly important role of legislation in the Common law this leads to the conclusion that differences in the theory of the sources of law between the two major families of law are becoming more formal than real. According to Esser, zeigt sich die Annäherung beider Systeme [codified law and case law] darin, daß kontinentale Sprachpraxis mehr und mehr vom Begriffsdenken zur Kasuistik der neu entdeckten Probleme.

148 G Bachelard, La formation de l'esprit scientifique (Vrin, 1938), p.44.
149 GCGJ van Roermund, Europese recht en beginselen van legaliteit, Juut (Tilburg) 1991.
150 The question whether the courts have, from time to time, been able to exercise a discretionary power of treating particular statutory words or phrases as mere surplusage, especially where they make little or no sense in the relevant statutory context (cf. J Kodwo Bentil, Statutory surplusage, 1991 Statute Law Review, p.64-75) falls beyond the scope of this book.
152 M Vranken, p.46-47.
Clear rules and principles of the legal system are, of course, preferable and more authoritative. But Schoordijk is quite sceptical about the legislator’s power to shape the method of interpretation that the judge is supposed to adhere to. The Netherlands Civil Code does not contain rules of interpretation (as did the old Civil Code of 1838). And when the standards and rules of the legal system do not provide a clear resolution of a dispute, judges may use policy arguments as substantive justifications for decisions. In Bell’s view, legal solutions can be justified simply by appealing to legal sources provided that the relevant statutory provisions are made up of a written text which can be easily determined and is incontrovertible when read in the light of the rest of the text. The statutory purpose, and settled legal principles in that area of law. If this is the case, meritorious or socially beneficial aspects of the legal solution do not necessarily need to be demonstrated; policy arguments providing such a demonstration are needed only in hard cases. To apply the purposes and principles underlying a particular provision is to apply the provision itself, according to Bell, who mentions art. 5 lid 2 NBW giving a similar rule. This provision is not incorporated in the Netherlands Civil Code, although it was part of the original draft for a new Civil Code in the Netherlands. Parliament postponed the Inleidende Titel, consisting of nine articles, in 1956 (this title has in part been transferred to subtitle 3.1.1), but it contained two different types of rules. Articles 1 to 7 regulated the relationship between coercive and dispositive statutory rules, as well as the applicability of legal rules emaating from other sources than the law (usage, reasonableness and fairness). Article 8 laid down general rules for the misbruiken van een bevoegdheid; abuse of right, and article 9 contained the rule that any bevoegdheid based on private law was not to be enforced whenever incompatible with written or unwritten rules of public law. The First

154 HGF Schoordijk, Macht en onmacht van de civielrechtelijke wetgever, in: Macht en onmacht van de wetgever (Deventer, 1978), p.31-34.
157 Bell, p.59, in IS: article 5 of the so-called Inleidende Titel (Preliminary Title) of the draft Code by Meijers.
158 Toepassing van rechtsbeginselen die aan weitsvoorschriften ten grondslag liggen, gelt als toepassing van die voorschriften. Deze wijze van toepassing is slechts geneoofd, wanneer de wet niet rechtsstreeks in het gegeven geval voorziet (art. 5, lid 2 NBW Ontwerp Meijers).
159 See EM Meijers, Ontwerp voor een Nieuw Burgerlijk Wetboek, tekst en toelichting eerste gedeelte (Bock 1-4) (s-Gravenhage 1954), p. 21.
set of rules (articles 1 to 7) was criticized as being in part superfluous and also undesirable because the legislator clearly favoured his own creation (statutory law) to other legal sources. Furthermore, the relationship between the law and the redelijkheid en billijkheid (the rules of reasonableness and fairness) was given a different complexion when Book 6 of the draft Civil Code was summoned to Parliament. Articles 1 to 6 were cancelled and articles 7 to 9 became incorporated in subtitle 3.1.1 of the Netherlands Civil Code and are primarily applicable when dealing with questions regarding patrimonial law (vermogensrecht). Applicability of these rules is, however, not strictly limited to the vermogensrecht (cf. s. 3: 15). The expression bevoegdheid can be translated either as 'right' or as 'power', depending on the circumstances; and to have bevoegdheid can, according to Haanappel & Mackaay, sometimes be translated as 'to be entitled to', 'to be empowered to' or 'to be authorized to'. In their French translation bevoegdheid is translated by pouvoir rather than the more specific droit; but in this book, preference is given to the translation 'right' because the English notion abuse of right assumes much of its meaning from the idea of a right as a subjective power (cf. Ch. 13 § 7) and covers therefore actions taken on the basis of de objectieve wet, substantive statutory rules of private law, as well as actions based on de subjectieve bevoegdheden die in de wet hun grondslag vinden, the subjective right itself. Meijers interprets the expression in the context of the Inleidende Titel: of het taalkundig juist is van misbruik van recht en van misbruik van een bevoegdheid te spreken, kan in het midden worden gelaten. De uitdrukking is kort en krachtig en wordt door een ieder begrepen.

160 See AS Harikamp, Compendium (Deventer, 1990) ars. 3 and 4.
161 Cf. Haanappel & Mackaay, p.6 ft 1.
162 Toelichting Meijers (o.c.), p.29.
4 GENERAL REMEDIES

§ 1 DEBT AND DAMAGES

34. It may seem curious to the Continental jurist to put the remedies of law before the rights of the individual, but, as we have already explained (cf. Ch. 2 § 4), the emphasis of English law is still towards the idea of ubi remedium ibi ius. Moreover this emphasis is reinforced by the fact that in the English common law (as opposed to equity) the only judgment that the court can normally give is one expressed in money (one exception is an action to recover property). At common law, then, the law of obligations is largely about liability for sums of money\(^1\).

These sums of money may be predetermined before the trial, a typical example being the price of goods sold or the price of a service rendered. An action by a creditor to recover such a sum is an action in debt\(^2\). Alternatively the sum of money sought by a plaintiff may be unascertained before the trial; in these situations it is up to the court to quantify the amount and, in so doing, the court will refer either to an injury or loss suffered by the plaintiff (an action for compensation)\(^3\) or to a benefit gained by the defendant (an action in restitution) depending upon the nature of the cause of action.

This distinction between compensation and restitution is in turn important. For although both types of claim are for an amount of money to be assessed during the trial itself, a restitution claim is generally seen as being an action in debt\(^4\). Thus one of the great differences between an action in tort (cf. Ch. 12 § 2) and an action in restitution (cf. Ch. 11 § 3) is that, from a remedy point of view, the former is usually an action for 'damages' while the latter is usually an action in 'debt'. Moreover this difference of form in the law of actions can also be used to explain an important distinction to be made between a claim in tort for compensation and a claim under statute (or even contract: cf. Ch. 9 § 4) for an indemnity. The former is an action for damages whose cause arises as a result of the happening of the damage itself, the actual assessment of the damage by the court being secondary to the cause of action; the latter is an action for debt whose cause arises only when the expenses are actually incurred\(^5\). The right to an indemnity debt is, in other

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1 For an historical and comparative view of omnis condemnatio pecuniaria see Zimmermann, pp.711-782.
3 Ibid., s.50.
5 Yorkshire Electricity Board v British Telecom [1986] 1 WLR 1029.
words, located neither in the damage nor in its physical cause; it is located in the public law statute or private law contract which acts as the cause of action.

35. The dichotomy between debt and damages can reflect itself in the law of contract as well; and so a rule formulated for a contractual compensation action (la responsabilité contractuelle) might not be suitable for a contractual claim for a specific sum of money. For example, in a claim for a debt the damages rule that a plaintiff is under a duty to mitigate his loss will have no application, unless perhaps the plaintiff’s action is a flagrant abuse of his right; equally in such a debt claim the plaintiffs cannot always expect to have a damages rule applied in their favour. The nature of the claim can attract its own rules capable not only of operating independently of the actual cause of action itself but of creating separate causes of action within a single obligation category with the effect, for example, of avoiding the maxim nemo debet bis vexari.

§ 2 DAMAGES

36. Drawing a distinction between debt and damages is insufficient to give a proper picture of the role that the damages remedies themselves can play in the English law of obligations. For damages actions can be of various types depending not only upon the nature of the interest or right invaded, but upon the way the monetary awards are actually assessed. The law of damages in England is nothing short of an independent area of private law giving rise to its own cases and literature.

The starting point of the law of damages is to be found in the notion of compensation, the principle of law here being restitutio in integrum. However the notion of compensation, or the principle of restitutio, are subject to qualifications: for example some plaintiffs may receive only nominal damages despite the undoubted interference with a right; other plaintiffs may receive substantial damages without proving loss - e.g. in libel - or

7 Luxor (Essex) Ltd v Cooper [1941] AC 108.
8 A plaintiff can thus bring a debt and subsequently a damages action on the same contract Overstone Ltd v Shipway [1962] 1 WLR 117.
9 See e.g. Barlow.
10 Where any injury is to be compensated by damages... you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or repairation per Lord Blackburn in Livingston v Rawyards Coal Co (1880) 5 App Cas 25, 39.
11 Constantine v Imperial Hotels Ltd [1944] KB 693.
12 See now Sutcliffe v Pressdram Ltd [1990] 2 WLR 271.
may, if the defendant's behaviour has been particular abusive, obtain punitive or exemplary damages which do not even pretend to be based upon compensatory principles\textsuperscript{13}.

An award of damages can sometimes be guided by some unexpressed substantive principle beyond that of the immediate cause of action in issue. For example an award of nominal damages may be made by the court in order to prevent unjust enrichment\textsuperscript{14}. Equally an award of substantial damages may be made not so much to compensate a plaintiff (for there may be no loss as such), but to deprive a defendant of an unjust gain; in this situation the award of damages is to further the aims of the law of restitution rather than the law of tort\textsuperscript{15}. On other occasions the court may indirectly recognise a new interest by making an award that will compensate not just the immediate plaintiff but also, for example, his family, the latter not themselves having a direct cause of action\textsuperscript{16}. In these situations, then, it is the law of actions rather than the law of obligations that is the motivating area, but of course this independence of the law of damages is able to give the common law of obligations a certain flexibility over and above the positive causes of action to be found in contract and tort.

However the principles of the law of damages are not entirely separate from the categories of substantive law in that it can be of importance whether the cause of action is contractual or tortious. Thus in contract the test of remoteness of damage (cf. Ch. 13 § 3) is 'contemplation' while in tort the test is 'foreseeability'; and this, in theory, means that the amount of damages recoverable can be dependent upon the nature of the obligation\textsuperscript{17}, at least where the damage suffered is financial rather than physical\textsuperscript{18}. In fact these different tests of remoteness reflect the fact that the substantive law is of importance with regard to the \textit{restitutio} principle itself. In contract the principle is extended to cover the position that the plaintiff would have been in had the defendant not broken the contract; in contract, in other words, the object of an award of damages can often be to compensate not just for the

\textsuperscript{13} Rookes v Barnard [1964] AC 1129, 1221-1233.
\textsuperscript{14} The Alhazero [1977] AC 774.
\textsuperscript{15} Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd [1952] 2 QB 246.
\textsuperscript{16} Jackson v Horizon Holidays Ltd [1975] 1 WLR 1468.
\textsuperscript{17} The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realized that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation. The modern rule in tort is quite different and it imposes a much wider liability. The defendant will be liable for any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case, unless the risk is so small that a reasonable man would in the whole circumstances feel justified in neglecting it per Lord Reid in The Heron Il [1969] 1 AC 350, 385.
\textsuperscript{18} Parsons v Uitley Ingham & Co Ltd [1978] QB 791.
loss arising from reliance *damnum emergens* but for the loss of an expectation as well *lucrum cessans*. In addition to this general difference between contractual and tortious damages, a difference of substantive law can be of importance with respect to a number of more technical rules of damages, for example it would seem that punitive or exemplary damages are not available if the cause of action is contractual. For contract is primarily about the protection of economic interests.\(^{19}\)

37. In Netherlands law, damages to be paid on the basis of a statutory duty to compensate (be it non-performance, delict, or any other legal obligation to compensate damages) is specifically dealt with in s. 6.1.10\(^{20}\). Financial damage has to be compensated, as does any other disadvantage, as far as the law entitles anyone to recover such loss. Compensation for the loss of a thing amounts at least to the equivalent economical value of the thing lost, and this value has to be estimated as exactly as possible\(^{21}\) and financial damage comprises (s. 6: 96) consequential loss in money and property, as well as loss of profits *lucrum cessans*. Damage can only be compensated if a causal relationship exists between the loss and the event that gave rise to liability. For instance, the obligation to compensate the damage caused by an accident does not include damage that would have occurred anyhow, such as an illness not caused directly by the accident itself\(^{22}\). Any gain the prejudiced person received has to be set-off against the damages claimed\(^{23}\). Contributory negligence and uncertain future damages are regulated (s. 6: 101 and 105) and, in this respect, it is interesting to note that in accordance with the principle of causation, the rules of reasonableness and fairness can, given the circumstances, set limits to the compensation for damage in cases of contributory negligence (cf. Ch. 13 § 3). Contributory negligence of children, however, is in general no ground for the reduction of the compensation awarded (and definitely not if the child is under fourteen)\(^{24}\). Loss other than material damage can be awarded in specific circumstances (s. 6: 106); and persons directly supported by a victim who dies as a result of an event for which another person is liable, are entitled to claim damages (s. 6: 108) (cf. Ch. 13 § 6). An important new feature in the field of compensation is the general provision giving the courts the power to moderate, given the

19 *Addis v Gramophone Co. Ltd* [1909] AC 488.
20 In case of non-performance, the causal link required between damage and act is similar to the causal link required when dealing with delictual liability. See (under the *old* Netherlands Civil Code of 1838) *e.g.* *Van Dijk v Beter Wonen*, NJ 1991, nr. 74, and now s. 6: 98. In contract, the courts have tended to rely more on a theory of ‘reasonable imputation’, i.e. to assess damage by reference to the knowledge of possible losses which the defendant had or ought reasonably to have had. And the Civil Code allows plaintiffs to recover interest on unpaid debts, providing the defendant is in default, cf. EH Hondius in: *Contract Law and Practice*, p.254; see also s. 6: 96.
circumstances, the consequences of the compensation awarded (s. 6: 109),
whilst government can set limits to damages (s. 6: 110).

Punitive or exemplary damages (cf. nr. 36) as such are unknown in the
Netherlands law of obligations. Any advantage the schuldenaar (debtor)
acquired as a consequence of his niet-nakoming or onrechtmatige daad is not
included in the schade (damage) of his schuldeiser (creditor). Nevertheless s.
6: 104 offers the possibility of taking into account such advantage when
compensation is awarded. Application of the rule of s. 6: 104 is at the
disposition of the judge and will depend to a great extent on the culpability
of the debtor in combination with the nature of his conduct.

38. The dichotomy between debt and damages and the emphasis on ubi
remedium ibi ius in English law differs substantially from the Netherlands legal
system. The statutory basis for an obligation to compensate damage (e.g., niet-
nakoming or onrechtmatige daad) is complemented by statutory provisions
dealing with the obligation to pay damages in general (cf. nr. 30 and 51).
Furthermore Netherlands legal science makes a distinction between formal
and substantive rules of civil procedure (cf. nr. 23) and the rechtswerving
itself is governed by subtitle 3. 11. The distinction between formal and
substantive rules of civil procedure is difficult to make, especially because the
concept of substantive rules of civil procedure is usually connected to the droit
subjectif itself (cf. nr. 26).

§ 3 SPECIFIC REMEDIES

39. Preliminary Remarks
The major contribution of the Court of Chancery (cf. Ch. 4 § 2) to English law
was that it introduced specific, that is non-monetary, remedies into the law of
actions. This relief is of several kinds and operates to protect both equitable
and common law substantive rights. In theory these equitable remedies are
available only where existing rights have been infringed or threatened, but the
position is not quite so simple (cf. Ch. 4 § 5). Moreover the equitable
remedies are discretionary and so even if the plaintiff can show that a right
has been infringed, it does not mean the court must grant equitable relief,
although it usually will.

Equity has also contributed the important monetary remedy of account
(cf. ar. 45). This remedy has been formulated primarily to accompany and to
complement some other non-monetary equitable remedy like an injunction (cf.

26 Cf L Dommering-van Rongen, Produktenaansprakelijkheid (Deventer, 1991),
nr. 40) or some substantive equitable institution like the trust (cf. Ch. 4 § 4); but it can sometimes operate independently, particularly where the court holds that there is a fiduciary relationship between the parties (cf. Ch. 4 § 4). Furthermore a court has had statutory power for well over a century to award damages in lieu of an injunction or specific performance28 and this means that damages can sometimes be awarded in situations where perhaps the law of tort has not fully developed any substantive right or recognised interest. One such area is the wrongful use of confidential information29.

40. **Injunctions**

An injunction is, *prima facie*, an *in personam* order requiring a person not to do something30. In the law of obligations it can be used to prevent a plaintiff from breaking a contract31, and in the law of tort it can be an effective weapon against interference with property rights or established business interests32. In the law of restitution the injunction can be used in public law to prevent a person from profiting out of breaches of the criminal law33. In addition to its role in the law of obligations, the injunction has an important part to play in procedural and property law. It can not only protect both real and personal property rights - together with incorporeal property such as confidential information34 and product designs (cf. Ch.11 § 2) - but can freeze a defendant's patrimony in order to ensure that there are assets available to meet any liability the defendant might incur in, for example, the law of obligations35.

The effectiveness of this remedy is enhanced by the fact that it can be obtained at very short notice: an 'interlocutory' injunction is available before a full trial to prevent a *fait accompli*36 and, although this is only a temporary remedy, it can sometimes be a sufficient process in itself37. At any trial following the issue of an interlocutory injunction a plaintiff can seek a 'final' injunction, but such an injunction might well be qualified in its terms (for example, in cases of noise amounting to a nuisance, the defendant might be prohibited from making the noise only at certain times) or it might be refused.

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28 *Chancery Amendment Act 1858; Supreme Court Act 1981* s. 50. And see also *Misrepresentation Act 1967* s.2(2).
29 *Seager v Copydex Ltd* [1967] 1 WLR 923.
31 See e.g., *Warner Brothers Pictures Inc v Newton* [1937] 1 KB 209.
32 See e.g., *Torquay Hotel Co v Cousins* [1969] 2 Ch 106.
33 *Att-Gen v Harris* [1961] 1 QB 74.
34 See e.g., *Att-Gen v Guardian Newspapers* [1987] 1 WLR 1248.
36 Power to grant interim (i.e. interlocutory) injunctions is now to be found in statute: *Supreme Court Act 1981* s.37. Guidelines for the issue of such injunctions are to be found in *American Cyanimid Co v Ethicon Ltd* [1975] AC 396.
37 See e.g., *Gulf Oil (GB) Ltd v Page* [1987] Ch 327; but see *Femis-Bank Ltd v Laxar* [1991] 3 WLR 80.
altogether. A plaintiff can also seek a 'quia timet' injunction where the wrong or interference is apprehended; however such a plaintiff must adduce evidence to show that his fears are well grounded and thus he cannot succeed merely by saying 'timet'.

Oddly, perhaps, injunctions are also available as positive orders. A 'mandatory' injunction is one requiring the defendant actually to do some positive act such as removing a sign that trespasses onto the plaintiff's land; and an 'Anton Piller' order is little short of a pre-trial private law search warrant designed to combat copyright infringements. These positive order injunctions can sometimes be difficult to distinguish from the quite separate equitable remedy of specific performance.

41. **Specific Performance**

Specific performance is an order requiring a person to do something. It is associated with the law of contract where it is used to order a contractor actually to perform his side of the bargain as opposed to just paying compensation for breach. To the Continental lawyer it might seem odd that this remedy is not the most frequently used remedy in the English law of contract; but, leaving aside debt (which is a form of common law specific performance), the equitable remedy of specific performance is in theory available only where it is necessary and desirable. Accordingly it will not be available where damages would be an adequate remedy nor will it be available where the court would have to supervise enforcement of the order 'to an unacceptable degree'.

Care must be taken to distinguish specific performance in equity from an action in debt at common law. A court, in holding a person to a contract, may order that a promise to pay a specific sum of money is fully enforceable and, in this situation, the defendant is liable at common law in debt arising from a contract. However if the debt is for some reason unenforceable at common law it may be that a creditor can seek the aid of equity to order specific performance of the debt; in such an exceptional situation the debtor is liable as a result of principles attaching as much to the equitable remedy itself as to the substantive law of contract and this will allow

40 See e.g., *Kelsen v Imperial Tobacco Co* [1957] 2 QB 334.
41 *Anton Piller KG v Manufacturing Processors Ltd* [1976] 1 All ER 779 Ch 55.
42 The Anton Piller order does not contravene art. 8 of the European Human Rights Convention: European Court March 30, 1989 (see *NJ 1991*, nr. 522).
43 As it is in the Continental legal systems, cf. Zimmermann, pp.776-781.
44 *Tretel*, para.39.
45 *Tretel*, para.63.
46 *Postner v Scott-Lewis* [1986] 3 WLR 531, 540.
47 *White & Carter (Councils) Ltd v McGregor* [1962] AC 413.
the court to give expression to, for example, the principle of unjust enrichment. All the same, the common law remedy of debt in effect amounts to specific performance of a contract and so the question has been asked - but not really answered as yet - as to whether the common law should take account of the principles that equity attaches to its remedy of specific performance before it grants an action in debt in situations where the defendant thinks that compensatory damages ought to be adequate. In other words should the common law of contract directly incorporate principles from equity?

42. Rescission
Another equitable remedy associated with contract - and with other legal transactions - is one designed to help a person who wishes to escape altogether from an obligation which, if enforced, could give rise to unjustified enrichment (cf. Ch.11 § 4) or could amount to an abuse of a right (cf. Ch. 13 § 7). Equity may, accordingly, order the rescission of a contract entered into under fraud, duress, undue influence or mistake and it can set aside contracts which have been induced by statements which turn out to be untrue (cf. Ch. 7). This remedy must, however, be distinguished from other kinds of actions. Thus a litigant may achieve the same objective through a declaration action whereby the court declares a transaction void; alternatively a party may make use of self-help in unilaterally repudiating a contract for serious breach or other vitiating factor.

Where equity does order rescission - and it retains a discretion to withhold the relief where damages would be a more suitable remedy - it will only do so where restitutio in integrum is possible. But in order to achieve such restitution the court cannot make use of damages in addition to the rescission (unless there is a separate right to damages at common law or under statute); however it can, via the remedy of account (cf. nr. 45), order that an indemnity be paid so as to prevent unjust enrichment.

The equitable remedy of rescission has a creative and fundamental role to play in certain areas of, or associated with, the law of contract. It may, for example, be the only remedy available for misrepresentation and, accordingly, it is a remedy that must be carefully distinguished from the remedy of

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51. *Car & Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525. Repudiation for serious breach of contract is a self-help remedy in as much as the contractor can repudiate without obtaining a court order or declaration. However if he exercises this remedy in situations where the breach would not justify such a drastic remedy, then he risks being sued for damages for breach of contract.
   See generally Treitel, para.248.
52. *Leaf v International Galleries* [1950] 2 KB 86.
damages\textsuperscript{34}, equally it can play an important role in contracts affected by mistake (cf. Ch. 8 § 7) or fraud (cf. Ch. 8 § 8). In the area of what might be called unfair or unconscionable bargains equitable rescission is the means by which the victim of such a bargain might escape from the transaction (cf. Ch. 8 § 9). However in these latter situations the remedy is available only in exceptional situations\textsuperscript{35}.

43. \textit{Rectification}

If rescission proves to be an unsuitable remedy, for example because the parties cannot be returned to their original positions or because the contract is simply not voidable, then equity can order rectification of a written contract\textsuperscript{36}. However this remedy is applicable only in situations where a written document wrongly records what was clearly agreed between the two parties and thus evidence is often crucial in these cases. As we shall see, rectification can be a most useful remedy for dealing with contracts containing written errors (cf. Ch. 8 § 7) and so it is a legal action which is closely interrelated not only with the doctrine of mistake in contract (cf. Ch. 8 § 7) but with other areas of equity such as rescission and estoppel.

44. \textit{Estoppel}

Whether estoppel deserves to be treated as an independent equitable remedy is open to doubt. In truth it is an equitable doctrine used to motivate certain equitable remedies such as injunction and rectification. Nevertheless it is an area of Chancery relief that has attracted its own body of caselaw and is now of such practical importance that it needs to be distinguished from those substantive areas of law of obligations where it often finds expression.

Estoppel is a doctrine whereby a person (the representer) may be prevented by his statement or conduct from asserting or denying certain facts if the statement or conduct might cause loss to another (the represented) who has relied upon it. It is an equitable ground of relief that in some ways resembles the \textit{exceptio} of Roman law. As such it is in principle available only as a defence ("it is a shield not a sword") and cannot in theory create new substantive obligations. In practice, however, it can indirectly create not only \textit{iura in personam} but \textit{iura in rem} - for example, it can create a 'servitude'\textsuperscript{37} - and, despite its procedural nature, it is a particularly useful doctrine in that its whole purpose can be to prevent a person from unreasonably exercising rights at common law (cf. Ch. 13 § 7). Estoppel therefore is a useful device through which various fundamental principles of Western law can find expression. For example it can be used not only to prevent, on occasions, unjust enrichment (cf. Ch. 11 § 4), but to give expression to principles such as

\textsuperscript{34} \textit{Banque Keyser Ullmann v Skandia Insurance} [1989] 3 WLR 25 (CA); [1990] 3 WLR 364 (HL); \textit{The Good Luck} [1990] 1 QB 818.


\textsuperscript{36} \textit{Roberts & Co Ltd v Leicestershire CC} [1961] Ch 555.

\textsuperscript{37} See e.g., \textit{Crabb v Anun DC} [1976] Ch 179.
nemo auditus propriam turpitudinem allegans and male enim nostro jure uti non deberrmus (cf. Ch. 13 § 7). Thus one who promises, in the absence of any consideration (cf. Ch. 9 § 3), not to enforce his full contractual rights at common law might find himself estopped in equity from going back on his promise.58

There are a number of different kinds of estoppel. Estoppel by representation has a particular relevance to the law of contract in that it might, as has just been suggested, give legal force to some promises unsupported by consideration (cf. Ch. 7 § 3); estoppel by negligence can have a relevance within the law of tort because it may raise questions on occasions as to whether a person who has been careless with his property ought to be allowed to enforce his property rights if this enforcement would cause damage to another59 (cf. Ch. 13 § 9); and estoppel by acquiescence, or proprietary estoppel, has a relevance for the law of restitution in that an owner may legally be forced to give credit to one he has allowed to spend money on his property60. The fact that estoppel is a creature of equity in itself adds a further remedial dimension to the general law of obligations in that a court can take account of any behaviour by the representee; if the representee has acted in an abusive way he may be refused a remedy on the ground that it would not be 'inequitable' for the representor to enforce his full rights61.

45. **Account**

The equitable remedies considered so far complement the common law primarily by being non-monetary. Yet there is one Chancery monetary remedy which could have quite profound repercussions in the development of an English law of restitution (cf. Ch. 11 § 4) if it were to go through some kind of modern renaissance62. This is the remedy of account, which is a procedural process amounting in effect to an equitable debt action. Such a claim is usually used to obtain an indemnity or benefit from a person in breach of an equitable financial duty (cf. Ch. 4 § 4); and so the mortgagee who carelessly sells the mortgaged land for less than its market value63, or the trustee who profits from a trust64, may well have to account for the resulting loss or for the profit received.

One puzzling aspect of account is its actual scope and function within the general context of private law. Does it lie only when there has been a breach of fiduciary duty (cf. nr. 46); or is it available in situations where the relationship between the parties is something less than a fiduciary

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58 Central London Property Trust Ltd v High Trees House Ltd [1947] 1 KB 130.
64 Boardman v Phipps [1967] 2 AC 46.
relationship? There is some authority that account is available outside of the fiduciary relationship - particularly where intellectual property rights are concerned and it would seem that it is a remedy that is available either to enforce a legal right to a debt in situations where the common law of actions is defective or to prevent a person from deriving a profit from his own wrong. Consequently the remedy of account could play in English law the role that the condicio played in Roman law. Much will depend upon future developments in the law of actions and in the law of unjust enrichment (cf. Ch. 11 § 4). What is important for the moment, however, is to remember that the remedy of account is quite separate from monetary remedies at common law; accordingly duties arising in equity which may give rise to account must be carefully distinguished from duties at common law giving rise to the remedy of damages.

46. Tracing
One of the devices that equity can import into a fiduciary relationship is a remedy that goes beyond account (cf. nr. 45). The doctrine of tracing allows a plaintiff to recover money on the basis of an in rem relationship with the coins themselves and this has been extended to reach into a defendant’s bank account. In effect equity can grant a revindicatio claim - an actio in rem - in respect of money. The actual details of this remedy are complex and outside the scope of this survey; nevertheless tracing can on occasions make its own individual contribution to the law of obligations in that it has been used as a method in itself of preventing unjust enrichment. Moreover it must be remembered that debt, being a chose in action, is a species of

66 London, Chatham & Dover Railway Co v S.E. Railway Co [1892] 1 Ch 120, 140, 143.
68 Parker-Tweedale v Dunbar Bank Fic [1990] 3 WLR 767, 773.
71 See Lawson, pp.147-160; and Agip, supra.
72 Sinclair v Brougham [1914] AC 398.
property; thus it may be that the 'owner' of such a debt can trace it into the hands of third parties.\(^{23}\)

The principle of tracing can, then, go beyond the actual equitable remedy itself. Thus with the help of an injunction the assets of an alleged criminal can now be frozen in a bank account to facilitate tracing on behalf of the alleged criminal's victims; and, given that the main practical effect of tracing is to turn the plaintiff into a privileged creditor, the idea has been seized upon and extended, via contract, to moveable property. A 'retention of title clause' in a contract for the 'sale' of goods in effect allows a seller to trace and to vindicate his goods - or indeed money representing those goods - from the assets of a bankrupt buyer.\(^{25}\) Tracing, therefore, is both a specific equitable remedy and a more general legal doctrine about ownership and property rights.

47. **Subrogation**

Another equitable remedy which plays an important role in both unjust enrichment and the law of obligations in general is the remedy of subrogation. This is a remedy whereby one person is allowed 'to stand in the shoes' of another person in order that the former may take over certain rights of the latter. It is a convenient way of describing a transfer of rights from one person to another, without assignment or assent of the person from whom the rights are transferred and which takes place by operation of law in a whole variety of widely different circumstances.\(^{76}\) It is a doctrine of particular significance in situations where there is insurance cover because an insurance company may often be entitled to stand in the shoes of an insured person whom it has paid. Thus in many property damage cases it is often not the owner of the damaged property who sues in tort or contract, but the owner's insurance company.\(^{77}\) In accident at work cases arising as a result of the negligence of a fellow employee, it is legally possible for the employer's insurance company to recover from the negligent employee, via the doctrine of subrogation, any damages it has paid out on behalf of the employer: for the insurance company can take advantage of the employer's contractual right against the careless employee.\(^{78}\)

It may seem odd that the courts allow an insurance company to recover their accident payments from a person least able to bear this risk. After all it is the insurance company that has been paid premiums to bear the risk of

\(^{73}\) *Beswick v Beswick* [1966] Ch. 538 (CA); *Lipkin Gorman v Karpnale Ltd* [1991] 3 W.L.R. 1029.

\(^{74}\) *Chief Constable of Kent v V* [1983] 1 QB 34.

\(^{75}\) *Aluminium Industrie Vaassen B.V. v Romalpa Aluminium Ltd* [1976] 2 All E.R. 552.

\(^{76}\) *Lord Diplock in Orakpo v Manson Investments Ltd* [1978] AC 95, 104.

\(^{77}\) See e.g. *Photo Production Ltd v Secureco* [1980] AC 827.

\(^{78}\) *Lister v Romford Ice & Cold Storage Co Ltd* [1957] AC 555.
these kinds of losses\textsuperscript{79}. In effect it would appear that the remedy of subrogation is anything but a remedy that responds to unjust enrichment. Nevertheless there are occasions when subrogation can be used as an unjust enrichment remedy in its own right (cf. Ch. 11 § 4). Thus where a contract of loan provides that moneys lent by L to B are to be applied in discharging a liability of B to C secured on property, it is an implied term of that contract that L is to be subrogated to C's security\textsuperscript{80}. It is in this way that subrogation acts as 'an empirical remedy to prevent a particular kind of unjust enrichment\textsuperscript{81}.

\section*{§ 4 FIDUCIARY RELATIONSHIP}

48. Account, as we have suggested, is a remedy often associated with the equitable doctrine of fiduciary relationship. This relationship, difficult to define logically, can best be described as a strict duty of good faith, confidence and care between two legal subjects usually in relation to a fund of property and/or money which can be seen as the legal object. It is found within certain contractual relationships, such as that between solicitor and client, and it is at the basis of the relationship between trustee and beneficiary - a trust being an equitable creation whereby the owner of the property (the trustee) owns property for the enjoyment of another (the beneficiary).

The concept of a fiduciary relationship is of importance to anyone studying the law of obligations because it can be relevant not just to damages and debt actions but to specific equitable remedies as well. On the one hand a fiduciary owes a special equitable duty to take care, for example not to speak carelessly so as to cause loss to a principal\textsuperscript{82} on the other hand a fiduciary may owe a duty to act positively in certain circumstances. And so, for example, if a bank manager fails to advise a client to take independent financial advice before entering into a mortgage transaction with the bank the contract may be voidable for undue influence if the transaction is manifestly unconscionable\textsuperscript{83}. The point to be made is that equity, by turning a common law relationship into a 'fiduciary' one, can gain access to the transaction or proprietary bond and bring with it its own doctrines and remedies. This is of particular importance within a law of obligations that does not recognise, unlike the Civil Law, a general doctrine of \textit{bona fides} in the performance of a contract\textsuperscript{84}.

\textsuperscript{79} Morris \textit{v} Ford Motor Co Ltd [1973] 1 QB 792.
\textsuperscript{80} Lord Diplock in Onakpo \textit{v} Manson Investments \textit{Ltd} [1978] AC 95, 104.
\textsuperscript{81} \textit{Ibid}, at p.104.
\textsuperscript{82} Nocton \textit{v} Lord Ashburton [1914] AC 932.
\textsuperscript{84} But cf. Interfoto \textit{Ltd} \textit{v} Stiletto \textit{Ltd} [1981] 1 All ER 348, 352-357. And see JF O'Connor, Good faith in \textit{English law} (Dartmouth, 1990), p.101: The development of English law generally by the case-law method, and the systematic
§ 5 EQUITABLE REMEDIES AND LEGAL RIGHTS

49. Despite the apparent independence of these equitable remedies the general principle remains that ‘equity follows the law’. That is to say, equity is not free to operate without reference to existing rules, principles and remedies of the common law. What, then, is the relationship between the equitable remedies and the substantive law of obligations? The stated rule is clear enough: a right to an injunction or to specific performance is dependent upon some pre-existing legal or equitable cause of action in the person seeking the remedy. A right to an equitable remedy ‘cannot stand on its own’ in the sense that the court can grant such a remedy without reference to existing rights and causes of action at common law. Thus a plaintiff seeking, for example, an injunction must show more than a mere legitimate or sufficient interest in the claim; he must show that some pre-existing right has been infringed or is threatened.

However this rule should be treated with some caution in that equitable remedies can be used to expand areas of the law of obligations by acting as a vehicle for the protection of new kinds of interests. Thus much of the law concerning the protection of confidential information has developed around the institution of the injunction. And while the House of Lords has on occasions been critical of the rather free use of equitable remedies, they themselves have used specific performance to come to the aid of a widow whose common law right to an annuity, negotiated by her late husband, was unenforceable in debt itself because she was not a party to the contract and worthless in damages because the husband’s estate had suffered no loss.

requirement to ‘reconcile’ apparently conflicting rules, for example, the rules about consideration in the law of contract and the ‘rules’ of promissory estoppel, provide a good example of the ‘concealed’ operation of the principle [of good faith]. O’Connor offers a definition of this principle (p. 102): The principle of good faith in English law is a fundamental principle derived from the rule pacta sunt servanda and other legal rules, distinctively and directly related to honesty, fairness and reasonableness, the application of which is determined at a particular time by the standards of honesty, fairness and reasonableness prevailing in the community which are considered appropriate for formulation in new or revised legal rules.

85 The Siskine [1979] AC 210, 256.
87 See e.g., Ex p. Island Records [1978] Ch 122.
89 Beswick v Beswick [1968] AC 58. Treitel describes this case as an example of the application of the doctrine of privy (Treitel, p.209), where X transferred his business to his nephew A, who promised X that after X’s death he would pay £5 per week to X’s widow (Y). It was assumed by the House of Lords that the widow could not in her own right enforce the nephew’s promise, as it had not been made to her but to her husband. In Netherlands law, it has been argued by Leclercq that a scheme governing the life insurance contract should be based upon the doctrine of a derived right (as opposed to the

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The truth seems to be that equity will on occasions look beyond existing causes of action to give expression to more general and enduring principles of law such as unjust enrichment (cf. Ch. 11 § 4) and abuse of rights (cf. Ch. 13 § 7). And the means by which it takes this initiative is through the operation of its remedies. *Ubi remedium ibi ius.*

50. However this willingness of equity to act in circumstances beyond the frontiers of the existing rights in turn raises a question concerning the availability of the common law remedy of damages. Once an equitable remedy becomes available in an area where the common law has traditionally been reluctant to act, will this establish an obligation or duty which will then be protected by an action for damages at common law? Such a question may be very relevant in areas such as mistake and misrepresentation where the difference between rescission and damages is particularly marked (cf. Ch. 8 § 6). In the absence of any power for equity itself to award damages in lieu of rescission, it seems that the availability of an equitable remedy will not of itself give rise to such a duty. In other words there must normally be a breach of contract or a tort before a damages action will be available.

51. The dichotomy in English law between debt and damages (as described in nr. 34) is not similar to the *wettelijke verplichtingen tot schadevergoeding* (statutory obligations to compensate damage) in Netherlands law (subtitle 6.10), although *schadevergoeding* is usually awarded in money. The old Civil Code contained several provisions for compensation of damage for *wanprestatie* (breach of contract) and for *onrechtmatige daad* (delict), but the Civil Code deals with all statutory obligations to compensate damage in a general way. In principle subtitle 6.10 covers compensation not only for *nietsverwerving* (non-performance of an obligation), *onrechtmatige daad* (delict) but also for *ongerechtvaardigde verrijking* (unjust enrichment), *zaakwaarneming* (negotiorum gestio) and other statutory obligations to compensate damage.

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90 See *The Misrepresentation Act 1967* s.2(2).
92 Asser-Hartkamp I, p.343; nevertheless, the judge can (on demand of the prejudiced party) award damages other than a sum of money. The obligation to pay a sum of money is governed by subtitle 6.11 (*verbintenissen tot het betalen van een geldsom*), dealing with the way sums of money should be paid, the place of payment, the currency, as well as with e.g., payment by giro and the exchange rate (if applicable).
93 Asser-Hartkamp I, p.338. This section is not applicable to contractual obligations to compensate damage (such as insurance contracts). Furthermore, exclusion and limitation clauses may set aside the rules in this section, but these clauses fall within the scope of the standard contract terms provisions.
However the fact that the obligation to pay damages is dealt with in a general way in subtitle 6.10 does not imply that the outcome of an action to recover damages is always the same, independent of the cause of action. The term schade is interpreted in the usual way, covering actual damage: loss of money and any other disadvantage, *dit laatste voor zover de wet op vergoeding hiervan recht geeft* (as far as the law allows for recovery of such disadvantage), s. 6: 95 (cf. nr. 37).

52. When dealing with specific remedies and fiduciary relationships (nrs. 39-48), the approach in the Netherlands Civil Code is totally different. Basically, the provisions of s. 3: 13 and 3: 14 set limits to the pursuance of any right or competence the law (*het objectieve recht*) attributes to a person (cf. nr. 188). Furthermore Book 3 of the Code contains general provisions for *rechtshandelingen* (the performance of juridical acts) and these rules are of the utmost importance for the entire law of obligations because of the structure of the Netherlands Civil Code (cf. nr. 19). The most important aspects of the rules for *rechtshandelingen* in this respect will be discussed later (nrs. 60 and 104). The problems relating to the principles of reliance, misrepresentation and consensus ad idem are statutorily regulated in s. 3: 33-36 (cf. nr. 81); and fiduciary relationships in Netherlands law should be set in the context of the rules of reasonableness and fairness (s. 3: 11 and 12, cf. nr. 19). Moreover special attention should be paid (cf. nr. 64) to the provisions concerning *bezit* (possession), *houderschap* (custody, *detentio sec*), as well as to specific (new) rules regarding *pand* (pledge) and *hypotheek* (mortgage, hypotheek).

As far as *rechtsvorderingen* (*remedies*) in general are concerned, Netherlands law starts out from the notion that anyone who is entitled to a prestation or a performance of some kind by another person has a cause of action to obtain from the court a remedy against that person. The exception to this remedies principle is when the cause contravenes the law, the nature of the duty or a *rechtshandeling* stipulating otherwise. A remedy will also be available if anyone is under a duty to refrain from a certain conduct towards another person (s. 3: 296). On the demand of the prejudiced party, the authority to take effective measures or to remove the prejudice can be obtained from the court; and any costs thereof are to be paid by the party who fails to live up to his duties (s. 3: 299). And in principle, a court decision can act as a substitute to a legal relation on the demand of the person entitled to a *rechtshandeling* (s. 3: 300 and 301). At the request of a party concerned, the judge can give a declaratory judgment about the legal relationship involved (s. 3: 300).
Simultaneously with the Civil Code revision enacted on January 1st, 1992, the rules for beslag en executie securing the execution and enforcement of substantive private law have been reviewed. This new legislation is closely connected to s. 3: 296.

53. In the Netherlands law of obligations several rules of substantive civil law deal with aspects of law that English law would treat as a remedies question. However it must be stressed that similar objectives in the Netherlands law of obligations are obtainable via a different legal approach. Apart from the fact that such objectives are incorporated in the law of obligations in Book 6, the mechanisms for the realization of these objectives are totally different and connected with the general provisions in Book 3 through the hierarchical structure of the Civil Code (cf. nr. 19). *Nakoming van verbintenissen* (the duty to perform an obligation) is in part regulated in subtitle 6.6 (s. 6: 27-51). This section contains the rule that anyone who has to deliver a specific zaak (a chose) is under a duty to take reasonable care of this zaak (s. 6: 27). Partial performance without the consent of the creditor is prohibited (s. 6: 29), and s. 6: 30 stipulates that, given the nature of the obligation, performance (*nakoming*) by a third person is in principle allowed. The problems of payment (*betalings*) (cf. nr. 144) to a person other than the actual creditor or a *handelingsonbekwame* (cf. nr. 104), and the protection of a debtor who on reasonable grounds but erroneously performs to another person than the creditor are dealt with in s. 6: 31-34.

The *exceptio non adimpleti contractus* (cf. nr. 144) is expressly stated in s. 6: 262 and so is the so-called *onzekerheidsexceptie* in s. 6: 263, but subsection 6.7 (s. 6: 52-57) lays down general rules for the *opschortingsrechten* ('rights of deferral'). A debtor to an obligation who has, at the same time, an *openbare vordering* (a debt action, an actionable claim) against his creditor is allowed to defer the *nakoming van zijn verbintenis* (the performance of his obligation) up to the moment his vordering is paid. However this is only allowed if a sufficient relationship (*un lien suffisant*) exists between the debt and the obligation to be performed (s. 6: 52). Standing business relations or obligations mutually based on the same *rechtsverhouding* (*juris vinculum*, legal relationship) lead to the assumption of a sufficient relationship (s. 6: 52-1).

98 The right to defer the performance of one's own (prior) obligation if circumstances which became known subsequent to the formation of the contract give reasonable ground to the presumption (fear) that the other party will not perform up to his reciprocal obligations.
The rules of subsection 6:7 are whenever possible applicable when dealing with *retentierecht*, s. 3: 290-295.  

In addition to the examples mentioned, the rules of *niet-nakoming* (non-performance) in s. 6: 74-94 (cf. nr. 144) give rise to remedies such as the one which can, in specific circumstances, to convert an obligation to perform into an obligation to pay compensation (s. 6: 87). *Subrogatie* (subrogation) is dealt with in s. 6: 150-154 in title 6:2. This title lays down rules for the assignment of *vorderingen en schulden* (rights and debts), as well as the renunciation of a *vordering*. *Subrogatie* is a doctrine aimed at the enforcement of the legal position of a 'third' person who has paid on behalf of the debtor.  

In the law of contract, the rule of s. 6: 248 is of the utmost importance when dealing with abuse of rights in contractual relationships (cf. nr. 188); and the doctrine of *rechtsverwerking* (cf. nr. 56) is a species of the rules of reasonableness and fairness. A party to a contract loses his competence to exercise a contractual right in so far as his conduct and behaviour go against these rules. In this context, *rechtsverwerking* is complemented by the principle of *opgewekt vertrouwen* (reliance, cf. s. 3: 35): the debtor may have presumed - provided this presumption is justifiable - that his creditor has waived his claim. The fact that the creditor has, for a certain time period, not

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99 The statutory right given to a creditor (cf. s. 3: 290) to defer his *verplichting tot afjijte van een zaak* (his obligation to supply the chattel, close) to his debtor until his own claim has been paid. This right is granted in several statutory provisions e.g., in sale of goods (Book 7, Title I) to a buyer who refuses goods and has incurred expenses while exercising his duty to take reasonable care of the goods (s. 7: 29), and in the Law of Transport to an expediteur (dispatching agent) in regard to chattels or documents related to the contract (s. 8: 69). Retentierecht of a contractor on immovable property is possible. This right is connected to the property itself and the buildings on it as described in the *aanemingsovereenkomst* (construction contract). Furthermore this right is limited to situations where the builder is the apparent and actual possessor of the property, see R. Agema & Zoon BV v Westland Utrecht Hypotheekbank NV, NJ 1991, nr.628. The rule of s. 3: 290 is also applicable in legal relations resembling the English relationship of bailment (cf. nr. 63 and 64).  

100 Cf. Asser-Hartkamp L, p.513. Insurers have a statutory right to subrogation (s. 284 Wboek van Koophandel, see also s. 7.17.2.25 draft NBW and SJA Mulder, *Subrogatie* (Zwolle, 1988). The possibilities of subrogation in the Netherlands Civil Code in regard to 'new' strict liability rules are limited by statute (s. 6: 197): these rules serve only the protection of the injured persons and are not to be invoked by insurers etc., see nr. 167 and T Hartlief & GE van Maanen, *Bedrijfsvereniging, verhaal en nieuw BW*, Sociaal Maandblad Arbeid 1991, p.292-302, discussing the *Tijdelijke regeling verhaalsrechten* in s. 6: 197.  

101 In principle, the circumstance that a party fails to pursue his claim will not automatically lead to *rechtsverwerking* and the same applies to time intervals alone, see *De Staat der Nederlanden v Termeuzen*, NJ 1991, nr.272 (cf. nr. 68).
served notice upon his debtor does not imply rechtverwerking. In principle rechtverwerking exists if the creditor has acted in such a way that it would be irreconcilable with the rules of reasonableness and fairness if he chooses subsequently to pursue his claim. However a change of position of the debtor (in the sense that the debtor is at a disadvantage) is not required when invoking rechtverwerking.

In English law, the effectiveness of an injunction is enhanced by the fact that it can be obtained at very short notice (cf. nr. 40): an 'interlocutory' injunction is available before a full trial to prevent a fait accompli. In Netherlands law, a kort geding (summary procedure) in civil law before the President of the court is similar in effect. A summary procedure is not necessarily connected with a claim that has been brought before the court; it is frequently used and can be a substitute for the actual litigation, being both an expedient and an additional procedure to the principal case.

In conclusion one can say that the emphasis in English law is still towards the idea of ubi remedium ibi ius (cf. nr. 20 and 34). Despite the fact that English lawyers are to some extent beginning to see their law through the perspective of 'subjective rights' (cf. nr. 21), it is not in accordance with the principles of English law to analyse rights as being something separate from the remedy given to the individual. Rights are to be understood in the positive legal sense of being legal entitlements or claims deduced from causes of action and the nature of the legal action is as important as the legal right. In Netherlands law, the rules of substantive civil procedure are closely connected with the notion of subjectief recht (le droit subjectif). Therefore the rules of substantive civil procedure are incorporated in the Netherlands Civil Code and the rules of formal civil procedure are to be found in the Wetboek van Burgerlijke Rechtsvordering (cf. nr. 24).

102 See HCF Schoordijk, Rechtsverwerking (Deventer, 1991), p.34: Rechtsverwerking vindt haar grondslag in de goede trouw, en wel de goede trouw als factor van interpretatie.
106 Cf. JF Bruinmu, Het kort geding in Amsterdam, NJB 1990, p.337-341.
5  LAW OF OBLIGATIONS

§ 1 DIVISIONS AND CONCEPTS

54. Although the term 'law of obligations' is being used with increasing frequency in England it can never have quite the same meaning for common lawyers as it does for the Continental jurist. There are two reasons for this. First, in the Continental systems the law of obligations is part of a complete logical system of private law; in England such a logical system is, despite Blackstone's use of the Roman classification scheme (cf. Ch. 2 § 3), largely absent. The English lawyer has traditionally thought only in terms of autonomous legal categories like contract, tort, real property, family law and so on. Secondly, the Continental systems, following Justinian, have always had an abstract notion of a juris vinculum, that is to say a 'legal chain' binding two persons, pre-existing any legal action or sanction; in England there has, historically at least, rarely been any notion of an abstract in personam obligation pre-existing a legal remedy. English law has, instead, usually started from the idea of an invasion of an interest (cf. Ch. 2 § 2) which, at one and the same time, has traditionally described both the right and the remedy (trespass, conversion, debt, nuisance etc.), each remedy in turn attracting its own procedural rules. Only in the area of debt has there been some idea of a pre-existing relationship and even this was both more proprietary than obligational and more transactional than abstract. Perhaps the nearest that one can get to a law of obligations in the Continental sense of the term is a 'law of liability' or a 'law of damages'.

55. The Netherlands Civil Code has a different approach. Book 6, algemeen gedeelte van het verbintenissenrecht (dealing with the law of obligations in general) is subdivided in Title 1 verbintenissen in het algemeen (general part of the law of obligations), Title 2 overgang van vorderingen en schulden en afstand van vorderingen (passing of claims and debts), Title 3 onrechtmatige daad (delicts), Title 4 verbintenissen uit andere bron dan onrechtmatige daad of overeenkomst (obligations from sources other than delict or contract) and Title

1 See e.g., Tettenborn; Cooke & Oughton.
2 See e.g. Coing, pp.434-468.
3 Stein, pp.125-129.
4 J.3 13pp; Stein, p.184.
5 In the fourteenth century there was no law of England, no body of rules complete in itself with known limits and visible defects;... the lawyer's business... was procedural, to see that disputes were properly submitted to the appropriate deciding mechanism: Milson at p.83.
6 Milson, p.263.
7 David & Pugsley, para.72.
5 overeenkomsten in het algemeen (contracts, general provisions). The first article of Book 6 (s. 6: 1) expressly states that the only source of obligations is the law; this does not mean, however, that the Netherlands law of obligations has a so-called 'closed' system. The sources of obligations in Book 6 are formulated in an abstract way, and the influence of the unwritten law is very substantial. Book 6 lays down for instance rules for natural obligations (natuurlijke verbintenissen⁸) and the following sources of obligations: delict (onrechtmatige daad) (s. 6: 162), negotiorum gestio (zaakwaarneming) (s. 6: 198), condictio (solutio) indebiti (onverschuldigde betaling)(s. 6: 203), unjust enrichment (ongerechtvaardigde verrijking)(s. 6: 212) and contracts (overeenkomsten) generally (s. 6: 213), with specific provisions for what are called mutual (reciprocal) contracts (wederkerige overeenkomsten)(s. 6: 261). The question whether Netherlands law has a so-called 'closed' system of sources of obligations was the key issue in the case Quint v te Poel⁹, decided under the Civil Code of 1838. The Hoge Raad held that the old s. 1269 Civil Code was not the only source of obligations; the coming into existence of obligations in cases not expressly based on statutory provisions has to be decided in accordance with the system of the law corresponding with cases that are regulated by statute. The Netherlands Civil Code attempts to achieve certainty by adopting the rule in Quint v te Poel via s. 6: 1 as mentioned. Obligations can originate from legal facts such as juristic acts, judgments and other legal facts for example delict, negotiorum gestio, and the like; and the influence of unwritten law as a source of obligations, and for the contents of obligations, is provided for in the Netherlands Code on a wider basis than before, mainly through the rules of reasonableness and fairness which are applicable not only for contract but for obligations in general. Moreover the applicability per analogiam is not excluded outside the law of obligations.

In Netherlands legal doctrine¹⁰ it has been argued that there are two central problems in the law of obligations. First, there is the desire to neutralize actual inequality between citizens through the administration of justice in the province of the law of contract. And secondly there is the problem of those obligations which cannot be founded either in the law of contract or in the category obligations ex lege in that they present theoretical problems in respect of the sources of obligations. The limits that delictual liability or the doctrine of consideration¹¹ set to the categorisation of these obligations are unknown to the Netherlands law; but for the greater part problems can be solved through the law of contract, the rules relating to offer and acceptance and the law of onrechtmatige daad (delict). However this does not apply to all factual situations from which obligations might emanate and so, for instance, the possibility that the principle of reliance can replace (ex

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8 See B Wessels, Natuurlijke verbintenissen (Zwolle, 1988).
9 NJ 1959, 548.
s.3: 35) the consent of a party to a rechtshandeling (juridical act) gives rise to theoretical difficulties. Classifying these obligations, Nieskens-Isphording refers to the criterium 'change of position' comparing this with the Netherlands nadelsvereiste12. And in her opinion the protection of a person who has acted in reliance on the existence of a certain act or declaration of another party and has changed his position as a consequence thereof (financially or otherwise) could be based on the desire to remove any unevenness in the law of obligations. This opinion is closely connected to her thesis that the entire law of obligations should be seen as a system consisting of legitimatemomenten met betrekking tot vermogensverschuivingen, defining the legitimacy (lawfulness) of the momentum leading to the displacement or transfer of patrimonium (cf. nr. 58). However the relevance of the definition of the sources of obligations is contested and several other problems are seemingly more important14. All the same the system of the revised Netherlands law of obligations consists of new and open-ended categories, rules and standards; and the system offers a variety of points of departure for the classification and legitimation of 'new' obligations, leaving the law of obligations to develop within the existing legislative framework15.

The Netherlands Civil Code does not define the concept verbintenis15 (obligation) but it is usually described as a legal (patrimonial) relationship between two or more persons, giving on the one hand a right, and creating on the other hand a corresponding duty. An exact definition of the concept

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12 See also s. 3: 36, incorporating the doctrine of 'change of position'.
13 See AS Hartkamp, De functie van het vertrouwen bij het ontstaan van verbintenissen (book review Nieskens-Isphording, o.c.), WPNR 6024 (1991), p.747-752, who mentions the private law aspects of the relationship between government and civilian, the protection of the weaker contracting party against the stronger and the limits of strict liability and other questions.
14 Hartkamp, o.c. p.752. And see T Koopmans, advocating the use of open-ended or rather undetermined concepts and categories: elk definitief oordeel over de inhoud van rechtsbegrippen [is] onmogelijk, cif in elk geval buitengewoon riskant, want het aantal variabelen waarmee de beoorendبا rekening moet houden is oneindig groot in aantal en onmogelijk voorspelbaar in zijn ontwikkeling, en het recht zal zich, al met al, op een meer bevredigende wijze ontwikkelen naar gelang het over meer onbestemde begrippen besikt (Lof der onbestemdheid, Rechtsgeleerd magazijn Themis (RM Themis) 1991/5, p.209-211). And the fact that this makes law as such an ureine science in the absence of clearly defined knowledge and categories or analytical powers moeten we dan maar op de koop toe nemen (tant pis), cf. Koopmans. However the development towards a scientia iuris is not unthinkable (cf. Ch. 15).
15 See art. 1126 of the French Code Civil: Tout contrat a pour objet une chose qu'une partie s'oblige à donner, ou qu'une partie s'oblige à faire ou à ne pas faire, and § 241 BGB: Kraft des Schuldverhältnisses ist der Gläubiger berechtigt, von dem Schuldner eine Leistung zu fordern. Die Leistung kann auch in einem Untertassen bestehen. Justinian defined an obligation as: obligatio est iuris vinculum, quo necessitate adstringimus siccus solvendae rei secundum nostrae civitatis iura (Institutes 3.13pr).
'obligation' is not available. The parties to an obligation in most civilian systems are called creditor and debtor and so these terms do not have the narrow meaning given to them in England. Moreover obligation and contract are different concepts in Netherlands civil law: a contract is a source from which several obligations can emanate. A contract for the sale of goods, for instance, is the source of an obligation giving the right to get paid, corresponding with a duty to pay, and, correlative, an obligation giving the right to receive the goods sold, corresponding with a duty to supply the goods and to transfer property. Statutory provisions for remedies in general are codified in s. 3: 296-362. The remedy forcing the debtor by order of the court to perform is called (direct or indirect) value execution (reële executie). The object of an obligation is called prestatie (performance), and, especially for contracts, the performance has to be definable and lawful. An obligation gives the creditor the right to receive the performance, a ius agendi and an action.

Usually obligations are legally enforceable, but some obligations (for instance the obligatio naturalis) are not. Natural obligations as described in s. 6: 3 can be classified as obligations naturelles dérivées et obligations naturelles indépendantes; a derivative natural obligation exists when the law or a rechtshandeling deny any legal effect to an obligation. An independent natural obligation exists when a person feels an urgent moral duty towards another of such a nature that, although the other has no right to claim the fulfilment of this duty, any fulfilment thereof can be seen as the performance of a duty to which the other person was entitled in view of opinions prevailing in society. The latter form of a natural obligation is called independent because it exists solely on the basis of a chain of mutually interacting facts, events and circumstances, providing an open source from which an obligation can emanate. The parties involved and, in the end, the judge, are to decide whether an independent natural obligation exists and what the contents thereof are (‘programmatic judge-made law’). Natural obligations are submitted to the law of obligations unless the law or the effects thereof lead to non-applicability of a statutory provision in respect to a non-enforceable

16 Asser-Hartkamp I, p.4; see on the distinction between rechtsplicht (legal duty) and verbintenis (obligation) JB Veger, Opmerkingen over juridische gehondenheid in verband met de begrippen nakoming, schadevergoeding en verhoudingsplichtigheid WFN (1991) 5996 en 5997.
17 Cf Asser-Hartkamp I, p.563.
18 Asser-Hartkamp I, p.4-19.
20 For instance the natuurlijke pensioenverbintenis (e.g. pension schemes not based on a statutory duty), cf. Wessels (o.c.), p.222.
21 See Wessels, Natuurlijke verbintenissen (o.c.), nr. 5 in 13.
obligation, s. 6: 4. Obligations are *iura in personam* which must be distinguished from *iura in rem* (cf. Ch. 2 § 4 and nr. 56)\(^\text{22}\).

56. The parties to an obligation are, according to Netherlands law, obliged to act in accordance with the rules of reasonableness and fairness (s. 6: 2)\(^\text{23}\). Accordingly creditor and debtor to an obligation should behave as 'reasonable men' and are under a duty to consider the legitimate interests of the other. Reasonableness and fairness are very important for determining the contents of an obligation because these unwritten rules apply when interpreting the legal relationship and they help to complete the obligation in case of flaws. Moreover reasonableness and fairness can set aside rules applicable to the legal relationship between creditor and debtor to an obligation and so, given the circumstances, they can override rules which obtain for the parties by virtue of statute, usage or judicial act (s. 6: 2 for obligations in general and s. 6: 248 for contracts)\(^\text{24}\). Exercising a right can, if unreasonable, also contravene the rules of reasonableness and fairness. The existence of this doctrine is one of the most typical aspects of Netherlands patrimonial law, which differs in this respect from the Common law (cf. Ch. 13 § 7)\(^\text{25}\), and it pervades the entire *ius rerum*, but especially the law of obligations. For example, a party to a contract loses his competence to exercise a contractual right in so far as his conduct and behaviour (acts and/or omissions) go against the rules of reasonableness and fairness (*rechtswerking*). Judges have the power to mitigate or discharge contracts on request of a party in case of unforeseen circumstances, given the rules of reasonableness and fairness (s. 6: 258). General conditions (*algemene voorwaarden*, standard contract terms\(^\text{26}\)) are put to the test of reasonableness and fairness in s. 6: 231-247. These general conditions are defined as written contract terms drawn up to be used in several contracts, not being those which describe the essential duties at the heart of the contract. A general condition is voidable if it is unreasonably onerous in the context of the nature and contents of the contract, in the way the conditions were incorporated in the contract, in the (knowable) reciprocal interests of the parties and in any other circumstances of the case. This unfair contracts terms legislation\(^\text{27}\), being a specification of the rule of s. 6: 2 and 6: 248 resembles the German *Gesetz zur Regelung des*

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22 See Digest 44.7.3pr.
23 See on good faith in the English law of contract *JF O’Connor, Good faith in English law* (Dartmouth, 1990), p.17-49.
Rechts der Allgemeinen Geschäftsbedingungen (AGBG) but is actually firmly based on the famous Netherlands case Saladin v HBU.

The classification of the legal provisions regarding het vermogen (patrimonial law in general) in the Netherlands Civil Code is different from most existing codes and it also differs from the revised Civil Code of 1838 (cf. nr. 15) which reflected the principles of Roman law. In this Code, the category vermogensrecht in het algemeen seems to have emerged, albeit tacitly. The present Code deals in Book 3 with all relations in respect to goederen and these comprise toutes les choses et tous droits patrimoniaux. Zaken are all corporeal objects that can be controlled by man (including things, animals and chattels identified by measure or weight), and a right is a vermogensrecht if it meets up to at least one of the criteria of s. 3: 6.

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31. Cf. s. 3: 1 and EM Meijers, Toezichting (eerste gedeelte), p.159-160, describing the development of the dichotomy res corporalis/res incorporatores and tura in re/in persona in legal science. The Netherlands Civil Code distinguishes zaak (chose, corporeal objects) and goed (patrimonial assets). The relationship between goed and zaak should be interpreted as genus/species, disregarding the dichotomy corporeal/incorporeal object. A corporeal zaak is a good, but so are all other patrimonial assets such as subjective rights, copyrights, etc. Hazanappel & Mackay translate s. 3:1 goederen zijn alle zaken en alle vermogensrechten as: property is comprised of all things and all patrimonial rights (p.3 and ibid. fn. 1: the term 'property' includes both the Dutch singular ('goed') and the Dutch plural 'goederen').
32. I.e. (a) transferability (separate or in combination with other rights) and (b) connected to material benefit: the right is intended to procure material benefit to the person entitled, or the right is obtained in exchange for actual or expected material benefit. Passieve vermogensbestanddelen (passive assets of the patrimony, viz. debts) are as such no goederen, but the right that complements it is (in the patrimony of the creditor). The word vermogen can be used either in the general sense of patrimony, or in the limited sense of 'the material assets of a person', cf. Hijn & Olthof o.c., p. 10.
§ 2 LEVEL OF DUTY

57. Despite what was said earlier (cf. nr. 54), once one has shifted the emphasis from *jus vinculum* to damage and liability it becomes possible in English law to work back from the sanction or remedy to some kind of pre-existing relationship between the parties, even if this relationship is very different, epistemologically, from any Roman notion. That is to say one can work back from any harm or injury to the person or persons that have caused it in order to construct a conceptual relationship through which one can assess the relevance, if any, of fault. This relationship in English law is often described as a 'duty' and liability becomes, accordingly, a question of a breach of duty. Whether or not a duty has been breached is not however just a question of fact; breach will also depend upon the actual level of duty and so in some situations a defendant will owe a duty to take care while in others it might be pitched at some stricter level.

In some factual situations this duty may eclipse its legal source category in that the court will pay little regard to whether the action is contractual or tortious; in other cases the source of the duty can be crucial. Accordingly, in determining questions of liability, it can matter not only whether the duty relationship actually existed between defendant and plaintiff (cf. Ch. 12 § 4), but whether this duty arose out of statute - when it is the language of the statute which will determine the level - or out of factual circumstances such as promise, fault, unlawfulness, intention to injure or intention to act. For in the absence of a logical and scientific structure of private law it is these factual circumstances that can determine at one at the same time both the legal source of the duty (contract or tort) and the legal level of diligence required.

Consequently the question in England whether a defendant has promised a result (strict liability) or is merely under a duty to take reasonable care (fault) is not so much a question that can be determined by the concept of a pre-existing obligation as such. It is a question to be determined by the level of duty itself (cf. Ch. 14 § 6). And this fixing of the level of duty can be achieved either by reference to the legal source - for example the court holds

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33 Weir, Complex Liabilities, para.11; Treitel, para.10.
34 On which see Qualcast (Wolverhampton) Ltd v Haynes [1959] AC 743; Bolton v Stone [1951] AC 850.
35 Weir, Complex Liabilities, para.11; Greaves & Co v Baynham Meekle [1975] 3 All ER 99, 103-104; Treitel, para.10.
36 See e.g., Midland Bank Trust Co. Ltd v Hett, Stubbs & Kemp [1978] 3 All ER 571, 595.
38 Compare for example section 4 with section 13 of the Supply of Goods and Services Act 1982.
that the duty is contractual rather than tortious\(^9\) - or, if there already exists a definite contractual relationship, by the nature of the contract and the kind of term to be implied (cf. Ch. 9 § 6). In a contract for the supply of goods the level of duty is normally high in that liability is determined with reference to the objective quality of the goods themselves\(^40\). In a contract for the provision of a service the duty is normally only to take reasonable care\(^41\). In turn this choice as to the level of duty, although now largely enshrined in statute in contractual situations, was originally governed by notions of risk, loss spreading or some other socio-economic policy which the judges thought that the law should reflect\(^42\). In tort the level of duty question may be governed either by the nature of the cause of action or by the burden of proof doctrine of res ipsa loquitur. Thus a high duty is owed at common law by an occupier, and perhaps the landlord, of premises adjoining the highway to persons on the highway and this high duty can be expressed through the tort of public nuisance or by a shifting, or partial shifting at least, of the burden of proof in the tort of negligence\(^43\). English law does not easily think in terms of a liability for things (cf Ch. 12 § 6), but it can achieve the same result on occasions by the manipulation of the facts which give rise to the duty.


\(^{41}\) Supply of Goods and Services Act 1982 s.13.

\(^{42}\) See e.g., Hyman v Nye (1981) 6 QBD 685; Young & Marten Ltd v McManus Childs Ltd [1969] 1 AC 454.


\(^{44}\) County Courts Act 1984 s.15(1).

\(^{45}\) See for instance in German law the difference between Rechtshandlung and Rechtsgeschäft: Unter einem 'Rechtsgeschäft' versteht das BGB eine Handlung - oder auch eine Mehrzahl zusammenhängender Handlungen sei es einer, sei es mehrerer Personen - deren Zweck es ist, eine privatrechtliche Rechtsfolge, also eine Anderung in den rechtlichen Beziehungen einzelner, herbeizuführen. Mittels des Rechtsgeschäfts gestalten die einzelnen ihre rechtlichen Beziehungen zu anderen selbst - das Rechtsgeschäft ist das Mittel zur Verwirklichung der von BGB grundsätzlich vorausgesetzten 'Privatautonomie', cf. K. Larenz, Allgemeiner Teil des deutschen Bürgerlichen Rechts (München, 1988), p.314. And das Rechtsgeschäft ist also in den Regelfällen, von denen auszugehen ist, ein finaler, auf die Herbeiführung eines bestimmten Rechtsfolges zweckhaft gerichteter Akt (...). Die Handlung durch die sich der Wille, einen bestimmten Rechtserfolg herbeizuführen, verwirklicht, ist in aller Regel die 'Erlaubnis' dieses Willens, eine

§ 3 LEGAL ACTS AND LEGAL FACTS

58. The emphasis on factual circumstances, and the distinction between a law of contract and a law of tort\(^44\), might suggest at first sight that English law makes a distinction, similar to Continental law\(^45\), between the legal act
and the legal fact. And to some extent it does distinguish between acts intended to have legal effects, external events and voluntary acts that were not intended in themselves to have legal effects. But on closer examination it will be found that the division between legal ('juridical') acts and legal facts is largely unhelpful simply because it is unable to reflect with any consistency the difference between contractual and tortious situations in the common law.

As we shall see (cf. Ch. 6 § 2), the basis of contract is promise rather than agreement⁴⁶ and this has led the courts to concentrate upon objective statements, that is to say the promise, as much as upon any notion of the will (volonté). Whether or not a person is liable in contract can depend just as much upon the existence of objective facts as upon any specific intention to be bound. Thus if a person makes to another a statement capable of being construed as a promise and this promise fulfils all the objective requirements of an enforceable contract then the fact that there was no intention to perform a legal ('juridical') act is irrelevant⁴⁷. Indeed the existence of an objective relationship close to a contractual one can even be a reason in itself for making a defendant's statement (representation) a legal fact capable of giving rise to a tortious duty of care⁴⁸. In other words the law of obligations itself is more interested in the objective than the subjective.

The question, then, whether the duty is contractual or tortious - or even equitable (cf. Ch. 4 § 4) - is a question that cannot be answered by reference to a dichotomy between subjective intention and objective events. The duty relationship, particularly in damages actions (as opposed to debt), is often determined objectively by the circumstances themselves, including perhaps the policy requirements (for example certainty) of commercial law (cf. Ch. 5 § 7). If the legal act has any relevance at all it is usually only at the level of linguistic interpretation - what did the parties mean by this or that word⁴⁹? - or at the level of the effect of a contractual term such as, for example, a clause giving a defence to an action for failure to take reasonable care - did the parties mean to exclude liability (cf. Ch. 9 § 3) for this loss⁵⁰? And so whatever the source of the legal action one is continually forced back to the objective factual circumstances of the relationship of the parties, often in the


⁴⁶ The basic principle which the law of contract seeks to enforce is that a person who makes a promise to another ought to keep his promise per Lord Diplock in Moschi v Lep Air Services Ltd [1973] AC 331, 346.

⁴⁷ Carllit v Catholic Smoke Ball Co [1893] 1 QB 256.


⁵⁰ See e.g., Photo Production Ltd v Securicor Transport Ltd [1980] AC 827.
context of the requirements of commerce rather than in the context of the subjective intentions of the parties as interpreted by the judge (cf. Ch. 6 § 5).

§ 4 CONTRACT OR CONTRACTS

59. The notion of factual transaction as the basis of contract suggests that the key to English contract law might be found in the Roman law characteristic of predetermined contractual categories. Instead of a law of 'contract' one should think of a law of 'contracts'. In fact at the theoretical level English law specifically takes quite the opposite approach: all the various types of contractual transaction are merely species of a general law of contract. The reason for this singular approach is to be found in history: the modern contractual action grew out of two main forms of action and the first form, debt, got swallowed up by the second form, assumpsit, at the beginning of the seventeenth century. The general principle since that time is that contract is founded upon breach of promise sanctioned by a damages action; and this principle and remedy indicate clearly the close historical relationship between contract and tort, a close relationship still to be found in the modern law.

All the same, it should be obvious from the survival of debt and damages as conceptually separate causes of action that the general principle is subject to qualification (cf. Ch. 4 § 1). Despite the existence of a general part to the English law of contract, the reality is that the rules governing many transactions are to be found in books on specific contracts. Thus sale of goods, agency, insurance, hire-purchase, partnership, charterparties and various other types of contract have all attracted their own special pieces of legislation and their own textbooks. Indeed some areas of contract have now become almost separated from the law of obligations and form part of new classifications such as labour and consumer law; and even the 'innominate' contracts tend to fall within identifiable patterns of factual transactions. Consequently, one finds in the casebooks on contract, factual groups which tend to generate their own particular rules, and so in truth English law, like Roman law, often thinks in terms of sets of established types.

52 Slade's Case (1692) 76 ER 1074.
53 See e.g., Smith v Eric Bush [1990] 1 AC 831.
54 Overstone Ltd v Shipway [1962] 1 WLR 117.
55 The summa divisio might be the difference between a contract for the supply of goods and the contract for the supply of a service: Supply of Goods and Services Act 1982 s.1, 12.
of fact situations. The notion of promise, rather than being the basis of liability, begins in some respects to look more like a common denominator.

60. Netherlands law starts out from the notion of legal facts: that is to say from facts, events, and circumstances through which rights originate, are mitigated, lapse or are passed on to another person. Legal facts are facts creating any legal effect. These facts can be caused by human acts, or they can be bare legal facts such as birth, death, age, consanguinity, the passing of time etc. Human acts can be either rechtshandelingen, acts creating a legal effect by virtue of the volonté of a person (or, given the circumstances, if someone rightfully assumes that a person wanted to create such legal effect) or, if legal effect is given to any human act irrespective of the volonté, a materielle daad. Examples of such acts, not being rechtshandelingen, are onrechtmatige daden (delicts) and the creation of a work of art, science or literature. The concept of rechtshandelingen is, again, subdivided into unilateral and multilateral acts. Unilateral are acts from which the legal effect originates through a volitional act of one person; when dealing with multilateral acts the legal effect presupposes cooperation of two or more persons. The most common multilateral acts creating legal effect are contracts (overeenkomsten) and the most important of these are contracts creating obligations. Outside the law of obligations, the existence of overeenkomsten is recognised, for instance in family matters, in civil procedure or public law and, like the concept verhinder (obligation), the notion of overeenkomsten is not easy to define. The rules for overeenkomsten are given in s. 6: 213-279; for other multilateral patrimonial acts with intended legal effect, the rules of part 1 to 4 of Title 5 of Book 6 apply by way of analogy (s. 6: 216). The Netherlands Civil Code lays down (unlike the old Civil Code of 1838) general rules for rechtshandelingen in Book 3 (Patrimonial law in general)(s. 3: 32-59). Various provisions originally based on the law of contracts are formulated in a general way, such as vitiating factors (incapacity, duress, fraud, abuse of circumstances), ordre public, mores, and, especially, volonté, reliance and misrepresentation. Remedies for voidable rechtshandelingen are to be found in s. 3: 49-51; dwaling (misrepresentation), on the other hand, is dealt with in s. 6: 228, although s. 6: 216 stipulates that this rule can be applied by analogy to other multilateral acts creating legal effect. One of the most important provisions of the Code, s. 6: 248 (legal effects of a contract, reasonableness and fairness), is given a central and powerful place through s. 6: 216.

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56 See e.g., The New York Star [1980] 1 WLR 138 (PC) where the Privy Council justify their decision, inter alia, by comparing the facts of the case before them with those of The Euonymon [1975] AC 154.


58 Asser-Hartkamp II, p.3-8.
§ 5 TORT OR TORTS

61. In contrast to the law of contract, the law of torts has its historical roots in a number of old writs - trespass, trover, nuisance and the action on the case. And this historical diversity of separate legal actions, each attracting their own procedural rules, has traditionally made it more difficult to see any unitary idea underlying the subject. It is only with the development of negligence as an independent tort (cf. Ch. 12 § 4) - a development that cuts across the old forms of action because it is a substantive rather than a remedial idea - that one began to be able to think along the lines of a law of 'tort' rather than 'torts'. Yet even with the rapid expansion of negligence in this century, it remains difficult to perceive a common theoretical basis for tort(s) because the subject still finds itself having to perform a range of different functions. Non-contractual damages actions are used by the common law to protect personal, proprietary and economic interests on the one hand, and constitutional, property and personal rights on the other. Moreover, these interests and rights are a range of duties differing in both extent and intensity; this is a reflection of the mass of public and private relationships which underlies a system of liability that focuses sometimes on individual acts (cf. Ch. 12 § 3), sometimes on the control of things (cf. Ch. 12 § 6) or people (cf. Ch. 12 § 7) and sometimes just on the invasion itself (for example the torts of trespass, defamation and conversion).

The problem with the category of the law of tort(s) is that, in trying to protect so many different kinds of interests, it simply ends up as a category with little internal unity. Some areas such as private nuisance (cf. Ch. 12 § 6) and breach of statutory duty (Ch. 12 § 5) are increasingly being treated as a species of fault liability, but other areas, such as defamation (Ch. 12 § 8) and conversion, seem closer to the law of property than to the law of obligations. Thus it is difficult to describe these non-contractual damages actions as being founded on 'wrongs' since some of them are also founded on the interference with property rights. One can of course call such interferences 'wrongs' in themselves, but all this will do is to mask the fact that the law of tort(s) is a category that contains aspects of administrative, constitutional and property law. In truth the law of torts bears witness to the fact that it can never be an obligations category in the sense of being a category that stands in contrast to a law of property category.

60 See e.g., Leakey v National Trust [1980] QB 485.
61 Cane, supra, p.125. Thus damages awarded in defamation cases bear no relation to those awarded in personal injury or property damage cases: Sutcliffe v Pressdram Ltd [1990] 2 WLR 271.
62. The Continental concept of the category tort(s), *acte illicite*, (cf. Ch. 12 § 3) traditionally covers various types of liabilities, sometimes even situations where no true *acte illicite* is committed as for instance when dealing with liability for animals. After all, only persons can act delictually, so, in cases involving liability for animals, it is the owner (possessor; user) of the animal who is liable for neglecting his responsibilities. Objects can also cause damage; so a division of delicts and quasi-delicts (or, as Grotius calls it, *Misdraet door Wet-duydlingh*) seems helpful. Events causing damage can, consequently, be divided in human acts and other events. Human acts can be lawful or tortious, whereas tortious acts in turn can be either acts of the person responsible or acts of other persons (children, employees, servants, etc.). Furthermore, the concept of *culpa* as a requirement for liability can be applied; however, it is interesting to note that for several categories the Netherlands Civil Code has shifted (under French/Belgian inspiration) from liability based on fault to liability based on risk.

The rules in Netherlands Civil law imposing liability on a person for damage caused to another are systematically arranged as follows. An obligation to compensate exists when an *onrechtmatige daad* (delict) is committed, and such act is one arising from fault or from any cause attributable to the person committing the act (s. 6: 162), or, in the absence thereof, from statutory liability. Liability is avoided if a justification exists (cf. Ch. 12 § 2). The fact that a person (from the age of fourteen or older) commits an act under the influence of a physical or mental condition, does not prohibit attribution of an illicit act to that person (s. 6: 165) but an act of a child under fourteen cannot be attributed to the child itself as an illicit act because of their tender age (s. 6: 164); the parents or supervisors, therefore, are liable by statute for such acts (s. 6: 169). This liability is a genuine 'strict liability', without fault or culpa requirements. As for children between the age of fourteen and sixteen, parents or supervisors are liable if it can be shown that there was insufficient supervision; and liability for employees, servants, independent contractors in the pursuance of an employer's business is imposed on the persons responsible (the enterprise, the employer) in specific circumstances (s. 6: 170-172, cf. Ch. 12 § 7). Furthermore, liability for things (du fait des choses) and for animals is statutory (s. 6: 173, 174), whereas special rules exist for product liability (cf. Ch. 12 § 6). In extreme circumstances, liability for lawful acts causing damage is possible (acts of public bodies, for instance) and damage caused by other lawful acts such as

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64 Coing, pp. 512-530.
65 However, the French distinction between *délit* and *quasi-délit* (see art 1382-1386 Code Civil) is not an essential feature of the Netherlands law of obligations, cf. s. 6: 1 in connection with Title 6.3 (*onrechtmatige daad*, delict).
66 Asser-Hartkamp III, p.16-17, Hartkamp, p.XXIII.
68 Asser-Hartkamp III, p.29.
salvage can be compensated on other grounds; special rules are applicable in pre-contractual relationships (cf. Ch. 7 § 3, nr. 98).

The common ground for liability could be the principle of *culpa* or the principle of *risk*. But in view of the difficulties in categorising the sources of liability, it is held in Netherlands law that the reasonableness of the decision of the legislator to shift the loss to another person in specific circumstances, taking into account all interests concerned, is the most appropriate ground. The influence of insurance is very important here, both in creating statutory liabilities and in the interpretation by the courts of the rules applicable. And by adopting reasonableness of liability rules as a common ground, some internal unity is achieved in the field of tort law.

§ 6 BAILMENT

63. The property and obligations dichotomy is at the heart of another type of transaction that can cause problems for theories of both contract and tort: this is the legal relationship of bailment. This relationship arises out of a transaction whereby one person (the bailor) transfers to another (the bailee) possession, but not ownership, in a piece of moveable property (a chattel). In the absence of any specific contract the bailee owes to the bailor a strict duty of care with regard to the chattel(s) bailed and this duty can be discharged only by the bailee producing the goods to the bailor on demand or by the bailee proving that they were lost without any fault on his part. In return the bailor owes a duty to reimburse the bailee - in a 'commercial' bailment, if not in others - for any expenses incurred in upkeeping the goods.

This relationship of bailment looks at first sight very similar to a real contract and no doubt the whole notion was originally influenced by Roman law. Nevertheless although bailment is often closely associated with contract and with tort - the bailee might for example try to limit or exclude via a contractual term liability for loss or damage, and the bailor's actual remedy is now the tort of conversion - the legal relationship itself belongs

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72 Coggs v Bernard (1703) 92 ER 107.
73 See e.g., Levinson v Patent Steam Carpet Cleaning Co Ltd [1978] QB 69.
74 Torts (Inference with Goods) Act 1977 s. 2.

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to the law of property rather than to the law of obligations. Consequently before liability can arise there must be the required mental element for possession. Moreover although the bailor's remedy is a claim for damages in tort, the law of damages itself reflects the property nature of the relationship by granting an action for the full value of the chattel lost, save perhaps where this would lead to unjustified enrichment.

64. The Netherlands counterpart of bailment commodatum or locatio et condicio used to be fiduciaire eigendom but this type of bailment has now been abolished. The Netherlands Civil Code has prohibited fiduciaire eigendom (s. 3: 84-3) and in its place offers a new method to attain the effects intended by the parties. The right of pand (pledge on moveable property, or le droit de gage sur une chose mobilière) is enlarged, comprising le droit de gage sur une chose mobilière, sur un droit au porteur ou sur l'usufruit de telle chose ou de tel droit. A right of pand is established by bringing the object under the control of the pledgor or a third person agreed upon by the parties (s. 3: 236). Such a right can, on the other hand, also be established by an authentic deed or a registered deed sous seign privé, without the object of the deed being brought under the control of the pledgor or of a third person (s. 6: 237). Protection of the pledgor against a grantor who lacks the right to dispose of the pledge is statutorily granted in s. 3: 238. The relationship of the person granting the pledge and the pledgor is regulated in s. 3: 236-259. The problems bailment causes for the theory of contract and tort are solved in Netherlands law through the provisions concerning bezit (possession) and houderschap (s. 3: 107-125), together with for instance retentierecht (s. 3: 290-295). As far as the general aspects of the English relationship of bailment are concerned bewaarneming (s. 7: 600) (one of the benoemde overeenkomsten, specific contracts) should be mentioned.

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75 Building and Civil Engineering Holidays Scheme Management Ltd v Post Office [1966] 1 QB 247, 261.
76 Ashby v Tolhurst [1937] 2 KB 242.
77 The Winkfield [1902] P 42.
78 Wickham Holdings Ltd v Brook House Motors Ltd [1967] 1 WLR 295.
79 Hypotheek, the right of mortgage is regulated in s. 3: 260-275, with s. 3: 227-235 giving general rules applicable to both pand and hypotheek.
80 Bewaarneming (Title 7.9) is translated by Haanappel & Mackaay as 'deposit [...] a contract whereby one party, the depositary, obliges himself toward the other party, the depositor, to safekeep and return a thing which the latter entrusts or will entrust to him' (p.394). Bewaarneming is one of the specific contracts (special contracts) in Book 7 of the Code, together with Koop en ruil (Sale of Goods and contracts of exchange, Title 7.1), Lastgeving (Mandate to perform a legal ('juridical') act, Title 7.7) and Borgtocht, Title 7.14 (in French: Cautionnement, Haanappel & Mackaay p.398; see Code Civil art. 2011 Celui qui se rend caution d'une obligation se soumet envers le créancier à satisfaire à cette obligation, si le débiteur n'y satisfait pas lui-même, cf. Guarantee). Other specific contracts are provisionally incorporated in Book 7A (cf. Ch.1, Preliminary remarks).
§ 7 CIVIL AND COMMERCIAL LAW

65. One important distinction to be found in bailment is the distinction between commercial and non-commercial bailments. Is the distinction between civil and commercial matters also to be found in other areas of private law? The traditional answer is that the division is ignored because the lex mercatoria was absorbed into the common law in the seventeenth century. However in truth it was the common law that got itself absorbed into commercial law and this means that much of the English law of contract exhibits the spirit of a commercial law rather than the spirit of a rationalized law of obligations. And this commercial spirit has led not only to commercial contract cases being differently treated from, say, employment relationships but to a situation within the whole of the law of obligations whereby the needs of commerce can dictate requirements such as certainty and predictability. Equally, and perhaps somewhat illogically, 'commercial reality' can in itself be a reason for turning what would normally be a nudum pacum into a contractual obligation. In the law of tort the distinction between business and social contexts can be of the utmost importance in claims for financial loss arising out of careless statements, and the distinction between business and private status can sometimes be important in an action for wrongful interference with goods.

The importance of these cases, and also certain pieces of legislation which distinguish between business and private situations, is that they show that at the factual level the dichotomy between civil and commercial (or business) law can be of relevance to the English law of obligations. And even at the procedural level the dichotomy has relevance to the extent that 'commercial actions' can be put into a special Commercial Court where they will be dealt with by a procedure more suited to the needs of the mercantile community. However if one asks whether the division between civil and commercial law exists as a formal category of legal rationalisation,

81 The Watson, op.cit, p. 964.
82 See on the lex mercatoria in English law for instance F de Ly, De lex mercatoria (Amsterdam, 1989), p.40-42.
83 Harris & Tallon, p.147.
84 Shepherd & Co Ltd v Jerrom [1986] 3 WLR 891, 821, 823-826.
88 Stevenson v Beverley Bentick Ltd [1976] 2 All ER 606.
89 See on the resolution of commercial disputes in general e.g. RM Goode, Commercial law (London, 1985), p.942-963. Commercial courts do not exist in the Netherlands; there is, however a special ondernemingskamer, cf. s. 72 Wet op de rechterlijke organisatie (Code of Judicial Organization), dealing with specific matters in the field of company law.
90 Supreme Court Act 1981 s. 6; RSC Order 72.
the recent response of the House of Lords has been that the only meaningful distinction in English law is the one between civil and criminal proceedings.91

The needs of commerce have, all the same, had to adapt to the growth and influence of an interest group which, at one and the same time, has given a new impetus to the traditional civil/commercial distinction as well as bringing it into question. This new interest group is the consumer. Perhaps the greatest influence of consumer pressure has been felt in regard to the principle of freedom of contract (cf. Ch. 6 § 4) with the result that some areas of contract, where there had been frequent abuse of consumer interests, are now controlled by statute (cf. Ch. 9 § 3). Moreover the influence of the consumer is making itself felt in the case law. The courts are now more willing to look at the status of the parties in certain kinds of contract and tort cases and to decide liability in terms of a policy which distinguishes the consumer from the commercial relationship. Thus in principle the law of tort cannot, in commercial relationships, be used as a means of extending the law of contract92; however if the relationship is one involving damage to a consumer, and the insurance position is such that the consumer ought to be protected against this type of damage, then the courts may allow the tort of negligence to be used to extend what is in essence a contractual situation93. Commercial law is in effect a category that can play an important role in the analysis of the facts even if it has no place in the grand plan of English law.

66. The Netherlands legislator has approached the distinction between civil and commercial law in a pragmatic way. The Netherlands Commercial Code dates back (as the old Civil Code) to 1838, and was preceded by the French Code de Commerce. The distinction between civil and commercial law did not exist in the United Provinces before the French revolution. As Hartkamp points out94, Grotius dealt with both branches of law in his Inleidinge; the same is true of other classical Netherlands jurists and now the Code brings together civil and commercial law. The Netherlands Commercial Code of 1838 stipulated that, apart from explicit derogations, the Civil Code applied to all subjects of the Commercial Code; special courts of commerce were abolished in 1838. The law of bankruptcy has been codified in a special statute (no longer restricted to merchants)95 since 1893. The differences between

91 In re Norway's Application [1990] 1 AC 723.
95 Although, recently, changes in the law of bankruptcy and insolvency have been advocated, dealing with the insolvency problems of 'consumers' (cf. nr. 13); see also the French Loi n° 89-1010 du 31 décembre 1989. Furthermore, specific (civil) legislation exists in other areas (the Consumer Credit Act 1992 deals, for instance, with public and private law aspects of Consumer Credit). It is held, nevertheless, that at the end of the day, all private law should be incorporated in the new Netherlands Civil Code.
merchants and non-merchants (cf. for instance the German notions of *Kaufleute* and *Nicht-Kaufleute*) were largely removed from private law in 1934. Commercial law is already, for the greater part, incorporated in the Netherlands Civil Code. Book 2 contains rules for Legal Persons, some 'commercial matters' are dealt with in Book 7 on Special Contracts; the Law of Transport is to be found in Book 8. The general provisions of Book 3 (Patrimonial law in general) and Book 6 (Law of obligations) apply irrespective of any presupposed distinction between civil and commercial law. The development of consumer law is, as mentioned before, almost entirely an integrated part of the Netherlands law of obligations. Thus commercial law is, in effect, no longer a special category in civil law. Consumer law is at the heart of the law of obligations, mainly because the legislation protecting consumers is coercive, allowing no derogation or, sometimes, no derogation to the detriment of the consumer (for instance in s. 7: 6 dealing with sale of goods).

§ 8 PUBLIC AND PRIVATE LAW

67. Given the view of the House of Lords that the only meaningful distinction is between civil and criminal proceedings, another division which causes rationalization problems for common lawyers is the dichotomy between *ius publicum* and *ius privatum*. Once again the reason for this difficulty is to be found in history. Traditionally there has been a refusal to distinguish between public and private bodies in the eyes of the law, and this has meant that contracts involving public bodies are governed by the general principle of contract (cf. Ch. 5 § 4) and the various torts are available, in substance, for or against private and public litigants (cf. Ch. 13 § 2).

However, as with the distinction between civil and commercial law, the position is not as simple as it first seems. At the general level it is certainly true to say that there is no distinction between private liability in tort and administrative liability in tort and this means, for example, that there is no

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97 Stein, pp.107-124; Ruddera, Harris & Tallon, pp.94-109. English lawyers have only recently begun to use the dichotomy public and private law, and this dichotomy is still regarded as a typical continental categorisation; JHM van Erp, *Mischuur van privaatrecht door de overheid in Engeland*, proefschrift uitgebracht voor de Nederlandse Vereniging voor Rechtsvergelijking no.4 (Deventer, 1989), p.31-44. However, the distinction between public law and private law seems useful, cf. Van Erp o.c., p.31 fn. 124 and 125.


general principle in the common law equivalent to *le principe d'égalité des citoyens devant les charges publiques*. In the law of contract, also, no formal distinction is made, at common law at least, between private law contracts and administrative contracts. Yet the courts now recognise that public bodies can present special problems for the law of tort (cf. Ch. 11 § 2), and in contract one can find not only the notion of public interest in cases involving public bodies but a refusal even to apply the concept of contract to some kinds of public utility services (cf. Ch. 7 § 4). Thus gas, water and electricity are supplied pursuant to a statutory duty rather than a private law contract.

The truth seems to be, then, that although 'the common law does not - or at any rate not yet - recognise any clear distinction between public and private law', it is a distinction that 'is beginning to be recognised' in England. Just what substantive consequences will flow from a recognition of the division is by no means clear yet. It may act as a means of extending liability without fault or it may act as a means of restricting the liability of public bodies. But one principle so far discernible is that the courts, and now statute, will intervene to prevent public bodies from exercising their rights where the exercise amounts to an abuse of power or an abuse of rights (cf. Ch. 13 § 7).

68. In Netherlands law, public bodies are primarily subject to public law; the possibility that public bodies can use private rights to attain their (public) goals does not mean, however, that, when doing so, they are free to do as any private persons would do. The public law (especially the recognized principles for good government policy, as they are called) limits the possibilities for...
public bodies to act as private persons. The principles mentioned can even, given the circumstances, prevent a public body from acting unreasonably in the way it solves a conflict, even in cases where no rechtsverwerking (cf. Ch. 5 § 1) has taken place.

The Government, when enforcing public law objectives through private law, is bound primarily by public law rules. If these rules do not provide a solution for the decision to use either public or private law remedies, the Netherlands Hoge Raad has held that the private law remedy, if used, should not infringe on the public law applicable. The nature and goals of the public law in casu determine, together with the measure of protection offered to citizens and written and unwritten rules of public law in general, whether the public body was justified in choosing the private law to reach its objectives. An important additional factor is whether similar results would have been attainable both in private law and in public law.

The distinction between public law and private law was recognized in the draft for the Netherlands Civil Code, although the dividing line presented difficulties. Nowadays, public law and private law have become entangled not only in environmental law and construction law, but also in relation to actions in tort against public bodies; the distinction can thus become rather unrealistic. Furthermore the restructuring of the Netherlands judicial organization (integrating the administrative courts of first instance and the ordinary courts of first instance) will advance the integration of public law and private law. That said, the codification of the Algemene wet bestuursrecht is linked up with the Netherlands Civil Code whenever possible; and the schakelbepalingen in the Code secure applicability of general parts of the Code on legal matters outside the patrimonial law where necessary (cf. nr. 19). In principle the use of private law by public bodies

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113 And in English law see now: Roy v Kensington & Chelsea & Westminster Family Practitioner Committee [1992] 2 WLR p.239 (HL).


115 These schakelbepalingen deal with the applicability of the rules of good faith, reasonableness and fairness and abuse of power (s. 3: 11-14), the provisions regarding rechtsverhandelingen creating legal relations (s. 3.2), volmacht (proxy
is acceptable because the 'open' structure of private law is conducive to the safeguards that public law (and especially administrative law) offers to the citizen116. Thus the conduct of a public body using private law will be judged by private law giving way to the basic principles and the rules of public and administrative law. However despite its multi-functional character, private law cannot replace the function of public law and administrative law; and so whenever a public body is considering the recovery of expenses for public services via private law, and the applicable rules of public law offer specific safeguards, le principe d'égalité des citoyens devant les charges publiques might in the end prohibit the choice of private law117.

§ 9 LAW OF PERSONS AND LAW OF THINGS

69. The traditional refusal formally to distinguish between public and private litigants is in many ways part of a more general English habit of paying little regard to the need for a rational law of persons; and the lack of a rational law of persons has in turn meant that there is no clearly defined notion of patrimony118. This is not to say that English law does not on occasions think in terms of status and capacity119 nor is it to say that it has no notion of the legal person120. Nor, also, is it to say that the common law does not hold the legal subject's tangible and intangible (corporal and incorporeal) property responsible for his obligations121. The point to be made is that as the common law has no real tradition of a system of rights along the lines of Justinian's Institutes, it has not worked out a rational scheme of legal relationships between legal subjects and legal objects. Persona and patrimonium have little independent existence outside of the standard categories of law or rules of procedure. The best one can say is that most of the private law of persons problems likely to arise in the English law of obligations are handled either as integral parts of contract and tort or as issues to be dealt with at the level of the law of procedure122.

116 This conclusion is based on a comparison of public and private law, revealing a convergence of fundamental principles and standards: M Kobussen, De vrijheid van de overheid (Zwolle, 1991), Ch. 3 and 4.
117 Kobussen, o.c., p.305.
118 Nicholas, pp.28-30.
119 See e.g., Stevenson v Beverley Bentinck Ltd [1976] 2 All ER 606.
121 County Courts Act 1984 s. 85(1).
122 See e.g. Employment Act 1982 s. 15.
This lack of a rational structure underlying the law of persons is mirrored in the law of things by the lack of any theory concerning patrimony in the French sense of the term or vermogen in the Netherlands Civil Code (cf. nr. 55). Instead the common lawyer thinks either of property - debts and the like being a form of intangible property (chooses in action) - or of actions, the latter being assignable only if they can be described as commercial assets. In fact one advantage in eschewing the Continental notion of patrimony is that English law has no difficulty in conceiving of an independent 'patrimony'; the trust (cf. nr. 46) in England does much of the work that the legal person plus patrimony do in the Continental legal systems. Thus one reason why English law can seemingly defy the classification system of Justinian's Institutes is because equity has been happy to turn legal objects - a patrimony - into what is in effect a legal subject: it is the trust itself that is often seen as being entitled to certain legal remedies like tracing (cf. nr. 46).

However one area where English law does make use of a concept quite close to the notion of patrimony is the law of succession as it affects, inter alia, the law of obligations. When a person dies all 'causes of action' (cf. Ch. 2 § 3) subsisting for the benefit of, or against, the deceased will survive for the benefit of his or her 'estate'. In the context of the law of obligations 'estate' takes the place of the deceased legal subject and acts as a kind of corpus ex distantibus in both the law of persons (universitas personarum) and the law of things (universitas bonorum) sense (cf. Ch. 11 § 2). It can, as a result, motivate a damages action on behalf of a victim killed by the defendant's tort or breach of contract, thus helping to ensure that the family receive compensation, and sometimes can even motivate an equitable remedy like specific performance (cf. nr. 41), ensuring that a family member continues to receive an annuity or some other debt.

§ 10 CONCLUSION

70. All of the differences between Common law and Civil law so far examined suggest that English law does not think in terms of a law of obligations as a right generating category in itself; it thinks only in terms of the categories of actions founded on contract and on tort. When judges and writers do use the term it is just loosely to describe a group of positive categories and does not indicate the existence of an abstract juris vinculum in

123 Weir, Complex Liabilities, para.42.
126 On which see Pickett v British Rail Engineering Ltd [1980] AC 136.
128 See County Courts Act 1984 s.15.
turn giving rise to actions in personam (obligatio mater actionis). This means that the general principles of the English law of obligations must be approached through the separate principles applicable to each of the autonomous categories of contract and tort, supplemented by rules and principles from the law of actions - that is from the law of procedure and the law of remedies. As we shall see, it is possible to talk of unjust enrichment (cf. Ch. 11 § 4) and abuse of rights (cf. Ch. 13 § 7), ideas that one associates with a developed notion of a law of obligations; but the substance of these areas is still to be drawn from the existing positive categories of English law or from the law of remedies.

When one turns to the Netherlands law of obligations, the system of the Civil Code presents a totally different approach to this category. Its structure of hierarchical levels (cf. nr. 19), a pattern of general rules preceding more detailed rules, starts out from vermogensrecht in het algemeen (patrimonial law in general) in Book 3. The rules for the creation of legal relationships, the requirement of the volonté, and the principles of reliance and misrepresentation are applicable to the law of obligations in Book 6, as are other provisions of Book 3. The concept of vermogensrecht as part of the objective law, covers all subjective rights and duties in patrimonial law (all patrimonial assets: all goederen) (Book 3), rights on zaken (property, Book 5) and vordeningrechten (law of obligations in Book 6, 7 and 8: both active, claims against a person, and passive, debts). Furthermore Book 3 contains general provisions applicable to both goederenrechtelijke and verbintenisrechtelijke matters129. And the hierarchical structure is sometimes expanded via the so-called schakelbepalingen (transition articles) securing the applicability of certain rules in situations outside the scope of the patrimonial law130. As to the law of obligations as a right generating category in itself, Book 6 expressly states the sources of obligations in s. 6: 1: verbintenissen kunnen slechts ontstaan, indien dit uit de wet voortvloeit131. Thus, the Netherlands law of obligations is a 'right generating category in itself', unlike the English law of obligations. Furthermore in the law of obligations the subdivision in Book 6 gives way to the intricacies of subjective rights132. And

130 Thus reaching the effect of analogy ex lege, although this does not mean that the use of reasoning per analogiam by the judge is excluded. See s. 3: 59, s. 3: 78, s. 3: 79, s. 3: 326, s. 6: 216, s. 6: 216-2 and s. 6: 279. And s. 3: 15 secures explicitly the applicability of several provisions of s. 3.1.1 outside patrimonial law, cf. Hijnman & Olthof, o.c., p. 4.
131 Obligations come into being only if this results from the law (in the translation of Haanappel & Mackay, p.235: Obligations can only arise if such results from the law/Les obligations ne peuvent naître que si cela résulte de la loi.
132 Title 1: verbintenissen in het algemeen (general part of the law of obligations), title 2: overgang van vordeningen en schulden en afstand van vorderingen (the passing of claims and debts), title 3: Onrechtmatige daad (delict/unlawful acts), title 4: verbintenissen uit andere bron dan onrechtmatige daad of overheenkomst (obligations from other sources than contract ex delict), and title
the use of open-ended rules and 'undetermined' concepts together with the
influence of unwritten law supported by the overriding rules of reasonableness
and fairness provide a flexible system for the law of obligations.

5: overeenkomsten in het algemeen (contracts, general provisions), with special
rules for mutual (reciprocal) contracts, cf. nr. 56.
6 LAW OF CONTRACT: GENERAL INTRODUCTION

§ 1 GENERAL REMARKS

71. We have already mentioned that the common law thinks in terms of a general principle of contract as a result of a single form of action (assumpsit) establishing itself at the end of the sixteenth century to deal with loss and damage (including the failure to pay a debt) arising from undertakings (cf. Ch. 5 § 4). This single form of action, as we shall see (cf. Ch. 6 § 2), was based on the notion of promise, and it is this notion of promise which ultimately allowed English lawyers to escape from the procedural technicalities of the forms of action and to think in terms of a general law of contract. By the late nineteenth century this form of action had become the basis of a general theory of contracting with the result that even pragmatic English judges began to see contract as an obligation created by a communion of wills. Alongside this development of a general theory of contract, there also developed the notion of contractual freedom: if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice.

This judicial statement bears a very close policy relationship with French law, yet care must be taken before concluding that the common law has a law of enforceable agreements (les conventions). In reality assumpsit, the remedy upon which the modern English law of contract is constructed, was an action founded originally upon wrong and, later, upon breach of undertaking and these are ideas quite different from agreement; consequently the historical emphasis in English contract law cannot be likened to the one to be found in Roman legal scholarship. It may be that English lawyers were influenced by Roman legal scholarship during the nineteenth century, but if Roman concepts are to be emphasised in this respect it is pollicitatio rather

1 Aliyah, Rise and Fall, p.215.
2 Ibid., p.407.
3 Printing and Numerical Registering Co. v Sampson (1875) LR 19 Eq 462, 465.
4 French CC art 1134: les conventions légalement formées tiennent lien de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi.
5 Milsom, pp.317, 355-356.
6 Zimmermann, pp.569-571.
than *conventio* that forms the basis of the modern contractual obligation. Moreover the transactional contexts within which undertakings are made are capable of having, as we have seen (cf. Ch. 5 § 4; Ch. 5 § 7), an important bearing on the substance of the promises to be enforced. Accordingly, before looking at the actual requirements for an enforceable *parol* contract - an enforceable promise - it will be necessary to say something about contractual promises themselves and their classification (cf. Ch. 6 § 2).

72. In Netherlands law, a contract has not only those juridical effects agreed to by the parties, but also those which, according to the nature of the contract, result from statute, custom (usage) or reasonableness and fairness (s. 6: 248). A rule arising from an agreement binding upon the parties as a result of the contract is not enforceable if this would be unacceptable, given the circumstances of the case, according to the rules of reasonableness and fairness (s. 6: 248-2). The Netherlands legislator has codified the principle, based on Roman law, that the law of obligations is governed by *bona fides*; but this does not mean, however, that all Netherlands contracts are *contractus bonae fidei* in the sense the Roman law distinguished *contractus stricti juris* and *contractus bonae fidei*. In Netherlands law the principle of *bona fides* has to be taken into account while in France, the interpretation of s. 1134 Code Civil is only of marginal importance; Belgian law has a position mid-way between French and Netherlands law. The developments in Netherlands law are best compared to German law, where § 242 BGB has been developed extensively in case law.

73. A uniform definition of contract - leaving aside the question whether contract is dead or *en renaissance* - does not exist but, depending on the background of the jurist, an historical approach is thinkable, that is to say the notion of contract is absorbed by its historical development. For the formalists, the notion of contract offered by the Codes and the *Restatement 2nd of the law on contracts* (USA) is sufficient, with the additional *apostille* that the freedom of the parties to a contract is valid because the law deems obligations enforceable. In law and economics, contracts are agreements

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7 Zimmermaan, pp.572-573.
8 Coing, p. 434.
9 Asser-Hartkamp II, p.272-273; see on the interpretation of contracts e.g. *Bloemert v Jelbirk*, RvW 1991, nr. 139.
11 Asser-Hartkamp, Ic.
12 Cf Palandt (Heinrichs), *Bürgerliches Gesetzbuch* (München, 1991) Einl v § 242 BGB.
15 See generally Gordley.
concluding economic operations at the lowest transaction costs possible, while sociologists regard contract as one of the many types of agreements people can enter into, albeit that contracts are not strictly essential to make the market work. One could agree with Atiyah that, because the notions of contract vary fundamentally, the notion of contract should not be defined or at least only be defined in the traditional way, providing the definition can change according to the circumstances. In Netherlands law, \textit{overeenkomst} (contract) is defined as an act realized through the consensus and interdependent will of two or more persons, with due observance of possible statutory formalities, created with intended legal effect (cf. Ch. 5 § 1 \textit{rechtshandeling}) for the benefit of one party or for the reciprocal benefit and to the charge of both (all) parties concerned. The so-called obligatoires \textit{overeenkomst} is a contract with the intention of creating - or mitigating - obligations to the benefit of one party and to the charge either of the other party or mutually. This type of contract is the most common source of obligations.

74. Netherlands contract law is governed by three principles. First, contracts are generally concluded by communion of the wills of the parties (\textit{wilsoveenstemming}) (s. 3: 33); secondly, the underlying principle of Netherlands contract law is \textit{de verbindende kracht der overeenkomst}; parties should perform up to the requirements of the contract (s. 6: 248). Thus a contract is binding upon the parties and has not only the legal effects intended by the parties, but also the effects based on statute, usage or the demands of the rules of reasonableness and fairness, taking into account the nature of the contract. The third principle is freedom of contract (\textit{contractsvreijheid}), generally accepted as the basic principle of private law, and partly codified in s. 6: 248. Several types of contracts are distinguished, such as mixed, nominated and non-nominated contracts; and the contract for sale of goods is nominated in Book 7, together with several other types of contracts. Further distinctions are, for instance, contracts \textit{ex consensu} and \textit{ex re}, and contracts for which formalities are statutory, as well as bilateral and unilateral contracts (cf. Ch. 6 § 3). Principal contracts are distinguished from auxiliary contracts, of which the \textit{pactum de contraendo} (\textit{Vorvertrag, avant-contrat}) is a good example.

Private law is based on the fundamental right of self-determination and the exertion of a right or the coming into existence of a \textit{juris vinculum} is, then, left to the initiative and the free choice of the parties (the principle of

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16 Cf Alpa, I.c.
17 Cf. Asser-Hartkamp II, p.9. Huisappel & Mackay give the following translation of s. 6: 213-1: 'a contract in the sense of [title 5 Book 6] is a multilateral juridical act whereby one or more parties assume an obligation towards one or more other parties'. The draft for s. 6: 213-1 was translated in 1977 as follows: 'a contract within the meaning of this chapter is a multilateral juristic act by which one or more parties enter into an obligation with one or more others'.
18 Asser-Hartkamp II, p.31.
autonomy, cf. nr. 26\(^1\)). Furthermore *vertrouwen* (reliance) in the context of the autonomy of the parties governs the law of contract. And the obligations created by an *obligatoire overeenkomst* are interdependent in the context of the purpose and the objectives of the contract (the causa requirement\(^2\)), whereas public order and the prevailing morals of society set limits to the *verbindende kracht van een overeenkomst* (the binding force of a contract)\(^3\).

The constituent parts of a contract are *essentialia*, *naturalia* and *accidentalia*. Of the *essentialia*, the requirement of s. 6: 227 is important: the obligations which parties assume must be determinable. The difference between *essentialia*, *naturalia* and *accidentalia* or, in modern private law, principal and additional components of a contract, is important in several respects; for example, the Netherlands law on standard contract terms (incorporated in the Netherlands Civil Code in s. 6: 231-247) is not applicable to the essentialia of the contract. In cases of partial nullity (cf. s. 3: 41), the distinction is also important\(^4\).

Unilateral acts with intended legal effect (*eenzijdige rechtshandelingen*) created by the expression of will towards another person can be distinguished from contracts, and for the validity of such acts (for instance an offer) it is required that the declaration made to another, specifically determined, person must have reached that person (s. 3: 37). The distinction between these acts and contracts is difficult; and so, whenever possible, the general rules of contract (validity, nullity) apply. Thus, the rules concerning validity, nullity or annulment apply also to offers (s. 6: 218)\(^5\).

Vranken has argued that several major doctrines in the Netherlands law of obligations (and, especially, in the law of contract) such as *dwaling* (cf. nr. 102), consensus, threat, abuse of circumstances, could be analysed and described in terms of *mededelings-, informatie-en onderzoeksplichten*\(^6\) (the duties to disclose, inform and investigate). Legal control of the contents of a contract is on the increase in Netherlands law and the development of the criteria for judging the behaviour of parties in negotiations and contract (the rules of reasonableness and fairness), as well as the widespread protection of persons who have acted in good faith on the presumption of the existence of

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20  See nr. 80.
21  Nieuwenhuis, o.c., p.66.
22  Asser-Hartkamp II, p.66-68: whenever a *rechtshandeling* is partially null, the relationship between this element and the remaining part of the *rechtshandeling* determines whether the valid part will continue to be in existence, cf. s. 3: 41.
23  See on offer and acceptance in the Netherlands Civil Code s. 6: 217-225, cf. nr. 84.
a certain *juris vinculum*, have made inroads into the freedom of contract and the exclusive character of contractual obligations. The duties mentioned are based on the accepted principle in the law of obligations that the justified interests of the other party have to be taken into account when entering into a contract. Both the legislator and contractual parties themselves can impose such duties on the actors in the law of obligations, but unwritten rules of law can also bring about a certain specific duty towards the other party. The exact contents of this duty can be specified from different perspectives in the legal order, and varies according to procedural, methodological and legal points of view. The idea that inequality of the (bargaining) powers of parties to a contract should be neutralised or, at least, counterbalanced, plays an important role in the Netherlands law of obligations. The procedural aspect of this doctrine is closely intertwined with the movement in the Netherlands legal order towards substantive legal control of the obligations that the parties to a contract have towards each other, and the objective of this control is to protect the equality and the freedom of the parties in private law. In the law of obligations, the mutual (reciprocal) duty to assert the other party's intentions and position can be differentiated according to the rules of reasonableness and fairness. However it cannot be formulated in a general rule of law but depends to a great extent on the specific circumstances of each case, taking into account the nature and contents of the contract, the way in which the contract has been entered into, the nature and severity of the mutually knowable interests involved and all other circumstances of the case, including the position of the parties in the social order and their relationship. This catalogue of circumstances to be considered leads inevitably to the conclusion that the duties described by Vranken can only be developed further in case-law, although the underlying principles are, of course, based on legislation.

§ 2 PROMISE AND AGREEMENT

75. English judges and academics state from time to time that the English law of contract is about enforceable agreements and it has to be said at

25 Vranken, p.201.
26 Vranken, p.201 and 205. See in this respect, e.g. the rules of reasonableness and fairness in the Netherlands Civil Code and, especially, the new provisions dealing with general contract terms in s. 6: 231-247 in combination with s. 6: 2 and 6: 248. When dealing with *dwelling*, the duties parties have toward each other are explicitly mentioned in the Civil Code (s. 6: 228).
once that there is a certain truth in this view28. Thus most English commercial contract documents superficially look little different from the commercial agreements to be found anywhere in Europe, and even the legislator in the United Kingdom occasionally uses the language of agreement29. Yet a strict legal analysis of English contract law will reveal, as we have already indicated, that it is not the notion of convention but the notion of pollificatio or promissum that forms the focal point of liability; the English contract is liable in damages at common law for breach of promise rather than non-performance of an agreement30.

In fact a close look at the nineteenth century cases reveals that the English law of contract was, in its formative days at least, founded on two ideas. First there was a general principle that 'if a man has made a deliberate statement, and another has acted upon it, he cannot be at liberty to deny the truth of the statement31. Secondly, there was the principle that any contractual promise was prima facie actionable even if it lacked an object and a cause in the French law sense of these terms. Accordingly if a person was contractually to promise that it shall rain the next day he would be liable not only on the basis that he ought not to be allowed to go back on his word32 but also on the basis that he has assumed a risk and must bear the consequences33. These two ideas give rise to a law of contract in England which is really very much more objective in its foundation than the French model which is founded on the subjective notion of consent.

Of course the law of contract has matured conceptually since the mid-nineteenth century - and it must not be forgotten that some nineteenth century English judges were, as we have already said, influenced by the Institutes of Justinian and the writings of Pothier and von Savigny34. Yet the promise aspect of contract is still to be found alive and well in the common law. Thus it remains possible that a contractor who has relied upon a contractual promise can obtain damages for breach of promise even if the object of the obligation is non-existent35; and only a decade ago an attempt

28 See Treitel (o.c. fn 27), p.4-5: the legal enforceability of contractual agreements is so well established, in all western systems of law, that a discussion of the reasons for it may seem to be superfluous. Yet such a discussion is important in relation to the topic of remedies for breach of contract, since the principles on which enforcement is based will determine the often difficult question of the extent to which enforcement is to be carried. Three reasons for the enforcement of contracts are commonly given: restitution interest, reliance interest and expectation interest (Treitel, I.c.).
30 Zwiegert & Käte, II, p.7.
31 Baron Bramwell in McCance v L & N W Ry (1861) 31 LJ Exch 65, 71.
32 Canham v Barry (1855) 24 LJCP 100, 106.
33 Hall v Wright (1860) 29 LJQB 43, 46.
34 See Atiyah, Rise and Fall, pp. 405-408; and see Hall, supra, pp. 46-47
35 McRae v Commonwealth Disposals Commission (1951) 84 CLR 377 (damages awarded in contract for the sale of a non-existent ship).
by one English appeal judge to found contract upon agreement rather than upon an exchange of promises was quashed by the House of Lords\textsuperscript{36}. The standard definition of an English contract remains 'a promise or set of promises which the law will enforce'\textsuperscript{37}; and it is only in the notion of 'consensus' that the English lawyer comes anywhere near to the idea of subjective agreement (cf. Ch. 7 \S 2).

\textbf{§ 3 TYPES OF CONTRACT}

76. The principle of a general law of contract covering all transactions (cf. Ch. 5 \S 4) means that there is no theoretical distinction in English law between general and special contracts; and the lack of a formal distinction between public and private law (cf. Ch. 5 \S 8) and between civil and commercial law (cf. Ch. 5 \S 7) means that administrative and commercial contracts are in form indistinguishable from ordinary private contracts. All the same, we have seen that this general principle of contract must be treated with some caution in practice and so when it comes to the question of, for example, implied terms (cf. Ch. 9 \S 6) the courts can find themselves looking at types of contractual transaction in order to determine, for example, the level of duty (cf. Ch. 5 \S 2).

One French distinction that is, seemingly, used by English law is the distinction between unilateral and bilateral contracts. Indeed the terms \textit{synallagmatique}, \textit{bilateral} and \textit{unilateral} have been specifically referred to by the English Court of Appeal\textsuperscript{38}. However while there are similarities between the French and English approaches - for example, the promisee in a unilateral contract is under no obligation to the promisor - there are also important differences\textsuperscript{39}. In the common law the distinction is founded in the requirement of consideration (cf. Ch. 7 \S 3) and not in the type of obligation; and this means that most English unilateral contracts consist of a promise in return for an act, the promise becoming operative only if the act is performed. In other words an English unilateral contract is one in which only one party makes a promise in consideration for something other than a return promise. In fact a promise to make a gift cannot be a contract under the general

\textsuperscript{36} \textit{Gibson v Manchester City Council} [1979] 1 WLR 294 (I can see no reason in the instant case for departing from the conventional approach of looking at the handful of documents relied on as constituting the contract sued on and seeing whether on their true construction there is to be found in them a contractual offer by the council to sell the house to Mr Gibson and an acceptance of that offer by Mr Gibson, per Lord Diplock).

\textsuperscript{37} See e.g., Lord Diplock in \textit{Ashington Piggeries Ltd v C Hill Ltd} [1972] AC 441, 501.

\textsuperscript{38} \textit{U.D.T. v Eagle Aircraft Services Ltd} [1968] 1 WLR 74, 82.

common law principle of contract law (unless it is under seal\(^40\)) because there is no consideration for the promise and English law does not recognise any specific category of real contracts. Most 'real contract' problems in England fall either within the category of bailment - which, as we have seen, has its own special rules (cf. Ch. 5 § 6) - or within the category of loan, which is governed by the contract principle that there is an implied promise to repay\(^41\).

§ 4 FREEDOM OF CONTRACT

77. The emphasis upon promise rather than agreement has meant that English law has not developed a general theory of will (volonté) or consent as such. Nevertheless it had, by the late nineteenth century, developed, as we have seen (cf. Ch. 6 § 1), a theory of freedom of contract and so there is a general principle that 'parties to contracts have freedom of choice not only as to what each will mutually promise to do but also as to what each is willing to accept as the consequences of the performance or non-performance of those promises so far as those consequences affect any other party to the contract\(^42\).

In the twentieth century consumer society this general principle was to give rise in England to many of the same problems that standard form contracts produced on the Continent\(^43\). In particular the widespread use of exclusion clauses was adopted as a means by which vendors could put the risk of poor quality, even dangerous, goods on to the buyer. And although the courts created a number of devices to combat these kinds of abusive clauses (cf. Ch. 9 § 3), it was only when the legislature intervened that the problems for consumers were generally eased (cf. nr. 137). In commercial contracts freedom of contract remains the general principle (cf. nr. 136), but the rationalisation of this freedom tends to be based less and less upon notions of individualism and laissez-faire and more and more upon questions of risk, insurance and commercial certainty. There is a general feeling in the courts that it is not the role of the judges to 'police the fairness of every commercial contract by reference to moral principles\(^44\). England, it would seem, has passed out of the Age of Principle into the Age of Pragmatism\(^45\).

\(^{40}\) Law of Property (Miscellaneous Provisions) Act 1989 s.1.
\(^{41}\) Slade's Case (1602) 76 ER 1074. The consideration for the implied promise to repay is the creditor's 'promise' to convey the money to the debtor.
\(^{42}\) Per Lord Diplock in Ashington Piggeries Ltd v C Hill Ltd [1972] AC 441, 501.
\(^{43}\) Zweigert & Kötz, II, pp.9-25.
\(^{44}\) Banque Keyser Ullmann v Skandia (UK) Insurance [1990] 1 QB 665, 802.
\(^{45}\) Aiyah, Rise and Fall, p.640ff.
§ 5 INTERPRETATION OF CONTRACTS

78. The idea of freedom of contract expresses to some extent the view that contract is based upon subjective consent: the court will enforce what the parties themselves have subjectively constructed. And, as we shall see, the English judges have talked of the need for consensus ad idem before there can be a binding contract (cf. nr. 88). But, because of the emphasis on objective promise rather than subjective agreement, the notion of contract is interpreted in a particular way by common lawyers in that the court rarely looks at the actual subjective intention of the contracting parties. It looks only at their outward actions and construes contractual liability from their objective behaviour.

This objective approach to contract is also reflected in a stricti iuris approach to liability. Unlike the Continental systems, the English common law has no general doctrine of bona fides: all it has are specific doctrines which apply to certain kinds of contract (for example insurance, which are contracts uberrimae fidei) and certain kinds of relationship - for example fiduciary relationships (cf. Ch. 4 § 4) - and thus it 'has, characteristically, committed itself to no such overriding principle [of bona fides] but has developed piecemeal solutions in response to demonstrated problems of unfairness'. Accordingly the fact that one party negotiating a contract is aware that the other is labouring under an error will not, at common law, mean that any subsequent contract will be a nullity if the former has not corrected the latter's mistake (cf. Ch. 8 § 7). In other words there is no general duty of disclosure because there is no general theory of consensuality; what matters is an objective view of promise.

However there are ways in which the courts can inject into contracts doctrines about good faith, error and the like. Given that the basis of contractual liability is the promise, the way the courts analyse any one contract is as a bundle of different promissory obligations (cf. Ch. 9 § 1) and while some of these obligations will arise from the express intentions of the parties others will have to be implied (cf. Ch. 9 § 6). It is this concept of the implied promissory obligation - the implied term - that is the means by which both the courts and the legislator can inject into contracts a whole range of doctrines, principles and rules. In practice this results in much interpretation taking place at the level of some objective contractor such as the 'commercial man'.

47 Bingham LJ in Interfoto Ltd v Stiletto Ltd [1988] 2 WLR 615, 621.
48 See e.g., The Moortock (1889) 14 PD 64; Sale of Goods Act 1979 ss.12-15; Supply of Goods and Services Act 1982; Landlord and Tenant Act 1985 s.8; Housing Act 1988 s.16.
or the 'reasonable man' - a role to be assumed by the judge(s)⁴⁹ - who, within the context of the class of transaction in question (sale, hire or whatever), acts as the source of the implied term. And sometimes, as has been the case with the doctrine of frustration (cf. Ch. 10 § 5), this objective contractor can become completely divorced from the implied term to find himself a direct source of a contractual rule which will then exist as a matter of objective law⁵⁰.

Where contracts have been reduced to writing the general rule is that the court can only look at the written document. The parties cannot adduce parol evidence to vary or to add promises to those set out in the document. However not only is this rule subject to many exceptions and evasions - so many in fact that the Law Commission concluded that the rule no longer existed⁵¹ - but linguistic interpretation of the written promises themselves can give rise to teasing problems. For example, promises labelled as 'conditions' are said to be so fundamental that, if broken, the innocent contractor can repudiate the contract (cf. nr. 129); but merely because a term is described as a 'condition' in the document does not settle the matter because in the English language the word 'condition' has many meanings⁵². And so even at the level of linguistic interpretation the objective contractor - that is, the judge playing the role of the reasonable or commercial man - may have to make an appearance before the court can decide how to construe any particular contract.

Interpretation of contracts is, then, primarily a matter of linguistic interpretation of written promises in the case of written contracts - and here the approach of the courts is to look at the final document rather than the negotiations which preceded it⁵³ - or of the formulation of implied promises if such promises are necessary to give the contract 'business efficacy'⁵⁴. If there is one overriding or general principle it is that the courts will not 'give the words a meaning that would defeat the clear intention of the parties as revealed by the rest of the relevant evidence of the agreement'⁵⁵. However, that said, it must not be forgotten that many contractual problems find themselves before the court via the institution of the remedy rather than the right; accordingly interpretation problems can sometimes be found behind estoppel, rescission and rectification (cf. Ch. 4 § 3) cases and these remedies are on occasions capable of importing their own rules and principles into the problem.

⁴⁹ See e.g., Staffs Area Health Authority v South Staffs Waterworks Co [1978] 3 All ER 769.
⁵⁰ See Davis Contractors Ltd v Fareham UDC [1956] AC 696, 728-729.
⁵³ Prent v Simmonds [1971] 1 WLR 1381.
The Netherlands Civil Code does not contain provisions regarding the interpretation of contracts\(^56\) - that is the assessment of the meaning of the declarations made by the parties to a contract and of the legal consequences thereof; and this process of interpretation is also influenced by the rules of reasonableness and fairness\(^57\). Interpretation of contracts is not primarily the task of the judges; basically, the parties to a contract are to interpret their contract but if they disagree, the judge will have to interpret their agreements. And the interpretation itself rests to a great extent on the factual circumstances\(^58\). The process of interpreting contracts should be distinguished from the possibilities that the Netherlands law of obligations offers when it comes to determining the contents and scope of contractual obligations (cf. s. 6: 248)\(^59\).

§ 6 THE PROVINCE OF THE LAW OF CONTRACT

79. Once remedies bring their own rules into the area of contract this raises a question about the scope and province of the law of contract itself. Does one have to have a knowledge of all the remedies before one can safely attempt to answer a 'contract' problem? And what about the law of non-contractual debt and damages actions: will these have a role to play in the province of contract? There is no doubt that in certain areas of contract a knowledge of the law of tort and the principles of equity is essential. Thus in the area of misrepresentation (cf. Ch. 8 § 6) the availability of damages and rescission may well be governed by non-contractual principles with the result that a plaintiff damaged by a statement made in the course of contractual negotiations could possibly receive damages in tort\(^60\). Equally a non-contractual debt claim (cf. Ch. 11 § 3) might be available at common law\(^61\) or in equity\(^62\) founded on principles of restitution and unjust

\(^{56}\) Cf. EH Hondius in: Contract Law and Practice (o.c.), p.26: Instead the courts see it as their primary task to give effect to the meaning which the parties to the contract could attribute to what has been agreed upon, and to what they could reasonably expect from another in this connection, quoting Ernes v Havilte, NJ 1981, nr. 635. And a similar approach is taken where there is an obvious omission in a contract, Bunde v Eckens, NJ 1977, nr. 241. Therefore the assessment of the role of the judge vis-à-vis facts (cf. ar. 26 and 31) is of the utmost importance when it comes to interpreting contracts.

\(^{57}\) Asser-Hartkamp II, p.253-257.

\(^{58}\) Cf. Asser-Hartkamp, p.257.

\(^{59}\) Cf. Asser-Hartkamp II, p.255-256; but see JM van Dumné, Nommatieve uitleg van rechtsHandelingen (Leiden, 1971) and HCF Schoordijk, Het algemeen gevoel van het verbintensienrecht naar nieuw Burgerlijk Wetboek (Deventer, 1979), advocating a method of interpretation of contracts which incorporates reflection on the legal consequences of the interpretation chosen.

\(^{60}\) Box v Midland Bank Ltd [1979] 2 LJ Rep 391.

\(^{61}\) British Steel Corporation v Cleveland Bridge & Engineering Co Ltd [1984] 1 All ER 504.
enrichment (cf. Ch. 11 § 4). The law of contract cannot, therefore, be fully understood from a practical point of view without a knowledge of the torts of negligence and deceit, of the law of quasi-contract63, of some of the general principles surrounding equitable remedies and, as we have seen, of aspects of the law of property (cf. Ch. 5 § 6).

That said, however, it must be added that there has been something of a regression in recent years associated with the reluctance both to award damages in negligence for pure economic loss (cf. nr. 192) and to allow the intervention of equity to undermine the security of transactions. Where there is a commercial relationship governed by a contract it would seem that there is now much less scope for actions in the tort of negligence64, and legislative intervention in the field of consumer protection has led to the view that further restriction upon the principle of freedom of contract (cf. Ch. 6 § 4) is a matter for Parliament rather than the courts65. In truth the position is complex because the interrelation of contract, equity and tort is itself complex and the exclusion from contract either of the law of tort or of equitable doctrines will always be an unrealistic exercise in some respects. If the damage is physical the law of tort will have something of a role even if this role is, in the end, subsumed by a contract apportioning risks via an exclusion clause66; if it is financial, and results from reliance, the role of the law of tort will largely be dependent on the aims of the two categories as viewed through the status of one or more of the parties. When a consumer is involved the tort of negligence may well come to the aid of the law of contract where for example this latter category is unable to found a damages action simply on the basis of a technicality67 or where a contracting party has clearly assumed a duty

63 The term quasi-contract is unknown in the Netherlands law of obligations (cf. Asser-Hartkamp I, p.38); the notion quasi-contract does not seem helpful when assessing the sources of obligations (cf. s. 6: I).
64 Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the right and duties inherent in some contractual relationships... either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether the liability arises from contract or tort, e.g. in the indemnity of action per Lord Scarman in Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd [1986] AC 80, 107.
66 See e.g., Photo Production Ltd v Securicor [1980] AC 827.
67 See e.g., Smith v Eric Bush [1990] 1 AC 831.
beyond the contract. And while the equitable jurisdiction to grant relief does not formally distinguish between consumer and commercial contracts the fact of an unequal bargain will, of course, be a relevant feature in some cases of undue influence even if it can never become an appropriate basis of principle of an equitable doctrine... of relief against inequality of bargaining power.

With regard to the law of obligations and the rules and principles of civil procedure (especially s. 48 of the Wetboek van Burgerlijke Rechtsvordering, cf. nr. 26) the position in Netherlands law as to the province of the law of contract appears simple. As we have seen (nrs. 73 and 74), the approach to contracts is set in the framework of the Netherlands Civil Code, explicitly dealing with aspects of vermogensrecht in het algemeen (patrimonial law in general) and verbintenissenrecht (law of obligations) as the genus of the species overeenkomstenrecht. And wederkerige overeenkomsten (mutual, reciprocal contracts) are a subcategory of these concepts. Samenloop (cf. concurring causes of action) between the rules of contractual and delictual obligations is possible; and in the law of contract s. 6: 248 explicitly rules that the contents of a contract are determined not only by the agreement of the parties, but also by the nature of the contract, the law, usage or the demands of reasonableness and fairness. Furthermore contractual provisions that contravene the standards of reasonableness and fairness are not enforceable (s. 6: 248-2). The meaning and effect of written terms and the question whether there are omissions to be filled is not resolved by mere grammatical construction of the terms of the contract (cf. nr. 78); the parol evidence rule is unknown to Netherlands law.

Legal control of the contents of a contract in Netherlands law is on the increase, but in the context of the development of criteria for judging the behaviour of the parties in negotiations and in the contract itself and for giving effect to the principle of reliance. The binding force of an overeenkomst is based on communion of the wills and freedom of contract and the principles of equality and freedom of the parties to a contract are safeguarded by statutory provisions protecting the 'weaker party' (for example the consumer). Finally the rules of reasonableness and fairness allow for a detailed assessment of the (factual situation by the judge, taking into account all circumstances of the case.

The Netherlands law of contract cannot be understood from the perspective of the specific rules in the Civil Code dealing with wederkerige overeenkomsten (s. 6: 261-279) alone. On the one hand the interpretation of the rules applicable and the additional statutory requirements for the formation of contracts require a conceptual approach within the Netherlands

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70 Cf. EH Hondius, in: Contract Law and Practice (o.c.), p.81-82.
law of obligations (Book 6) and, on the other hand, the rules of *vermogensrecht in het algemeen* (in Book 3) deal with general aspects of the creation of legal relations (cf. nr. 81 and 102). As such, the Netherlands law of contract is about obligations and the only source of obligations is the law itself (s. 6: 1, cf. nr. 55). That said, the divisions and concepts of the Netherlands law of obligations, although drafted in abstract terms, are conform to the underlying principles of contract law and unwritten rules of law.
THE FORMATION OF A CONTRACT

1 THE ESSENTIAL REQUIREMENTS OF A CONTRACT

1. Leaving aside the question of capacity, which is not an essential condition of an English contract but a vitiating factor (cf. Ch. 8 § 3), there are three requirements that must be fulfilled before a promise, or set of promises, will be enforceable as a contract. These are: offer and acceptance; consideration; and an intention to create legal relations. Certain types of contract sometimes attract further formal or evidentiary requirements - in particular contracts for the disposition of land or an interest in land must be in writing¹, and various consumer credit contracts must be in a required form² - but failure to comply with such requirements usually make such contracts unenforceable rather than non-existent (cf. Ch. 8 § 2).

1. In Netherlands law, the formation of a contract rests upon capacity, commumion of the wills of the parties and valid formation of the volonté, sometimes formalities are required. Every natural person has the capacity to erform a rechtshandeling (juridical act) to the extent that the law does not provide differently (s. 3: 32) but minors and people under guardianship do not have the capacity to perform the act necessary for a contract and contracts with persons lacking the capacity mentioned may be annulled. A unilateral juridical act of a person lacking capacity is void³; and in general, a juridical act of such a person is voidable (cf. s. 3: 32-2). Contracts concluded by minors are voidable, but this rule does not apply if the minor has acted mera
anderscheid (knew what he was doing) with the consent of his parent or with unds which the parent has put at his disposal for regular expenses or for his education⁴ (s. 1: 234 and 381). And the obligation to pay for a performance received by a minor or someone under guardianship on the basis of a contract has been set aside (cf. nr. 144) is limited in s. 6: 276.

Communion of the wills is an essential part of Netherlands contract law. Rechtshandelingen (juridical acts) require the intention to create legal effects, whereby the intention has to be manifest through a declaration (s. 3: 13). However the absence of intention (volonté) in a declaration cannot be invoked against a person 'in good faith' if a person declares something or adopts an attitude inconsistent with his will, and another person reasonably

¹ See Law or Property (Miscellaneous Provisions) Act 1989 s. 2(1).
² See Consumer Credit Act 1974 s.60.
³ This rule does not apply if the juridical act was directed towards ('aimed') at one or more specific persons, cf. s. 3: 32-2 ff.
⁴ See E.H. Hondius, in: Contract Law and Practice (o.c.), p.82.
accepts this declaration or conduct as an expression of a certain will directed towards him. In other (French) words: lorsqu'une personne fait une déclaration ou adopte un comportement non conformes à sa volonté, le défaut de volonté ne peut être opposé à celui qui a compris cette déclaration ou ce comportement, d'après le sens qu'il pouvait raisonnablement lui donner dans les circonstances, comme constituant une déclaration de portée déterminée à son adresse (s. 3: 35).

A third party who has acted in reasonable reliance on the assumption of a certain juris vinculum is, given the circumstances, protected against the inaccuracy of the declarations or behaviour of the other person (s. 3: 36). The intention corresponding to declarations of persons of unsound mind (permanently or temporarily impaired) is deemed to be lacking if the impairment obstructed reasonable appraisal of the interests involved or brought about the declaration. In principal, prejudicial acts of persons of unsound mind can be annulled, unless the prejudice was not reasonably foreseeable (s. 3: 34).

These provisions of the Netherlands Civil Code are the outcome of the discussion about the problems that arise when volonté, declaration and reliance diverge. One controversial question was whether a contract could be valid if there was no volonté corresponding to the declaration. The protection of other persons acting in good faith on the assumption of a certain declaration or in reliance on the existence of a specific juris vinculum raised further problems. The controversy about the foundations of the binding effect of contracts has not been decided in full in the Code; nevertheless it is laid down that contracts are concluded on the basis of communion of wills, manifested through a corresponding declaration, whilst the attributable appearance of a certain will can replace the actual intentions. Reliance upon a certain volonté evoked in an attributable way can 'replace' the actual intention of a party. All circumstances have to be taken into account when judging these cases, especially the nature of the act, the special expertise (or the absence thereof) of the parties, the duties to inform the other party or to inquire into the intention, and the various interests concerned.

§ 2 OFFER AND ACCEPTANCE

82. Fact and Law

The concept of offer and acceptance in English law is not all that different from the concept in Continental contract law, although the practical results can on occasions diverge. However in English law offer and acceptance is as much a question of law as fact and so it is quite possible for the supreme court (the House of Lords) to be called upon to decide questions which, in

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5 Asser-Hartkamp II, p.90.
6 Asser-Hartkamp II, p.97; see also JBM Vranken, Mededelings-, informatie- en onderzoeksplichten in het vertrekkenisbriefrecht (Zwolle, 1989).

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France, if not in other Continental jurisdictions such as the Netherlands, would belong only to the trial judge. The reason for this difference is to be found in the source of contract law. As we have seen (cf. Ch. 6 § 2), the foundation in the common law is promise rather than agreement and this has resulted in contract formation rules which generally function at a lower level of abstraction than in jurisdictions where contract is founded directly upon volonté.

All the same teasing conceptual problems can still arise. What is the position if A makes a promise to B that he, A, will compensate C if he damages C’s property in certain circumstances? Much will depend upon the view taken of the context. If the promise is made in the context of an association in which all three parties are involved, then the court may decide that there are contractual relations flowing between A and C thus allowing C to sue A in contract if A was to damage C’s property. However if the court takes an atomistic approach there is the possibility that no contractual relations will be established between A and C and this will then give rise to privity problems (cf. Ch. 9 § 7). It is easy enough to say that the Common law of contract is based on an exchange of promises via offer and acceptance, but, as we shall see, something more is required (cf. nr. 88) and it is this ‘something more’, said to lie in the notion of ‘intention’, that problems arise as to the exact basis of English contract law.  

83. Offer and Invitation to Treat
In many ways the whole dichotomy between law and fact is unreal in this area of English contract law and this is particularly true with regard to the distinction between an offer and an invitation to treat (invitatio ad offerendum). In this area of law one has to think in terms of rules emerging from particular fact situations (ex facto ius oritur). Many of these fact situations are similar to both Continental and English law but the practical approaches taken by the two systems can differ considerably. In an English supermarket, for example, goods on display shelves constitute only an invitation to treat — the consumer makes the offer to the cashier — and this means that if, before payment, there is an accident in the supermarket arising

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7 See e.g., Gibson v Manchester City Council [1979] 1 WLR 294.
8 Clarke v Dunraven [1987] AC 59. It must be stressed that three-party relationships from which obligations might emanate, pose intricate theoretical problems, cf. HCF Schoordijk, Beschouwingen over drie-partijen-verhoudingen van obligatoire aard (Amsterdam, Zwolle, 1958). And the Netherlands Civil Code has specific rules for the derdenbeding (based on a contract giving a third party a right to the contracting parties, s. 6: 253) and for meerpartijsvereenkomsten (contractual obligations between more than two parties, s. 6: 279).
10 The Leonidas D [1985] 2 All ER 796, 804-815.
11 See generally Samuel (1989) 8 CIQ 53.

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from a defective product the problem will be one for the law of tort rather than contract. It might be tempting to conclude from this that the emphasis in English law is usually on the consumer, as opposed to the supplier, when it comes to the making of contractual offers. Certainly it is true that the courts do not usually treat advertisements and displays in shop windows as constituting offers. Nevertheless an offer for a reward in return for an act, if specific enough, can constitute an offer to the public at large; consequently a company which stated, by way of a newspaper advertisement, that £100 would be paid to anyone who caught influenza after having used their medical product for two weeks was held liable in debt to a consumer who caught the illness and claimed that there was a (unilateral) contract between herself and the company.

84. In Netherlands law, commoration of the wills arises out of offer and acceptance (aanbod en aanvaarding, s. 6: 217-225). An offer is an invitation to enter into a contract and this invitation must be sufficiently precise, so as to enable the creation of a contract by accepting the offer. The invitatio ad offerendum has to be distinguished from a 'public' offer. A party engaged in a 'public calling' is not per se in an intermediate position between that of an ordinary contractual offerer and that of an option-giver (see s. 6: 217-225 which lays down specific rules for offer and acceptance, including counter-offers, termination of the offer and the possibility to revoke the offer before acceptance). The validity, nullity or voidability of an offer is similar to the rules for multilateral rechtshandelingen (juralical acts) (s. 6: 218); and an offer has to reach the other party in order to be effective and they are usually revocable or can lapse after a stipulated or reasonable time. Commoration of the wills exists when the acceptance reaches the offeree. The contract is deemed to be concluded in the place where the acceptance reaches the offeree. Contracts for the sale of immovable property pose special problems when the commoration of the wills of the parties differs from the contract itself. Between the parties, the principle of reliance will be applied, whereas third parties acting in good faith on the contents of the - registered - contract have also to be protected. The interpretation of the mutual statements in the contracting phase is subject to the rules of reasonableness and fairness, and there are reciprocal obligations on the parties to make sure the other party is aware of all aspects of the offer and acceptance. If a contract for the sale of immovable property is based on an explicit offer made by the seller, it is

15 Carter v Catholic Smoke Ball Co [1893] 1 QB 256.
16 Asser-Hartkamp II, p.121.
17 See on the question whether an ordinary offer quo facto creates a legal relation e.g., WN Hoffeld, Fundamental Legal Conceptions (Westport, Conn., 1978 repr.), p.35-38 and Asser-Hartkamp, i.e.
18 Havilter, NJ 1981, nr. 635.
the seller who is obliged to clarify the contents of his offer to interested parties. In principle, the buyer is not under a duty to examine the offer in full. Generally speaking, an offer can be revoked; but this rule does not apply if the offer contains a stipulated time for acceptance or whenever the irrevocability is in the nature of the offer (s. 6: 219). An offer can only be revoked so long as it has not been accepted or the acceptance has not been mailed. Furthermore, a 'public' offer (vrijblijvend, an offer containing the message that it is 'open') can be revoked immediately after it has been accepted. An acceptance that is not in conformity with the offer is regarded as a new offer and the original offer is therewith rejected (s. 6: 225); an oral offer expires if not accepted immediately and written offers expire if unaccepted within a reasonable period of time (s. 6: 221).

85. Counter-Offers
In English law when one moves from consumer to commercial law the problem of identifying contractual offers usually takes a different contextual form: the problem usually becomes one of distinguishing between offers and counter-offers. This is because businesses tend to use standard forms of offers and acceptances. Here the law is simple enough - a counter-offer destroys the original offer and so the original offer cannot thereafter be accepted - but the facts can be complex because standard form offers and acceptances can often contain conflicting clauses when compared in detail. In these situations the courts are faced with a dilemma as to whether to take an obligational (logical) or a commercial (flexible) approach (cf. Ch. 5 § 7). The tendency these days is to take the commercial law approach, if only because the parties have usually acted upon the basis that there was a contract; and this means that the doctrine of counter-offer is often less a method of establishing consensus ad idem (cf. nr. 88) and more a tool of contractual interpretation (cf. Ch. 6 § 5). Indeed, were it otherwise, 'there would be many important mercantile contracts which would, no doubt to the consternation of the parties, be nullities'.

86. Termination of Offer
A counter-offer is, of course, not the only way an offer can be terminated. Besides lapse (after a stipulated or reasonable time), an offer may be revoked by the offeror at any time before acceptance, the only requirement being that the revocation be communicated, from any source, to the offeree. Indeed because of the requirement at common law that all enforceable promises be supported by consideration (cf. Ch. 7 § 3), an offeror can in principle revoke at any time even when he has promised to keep an offer open for a stipulated period and this could be problematical. However in practice a court will not

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19 Vis v Bruch, NJ 1991, nr. 166.
22 Dickinson v Dodds (1876) 2 Ch D 463.
allow an offeror to revoke until the offeree, once he has embarked upon
performance, has had a reasonable chance to complete; and it may be that
equity, via for example estoppel (cf. nr. 44), would not allow a contractor to
abuse his common law rights in such circumstances (cf. Ch. 13 § 7). Moreover
an offeror who has allowed another to expend money or work upon the
offeror’s property might be liable in the law of restitution if not in contract.

87. Acceptance
In unilateral contracts, as we have seen, it is the performance or conduct
which amounts to the acceptance of the offer and there is often no need to
communicate actual acceptance because the offeror is deemed to have
dispensed with the requirement. In bilateral contracts an offer must be
specifically accepted by the offeree, but there are several exceptions to this
rule - one being that conduct might, on occasions, amount to acceptance.

A more curious exception to the communication of acceptance rule is
where a contract is concluded by post. Provided that it is reasonable to use
the post as a means of acceptance, the rule formulated last century is that an
offer is accepted at the moment the letter of acceptance is posted. Whether
this rule has much of a future is now in some doubt, but modern means of
communication can still present problems with regard to the receipt of an
acceptance. If for example a telex message of acceptance fails to be recorded
then there will be no contract unless the offeree can show that the offeror was
at fault in some way; and, if fault can be shown, the reason why the
acceptance will be effective is that the offeror will be estopped (cf. nr. 44)
from denying the existence of a contract. 'No universal rule can cover all
such cases', said Lord Wilberforce, 'they must be resolved by reference to the
intentions of the parties, by sound business practice and in some cases by a
judgment where the risks should lie.'

88. Consensus ad Idem
The idea that a person may be estopped from denying the existence of a
contract indicates, again, how English law is closely attached to remedies and
to objective promises. Nevertheless there has to be some element of
subjectivity before an exchange of promises can constitute a binding contract.
Accordingly, if two promises happen by chance to cross in the post as

23 Daulia Ltd v Four Millbank Nominees [1978] Ch 231.
24 British Steel Corporation v Cleveland Bridge and Engineering Co Ltd [1984] 1
   All ER 504.
25 Carrill v Carbolic Smoke Ball Co [1893] 1 QB 256.
26 Bemelen v Metropolitan Ry (1877) 2 App Cas 666. In Netherlands law, offer
   and acceptance are specifically required. See on the rule that an offer is
   accepted at the moment the declaration reaches the addressee s. 3: 37, with
   specification in s. 6: 224.
28 Enrones Ltd v Miles Far East Corporation [1955] 2 QB 327, 333.
29 Brinkbon Ltd v Stahag Stahl [1983] 2 AC 34, 42.

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cross-offers this will not constitute a contract despite the fact that there is objective accord; equally there will not be a contract if the offeree has not outwardly exhibited his intention to be bound. Silence cannot amount to acceptance. Indeed the offeror who tries to impose chattels upon a silent offeree may find himself the unwilling distributor of free gifts.

What has to be shown is that there is objective evidence of an apparently subjective consensus ad idem. If the offeree objectively appears to have knowledge of, and be accepting, the offeror’s promise then the promise will be binding. But if specific evidence is introduced to show that the motivation of the ‘accepting’ act has no causal connection whatsoever with the offeror’s promise then the result might be different. It seems that the offeree must go to the length of showing that he knew of the offer and that he acted in reliance on it. What if there is consensus ad idem but no offer and acceptance? In principle there can be no contract because one looks to the facts to see if they constitute a contract and not to the subjective intention of one or both parties. Yet on rare occasions the courts have been prepared to view the relations between persons engaged in a common venture as contractual; these exceptional cases thus tend to involve problems arising from groups and, as such, the starting point is not the individual promise at the basis of the dispute itself but the more general promise to become part of a corporation, societas or association.

The question whether there is a general principle of English law that injurious reliance on what another person has done can be a source of legal rights against him is potentially of great importance for the development of English law and so it may be valuable to recall the main conceptual distinctions to be found in Continental Legal Systems. They are the basic distinction between contract and tort, the freedom of parties to enter into a contract and the strict boundary between being bound and not being bound to a contract. The fundamental difference between contract and tort is on the one hand the voluntary act by which one person binds itself to another by entering into a contract and, on the other hand, the creation of a bond (legal relation) between persons only because the law so stipulates (tort). However, the rigid distinction between contract and tort is vanishing in Netherland, if not in English law. Some Netherland scholars have argued that the law

30 The Leonidas D [1985] 2 All ER 796, 805.
33 Ibid., pp.915-916.
34 Taylor v Atten [1966] 1 QB 304.
35 Gibson v Manchester City Council [1979] 1 WLR 294.
36 Clarke v Dunraven [1897] AC 59.
38 Van Erp, p.319-320.
39 Van Erp, Ic, Nieskens-Iphording, p.159-160.
recognizes that, in a given case, duties can arise from any legal relationship; thus expectations, reliance, the intention to create legal relations, norms of proper legal behaviour and legal policies can model legal relations. In the absence of agreement or consideration, or any of the requirements for a valid contract, or in the presence of a breach of form, obligations and remedies based on reliance are, in the end, always reducible to the desire to prevent injustice; when judges break through the barriers of the traditional law of obligations, this generally happens only in favour of people who have undertaken action in response to the actions of others. It should be evident that English law often achieves the same results via the law of actions (remedies). In Netherlands law, the principles of reliance and the protection of third parties acting on the (reasonable) assumption of the existence of a certain conduct or declaration in relation to a legal relationship are statutorily regulated in s. 3: 35 and 36 (cf. nr. 81).

89. Certainty
Even if there is both offer and acceptance and consensus ad idem a transactional relationship can still fail contractually because the promises themselves remain too vague or because the factual basis of the alleged contract is too abstract. A 'contract to contract', for example, will not be an enforceable contract because it is too uncertain to have any binding force; and in such a situation there is a general principle that where there is a fundamental matter left undecided and to be the subject of negotiation there is no contract.

However, merely because an agreement to negotiate is not a contract, it does not always follow that there is no contract when an agreement contains a provision that some important matter, such as the price, is left to be agreed. In fact it is a matter of general principle in English law - in contrast to Roman and French law - that a sale of goods contract can exist without a price having been agreed. Much will depend upon the circumstances of the case. Thus in some situations a failure to agree upon a price can be fatal, while in other situations - particularly where the principle certum est quod certum reddi (what can be rendered certain is certain) is applicable or where the parties have actually conveyed property - the contract can be binding. No doubt the distinction between civil and commercial relationships (cf. Ch. 5 § 7) will, once again, be of relevance to the court's interpretation of the facts.

40 Note that this doctrine is contested, cf. nr. 44.
42 Sale of Goods Act 1979 s. 8. The same applies to a contract for the supply of a service: Supply of Goods and Services Act 1982 s.15; idem for Netherlands law: s. 74.
44 See e.g. Hillas & Co v Arcos Ltd (1952) 147 LT 303.
§ 3 CONSIDERATION

90. **Promise and Bargain**
The dichotomy between civil and commercial law might be said to be at the philosophical root of the second major requirement of English contract law; only those promises that have been bargained for will be enforceable under the general principle of contract. Consequently, with the exception of a promise made under a formal covenant (a hangover from the ancient writ of covenant\(^45\)), a mere gratuitous promise cannot amount to a contractual obligation because *il n'y a pas en droit anglais de contrats désintéressés*\(^46\). However what amounts to a 'gratuitous' promise, particularly within a commercial relationship, is by no means an easy question.

91. **Definition of Consideration**
The notion of bargain is translated into contract law via the essential requirement of consideration. For the Continental lawyer this notion of consideration is difficult because the basis of contract in the Codes is *pacta sunt servanda* and this imports into the law of obligations a moral dimension\(^47\). English contract law, on the other hand, is, as David and Puguley point out, *un droit économique, non une morale transplantée sur le terrain du droit*\(^48\). Both parties must accordingly have an economic interest in the contract and although this interest is a requirement which goes to the formation, rather than to the actual performance of the contract, the notion of consideration sometimes finds itself being used to assess whether there has been performance\(^49\). This is unfortunate because the actual definition of consideration is 'the price for which the promise of the other is bought'; and it may consist of an act, a forbearance or a promise made or given by the promisee\(^50\). In a typical bilateral contract such as sale, the consideration consists of the exchange of promises, not the actual conveyances; in a typical unilateral contract the consideration is the act performed or the forbearance made.

However the mere exchange of consideration is not itself enough: there must be a sufficient connection between the consideration moving from each of the parties. If, therefore, one person does a gratuitous act or service for another and the latter subsequently promises a reward or payment for this

\(^{45}\) *Law of Property (Miscellaneous Provisions) Act 1989* s.1. In making such formal and 'gratuitous' promises so much easier to execute, this statute could have an interesting future.

\(^{46}\) David & Puguley, para.158.

\(^{47}\) Harris & Tallon, p.386. See generally Zimmermann, pp.537-579. The concept of consideration is foreign to Netherlands law - but see the somewhat similar requirement of *causa*, now abandoned and substituted by other institutions, cf. EH Hondius in: Contract Law and Practice (o.c.), p.68.

\(^{48}\) Para.130.

\(^{49}\) See e.g., Rowland v Divall [1923] 2 KB 590.

\(^{50}\) Dunlop v Selfridge [1915] AC 847, 855.
service the promise will not be supported by consideration because the original act or service was not connected with the subsequent promise to pay. The consideration is said to be past consideration. In order for the promise to be enforceable by the promisee in such circumstances the original act would have had to be performed as a result of a prior request by the promisor and in the expectation by the promisee of some reward.

Consideration is associated with the very definition of contract. The civil law systems have, nevertheless, been able to develop an adequate law of contract without consideration and when discussing harmonisation of civil law, the abolition of the doctrine of consideration seems a possible option. This would imply, however, the need for legislation both to validate all contracts where there is genuine agreement and to provide for various types of essential unilateral promises, in order to avoid uncertainty in the law and this would, in theory, involve a major reform of the English law of contract. In this respect, the development of the equitable doctrine of promissory (quasi) estoppel protecting promisees who have been led to act differently from what they would otherwise have done (change of position) seems promising.

92. The doctrine of consideration has been compared to the causa requirement in the Codified systems, although causa is covered by a variety of topics and is by no means comparable to consideration as a concept in itself. In fact the Netherlands legislator has abandoned the requirement of causa and s. 6: 227 of the Netherlands Civil Code requires only that the obligations which the parties undertake are ascertainable. The role of causa in the law of obligations is undertaken by other institutions such as mistake (s. 6: 228), undue influence in specific circumstances (s. 3: 44) and non-performance (s. 6: 74).

For delivery pursuant to the transfer of a good (cf. nr. 56) a valid title is required (s. 3: 84-1), but in the law of contract a doctrine of a separate rechtgrond is not essential. The concept of causa in the old Civil Code (s.

54 Nieskens-Isphording, p.110-112; and see Lipkin Gorman v Karpnale Ltd [1991] 3 WLR 10 (HL).
56 Nieskens-Isphording, p.112.
1356) must be distinguished from the question whether a rechtshandeling (an juridical act, an act with intended legal effect creating a legal relation) requires a cause in the sense of rechtsgroo". A rechtsgroo" is a valid title but reflects also the requirements for betaling in order to avoid the condicio (solutio) indebiti (s. 6: 203)\(^\text{58}\). Whether a binding contract emanates from an agreement depends on what the parties expected, or might have expected reciprocally, in the context of prevailing opinions in society\(^\text{59}\).

93. Sufficiency of Consideration

The problem of past consideration in English law is really an aspect of a more general question: what amounts to sufficient consideration in English contract law? The general rule here is that consideration must be 'sufficient' - that is to say, real - but it need not be 'adequate'. It will be sufficient only if it is of some real value in an objective sense and so a promise in return for 'love and affection' would probably not be an enforceable contractual promise. Yet once there is sufficient consideration the fact that it is out of all economic proportion to the other party's consideration is irrelevant; one can promise to convey a valuable painting in return for a nominal sum of money, or indeed three sweet wrappers, and this, in principle, would be a binding contract\(^\text{60}\). It may be, however, that inadequate consideration would be evidence of an unconscionable bargain and thus subject to the attention of equity (cf. Ch. 8 § 9). Alternatively a low price in a sale of goods contract may affect the expectation interest of the purchaser in certain consumer and commercial contracts\(^\text{61}\).

One particular problem that can arise in the area of sufficiency of consideration concerns a promise in return for some performance which the

\(^{57}\) See Meijers, o.c. on the causa-requirement in Roman-Dutch law: Dat De Groot niet van een redelijke overeenkomst, maar van een redelijke oorzaak spreekt, komt omdat hij dit vereiste vermeldt bij de huishandeling, de toezegging, die zich tot de overeenkomst als gevolg tot oorzaak verhoudt (p.310).


\(^{59}\) See Snijders, o.c., p.63 and ibid. fn. 11, stressing the fact that s. 3: 33 and 35 should be interpreted in combination with each other and defending the approach chosen in the Netherlands law of obligations, in comparison with French and German law. And see K. Larenz, Allgemeiner Teil des deutschen Bürgerliches Rechts (München, 1988), p.328: Nicht nur dingliche Rechtsgeschäfte, sondern auch andere Verfügungen, wie z.B. die Abtretung einer Forderung, sind in der Regel 'abstrakt', d.h. sie gelten unabhängig von der Geltung des Grundgeschäfts, auf das sie sinnehaft bezogen sind. Dagegen sind verpflichtende Verträge in der Regel 'sakral'. Das soll besagen, daß sie eine 'causa', einen rechtlichen Zweck der Verpflichtung, der zugleich den damit verfolgten wirtschaftlichen Zweck erkennen läßt, in sich schließen. Sie sind daher aus sich allein heraus verständlich, bedürfen nicht, um wirtschaftlich verständlich zu sein, eines außerhalb ihrer selbst, in einem anderen Geschäft oder Rechtsverhältnis gelegenen Zweckgrundes.

\(^{60}\) Chappell & Co v Nestle Ltd [1960] AC 87.

promisee is already under an existing public or private duty to perform. Here there are two possible approaches: a legal approach which focusses strictly on the actual existence or non-existence of a duty in law; or an empirical approach which investigates whether the promisor actually received a benefit in practice. The tendency of the courts in recent years has been to favour the latter approach for reasons both of 'commercial reality' (cf. nr. 95) and of developments in the area of economic duress (cf. Ch. 8 § 9). English contract law still insists on consideration, but 'the courts nowadays should be more ready to find its existence so as to reflect the intention of the parties to the contract where the bargaining powers are not unequal and where the finding of consideration reflects the true intention of the parties'\(^\text{62}\).

94. Third Parties
The existence of sufficient consideration, even if adequate, will be of no use if it does not move from the promisee. This rule is often said to be at the base of the principle of privity of contract (cf. Ch. 9 § 7) whereby only those persons who are parties to the contract can sue or be sued on it; but the privity principle itself has been extended beyond its original scope, as a result of the consideration rule, to prohibit any third party from taking the benefit of a clause in a contract between two others. Thus where a third party is sued in the tort of negligence (cf. Ch. 12 § 4) for damage carelessly caused to property forming the subject matter of a contract between two others, the third party cannot, in principle, claim the protection of any exclusion clause in the contract even if the clause specifically purports to cover the third party\(^\text{63}\).

95. Commercial Reality
However the English courts are recognising that multi-party commercial transactions must be treated with a certain flexibility. Admittedly the problems of the privity and consideration rules could, anyway, often be avoided by recourse to other remedial or substantive doctrines such as bailement (cf. Ch. 5 § 6)\(^\text{64}\), estoppel (cf. nr. 44) or even, perhaps, the defence of consent in tort (volenti non fit injuria). And so hardships created in the commercial world by English contract law ought not to be exaggerated. Yet the main difficulty with regard to consideration is that it has always attached itself to the promise rather than to the bargain as a whole and this atomistic approach to the analysis of transactions can cause particular problems in international trade and commerce agreements; for there is always the danger that one particular promise may turn out, in isolation, to be devoid of consideration.

The courts, in recognising this difficulty, have recently suggested that it may be unreal to describe one set of promises as a \textit{modum pactum} in a complex commercial transaction. And so what they have done is to have

\(^{62}\) Russell LJ in \textit{Williams v Roffey Brothers} [1990] 2 WLR 1153, 1168.

\(^{63}\) \textit{Scruttons Ltd v Midland Silicones Ltd} [1962] AC 446.

\(^{64}\) But cf. \textit{Morris v C W Martin & Sons Ltd} [1966] 1 QB 716.
recourse to the distinction between civil and commercial relationships (cf. Ch. 5 § 7) to make the point that ‘commercial reality’ may dictate that ‘a practical approach’ be injected into the law of contract when it comes to contracts ‘of a commercial character’\textsuperscript{65}. They have, in other words, taken a more universalist view of the notion of bargain in certain kinds of commercial dealings. All the same, the consideration rule has not been abandoned: an atomistic approach to promises can still be useful, for example, in preventing unjust enrichment in situations where a promise has been extracted under economic duress\textsuperscript{66}.

96. Public Policy
In fact the cases where the rules of consideration have been applied to deprive a promise of its legal force may well, on closer examination, be ‘cases in which public policy has been held to invalidate the consideration’\textsuperscript{67}. This suggests that the problem of consideration must be looked at not just in the context of the dichotomy between commercial and non-commercial relationships, although public policy can of course be of relevance to ‘commercial reality’; it must be looked at in the context of the distinction between public and private law (cf. Ch. 5 § 8) as well. Consideration is a useful device for defining the boundaries between public and private obligations, particularly where a public organ such as the police finds itself performing services for the private sector\textsuperscript{68}. And in understanding how the common law approaches questions of sufficiency of consideration it is as important to look at the nature of any pre-existing legal or factual relationships as it is to look at the economic value of the alleged consideration itself.

97. Estoppel and Abuse of Contractual Rights
The fact that a gratuitous promise is unenforceable in the law of contract does not mean that such a promise is without legal effect. If a promisee relies to his detriment upon a promise it may be that equity, through its doctrine of estoppel (cf. nr. 44), will prevent the promisor from going back upon his statement\textsuperscript{69}. For example, a promise made by a creditor to a debtor to accept a lesser sum than the legal debt is not, in principle, binding at common law because of a lack of consideration\textsuperscript{70}; yet a creditor who makes such a promise, provided the debtor relies and acts upon it, might be estopped in equity from going back upon his statement\textsuperscript{71}. In other words, equity may prevent a creditor in a contractual relationship from abusing his right at common law (cf. Ch. 13 § 7) where it would be ‘unconscionable in all the

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\textsuperscript{65} The Euromedon [1975] AC 154, 167 per Lord Wilberforce.
\textsuperscript{66} D & C Builders v Rees [1966] 2 QB 617.
\textsuperscript{68} See e.g., Glasbrook Bros. Ltd v Glamorgan CC [1925] AC 270.
\textsuperscript{69} Crab v Arun DC [1976] Ch 179.
\textsuperscript{70} Foakes v Bee (1884) 9 App Cas 605.
\textsuperscript{71} Central London Property Trust Ltd v High Trees House Ltd [1947] 1 KB 130.
circumstances' for him to do so\textsuperscript{72}. Whether the doctrine of estoppel will be available to enforce a promise to pay a larger debt than the one originally agreed is open to question since estoppel is supposed to operate as a shield rather than a sword (cf. nr. 44). However it has recently been suggested \textit{obiter} that the defence of estoppel might be available to preclude a contractor from denying that his promise to pay is not legally binding\textsuperscript{73}.

98. \textbf{Pre-contractual Liability}

Remedies like estoppel can also be used to solve problems of pre-contractual liability. The offeror who carelessly fails to maintain his telex machine might find himself estopped from denying a contractual relationship with an acceptor whose acceptance was not actually received by the offeror because of the defective telex machine (cf. nr. 87). And this in effect means that the offeror might be liable in damages for \textit{culpa in contrahendo}\textsuperscript{74}. Another way of achieving liability in respect of bad faith or negligence in the conduct of pre-contractual negotiations is via the concept of a collateral contract (\textit{pactum de contrahendo}): in this situation a statement is regarded as a contractual promise by treating the entering into the main contract as consideration for the enforceability of the collateral statement\textsuperscript{75}. This notion of the collateral contract - \textit{pactum de contrahendo} - is particularly useful in turning pre-contractual expectations into actual contractual obligations; however the court will probably only be prepared to do this in rare cases where both parties had a clear commercial interest in the proper conduct of pre-contractual negotiations and where one party had acted in bad faith, amounting to abuse of power or of their (pre-contractual) rights, leading to wasted expenditure on the part of the other party\textsuperscript{76}.

If the party acting in bad faith is a public rather than a private body then the rules of administrative law may also come into play. Thus a local authority does not have the right at public law to exercise private law rights in an unreasonable way\textsuperscript{77}. This public law liability for abuse of rights raises a question about the duties of private bodies: is there a duty to negotiate in good faith? In general there is no such duty\textsuperscript{78} - and even where there might be a specific duty of good faith it does not automatically follow that breach of this duty will in itself give rise to a claim in damages. Accordingly a duty to disclose which attaches to contracts of insurance gives rise only to the

\textsuperscript{72} \textit{Amalgamated Inv. & Property Co v Texas Commerce Int. Bank} [1981] 1 All ER 923, 937.
\textsuperscript{73} \textit{Williams v Roffey Brothers} [1990] 2 WLR 1153, 1167.
\textsuperscript{74} Atiyah, Harris & Tallon, pp.29-30.
\textsuperscript{75} See e.g., \textit{Carlill v Carbolic Smoke Ball Co} [1893] 1 QB 256.
\textsuperscript{77} \textit{Wheeler v Leicester CC} [1985] AC 1054; \textit{R v Lewisham LBC, Ex p Shell UK} [1988] 1 All ER 938; \textit{Local Government Act 1988} s.17.
\textsuperscript{78} \textit{Smith v Hughes} (1871) LR 6 QB 597.
equitable remedy of rescission. If a party wishes to obtain damages then it would have to be shown that the silence amounted to a negligent misstatement giving rise to a liability in tort (cf. Ch. 12 § 8) or in contract. Of course once a fiduciary relationship (cf. Ch. 4 § 4) is established between the negotiating parties it might well be possible for one of the parties to bring an action for account when there has been a breach of this duty (cf. nr. 45); and it must not be forgotten that the common law might allow a non-contractual restitution claim in a situation where one party has expended money at another’s request. In short pre-contractual liability can be a matter for the law of contract, tort, unjust enrichment, equity and/or administrative law depending on the circumstances of each case.

99. Pre-contractual negotiations may have far-reaching consequences in Netherlands law. Not only can contracts come into existence without offer and acceptance, but pre-contractual negotiations may also influence the legal relationship of the parties once a contract exists. In the famous case Baris v Riezenkamp, the Hoge Raad held that parties, when negotiating about a contract, enter into a special legal relationship governed by the rules of reasonableness and fairness; these rules stipulate that the parties have to allow for their conduct to be assessed by the justified interests of the other party. The rules of reasonableness and fairness can also bring about that a party is not free to end the negotiations; a party can, therefore, given the circumstances, be obliged to continue the negotiations (by order of the court) and if a party stops the negotiations at a certain advanced stage, an obligation to compensate the damage of the other party may exist. Costs, other damages, even loss of profits have to be compensated, given the circumstances, providing it is plausible that a contract would have been agreed if the negotiations had continued. The source of the obligations arising

80 BSC v Cleveland Bridge & Engineering Co Ltd [1984] 1 All ER 504.
81 NJ 1958, 67.
83 But cf. English law: ‘The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations...’ per Lord Ackner in Walford v Miles [1992] 2 WLR 174, 181.
84 Plas v Vakburg, NJ 1983, nr. 723, VSH v Shell, NJ 1988, nr. 1017; and also Vogelaar v Skil, NJ 1991, nr.647.
from pre-contractual negotiations can be delict, *pactum de contrahendo* or, possibly, the (unwritten) rules of reasonableness and fairness.  

§ 4 INTENTION TO CREATE LEGAL RELATIONS

100. The distinctions between civil and commercial law and between *ius publicum* and *ius privatum* emerge once again in the third essential requirement for the validity of an English contract. The parties to a contract must intend the promise or promises to be legally binding. Accordingly if a clause is inserted into an agreement specifically stating that the promises are not intended to have legal effect, then the promises will in principle be unenforceable for a lack of an intention to create legal relations.

The civil and commercial distinction is of relevance to this essential condition because in many transactions the parties do not actually put their minds to the question of whether they are entering a legal relationship. The question of an intention to create legal relations has, accordingly, to be determined from the context out of which the promise arises. The traditional approach is that in social and family relations there is a *prima facie* presumption that no legal relations were intended, whereas if the transaction took place in the context of business relations the court will be very hesitant before allowing either party to claim that no legal transaction was intended. All the same if the commercial relationship is outweighed by other considerations things may be different - and one such consideration is a business relationship involving the public rather than the private bond. Thus the supply of energy (gas, electricity) is pursuant to a statutory and not a contractual duty; and industrial relations agreements are usually regarded at common law as being matters of public policy outside of the private law. One practical use, then, of the requirement of an intention to create legal relations is that it can be used to re-categorise problems out of private law and into the field of *ius publicum*, labour law or perhaps quasi-contract.

101. In conclusion one might say that the concepts of the formation of contracts in English law differ from the Continental legal systems, although offer and acceptance are somewhat similar in approach (although practical results might diverge). As far as the doctrine of consideration is concerned, a social, if not moral, dimension seems to be imported into the English law. 

85 Asser-Harkamp II, p.145, see e.g. EA Farnsworth, *Negotiation of contracts and Precontractual liability: General Report*, in: Conflits et harmonisation (Fribourg, 1990) and JGJ Rinkes *Verzwijging en precontractuele goede trouw bij verzekeringsovereenkomsten*, Bedrijfsjuridische berichten 1991, p. 84-89.

86 See e.g., *Albert v Motor Insurers’ Bureau* [1972] AC 301; *Blackpool Area Club v Blackpool BC* [1990] 1 WLR 1195.

87 *Esso Petroleum Ltd v Commissioners of Custom and Excise* [1976] 1 All ER 117, 120, 121.
of obligations because parties must accordingly have an economic interest in
the contract. In the Netherlands law of obligations, the answer to the
question whether a binding contract emanates from an agreement depends on
what the parties expected or might have expected reciprocally, in the context
of prevailing opinions in society. In the formative stage of a contract the
prevention of injustice or the desire to reduce an uneveness between the
parties dictate a detailed and factual approach, taking into account all
circumstances of the case. The autonomy of the parties in private law is
intertwined with the principie of reliance, and finds its limits in the
requirement of ascertainability and the prevailing morals in society. In
addition, the rules of reasonableness and fairness pervade the formation of the
contract in Netherlands law, while in English law the emphasis is still on
economic self-interest.

88 And there must be a sufficient connection between the consideration moving
from each of the parties, cf. nr. 80.
89 See B Wessels, Precontractuele problemen, in: LG Eijkman c.a., Onderhandelen
en schikken (Zwolle, 1990), p.83-117, and on contractual negotiations under
usual reserve (e.g. 'subject to board approval') HJ de Kluiver and CA
Schwarz, Onderhandelen onder voorbehoud, in het bijzonder met rechtspersonen,
in: ibid., p.54-82.
8 VITIATING FACTORS

§ 1 GENERAL REMARKS

101. The historical emphasis upon promise rather than consensual agreement and will (volonté) has resulted in the question of defective contracts being treated in a piecemeal fashion by English law. Both common law and equity have developed their own separate doctrines and remedies to deal with mistake, duress and fraud, and this piecemeal approach has given rise to distinctions which are unknown in some of the Continental systems. For example, in the area of mistake, an important distinction is made between non-contractual statements (representations) and contractual promises (terms); and this distinction in turn is related to the objectivity and sanctity of promises. Once an objective enforceable promise has been established the law often prefers to look, not at the institution of the contract itself in order to see if it is non-existent, but at the surrounding circumstances in order to see if relief can be granted. Accordingly the emphasis is more often (but not always) on voidability rather than voidness (cf. Ch. 8 § 2).

The underdeveloped notion of the law of persons in the common law is also of importance here because it has led to the topic of incapacity being treated as a vitiating factor and not as an essential requirement of a valid contract. Accordingly a contract with a minor or a drunkard is prima facie valid. Here again one can see that the focal point is not subjective agreement, but objective promise. English law starts from the assumption that promises supported by consideration are enforceable; one only looks into problems of consent and the capacity of a legal subject as something which may undermine the established contract.

102. In Netherlands law, wilsbreken - invalid or defective formation of the volonté - can bring about the annulment of a contract (or to be precise, of rechtshandelingen). The 'vices of consent' are classified as dwaling (mistake of fact, error, misrepresentation), bedrog (fraud), bedreiging (threat, duress) and misbruik van omstandigheden (undue influence, abuse of circumstances). A contract that is concluded under the influence of dwaling (s. 6: 228) can be annulled\(^1\). Fraud, threat (duress) and undue influence are regulated in s. 3:44.

\(^1\) See e.g. Van Geest v Nederhof, NJ 1991, nr.251. Haanappel & Mackaay have translated s. 6: 228 as follows: (1) a contract which has been entered into under the influence of error and which would not have been entered into had there been a correct assessment of the facts, can be annulled: (a) if the error is imputable to information given by the other party, unless the other party could assume that the contract would not have been entered into even without this
These three wilsgebreken (vices of consent, defects of the wills) are broadly applicable to all rechtshandelingen, whereas dwaling is basically incorporated in the law of contracts. A wilsgebrek exists if the volonté and the declaration thereof coincide, but the volonté has been formed in a defective way, making the rechtshandeling voidable (s. 3: 49-51) on the demand of the ‘victim’, and opening the way for a damages action based on onrechtmatige daad (unlawful act, delict, s. 6: 162). Bedreiging (daress) is the threat with any disadvantage, physical or psychological (blackmail, for example), lawful or unlawful, and a causal link is necessary between the threat and the rechtshandeling that occurred under the influence thereof. The bedreiging (duress) has to be a threat to a reasonable person (s. 3: 44-2); bedrog (fraud) exists if a representee is induced by another to execute a certain rechtshandeling on the basis of deliberately inaccurate information, facts or any other artifice, and the representor knowingly misleads him. General recommendations - talking a person into doing something - even if they are untrue, are not fraudulent as such; and undue influence consists in taking advantage of special circumstances such as a state of necessity, dependence, abnormal mental condition or inexperience and is called misbruik van omstandigheden (abuse of circumstances). If a person induces another in these circumstances to execute a rechtshandeling whereas his knowledge (or what he should have known) ought to have led him to speak or behave differently, the rechtshandeling is voidable; but third parties acting upon the existence of a declaration that has been made under threat, fraud or abuse of circumstances are protected, provided they had no reason to assume the existence thereof (s. 3: 44-5). Dwaling (s. 6:228) leads to annulment of the contract if the

information; (b) if the other party, in view of what he knew or ought to know regarding the error, should have informed the party in error; (c) if the other party in entering into the contract has based himself on the same incorrect assumption as the party in error, unless the other party, even if there had been a correct assessment of the facts, would not have had to understand that the party in error would therefore be prevented from entering into the contract. (2) the annulment cannot be based on an error as to an exclusively future fact or an error for which, given the nature of the contract, common opinion or the circumstances of the case, the party in error should remain accountable.

In the translation of Haanappel & Mackaag (s. 3: 44): (1) a juridical act may be annulled when it has been entered into as a result of threat, fraud or abuse of circumstances. (2) a person who induces another to execute a certain juridical act by unlawfully threatening him or a third party with harm to his person or property, makes a threat. The threat must be such that a reasonable person would be influenced by it. (3) a person who induces another to execute a certain juridical act by intentionally providing him with inaccurate information, by intentionally concealing any fact he was obliged to communicate, or by any other artifice, commits fraud. Representations in general terms, even if they are untrue, do not as such constitute fraud. (4) a person who knows or should know that another person is being induced to execute a juridical act as a result of special circumstances - such as a state of necessity, dependency, wantoness, abnormal mental condition or inexperience - and who promotes the creation of that juridical act, although what he knows or ought to know should prevent him therefrom, commits an abuse of circumstances. (5) if a declaration has been
contract is entered into under the influence of the error and would not have been entered into if there had been a correct assessment of the facts. The annulment cannot, however, be based on exclusively future facts or on a self-induced error given the prevailing opinions in social intercourse or the specific circumstances of the case. Annulment is possible if the error is imputable to information given by the other party, except when he could assume that the contract would have been entered into even without this information, or if one party should have informed the other party in error. If both parties are in error, annulment is possible, but this rule is overridden in specific situations (s. 6: 228-1 sub c). The consequences of annulment are dealt with in s. 3: 49-59.

Dwaling usually occurs in the context of incorrect information and the violation of the duty to inform the other party, in relation to the duty of the party in error to inquire. The conduct of the opposite party is a prevailing circumstance for the assessment of dwaling, although that s. 6: 228 does not imply that the other party can be reproached for the violation of the duty to inform. The problems that arise when both parties are in error are dealt with separately in s. 6: 228-1 sub c, and this rule is not explicitly connected to the duty to inform and inquire. Nevertheless the Hoge Raad has held that when dealing with wederzijds dwaling (‘mutual error’) the fact that one of the parties is a professional or an expert is of prevailing importance. If one of the parties is in a better position to assess any risks or possible disadvantages to the contract, the other party should be informed adequately thereof. This basic rule applies also in cases of wederzijds dwaling.

§ 2 VOID, VOIDABLE AND UNENFORCEABLE CONTRACTS

103. The piecemeal approach of the Common law to problems that the Continental jurist would see as defects of consent has resulted in some important conceptual distinctions. A contract may be defective in such a way

made as a result of threat or abuse of circumstances on the part of a person who is not a party to the juridical act, this defect cannot be invoked against a party to the juridical act who had no reason to assume its existence.


Formulated in the landmark case Bars v Rietiamp, NJ 1958, ur.67.

Van Rossum. o.c., p.135.
that, in truth, there was no contract at all (void); alternatively a contract may be valid but the defect gives one or other of the parties the right to rescind (voidable). However some contracts may be neither void nor voidable but, because of some defect of form or some principle of public policy, unenforceable in the courts. These unenforceable contracts are of a different class from either void or voidable contracts.

In fact the expression 'void contract', although often used by lawyers, is a contradiction in terms: there never was a contract in the eyes of the law. Such voidness may result either from the absence of some essential condition (cf. Ch. 7 § 1) or possibly from a rule of public policy and thus void contracts are questions for the common law - they are questions of substantive contract law. Contracts that are voidable for some defect are, on the other hand, mainly problems for equity; they tend to be questions located in the law of actions or remedies. This is because the common law could only offer monetary remedies and it was the Court of Chancery that supplied the more flexible methods of intervention (cf. nr. 42). This intervention at the remedial level in turn encouraged a more subtle approach towards both the formation of substantive equitable doctrines of intervention and the analysis of facts.

An unenforceable contract is, in theory, valid at law and it is only at the level of procedure that the law intervenes for want of form, proof or public policy. Accordingly an unenforceable contract can still have substantive legal effects and this means that there may well be situations where it is of importance to distinguish between a void and an unenforceable contract. For example, an unenforceable contract may be able to affect a conveyance of moveable property whereas a void contract cannot. It must be said, however, that the judges themselves have not always been that precise in the distinction between void, voidable and unenforceable contracts, particularly in the area of illegality (cf. Ch. 8 § 4).

104. The Netherlands Civil Code deals with the doctrine of nullities in a systematic way. Nullities and annulments are to be found in Book 3, Title 2 (rechtshandelingen), and the main distinction with regard to imperfect rechtshandelingen is that between nullity and annulment of legal acts. If the law denies any legal effect, the act is held to be van rechtswege nietig, null and void; the notion of vernietigbare rechtshandelingen is used when legal acts can be nullified and the volonté of a specific person determines whether the act

8 Where contracts are 'void' for public policy reasons it is often difficult to know whether they are really void or just unenforceable: Bennett v Bennett [1952] 1 KB 249, 260; Shell UK Lid v Luton Garages Ltd [1977] 1 All ER 481, 488-489.
10 Cundey v Dunlay (1878) 3 App Cas 459.
11 See J Hjima, Nichtigkeit en vernietigbaarheid van rechtshandelingen, (Deventer, 1988)
is enforceable or null and void\textsuperscript{12}. Nullity can be absolute or relative to specific persons. In general, nullification can be invoked both by an extrajudicial declaration or in court (s. 3: 49), within statutory prescribed time-limits (s. 3: 52); however bekrachtiging (regularization) of invalid legal acts is sometimes possible (s. 3: 58). Rechtshandelingen contrary to the ordre public or the prevailing morals of society are null and void (s. 3: 40). A rechtshandeling of a person who lacks legal capacity is voidable, as is a rechtshandeling of a person of unsound mind (s. 3: 32 and 34). A unilateral rechtshandeling not addressed to another person performed by anyone who lacks legal capacity is null and void; in other cases, the sanction is annulment. If a rechtshandeling contravenes coercive - ius cogens - legal rules, it is null, but the nature of these legal rules can stipulate that the sanction is annulment instead of nullity (s. 3: 40-2). Threat, fraud or abuse of circumstances can lead to the annulment of any rechtshandeling made under the influence thereof (s. 3: 44). Under the circumstances, rechtshandelingen that are detrimental to creditors are voidable (s. 3: 45 and 46). The Netherlands legislator does not prefer the sanction of nietigheid (nullity) to that of vernietiging (annulment) and so the grounds for nietigheid are limited in the Code. The consequences of nullity or annulment can be far-reaching; these consequences are, therefore, sometimes mitigated by special statutory provisions such as s. 3: 53, 3: 54 and 6: 229.

The consequences of annulment are regulated in s. 3: 53. Annulment has retroactive effect, back to the time the rechtshandeling was committed, but if the judge - on demand of the party concerned - is convinced that the effects of the act can only be undone with difficulty monetary compensation can be awarded. The consequences of nietigheid van rechtswege are comparable to those of annulment. In principle partial nullity does not affect the rest of the rechtshandeling (s. 3: 41); and conversie (conversion) of a null rechtshandeling is possible, given the circumstances (s. 3: 42)\textsuperscript{13}. Conversie is applied by the courts where appropriate, and is based on the rules of reasonableness and fairness\textsuperscript{14}.

\section*{§ 3 INCAPACITY}

105. Incapacity in the Common law of contract differs from problems of capacity in Continental law in two main ways. First it is not really part of any

\textsuperscript{12} Asser-Hartkamp II, p. 422.

\textsuperscript{13} Cf Hanaappel & Mackaay s. 3: 42: where the necessary implication of a null juridical act corresponds to such a degree to that of another juridical act, which is to be considered as valid, so as to imply that the latter juridical act would have been performed had the former been abandoned because of its invalidity, then the former shall be given the effect of the latter juridical act, unless this would be unreasonable to an interested person not party to the act.

\textsuperscript{14} Asser-Hartkamp II, p. 454.
general theory of the law of persons primarily because the Common law has not worked out any such theory (cf. Ch. 5 § 9). Legal personality, for example, is a somewhat restricted concept applied mainly to public or commercial organisations and, as such, the associated problems of contractual capacity belong more to public or to company law15. Secondly capacity is not an essential requirement for the validity of a contract and this means that a contract with a person of unsound mind will prima facie be valid and only voidable in equity if equitable fraud can be shown16.

The same is true for a contract with a minor - that is a person under the age of eighteen years - except that the contract is either fully valid (for example a contract for the sale of necessary goods17 or a beneficial contract of employment) or voidable or unenforceable as against the minor. And even if a contract is voidable or unenforceable against a minor, the law of restitution (cf. Ch. 11 § 4) has now been given a statutory role. A court may, if it is 'just and equitable' to do so, require a person who was a minor when the contract was made to transfer to the other contractor any 'property' acquired under the contract or any property representing it18.

§ 4 ILLEGALITY

106. The problem of whether certain contracts are void, voidable or enforceable (cf. Ch. 8 § 2) is to be found in a more acute form in contracts that are deemed illegal. Part of this difficulty may be due to the fact that English contract law, because it focuses upon promise rather than agreement (cf. Ch. 6 § 2), does not use any concept such as illegal cause; it can therefore be very difficult to find within a transaction tainted with illegality any firm focal point around which can be made a decision as to whether or not a remedy should be available. English law, instead, distinguishes between contracts illegal per se (for example a contract to murder), contracts illegal in motive (for example a contract to hire a vehicle for prostitution) and contracts illegal by statute (for example a contractor fails to have a proper licence as required by public law).

The general principle of English law is that if the illegality arises out of public morality or public policy - that is contracts illegal at common law - the contract will be unenforceable if not void: *ex turpi causa non oritur actio* (an immoral cause gives rise to no action)19. And if both parties are equally in the wrong the court will give no effect to the contract or allow any remedy

15 *See Companies Act 1985* s.35.
16 *Han v O'Connor* [1985] AC 1000 PC.
17 *Sale of Goods Act 1979* s.3. For the Netherlands law see nr. 81.
18 *Minor’s Contracts Act 1987* s.3.
19 *Euro-Diam Ltd v Bathurst* [1990] QB 1.

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whatsoever: *in pari delicto potior est conditio possidentis* (where both parties are equally in the wrong, the position of the possessor is stronger). However, if the parties are not *in pari delicto*, or the contract is illegal only because of the motive of one of the parties, the court might be prepared to entertain an action in tort, in restitution or via a collateral contract. But much depends upon the circumstances of the case and the degree of innocence with regard to the person seeking enforcement or some other remedy; and in this context the maxim *nemo auditur propter rem punitudinem alleges* (no one alleging his own wrong is to be heard) can be of relevance.

When a contract is illegal as a result of statute the position becomes even more complex because the courts make a distinction between illegal activities and illegal contracts; that is to say they will interpret the legislation to see if it was the intention of Parliament to make any contract arising out of the illegal activity also illegal. For example, it is in breach of statute to overload any lorry or ship, but the question as to whether any contract of carriage will be illegal and unenforceable will depend upon the aims of the statute in question, the degree of culpability of both parties and the public interest in making any such contracts illegal.

In the Netherlands case concerning 'Club 13' the question of illegality of a contract for the sale of a brothel (including 'goodwill') came before the Hoge Raad. It was argued before the court that the context of the rules reflecting the mores and fundamental assumptions of the community varied from country to country and from era to era and although the exploitation of a brothel was a criminal offence, the law was moving towards a more liberal approach penalizing only force, duress etc. in these situations. In German and Netherlands law especially, changes in the Penal Code will alleviate the provisions penalizing prostitution and the exploitation of brothels, and this generated decisions of the highest courts (Bundesgerichtshof and Hoge Raad) holding, as in 'Club 13', that contracts in this branch are not *de facto* illegal. This does not mean, however, that illegality need necessarily not exist in situations of duress, undue influence and other kinds of pressure. Moreover

20 *Taylor v Chester* (1869) LR 4 QB 309.
21 *Bowmakers Ltd v Barnett Instrumentis Ltd* (1945) KB 65.
22 *Kiri Coton Co Ltd v Dewani* (1960) AC 192.
23 *Strongman v Sincock* (1955) 2 QB 525.
24 See e.g. *Euro-Diam Ltd v Bathurst* (1990) QB 1; *Howard v Shriston Ltd* (1990) 1 WLR 1292.
25 See e.g., *Ashmore, Benson, Pease & Co Ltd v A. V. Dawson Ltd* (1973) 1 WLR 828.
26 *St John Shipping Corp. v Rank* (1957) 1 QB 267; *Archbolds (Freightage) Ltd v Spanglett Ltd* (1961) 1 QB 374.
27 *Ashmore, Benson, Pease & Co Ltd v A. V. Dawson Ltd* (1973) 1 WLR 828.
in France and, for instance Italy, contracts for *maisons de tolérance* remain illegal\textsuperscript{29}.

\section*{§ 5 CONTRACTS VOID BY PUBLIC POLICY}

108. There are certain classes of contract which, although not illegal as such, are said to be 'void' for reasons of public policy. The most important of these contracts are contracts in restraint of trade and these are usually dealt with in depth in competition law rather than in a general work on contract\textsuperscript{30}. But it is worth mentioning in a general survey of the law of obligations that the restraint of trade doctrine might now be available as a means for avoiding some oppressive standard form contracts where the bargaining power of the parties has not been equal\textsuperscript{31}. An unconscionable bargain between economically unequal parties may, in some circumstances, be against the public interest and void, 'void' here probably meaning unenforceable\textsuperscript{32}.

\section*{§ 6 MISREPRESENTATION}

109. \emph{Contractual and Pre-Contractual Promises}. Contract lawyers in a commercial and a consumer environment are often faced with the problem of having to analyse contractual liability within a mass of negotiating statements motivated by the legitimate self-interest of the parties. Many of these statements can be ignored by the law as being non-specific advertising 'puffs'; other, more specific statements, may not end up as part of any formal contract. Nevertheless statements made before contract can affect the beliefs and assumptions - the will (volonté) - of one or both parties.

English law, in analysing all negotiations leading to the completion of a contract, focusses on the statements themselves more than on the actual contractual intention of the parties. Promises made to induce a contractual bargain (representations) are distinguished from promises (terms or warranties) that go to make up the bargain itself\textsuperscript{33}. However representations made to induce a contract, although conceptually separate from the contract

\textsuperscript{29} See for a summary of the rules regarding illegality and the various developments in respect to 'morality' the conclusion by A-G Hartkamp in \textit{Sibelo v Lamei} Le.


\textsuperscript{31} \textit{Schroeder Music Publishing Co Ltd v Macaulay} [1974] 1 WLR 1308.

\textsuperscript{32} \textit{Bennett v Bennett} [1952] 1 KB 249, 260; \textit{Shell UK Ltd v Lostock Garages Ltd} [1977] 1 All ER 481, 488-489.

\textsuperscript{33} \textit{Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd} [1965] 1 WLR 623.
itself, are not without legal consequence if untrue (misrepresentations), provided that the representee has relied and acted upon them. In equity a misrepresentation may give rise to the remedy of rescission\textsuperscript{34} (cf. \textit{nr. 42}) - although if the representee delays, or third parties gain property rights in the subject matter, the remedy may be refused\textsuperscript{35}. And at common law, if a representer cannot prove that the representation was made without negligence, a misrepresentation can form the basis of an action in tort\textsuperscript{36}. Before 1967 such a damages action could be founded only in the tort of deceit, where fraud had to be proved\textsuperscript{37}, or, after 1964, in the tort of negligence where carelessness had to be shown\textsuperscript{38} (cf. \textit{Ch. 12 \S 8}); the new statutory action continues to use the tort of deceit, but with the requirement of fraud removed and replaced by a presumption of negligence\textsuperscript{39}.

110. \textit{Types of Misrepresentation}
As a result of these differing remedies for pre-contractual statements it has traditionally been necessary to distinguish between three kinds of misrepresentation. The first is fraudulent where the untrue statement was deliberately or recklessly made; the second is negligent where the untrue statement was made without due care; and the third is innocent misrepresentation where the untrue statement was made in good faith and on reasonable grounds. In principle innocent misrepresentation is incapable of giving rise to an action for damages at common law unless the representation can be deemed a collateral contract\textsuperscript{40} (cf. \textit{nr. 112}); but equity now has the statutory power to award damages in lieu of rescission for misrepresentation\textsuperscript{41} and so it may be that damages are now, in practice, generally available for all types of misrepresentation.

111. \textit{Definition of Misrepresentation}
It has already been suggested that not all statements made to induce a contract can be treated as statements having legal effects. A mere advertising puff does not, to put it another way, amount to a 'misrepresentation' in law. The statement must be of a particular kind in order to amount to a misrepresentation and the starting point is the definition of a misrepresentation itself. A misrepresentation\textsuperscript{42} is an untrue statement of existing fact which induces the representee to enter into a contract with the representer and to suffer loss in consequence. As a result of this definition

\textsuperscript{34} \textit{Redgrave v Hurdt} (1881) 20 Ch D 1.
\textsuperscript{35} \textit{Leaf v International Galeries} [1950] 2 KB 86.
\textsuperscript{36} \textit{Misrepresentation Act} 1967 s.2(1).
\textsuperscript{37} \textit{Derry v Peek} (1889) 14 App Cas 337.
\textsuperscript{39} \textit{Howard Marine & Dredging Co v Ogden & Son (Excavations) Ltd} [1978] QB 574.
\textsuperscript{40} \textit{Heilbut, Symons & Co v Buckleton} [1913] AC 30.
\textsuperscript{41} \textit{Misrepresentation Act} 1967 s. 2(2).
\textsuperscript{42} Cf. MM van Rossum, \textit{Da mijn bijzonder bij koop van onroerend goed} (Deventer, 1991), p.269-234.
neither a statement of opinion\textsuperscript{43} nor a statement of law\textsuperscript{44} can in theory amount to a misrepresentation, but in practice the court will look closely at 'opinions' to see if they do amount to statements of fact\textsuperscript{45}. The definition also excludes statements of future intention and silence. The former is excluded on the questionable ground that a promise to do something in the future cannot be said to have been true or false at the time when it was made\textsuperscript{46}; and the latter is subject to exceptions - indeed contracts of insurance, contracts \textit{uberrimae fidei}, actually impose a positive duty of disclosure\textsuperscript{47}, although this non-disclosure will not necessarily found a damages (as opposed to a rescission) action\textsuperscript{48}. Non-disclosure may however give rise to an action in restitution (cf. nr. 45) if a party to a fiduciary relationship (cf. nr. 46) gains an unjustified profit as a result of the silence\textsuperscript{49}.

112. \textit{Collateral Warranties}

The limited power of the courts to award damages for non-fraudulent misrepresentation before the expansion of the law of tort into the field of negligent misstatement (cf. Ch. 12 § 8) led the courts sometimes to take a more generous view of what amounted to a contractual promise. The courts were sometimes prepared either to incorporate a representation into the main contract as a term or to treat a misrepresentation as forming a separate contract collateral to the main one (cf. nr. 98). Whether or not a representation amounts to a collateral warranty or a collateral contract depends upon a number of factors, one being the status and expertise of the representor\textsuperscript{50}. Thus a representation by a car dealer (as opposed to a private vendor) about the condition or mileage of a car subsequently sold to the representee by the representor might well amount to a contractual term\textsuperscript{51}.

Once the court had incorporated a representation into a contract the right to rescind in equity for misrepresentation was lost on the ground that the statement was logically under the control of the substantive doctrine of contract itself. Thus rescission would become a matter of the status of the term broken (cf. nr. 131). This bar has now been removed\textsuperscript{52}, but this means that a party to a contract can rescind the contract for the breach of a relatively minor term if such a term started its life as a representation (cf. nr. 129). Of course whether the courts would actually treat the contract as

\textsuperscript{43} Bisset \textit{v} Wilkinson [1927] AC 177 (PC).
\textsuperscript{44} Eaglesfield \textit{v} Marquis of Londonderry (1876) 4 Ch D 693, 708.
\textsuperscript{45} Esso Petroleum \textit{v} Marson [1976] QB 801.
\textsuperscript{46} R \textit{v} Sunair Holidays Ltd [1973] 2 All ER 1233, 1236.
\textsuperscript{47} See e.g., Lambert \textit{v} Co-operative Insurance Society [1975] 2 Li Rep 485.
\textsuperscript{48} Banque Keyser Ullmann \textit{v} Skandia Insurance Ltd [1989] 3 WLR 25, 97.
\textsuperscript{49} English \textit{v} Dedham Vale Properties Ltd [1978] 1 WLR 93.
\textsuperscript{50} Esso Petroleum \textit{v} Marson [1976] QB 801.
\textsuperscript{51} Dick Bentley Productions Ltd \textit{v} Harold Smith (Motors) Ltd [1965] 1 WLR 623.
\textsuperscript{52} Misrepresentation Act 1967 s.1.
voidable in these circumstances is uncertain now that they have power to
award damages in lieu of rescission.\footnote{53}

The concept of a collateral contract (\textit{pactum de contrahendo}), besides
being useful in getting around the parol evidence rule (cf. Ch. 6 § 5), is also
a useful device for giving damages at common law for innocent
misrepresentations. It can turn an ‘expectation’ induced by a misrepresentation
into a legal ‘right’.\footnote{54} Furthermore the collateral contract has also shown itself
useful in three-party situations where the representation does not come from
the contractor (for example, a retailer) but from a third party (for example,
a manufacturer). Thus an advertisement by a manufacturer which makes
specific promises to the public at large could form not only the basis for an
action in debt\footnote{55} but one in damages if loss results from reliance upon the
statements.\footnote{56}

113. \textit{Concurrence}

With the expansion of the tort of negligence into the area of misstatement
these three party situations can become legally quite complex in that the rules
and remedies of contract, tort and equity (estoppel) often exist side-by-side.
In some factual situations the rule of non-concurrence used to operate,
particularly in the area of professional liability, and it may be that the rule is
beginning to reassert itself once again (cf. Ch. 6 § 6). Certainly in the field of
commercial law contractual duties are capable of excluding tort duties even
in three party situations.\footnote{57} However in the area of misrepresentation the idea
of non-concurrence can often be rather unrealistic as the established rights
and remedies straddle the boundaries of contract, tort and equity; a
misleading statement can, at one and the same time, lead to a number of
causes of action and a number of different remedies. Moreover the idea that
a breach of contract can, as against a third party, amount to a tort\footnote{58} and that
a tort can affect the doctrine of estoppel\footnote{59} is established in the case law. All
the same the courts still claim to be keen to uphold the boundaries between
the various causes of action\footnote{60} and this can effect the scope and application
of remedies particularly in the area of misrepresentation.\footnote{61}

\footnote{53} Section 2(2).
\footnote{54} \textit{Blackpool Aero Club v Blackpool BC} [1990] 1 WLR 1195.
\footnote{55} \textit{Carll v Carbolic Smoke Ball Co} [1893] 1 QB 256.
\footnote{56} \textit{Wells (Mertham) Ltd v Buckland Sand \\& Silica Ltd} [1965] 2 QB 170.
\footnote{57} See e.g., \textit{Pacific Associates Inc v Baxter} [1990] 1 QB 993.
\footnote{58} \textit{Ross v Caunters} [1980] Ch 297.
\footnote{59} \textit{D \& C Builders v Rees} [1966] 2 QB 617.
\footnote{60} \textit{China \\& South Sea Bank Ltd v Tan} [1990] 2 WLR 56,58.
\footnote{61} \textit{Banque Keyser Ullmann v Skandia Insurance Ltd} [1989] 3 WLR 25 (CA).
§ 7 MISTAKE

114. General Principle
Misrepresentation, although not actually part of the law of contract itself, nevertheless does much of the same kind of work that the doctrine of error does in the Continental legal systems. Thus an error induced by a misrepresentation coming from one of the parties will in principle make a common law contract voidable in equity even if the aggrieved party is guilty of contributory negligence. However the other side of the coin is that if there is an error but no misrepresentation then, bearing in mind that silence is prima facie no misrepresentation, the promises will be valid and enforceable; for there is no mechanism by which the subjective intentions of the parties can affect the objectivity of the promises. Consequently the general principle at common law is that a contract is neither void nor voidable simply as a result of the existence of an error.

115. Consensus and Error
In fact, as one might except, the position is not quite as simple in practice as the general principle suggests. A fundamental mistake with regard to the subject-matter of the contract (error in corpore), to the nature of the legal transaction (error in negotio) or to the identity of one of the contracting parties (error in persona) (cf. nr. 119) might result in the court holding that there never was consensus ad idem (cf. nr. 88); in other words the mistake will make a contract void because of the failure of an essential condition of validity (cf. Ch. 7 § 1). Thus, in a sale agreement, if one party had in mind one object and the other party had in mind quite a different object then the contract might well be void for lack of consensus.

116. Implied Condition Precedent
Alternatively a court might hold that the contract is void for the failure of an implied condition precedent upon which the whole contract is founded. Here the court is using a device well known to Civil lawyers, and so if two parties make a contract of sale or hire of a thing which, unknown to them, has perished the contract will be void on the basis that it was an implied condition precedent (cf. nr. 130) of the contract that the goods remained in existence or in substantially the same condition.

62 Redgrave v Hurd (1881) 20 Ch D 1.
63 Bell v Lever Brothers [1932] AC 161.
64 Zimmermann, p.619.
65 Raffel v Wucherhaus (1864) 159 ER 375.
However the courts are not overready to imply such terms into a contract. For example, if a buyer appears objectively to agree to the actual promises of the seller the fact that the buyer may be labouring under some mistake will not in itself be grounds for setting the contract aside. Indeed even if the seller was aware that the buyer was labouring under an error the seller is under no duty at common law to speak out, for there is no general doctrine of bona fides in English contract law. Furthermore the emphasis upon promise rather than agreement (cf. Ch. 6 § 2) means that it is theoretically possible to have consensus ad idem and a binding contract even if both parties are in error as to the actual existence of the subject matter. Consequently much will depend upon the nature of the promises themselves and the practices of commerce, the question often being as to whether or not the promise(s) contained an implication or guarantee as to the existence or generic quality of the subject matter.

117. *Contracts Voidable in Equity*  
If the general principle of the common law seems unduly strict, recent developments in equity suggest that English law is becoming more sensitive to situations where the abuse of a contractual right gives rise to an unjustified enrichment. If a contract is subject to a mistake and the mistake is of such a type that the enforcement of the bargain would in all conscience turn a justified means of enrichment into an unjustified one then equity might be prepared, in the last resort, to allow its remedy of rescission (cf. nr. 42) to be used to set the contract aside on terms stipulated by the court. Such rescission will, however, be available only where the mistake was fundamental and common to both parties; and it is highly unlikely that it will be available to set aside the 'good bargain' in that it is one of the principles of commercial law that one person should be allowed to take advantage of another's miscalculation or mistake with regard to the value of the subject-matter of the contract. Equity will not protect a person from his own imprudence, save in cases where this imprudence is outweighed by fraud on the part of the other party.

118. *Rectification and Refusal of Specific Performance*  
Equity can also provide relief for mistake by granting rectification of a written contract containing an error (cf. nr. 43). Here of course equity is simply following the common law in upholding what in truth was promised. Once again the court will have to strike a balance between the legitimate objectives of commerce and the dictates of conscience, and it will often look for some inequitable behaviour - for example, silence as to the error on the part of the

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69 Associated Japanese Bank, above, pp.268-269.  
70 Smith v Hughes (1871) LR 6 QB 597.  
71 McRae v Commonwealth Disposals Commission (1951) 84 CLR 377.  
72 Solie v Bucher [1950] 1 KB 671.  
73 Riverplae Properties Ltd v Paul [1975] Ch 133.  
person benefiting from the mistake - which can be used as a focal point for turning the good bargain into an unconscionable transaction\textsuperscript{76}. Alternatively, equity can prevent a person profiting from a mistake in a contract by refusing, as a matter of discretion, to grant specific performance of a contract containing an error (cf. nr. 41).

119. **Mistake of Identity**
The principle governing mistake of identity (\textit{error in persona}) has already been mentioned as being a problem of offer and acceptance (cf. nr. 115). Yet because many of the cases in this area have a common factual pattern and raise a particular property problem they need to be looked at on their own.

The common factual pattern takes the form of a three-party situation where the seller of a chattel is misled by a buyer's misrepresentation into believing that he is dealing with someone quite different from the person standing before him and as a result the seller hands over the goods either on credit or against a cheque which later turns out to be worthless. In such circumstances the contract is, of course, voidable for misrepresentation; but by the time the seller discovers the true situation the rogue buyer has usually sold the goods to a \textit{bona fide} purchaser\textsuperscript{77}. The mistake of identity cases thus involve, at the level of the remedy, an action in tort for reindication of property or its value and, at the level of substance, a claim by the original seller that the original contract of sale was void for mistake (thus preventing the passing of title).

What makes these cases so difficult in England is that the common law has no equivalent to the French principle that \textit{en fait de meubles, la possession vaut titre} (in the case of moveable property possession is equivalent to title)\textsuperscript{78}. Instead a number of principles of law oppose each other in an attempt to settle a dispute between two innocent parties. The first principle, from the law of property, is \textit{nemo dat quod non habet} (no one can give a better title than he himself has); the second principle, from the law of contract, is 'that if you propose to make a contract with A, then B cannot substitute himself for A without your consent and to your disadvantage'\textsuperscript{79}; and the third principle, from equity, is 'that whenever one of two persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it'\textsuperscript{80}. If the court wishes to give expression to the first

\textsuperscript{76} Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd [1981] 1 All ER 1077, 1086.

\textsuperscript{77} But see Car & Universal Finance Co v Caldwell [1965] 1 QB 525.

\textsuperscript{78} French CC art. 2279. What it has is \textit{Sale of Goods Act 1979} s.23: When the seller of goods has a voidable title to them, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title. Caldwell, above, shows the limits of this section.

\textsuperscript{79} Boulton v Jones (1857) 157 ER 232.

\textsuperscript{80} Lickbarrow v Mason (1787) 100 ER 35, 39.
two principles then the mistake of identity will make the contract void and thus incapable of effecting a conveyance; if the court wishes to give expression to the last principle then it will arrive at the conclusion that the mistake made the contract voidable, the seller being deemed to have made the contract with the actual person standing before him.

What principle a court may wish to give expression to in these mistake of identity cases in turn can depend upon a number of factors. The court may, for example, pay particular regard to the status of the parties on the ground that the business salesman is usually protected by insurance; and so not just insurance but the private and commercial law dichotomy (cf. Ch. 5 § 7) could be of relevance in this area of mistake in that it might help determine the route to be followed in allocating the risks and losses of commerce in a consumer society. One must add, of course, that once the car (or whatever) has passed through market ouvert statute will endow the buyer with a good title.

120. Mistake as to the Nature of the Contract
A similar property and principle problem can arise when a party misrepresents the nature of the contract or document to the other party. In this situation the contract will of course be voidable for misrepresentation, but when it comes to the question of whether it is void as a result of the representee's plea of non est factum meum the courts have reached something of a compromise. The contract will be void only if the representee signed, without any negligence on his or her part, a contract which was radically different from the document that the signer believed it to be. Particular emphasis, then, is put not just on the nature and contents of the contractual document, but upon the maxim quod quis ex culpa sua damnit fecit, non intelligitur damnus sentire (whoever is damaged as a result of his own fault is deemed not to suffer damage) in order to protect third party rights; however if the third party should have been put on guard then equity may intervene to set aside any charge or security transaction.

121. Conclusion
The general principle that promises are prima facie enforceable as a valid contract even if they have been arrived at on the basis of a mistake is subject to so many exceptions that the exceptions are now becoming the rule. This development may or may not be desirable in terms of contractual justice, but the piecemeal approach of English law to the problem of mistake has resulted

82 Lewis v Avey [1972] 1 QB 198.
84 Sale of Goods Act 1979, s.22(1); Bishopsgate Motor Finance Corporation Ltd v Transport Brakes Ltd [1949] 1 KB 322.
86 Avon Finance Co Ltd v Bridge [1985] 2 All ER 281.
in a confused legal situation. At the level of contractual rights there is no separate doctrine of mistake as such, only doctrines about formation and terms which may be applicable to factual situations involving mistakes. At the level of remedies, on the other hand, the Court of Chancery has taken a more subtle approach and might be prepared to allow one of its remedies to be used so as to prevent unjustified enrichment or abuse of a contractual right. Nevertheless in one of the more recent contract cases involving contractual mistake one judge thought that the contract was void at common law, another judge thought that it was voidable in equity, and the third judge thought that the contract was valid. The confusion between these legal judgments reflects only the confusion of the law itself.

§ 8 FRAUD

122. The misrepresentation and mistake cases illustrate that fraud will make a contract voidable in many circumstances; and if there is "actual fraud" (dolus malus) an action for damages in the tort of deceit will also be available to compensate the innocent party who suffers loss as a result of the wrong. In equity the notion of fraud is wider than at common law in that certain kinds of behaviour not involving dolus malus can amount to "constructive fraud" for the purposes of equitable remedies; but in these equity cases, as one might expect, the emphasis is often less on the substantive law of contract and more on the law of actions. Accordingly one should not be surprised if the boundaries between mistake, fraud and duress (undue influence) become, at the level of remedies, rather indistinct.

§ 9 DURESS

123. Duress to the person, like fraud, will probably make a contract voidable rather than void, both at common law and in equity. But, as with fraud, equity has traditionally taken a much wider view of the notion of duress and includes within its scope not only certain relationships between the parties which raise a presumption of undue influence but certain kinds of commercial

87 Cf. MM van Rossum (o.c.), p.234-243.
89 Edginton v Fitzmaurice (1885) 29 Ch D 459; Derry v Peek (1889) 14 App Cas 337.
90 Much presumably will depend on the actual nature of the duress: extreme duress could presumably make any extracted promise quite meaningless and thus void in the eyes of the law, although in turn this could depend on the definition of vis aboluta: Zimmermann, pp.560-562. See on remedies against vis, metus in Roman law AS Hartkamp, Der Zwang im Römischen Privatrecht (Amsterdam, 1971).
pressure said to constitute 'economic duress' which vitiate the consent of the victim, making the contract 'not a voluntary act'.

Undue influence is a form of equitable duress that arises either out of certain relationships which raise its presumption - and this aspect of equitable duress is usually tied up with fiduciary (cf. Ch. 4 § 4), family or guardianship relationships - or out of its proof in any individual case. It is an extended form of _metus revertentialis_ and is based on the idea of an abuse of personal influence. In recent years the commercial transaction has increasingly been brought within its scope - indeed undue influence and economic duress are the main ways by which equity now tackles the 'unconscionable' bargain, there being no independent doctrine of unconscionability or inequality of bargaining power either in equity or at common law. But this does not mean that equity will necessarily set aside any transaction involving an inexperienced consumer or indeed any person subjected to undue influence. The court will look to see if the stronger contracting party abused his position _vis-à-vis_ the weaker consumer, for example by not advocating that the latter seek independent legal advice before signing some important legal document, and it may well insist that the transaction itself is objectively and manifestly unfair.

§ 10 RESTITUTION PROBLEMS

124. Once a contract is set aside on the ground of mistake, incapacity, duress or whatever restitution problems can arise if property or money has been conveyed under the defective transaction. For the contractual obligation is often no longer around to adjust the parties' rights and duties. In the case of infants restitution is now available under statute (cf. Ch. 8 § 3); and in a range of other situations the quasi-contractual remedy of money had and received (cf. nr. 159) might be available to prevent one party from unjustly enriching himself at the expense of another (cf. Ch. 11 § 4). Thus at common law money paid under a defective contract will be recoverable if there has been a 'total failure of consideration', unless the defect in the contract arose as a result of illegality (cf. Ch. 8 § 4) or the defendant is able to

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91 _Pau On v Lau Yu Long_ [1980] AC 614, 636; the duress does not have to amount to a tort: _Dimskal Shipping Co v ITF_ [1991] 3 WLR 875 (HL).
94 Ibid.
96 _Rover International Ltd v Canon Films Ltd_ [1989] 1 WLR 912.
establish a change of position\textsuperscript{97}. One might add that money paid under a mistake of law is, prima facie, not recoverable since ignorance of the law is seen as no excuse\textsuperscript{98}.

Illegal contracts, as we have seen (cf. Ch. 8 § 4), pose special problems. However if an owner is able to trace money or property transferred under the illegal contract - that is, if he is able to rely on his right in rem rather than on the contractual right in personam (cf. nr. 46) - then restitution might be available\textsuperscript{99}, although it may be that an illegal contract, not being void as such (cf. Ch. 8 § 2), can act as a valid conveyance\textsuperscript{100}. Gaming contracts also present restitutionary problems in that the courts do not like to use the law of restitution to enforce indirectly contracts which are illegal or void for public policy reasons\textsuperscript{101}; however if stolen money is used for gambling the gambling club 'is bound to reimburse the victim for stolen money received and retained by the [club]' provided that the club has been 'unjustly enriched'\textsuperscript{102}. This does not mean, of course, that a gambler himself can recover his lost bets on the basis of a failure of consideration: 'for he has relied upon the casino to honour the wager' - he has in law given money to the casino, trusting that the casino will fulfill the obligation binding in honour upon it and pay him if he wins his bet\textsuperscript{103}.

125. Comparing Netherlands and English law, the doctrines of *dwaling* and misrepresentation are different but not dissimilar, although the Netherlands approach sets out from the point of view of defects of the will (*wilsgebreken*)\textsuperscript{104}. *Dwaling* makes a contract voidable, and title 3.2 gives rules for the consequences of *dwaling*\textsuperscript{105}. The vitiating factors fraud, threat and abuse of circumstances are codified in s. 3: 44, giving a description of these defects of the will (see § 1), and, generally speaking, the Netherlands Civil Code deals with the subject-matter described in this Chapter in a systematic way, rather different than the somewhat piecemeal approach to such problems in English law (cf. nr. 103). The vitiating factors mentioned are codified in Title 3.2 (on *rechts-handelingen*) and are applicable when dealing with patrimonial law but also *mutatis mutandis* to other areas of the law, taking into account the nature of the rechts-handeling or relationship *in casu* (s. 3: 59). The annulment has retroactive effect to the point in time when the


\textsuperscript{98} R v Tower Hamlets LBC, Ex p.Chetnik Ltd [1988] 2 WLR 654, 669 HL.


\textsuperscript{100} Singh v Ali [1960] AC 167.

\textsuperscript{101} Onakpo v Manon Investments Ltd [1978] AC 95; Lipkin Gorman v Karpnale Ltd [1991] 3 WLR 10.

\textsuperscript{102} Lipkin Gorman v Karpnale Ltd [1991] 3 WLR 10, 22.

\textsuperscript{103} Ibid, at p.32.

\textsuperscript{104} Cf. MM van Rossum (o.c.), p.305-309.

\textsuperscript{105} Cf. Hjema & Olthof (o.c.), p.317-321.
handeling was performed (s. 3: 53). If the consequences of the annulled handeling cannot be undone, the judge can, on demand of the opposite party, deny effect to the annulment in full or in part. If a party acquires an reasonable advantage therefrom, restitution in money can be awarded (s. 53-2).
9 THE CONTENTS AND SCOPE OF THE CONTRACTUAL OBLIGATION

§ 1 THE CONTENTS OF A CONTRACT

126. If the English law of contract is founded upon promises and not some abstract juris vinculum then the nature and contents of the English contractual obligation are likely to be expressed as a bundle of promises and not as a single obligation containing various rights and duties. Yet while this is largely the conceptual position, care must be taken in analysing the bundle of promises that make up the contract. For the courts not only distinguish between the status of the promises themselves (cf. Ch. 9 § 2) but sometimes distil out of the bundle a single, fundamental promise or term upon which the whole contract exists. Thus in a contract for the sale of a car the promise by the seller to convey title is so fundamental that if it is broken there will be a 'total failure of consideration', allowing the buyer to recover as a debt the whole of the sale price. All the same, it is doubtful if the breach of such a fundamental term will actually destroy the contract itself; and so as a matter of common law principle any express term or clause will, despite the breach, remain in existence and prima facie valid (cf. Ch. 9 § 3).

127. In Netherlands law determining the contents and scope of a contract is closely related to the interpretation of contracts (cf. Ch. 6 § 5). When interpreting a contract, the judges try to establish the meaning of the declarations of the parties and the subsequent legal effects thereof. The interpretation is, furthermore, based on the rules of reasonableness and fairness. Contracts are binding upon the parties, but statute, usage and the rules of reasonableness and fairness can supplement the contract and these latter may be considered as a separate source of contractual obligations. Reasonableness and fairness form the central doctrine of the Netherlands law of obligations; and so in pre-contractual relationships (cf. nt. 98), or whenever flaws or gaps occur in contracts or whenever exclusion or limitation clauses are in question, the rules of reasonableness and fairness play a key role.

One of the changes introduced by the Netherlands Civil Code (as opposed to Netherlands civil law under the Code of 1838) is to be found in the field of 'standard' or general contract terms (algemene voorwaarden). The

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1 Rowland v Divall [1923] 2 KB 506.
4 Asser-Harkamp II, p.266.
incorporation of 'standard' contract terms in a contract is governed by the general principles for the formation of contracts. Under the Netherlands Civil Code, standard contract terms are incorporated into a contract if a party accepts that they will form part of the contract, and the fact that he was not aware of the contents of the terms or conditions is not relevant. The complement of this 'hard and fast' rule for the incorporation of standard contract terms into a contract is that any term or condition can be annulled if it is unreasonably onerous with respect to the other party, or if the party who utilizes the standard contract terms has not made a reasonable effort to inform the other party about the conditions to be applicable (s. 6: 233). In principle, these conditions should be handed over to the other party before or at the time of the formation of the contract, unless this is not reasonably possible (s. 6: 234). In the latter case notice should be given that the conditions are available for inspection and, in general, if the conditions were not handed over to the other party in the first place, they should be sent without delay and at the costs of the user to the other party upon his request. The possibility of annulling unreasonably onerous standard contract terms (the open norm of s. 6: 233 sub a) is the most important provision of the Netherlands Standard Contract Terms Act, incorporated in s. 6: 231-247 of the Netherlands Civil Code. This Wet algemene voorwaarden provides for protection against unreasonably onerous terms, especially in consumer contracts, and the influence of the Act has been important in recent cases on general contract terms such as Van der Meer v Smilde and Kleijn v Van der Ende, all decided under the old Civil Code. The effects of the Wet algemene voorwaarden will probably be considerable; the Act not only protects against unreasonably onerous terms, but gives also the ius agendi and ius standi to, for instance, consumer organisations in their battle against unfair contract terms. The criterium for judging onerous terms is the open norm, specified in a 'black' and 'grey' list of onerous terms, or terms presupposed to be unreasonably onerous when used against 'consumers'. For 'grey' terms, the onus of proof of the acceptability of the terms is shifted to the person using them and so exclusion and limitation clauses, for instance, are 'grey'. In addition to this Act, there is now the possibility of issuing directives (reglementen-type, standaardregelingen) based on s. 6:214.

7 See on the incorporation of standard contract terms in commercial contracts e.g. Van Lent & Visscher BV v Oesloot Tapifabriek BV, NJ 1991, nr. 416.
8 NJ 1986, nr. 714.
10 The notion of "consumer" in the Netherlands Civil Code can be translated as 'a natural person, not acting in the course of a business or a profession' cf. Haanappel & Mackay.
11 Jongeneel, p.251-253.

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§ 2 TERMS AND THEIR CLASSIFICATION

128. General Remarks
When one looks at a transaction as a whole we have already seen that promises made in the course of negotiations and bargain can fall into one or other of two general categories: those outside of the contractual bargain are classed as representations while those inside are classed as contractual terms (cf. nr. 109). These contractual terms are in turn classified into various types. Traditionally those that are fundamental to the whole contractual obligation are called 'conditions' and those that are merely accessory are called 'warranties'. However when these two different classes of term are put into the context of an actual breach of contract the classification can sometimes prove inadequate in that it is not always practical to use the status of terms as a means of determining whether the breach is serious enough to allow an innocent party to repudiate the whole of the contract (cf. nr. 129). Moreover there is an added difficulty that the word 'condition' itself has a number of meanings depending upon the context within which it is used. Accordingly, other categories of term have appeared alongside the traditional conditions and warranties.

129. Conditions
The common law, like the Romanist systems, has had to face the problem that some breaches of contract are so serious that they should allow the injured party to treat the whole obligation as being at an end. Yet the question as to which breaches should give rise to the right to 'repudiate' the contract and which breaches should give rise only to a right to damages has been rendered rather complicated in the common law by the fact not only that it has been dealt with at two levels - at the level of breach (cf. Ch. 10 § 3) and the level of terms - but that the repudiation is a 'self-help' remedy. A contractor who wishes to repudiate a contract for serious breach does not have to go to court to obtain the rescission.

The traditional approach of the common law towards this self-help right to repudiate for a serious breach was to look at the nature of the term broken. If the breach involved a promise that could be described as an implied 'condition precedent' to the whole contract then the obligation would

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12 Sale of Goods Act 1979 s.11(3). Note that 'condition' comes from the Latin word 'condicio' and thus has an important relationship with the Civilian learning on conditions: Zimmermann, p.743.
14 Zweigert & Kötz, II, p.201.
15 It is necessary to use the term 'repudiate' rather than 'rescind' otherwise there might be confusion with equitable remedy of rescission: for 'rescinding' a contract for serious breach is a common law remedy which has no conceptual relation whatsoever with the equitable remedy of the same name. See Treitel, para.188.
be destroyed as a result of the operation of this rule. The approach, in other words, was not that different from the one adopted in dealing with mistake at common law (cf. nr. 116). However in the course of time the 'precedent' aspect became lost and the notion of 'condition' took on a rather different meaning: it became a way of describing the status of a fundamental term of the contract which, if broken, would give rise to the right of repudiation. This is the meaning adopted in contracts for the sale of goods and is a meaning in theory applicable to all contracts.

The question whether a term is a 'condition' or not depends either on the intention of the parties or, if the parties are silent on the matter, on whether the term is one that is 'so essential to [the] very nature of the contract that [its] non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all'. In some types of transaction the courts will determine the status of the term with reference to commercial usage and the like; in some other types of transaction - in particular sale of goods - the status of the most important terms are implied into the contract by statute. And this statutory approach to implied conditions has now been extended to other kinds of consumer contracts. All the same, it must be borne in mind that many actual cases dealing with the status of terms involve the question of whether an innocent party was correct in repudiating the contract for breach: thus in interpreting the terms the court may well look at the nature and effects of the breach itself, even if the parties themselves have used the word 'condition' (cf. Ch. 10 § 3).

130. **Conditions Precedent**
The complexities surrounding the meaning of 'condition' are made worse by the survival of the original notion of 'condition precedent'. As in French:

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16 Zimmermann, p.803.
17 Treitel, para.198.
18 *Sale of Goods Act 1979* s.11.
19 Treitel, para.198.
24 And note the reverse: "a stipulation may be a condition, though called a warranty in the contract" per *Sale of Goods Act 1979* s.11(3).
25 One might say that the common law uses 'condition' to refer either to an event or to a term of the contract: see Treitel, para.195.
26 Cf. art. 1168 Code Civil: l'obligation est conditionnelle lorsqu'on la fait dépendre d'un événement futur et incertain, soit en la suspendant jusqu'à ce que l'événement arrive, soit en la résiliant, selon que l'événement arrivera ou n'arrivera pas, et art. 1181 Code Civil: l'obligation contractée sous une condition suspensive est celle qui dépend d'un événement futur et incertain, ou d'un événement actuellement arrivé, mais encore inconnu des parties.
or Netherlands law\textsuperscript{27}, an English contract can be subject either to a condition precedent (\textit{condition suspensive}) or to a condition subsequent (\textit{condition résolutoire}) and so a promise to pay a debt can be made to be dependent upon the promisee catching influenza\textsuperscript{28} or the validity of a contractual bargain can be made to be dependent upon the subject-matter of the contract remaining in existence\textsuperscript{29} (cf. nr. 116). True conditions subsequent are actually hard to find in the English caselaw, and so most of these kinds of conditions are referred to as conditions precedent.

131. \textbf{Warranties}

Warranty, like condition, has a number of different meanings. As we have seen, the name can be applied to a contractual promise in general (cf. nr. 109) and when used in this sense it acts as a generic term within which a 'condition' is merely a species\textsuperscript{30}. This general meaning is of use in the area of misrepresentation when it can be of importance to distinguish between contractual promises (warranties) and mere representations (cf. nr. 112). To add to the confusion, however, the term warranty has a special meaning in insurance law: here it 'is a term whose breach discharges the insurer from liability even if the breach is unconnected with the loss\textsuperscript{31}. In addition to these meanings, 'warranty' can also be used to describe a particular type of contractual term which, if broken, will give rise only to an action for damages\textsuperscript{32}; in this context it is used to contrast an ancillary term with a 'condition' (cf. nr. 129). A breach of warranty, unless it started life as a representation (cf. nr. 112), will not therefore give rise to a right to repudiate the contract.

132. \textbf{Innominate Terms}

The conditions and warranties dichotomy no doubt works well enough for some kinds of contract - or, at least, for some kinds of contractual stipulations. For, so it is said, it has the great merit of providing certainty in commercial

\textsuperscript{27} Netherlands Civil Code s. 6: 21-26 (een verbintenis is voorwaardelijk, wanneer bij rechthandeling haar werking van een toekomstige onzekere gebeurtenis afhankelijk is gesteld, s. 6: 21, and s. 6: 22: een onbetinge voorwaarde doet de werking der verbintenis even of het plaatsvinden der gebeurtenis aanvangen; een onbetinge voorwaarde doet de verbintenis met het plaatsvinden der gebeurtenis vervallen); see also s. 3: 35-1 (en zit zij uit de wet of uit de oord van de rechthandeling anders voortvloeit, kan een rechthandeling onder een tijdshouding of een voorwaarde worden verricht).

\textsuperscript{28} Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256.

\textsuperscript{29} Financings Ltd v Stimson [1962] 1 WLR 1184.

\textsuperscript{30} Zimmermann, p.803: Every contractual term, express or implied, is in law a 'warranty', and breach of a warranty enables the innocent party to claim damages. If, however, the term which has been broken is not only a warranty but also a 'condition', the innocent party has the option of withdrawing from the contract. See also Treitel, paras.198.

\textsuperscript{31} Euro-Diam Ltd v Rathurs [1988] 2 All ER 23, 33 CA. See also Marine Insurance Act 1906 ss.33(3).

\textsuperscript{32} Sale of Goods Act 1979 ss.11(3), 61(1).
law\textsuperscript{33}, However when applied to some other types of contract, or some other contractual stipulations, it can cause logical problems in that once there has been a breach of any term which formally has the status of a 'condition' it must follow that the innocent party has the right to repudiate the whole of the contract and to claim damages for the loss of the whole bargain\textsuperscript{34}. This could mean that repudiation might be available for what in reality was just a minor breach of contract (cf. Ch. 10 § 3)\textsuperscript{35}.

In recognising this logical problem the Court of Appeal decided that a breach of 'condition' might not always give rise to a right to repudiate the contract\textsuperscript{36}. They held that with regard to some kinds of contract, or at least with regard to some kinds of contractual promises, reliance upon the condition and warranty dichotomy was no longer to be the only method of determining the right to repudiate for breach; regard was also to be had, in certain circumstances, to the gravity of the breach itself. However the House of Lords has recently reaffirmed that in commercial contracts the intention of the parties is paramount. If the parties to a mercantile contract have made it clear that the breach of a particular stipulation is to give rise to a right to repudiate then the courts should not be reluctant to class such a stipulation as a condition; for the gravity of the breach approach in commercial transactions, where the parties are entitled to know their rights at once, is often unsuitable\textsuperscript{37}.

It would seem, then, that there is now no complete dichotomy between conditions and warranties. There is also a third class of term, the 'innominate term', breach of which will give rise to a right to repudiate only if the parties have impliedly agreed that this is what should happen given the nature and consequences of the breach\textsuperscript{38}. Of course whether or not the parties were clear as to the repudiation issue is itself a difficult contractual interpretation.

\textsuperscript{34} Cf. Lombard Plc v Butterworth [1987] QB 527.
\textsuperscript{35} My Lords, it is beyond question that there are many cases in the books where terms, the breach of which do not deprive the innocent party of substantially the whole of the benefit which he was intended to receive from the contract, were nonetheless held to be conditions any breach of which entitled the innocent party to rescind per Lord Roskill in Bunge Corp., supra, at p.724.
\textsuperscript{36} Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26.
\textsuperscript{37} Bunge Corporation v Tradex S.A. [1981] 1 WLR 711, 716, 725.
\textsuperscript{38} A condition is a term, the failure to perform which entitles the other party to treat the contract as at an end. A warranty is a term, breach of which sounds in damages but does not terminate, or entitle the other party to terminate, the contract. An innominate or intermediate term is one, the effect of non-performance of which the parties expressly or (as is more usual) impliedly agree will depend upon the nature and the consequences of breach per Lord Scarman in Bunge Corp, supra, at p.717.
problem; but unless the wording is very clear, the approach of the court is likely to be one of interpreting the language of the contractual document (cf. Ch. 6 § 5) in the context both of any breach and of any established commercial usage.

133. **Fundamental Terms**

The innominate term has not been the only development to cause problems for the traditional conditions and warranties dichotomy; the 'fundamental term' has given rise to confusion as well. At one time it seemed that the fundamental term was a promise even more fundamental than a 'condition', and so if it was broken this would give rise to a 'fundamental breach'. The effect of such a fundamental breach was, according to the Court of Appeal, not only to give the innocent party the right to repudiate the contract but, on such repudiation, to sweep away the whole of the primary contractual obligation taking with it any exclusion clauses (cf. Ch. 9 § 3). This fundamental breach doctrine has now been abolished by the House of Lords with the result that there is less reason to distinguish conceptually between conditions and fundamental terms; the only reason for making the distinction is to separate from conditions those terms which, if broken, would deprive the other party of substantially the whole benefit of the contract (cf. Ch. 9 § 1). In other words the distinction might serve to distinguish defective performance from effective non-performance.

134. **Express Terms or Clauses**

The concept of a fundamental term was a device employed to tackle the widespread use in standard form contracts of clauses designed to exclude or limit the liability of a contractor. These clauses came in many forms. They might exclude altogether the liability of a party for breach of some or all of the terms of the contract (cf. Ch. 9 § 3); they might limit the amount payable in damages for a breach of contract (cf. Ch. 9 § 3); or they might require a

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39 It is by construing a contract (which can be done as soon as the contract is made) that one decides whether a term is, either expressly or by necessary implication, a condition, and not by considering the gravity of the breach of that term (which cannot be done until the breach is imminent or has occurred). The latter process is not an aid to construing the contract, but indicates whether rescission or merely damages is the proper remedy for a breach for which the innocent party might be recompensed in one way or the other according to its gravity per Lord Lowry in Bunge Corp., supra, at p.719.

40 See Lord Scarman in Bunge Corp., supra at p.717.

41 A fundamental term must be something - narrower than a condition of the contract.... It is... something which underlies the whole contract so that, if it is not complied with, the performance becomes something totally different from that which the contract contemplates per Devlin J in Smeaton Hanscomb v Sassoon & Setty [1953] 2 All ER 1471, 1473.


contractor to indemnify (in debt) a party in breach of contract who has had to pay damages (cf. Ch. 9 § 4). Furthermore, as in French law, an English contract might also contain a clause requiring a party in breach, or on termination of the agreement, to pay a fixed sum (in debt) by way of compensation (cf. Ch. 9 § 4). These penalty clauses, unlike the other stipulations, have however attracted the attention of equity. In Netherlands law, penalty clauses are regulated by s. 6: 91-94, giving the courts for instance the power to reduce the stipulated penalty upon the demand of the debtor if it is evident that reasonableness so requires.

§ 3 EXCLUSION AND LIMITATION CLAUSES

135. Introductory Remarks

The area of exclusion and limitation clauses was, until 1978, one of the most conceptually complex areas of English contract law. The reason for this complexity lay primarily in the conflict between two principles of contractual justice: on the one hand the courts were keen to uphold the principle of freedom of contract (cf. Ch. 6 § 1 and 4); on the other hand they wished on many occasions to give relief to consumers oppressed by powerful contractual corporations who, from a monopoly or quasi-monopoly position, were relying upon exclusion clauses in standard-form contracts to the point of abuse.

A second reason for the complexity once to be found in this area of law lay in a divergence of approach towards the level of operation of exclusion clauses. Some judges and academics took the view that such clauses defined the actual contractual obligation itself; other judges took the view that such clauses operated only in respect of the remedy - an exclusion clause just gave protection on a secondary level for breach of an obligation on the primary level. Today the approach adopted by the House of Lords would seem to be the former; in commercial contracts where the parties are of equal economic strength and the risks are ones that can be covered by insurance an exclusion clause would seem to be - or certainly capable of being - part of the definition of the primary contractual duty.

136. Interpretation of Exclusion Clauses

Another reason, perhaps, for the complexity surrounding the problems posed by exclusion clauses is that neither the common law courts nor the Court of Chancery developed a general doctrine of abuse of rights (cf. Ch. 11 § 5).

46 French CC art 1152.
47 See Treitel, para.179.
Consequently consumer transactions were always to be treated, at common law, on the same level as commercial contracts. This has meant that the courts, in order to combat the abusive use of standard-form contracts by contractors in a powerful economic position, had to develop a number of rather artificial rules of interpretation\textsuperscript{51}.

In order for a clause to be effective at common law it must have been properly incorporated into the contract\textsuperscript{52}, its language must cover both the actual event or breach that has occurred and the actual party attempting to rely upon the clause\textsuperscript{53}; and in cases of ambiguity the clause must be read \textit{contra proferentem}\textsuperscript{54}. It seems, also, that if there is a very serious breach of contract - the breach of a fundamental term (cf. nr. 133) or a fundamental breach - the clause will specifically have to cover the breach and the damage that has occurred. For there is a 'rule of construction' that an exclusion clause or similar provision should not be interpreted as covering a fundamental breach of contract\textsuperscript{55}. Put another way, 'the agreement must retain the legal characteristics of a contract\textsuperscript{56}.

137. \textbf{Statutory Protection and the Consumer}

Many of the abuse problems associated with standard-form contracts have been alleviated by statutory intervention aimed at protecting the consumer\textsuperscript{57}. Thus in consumer sale of goods and hire-purchase contracts the statutory implied terms as to title, fitness for purpose and quality cannot now be excluded\textsuperscript{58}, and in many other consumer transactions an exclusion clause will be effective at best only if it is 'fair and reasonable'\textsuperscript{59}. This fair and reasonable provision also applies to any clause attempting to exclude any liability or any remedy available for misrepresentation, and it is unlikely that businesses will be able to have recourse to any collateral contracts to evade liability for their defective products\textsuperscript{60}.

\textsuperscript{52} Thornton \textit{v} Shoe Lane Parking Ltd [1971] 2 QB 165.
\textsuperscript{53} See e.g., Holier \textit{v} Rambler Motors Ltd [1972] 2 QB 71.
\textsuperscript{54} Ambiguous clauses are to be construed against the party putting them forward: see Zweigert & Kötz, II, pp.10-25. This ambiguity rule is an example of a very old (i.e. Roman) interpretation principle being adapted to deal with a modern problem: on which see Zimmermann, pp.639-642. In Netherlands law, the Hoge Raad has held in Ram \textit{v} Matser NJ 1978, nr. 125, and Liszkyv v Harmen NJ 1990, nr. 583, that application of the contra-proferentem rule depends on 'all circumstances of the case', cf. Jongeneel, o.c. p.152-155.
\textsuperscript{55} Suisse Atlantique etc \textit{v} Rotterdam etc [1967] 1 AC 361.
\textsuperscript{56} Photo Production, supra, at p.850.
\textsuperscript{58} Unfair Contract Terms Act 1977 s.6.
\textsuperscript{59} Sections 2(2), 3, 11.
\textsuperscript{60} Sections 5, 10.
In interpreting 'fair and reasonable' under the Act the courts will no doubt look at the circumstances of each case\(^\text{61}\). Yet the Act is, primarily, a piece of legislation designed to protect the consumer and so the courts are likely now to distinguish between the commercial and the consumer factual situation\(^\text{62}\). In the latter situation an attempt to exclude negligence, especially by a professional institution in a powerful economic position, will no doubt be treated with scepticism, especially where the institution can spread the loss via insurance and the loss itself is not open-ended\(^\text{63}\).

138. Commercial Contracts
The effect of the legislative intervention on behalf of the consumer has, then, been to create not just a distinction between the business and the purely private transaction but between the consumer and the commercial contract\(^\text{64}\). This has had the beneficial effect of sweeping away some of the conceptual confusion surrounding exclusion clauses and freedom of contract: for 'in commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said ... for leaving the parties free to apportion the risks as they think fit'\(^\text{65}\).

All the same, it must not be forgotten that some of the provisions of the Unfair Contract Terms Act 1977 stretch beyond the consumer contract. Liability arising from negligence, whether it is a question of contractual or tortious liability, is to be treated differently from general contractual liability. Accordingly negligence liability can be excluded in cases of property and financial loss only if the exclusion clause or notice is reasonable\(^\text{66}\), and in cases of personal injury or death no exclusion clause or notice will be effective\(^\text{67}\). In sale of goods and hire-purchase commercial contracts liability arising from failure to pass good title, or to provide quiet possession, cannot be excluded\(^\text{68}\), and liability arising from breach of description or a failure to provide goods that are reasonably fit or of merchantable quality will be excluded only if such a clause is 'fair and reasonable'\(^\text{69}\). Furthermore the reasonableness provision applicable to liability in contract applies not just to situations where one party 'deals as consumer' but where one of them deals

\(^{61}\) Section 11. In the case of a contract term the contemplated circumstances are at the time of the making of the contract (s.11(1)); in the case of a general notice the circumstances are at the time of liability (s.11(3)). With regard supply of goods contracts the Act sets out certain guidelines in the Schedule. Note also that the burden of proof is on the person claiming reasonableness (s.11(5)).

\(^{62}\) Thompson v T Lohan (Plant) Ltd [1987] 1 WLR 649.

\(^{63}\) Smith v Bush [1990] 1 AC 831.

\(^{64}\) Unfair Contract Terms Act 1977 ss.1(3), 12.

\(^{65}\) Photo Production, supra, p.843.

\(^{66}\) Section 2(2).

\(^{67}\) Section 2(1).

\(^{68}\) Section 6(1).

\(^{69}\) Section 6(3).
'on the other's written standard terms of business\textsuperscript{70}. Accordingly the reasonableness provision has an extensive role to play in commercial, as well as consumer, law.

It has to be added, however, that there are a number of contracts which fall outside of the 1977 legislation. At the general level the Act applies only to 'business liability' obligations\textsuperscript{71}, although this will include a profession and the activities of any public department\textsuperscript{72}; and at the specific level the Act, or parts of the Act, will not apply to certain contracts like insurance or to contracts involving the creation or transfer of real or intellectual property interests or rights\textsuperscript{73}. It is, then, a technical piece of legislation that highlights the dangers of putting too much emphasis on the theory that English law thinks just in terms of a single principle of contract and not in terms of specific contracts (cf. Ch. 5 § 4).

§ 4 INDEMNITY CLAUSES

139. Exclusion and limitation clauses are express terms that are negative in effect - they usually protect a contractor from all or part of a claim for damages. An indemnity clause - that is a clause whereby one party agrees to indemnify the other for a liability incurred - is positive in effect: its operation will involve a contracting party being put under a legal duty to pay to another party a specific sum of money. In other words, an indemnity clause creates a right to a debt on the happening of some event, the liability which creates the indemnity right\textsuperscript{74}, and, as a result, is a conditional obligation. Despite this difference, and despite the fact that an indemnity provision need not involve a breach of contract, the approach of the courts is nevertheless the same towards an indemnity clause as it is towards an exclusion clause and this means that if such a clause is to be effective it must be very clearly worded, especially if the indemnity debt claim arises out of the claimant's own negligence\textsuperscript{75}. In commercial contracts these clauses are usually inserted to locate insurance risks\textsuperscript{76}, but if they occur in consumer contracts as an indirect means of protecting the business party against the consequences of their own negligence or breach of contract they will be effective only if they are

\textsuperscript{70} Section 3(1).
\textsuperscript{71} Section 1(3).
\textsuperscript{72} Section 14.
\textsuperscript{73} Section 1(2) and Schedule.
\textsuperscript{74} See e.g., \textit{British Crane Hire Corp v Ipswich Plant Hire Ltd} [1975] QB 303; \textit{Civil Liability (Contribution) Act 1978} s.1(1).
\textsuperscript{75} Smith v South Wales Switchgear Ltd [1978] 1 WLR 165.
\textsuperscript{76} Thompson v T Lohan (Plant) Ltd [1987] 1 WLR 649.
reasonable. Reasonableness will, once again, depend *inter alia* on the status of the parties.

§ 5 PENALTY CLAUSES

140. A penalty clause is similar to an indemnity clause inasmuch as it places one contracting party under a debt liability to the other on the occurrence of some event, but the difference is that a penalty clause comes into operation only where there has been a breach by the debtor. And so, as in French law, the penalty clause in an English contract can just be a means by which a person who has broken a contract is put under a debt liability to the other party in place of a liability in damages.

Provided that such a clause is a genuine pre-estimate of the damage - not always an easy question - it will be effective. But if such a clause is not a genuine pre-estimate and is excessive equity will intervene to relieve the person in breach from liability in debt, the creditor in such a situation being allowed to sue only in damages for the actual loss. This equitable relief is, however, only available for debt clauses that come into operation on the debtor's breach of contract. Consequently a penalty clause must be carefully distinguished from termination, price and damages clauses. If a party legally terminates, rather than breaks, a contract it is quite possible that the equitable doctrine against penalties has no place; and if on a serious breach the innocent party elects to keep the contract alive a subsequent claim for the contract price will not be treated as a penalty or an abuse of a right unless the creditor has no 'legitimate interest' whatsoever in performing the contract.

Care must also be taken to distinguish a penalty clause from a condition (cf. nr. 129). If a contract contains a clause which expressly turns a relatively minor breach of contract into a breach of 'condition' this will have the effect of allowing the innocent party to recover damages for the whole loss of the bargain; yet such a clause is not a penalty and so will not be subject to the equitable doctrine against penalties. Whether, then, equity can gain

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77 *Unfair Contract Terms Act 1977* s.4.
78 See e.g., *Thompson v T Lohan (Plant) Ltd* [1987] 1 WLR 649, 656-657.
79 Treitel, paras. 165-166.
80 French CC arts. 1152, 1226.
81 Treitel, para. 167.
82 *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79.
83 *Bridge v Campbell Discount Co Ltd* [1962] AC 600; *ECGD v Universal Oil Products* [1983] 1 WLR 399 (HL).
84 Treitel, para. 166.
85 *White & Carter (Councils) Ltd v McGregor* [1962] AC 413.
entry to the problem of payments to be made when a contract is terminated can depend both on the drafting of the contract and on how the courts choose to interpret the facts, the law and the contractual document.

§ 6 IMPLIED TERMS

141. Penalties, exclusion clauses and the like are clauses written into contracts as express terms - or perhaps incorporated by way of course of dealing. But a contract can also contain a great many promises which are implied and these implied terms are classified in the same way as any other contractual term (cf. Ch. 9 § 2).

The theoretical starting point of the implied term is the presumed intention of the contractual parties. The law will not, in theory at least, make, or remake, a contract for the parties; but it will imply into any existing contract such terms as are necessary to give 'the transaction such efficacy as both parties must have intended that at all events it should have'. This means that the court will interpret a contractual obligation in such a way as either to make it conform, in the case of mercantile transactions where the parties are silent as to the point in issue, to established commercial usage or custom, or to give it efficacy when, without the implied term, the contract would simply not work.

The courts will not, however, imply a term into a contract unless in all the circumstances it is reasonable to do so and this imports into this area of contract a certain objectivity. The implied term is a means by which the court can grant compensation claims on the basis of a range of different relationships. But this notion of reasonableness is a condition, not a reason in itself, for implying a term and so the courts have stopped short of admitting that they will imply a term merely because it is reasonable to do so. Accordingly in order to appreciate the way an implied term operates it is necessary to treat the doctrine either as a means of contractual interpretation or as a kind of supplementary law. Terms are implied directly on the basis of an intention imputed to the parties in order to make the contract workable in particular circumstances or indirectly via the notion of particular contractual transactions - sale, hire, insurance etc. (cf. Ch. 5 § 4) - within which certain general obligations have been established by mercantile usage or custom.

88 The Moorcock (1889) 14 PD 64.
89 Liverpool City Council v Irwin [1977] AC 239.
90 Young & Martin Ltd v McManus Chids Ltd [1969] 1 AC 454.
The idea of the implied term acting as a form of supplementary law is reinforced by statute91. Certain pieces of legislation dealing with particular types of transaction specifically imply terms into contracts involving the relevant transaction92; and in the case of some of these transactions - in particular sale and supply of goods - the parties are no longer free to depart from some of these implied terms by an express term93. Thus the concept of an implied term, for some transactions, has become a vehicle for the imposition of imperative laws - a form of ius cogens94.

§ 7 PRIVITY OF CONTRACT

142. One of the major distinctions between contractual and tortious liability is to be found in the relative effect of a contract. In English law, as in classical Roman law95, a contract cannot in principle confer upon a third party either any obligations or any rights because it is a general rule of English law that consideration must move from the promisee (cf. nr. 94). In principle the only Common law (in personam) obligation that a contractual party normally owes to a third party is a duty of care arising in the law of tort and the only rights that a third party can obtain from the contract is a right attaching to property96. This rule is known as the doctrine of privity of contract and, despite criticism97, it remains a valid principle of English contract law98.

All the same there are a range of important exceptions to the privity doctrine which severely curtail its application. Certain obligations and rights can be conveyed to third parties via the law of property and although this will not extend per se to debts99, despite their property status, the doctrine of assignment allows for the transfer of contractual rights from a creditor to a third party100. The device of agency allows an agent to contract on behalf

91 The reverse is also true in certain circumstances: that is to say the courts will refuse to imply a term because of the absence of legislation; see e.g., Reid v Rush & Tompkins Plc [1990] 1 WLR 212.
93 Unfair Contract Terms Act 1977 ss.6-7.
94 Euro-Diam Ltd v Bathurst [1987] 2 All ER 113, 119.
95 Zimmermann, pp.34-40 (Alteri stipulatī nemo potest: Digest 45.1.38.17); Zweigert & Kötz, II, pp.142-156.
96 Law of Property Act 1925 ss. 47(1), 56(1); and see Beswick v Beswick [1966] Ch 538 (CA), rewd [1968] AC 58.
97 For the later developments in Civil Law, and how the rule was finally overcome, see: Zimmermann, pp.41-45; Zweigert & Kötz, II, pp.142-150. Lord Denning adopted, inter alia, the 'interest' strategy in his attempt to avoid the privity rule in Beswick v Beswick [1966] Ch 538 (CA).
99 Beswick, supra.
100 Law of Property Act 1925 s. 136. See generally Zweigert & Kötz, pp.125-141.
of a principal\textsuperscript{101}, and both statute and the common law have abrogated the doctrine of privity with regard to certain mercantile transactions involving banking and insurance\textsuperscript{102}. Moreover the institution of the trust (cf. nr. 46) can be used to grant equitable rights directly upon third parties in respect of a fund of property established as a result of an agreement between others.

Developments in the law of remedies have also outflanked the privity doctrine in a number of situations. Thus contractors who cause damage may find themselves liable in damages to third parties in a number of different ways. The third party might be deemed to be a contractual party and thus the contractor could be liable for breach of a contractual term\textsuperscript{103}; the third party might indirectly be able to obtain compensation through an award of damages to the actual contractor\textsuperscript{104}, or the third party might be able to obtain damages in the tort of negligence either for breach of a duty "falling only just short of a direct contractual relationship"\textsuperscript{105} or for a breach of a contractual duty which injures a foreseeable and proximate third party in respect of a quantifiable and particular loss\textsuperscript{106}. If the problem is one of debt rather than damages it may be that a third party will, on occasions, be able to have recourse to the equitable remedy of specific performance to enforce the claim\textsuperscript{107}; and if the difficulty is one involving the benefit of an exclusion clause the third party might be able to look to estoppel (cf. nr. 44) or commercial reality (cf. nr. 95) in order to avoid the privity doctrine\textsuperscript{108}. In truth it may be that a third party can obtain no direct rights from a contract to which he is not a party, but this does not mean that the third party will have no legal or equitable remedies if he suffers an injury arising from a breach of contract between two other persons.

143. The sections 6:248-257 of the Netherlands Civil Code are based on the principle that a contract creates obligations only for the parties themselves\textsuperscript{109}. Third persons cannot benefit or be burdened with obligations from a contract to which they are not a party. This does not mean, however, that contracts have effects which oblige third parties to take the contract into consideration and so, for instance, breach of contract of a party can constitute a delict towards another person\textsuperscript{110}. Statutory inroads into the 'privity of

\textsuperscript{101} For the general background in Civil and Common law see: Zimmermann, pp.45-58; Zweigert & Kötz, II, pp.113-224.
\textsuperscript{103} Lockett v A. & M.Charles Ltd [1938] 4 All ER 170.
\textsuperscript{104} Jackson v Horizon Holidays Ltd [1975] 1 WLR 3468.
\textsuperscript{105} Junior Books Ltd v Vesitch Co Ltd [1983] AC 520.
\textsuperscript{107} Beswick v Beswick [1965] AC 58.
\textsuperscript{108} Norwich CC v Harvey [1989] 1 WLR 828.
\textsuperscript{109} Asser-Hartkamp II, p.349.
\textsuperscript{110} Staats v Degens, NI 1980, nr. 117.
contract-rule in the Netherlands are to be found in s. 6: 251, 252, 253 and 257; unwritten rules, too, can act as exceptions\textsuperscript{111}. In the area of third parties and exclusion and limitation clauses the cases \textit{Gegaste uien} and \textit{Securicor}\textsuperscript{112} are important: as in English law\textsuperscript{113}, the benefit of some exemption clauses is to be available to certain specific third parties, and exemption clauses can even sometimes bind a third party, although the general rule is that the operation of these clauses is restricted to the parties to the contract. In Netherlands law this principle operates also, except in the specific circumstances, where a third party is bound to the exemption clause on grounds of reasonableness. This binding force of exemption clauses on third parties is justified by the nature of the contract and the clauses, together with the special relationship between the third party and the party claiming applicability of the clause, taking into account legislation and the system of the law. The conduct of third parties, as well as the principle of reliance in respect of this conduct, are important criteria\textsuperscript{114}.

Netherlands law draws no distinction as between innominate terms, conditions and warranties and a contract may be repudiated only when the breach is of some importance\textsuperscript{115}. Exclusion and limitation clauses will be put to the test of reasonableness and fairness in the Netherlands 'Standard Contract Terms Act', incorporated in the Civil Code (cf. nr. 81). Furthermore, it should be noted that, especially in sale of goods law, the Netherlands Civil Code contains strict statutory rules dealing with \textit{consumentenkoop} (sale of goods to a consumer) in Book 7, Title 1.

\textsuperscript{111} Asser-Hartkamp II, p.354-355.
\textsuperscript{112} NJ 1969, nr. 249 and NJ 1979, nr. 362.
\textsuperscript{113} GH Treitel, \textit{An outline of the law of contract} (London 1989), p. 87-88, 208-222.
\textsuperscript{114} Vojvodina v Europe Container Terminals BV, S&S 1989, nr. 121, NJ 1990, nr.40; see also Citronas, NJ 1987, nr 35.
\textsuperscript{115} EH Hondius in: Contract Law and Practice (o.c.), p.104: and as to implied terms, the rules of reasonableness and fairness, usage and legal rules play an important role.
10 THE DISCHARGE OF CONTRACTS

§ 1 INTRODUCTORY REMARKS

144. In Netherlands law, the discharge of contracts is closely intertwined with the discharge of obligations. The contract as legal fact cannot perish; obligations that originated from the contract can, of course, lapse and the contract as a legal relationship will be extinguished when all obligations have been fulfilled or have ended in any other way. On the other hand, if a contract ends (for instance in cases of fraud), the obligations will vanish. Obligations (verbintenissen) lapse, primarily, through betaling (performance), s. 6: 27-51; but renouncement (s. 6: 160), annulment and prescription (praescriptio, statute of limitations, s. 306-326) have the effect of discharging the relevant obligations. The contracting parties can, also, end the contract by mutual agreement. Contracts are binding upon the parties and so unilateral repudiation and interference by judges are in principle not allowed; nevertheless the law or contractual agreements can stipulate otherwise. Legal grounds for the discharge of contracts are, for instance, imprévision (unforeseen circumstances, s. 6: 258) or non-performance of an obligation (s. 6: 74-94). Every failure in the performance of an obligation obliges the debtor to repair the damage which the creditor suffers therefrom, unless the failure cannot be imputed to the debtor; to the extent that performance is not already permanently impossible, this rule only applies subject to the provisions respecting the default of the debtor in s. 81-87 (s. 6: 74). A failure in the performance of an obligation cannot be imputed to the debtor if it does not result from his fault, and if he cannot be held accountable for it by law, rechtshandeling (juridical act) or prevailing rules of society (s. 6: 75). The

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1 Asser-Hartkamp I, p.32-34.
2 In the Latin texts of the Roman and of the Roman-Dutch law the words 'sovere'- 'solutio' are used in an extended sense to express the performance of any contractual duty: Betaaling, dat is de dadelijke vervulling van het geen men zich verplicht heeft te geven of te doen. And the use of 'payment', even in a wide sense, does not cover 'betaling', cf. RW Lee, An introduction to Roman-Dutch Law (1953), p.250, DC Fokkema, Law of Obligations, Introduction to Dutch law for foreign lawyers, Ch. 9, p. 117, see on nakoming van verbintenissen and betaling to an unqualified person H Wammes, Betaling aan een onvoozegele, WPNR (1991) 6004.
3 Rescission or alteration of a contract in whole or in part is made possible by s. 6: 258 (imprévision, onvoorziene omstandigheden) although the principle is used sparingly and as a matter of last resort, cf. EH Hondius in: Contract Law and Practice (o.c.), p.234.
5 Asser-Hartkamp I, p. 249 ff.
rules relating to non-performance and *force majeure* are recodified, using, as much as possible, neutral terms such as *tekortkoming in de nakoming* (failure in the performance of an obligation) and *toerekening* (imputation of this failure to the debtor).

The Netherlands Civil Code contains several special provisions for the discharge of *wederkerige overeenkomsten* (reciprocal, mutual contracts) in s. 6: 261-279, in addition to s. 6: 213-247 (rules relating to all contracts). Every failure of a party in the performance of one of his obligations gives the other party the right to set aside the contract in whole or in part, unless the failure, given its special nature or minor importance, does not justify the setting aside of the contract and the consequences therefrom; to the extent that performance is not permanently or temporarily impossible, the right to set the contract aside does not arise until the debtor is in default (s. 6: 265). The contract is set aside by a written declaration of the person entitled to do so, or by a judge upon the demand of such person (s. 6: 267), and discharge frees the parties from the obligations not yet performed and obliges them to undo any performance (s. 6: 271). The *exceptio non adimpleti contractus* (actually a defence against an action to obtain performance), a species of the general right to suspend performance (s. 6: 52-57), is expressly stated in s. 6: 262.

145. When one turns to English law one sees that the binding nature of the English contractual promise has its original historical roots in three rather different forms of action and these differences of form have left their mark on the modern law. In the old writs of Covenant and Debt the emphasis was on the binding nature of the promise undertaken and in the modern law there is a survival of this approach in that courts are still reluctant to relieve a party who has specifically bound himself to complete a certain act or to pay a specific sum. In these *stricti iuris* 'covenant' and 'debt' transactions the approach is all or nothing: either the contractor has performed the act or, unless he is to be relieved by some external event (cf. Ch. 10 § 5), he has not; there is no half-way house in these kinds of cases and equity will intervene only where there has been abuse or unjustified enrichment.

In the contractual liability cases, on the other hand, the historical action of *assumpsit* - a form of trespass - asserts itself by locating the point of emphasis in the damage as much as in the undertaking. The plaintiff will have to show that the damage or loss that is being claimed is caused by the defendant's contractual liability. If the damage is caused by the plaintiff's own failure to mitigate his loss, or is caused by an external event rather

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6 *Paradine v Jane* (1647) 82 ER 897.
7 *Bolton v Mahadeva* [1972] 1 WLR 1009.
8 *White & Carter (Counsels) Ltd v McGregor* [1962] AC 413.
9 *Quinn v Burch Brothers* [1966] 2 QB 370.
than by the defendant's own voluntary act\(^\text{11}\), the courts are likely to attribute the cause of the loss, or parts of it, to events beyond the contract; in these situations, then, the emphasis may well be on 'liability' both in a causal and in a behavioural (culpa) sense\(^\text{12}\). All the same much can depend upon the interpretation of the contractual promise, the way the case is pleaded and the burden of proof. If there is a contractual relationship between the parties any loss suffered by one party will, probably, \textit{prima facie} be attributable to the other party's breach of contract\(^\text{13}\) and so if a contractual party wishes to escape liability in damages, or indeed to claim in debt for the price of a service rendered, he will have to show that any damage suffered by the other contractual party is not the result of a breach of a term of the contract\(^\text{14}\).

That said it must be remembered that it is a general rule of pleading that in damages cases arising out of fault it is for the party alleging fault to prove it. Accordingly if the subject matter of a contract is destroyed for some unexplained reason it would seem that the question of liability might simply be one of burden of proof\(^\text{15}\). Take the case of the hiring out of a chattel by O (owner) to H (hiring): if the chattel explodes and is destroyed for some unexplained reason several quite different questions can arise. Can O sue H in damages arguing that H is in breach of his obligation towards the chattel\(^\text{16}\)? And if so, for how much? Can O sue H in debt for the hire fee if H refuses to pay anything because of the loss of the chattel hired?\(^\text{17}\) Can H sue O for damages for any physical injury he might have suffered as a result of the explosion?\(^\text{18}\) Can H sue O for his economic losses resulting from the loss of use of the chattel?\(^\text{19}\) Each of these questions, it might be said, arises out of the same contractual relationship, but the way that they are answered may depend on issues which reach beyond the contractual bond itself because the common law has never devoted much attention to the role of fault in contractual liability\(^\text{20}\). It has on the whole preferred to start from the nature of the remedy pursued and to deal with difficult causal problems by reference to notions which function at this level, for example burden of proof, defences, remoteness of damage and the like.

146. One starting point, then, for discharge of contractual obligations is often to be found in the distinction between debt and damages (cf. Ch. 4 § 1)

\(^{11}\) \textit{Taylor v Caldwell} (1863) 122 ER 309.
\(^{14}\) \textit{Vigers v Cook} [1919] 2 KB 475.
\(^{15}\) Treitel, para.12.
\(^{16}\) \textit{Re Polesis} [1921] 3 KB 560.
\(^{17}\) \textit{Vigers v Cook} [1919] 2 KB 475. See also \textit{The Eugenia} [1964] 2 QB 226.
\(^{18}\) \textit{Reed v Dean} [1949] 1 KB 188.
\(^{19}\) \textit{Joseph Constantine SS Ltd v Imperial Smelting Corporation} [1942] AC 154.
\(^{20}\) Treitel, para.10.
which, in turn, may well be related to the unilateral and bilateral dichotomy. In a bilateral contract non-performance will usually be seen as a breach of contract and the legal action will focus around the issue of liability in damages; in a unilateral contract non-performance by the promisee would be seen as a failure to provide consideration and the legal claim will centre upon liability for debt. Today most commercial contracts are bilateral but aspects of the unilateral approach can still attach to the way the problem is analysed; incomplete or different performance by a potential creditor could free the potential debtor from the promise to pay simply because the potential creditor has not furnished the required consideration. Many cases involving liability for defective or incomplete performance should, as we have suggested, be approached both from a substantive and from a remedial point of view. Under what circumstances will a contractor be relieved from having to pay rent, a price or some other contractual sum? Under what circumstances can a contractor refuse to go on with performance of his obligations under the agreement? Or under what circumstances can a contractor claim compensatory damages for damage caused by an accident or other event which has interrupted the contractual transaction?

§ 2 DISCHARGE BY PERFORMANCE

147. The general rule as to the entitlement to a contractual debt is governed first of all by the doctrine of performance. A creditor is entitled to the contract price only when he has completed his part of the bargain and only if his performance is exactly in accordance with the contract; an incomplete performance will entitle the creditor to nothing at all under the contract.

This performance rule may seem unduly strict (cf. Ch. 10 § 1) but it is subject to a number of exceptions. The rule will apply only to entire contracts and so in certain transactions the liability to pay the entire price will be apportioned into smaller debts payable on the completion of certain stages of performance. The courts have also formulated the doctrine of substantial performance. In this situation the court adheres to the principle that fulfilment of every promise or term is not necessarily a condition precedent for the payment of a lump sum price; if the performance of the contract could be said to be complete but defective then the court will, provided the defects are

21 Ibid., para.109.
22 Ibid., para.233.
23 The Liddesdale [1900] AC 190.
24 The Liddesdale [1900] AC 190.
26 Treitel, para.233.

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minor, allow recovery of the debt subject to a set-off for the cost of the defects\textsuperscript{27}. If the defects are serious, however, the strict rule will apply\textsuperscript{28}.

\textbf{§ 3 DISCHARGE BY BREACH}

148. A plaintiff who complains that a party has not rendered complete performance is, if the contract is bilateral, in effect claiming that there has been a breach of an implied term - an implied condition precedent (cf. nr. 130) - that the work will be completed\textsuperscript{29}. A debtor who refuses to pay for incomplete performance can, therefore, be seen as a contractor who is effectively repudiating the agreement for breach of a condition (cf. nr. 129); and such a repudiation is, as we have seen, a matter of general principle if the breach is either a breach of condition or is in itself grave enough to 'go to the root of the contract'\textsuperscript{30}.

Yet it is important to stress that it is not the breach itself which discharges the obligation but the election by the innocent party to bring the primary obligations under the contract to an end\textsuperscript{31}. This point is of importance in cases of 'anticipatory breach' where a party declares that he will not perform, or behaves in such a way as to disable himself from performing, the contract\textsuperscript{32}. In this situation the innocent party has a choice. He can either repudiate the contract at once and sue in damages for his loss - that is to say, he can rely upon the 'Secondary obligation on the part of the contract breaker ... to pay monetary compensation for the loss'\textsuperscript{33} - or keep the contract alive, perform his promises and then sue in debt for the full contract price provided that performance is possible without the cooperation of the party in breach\textsuperscript{34}. Only if such a debt claim were to amount to a very clear abuse of a contractual right would the court think about preventing the innocent party from recovering the price, although one judge has expressed his dislike for such an action in debt on the ground that it amounts to a form of specific performance of a contract (cf. nr. 41) in circumstances where damages 'would be an adequate remedy'\textsuperscript{35}.

What breaches will entitle an aggrieved, or innocent, party to repudiate the contract? There are, as we have seen (cf. nr. 129-132), two approaches to

\textsuperscript{27} Hoenig v Isaacs [1952] 2 All ER 176; applied in Williams v Roffey Brothers Ltd [1996] 2 WLR 1153.
\textsuperscript{28} Belton v Mahadeva [1972] 1 WLR 1099.
\textsuperscript{29} Hoenig v Isaacs, op.cit., at pp.180-182; Treitel, para.257.
\textsuperscript{30} Deeco-Wall v Practitioners in Marketing Ltd [1971] 2 All ER 216.
\textsuperscript{31} Treitel, para.280.
\textsuperscript{32} Treitel, para.279.
\textsuperscript{33} Lord Diplock in Photo Production Ltd v Securicor [1980] AC 827, 849.
\textsuperscript{34} White & Carter (Councils) Ltd v McGregor [1962] AC 413.
\textsuperscript{35} Lord Denning in Attica Sea Carriers Corp v Ferrostaal [1976] 1 Li Rep 250.
this problem. The court can look at the status of the term broken and, if it was a 'condition', give the innocent party the right to repudiate\textsuperscript{36}. The problem with this approach, however, is that it may give the innocent party the right to terminate for what is in truth a relatively minor breach\textsuperscript{37}. The other approach is to look at the breach itself and to decide whether such a breach goes to the root of the contract\textsuperscript{38}. The problem here is that it may allow a party to repudiate a contract for the breach of a relatively minor term\textsuperscript{39}. No doubt this latter approach appears more sensible given that it is a general feature of the law of obligations both to measure liability against the degree of harm and of default\textsuperscript{40} and to try to prevent situations where one party might be able to enrich themselves from the abuse of a contractual right\textsuperscript{41}. Yet the doctrine of freedom of contract (cf. Ch. 6 § 4) would appear to dictate that it should be left to the parties to decide upon the status of terms\textsuperscript{42} and so the whole question of discharge by breach might also have to be viewed in the context of a dichotomy between commercial and consumer law.

§ 4 DISCHARGE BY AGREEMENT

149. It must be said, of course, that in many commercial and business relationships an innocent party might elect to keep the contract alive for reasons other than a desire to extract the full debt. An innocent party might, for example, decide to keep the contract alive and accept a different performance from the other party or to abandon completely both the primary and the secondary obligations under the contract. In other words, the parties to a contract may expressly or impliedly agree to discharge or vary the original contract.

Such a discharge or variation presents few problems when the contract to be discharged or varied is still executory on both sides - that is, when neither party has performed his promise(s) under the bargain. For the new pact will generate its own consideration and the agreement will be seen as a new contract replacing an old one. Problems arise when a contract is varied or discharged after one of the parties has executed his part of the bargain because the new pact will lack the necessary consideration to make it enforceable at common law (cf. Ch. 7 § 3). Thus the creditor who agrees to accept a lesser sum than the contractually stipulated debt can, if he has performed his side of the bargain, disregard this subsequent agreement as a

\textsuperscript{36} Treitel, para.267.
\textsuperscript{37} The Hansa Nord [1976] QB 44; Treitel, paras.259, 264.
\textsuperscript{38} Treitel, paras.260, 264.
\textsuperscript{39} Aerial Advertising Co v Batchelor's Peas Ltd [1938] 2 All ER 788.
\textsuperscript{40} Treitel, para.268.
\textsuperscript{41} Treitel, para.267 (p.363).
\textsuperscript{42} Bunge Corp v Tradax Export [1981] 1 WLR 711.
nudum pactum and sue for the full debt (cf. nr. 97). Equally the contractor who subsequently promises to pay more than the origially agreed price can, in theory if not in practice⁴³, claim there is no consideration to support the second promise (cf. nr. 93).

Nevertheless, as we have seen, the position is by no means as simple as the common law at first suggests because a promise unsupported by consideration, although in principle a nudum pactum, is not necessarily without legal effect (cf. nr. 97). The doctrine of estoppel (cf. nr. 44) may well prevent a promisor going back on his bare promise and this equitable doctrine has, in the area of discharge and variation of contracts, been given added support by the common law doctrine of waiver⁴⁴. This latter doctrine is founded in the election right given to an innocent party faced with a serious breach of contract: if the innocent party elects to waive his right to repudiate the contract for breach of condition this election will act as 'a kind of estoppel'⁴⁵ and he will be forced from then on to rely upon his remedy of damages for breach of warranty (cf. nr. 131).

When estoppel and waiver are taken together it seems that an agreement to discharge or to vary an existing, but partly executed, contract will be effective in law to the extent that the promisor in the second pact will be prevented from going back on his promise if the promisee has relied upon the promise and it would be inequitable to allow him to enforce his strict contractual rights. Whether this doctrine has its foundation in common law or in equity is not entirely clear⁴⁶; what is clear is that an existing substantive contractual obligation can, in strict contractual theory, be replaced only by a second contract supported by consideration. Consequently when a partly executed contractual obligation is varied or discharged for the benefit of just one of the parties any legal consequences attaching to this new pact belong, not so much to the substantive law of contractual rights, but more to the law of actions or remedies.

§ 5 DISCHARGE BY FRUSTRATION

150. One of the dangers that threatens the innocent party who elects to keep a contract alive after a serious breach is the danger that some later event (casus) may supervene to discharge the contractual obligation, freeing the party in breach from any potential liability⁴⁷. Such a supervening event which

⁴³ Williams v Roffey Brothers Ltd [1990] 2 WLR 1153.
⁴⁴ Treitel, para 200.
⁴⁵ Charles Rickards Ltd v Oppenheim [1950] 1 KB 616; see also Sale of Goods Act 1979 s.11(2).
⁴⁷ See e.g., Avery v Bowden (1855) 119 ER 647; Bank Line Ltd v Arthur Capel & Co [1919] AC 435.
leads to impossibility of performance is known as the doctrine of frustration and, in English law, it plays a similar role to that played by cause estrangère and force majeure in French and Netherlands law.

However the doctrine of frustration differs in its approach to contractual liability from the Continental doctrine of force majeure in that frustration is, in theory, less a question of contractual liability and more a question of the frustration of the bargain itself (cf. Ch. 10 § 1). The approach is to focus upon the object of the economic transaction and not upon the party claiming impossibility of performance. It may be, of course, that a party claiming frustration of the venture will have to go some way in showing that the alleged frustrating event is not due to any fault on his part. And even then it must be remembered that it is an axiom of English contract law 'that, in relation to claims for damages for breach of contract, it is, in general, immaterial why the defendant failed to fulfil his obligation, and certainly no defence to plead that he had done his best'. But if the intervening event is held to be a frustration of the contract the doctrine operates to set the venture aside rather than to relieve performance of one of the parties. Indeed the doctrine of frustration was, and still is to some extent, much closer to a 'vitiating factor' (cf. Ch. 8) and this was once reflected in the idea that frustration, like mistake (cf. Ch. 8 § 7), was dependent upon an implied condition precedent concerning the continued existence of the subject-matter of the contract, later extended to the commercial substance of the bargain.

Today the subjective implied term theory has been discarded and replaced by the objective 'reasonable man' hypothesis. It is the court, acting as the 'reasonable man', which discharges the contract on the basis that the frustrating event would make performance of the promise radically different from that originally undertaken: non haec in foedera veni. All the same, the doctrine of frustration is applied only in very narrow limits. Thus if the frustrating event is 'self-induced' - that is, it arises from the fault, default or

48 See art. 1148 Code Civil: Il n'y a lieu à aucun dommages et intérêts lorsque, par suite d'une force majeure ou d'un cas fortuit, le débiteur a été empêché de donner ou de faire ce à quoi il était obligé, ou a fait ce qui lui était interdit.
49 Zweigert & Kötz, II, pp.190-191, 199-200; The Hannah Blumenthal [1983] 1 AC 854, 881-882 (CA); Netherlands Civil Code s. 6: 74-1 and 75.
51 Lord Edmund-Davies in Raineri v Miles [1981] AC 1050, 1086. And see Treitel, para.10.
52 Taylor v Caldwell (1863) 122 ER 309.
53 Jackson v Union Marine Insurance Co Ltd (1874) LR 10 CP 125.
55 See e.g., Treitel, para.18.
deliberate act of one of the parties\textsuperscript{56} - the venture will be discharged but the person who induced the \textit{casus} will remain contractually liable to the other party\textsuperscript{57}. And a mere increase in expense\textsuperscript{58} will not be enough to set the venture aside unless, perhaps, the increase is so astronomical as to give rise to a 'fundamentally different situation'\textsuperscript{59}. Also, if there is an express clause in the contract which specifically covers the \textit{casus} this will prevent the doctrine of frustration from applying, save where the intervening event is illegality arising, say, from the outbreak of war\textsuperscript{60}.

In debt cases arising from the hire of property difficult problems can arise where the supervening event frustrates the purpose for which the property was to be used. In these situations the courts have to distinguish between contractual venture (the 'foudation of the contract') and motive and this can often be a difficult question of fact, and law\textsuperscript{61}, depending on the circumstances of each particular case\textsuperscript{62}. However the House of Lords has indicated\textsuperscript{63} that when it comes to applying the doctrine of frustration it is not a matter of reasoning by analogy, involving the massive citation of previous cases, but the application of Lord Radcliffe's 'radically different' test\textsuperscript{64}.

151. All the same it can still be important to distinguish between various classes of contracts because in cases where a contractor is claiming in debt much can turn on the 'consideration' furnished in respect of the debt. Did the debtor contract for a specific thing or did he contract for a chance to make a profit which has not materialised? Or, put another way, upon whom should fall the risk when expectations fail to materialise because of some unforeseen event? Leases present particular difficulties here because a debtor can rent land for a particular commercial purpose. If that purpose is frustrated by some supervening event does that also frustrate the lease? One old case made the point that there are profit and loss risks attached to land and the court refused to relieve the debtor from liability to pay the rent because, in effect, the owner of the property had performed his side of the bargain\textsuperscript{65}. This decision was later seen as denying completely any doctrine of frustration in English contract law\textsuperscript{66}. Yet leases can still appear immune in practice, if not

\textsuperscript{56} \textit{Maritime National Fish Ltd v Ocean Trawlers Ltd} [1935] AC 524.
\textsuperscript{57} \textit{Shepherd & Co Ltd v Jerom} [1986] 3 WLR 801, 818-819.
\textsuperscript{58} \textit{The doctrine of imprévisión: Zweigert & Kötz, II, pp.217-226; Isabelle de Lamberterie, Harris & Tallon, pp.228-234.}
\textsuperscript{59} \textit{The Eugenie} [1964] 2 QB 226, 240. But see \textit{Staffs Health Authority v S Staffs Waterworks} [1978] 1 WLR 1387; and the Netherlands Civil Code, \textit{s. 6: 258 and 260 (imprévisión).}
\textsuperscript{60} Bell, Harris & Tallon, p.208.
\textsuperscript{61} \textit{The Nema} [1982] AC 724.
\textsuperscript{62} \textit{Kpell v Henry} [1903] 2 KB 740.
\textsuperscript{63} \textit{The Nema} [1982] AC 724.
\textsuperscript{64} \textit{Davis Contractors Ltd v Fareham U.D.C.} [1956] AC 696, 729.
\textsuperscript{65} \textit{Paradine v Jane} (1647) 82 ER 897.
\textsuperscript{66} Cooke & Oughton, p.194.
in theory, from the doctrine of frustration and this is simply because in this class of case the risks attach to the property rather than to the obligation. There is, it might be said, 'no total failure of consideration' and consequently the contractual promise remains in existence.

§ 6 RESTITUTION AND DISCHARGE OF CONTRACT

152. The notion of a 'total failure of consideration' is also an important concept in handling the very difficult restitution problems that can arise when contracts are discharged (cf. Ch. 8 § 10). As a general principle an action in quasi-contract (cf. nr. 158) is available only when the contract itself has been completely discharged; and such discharge will take effect only if there has been a total failure of consideration. If there has been no such failure then the contract will remain in existence, although this may prove just as advantageous for any plaintiff in that a damages action for breach is usually as good as, if not better, than any debt claim in restitution.

These restitution problems were at one time particularly acute with regard to frustrated contracts because, in the absence of a total failure of consideration, the rule at common law was that the loss was to lie where it fell. And even if there had been a total failure of consideration allowing one party to recover a payment made before frustration, there were no means by which the other party could recover an indemnity for any expenses incurred unless, perhaps, some tangible benefit had been bestowed. Some of these 'all-or-nothing' defects with regard to frustrated contracts have been remedied by statute. If money has been paid, or has become payable, before the frustration the payer can recover the sums paid, or will cease to be liable for the sums payable, except insofar as the court can allow the payee to deduct, or to claim for out of money due, any expenses incurred in the performance of the contract. And if one party has obtained under the contract a 'valuable benefit' as a result of anything done by the other party before frustration, the person receiving the benefit can be made by the court to pay for such a benefit received. The principle upon which the court operates in ordering these deductions or claims with regard to expenses and benefits is the equitable principle of unjust enrichment; the court orders a deduction.

67 National Carriers Ltd v Panalpina (Northern) Ltd [1981] AC 675; and see also Amalgamated Investment & Property Co v John Walker & Sons [1976] 3 All ER 509.
68 Zweigert & Kötz, II, pp.196-200.
69 Rover International Ltd v Canon Films Ltd [1989] 1 WLR 912.
70 See Yeoman Credit Ltd v Appx [1962] 2 QB 508.
71 Chandler v Webster [1904] 1 KB 403.
72 Fibrowa v Fairbairn [1943] AC 32.
73 Law Reform (Frustrated Contracts) Act 1943 s.1(2).
74 Section 1(3).
or an indemnity where it is ‘just’ in the ‘circumstances of the case’ to do so. Yet the use of this principle of restitution or unjust enrichment also has its disadvantages in that, in looking to the defendant’s benefit rather than to the plaintiff’s loss, the words ‘valuable benefit’ will be interpreted, not by reference to things done or to money expended by the plaintiff, but by reference to the benefit itself. If the defendant has received no actual or real benefit he will not be liable under the statute.

It must also be observed that the 1943 statute applies only when a contract has been discharged through frustration and so where a contract has been discharged for breach the rules of common law are applicable. One of these rules, as we have seen, stipulates that a party who fails to render complete performance is in principle entitled to nothing (cf. Ch. 10 § 2). But this strict rule may not be applicable if it can be shown that the innocent party to a breach expressly or impliedly agreed to accept a partial performance; and it may be that a party who has received a large advance payment would not be entitled to keep the whole amount if such a deposit amounted to a penalty (cf. Ch. 9 § 5). Furthermore statute allows the court to order restitution of advance payments in certain kinds of transaction, for example in consumer hire-purchase and consumer hire contracts.

153. Sometimes it is tempting to think that there is a general principle of unjust enrichment which will come into play in all situations where a contract has been discharged. Yet if there is such a principle it is not one that per se will give rise to any restitutatory remedy in this area of the law (cf. Ch. 11 § 4). In unjust enrichment problems arising out of a breach of contract the rules applicable will be the rules that attach to any restitution remedies existing in the law of actions; but these law of actions rules will in turn be subject to any policy considerations that attach to the law of contract (cf. nr. 161).

§ 7 BREACH OF CONTRACT AND DAMAGES

154. When a contract is discharged for breach we have already seen that the distinction between debt and damages can be of relevance because the remedy of debt is, in truth, a kind of specific performance of the contract (cf. Ch. 10 § 3). It is a remedy that grows directly out of the primary contractual obligation itself. A damages claim, in contrast, does not arise out of the

75 B.P. Exploration (Libya) Ltd v Hunt (No.2) [1979] 1 WLR 783; [1983] 2 AC 352.
76 Sumpter v Hedger [1898] 1 QB 673.
77 Consumer Credit Act 1974 ss. 100, 132.
primary contractual obligation; it is a 'secondary obligation ... to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach'.

First, what if a failure to pay a contractual debt causes loss to the creditor over and above the amount of the debt itself? Can the creditor sue the debtor both at the primary (debt) and the secondary (damages) levels? As the two remedies are also separate causes of action (cf. Ch. 4 § 1), it would appear that a compensation claim can be mounted, although the loss would specifically have to be proved as 'special damage' and not be too remote. One might add that interest on a debt, irrecoverable at common law, can now under statute be awarded at the discretion of the court.

A second question concerns the nature of the interest protected by debt and damages actions. If an award of money at common law is, in general, to compensate a contracting party for breach of promise, what kind of interest does a debt claim protect? And is the interest protected by debt one that will be protected by an award of damages as well? The standard response here is to say that a successful debt claim is protecting a contractor's 'expectation interest' and that this is an interest which an award of damages will also seek to protect in contract. In other words a monetary remedy for breach of contract will compensate both consequential losses (damnum emergens) and failure to make gains (lucrum cessans). The problem, however, is that in fact this is not always true of a damages action because, unlike debt, it is subject to the rules of causation and remoteness (cf. Ch. 4 § 1); in truth the expectation interest may well find itself excluded, perhaps because of difficulties of proof or causation, leaving the plaintiff either to his reliance or to his restitutionary interests.

A third question arises out of the nature of the interests themselves. Will a monetary award protect only the economic interests of the contractor or will it extend to the more intangible losses? Here the position is quite complex because although an award of damages will go well beyond the immediate economic loss in personal injury and physical damage cases - for the damages rules here are the same as in tort - the courts are often

81 *Wadsworth v Lyddell* [1981] 2 All ER 401.
82 *Supreme Court Act* 1981 s. 35A.
83 Fuller & Perdue (1936) 46 Yale LJ 52; Treitel, para.82.
84 *Damon Compania Naviera v Hapag-Lloyd International* [1985] 1 WLR 435.
85 Treitel, para.34; cf French CC art.149. For the historical background see Zimmermann, pp.826-833.
86 See generally Treitel, paras.93-98.
87 See e.g. *Anglia TV v Reed* [1972] 1 QB 60.
88 See e.g. *Farnworth Finance Facilities Ltd v Attridge* [1970] 1 WLR 1053.
89 *Parsons v Utley Ingham & Co* [1978] QB 791; Treitel, para.86..
reluctant to compensate for mental distress and disappointment. For example, they will compensate for the loss of a chance to win a competition and they will give damages for mental distress in a certain kind of contract case, namely where the object of the contract is to provide peace of mind and freedom from distress. Yet on the whole, contract being a creature of commercial law, finds itself protecting interests which are usually solidly economic and its damages rules, in commercial law itself, thus tend to be quite generous in terms of *lucrum cessans*, at least when compared with tort, and quite strict in terms of certain *damnnum emergens* interests. A breach of contract must disclose actual economic loss before a plaintiff can recover substantial damages.

91 Chapin v Hicks [1911] 2 KB 786.
93 Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528.
§ 1 HISTORICAL REMARKS

155. Lord Haldane said in 1914 that broadly speaking, so far as proceedings in personam are concerned, the common law of England really recognises (unlike the Roman law) only actions of two classes, those founded on contract and those founded on tort. This twofold division of the law of obligations would, in fact, cause little surprise to a Continental lawyer since the history of the Civil law is beset with conceptual difficulties not dissimilar to those experienced by the modern common law. The inadequacies of the contract and delict (tort) dichotomy were recognised at almost the same moment as they were originally proposed. In particular the dichotomy left little place for the non contractual debt claims. Subsequent Roman jurists developed the category of quasi-contract to accommodate those in personam debt actions which could be based neither on agreement nor on wrongs and this categorisation exercise was completed when the late medieval and Renaissance Civilians brought together various in personam remedies, the category of quasi-contract and the principle, to be found in Roman law, of unjust enrichment (cf. Ch. II § 4). Modern Civil lawyers, to a greater or lesser extent, all now recognise that the law of obligations consists of a threefold subdivision of contract, quasi-contract and delict.

156. The Netherlands Civil Code has adopted a different approach (cf. Ch. 5 § 1), departing from the rule that the only source of obligations is the law itself. And the dichotomy between contract and quasi-contract is unknown in Netherlands law. In France, much attention has been given to the question whether the obligation to compensate damage in delict (tort) differs structurally from its counterpart, damages for non-performance of a contractual obligation. Nowadays it is held that, basically, there is no substantial difference between these obligations, although the rules may vary in several ways. In Netherlands law, the liability for non-performance of an

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1 Sinclair v Brougham [1914] AC 398, 415.
3 Stein, p.205.
4 See on the development described in this para. Zweigert & Kötz, II, pp.230-244; and see now for English law Lipkin Gorman v Karpnale Ltd [1991] 3 WLR 10, 32-33. See for Netherlands law p.110 (In 63).
5 Asser-Hartkamp I, p.38.
obligation is regulated separately from other sources of obligations, mainly for practical reasons but the rules might converge in cases of *samenloop* (concurring causes of action). The obligation to compensate damage is controlled (uniformly) by s. 6: 95 infra.

In Netherlands Civil Law, apart from delict and contract, *negotium gestio* *(zaakwaarneming)*, *solutio indebiti* *(onverschuldigde betaling)* and unjustified enrichment *(ongerechtvaardigde verrijking)* exist as sources of obligations. *Negotium gestio* consists in intervening intentionally and on reasonable grounds in order to safeguard another person's interests without any authority derived from a juristic act or a specific statutory (legal) relationship (s. 5: 198). *Solutio indebiti*, performance in the absence of any obligation to perform, gives the right to reclaim money paid or to force the other party to undo the performance received (s. 6: 203). Anyone who has been unjustifiably enriched at the expense of another is obliged, as far as is reasonable, to compensate the other's loss to the extent of his enrichment (s. 6: 212).

When one turns to English law the position appears to be, as we have seen, that there are only two categories within the law of obligations. This lack of any general substantive principle of restitution (cf. Ch. 11 § 4) is indicative of the dominating role that contract has exerted on the English law of obligations for well over a century now. What developments there had been in quasi-contract at the dawn of the industrial revolution were quickly restricted by the theory that quasi-contracts were implied contracts based upon the fiction of an implied promise; and even if such a fiction has now been abandoned the relationship of the parties can still remain a pre-condition for

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7 Parlementaire Geschiedenis Book 6, p.377f and 614f.
8 No attempt will be made to find an English equivalent for *onverschuldigde betaling*, cf FH Lawson, Book 6 *The law of obligations*, Leyden 1977 p.51 fn, comparing the rule with the Common law action for money under a mistake of fact, covering also payment under coercion and performance of contracts that are void. See e.g. *onverschuldigde betaling* to an agent: Van Deuff v Stolp, NJ 1991, nr. 200.
9 Note that unjustified enrichments and *solutio indebiti* are dealt with separately in the Netherlands Civil Code; in e.g. German law, this situation is different, see § 812 BGB: (I) Wer durch die Leistung eines anderen oder in sonstiger Weise auf dessen Kosten etwas ohne rechtlichen Grund erlangt, ist ihm zur Herausgabe verpflichtet. Diese Verpflichtung besteht auch dann, wenn der rechtliche Grund später wegfällt oder der mit einer Leistung nach dem Inhalte des Rechtsgeschäfts bezweckte Erfolg nicht eintritt (II) Als Leistung gilt auch die durch Vertrag erfolgte Anerkennung des Bestehens oder des nichtbestehens eines Schuldverhältnisses. And Ungerechtfertigte Bereicherung durch die Leistung eines anderen (und) Leistungen zum Zwecke der Erfüllung einer Verhältnis, die in Wirklichkeit nicht besteht (conditio indebiti) are submitted to § 812 (f), cf. Palandt (Thomas), *Bürgerliches Gesetzbuch* (*München*, 1991) § 812, p.882.
10 See also County Courts Act 1984 s.15(1).

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restitution. Thus the nearest that English law can get to a doctrine of *negotiorum gestio* is to allow a debt claim for necessary expenses to arise out of the relationship of agency or bailment\(^{12}\).

In tort, also, the dominating role of contract was given support by the nineteenth century empirical reality that most accidents happened on the railways or in the workplace\(^{13}\). A great many damages claims could thus be decided on the basis of an implied term within a contractual relationship. It was only with the growth of road accidents that the 'contractual' duty of care was transferred from the implied term to the tort of trespass\(^{14}\) and in the twentieth century consumer protection problems finally stimulated the courts into giving legal independence to the 'implied duty of care'\(^{15}\). All the same, the separation has never been a complete one; the scope and contents of the independent duty of care can, on occasions, still be dependent, if not actually upon the existence of a contractual relationship, then upon a relationship that is 'near to' or 'equivalent to' contract\(^ {16}\).

Yet the rapid growth of the tort of negligence in this century (cf. Ch. 12 § 4) ought not to be allowed to obscure the fact that its history in many ways pre-dates that of the category of contract. For the idea of promissory liability is, in England, a relatively recent phenomenon associated with the decline and abolition of the forms of action\(^ {17}\). In the early era of the Common law most compensation actions were 'tortious' in the sense that they were, directly or indirectly, founded on trespass or nuisance; and those actions that were not - debt and detinue for example - were more proprietary than obligatory\(^ {18}\). Before the nineteenth century English lawyers thought more in terms of trespass and debt than contract and tort and this older dichotomy, emphasising as it does the remedy rather than the right, is still a characteristic of the modern common law.

\section*{§ 2 DEBT AND DAMAGES ACTIONS}

157. The distinction between debt and damages is, then, not only fundamental in the English law of remedies (cf. Ch. 4 § 1) but is a distinction that can also act as a good guide when it comes to the classification of non-contractual obligations. For the distinction between debt and damages

\begin{footnotes}
\begin{enumerate}
\item The \textit{Wislon} [1982] AC 939.
\item Aiyah, \textit{Rise and Fall}, pp.501-505.
\item \textit{Holmes v Mather} (1875) LR 10 EX 261.
\item \textit{Donoghue v Stevenson} [1932] AC 562.
\item Milsom, p.355.
\item Note how debt continues to be proprietary in nature; it is still something that can be 'owned': \textit{Lipkin Gorman v Karpnale Ltd} [1991] 3 WLR 10, 29.
\end{enumerate}
\end{footnotes}
reflects in English law, just as it did in Roman law, a difference between unjust loss and unjust benefit. The action of debt, like the Roman condicio, can be used to claim money in situations where a defendant has obtained a benefit which it would be unjust for him to retain; the action for damages, although it can be used to prevent unjust enrichment, has been fashioned mainly to deal with problems of compensation, and so is more suitable for dealing with problems of loss and injury. Non-contractual debt actions might then be said to form the basis of quasi-contract, while non-contractual damages might be seen as the basis of delictual liability - that is to say the law of tort.

§ 3 NON-CONTRACTUAL DEBT ACTIONS (QUASI-CONTRACT)

158. Quasi-Contract
The idea that some debt claims can be justified by reference neither to the law of tort nor to the law of contract has exercised the minds of the modern common lawyers as much as it once exercised the minds of Roman and Civilian jurists. Traditionally many of these debt claims have been rationalised either as implied or fictitious contracts or as 'empirical' remedies in the law of actions; today the tendency is to agree with Lord Wright and to see such claims as falling 'within a third category of the common law which has been called quasi-contract or restitution' - although a complete separation from contract or the law of actions has not yet been achieved. These non-contractual debt claims developed in form from the old action of indebitatus assumpsit and in substance from the equitable action of account (cf nr. 37); and in the modern law they take several forms depending upon the nature of the benefit conferred upon the defendant (cf. Ch 8 § 10; Ch. 10 § 5). But it has to be stressed that this is an area of the English law of obligations that is somewhat underdeveloped in that quasi-contract remains closely tied to the forms of action.

159. The Action for Money Had and Received
The first form of quasi-contractual claim, an action for money had and received, is an action which quite closely resembled, indeed may even have taken its nineteenth century motivation, from the old Roman condicio. It is thus available for the return of money paid under a mistake of fact, under

19 United Australia Ltd v Barclays Bank Ltd [1941] AC 1, 26-27; Fibrosa etc v Fairbairn etc [1943] AC 32, 61-64; Lipkin, supra, p. 29.
21 Orakpo v Manson Investments Ltd [1978] AC 95, 104.
23 For an excellent survey from the position of unjust enrichment see Zweigert & Kötz, II, pp.244-254.
24 See for the 19th century developments on quasi-contracts Coing, p. 499-511.
compulsion or under a transaction whose consideration has wholly failed (cf. Ch. 8 § 10; Ch. 10 § 5).

Furthermore the action for money had and received is available in situations where the defendant has received money from a third party of which account ought to be made to the plaintiff, and where the defendant has profited at the plaintiff's expense through the commission of an unlawful act. In this latter situation the action for money had and received might be a useful alternative to a damages claim for breach of statutory duty (cf. Ch. 12 § 5) where the defendant has made a profit from his crime, although it is likely that the equitable remedy of account (cf. nr. 45) will now be more relevant.

160. The Action for Money Paid
The second form of quasi-contractual debt claim is available in cases where the defendant has received a benefit by reason of money paid by the plaintiff to a third party. This claim is useful in situations where the plaintiff has paid money on the defendant's behalf in circumstances of necessity and thus it can resemble the Roman action of negotiorum gestio (cf. Ch. 11 § 1). However in contrast to negotiorum gestio it is probably available only in situations where there is some pre-existing relationship between the parties such as agency or bailment and thus the existence of a factual emergency will not per se be enough to give rise to quasi-contractual liability.

161. Quantum Meruit
The third form of debt claim is available, together with its sister quantum valebat, to recover money for services or for property supplied to the defendant. However it must be remembered that it is an established principle of English law that the mere rendering of services or property to another is not enough, in itself, to give rise to restitutionary liability since 'liabilities are not to be forced upon people behind their backs'. Accordingly in a quantum meruit or valebat action the plaintiff must normally show that the defendant expressly or impliedly requested, or at least he freely accepted, the services or goods in question. If such services or goods were rendered pursuant to a contract incompletely performed then it is unlikely that the courts would allow a quasi-contractual claim unless there is evidence that the defendant had agreed to accept incomplete performance (cf. Ch. 10 § 1 and 5). But where services have been rendered under a void contract the court will

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25 This kind of claim is akin to a tracing (in rem) action and thus is not based on the notion of a 'wrong': Lipton Gorman v Karpnale Ltd [1991] 3 WLR 10, 29, 32-35.
26 Reading v Att-Gen [1951] AC 507.
29 Faleke v Scottish Imperial Insurance Co (1886) 34 Ch D 234, 248.
30 Sumpter v Hedges [1898] 1 QB 673.
in principle allow a quasi-contractual action for their value\textsuperscript{31} provided that
the principle of restitution takes account of any policy considerations which
underlie the rule that makes the contract void, illegal or unenforceable (cf.
Ch. 8 § 10). The courts are not prepared indirectly to enforce certain contracts
that statute has made illegal or void\textsuperscript{32}.

162. **Defences to Restitution**

Given that most of these non-contractual debt claims have their foundation
in the law of actions rather than in some rationalised structure of
restitutionary rights\textsuperscript{33}, it has not been that easy to develop a coherent set of
defences to such claims. Furthermore the vagueness of the whole area ('unjust
enrichment') has also meant that defences have tended to become swallowed
up by the discretionary nature of the 'right' itself. However developments are
now taking place in English law. A plaintiff who, in full knowledge of a
possible ground on which to contest liability, nevertheless pays a claimed debt
in consequence of a deliberate decision not to contest the claim can be met
with the defence of voluntary payment should he ever wish to claim
restitution\textsuperscript{34}. And a defendant who can show that he has changed his position
as a result of the payment - for example he has given the money to a charity
- now has a substantive defence provided he can show that he was neither a
wrongdoer nor one who has paid in bad faith\textsuperscript{35}. It must be stressed, however,
that merely showing that the money received has been paid to some third
party will not of itself amount to the defence of change of position\textsuperscript{36}.

\textbf{§ 4 UNJUST ENRICHMENT}

163. Alongside these common law quasi-contractual debt claims and their
defences the Court of Chancery provides a number of equitable remedies and
doctrines which can also perform the function of preventing a person from
obtaining or retaining an unjustified benefit (cf. nr. 45-47). Three remedies of
particular significance are account (cf. nr. 45), tracing (cf. nr. 46) and
subrogation (cf. nr. 47). However it has also been said of subrogation that it
is a remedy that appears 'to defeat classification except as an empirical
remedy to prevent a particular kind of unjust enrichment'\textsuperscript{37} and, given this
reference to unjust enrichment, and given all the different quasi-contractual
and equitable remedies which appear to be designed to prevent it, it is
tempting to hold that there exists in England the adage: \textit{jure naturae aequum}

\begin{flushright}
\textsuperscript{31} Craven-Ellis v Canons Ltd [1936] 2 KB 403.
\textsuperscript{32} Orakpo v Manson Investments Ltd [1978] AC 95.
\textsuperscript{33} But see generally P Birks, \textit{An introduction to the law of Restitution} (Oxford,
\textsuperscript{34} R v Tower Hamlets LBC, Ex p. Chensik Ltd [1988] 2 WLR 654, 670.
\textsuperscript{35} Lipkin Gorman v Karpnak Ltd [1991] 3 WLR 10.
\textsuperscript{36} Lipkin Gorman v Karpnak Ltd [1991] 3 WLR 10, 35.
\textsuperscript{37} Orakpo, supra, p.104.
\end{flushright}
est nominem cum alterius detrimento et injuria iei locupletiorum (by natural law it is equitable that no one should be enriched by the loss or injury of another)\textsuperscript{38}. Certainly the principle seems to have been used as the basis for decision in a few cases and it even appears in a modern statute\textsuperscript{39}. Yet it would be wrong to say that the principle exists in England as an independent source of obligations\textsuperscript{40}. What does exist are a number of in personam and in rem remedies which can be used, \textit{inter alia}, to prevent unjust enrichment\textsuperscript{41}; in other words, if there is a principle of unjust enrichment, it is a principle that operates only through the existing categories of substantive law - through contract, tort, equity or bailment - or through certain 'empirical' remedies belonging to the law of actions.

The position in Netherlands law as to unjust enrichment is quite simple: s. 6: 212 gives the general rule for ongerechtvaardigde verrijking. Anyone who has been unjustifiably enriched at the expense of another is obliged, as far as is reasonable, to compensate the other's loss to the extent of his enrichment (cf. nr. 154). And generally speaking, the sources of obligations in the Netherlands Civil Code comprise, apart from delict, contract and unjust enrichment, \textit{negotiorum gestio} and \textit{solutio indebiti}. In English law, when it comes to the classification of non-contractual obligations, non-contractual debt actions might be said to form the basis of quasi-contract, while non-contractual damages might be seen as the basis of delictual liability - that is to say the law of tort. Equity, in addition, provides a number of remedies designed, \textit{inter alia}, to prevent unjustified enrichment.

\textsuperscript{38} Zimmermann, pp.873-874.
\textsuperscript{39} Torts (Interference With Goods) Act 1977 s. 7(4).
\textsuperscript{40} Osako, op.cit., p.104; but see now Lipkin Gorman v Karpnale Ltd [1991] 3 WLR 10 where Lord Goff states (p. 33): The recovery of money in restitution is .... made as a matter of right; and .... the underlying principle of recovery is the principle of unjust enrichment.
\textsuperscript{41} See Lipkin Gorman v Karpnale Ltd [1991] 3 WLR 10,33.
12 NON-CONTRACTUAL OBLIGATIONS: DAMAGES ACTIONS (1)

§ 1 NON-CONTRACTUAL DAMAGES ACTIONS (TORT)

164. This chapter will look at damages actions falling outside of the law of contract (cf. Ch. 11 § 2). Such claims are said to fall within the law of torts, or tort (cf. Ch. 5 § 5), and most of this category is actually taken up with such actions. All the same an equitable remedy like injunction (cf. nr. 40) can be of importance in the development of certain areas of the law of tort, for example torts involving property (cf. Ch. 12 § 6) or interference with business relations (cf. Ch. 12 § 8), and so, strictly speaking, this chapter will embrace more than just claims for compensatory damages. From a law of obligations position the chapter will concern what a Continental lawyer would call delict and quasi-delict.

§ 2 HISTORICAL AND GENERAL REMARKS

165. It might seem ironical that tort (trespass), having once been the father of contract (assumpsit), should find itself in the twentieth century being the off-spring of contract (cf. Ch. 11 § 1). Yet such historical developments help explain why a strict comparison between English and Continental private law will always be difficult. The categories of contract and tort (delict), so well established in the Civil law, are in truth a relatively modern phenomenon when it comes to English law and this can mask the fact that in its formative days the Common law tended to think, not in terms of 'a coherent body of rules based on general principles and abstract concepts' but in terms of separate compartments of factual situations, each compartment being founded on a particular writ. This forms of action approach gave rise to a system of

1 Zimmermann, pp.19-20, 907-908. The Roman law notion of quasi-delict still exists in French law (see e.g. art. 1310 and 1370 if. Code Civil), although with a different meaning than in Roman law, see Asser-Hartkamp III, p.6. And the Netherlands Civil Code does not distinguish delict and quasi-delict. Onrechtmatige daad (delict) is dealt with in Title 6.3 (s. 6: 167-197).
2 See Zimmermann, pp.1-33.
3 Id., p.907. See e.g., the rule in Winterbottom v Wright (1842) 10 M & W 109; 152 ER 402: a plaintiff who was a third party to a contract could not make a claim in tort, that is a claim based on an independent tort duty, if the conduct of the defendant identified as tortious also happened to constitute a breach of contract (Stapleton, LOR (1991), p.250-251).
liability attached to categories of fact situation and types of injury. Even today non-contractual damages cases can still be determined as much, for example, by the place where an accident happened - or as much by the species of animal which causes damage - as by any general principle of fault or risk (cf. Ch. 5 § 5). Of course the development of a general liability based on promise meant that a large section of the law of obligations was transferred from a law of debt and damages to a category of 'contract' (cf. Ch. 5 § 4), but the apparent architectural perfection of this contract category did not of itself mean that the non-contractual debt and damages actions would also find themselves in categories unified by a common denominator. Indeed English law has still not fully accepted that non-contractual debt claims are founded upon a general source principle of unjust enrichment (cf. Ch. 11 § 4). And with regard to the non-contractual damages actions there is still a debate as to whether they belong to the category of torts or tort (cf. Ch. 5 § 5).

166. Roman law distinguished criminia publica and delicta privata. From delicta privata originated an obligatio ex delicto, mostly with a penal character (actiones poenales), but in Roman law itself, no general provisions for the effects of unlawful (defictual) responsibility developed. The most important remedies were based on specific delicts, for example the actio furti, the actio legis Aquilliae and the actio iniuriarum. Apart from delicts, Roman law recognised quasi-delicts, not being delicts leading to a genuine obligatio (in the normative sense of the term), but nevertheless giving similar remedies. In French law, the distinction between délit and quasi-délit (both belonging to the category responsabilité du fait personnel, as opposed to responsabilité du fait des choses and responsabilité du fait d'autrui) still exists but in Netherlands law this distinction is irrelevant.

167. In Netherlands law it is still held that - in principle - everyone has to bear the risk of his own damage; but the legislator, codifying judge-made law based mainly on the old Civil Code s. 1401, made inroads into this rule via a substantial set of statutes which impose liability for damage caused by one person to another and the most important rule in this respect is s. 6: 162. The old Netherlands Civil Code Section 1401 (dealing with faits illicites) was based on the French article 1382 Code Civil: tout fait quelconque de l'homme, qui

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4 Milsom, pp.398-399. The concepts causation, duty and remoteness could be used to resolve cases on an individual basis with more sensitivity to justice than the crude but administratively cheaper "bright line" of the no-liability rule. The exceptions to the general no-liability rule in English law, such as Hedley Byrne, seem to illustrate this: Stapleton, LQR (1991), p. 256 fn. 23.
5 See e.g., Jacobs v LCC [1950] AC 361.
6 Animals Act 1971.
7 See generally, CF Kolbert, Justinian: The Digest of Roman Law: Theft, Rape, Damage and Insult (Penguin, 1979).
8 See art. 1382-1384 Code Civil.
9 Cf Asser-Hartkamp III, p.5-7 and p.29. See on the 19th Century Continental law of delict and quasi-delict Coing, § 105 (Ausgangstage).
cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer. Section 1401, although no exact translation of its French counterpart, does not specify the notion of onrechtmatige daad\textsuperscript{10}, but since the 1919 landmark case Lindenbaum v Cohen\textsuperscript{11} the interpretation of s. 1401 by the Hoge Raad - now codified in s. 6: 162 - holds any act onrechtmatig (illicit) if it, without justification, interferes with a right, is in breach of a statutory duty or violates any rule of unwritten law pertaining to proper social decency. Justification is possible in cases of for instance force majeure\textsuperscript{12}, self-defence, statutory obligations (duties) and when acting by order of (competent) authorities\textsuperscript{13}. The law distinguishes the concept of onrechtmatige daad from the question whether an onrechtmatige daad can be attributed or imputed to its author. Attribution of an onrechtmatige daad is possible whenever the act results from his fault or from a cause for which he is accountable according to law or verkeersopvattingen (suivant l'opinion généralement admise)\textsuperscript{14}.

168. Netherlands law does not have a catalogue of all delicts (torts). The general rule is codified in s. 6: 162 and several liability rules and some delicts are dealt with separately. The Netherlands law of delicts rests on five elements, the onrechtmatige daad, fault or attributability of the act that constitutes a delict, damage, causality and relativity\textsuperscript{15}. Any onrechtmatige daad caused by fault or attributable to a person obliges the person responsible

\textsuperscript{10} The translation of the expression onrechtmatige daad is difficult (cf Haanappel & Mackay, p.298 nt. 1). Despite connotations with the criminal law and notwithstanding the irrelevance of the division delict/quasi-delict, preference is given to delict as a general category for unlawful/illicit acts. The most important article on tort/delict in the old Netherlands Civil Code (s. 1401) can be translated as 'every unlawful act which causes damage to another obliges the person by whose fault that damage has been occasioned to repair it', cf. DC Fokkema, Introduction to Dutch law for foreign lawyers, Ch. 9, p. 137. The difference between art. 1382 Code Civil and s. 1401 Netherlands Code Civil 1838 is that the French provision does not contain the notion onrechtmatig (illicit), but the more general expression tout fait quelconque.

\textsuperscript{11} NJ 1919 p.161, GE van Maanen, Onrechtmatige Daad (Groningen, 1986).

\textsuperscript{12} Cf. English law: Nichols v Marsland (1876) 2 Ex.D.1.

\textsuperscript{13} In the 1977 translation of the draft of Book 6 of the Netherlands Civil Code, onrechtmatige daad is labelled 'tort': a person who commits a tort is bound to make good the loss that other suffers in consequence thereof. The notion tort in Netherlands law is defined as an infringement of a right or an act or omission contrary to a statutory duty or to what is dictated by unwritten law in social intercourse, without the existence of a ground justifying it. A tort can be attributed to the actor if it is due to his fault or to a cause for which he is liable by virtue of statute or opinions prevailing in society (cf. the translation of the draft of s. 6: 162, s. 6.3.1).

\textsuperscript{14} The need to specify these different grounds for the attribution of an onrechtmatige daad to its author is disputed, see R Herrmann De (beperkte) betekenis van de toerekening op grond van verkeersopvattingen in art. 6.162 lid 3 NBW, Liber Amicorum NBW (De Die) (Arnhem 1991), p.93.

\textsuperscript{15} Asser-Hartkamp III, p.28.
to compensate and the law of damages, a general part of the law of obligations, lays down rules applicable to any statutory obligation to pay damages. The requirement of a causal link between the act or event that generates liability and the damage caused is codified in s. 6: 98. If a certain kind of behaviour - for example driving too fast - is wrongful because it increases the danger of a possible accident, and an accident occurs, the causal link between the behaviour and the accident is a given fact unless the opposite can be proved16.

The theory of relativity of the onrechtmatige daad originates from German law (Normzweck-theory): no obligation to pay damages exists, if the standard or duty that is violated was not ordained to protect the person who suffers damage against the specific type of loss suffered (s. 6: 163)17. Several actions are available in case of an onrechtmatige daad; the person who suffered a loss can claim compensation for damage in money or in kind, or reinstatement of the original state of things, as well as a judicial statement that the act was illicit, or an injunction prohibiting the act. In defamation cases, or cases concerning misleading advertisements, publication of a correction can be claimed.

The delicts mentioned specifically in the Netherlands Civil Code are, for example, liability of parents and supervisors for children under fourteen (s. 6: 169), liability for employees and servants (s. 6: 170-172), liability for defective things (chattels), buildings (opstallen) (s. 6: 174), animals (s. 6: 179)18 and product liability (s. 6: 185-193). Section 6: 194-196 lays down rules for misleading advertisements. Some of these liability rules extend the possibilities of compensation by introducing risk liability19, but these provisions do not apply for anyone other than the prejudiced person, for instance insurers or when applying the Wet op de Arbeidsongeschiktheidsverzekering (the Netherlands Workers' Compensation Act), s. 6: 19720.

The conduct of children under fourteen years of age cannot be attributed to them as an onrechtmatige daad (delict), s. 6: 164. But supervisors (a person who exercises parental authority or guardianship) of children under fourteen are liable for damage caused to a person (schade aan een derde

16 Stichting v Engelen, NJ 1991, nr 55.
17 See on the question which interests are protected by s. 1401 (old Civil Code) or s. 6: 162 Benckiser GmbH v De Staat der Nederlanden NJ 1990, nr.712.
18 See e.g., TUS v Jansen, NJ 1991, nr. 39, Baars v De Staat der Nederlanden, NJ 1991, nr.321, and Zengert v Blazer, NJ 1990, nr.365. Risk liability for animals is based on the danger that lies in the energy and animus of the animal, which is beyond control of the possessor of the animal.
19 Risk liability, liability without fault.
20 Several new rules in the Netherlands Civil Code imposing strict liability are codified for the benefit of victims, and are not aimed at the protection of insurers etc. Therefore, a (temporari) rule regarding rights of recourse (tijdelijke regeling verhoudrechten) has been codified in s. 6: 197.
toegebracht) by the conduct of the child, providing the act (the conduct) causing the damage could have been attributed to the child as an onrechtmatige daad, had it not been for its age (s. 6: 169-1). And supervisors are liable for damage caused to a person by a fault of a child between fourteen and sixteen years of age, unless they cannot be blamed for not preventing the conduct of the child (s. 6: 169-2).

S. 6: 162 limits the application of the specific risk-liabilities in s. 6: 173-179 via the 'unless'-clause (the tenzij-formula), although the exact interpretation of the rules might well be difficult. This clause obliges the judge to apply a hypothetical rule when dealing with the risk-liabilities mentioned. For instance, s. 6: 179 gives a strict liability rule for animals: de bezitter van een dier is aansprakelijk voor de door het dier aangerichte schade, tenzij aansprakelijkheid op grond van de vorige afdeling zou hebben ontbroken indien hij de gedraging van het dier waardoor de schade werd toegebracht, in zijn macht zou hebben gehad: the possessor of an animal is liable for the damage caused by the animal unless, given the hypothetical case that he would have had the behaviour of the animal under his control, there would have been no liability pursuant to the preceding subtitle (i.e. s. 6: 162-168). This liability should be distinguished from the liability of the possessor of an animal who willfully encourages his animal to cause harm. In that case, the possessor of the animal is liable on the basis of the general liability rule of s. 6: 162, providing his conduct fulfills the requirements of this section. But what if a sick pig wanders off and contaminates a pig in a neighbouring pigsty, and the possessor of the pig does not know that it is sick? In principle, the possessor of the pig is liable on the basis of the general rule for liability for animals in s. 6: 179. But when applying this rule, the hypothetical question has to be asked whether the possessor of the pig would have been liable if he had controlled the behaviour of the pig. In this case, the possessor would not have been liable on the basis of s. 6: 162 because the behaviour of the pig (wandering off to a neighbouring pigsty) is not unlawful, even if allowed to happen by its possessor. Thus, given these circumstances, the possessor of the pig is not liable for the damage caused by it. There would have been liability, though, if the possessor of the pig knew of its illness and nevertheless let the pig wander off (or, for instance, allowed the pig to bite another animal). And in that case, he will be liable for the damage caused to his neighbour, even if he did not actually control the behaviour of the pig.

21 Cf. C.J.M. Klaassen, Risico-aansprakelijkheid (1991), and see the discussion between Van Maanen en Hartkamp, Asser-Hartkamp III, p.175-176.

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A very interesting development in Netherlands law is the liability for onrechtmatige daad in groepsverband, (collective, or 'group' liability), codified in s. 6: 166. The members of a group of persons are collectively liable for damage illicitly caused by the behaviour of the group if the risk of such behaviour should have prevented them from acting as a group, and this behaviour can be attributed to them. Between the members of the group, the compensation paid should be shared proportionally, unless the rules of fairness require a different distribution, given the circumstances of the case.

§ 3 STRICT LIABILITY

169. The debate over the question whether the non-contractual damages actions in English law belong to the category of tort or torts becomes particularly acute when one focusses on the difference between fault and strict liability. For although there have been major attempts to underpin certain kinds of damage and injury cases with a single principle (cf. Ch. 12 § 4), the existence of the so-called strict liability torts serves to remind English lawyers not only that 'the law of torts has grown up historically in separate compartments', but that until recent times 'the facts [were] nearly always hidden behind formal pleadings'. Strict liability thus finds itself as much a product of the law of procedure as of any rational debate amongst English jurists and this procedural aspect is still evident in some strict liability torts. Moreover tort's role in protecting real and personal property interests has resulted in a number of remedies where strict proprietary entitlement rather than fault is the motivating factor.

Occasionally strict liability has been justified on the basis of risk and insurance, but on the whole it is treated with a certain suspicion by judges who seem unsure either of the relationship between fault and risk in a modern industrial society or of their own role in the litigation process. Accordingly

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24 In the translation of Haanappel & Mackay: if a member of a group of persons unlawfully causes damage and if the risk of causing this damage should have prevented these persons from their collective conduct, they are solidarly liable if the conduct can be imputed to them (s. 6: 166-1). See on this Dommage causé par une personne indéterminée dans un groupe déterminé de personnes generally RJB Boonekamp, Onrechtmatige daad in groepsverband volgens NBW (Deventer, 1990).
28 Milsom, p.291.
29 For example defamation: many of the cases involve pleading technicalities interspersed with substantive ideas.
30 Milsom, p.370.
32 For a modern example see In re Workvale Ltd [1991] 1 WLR 294, 300.
the House of Lords sees the task of the courts, including their own task, as nothing more than that of deciding particular cases between particular litigants; there is no duty to rationalise the law of England or to produce a code of principles founded upon legal consistency. Such a duty is for Parliament. Now the problem with this attitude is twofold. First, even when Parliament does intervene with a strict liability statute there is a danger that such legislation will be narrowly construed with the result that any inherent or underlying idea such as risk or equality has little chance of emerging from the jurisprudence.

Secondly the law of tort itself is never able to rise above the logical contradictions caused by excessive compartmentalisation. Thus, for example, a defendant who carelessly causes financial harm through a misstatement will be liable only in exceptional circumstances even if the victim can prove his loss; yet a defendant who without negligence causes no financial loss through a misstatement might nevertheless be liable for high damages, without the proof of any actual loss by the plaintiff, if the statement is critical of the plaintiff. All that such a plaintiff need prove in this latter situation is publication to just one other person. Or take some other examples. If a person is injured by a dog it may depend upon the characteristics of the animal itself whether the victim can obtain damages without having to prove fault; if it was in the character of this kind of dog to bite this might deprive the victim of his strict liability claim under statute. If a bus conductor carelessly injures a passenger the bus company will be strictly liable; but if he deliberately injures the passenger - that is to say if his behaviour is worse than careless - this could deprive the passenger of any claim against the bus company and thus, in all probability, against the insurer. If an employee steals a customer's car sent for repairs to his employer's garage the employer (and no doubt the insurer) will be liable; yet if the same employee fails to save the car from fire as a result of industrial action such as a go-slow the employer might not be liable.

33 Lord Macmillan in Read v J Lyons & Co [1947] AC 156, 175; and see Lord Wilberforce in Air Canada v Secretary of State for Trade [1983] 2 AC 394, 438.
35 See e.g., Merlin v British Nuclear Fuels [1990] 2 QB 557.
37 See also CC von Damm, p.68-69.
38 Caparo Industries v Dickman [1990] 2 AC 605.
40 This may involve the Court - even the Court of Appeal - in an animal character studies exercise: Curtis v Betts [1990] 1 WLR 459.
41 Animals Act 1971 s.2(2)(b).
42 Keppel Bus Co v Sa'eed bin Ahmad [1974] 2 All ER 700 (PC).
It is of course easy to isolate instances of logical contradiction in almost any system of law and some of the above situations may be familiar to jurists outside of the Common law. All the same these examples go some way in indicating that in certain areas of non-contractual damages actions the forms of thought from a previous age have not yet been discarded. One reason for this conservatism is to be found in the fact that the old forms of action did protect particular, but diverse, kinds of interests. And in order for new general forms of liability to emerge from the caselaw movement will be required not just within the category of tort, but in other areas of the law so that these interests can be redistributed amongst more systematic classifications. If defamation and false imprisonment (trespass) cases were, for example, to be seen as part of public rather than tort law then the constitutional questions that lie behind many of these cases might be exposed for all to see. Equally if the torts of conversion and trespass to goods could be separated from the law of obligations then this might help distinguish between entitlement rights and obligational duties.

170. The differences of fact situation, and the co-habitation of rights and wrongs, within a single category certainly endows tort with an apparent flexibility, but this flexibility is misleading because in truth tort plays host to two quite different kinds of reasoning processes each from a different stage of development. On the one hand there are the strict liability cases whose reasoning is located in a descriptive stage - that is to say liability is determined by the descriptive form of the facts. On the other hand there are the fault cases founded not on the pattern of facts as such (although such a pattern might in truth be relevant when it comes to establishing duty of care), but upon a cause of action (culpa) which can be seen either as an inductive or a deductive law. Von Jhering held *Nicht der Schaden verpflichtet zum Schadenersatz, sondern die Schuld*, and deemed this *Ein einfacher Satz, ebenso einfach wie der des Chemikers, daß nicht das Licht brennt, sondern der Sauerstoff der Luft*, in analogy with reasoning in the natural sciences.

The existence of the descriptive and the inductive/deductive stages of reasoning within a single category has created an imbalance in that the fault principle always appears more progressive than the strict liability patterns.

46 See e.g., England v Cowley (1873) LR 8 Exch 126; *Esso Petroleum v Southport Corporation* [1953] 3 WLR 773; [1954] 2 QB 182 (CA); [1956] AC 218 (HL).
47 *Caparo Industries v Dickman* [1990] 2 AC 605, 617-618.
49 This comment by von Jhering is quoted in Zweigert & Kötz, II, p.325: it is not the occurrence of harm which obliges one to make compensation, but fault. This is as simple as the chemical fact that what burns is not the light but the oxygen in the air.
50 Private nuisance now seems to be being subsumed by the fault principle rather than by any idea of a liability for things: *Leakey v National Trust* [1980] QB 485.
In some situations this may be a good thing, but in others the fault principle itself belongs, perhaps, to a bygone age. In Netherlands civil law, a very flexible approach towards the categorisation of liability rules allows one to transcend the principles of fault and strict liability by adopting the concept of the reasonableness of the choice of the legislator to impose liability (cf. Ch. 5 § 5). The specific fact situation, taking into account all interests concerned (and, especially, insurance), plays an important role in determining whether liability exists, but the concept of strict liability (liability without fault) is found in several liability rules, for instance with regard to acts of children under fourteen.

§ 4 FAULT LIABILITY

171. Whatever one thinks about the role of fault in non-contractual damages actions in English law it should be evident that the old approach to liability through types of action has to some extent been broken down by the development of more general kinds of liability. The most important of these has been the emergence of negligence liability as an independent cause of action whose rapid growth in this century has done much to turn the law of torts into a law of tort (cf. Ch. 5 § 5). Today there is a general tort of negligence founded upon the idea of individual careless acts or statements. As regards intentional injury much still depends upon the nature of the damage; and so economic loss deliberately caused will, in a competitive society, obviously attract a different set of principles from physical injury deliberately caused. Yet with regard to physical injury there is now a general principle that all such injuries arising from culpa are prima facie actionable in tort.

The tort of negligence is, then, not dissimilar in principle to liability for fault in French law (cf. Ch. 12 § 2). One difference, however, is that in England liability in negligence is not based upon fault, causation and damage alone; before a defendant can be held liable to an injured plaintiff the latter must prove that the former owed him a 'duty of care'. Traditionally this duty was defined by particular kinds of factual relationships - manufacturers and consumers, occupiers and visitors, bailors and bailees (cf. Ch. 5 § 6) and so on. And even now, especially in pure economic loss cases, the nature of the factual relationship can sometimes be of paramount legal relevance. But the tendency today is to use the more general test of 'proximity' with the duty of care question more openly being recognised as a policy device. Accordingly,

51 Donoghue v Stevenson [1932] AC 562.
54 French CC art.1382: tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer; Zweigert & Kötz, II, p.318.
55 Caparo Industries v Dickman [1990] 2 AC 605, 617-618.
the general rule now is that where one person causes, through his negligence, physical injury to another person the former will in principle be liable unless he can show some very compelling policy reason as to why liability should be excluded\textsuperscript{56}. In cases of pure economic injury, on the other hand, the reverse situation remains the rule: liability will be excluded unless the plaintiff can show very compelling policy reasons as to why liability should be imposed\textsuperscript{57}.

These two general rules imply certain other qualifications. First the distinction between physical and economic loss is indicative of the important role that the nature of the plaintiff's damage plays in the tort of negligence: the weaker the damage the more intense must be either the relationship between the parties - and here the notion of 'interest' is playing an increasingly important role in defining this relationship\textsuperscript{58} - or the actual behaviour of the defendant\textsuperscript{59}. And secondly the notion of causation is reflected not only at its own separate level (cf. Ch. 13 § 3) but at the level of duty of care as well. Thus in order for a plaintiff to recover either for nervous shock damage or for an injury caused by a failure to act - factual situations involving three rather than two parties (leaving aside insurance companies) - it is important to establish some kind of relationship (family, employment, property) between shocked plaintiff and immediate victim\textsuperscript{60} or between plaintiff and defendant accused of culpa in omittendo\textsuperscript{61}. Moreover nervous shock has to be distinguished from, in the eyes of the law at least, lesser forms of mental anguish such as bereavement\textsuperscript{62} and distress\textsuperscript{63}, while even a close relationship between plaintiff and defendant might still not be enough to ground liability in omission cases if the damage is only economic\textsuperscript{64}.

172. In German and English law, the 'law of tort(s)' is limited formally by the concept of Tatbestand\textsuperscript{65} and duty of care respectively. It is not enough

\textsuperscript{56} Murphy v Brenwood DC [1990] 3 WLR 414.
\textsuperscript{57} Caparo Industries v Dickman [1990] 2 AC 605.
\textsuperscript{58} Pacific Associates Inc v Baxter [1990] 1 QB 993, 1029; Caparo, supra, at pp. 626, 652.
\textsuperscript{59} It must be stressed, however, that English law does not think in terms of degrees of negligence. Nevertheless it is perfectly possible for an English court to reflect the actual behaviour of the defendant via the existence or non-existence of a duty of care; see e.g., Smith v Littlewoods Organisation [1987] AC 241.
\textsuperscript{62} Fatal Accidents Act 1976 s. 1A.
\textsuperscript{63} Best v Samuel Fox & Co Ltd [1952] AC 716.
\textsuperscript{64} Yuen Kun You v Att-Gen of Hong Kong [1988] AC 175.
\textsuperscript{65} See § 823 BGB: Schadenersatzpflicht (I) Wer vorsätzlich oder fahrlässig das Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht eines anderen widerrechtlich verletzt, ist dem anderen zum Ersatz des daraus entstehenden Schadens verpflichtet (II) Die gleiche Verpflichtung trifft
that the defendant wrongfully caused harm; he must also have invaded a specifically protected interest. In the French and Netherlands system, on the other hand, the concept of 'tort' is open-ended\textsuperscript{66}. Despite this difference in the conceptual background of the notion of 'tort', one can still find the existence of a common denominator, namely careful risk avoiding behaviour. Four elements constitute this rule: the nature and extent of the damage, the probability and foreseeability of the damage, the nature of the act causing the damage and the question whether precautionary measures could have been taken. In applying this general concept, judges differentiate according to the person committing the act ('the reasonable man test', taking into account specific circumstances or professions) and the objectives of a specific liability rule; the possible objectives of a certain liability rule are risk-prevention, compensation of damage and reallocation of risks. The demands of society, the influence of insurance and the 'law and economics' school are possible approaches when formulating special liability rules and, as mentioned before (cf. Ch. 5 § 5), the importance of the concept of 'fault' seems to be diminishing in the field of 'tort' law\textsuperscript{67}.

\textbf{§ 5 LIABILITY FOR UNLAWFUL ACTS}

173. Negligence liability in English law has expanded so fast in this century that it sometimes gives the impression of having swallowed up most of the other forms of liability\textsuperscript{68}. In fact this is by no means the case. The torts of conversion, deceit, defamation, trespass, malicious prosecution and nuisance, for example, remain quite separate forms of liability from negligence (cf. Ch. 5 § 5); and a distinction continues to be made between an injury arising out of a negligent act and an injury resulting from an unlawful act\textsuperscript{69}.

There are two main torts dealing with unlawful acts: they are breach of statutory duty and public nuisance. The action for breach of statutory duty has experienced its most extensive growth this century in the area of industrial accidents where breach of certain types of legislation will usually give rise to

denjenigen, welcher gegen ein den Schutz eines anderen bezweckendes Gesetz versöfft. Ist nach dem Inhalte des Gesetzes ein Verstoß gegen dieses auch ohne Verschulden möglich, so tritt die Ersatzpflicht nur im Falle des Vorschuldens ein. See also § 826, which is complementary to the limited description of the grounds for delictual liability in §§ 823 and 824, see Palandt (Thomas), \textit{Bürgerliches Gesetzbuch} (München, 1991), § 826 Rdnr 1 (p.951).

\textsuperscript{66} Cf. CC van Dam, p.89-99, 107-154 and 247-254.
\textsuperscript{67} Van Dam, o.c.
\textsuperscript{68} China & South Sea Bank Ltd v Tan [1990] 2 WLR 56, 58.
\textsuperscript{69} Cf § 823 BGB: Wer in einer gegen die guten Sitten verstößender Weise einem anderen vorsätzlich Schaden zufügt, ist dem anderen zum Ersatz des Schadens verpflichtet. This para provides (Palandt (Thomas), i.e.) auch ohne Verletzung eines bestimmten Lebensgutes oder Rechtes einen Ersatanzspruch bei bloßer Vermögensbeschädigung.
a private action for damages in tort on behalf of any person belonging to the class of persons the statute was designed to protect. But such liability is only rarely extended outside situations where the relationship between the parties is close (employer and employee, ratepayer and local authority etc.) and the damage personal injury. In the field of consumer law the tort may have something of a future and in public law the action can sometimes be a vehicle for the imposition of administrative, or quasi-administrative, liability.

The crime of public nuisance also gives rise to a claim in private law for damages provided that the plaintiff has suffered special damage. The great advantage of this tort is that it is available not only for pure economic loss, but for injuries suffered by highway users as a result of man-made structures which adjoin the highway. In these highway accident cases arising from the control of things (cf. Ch. 12 § 6) the tort of public nuisance has had the effect of shifting the burden of proof onto the occupier; nevertheless, perhaps regrettably, the notion of liability arising from an unlawful act has not been extended to traffic accidents which, on the whole, remain governed by the tort of negligence.

§ 6 LIABILITY FOR THINGS

174. The tort of public nuisance provides examples of how common lawyers can, on occasions, attach liability to things rather than to people. Such liability, as we have seen, is common with regard to buildings which adjoin the highway and a liability for the control of things is the approach that is adopted with regard to damage done by animals. Motor vehicles can also attract liability where an owner has an interest in the journey undertaken by the negligent driver of the owner’s car. In addition, since the nineteenth

70 Buckley [1984] 100 LOR 204.
72 Consumer Protection Act 1987 s 41 (1).
73 Cocks v Thanet DC [1983] 2 AC 286.
74 Benjamin v Storr (1874) LR 9 CP 400; Kodilinne [1986] 6 LS 182.
75 Campbell v Paddington Corporation [1911] 1 KB 869; Tate & Lyle v GLC [1983] 2 AC 509.
76 Tarry v Ashton (1876) 1 QBD 314.
77 Mint v Good [1951] 1 KB 517.
78 Phillips v Britannia Hygienic Laundry Co [1923] 2 KB 832; Dymond v Pearce [1972] 1 QB 496.
79 Wing v Cohen [1940] 1 KB 229; Mint v Good [1951] 1 KB 517.
80 Animals Act 1971.
century, there has been a general principle of liability with regard to
dangerous things brought on to property which escape and do injury. 82

This principle of strict liability has not, however, been developed in
English law into a general principle of 'risk' liability based upon dangerous
activities. In fact the rapid growth of negligence during this century
encouraged the courts to see all personal injury accident actions only in terms
of individual acts. 83 Consequently the two main sources of personal injury
claims, namely road and factory accidents, remain largely governed by the
torts of negligence and breach of statutory duty, the latter tort increasingly
being seen as a form of statutory negligence. Nevertheless the idea of liability
arising out of the control of things has found expression within negligence
itself; and so those who put unsafe lorries onto the road, 84 or who are in
control of unsafe supermarkets, 85 may find themselves in practice having to
pay damages simply because they cannot disprove negligence. In the area of
consumer law this burden of proof principle of res ipso loquitur has been
useful on occasions to those who have suffered injury as a result of unsafe
products; and statutory intervention has now made the liability of
manufacturers even stricter. 86 One might add that there are a number of
other statutory provisions, some based on strict liability 87 and some based on
fault, 88 which give expression to an idea of a liability for things.

Most EC-countries have adapted their laws, regulations and
administrative provisions to the EC directive on product liability. 89 The
principle of this European product liability law is that the producer is liable
for damage caused by a defect in his product; but this liability rule is not
'strict' in the juridical sense of the word because the producer can defend
himself in specific circumstances. The harmonization of product liability in the
EC is complemented by a (proposed) Directive concerning general product
safety 90 and a (draft) Directive concerning liability for the supply of

82 Rylands v Fletcher (1866) LR 1 Ex 265; (1868) LR 3 HL 330.
86 Consumer Protection Act 1987 s. 2; founded on EC Directive of 25 July 1985
No. 85/374/EEC. But note Section 4(1)(e) of the 1987 Act which does not
appear to conform to the Directive; cf. Section 1(1).
87 See e.g., Civil Aviation Act 1982 s.76(2).
88 See e.g., Employer's Liability (Defective Equipment) Act 1969.
89 See Produkthaftpflicht International 1/91, p. 33 and e.g., B von Hoffmann,
Produkthaftung des Importeurs und Freihandel, in: Conflicts et harmonisation
(Fribourg, 1990). See on the consequences of an infringement on community
law Francovich and Bonifact v Italy (Court of Justice of the European
Communities case C-6/90 and C-9/90 (see Ch. 1, fn 33).
90 Amended proposal for a Council Directive concerning general product safety,
COM(90) 259 final - SYN 192, OJ No C 156/8, M Fallon & F Maniet,
Product safety and control processes in the European Community, Brussels
services and the implications of these developments for - especially - English legal thinking on the theory of tort(s) are of the utmost importance.

175. Land can also attract liability for those who own or occupy it. Under statute an occupier of land owes a duty of care to all visitors and the landlord owes, in certain circumstances, a duty to all persons who might suffer physical injury as a result of the defective state of any of his buildings. Even the trespasser gets some protection against personal injury arising from negligence. At common law any direct interference with another's property (or personal) rights attracts the tort of trespass, while an indirect interference will give rise to a claim in private nuisance if it results from the unreasonable use of land.

Liability in trespass attaches more to rights than to physical property as such - although it may often focus on land and chattels - but private nuisance is very much a property tort in that it arises either out of the use and condition of the land itself or out of some activity upon, or associated with, land. Behaviour can be of relevance here, particularly when a land user deliberately annoys his neighbour (cf. Ch. 13 § 7) or is guilty of culpa in omittendo, but on the whole liability is measured more by looking at the nature of the locality (except where the damage is physical), the type and level of the interference and the wording of any legislation designed to authorise economically beneficial, but socially annoying and/or environmentally damaging, activities. One might add that the law of actions has a role here as well (cf. nr. 40); and this role has helped ease nuisance out of the law of property and into the law of obligations.

§ 7 LIABILITY FOR PEOPLE

176. The idea of imposing liability for individual negligent acts has, in the twentieth century, acquired something of an unreal flavour in that a great

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92 Occupiers' Liability Act 1957.
93 Defective Premises Act 1972 s. 4.
95 See e.g. The Majfrid [1942] P 43, 145 (CA).
99 Hollywood Silver Fox Farm v Emmett [1936] 2 KB 468.
many defendants are now organisations rather than humans. As a result a
distinction has to be made at the level of legal personality between the acts
of the legal person and the acts of a human person. One way the law
could have dealt with this issue was to treat any act by a member of an
organisation as an act of the organisation itself; but the common law, like
many other systems, has only taken this approach in certain
circumstances. The general principle with regard to the liability of
organisations in tort is, as in French law, that an employer will be
vicariously liable for tortious acts committed by an employee acting in the
course of his employment.

This general principle can be broken down into three specific rules:
there must be a tort; committed by a servant; acting in the course of
employment. Each of these rules can give, or have given, rise to their own
problems. Thus the tortious act must be distinguished from the non-tortious
act; the servant (employee) must be distinguished from the independent
contractor; and the organisational act must be distinguished from the
individual frolic. None of the rules formulated to deal with each of these
issues is always applied with logical consistency and the caselaw can on
occasions give the impression of contradiction (cf. Ch. 12 § 3). Moreover the
nature of some activities and operations may be such that the law will impose
liability on an employer even if the servant rule cannot be satisfied; but
in these 'independent contractor' situations the employer will be liable on the
basis of a direct, 'non-delegable' duty between himself - or itself - and the
plaintiff.

103 See generally Tesco Supermarkets v Nattrass [1972] AC 153; Photo Production
104 See generally Zweigert & Kötz, II, pp.323-339.
105 In particular with regard to the law of contract: Photo Production v Securicor
106 French CC art 1384 para 5: Les maîtres et les commettants, du dommage causé
par leurs domestiques et préposés dans les fonctions auxquelles ils les ont
employés. And see Netherlands Civil Code s. 6: 170 and 171.
107 Roman law influence! See Zimmermann, pp.1135-1136 and Zweigert & Kötz,
II, p.324-325: in the Germanic legal family, the liability of a superior for the
harm caused by his work always depends on whether any personal fault of his
contributed to the harm (..) It is an invention of the pandectists that there was
no liability for others in Roman law unless the superior himself was at fault. In
fact the Romans never considered the problem of liability for others as a whole
at all; much less did they arrive at any general solution.
109 Ready Mixed Concrete v Minister of Pensions [1968] 2 QB 497.
110 Morris v C W Martin & Sons Ltd [1966] 1 QB 716; cf. General Engineering
Services v Kingston & St Andrews Corp [1989] 1 WLR 69.
111 Honeywill & Sein v Larkin Brothers [1934] 1 KB 191; but cf. Salsbury v
112 See e.g., McDermid v Nash Dredging and Reclamation Co [1987] AC 906.
Sometimes the non-delegable duty might be founded in a contractual or
The commission of a criminal act by an employee can (but will not always) free the employer from liability as a result of the course of employment rule of vicarious liability\textsuperscript{113}. Yet sometimes an organisation can directly be liable on the basis that the criminal act either resulted from a breach of duty of care on their part\textsuperscript{114} or gave rise to personal injury in circumstances where public law (Criminal Injuries Compensation Scheme) has undertaken to give compensation on a no fault basis\textsuperscript{115}. In some situations, then, the caselaw may involve policy questions as to the allocation of risks given the damage in issue\textsuperscript{116}. Curiously, however, the courts still refuse to take account of the existence of insurance\textsuperscript{117}, and this means that if an organisation is found vicariously liable it can - or, under the principle of subrogation, its insurance company can - in strict law sue the employee at fault for breach of an implied term of the contract of employment (cf. Ch. 9 § 6) so as to recover in debt any damages paid to the victim\textsuperscript{118}.

177. When dealing with liability of organisations in tort, the Netherlands Hoge Raad has stipulated that legal persons can act onrechtmatig, not only through illicit acts by 'organs' (for instance a director), but also through any person not being an organ of the legal person acting onrechtmatig providing the act is, according to the rules of social intercourse, attributable to the legal person. Specifically, s. 6: 170 deals with liability for servans and employees, s. 6: 171 for independent contractors and s. 6: 172 for agents. These specific rules can coincide with the general liability rule of s. 6: 162\textsuperscript{119}.

\section*{§ 8 LIABILITY FOR STATEMENTS}

178. The interrelationship of tort and insurance is only one area where contract and tort, and of course unjust enrichment, are closely intertwined; another area, as we have already seen (cf. Ch. 8 § 6), is that of misstatement. Until quite recently a damages action was, in the absence of a contractual or a fiduciary relationship, generally available only in cases of fraudulent misstatement (the tort of deceit) or defamation (the torts of libel and slander). But in 1964 all of this changed with the recognition that the tort of negligence might be available for misstatement in situations where there had been a

\begin{thebibliography}{99}
\footnotesize
\item[807] Photo Production v Securicor [1980] AC 827, 848.
\item[113] But see Morris v C W Martin & Sons Ltd [1966] 1 QB 716; cf. General Engineering Services v Kingston & St Andrews Corp [1989] 1 WLR 69.
\item[117] Launchbury v Morgans [1973] AC 127.
\item[118] Lister v Romford Ice & Cold Storage Co [1957] AC 555.
\item[119] Asser-Hartkamp III, p.226-233; and see Mon. Nieuw BW B-46 (Oldenhuis), Onrechtmatige daad: aansprakelijkheid voor zaken.
\end{thebibliography}
'special relationship' between the parties at the time the statement was made. One very important effect of this new duty of care is that it can turn certain negligent breaches of contract into torts with implications for third parties in business and commercial transactions.

Defamation, compared with the tort of negligence, is a tort of quite a different character and complexity - although some factual situations may prima facie attract both torts - in that it is based on the plaintiff's right rather than the defendant's wrong. Accordingly fault on behalf of the speaker (slander) or writer (libel) is largely irrelevant; all that need be shown is that words capable of being defamatory - in effect critical of the plaintiff were spoken or published to a third party, however obscure the three party situation. Given the strictness of liability, the defences in defamation play a central constitutional role - to escape liability the defendant must successfully plead truth, fair comment or privilege - but this is not so easy as these defences are not as wide as they might first appear. On balance the law seems more interested in protecting the private rather than the public interest and thus one finds that criticising public figures, filing complaints about public officials or even attempting to debate in the press issues such as blood sports can be an expensive exercise given that the damages awarded by juries bear no relation to those awarded by judges for serious personal injury. Part of the problem here is that there is no constitutional principle upholding freedom of speech, and so one can often find the private law of defamation acting as a forum for what are in truth issues of public law.

Liability can also attach to threats. If a person threatens to commit a wrongful act and this causes loss to the plaintiff the latter may have an action in tort unless the person issuing the threat can show legal justification. For intimidation of a person in normal commercial pressure is rarely tolerated by the law of obligations. Some threats are legal of course.

121 Smith v Bush [1990] 1 AC 831.
123 See e.g., Cornwell v Mykow [1987] 2 All ER 504.
124 Morgan v Odiams Press [1971] 1 WLR 1239 HL.
125 See e.g., Brent Walker Group Plc v Time Out Ltd [1991] 2 WLR 772 CA.
126 See Weir, Casebook, p.481.
131 Rookes v Barnard [1964] AC 1129.
133 Thorne v Motor Trade Association [1937] AC 797.
others may lose their legality if issued by a group rather than an individual. And threats to go on strike cause no end of private law problems because English law does not recognise a right to strike, only certain immunities under statute; such a threat can give rise not only to a breach of contract between employer and employee but to the tort of interference with contractual rights allowing the employer, or some other contractual party, to seek damages or an injunction. If violence is threatened this may give rise to a trespass action even if the plaintiff suffers only mental anguish from fear of imminent attack by the defendant.

The torts of passing off and trade libel are further forms of liability attaching to statements. These torts are primarily designed to protect intellectual property rights and business interests, but the emphasis is rather different depending upon whether the complaint is 'misappropriation' of the plaintiff's words or damage incurred as a result of the statement. A defendant does no wrong by entering a market created by another, but he must not attempt to deceive the public - an area where public law also has an important role - or maliciously to injure the plaintiff's products or business reputation. Thus a person may be prohibited by injunction (cf. nr. 40) from marketing goods in a container the distinctive shape of which has become a form of (intellectual) property in itself. If the defendant wrongfully uses the plaintiff's property (including confidential information) in order to make a profit for himself by, say, publishing a book he might well find that he has to disgorge such a profit through the remedy of account (cf. nr. 45) on the basis of unjust enrichment (cf. Ch. 11 § 4). Indeed if a constructive trust is declared the defendant may find himself faced with an in rem remedy (cf. nr. 46).

§ 9 PROFESSIONAL LIABILITY

179. Liability for misstatement is, then, an area that now straddles both contract and tort in that the 'implied duty to take care' now extends beyond the contract itself. Thus the professional valuer, the accountant and the solicitor may find themselves owing duties not just to the person who commissioned them for a report, but to other proximate persons who might foreseeably rely upon the report. No doubt the duty test will remain very strict indeed in the economic loss cases. But in both contractual and

134 Gulf Oil (GB) Ltd v Page [1987] Ch 327.
136 Read v Colker (1853) 138 ER 1437.
137 Cadbury Schweppes v Pub Squash Co [1981] 1 All ER 213, 223.
138 Defamation Act 1952 s. 3.
139 Reckitt & Colman Properties Ltd v Borden Inc [1990] 1 WLR 491 HL.
140 Morgan Crucible Co Plc v Hill Samuel & Co Ltd [1991] 2 WLR 655 CA.
141 Caparo Industries plc v Dickman [1990] 2 AC 605.
non-contractual situations negligence has an important role to play in compensation claims against doctors\(^{142}\), lawyers, architects and the like.

The liability is in form no different from any other liability under the fault principle. However in substance there are two special characteristics. First, where a professional skill is concerned, the test for a breach of duty is not governed by the reasonable man test as such; it is governed by the standard of the reasonable person exercising that professional skill\(^ {143}\). Thus when a medical operation goes wrong, although it may raise a presumption of fault under the *res ipsa loquitur* maxim, liability is by no means automatic because the risk of medical accident is, in the absence of carelessness, very much on the patient\(^ {144}\). Of course risk also implies informed consent and so the medical profession must take care to provide any necessary information\(^ {145}\). Yet the courts are not overready to hold doctors and surgeons liable when things go wrong in the surgery or on the operating table.

This reluctance also results from a second characteristic of professional liability, the role of policy and the public interest. No doubt all duty, breach and causation decisions contain an important policy element (cf. Ch. 7 § 5); but in certain areas this policy factor, sometimes under the guise of the public interest, can play a more direct role. Thus the incompetent barrister cannot be sued for the way he or she handles litigation\(^ {146}\), nor can the detective who fails to catch the murderer\(^ {147}\). This is not to say that lawyers and public bodies cannot be sued - indeed they are both a regular source of litigation, the point to be made is that institutions like the National Health Service, the constabulary and the courts are public law institutions and actions in the law of tort can raise issues of an administrative law nature (cf. Ch. 13 § 2).

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143 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.
144 *Roe v Minister of Health* [1954] 2 QB 66; see for the Netherlands e.g., *Speerkart v Ezden* (1991), nr. 26.
145 *Sidaway v Bethem Royal Hospital* [1985] AC 871.
147 *Hill v Chief Constable of West Yorkshire* [1989] AC 53.
13 NON-CONTRACTUAL OBLIGATIONS: DAMAGES ACTIONS (2)

§ 1 INTRODUCTORY REMARKS

180. This second chapter on non-contractual damages actions will look at the more general issues behind the law of tort and, like the last two chapters, its main focus of attention will be on obligations arising out of fact rather than promissory agreement. However, as we have seen (cf. Ch. 5 § 3), the distinction between legal acts and legal facts is unrealistic when it comes to the common law and so the chapter will also include some material relevant to contractual obligations. It is a chapter that looks more generally at damages actions in the common law.

§ 2 TORT AND PUBLIC LAW

181. We have seen that the tort of negligence has gone far in taking the law of torts towards a law of tort (cf. Ch. 5 § 5; Ch. 12 § 4) with the result that fault liability has assumed something of a central role in what a Civil lawyer would see as civil liability (la responsabilité civile). Yet the tort of negligence, together with some of the other torts, have important implications for public law (la responsabilité administrative) as well. This is because various organs of the state can find themselves liable to those whom they carelessly, abusively or unlawfully injure; and this liability has increased in scope with the recognition that pure economic loss flowing from a careless statement can give rise to a claim for damages. In theory there is no difference between public and private liability in tort (cf. Ch. 5 § 8), but in recent years the courts are increasingly recognising that public bodies can present special problems and that not all decisions by government officials can be allowed to be the basis of an action merely because they involve some negligence or the breach of a statute. There are issues of public law that must be taken into account.

In the absence of carelessness the public law rule is that an ultra vires decision will not give rise to an action for damages unless the decision amounted to an abuse of public office. The principle, therefore, would seem

1 Fellowes v Rother DC [1983] 1 All ER 513, 518.
at first sight to be one of abuse of power. Yet in interpreting abuse it must not be forgotten that since the early days of the common law one of the functions of the law of torts has been to protect constitutional rights; the torts of trespass and malicious prosecution have traditionally had a central role to play in guarding the citizen against governmental interference with his or her person or property not justified by lawful authority. And in trespass situations it is the interference, not fault, which has been the basis of the action. Consequently the task for the future, as the law of torts increasingly becomes a law of tort (cf. Ch. 5 § 5), is to work out a rational role for private law damages actions in the field of public law; and this task is now beginning to be worked out at the level of the law of actions by the recognition that there is a procedural, if not substantive, distinction to be made between public and private law.

Just where this distinction will lead to in relation to actions in tort against public bodies is difficult to predict as yet, save to say that in the short term it will result in a restriction in liability where the risk is one that belongs more to the private than to the public sector. Thus the trend now is not to make public bodies responsible for investment and property speculations. In fact even where personal injury is concerned the English courts have tended to put the risk on individuals rather than on the community at large and this emphasis on fault means that in any case where the courts do wish to spread the burden of loss more widely they have to be somewhat imaginative in interpreting the facts to fit the private law principles.

Part of the problem facing the common law when it comes to the public/private division is that public bodies have traditionally been treated on the legal stage as private people having not just the same rights as real people - for example with respect to reputation - but the same responsibilities as well. This is sometimes healthy. Yet it can also be unfortunate because the

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5 Cooper v Wensworth Board of Works (1963) 143 ER 414; Christie v Lencino (1947) AC 573; cf Police and Criminal Evidence Act 1984 s.28.
8 Yuen Kun Yau v At-Gen of Hong Kong [1988] AC 175.
12 Bognor Regis UDC v Campion [1972] 2 QB 169. However this case has now been put into doubt by the recent Court of Appeal decision of Derbyshire CC v Times Newspapers (1992) The Times 20 February, where it was held that to allow a local government authority to sue for libel would impose a substantial restriction on freedom of expression.
public interest is often different from the commercial interest - as the courts have recently been reminded\(^{13}\) - and so English lawyers will need to do more than just distinguish between 'public rights' and 'private rights'. There will need to be a greater appreciation of the institutional differences between public and private legal subjects and this will require a more sophisticated approach towards constitutional theory and the 'public interest' than at present is to be found in the English courts\(^{14}\).

182. In Netherlands law, the constitutionality of acts and statutes is beyond control of the courts and lies with Parliament. Organs of state can, nevertheless, be liable ex \textit{delicto} when acting in the public interest and in the Netherlands Civil Code the provisions regarding delictual liability do not exclude the possibility that public bodies be held liable as private persons. All the same, civil responsibility of public bodies is regarded as a special - and delicate - doctrine. One of the key issues in the field of tort and public law was the question whether \textit{la responsabilité civile} of public bodies should be judged via the (civil law) 'delict'-rule or directly by the 'recognized principles for good government policy' given that these principles (\textit{détournement de pouvoir}, \textit{abus de pouvoir}, reliance, equality before the law etc.) have to be respected by public bodies. The Hoge Raad has held that the principles of equality before the law and of reliance are especially applicable when \textit{la responsabilité civile} of public bodies is being judged\(^{15}\). Public bodies are free to act on behalf of the public interest, within the boundaries of the administrative law but such freedom must be exercised within the limits of the law and the judges are competent and obliged to put government in full to the test of lawfulness. Any freedom of public bodies \textit{in concreto} depends on the specific rules applicable\(^{16}\).

Delictual liability of public bodies traditionally focused on the most important branch of the \textit{trias politica}, the administration; but with the development of administrative law and procedure, the role of the courts became limited to complementary legal protection. With regard to public acts, not being acts of Parliament, the Hoge Raad has accepted the principle that they can be tested not only for compliance with higher acts, but also within certain limits - for compliance with unwritten legal rules such as the principles mentioned. The courts can issue an injunction forbidding the public body in question to act in pursuance of the unlawful act, but only in extreme cases can

\begin{enumerate}
\item \textit{R v Licensing Authority, Ex p Smith Kline & French Laboratories Ltd} [1990] 1 AC 64.
\item G Samuel, \textit{Le rôle de l'action en justice en droit anglais}, in P Legrand (sous la direction de), \textit{Common law fin de siècle} (forthcoming).
\item \textit{Amsterdam v Ikon} NJ 1987, kr. 727, see J Spie, \textit{Onrechtmatige overheidsdaad} (Zwolle, 1987), N Verhelj, NJB 1987, p.1309-1315.
\item Cy N Verhelj, \textit{Lc.}
\end{enumerate}
a legal remedy exist against judgments¹⁷ and the cause of action for such a remedy is delict.

If a public body, acting lawfully in the public interest, causes damage and decides not to compensate this damage, this decision in itself does not bring about delictual responsibility¹⁸. A public body that acts lawfully - for instance when arresting a suspect of a criminal offence - can, nevertheless, be held liable in tort for the damage that has occurred as a result of this event. The damage is as such not onrechtmatig (illicit) because the act was justified, but if, subsequently, it turns out that the act was without cause, then the public body ought to have taken into account that unjustified acts are onrechtmatig; an obligation to pay damages based on delict can therefore exist, and even the payment of compensation does not remove the illicit character of the act¹⁹.

If a public body acts illegally in taking a public law decision which, subsequently, is annulled in an administrative court because it contravenes statutory law or any other legal provision of administrative law - such as s. 8 Wet Arob - the Netherlands Hoge Raad has held that, in general, the culpability of the public body in committing a delict is a given fact. Even if the public body is not to blame in concreto, such an act is attributable to the public body - in the terminology of s. 6: 162 - and the decision of the administrative court is binding upon the parties in a civil process. Only in specific circumstances is this rule waived²⁰.

When dealing with administrative law in the Netherlands, the distribution of competence between administrative and 'regular' courts poses difficulties; and this problem is not uncommon in English law²¹. Comparing English and Netherlands law, Verheij has proposed a general procedure for claims against a public body, based on a petition containing elements of both administrative and civil procedural law. Then, given the cause of action, the court can adapt the procedure having regard to the nature of the claim and the nature of the matters in respect of which relief is asked²². For instance, when dealing with the distribution of the burden of proof and the lijfelijkheid (passiveness) of the judge, the lawfulness of a public law decision should be distinguished from the question of what damage has been caused²³. And the

¹⁹ De Staat der Nederlanden v B, NJ 1990, nr. 794; see also JAM van den Berk, Schadevergoeding voor rechtsmatig toegeschreven schade door de overheid (Zwolle, 1991).
²² See now Supreme Court Act 1981 section 31(2); Roy v Kensington & Chelsea & Westminster Practitioners Committee [1992] 2 WLR p.239 (HL).
²³ Verheij, o.c., p.11.
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court can very well play an active role in one respect and be *lijdelijk* in another. Furthermore, to avoid problems regarding the interpretation of the term *overheid* (public body), courts should have the competence to remit a case from an administrative court to a 'regular' court, and vice versa. In view of these problems, it should be noted that the Netherlands Hoge Raad has held that certain governmental policy rules can be seen as *recht* (law) as mentioned in s. 99 *Wet op de rechterlijke organisatie* (Code of Judicial Organisation). Governmental policy rules are not based on an administrative statute, but are binding upon public bodies on the basis of the generally accepted principles for proper government behaviour. Therefore, contravention of such rules can, given the circumstances, provide sufficient ground to quash a decision of a public body (*cassatie*).

§ 3 CAUSATION

183. Whatever the classification and conceptual differences between English and Continental law, one principle that the common law shares with all other Western systems is the principle that the plaintiff's damage must have been caused by the defendant's breach of contract or tort (cf. Ch. 4 § 2). If there is no causal link there is no liability. Unlike many other systems, however, English law tends to disperse the problem of causation behind a range of legal devices and so, instead of asking directly whether the defendant has caused all of the damage or loss claimed, the common lawyer tends to ask whether the damage was 'too remote' or whether the plaintiff has been guilty of 'contributory negligence' or 'failure to mitigate' his loss. There are cases where the courts directly have to decide causal issues, but on the whole, both in contract and tort, a great many causal problems are to be found operating at different levels of liability.

The first level of operation is that of actionability. Some torts will not even arise unless the damage has occurred in a particular way and so, for example, the tort of false imprisonment is not committed unless the plaintiff can show that the defendant directly caused his or her incarceration. Equally not all behaviour, even if it is a cause of the plaintiff's injury, will be treated as sufficiently proximate to the injury to give rise to an action. Thus merely to facilitate a situation in which another person can commit a tort will not of itself be enough, and a mere omission may also isolate the defendant from any damages action, especially if the plaintiff's loss is, *vis-a-vis*

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24 Verheij, i.e.
25 See B van der Meulen, E Steyger, M Heldeweg, R Bakker, R Cobben and T Tak, *Bestuursbevoegdheid als bron van recht?*, Tijdschrift voor Bestuursrecht 1991/5, p.133-141.
26 In Netherlands law, this causal link is alike for all kinds of obligations.
27 *Harnett v Bond* [1925] AC 669.
the defendant, purely economic.  

The second level of operation is the level of fact: the plaintiff must establish factual cause and connection between the defendant's wrong and the plaintiff's injury. In this area one is, of course, into scientific questions of causation and the common law experiences here many of the same difficulties experienced in other systems; it would thus be unrealistic to think that all policy issues are excluded completely from this question of fact. From the historical viewpoint the scientific problems associated with factual causation are a modern concern rather than a traditional one in that until the twentieth century this whole question would have been decided by a jury who would have used, presumably, their common sense. Today the judges, who have replaced the jury, apply the 'reasonableness' test in novus actus interveniens cases, but reasonableness here means something different than it does in the reasonable man test of negligence. Accordingly behaviour which is 'unreasonable' in one sense (careless or morally suspect) might not be 'unreasonable' in the causal sense.

The third level of operation is the level of law. Even if factual cause and connection can be established between the behaviour of the defendant and the damage suffered by the plaintiff, the action might still fail because the damage is 'too remote'. In truth this third level was, as a question of law, the means by which the judges, if they so wished, could override a jury's verdict for the plaintiff; and today it is the level of operation which most openly allows for all or some of the damage to be excluded on the basis of social and economic policy considerations. In tort the test of remoteness used by the courts is that of 'foreseeability of a reasonable man', but in contract it would seem that a different rule is applicable (cf. Ch. 4 § 2). In contract only

30 Barnett v Chelsea and Kensington Hospital Management Committee [1969] 1 QB 428. Note also that certain 'loss of a chance' cases can be dealt with as factual causation problems: Hooton v East Berkshire Health Authority [1987] 2 All ER 509 (HL); cf. Chaplin v Hicks [1913] 2 KB 701.
33 McKew v Holland & Hannen & Cubitts [1969] 3 All ER 1621.
34 See e.g., The Oropesa [1943] P 32; Pigney v Pointers Transport Services Ltd [1957] 1 WLR 1121; Kirkham v Chief Constable of Manchester [1990] 2 QB 283.
35 See e.g. Lamb v Camden LBC [1981] QB 625 where insurance may have played an important role in determining the causal issue.
those damages in the 'contemplation' of the party in breach will be recoverable. These foreseeability and contemplation tests must, however, be treated with some caution. In physical injury cases there may now be no, or at least not much, difference between the two and in situations where unforeseeable damage occurs, or damage occurs in an unforeseeable way, the courts might use the typical damage test, if not the 'discredited' directness test itself. Much will depend on the actual facts. The worse the defendant's behaviour the more extensive might be his liability and, in turn, the behaviour itself might be judged by the form of the action in issue. Thus the trespasser usually finds himself liable for all the direct losses.

In fact the form of action can influence the causal question even in strict liability cases because the actionability and the remoteness question tend to merge. Accordingly the bailee who deviates from the terms of the bailment will find himself in a situation where unforeseeability is irrelevant simply because liability and damage become one and the same issue. The same can be said for certain kinds of breaches of contract. Where damage arises from an unlawful act (cf. Ch. 12 § 5) actionability and causation find themselves merged at the level of risk in that such damage has to be of a kind envisaged in the statute or, in the case of public nuisance, at least within the realm of an objective state of affairs calling upon the defendant to justify the risk created. In cases of interference with goods the amount of compensation recoverable is not dealt with as a liability issue because, as with bailment, liability itself is strict. The question of 'consequential damages' in these interference cases is either a damages problem to be decided at the next causal level of operation (below) or an issue that belongs more properly to the law of restitution.

The fourth level of operation is the level of the law of damages. In situations where the liability of the defendant to the plaintiff can be established, the former will be liable only for those categories or heads of damage that can be attributable to the wrongful act itself. Thus some heads of damage may be excluded as being 'too remote'; other heads of damage

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43 See e.g., Vacwell Engineering v BDH Chemicals [1971] 1 QB 88.
44 Gorris v Scot (1874) LR 9 Ex 125.
45 Dymond v Pearce [1972] 1 QB 496.
46 The Winesfield [1902] P 42.
47 Tong (Interference with Goods Act 1977 s. 3(2)(a).
48 Strand Electric Co Ltd v Britford Entertainments Ltd [1952] 2 QB 246.
may be excluded on the basis that they are attributable either, if the action is in tort, to the plaintiff’s contributory negligence or to the plaintiff’s failure to mitigate his loss. In contract contributory negligence problems are usually tackled at the level of factual causation because the statutory provision allowing the courts to apportion loss between plaintiff and defendant in situations where the plaintiff is at fault does not extend to contract as such. Only if the breach of contract is also a tort will the Act be applicable and thus it will not apply in cases where contractual liability is strict.

§ 4 GENERAL DEFENCES

184. Contributory negligence and mitigation, because they do not normally affect liability itself, tend to be seen as defences more than essential issues going to the primary obligation. Yet because they are legal devices dealing with causation they can on occasions be used to solve some of the more difficult questions of culpa and cause. Thus where the plaintiff has sustained his injuries in the course of an anti-social activity the court might have recourse to contributory negligence or mitigation in order to deprive him of part or all of his damages. Alternatively the court might refuse a damages action on the basis that the plaintiff consented to his injuries (volenti non fit injuria) or was involved in an activity so anti-social that the illegality prevents any action arising (ex turpi causa non est actio). It should be stressed, however, that the courts are not overready to resort to the volenti defence and statute has intervened in the case of a motor vehicle - but not aircraft - passenger who freely embarks on a journey with an obviously drunk driver; such a passenger cannot be deprived of compensation on the ground of antecedent agreement or acceptance of risk. In road accident cases the primary emphasis is, then, on the compensation of victims. All the same this policy of compensation can be overridden in cases of serious criminal behaviour, and in situations where there is no accident insurance the courts might use the defence of volenti to protect the patrimonies of innocent third parties.

50 Law Reform (Contributory Negligence) Act 1945.
52 See generally on this question Law Comm (1990) working Paper No. 114.
59 Road Traffic Act 1988 s.149; see for the Netherlands law on the volenti defence RedW 1990, nr. 163, 174 and 180.
60 Pitts v Hunt [1990] QB 302.
Contributory negligence, consent and illegality are all defences of substance in as much as they require the courts to assess them in the context of a detailed examination of the circumstances of each case. By way of contrast the defence of limitation is one that functions only at the level of form in that it goes to the remedy not the right although in the case of property rights the effect of limitation is in reality to extinguish title. At common law limitation is entirely a creature of statute and in order to be effective it has to be specifically pleaded; payment of a statute barred debt cannot therefore be recovered on the grounds of lack of an obligation to pay. With regard to equitable remedies there is no actual statutory limitation as such, but time limits will be applied by way of analogy.

The standard time limit in a breach of contract and a tort action is six years from the accrual of the cause of action and this means that there may be a difference of limitation between contractual and non-contractual damages claims. A cause of action in contract accrues from the date of the breach whereas a claim in tort arises only from the suffering of the damage. However there are a range of exceptions to this period depending on the nature of the action or on the nature of the damage. Thus in the case of personal injury the time limit is three years from either the suffering of or the knowledge of the damage although the court does have a certain discretion to override this three year period where it would be equitable to allow an action to proceed and there are special time limits for defamation, defective products, recovery of land and a number of other types of action. Very complex problems have arisen as a result of latent damage and this has required special treatment both with regard to personal injury and property damage. There are now special rules about knowledge of damage in those cases where injuries or damage are not easily discoverable by the plaintiff.

§ 5 TORT AND DEBT

185. One aspect of the legislation giving the court power to reduce damages in tort for contributory negligence is that it in effect allows the court to

63 Buckinghamshire CC v Moran [1989] 2 WLR 152.
65 Limitation Act 1980 s.36.
66 See e.g., Leaf v International Gallerie [1950] 2 KB 86.
67 Limitation Act 1980 s.2, 5.
68 Midland Bank Trust Co v Heron, Stubb & Kemp [1979] Ch 384.
69 Section 11.
70 Section 33.
71 See e.g., sections 4A, 11A, 15.
72 Section 14.

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apportion losses between two parties who have both been guilty of wrongs. Where there is more than one person potentially liable to a victim another piece of legislation allows the defendant who has had to pay full compensation to the victim - for a plaintiff injured by several tortfeasors can sue any one of them for full damages - to recover contribution from any other person liable or potentially liable in respect of the same damage. And this contribution - or indeed complete indemnity - will be recoverable 'whatever the legal basis of... liability, whether tort, breach of contract, breach of trust or otherwise'. The point to notice here, however, is that liability to pay contribution is not actually part of the law of tort even although it may well be influenced by some of its policies; it is a statutory debt claim based on the principle of unjust enrichment (cf. Ch. 11 § 4). Accordingly the 'just and equitable' basis upon which the court decides the contribution question, while obviously based upon the defendant's share of the 'responsible for the damage in question, ought also, in principle at least, to be judged in the context of loss spreading and insurance generally. Whether it will be is another question.

§ 6 TORT AND ACCIDENT COMPENSATION

186. The idea that compensation for accidents is dependent upon fault and causation is one that presents acute social policy questions where personal injury and death are concerned. For a start there is the general question: how can severe personal injury, accompanied by pain and mental suffering, ever adequately be compensated by money? Yet, if compensation is to be the guiding principle in damages awards, ought causation rules strictly to be applied? Should for example private personal injury insurance, or a generous donation from a relative or the public, be taken into account in assessing the damages? And what about social security benefits and the National Health Service? These kinds of question give rise to much litigation whose complexity of detail is outside the scope of this general survey. However two general

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74 Fitzgerald v Lane [1989] AC 328.
75 Civil Liability (Contribution) Act 1978 s.1.
76 Section 2(2).
77 Section 6(1).
78 Section 2(1).
79 Presumably the court has the discretionary power to exempt any person from liability to make contribution if it considers it to be just and equitable; section 2 ss (1) and (2).
80 The court might feel that its discretionary power is governed by responsibility for the damage in question in section 2(1).
81 See now Social Security Act 1989 s. 22.
points must be made.

The first concerns the family. Serious personal injury and death is as much a tragedy for the immediate family of the victim and, in addition to their grief, dependants may well find themselves faced with severe economic hardship. Statute and case law now recognise that an award of damages to the victim may well contain a compensation element for the family. Accordingly the cause of action of a dead victim survives his or her death for the benefit of the estate and the interests of the family will now be taken into account in assessing damages payable by the tortfeasor. Moreover the death of the victim will also give rise to an independent cause of action on behalf of the victim’s dependants; here the measure of damages is the actual economic loss of each dependant entitled to sue, although a statutory sum for bereavement is also available to a spouse or parent in the case of the death of a wife, husband or child.

The second general point concerns insurance. Most personal injury claims arise out of road and factory accidents and these are two areas where liability insurance is compulsory; accordingly in most tort actions an insurance company will be a defendant party and this raises questions both about the role such companies ought to have in the apportionment of liability and about the aims and objectives of the law of tort itself. Should the courts now recognise that the plaintiff’s claim in reality is against an insurance company rather than against the actual wrongdoer? And, if so, should the fault principle itself be modified or abandoned? Sometimes the courts are prepared at least to recognise the role of insurance in risk allocation, but on the whole they continue to see a tort claim as lying only between plaintiff and tortfeasor and thus if the latter disappears the victim, as far as the common law is concerned, will be left without compensation despite the existence of an insurance policy. This continued reliance upon the fault system to determine accident compensation is, perhaps, an unfortunate situation which puts English law out of line with developments in other legal systems. Yet the answer to such compensation problems is not to be found only within the law of tort; for accident compensation is an area where tort interrelates both with the social policy issues of public law and the public interest and with the

(Loi Badinter).

84 Pickett v British Rail Engineering Ltd [1986] AC 136.
85 Fatal Accidents Act 1976.
86 Section 1A.
88 For cases raising these kinds of issues see: Lister v Romford Ice & Cold Storage Co [1957] AC 555; Morris v Ford Motor Co [1983] 1 QB 792.
89 See e.g., Smith v Eric Bush [1990] 1 AC 831.
differing roles of damages and debt remedies (cf. Ch. 4 § 1) within complex liability factual situations (cf. Ch. 13 § 5). Law reform, if and when it comes, will need to be comprehensive in scope.

§ 7 ABUSE OF RIGHTS

187. Another area where English law is to some extent out of line with developments in other systems is with respect to the idea of an abuse of a right. The difficulty here is in many ways analogous to the difficulty of recognising in English law a general principle of unjust enrichment as a source of law (cf. Ch. 11 § 4).

188. The principle of an abuse of a right is, seemingly, to be found in Roman law where Gaius claims *male enim nostro jure uti non debemus* (we ought not to use improperly our legal right), but in truth it is a relatively modern idea because the Roman jurist, like the modern common lawyer, did not think in terms of rights. It is only with the development of the idea of a right as a subjective power that the notion of an abuse of right - that is to say an unreasonable exercise of a right - assumes much meaning. In France the unreasonable exercise of a right can give rise to an action in tort on the basis that any damage caused by the unreasonable exercise is damage flowing from the fault of another[91]; and in Belgian law, the link between good faith in contractual relationships and the theory of abuse of rights is very strong. In Netherlands law, a special category of abuse of rights is unnecessary when dealing with delictual or contractual obligations because, in the general part of the Netherlands Civil Code (Book 3, Patrimonial law in general), s. 3: 13 lays down that nobody is allowed to exercise any right abusively. The provisions of s. 3: 13 and s. 3: 14 set limits to the pursuance of any right the law (*het objectieve recht*) attributes to a person. A right cannot be invoked as far as the person who is entitled to this right abuses it, and any abuse of right either constitutes an *onrechtmatige daad* (delict) or, *le cas échéant*, leads to dismissal (inadmissibility) of a claim based on the right. Abuse of rights as mentioned in s. 3: 13 encompasses the pursuance of a right with no other purpose than to cause harm to another person for a purpose other than that for which it was given, and 'disproportional' use of a subjective right (s. 3: 13-2). Sometimes, a subjective right cannot be abused, for instance when accepting a legacy, and it is the nature of the right which determines whether it can be abused or not (s. 3: 13-3). The exercise of a right contrary to the written or unwritten rules of public law is prohibited in s. 3: 14 and this category encompasses aspects of civil law, civil procedure and public (administrative) law. In Netherlands tort law, abuse of rights is no special criterium for determining whether an act is *onrechtmatig* and the general

91 Zweigert & Kötz, II, pp.313-315.

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formula of s. 6: 162-2 also applies to cases of abuse of rights. In contract law, the rules of good faith can set aside contractual provisions; no special rule for abuse of rights in a contractual relationship is therefore necessary. Abuse of rights of public bodies or abuse of rights of civil procedure is a specific area of Netherlands law.

189. In English law, by way of contrast, not only has it been held that the existence of an intention to injure cannot in itself turn a lawful act into a tort, but it has also been said that a person who has a right under a contract is entitled to exercise it "for a good reason or a bad reason or no reason at all". All the same, as with unjust enrichment, the position is not quite as simple as it first appears. In English administrative law abuse of power is now the central principle that motivates the judicial review remedies and this principle has recently been extended to cover abuse of ownership by public bodies; it is probably true to say, then, that any act by a public official or public body maliciously aimed at damaging another will attract the attention of the courts. In fact it is possible that even a negligent exercise of a right by a public authority will occasionally be a tort if it causes damage to a foreseeable person, although this is a difficult area now (cf. Ch. 13 § 2).

In French law the doctrine of abuse of rights has been used to some extent to deal with problems of culpa in contrahendo (cf. nr. 98) and it can now be said that a similar principle is in operation with respect to many public law contracts in English law; any considerations other than commercial ones will, by statute, be treated as abuses of contractual rights. Accordingly where there is an overlap between the law of obligations and public law there is a role for the notion of abusive behaviour acting as the basis for a remedy.

Equity also provides a number of remedies that can be used to prevent certain abuses of power and of rights and it may be that there is even a general equitable principle that a contractor will be prevented from exercising a right under a contract if the sole purpose of the exercise is maliciously to injure the other party. For if a party has no legitimate interest in enforcing a stipulation he cannot in general enforce it. In addition to any equitable intervention, the law of tort can make use of the concept of abuse as a constituent part of one of its actions. Thus the tort of nuisance (cf. Ch. 12 § 6) is available against the unreasonable user of land and malice can, in this context, amount in itself to unreasonable use - at least if the act complained

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93 Asser-Hartkamp II, p.286.
95 Chapman v Honig [1963] 2 QB 502, 520.
96 Wheeler v Leicester City Council [1985] AC 1054.
97 Ben Stansfield (Carlisle) Ltd v Carlisle City Council (1982) 265 EG 475.
98 Local Government Act 1988 s. 17. See also Blackpool & Fylde Aero Club Ltd v Blackpool BC [1990] 1 WLR 1195.
of is noise or some other form of pollution\textsuperscript{100}. Malice can also be used to undermine certain defences in the tort of defamation\textsuperscript{101}.

The truth seems to be, then, that although English law does not recognise a general principle of abuse of rights it nevertheless has a number of actions and torts designed to remedy certain kinds of abuses. However perhaps the real difficulty with regard to recognising a general principle of abuse of rights is that English law does not really think in terms of the subjective right\textsuperscript{102}; it thinks only in terms of particular rules and remedies arising out of the circumstances of the case (cf. Ch. 2 § 5). In order to have a theory of abuse of rights it is necessary first of all to have a theory of rights and if in order to have a theory of rights it is probably necessary to have a theory of ownership and of obligation; these theories are, as this survey has hopefully shown, often missing from English law.

\section*{§ 8 PROPERTY RIGHTS AND THE LAW OF TORT}

190. However just because English law does not have a theory either of ownership or of rights as such this does mean that it has no remedies capable of protecting what the layman would see as property rights. English law, like Roman law, recognises ownership of things even if (again like Roman law) it has no definition of dominium\textsuperscript{103}. In fact were English law to adopt a general definition of ownership along the lines of article 544 of the Code civil - a definition which sees ownership as an absolute right to enjoy and to dispose of property (le droit de jouir et disposer des choses de la manière la plus absolue) - it would result in the instant abolition of the trust, or at least its relegation to the law of obligations\textsuperscript{104}; consequently property problems need to be handled without recourse to a legal definition of ownership. The common law achieves this by using, on the one hand, remedies in the law of tort in place of an actio in rem\textsuperscript{105} and, on the other hand, possessio in place of dominium\textsuperscript{106}. An action for damages is available in conversion, trespass or negligence for any interference with a person's possessory title to moveable property; and the proprietary nature of these remedies is reflected in the damages rule that, prima facie, the plaintiff is entitled to the value of the goods converted\textsuperscript{107} plus, where appropriate, consequential damages\textsuperscript{108}.

\textsuperscript{100} Hollywood Silver Fox Farm v Emmett [1936] 2 KB 468.
\textsuperscript{101} But see Horrocks v Lowe [1975] AC 135.
\textsuperscript{102} G Samuel [1987] CLJ 264.
\textsuperscript{103} Sale of Goods Act 1979 s. 17, 21.
\textsuperscript{105} Torts (Interference with Goods) Act 1977 s. 1.
\textsuperscript{106} Section 7(1)(a).
\textsuperscript{107} The Winklefield [1902] P 42.
\textsuperscript{108} Torts (Interference with Goods) Act 1977 s. 3.
Under statute a court can also order a wrongful possessor of goods to redeliver them to the plaintiff\(^{109}\).

These kind of rules often go further than the law of tort as such is that the ability to be able to order consequential damages in addition to the value of the goods provides the court with a means of preventing unjust enrichment (cf. Ch. 11 § 4). If one person wrongfully detains a profit earning chattel belonging to another the latter might well be able to reclaim any lost profits from the former on the basis that the former has acquired an unjust benefit\(^{110}\). However this appears to be a rule of commercial law and so if the plaintiff is a public body the same principle might not apply\(^{111}\); furthermore if the court is convinced that the plaintiff has suffered no loss and the defendant has gained no benefit it is possible that a conversion claim will result only in nominal damages\(^{112}\).

One of the problems with using remedies and possession as the basis of an action for the full value of the goods is that a wrongdoer might be faced with a double liability. And so, for example, 'if a converter of goods pays damages first to a finder of the goods, and then to the true owner\(^{113}\) this might result in the true owner getting the goods or their value from the defendant and the finder getting the value of the goods from the defendant. Statute has now intervened here using the remedy of account (cf. nr. 45) and the principle of unjust enrichment (cf. Ch. 11 § 4); one claimant can be made liable to account over to the other person having a right to claim to such extent as will avoid double liability\(^{114}\) and '[w]here, as the result of enforcement of a double liability, any claimant is unjustly enriched to any extent, he shall be liable to reimburse the wrongdoer to that extent\(^{115}\). The value of this section is that it provides an excellent insight into how English law, via the law of actions, attempts to deal with complex liability problems involving three or more parties (cf. Ch. 13 § 5); however the end result is that the restitutionary remedies cannot easily be classified within any obligations structure (cf. Ch. 2 § 4). In theory the damages claim for conversion is one in tort and so, logically, must belong to the law of obligations. Yet in substance the action is often much closer to an actio in rem in that it is not based on fault\(^{116}\) and consists of a claim for the goods themselves or their value\(^{117}\). When it comes to a remedy like account (cf. nr. 45), the in rem aspect is

\(^{109}\) Ibid.

\(^{110}\) Stroud Electric & Engineering Co Ltd v Britford Entertainments Ltd [1952] 2 QB 246.

\(^{111}\) Stoke-on-Trent CC v W & J Wass Ltd [1988] 1 WLR 1406.


\(^{113}\) Torts (Interference with Goods) Act 1977 s. 7.

\(^{114}\) Section 7(3).

\(^{115}\) Section 7(4).

\(^{116}\) Section 11(1).

\(^{117}\) Section 3(2).
reinforced by the doctrine of tracing (cf. nr. 46) which allows a plaintiff, in
certain circumstances at least (cf. Ch. 4 § 4), to aim the actio, not against the
debtor as such, but against the debt itself. Restitution of money or
property is one area, then, where the property and obligations dichotomy
simply breaks down as a result of procedural rules attaching to the various
remedies themselves.

This property flavour to the torts of conversion and trespass to goods
is to be found in the location of liability in the relationship between person
and thing. They are torts of strict liability based on interference rather
than actions for damages based on fault and as a result persons such as an
auctioneer can be held liable if they innocently sell stolen goods. Now,
as we have mentioned, it is the (quasi) factual relationship of possession
rather than the legal relation of ownership which acts as the focal point
of liability; yet this must be treated with a certain amount of care since the real
starting point for conversion is not the fact of possession but the right to possess.
In truth one is thus dealing with a rational rather than empirical
concept and this means that conversion is, in substance, often more a question
of dominium than strict possessio; damage, even serious damage, to the
property itself is not conversion and will be a trespass only if it is done
intentionally. Careless damage to goods is a matter for the law of
contract or the tort of negligence and in these situations the measure
of damages is subject to the rules of causation (cf. Ch. 13 § 3).

But what if the defendant carelessly loses the plaintiff's goods: is this
a question of damage or interference? Or, put another way, is it a matter for
the law of obligations or the law of property? It has been said that the form
of action is not important in situations where the defendant causes the loss
of the plaintiff's ship by sinking it, and in those cases where a bailee (cf. Ch.
§ 6) carelessly loses the bailor's goods it has been implied that an action
might be available in conversion or in negligence under the res ipsa loquitur
principle (cf. Ch. 12 § 6). Yet the situation is not so simple because not only
does the bailment relationship itself give rise to proprietary rights and duties
(cf. Ch. 5 § 6), but the tort of negligence, as we shall see (cf. Ch. 13 § 9), does
still appear to distinguish between economic loss and physical damage.

119 Fowler v Hollins (1872) LR 7 QB 616; (1875) LR 7 HL 757.
121 Weir, Casebook, pp. 419-424.
122 England v Cowley (1873) LR 8 Exch 126.
124 See e.g., Photo Production Ltd v Securicor [1980] AC 827.
125 See e.g., Home Office v Dorset Yacht Co [1970] AC 1004.
126 The Mediana [1900] AC 113.
127 Houghland v RR Low (Luxury Coaches) Ltd [1962] 1 QB 694.
Moveable property in truth gives rise to a range of conceptual problems because it acts as a focal point for a range of different legal remedies (conversion, trespass, damages) and a range of different categories (contract; tort; bailment).

191. Land does not present quite the same property problems in that it cannot be stolen as such. The owner or rightful possessor can only be dispossessed and the main tort remedy here - trespass - is one of the oldest in English law. Trespass deals with a direct invasion of possessory title to land and, as a result, it may be available to a possessor against the actual owner of the property; all the same what actually constitutes an act of trespass can give rise to delicate problems not only in private law but also in public law. Trespass to land is the main remedy used against government officials who abusively enter or destroy a person's property. Indirect invasions which interfere with the possessor's enjoyment of the land might give rise to a claim in private nuisance (cf. Ch. 12 § 6) and here again the theory is that a defendant's unreasonable use of land is objective rather than fault-based. However the public interest question can often arise via the defence of locality or as a result of rules attaching to a remedy such an injunction (cf. nr. 40).

Private nuisance actions are available only for and against those with an interest in land and this means that it is not a particularly suitable tort for general protection of the environment. Pollution and environmental problems have usually to be tackled in public law through the use of statutory nuisance, public nuisance (cf. Ch. 12 § 5) or other statutory provision and the remedies here might well depend upon the willingness of the local authority or some other public body to pursue the matter. Landowners damaged by escaping things might be able to sue under the fault principle; however if the escaping thing is dangerous in itself they might have an action under the strict liability rule of Rylands v Fletcher (cf. Ch. 12 § 6) if the escape results from a non-natural use of the land or as a result of certain strict liability statutory provisions. In cases of undue noise or smell

129 The dispossessed owner of land also has a real remedy at common law which is quite separate from an action in trespass: Burrows, pp.409-410.
131 See e.g., Bernstein v Skyviews & General Ltd [1978] QB 497.
132 Cooper v Wandsworth Board of Works (1863) 143 ER 414; Robson v Hallett [1967] 2 QB 939; cf Police and Criminal Evidence Act 1984 ss. 15-19; Security Service Act 1989 s.3.
133 See e.g., Miller v Jackson [1977] QB 666.
135 Environmental Protection Act 1990 ss.79-82.
136 Note the defence of "best practicable means" in the 1990 Act: section 80(7).
138 See e.g., Civil Aviation Act 1982 s. 76(2).
the remedy of injunction is probably the most appropriate\textsuperscript{139} since there is a danger that damages in private nuisance for intangible harm might be somewhat modest\textsuperscript{140}.

\textbf{§ 9 ECONOMIC LOSS}

192. The nature of the damage can be of relevance in another way when it comes to the escape of a dangerous thing. Under statute a person suffering "injury or damage" as a result of the escape of nuclear radiation is entitled to compensation without proving fault\textsuperscript{141}. Does this cover the economic loss arising from the fall in the price of a house situated in the neighbourhood of a nuclear processing plant from which radiation has been leaking? The answer would appear to be that compensation is not available under statute because 'injury or damage' is to be interpreted as excluding pure economic 'loss'\textsuperscript{142}. Compensation is payable only in cases of physical injury.

This dichotomy between physical damage and financial loss is, as we have seen (cf. Ch. 12 § 4), a characteristic of the tort of negligence and this characteristic was specifically referred to by the court in its interpretation of 'injury or damage' in the escaping radiation case\textsuperscript{143}. English law would, accordingly, appear to distinguish between 'loss', 'injury' and 'damage'\textsuperscript{144} and in order to be able to obtain compensation for pure economic loss the relevant legal action must be one designed to compensate for this kind of harm\textsuperscript{145}. Now an action in contract, and certain tort actions, will undoubtedly compensate for financial loss, in addition to compensating damage or injury, in that these actions are clearly designed to protect, \textit{inter alia}, economic interests\textsuperscript{146}; accordingly 'special damage' resulting from a public nuisance will include financial loss\textsuperscript{147} and injury to commercial patrimonies caused by certain kinds of wrongful acts or misleading statements.

\textsuperscript{139} \textit{Kennaway v Thompson} [1981] QB 88.
\textsuperscript{140} \textit{Bone v Seatle} [1975] 1 All ER 787.
\textsuperscript{141} \textit{Nuclear Installations Act} 1965 s. 12.
\textsuperscript{142} \textit{Merlin v British Nuclear Fuels Plc} [1990] 2 QB 557.
\textsuperscript{143} Id, at p.572.
\textsuperscript{144} On the whole topic of 'damage' in English civil liability see T Weir, La notion de dommage en responsabilité civile, in: P Legrand (sous la direction de), \textit{Common law fin de siècle} (forthcoming).
\textsuperscript{145} See e.g., \textit{Consumer Protection Act} 1987 s. 5(1), (2).
\textsuperscript{146} Note in this respect the language of statutes designed to protect economic interests: \textit{Air Travel Reserve Fund Act} 1975 s. 2; \textit{Financial Services Act} 1985 s. 62(1), 150(1), 166(1); \textit{Courts and Legal Services Act} 1990 s. 44(1); and compare with statutes designed to protect other interests: \textit{State Immunity Act} 1978 s. 5; \textit{Civil Aviation Act} 1982 s. 76(2); \textit{Consumer Protection Act} 1987 s. 5; \textit{Housing Act} 1988 s. 27(3).
\textsuperscript{147} \textit{Benjamin v Storr} (1874) LR 3 CP 400; \textit{Tate & Lyle v GLC} [1983] 2 AC 509.
(cf. Ch. 12 § 8) may well be actionable via the so-called 'economic torts'. However when it comes to the tort of negligence, together with certain other torts such as breach of statutory duty, the duty of the defendant traditionally extended no further than 'damage or injury'. In other words there was no duty in respect of pure economic 'loss'. This principle can be expressed another way: that the tort of negligence was designed to protect physical interests in the person and in property and consequently those who do not suffer 'damage' have no 'legitimate interest' in the negligence actio. Moreover this position regarding interests also extended to the law of damages in that, in a negligence action, the court would distinguish between damnum emergens and lucrum cessans in those cases where the substance of the action was claim for the loss of a profit earning chattel.

The distinction between 'loss' and 'damage' has important consequences in both commercial and consumer law. In commercial law physical damage to a profit earning chattel or other asset amounts to 'damage' only for those having an actual proprietary interest in the chattel; those with a contractual right to the thing damaged are deemed to suffer 'loss' and, prima facie, are owed no duty of care. In consumer law the tort of negligence is traditionally available only to those who suffer physical damage to their person or property; compensation for the damaged product itself - loss arising from a bad bargain - has to be obtained through the law of contract. Before 1972 these rules were fairly well established and seen as part of the general principle that compensation was not available in the tort of negligence for pure economic loss. However there were some areas of uncertainty. Loss arising from a negligent misstatement has been recoverable in tort since 1964 (cf. Ch. 12 § 8), but this could, and still can, be seen as arising out of a special relationship which has more in common with contract and fiduciary relationships than with traditional damage cases. In addition to these special relationship problems, a number of factual situations could give rise to problems of distinguishing between 'damage' and 'loss'.

In 1972 both of these uncertainties came together when a purchaser of a house, which subsequently turned out to be physically defective because it was built on insecure foundations, successfully sued a local authority for negligence on the basis of their carelessly approving, pursuant to a statutory power, the foundations. Was the harm suffered by the house purchaser

148 Weir, Casebook, pp. 485-487.
149 See e.g., Weller & Co v Foot & Mouth Disease Research Institute [1966] 1 QB 560.
150 Cf. Nouveau Code de procédure civile art. 31; Netherlands Civil Code s. 3:303.
153 Young & Marten Ltd v McManus Childs Ltd [1969] 1 AC 454, 469.
physical 'damage' (the walls were badly cracked) or was it only economic 'loss' (she had purchased a bad bargain)? In 1978 the House of Lords decided that it was physical damage\textsuperscript{157}. A year or so later another court decided that the 'loss' of an expectation could be recoverable beyond the special relationship structure (cf. Ch. 12 § 8) normally associated with negligent misstatement\textsuperscript{158}. The way was now open to extend the duty of care beyond physical 'damage' and into the area of economic 'loss'.

This step was seemingly taken by the House of Lords some short time after\textsuperscript{159}, but almost immediately there was a 'counterrevolution...owing nothing to academic lawyers'\textsuperscript{160}. The extension of the tort of negligence into the area of 'loss' proved, for the judges, to have been out of tune with the enterprise culture of the Thatcher years\textsuperscript{161}. Twelve years after their decision holding the local authority liable for what was, subsequently, seen as a 'loss' rather than 'damage' the House of Lords changed its mind and overruled its decision which had made local authorities liable in such circumstances\textsuperscript{162}. The position now seems to be not only that investors and property speculators must carry their own 'losses' rather than try to blame others\textsuperscript{163}, but that consumers\textsuperscript{164}, employees\textsuperscript{165} and even school boys\textsuperscript{166} may be caught by the re-emphasis of dichotomy between 'loss' and 'damage'. According to the House of Lords the causing of physical 'damage' has universally to be justified, but the infliction of economic 'loss' does not; in order to recover in the tort of negligence for such loss something more is required than the mere foreseeability of such loss\textsuperscript{167}. The defendant must be under a duty to protect the specific financial interest of the particular plaintiff in question. For the notion of duty does not attach to abstract notions of person and injury but to actual individual legal subjects and to actual kinds of harm\textsuperscript{168}, liability is descriptive and analogical rather than institutional and deductive.

\textsuperscript{157} Anns v Merton LBC [1978] AC 728.
\textsuperscript{158} Ross v Caunters [1980] Ch 297.
\textsuperscript{160} Weir, Casebook, p. v (Preface to Sixth Edition).
\textsuperscript{161} Hepple & Matthews, p. 151.
\textsuperscript{162} Murphy v Brentwood DC [1991] 1 AC 398. See also R O'Dair, Murphy v Brentwood District Council: A House with firm foundations?, MLR 1991, p.561-570.
\textsuperscript{163} Caparo Industries Plc v Dickman [1990] 2 AC 605; Davis v Radcliffe [1990] 1 WLR 821.
\textsuperscript{164} Consumer Protection Act 1987 s. 5(2).
\textsuperscript{165} Reid v Rush & Tomkins Plc [1990] 1 WLR 212,
\textsuperscript{166} Van Oppen v Bedford Charity Trustees [1990] 1 WLR 235.
\textsuperscript{167} Murphy v Brentwood DC [1991] 1 AC 398, 487; Caparo Industries Plc v Dickman [1990] 2 AC 605, 643.
\textsuperscript{168} Caparo Industries Plc v Dickman [1990] 2 AC 605, 651.
§ 10 OBLIGATIONS AND ACTIONS

193. This emphasis on the nature of the harm in the law of tort raises a more general question about the mechanics of liability in the English law of obligations. What are the concepts which provoke decisions in contract, tort and unjust enrichment cases and how do they relate to a normative system of obligations? In the Civilian systems the two key concepts are *conventio* (together with *volonté*) and *culpa* and both of these concepts increasingly became more normative than descriptive with the result that during the second life of Roman law contract and delict ended up being more about liability than loss.\(^{169}\) With regard to delict, this was summed up by the maxim *omnium damnumorum reparatio ex hoc petatur*\(^{170}\). Interestingly, however, in classical Roman law purely patrimonial loss presented some of the same problems as it does in the modern common law\(^{171}\) and this raises the question about whether the distinction between damage and loss is as much a question of *scientia iuris* as social and economic policy. Is the Common law simply trapped in a stage of development where its concepts are incapable of provoking adequate decisions without recourse to propositions which are simply descriptive in their operation?

One can of course go from one extreme to another and simply decide that an *actio* will be available for certain types of economic losses\(^{172}\). But the problem here is that many would see this as conceptually clumsy and constitutionally dangerous in that some kinds of economic harm are an integral part of the political economy. Now one way of making the distinction is at the level of the law of actions and this was broadly the approach of Classical Roman law; another way is to utilise the boundary between contract and tort which, together with the notion of a right, is the German method\(^{173}\). Yet if one tries to apply these approaches to English law both caselaw and doctrine present serious problems\(^{174}\). The common law does not seem to have the conceptual sophistication which can relate the *actio* to *damnum* and to a structure of institutional relationships between legal subjects and legal objects. Classical Roman law, it must be admitted, might well have been equally uncertain of the division of labour between the law of actions and the law of things, but at least the jurists had developed the foundations of an institutional system upon which the later Civil lawyers could build a construction of rights. And this construction is still seen as something of a science even if the idealism of the Enlightenment epistemologists has waned. The economic loss debate in English law is not, then, just an issue concerning the scope of the law of obligations; it raises more fundamental issues about

\(^{169}\) Zimmermann, pp.537-545, 885-887, 1017-1018.
\(^{170}\) Ibid., p.1022.
\(^{171}\) Digest 4.3.18.5.
\(^{172}\) Justinian 4.3.16; Zimmermann, pp.1022-1023.
\(^{173}\) Zimmermann, pp. 1036-1038.
\(^{174}\) Ibid., pp. 1038-1039.
technique and methods in law. It raises a question about whether a legal
system which has to rely on notions like 'proximity' (rather than the subjective
right) is really well enough equipped to be able seriously to think about
harmonisation with a system more used to thinking in terms of abstract
notions of legal subjects and legal objects. A comparative discussion of the law
of obligations raises, in other words, issues of legal method and legal
reasoning.
§ 1 INTRODUCTION

194. The question what it is to have knowledge of contractual and non-contractual obligations in the common law presents difficulties owing to the burial of the forms of action (cf. nr. 2). In Continental thinking legal actions are no longer determined by their form but by their causes, focused around a person's legal rights. These rights are, in turn, defined in terms of systematised codes of legal propositions, applicable via syllogism. Is this approach also true of English law? Is legal knowledge in English law a matter of inducing a rule out of a precedent (ratio decidendi) or finding one in a statute and applying it logically to a set of facts?

It is tempting to think that the position in English law is, in terms of knowledge, not that different from the position on the Continent. It has of course been said that English law is a practical, rather than a logical, code and that, following Holmes, the life of the law has not been logic; it has been experience¹. But legal knowledge and its application is still, it would seem, a matter of propositional logic: thus according to Lord Simon A judicial decision will often be reached by a process of reasoning which can be reduced into a sort of complex syllogism, with the major premise consisting of a pre-existing rule of law (either statutory or judge-made) and with the minor premise consisting of the material facts of the case under immediate consideration. The conclusion is the decision of the case, which may or may not establish new law ...². This statement assumes legal knowledge to be a matter of pre-existing legal propositions and legal reasoning to be a matter of applying these propositions to facts (the application of existing law to the facts judicially ascertained). Unlike the Continent, however, the 'pre-existing law' does not always exist in a purified form in that what constitutes binding precedent is the ratio decidendi of a case, and this is almost always to be ascertained by an analysis of the material facts of the case - that is, generally, those facts which the tribunal whose decision is in question itself holds, expressly or implicitly, to be material³. English common law cannot, then, be seen as an organised system of legal propositions (major premises) existing in a metaphysical (or normative) world.

² FA & AB Ltd v Lupton [1972] AC 634, 658-659 HL.
³ Lord Simon, l.c.
ready to be applied to sets of facts as they arrive. The propositions can often remain locked within the facts of previous cases. But does this mean that reasoning consists of matching one set of facts to another? Lord Simon thinks not: Frequently... new law will appear only from subsequent comparison of, on the one hand, the material facts inherent in the major premise with, on the other, the material facts which constitute the minor premise. As a result of this comparison it will often be apparent that a rule has been extended by an analogy expressed or implied. The reasoning approach outlined here would appear to be a matter of both propositional logic (the vast majority of cases) and analogical reasoning (new law). Yet on closer examination of Lord Simon's speech it becomes clear that analogy applies more to the rule than to the isomorphic pattern of the facts. Thus a rule dealing with escaping water can be extended by analogy to a situation of escaping electricity; in turn electricity can act as the focus for some future analogy. Accordingly, in truth, it is not so much the rule, but a factual element around which the rule is framed that acts as the institution at the centre of the reasoning.

§ 2 LEGAL INSTITUTIONS

195. The notion of a legal institution is central to legal science on the Continent and it is a notion that has its roots in Roman legal thought. Today a legal institution is regarded as a social reality around which rules are framed; and in Roman law there were three such institutions - persons (persona), things (res) and actions (actiones). What this in effect means is that all legal rules attach themselves to a person, to a thing or to a legal remedy. These institutions are not just legal concepts however. They represent the meeting place between social fact and legal rationality and consequently they have a role not only in organising the law but also in organising the facts themselves (see Ch. 15 § 3). They are the means by which a raw set of facts are transformed into a legal scenario capable of receiving the application of a legal rule; and, in turn, the scenario plus rule can perhaps act as a precedent. Legal institutions are thus fundamentally both to problem-solving and to legal reasoning; they are the vehicle both by which facts are categorised so that the law can be applied and by which the law itself is structured so as to render it capable of being applied in the first place.

This institutional analysis is primarily Roman rather than English in origin, but one of the effects of the abandonment of the forms in action in

4 Lord Simon, i.e.
5 Rylands v Fletcher (1866) LR 1 Ex 265; (1868) LR 3 HL 330.
6 National Telephone Co v Baker [1893] 2 Ch 186.
7 See generally Stein, pp.125-129.
8 See e.g., Housing Act 1985 s.118(1).
9 See e.g., Sale of Goods Act 1979 s.14(2).
10 See e.g., Supreme Court Act 1981 s.32A, 37(1).
English law was that Roman law categories were imported into English law and this had the effect of introducing, more clearly, legal institutions into English legal thought\textsuperscript{11}. Thus the parties (legal subjects), property (legal objects) and remedies (actions) are now the main starting points in analysing legal liability in the common law; and each of these institutions is capable of generating its own particular case law and sets of legal rules. Yet what is important to bear in mind is that the institutions are also fundamental to the analysis and categorisation of the facts themselves. They can go some way in actually determining the rules that find themselves being applied\textsuperscript{12}.

196. Take for example \textit{Lister v Romford Ice & Cold Storage Co Ltd}\textsuperscript{13}. Lister and his father were employed as lorry driver and mate by the Romford Ice Co and one day Lister carelessly ran over his father causing him injury. The father successfully brought a damages action against the company which was held liable under the principle of vicarious liability for the negligence of their employee, the son. The father received £1600 by way of damages from the employer's insurance company and the latter, under the doctrine of subrogation, then sued to recover the money from the son claiming both that he was in breach of an implied term of his contract of employment and that he was liable to contribute under statute. The son argued in return that there was an implied term in the contract of employment that he should receive the benefit of any company insurance. The House of Lords held (by a bare majority) that the insurance company was entitled to succeed. Viscount Simonds said that the fact that one party was insured was to be disregarded in determining the rights between two parties in a civil liability claim.

What the law is doing here is placing the risk of personal injury arising out of accidents on the road and in the workplace not on the shoulders of those best able - and indeed paid - to carry the risk (that is on the insurance company), but upon the shoulders of someone least able to bear it (the worker). Is this a sensible policy? Is this good loss spreading? And what is the function of a category like 'tort' in respect of such loss spreading? Several institutional points should be stressed here. First it must be observed that the court made its decision on the basis of two rather than three legal subjects. The insurance company was not to be treated as an independent institution within the factual situation; instead the rights were to be determined as if the only players were the employer and the employee. As a result the facts attracted legal rules designed originally to govern a dispute arising out of an accident between two human beings. In truth this was not an 'accident' as such because personal injury and its cause are statistically predictable; indeed this is the one reason why industry and drivers use insurance to spread risks which are quite foreseeable\textsuperscript{14}. So why did the courts take this approach? One

\textsuperscript{11} See Stein, p.125.
\textsuperscript{13} \textit{Lister v Romford Ice & Cold Storage Co Ltd} [1957] AC 555 HL.
reason may simply have been that the predominant institutional pattern
associated with a negligence case. This pattern is the two party situation. If
one person negligently causes injury to another person, then the latter can
claim compensation from the former and if one introduces a third legal
subject whose role is in no way connected to the physical accident itself this
will create a situation in which the pre-existing rules are not easily applicable.
If the company has a right to damages from a negligent employee, then the
insurance company must, according to the existing pattern and rules, have a
right to be subrogated to this right.
Secondly it must be observed that there were in truth two legal remedies. The
claim by the father against the company was an action for damages, while the
claim by the insurance company against the son was in truth an action for
debt arising, not out of the facts of the accident, but out of either the law of
contract or the statute giving a right to contribution. It was here that the
House of Lords made what might be called an institutional mistake in that in
failing to separate these two remedies the second got infected by the rules
attaching to the first. The policy attaching to the law of tort undermined the
policy that ought to have attached to the law of restitution. Thus if one asks
whether insurance companies are to be in the happy position of receiving
premiums for risks they do not ultimately have to bear15, the answer from
the law of restitution would probably be opposed to that arrived at in the
Lister case. The principle of unjust enrichment which ought to attach to
contribution (debt) claims might well have come into play to prevent the
insurance company from recovering as a debt money in respect of a risk they
had been paid to take16.

§ 3 LEGAL CATEGORIES

197. Legal institutions not only have a role in organising the facts; they are
also, in the Roman tradition at least, a fundamental starting point for the
organisation of the law. Accordingly persons (personae), things (res) and
actions (actiones) form the strating point of legal classification by giving rise
to the general categories of the Law of Persons, Law of Things and Law of
Actions. In the modern Codes these actual Roman categories have been
modified; the two sub-categories of the Law of Things - that is to say the Law
of Property and the Law of Obligations - have been elevated to a generic role,
and the Law of Actions has now been relegated to separate procedural
codes17. The rules that attach to the various institutions are thus classified
within categories that reflect their institutional bias and it is, inter alia, via this
bias that the categories themselves relate to the 'non-legal' (or social, for want
of a better term) world.

16 See e.g., Morris v Ford Motor Co Ltd [1973] 1 QB 792.

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In turn, these general categories are subdivided into sub-categories. Thus, generally speaking, the Law of Obligations is sub-divided into contract, delict, and (usually) unjust enrichment or quasi-contract while the Law of Property usually divides up along the lines of ownership, possession and rights over another's property. Each of these sub-categories contain highly detailed rules and provisions and so they, in turn, are subdivided into further categories. One arrives at the situation where legal knowledge itself can be seen as the contents of a number of particular categories: detailed provisions from statutes and cases become the subject matter of lectures and textbooks and these lectures and books become the means of defining the knowledge to be known. Law becomes a declarative subject, a set of detailed propositions within particularised categories. And it is at this stage that it is in danger of becoming dogmatic and positivistic. It takes on the appearance of being a mass of propositions to be learned and applied logically.

Moreover, the relations between legal categories become important in that the categories appear to define the limits of the rules themselves. Thus an action in tort might be refused simply on the basis that the facts fall within the law of contract. This will not always be so. Indeed, some of the most famous cases have in truth been cases where the courts have been able to establish new liabilities by switching categories. But these exceptions often go far in proving the rule that legal categories form an essential part of legal science and legal rationalisation; they themselves become focal points of knowledge in that they act as a means of attracting theories - for example the will theory of contract - or policy implications (what is the function of the law of tort?). In turn, these theories and policy implications can directly affect the contents of the categories. For instance, in a defamation case raising the question of when exemplary damages could properly be awarded, Lord Wilberforce (dissenting) held that it cannot lightly be taken for granted, even as a matter of theory, that the purpose of the law of tort is compensation... As a matter of practice English law has not committed itself to any of these theories...

Now, despite what is being said here, the comment by Lord Wilberforce demonstrates clearly how the category itself can become a major influence on the actual rule it contains. The rules regarding exemplary damages - that is to say damages awarded to punish the defendant - were being attacked, inter alia, on the basis that punishment is not an aim that attaches to the category 'tort'. The role of the law of tort, so it was argued, was to compensate and it should be left to the category of 'criminal law' to punish. Legal categories thus become in themselves objects of knowledge. Tort claims are compared to contractual, quasi-contractual, equitable and proprietary actions; and

18 See e.g., Tai Hing Cotton Mill Ltd v Lia Chong Hing Bank Ltd [1986] AC 80, 107.
20 On which see, generally, Gördley.
21 Cassell & Co Ltd v Broome [1972] AC 1027, 1114 HL.
differences between different kinds of category can have important effects on the rules applicable in the law of actions (remedies). Thus the measure of damages might be different depending upon whether the action is founded in contract or in tort (for example an expectation interest not generally recoverable in tort, except in cases of fraud)\(^{22}\).

Legal rules can sometimes be influenced by the introduction of new legal categories which highlight new interest groups. Thus the development of labour and consumer law helped stimulate law reform by focusing attention on new classes of social interest groups and the new categories helped transform these interests into 'rights' and 'duties'. Formerly these areas were governed by contract, tort and crime; with the introduction of the new 'empirical' categories it became possible to talk about workers' and consumers' rights. What is interesting about these new categories is that, seemingly, they have developed independently from the Roman-based institutional system; they were categories that grew directly out of social reality so to speak.

\[\text{§ 4 LEGAL INTERESTS}\]

198. What stimulated these new categories was the notion of a legal 'interest'. Now it is certainly true that consumer, worker and environmental interests are not to be found directly in traditional legal science. Yet the object of Roman legal science was - as is quite specifically stated in the Digest itself\(^{23}\) - public and private interests (\textit{utilitas}) and when this notion is associated with the Roman institution of the legal subject (\textit{persona}) it can be seen that the recognition of new social realities in modern law does not require any new epistemological discourse as such. The recognition by the law of new interests is simply the application of a traditional scientific structure (\textit{persona} and \textit{utilitas}) to new social circumstances.

This is a fundamental aspect of legal method because not only does it illustrate the important interrelationship between legal institutions, legal categories and legal interests, but it also indicates how one moves from the world of social fact to the world of legal relations. The notions of \textit{persona} and \textit{utilitas} are acting as conduits from the social to the legal and once this transformation has taken place the factual situation is from then on subject to the rationality of the institutional model. And this rationality is not just a question of persons, things and actions; there is also a whole range of legal relations flowing between the three institutions. Thus between the legal subject (\textit{persona}) and legal object (\textit{rei}) there exists the property relations of ownership (\textit{dominium}), possession and real rights (rights of way, mortgages,

\(^{22}\) See e.g., \textit{Swingcastle Ltd v Gibson} [1991] 2 WLR 1091.

\(^{23}\) Digest 1.1.1.2.
charges, liens and the like); and between two legal subjects there is the relationship of contractual and non-contractual obligations. Between legal subject (persona) and legal action (actio) there is the relationship of 'legitimate interest' which can become quite crucial in those cases where the damage is more diffuse. For instance, in *Att-Gen v PYA Quarries Ltd*\(^24\), an action by the Attorney-General (relator action) for an injunction against a quarry said to be causing a public nuisance, Denning LJ said: *Take the blocking up of public highway or the non-repair of it. It may be a footpath little used except by one or two householders. Nevertheless, the obstruction affects everyone indiscriminately who may wish to walk along it. Take next a landowner who collects pestilential rubbish near a village...The householders nearest to it suffer the most, but everyone in the neighbourhood suffers too. In such cases the Attorney-General can take proceedings for an injunction to restrain the nuisance: and when he does so he acts in defence of the public right, not for any sectional interest...But when the nuisance is so concentrated that only two or three property owners are affected by it, ...then they ought to take proceedings on their own account to stop it and not expect the community to do it for them...*\(^22\). This litigation does of course involve legal subjects acting against another legal subject, but the main emphasis of the litigation is on the institution of the remedy (injunction) *vis-à-vis* the community interest affected. However, as is clear from Denning's comment, two interests are in play here: the public (community) interest and the private interest of each individual. These two interests can sometimes be crucial in deciding whether a remedy is to be available. Thus Lord Fraser in *Gouriet v Union of Post Office Workers*\(^26\) said: *The general rule is that a private person is only entitled to sue in respect of interference with a public right if either there is also interference with a private right of his or the interference with the public right will inflict special damage on him...*

Here we can see that the public and private interest have been transformed into 'rights' through the notion of 'damage' and this notion of damage is, in truth, simply an aspect of *utilitas*. Thus in measure of damages cases lawyers often ask what interests are to be protected by an award of damages\(^25\). In this latter situation the interest question is one that functions in the law of actions, yet the moment one moves from interest (damage) to rights one is moving out of the law of actions and into the substantive law of civil liability and thus interest can become a means of creating new rights. Accordingly Lord Denning MR in *Beswick v Beswick*\(^28\) said: *The general rule undoubtedly is that no third person can sue, or be sued, on a contract to which

\(^{24}\) *Att-Gen v PYA Quarries Ltd* [1957] 2 QB 169 CA.


\(^{26}\) *Gouriet v Union of Post Office Workers* [1978] AC 435 HL.

\(^{27}\) See e.g., Fuller & Purdue (1936) 46 Yale LJ 52.

\(^{28}\) *Beswick v Beswick* [1966] Ch 338 CA.
he is not a party'; but at bottom that is only a rule of procedure. It goes to the form of remedy, not to the underlying right. Where a contract is made for the benefit of a third person who has a legitimate interest to enforce it, it can be enforced by the third party in the name of the contracting party or jointly with him or, if he refuses to join, by adding him as a defendant. In that sense, and it is a very real sense, the third person has a right arising by way of contract. He has an interest which will be protected by law... It is different when a third person has no legitimate interest, as when... he is seeking to rely, not on any right given to him by the contract, but on an exemption clause seeking to exempt himself from his just liability. He cannot set up an exemption clause in a contract to which he is not a party... 29

In this case Lord Denning was simply creating new law and not so much by inventing new rules as by adroitly manipulating the interrelationship between legal institutions (person and remedy), legal categories (procedure and substantive law) and legal concepts (interest and legal rights). He was, of course, overruled by the House of Lords30, but this should not detract from the techniques employed. It is English legal reasoning at its most revealing and probably tells the reader of the Law Reports as much, if not more, than Lord Simon's analysis discussed earlier (nr. 194).

§ 5 LEGAL RIGHTS

199. The movement from legal interest to legal right is easier enough to achieve at the level of rhetoric and language31 as Lord Denning has so clearly illustrated. However the two notions are very different despite the fact that rights could be seen as legally protected social interests32. An interest, although undoubtedly a legal concept, is also a concept founded in other social science discourses and thus its definition is not dependent just on the structure of legal science. A right, on the other hand, is a construct of legal science: it takes its form from the relationship between persona and res and this is the reason why one always talks of a right to something33. In other words a right is a legal concept that uses the conceptual structure of the property relationship between person and thing and applies it to other legal (and indeed political and social) relationships. Thus performance under a contract can be seen as a res to which the other contracting party (persona) is

29 See for Netherlands law nr. 143; and on third parties and contract e.g., CLBN v De Maes, NJ 1991, 412.
31 See WJ Witteveen, De retoriek in het recht: over retorica en interpretatie, staatsrecht en democratie (Zwolle, 1988).
entitled and this leads to a situation where one can talk in terms of a right arising from a contract.

200. In Continental legal systems the notion of a right (le droit subjectif) is the fundamental concept of private law and its ascendency led to the relegation of the law of actions to procedural codes. As HF Jolowicz has pointed out, when the notion of a right became the leading conception in private law, there could be no doubt that the differences between types of action... were really differences of substantive right and the modern codes of Civil law therefore have no need for a special part on 'Actions'. The difference, then, between Roman law and modern Civil law is that in the former entitlements in law were defined by the existence of a remedy (ubi remedium ibi ius), while in the latter they are defined without reference to the remedy (ubi ius ibi remedium). In modern Civil law it is the Civil Codes which act as a source of rights, but with respect to certain rights - formerly called 'natural rights' but today called 'human rights' - they attach to each and every individual qua human being. These human rights - now the subject of its own 'codes' or 'conventions' - are, prima facie at least, inalienable which, in effect, makes the human being a source of law (leading to a contradiction with positivism).

201. When one turns to English law there is no difficulty in distinguishing between 'law' and 'right' at the level of language and it is very common to see judges and lawyers use the term right as a means of describing, apparently, legal entitlements. Yet care must be taken before concluding that the notion of a right is a legal concept capable in itself of provoking a legal decision. In fact the position in the Common law is little different from that of Roman law in that the maxim applicable is ubi remedium ibi ius rather than the reverse. Thus Sir Nicholas Browne-Wilkinson VC in *Kingdom of Spain v Christie, Manson & Woods Ltd* has observed: *In the pragmatic way in which English law has developed, a man's legal rights are in fact those which are protected by a cause of action. It is not in accordance, as I understand it, with the principles of English law to analyse rights as being something separate from the remedy given to the individual... In my judgment, in the ordinary case to establish a legal or equitable right you have to show that all the necessary elements of the cause of action are either present or threatened...*

The point being made here is that the notion of a right is not enough to generate a remedy: what has to be shown is that the facts themselves disclose a cause of action and only if such an action exists can one talk about the existence of a right. *Ubi remedium ibi ius.* This does have practical consequences in the law of civil liability: in *F v Wirral MBC* two children

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34 HF Jolowicz (o.c.), p.81.
35 But see Netherlands law, cf. nr. 52ff.
37 *Kingdom of Spain v Christie, Manson & Woods Ltd* [1986] 1 WLR 1120, 1129.
38 *F v Wirral MBC* [1991] 2 WLR 1322 CA.
were placed by their mother, who was suffering from depression, into local authority care. The mother claimed that she had agreed with the local authority that this should be a temporary arrangement and that the children would be returned when she recovered from her illness. The local authority subsequently assumed, in accordance with their statutory powers, parental rights over the children and refused to return them to the mother. The mother brought an action for damages against the local authority arguing, *inter alia*, that the unlawful interference with her parental rights should in itself give rise to a remedy. Her action was struck out by a judge as disclosing no reasonable cause of action and an appeal to the Court of Appeal failed. This case seems to confirm beyond doubt the observation of Browne-Wilkinson VC that the notion of a right has no creative role in itself within the common law. It is a term that can be used simply to describe existing causes of action as revealed by precedent or statute. Indeed one reason why the mother failed in this case is that the relevant legislation covering local authority powers in respect of children stress that the interests of the children are paramount; and so even if there was a right it would be displaced by the child's interests with the result that the term 'right' is either being used to mean just a 'privilege' or is a term devoid of any real content.  

202. All the same the position is not quite as simple as it may appear. Certainly a parent may not be able to claim a 'right' to a child; but what is the situation regarding actual property? Can an owner claim that he has a right to his chattels or his land? In this situation the law of tort is much more ambiguous because it will grant a damages remedy simply on the basis of an interference with a right to possession. Thus in *RH Willis & Son v British Car Auctions Ltd*[^20] a car owned by the plaintiffs was wrongfully sold, via the defendant auctioneers, by the person to whom it had been let on hire-purchase. The owners brought an action for damages against the auctioneers and they were found liable despite the fact that they had acted in good faith. Lord Denning MR observed that The common law has always...protected the property rights of the true owner. It has enforced them strictly as against anyone who deals with the goods inconsistently with the dominium of the true owner. Even though the true owner may have been very negligent and the defendant may have acted in complete innocence, nevertheless the common law held him liable in conversion.[^21]

In this kind of case cannot one talk in terms of rights? Indeed in all cases of strict liability it becomes more realistic to use the term 'right' because the plaintiff is entitled to damages simply on the basis of damage or interference; thus if the police or anyone else trespass, without lawful authority, on the person or property of another an action for damages will often be available not only without the proof of a special damage but also

[^21]: *RH Willis & Son v British Car Auctions Ltd* [1978] 2 All ER 392 (CA).

[^21]: Id., p.395.
without the proof of fault. This kind of remedy, as the House of Lords has indicated, is available to give expression to a constitutional right. Much the same could be said about the tort of defamation. This is available, in the case of libel, without proof of fault or damage and thus it is by no means idle to talk in terms of a right to reputation.

Interestingly in the Willis case Lord Denning went on to justify this situation by referring to insurance: *the only way in which innocent acquirers or handlers have been able to protect themselves is by insurance. They insure themselves against their potential liability. This is the usual method nowadays. When men of business or professional men find themselves hit by the law with new and increasing liabilities, they take steps to insure themselves, so that the loss may not fall on one alone, but be spread among many. It is a factor of which we must take account...* However this kind of reasoning fails not only to disclose much about the nature of rights; it also begs the question about who ought to insure. Why should it be the auctioneers rather than the finance company who should insure? Is it not the finance company that is using ownership for their own benefit? If insurance is to be the key to understanding legal rights this can only be achieved via a policy theory of loss spreading. And, as we saw from Lord Wilberforce in the Cassell case, English law has committed itself to no such theory.

§ 6 LEGAL DUTY

203. If English law has little or no theory with regard to rights, could this be because it has traditionally preferred to look at things from the defendant’s, rather than the plaintiff’s, point of view? In other words the key to ‘right’ is not to be found in the word right itself, but in the notion of ‘duty’ - a notion which could be seen simply as the correlative of a right.  

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43 At p.395-396.
It is quite tempting to analyse all legal situations in respect of 'duty' because it is a concept, like 'right', which transcends any particular legal category and thus can appear to act in itself as a means of provoking or denying a legal remedy. However it is also a more subtle term than 'right' because it does not import into any particular factual situation an all or nothing dichotomy: duty is not only a matter of relationship but also a matter of content. Thus to say that A is under a duty to B to take reasonable care in situation X implies that A will not be liable if he, without fault, causes damage to B in situation X. If, on the other hand, A is under a 'high', 'strict' or 'absolute' duty to B in situation X then this implies that A might be liable even in the absence of any fault on his part.

The reason why 'duty' is more subtle than 'right' is that, despite the two being apparent correlatives, the term is derived not from dominium but from obligatio. In other words duty implies the language of the law of obligations rather than the law of property, and this is why one talks about a duty to another (in personam) rather than a right to something (in rem). However this does not mean that the institution of the legal object has no role to play. By attaching a rule to a legal object rather than to a legal subject the law can in effect create a high duty: accordingly the seller, and lender under a contract of hire, are under a strict duty with respect to the quality and fitness of the goods supplied simply because the focal point of the rule is the res and not the persona. And so, s. 9(2) of the Supply of Goods and Services Act 1982 stipulates: Where... the bailor bails goods in the course of a business, there is...an implied condition that the goods supplied under the contract are of merchantable quality. In a contract of service on the other hand the focal point is the legal subject and this has the effect of changing the level and content of the duty: in a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill. The difference between sections 9(2) and 13 is to be found in the institution around which the rule is formed: in section 9 the court need look no further than the chattel or product itself in order to arrive at the seller's duty. In section 13, however, the court must take account of the contractor's behaviour before it can decide if the supplier of the service is in breach of duty.

204. But what if the 'duty' is more ambiguous? To illustrate this problem, the following examples should be compared. The Highways Act 1980 stipulates that the authority... are under a duty... to maintain the highway. And in an action against a highway authority in respect of damage resulting from their...

45 See e.g., Davie v New Merton Board Mills [1959] AC 604.
46 See e.g., Hyman v Nye (1881) 6 QBD 685.
47 See for Netherlands law s. 7: 17-18 and 21 (sale of goods).
48 Supply of Goods and Services Act 1982 s.13. In Netherlands law, no similar provision for the supply of a service exists, see s. 1637.
49 Highways Act 1980 s.41.
failure to maintain a highway...it is a defence...to prove that the authority had taken such care as in all the circumstances was reasonably required...50. According to the Water Act 1989, it shall be the duty of a water undertaker (a) when supplying water to any premises for domestic purposes to supply only water which is wholesome at the time of supply; and (b) so far as reasonably practical, to ensure...that there is, in general, no deterioration in the quality of the water, whereas it shall be the duty of every local authority to take all such steps as they consider appropriate for keeping themselves informed about the wholesomeness and sufficiency of water supplies...51. According to the Factories Act 1961, s.14 and 29(1), every dangerous part of any machinery...shall be securely fenced... (s.14) and there shall, so far as is reasonable practicable, be provided and maintained safe means of access to every place at which any person has at any time to work, and every such place shall, so far as is reasonably practicable, be made and kept safe for any person working there53.

These examples illustrate that the content of the duty may have to be determined either by relating one section to another or by carefully scrutinising the language of the section in order to see if there is a qualification to the duty. If there is a qualification then the issue may well become one of proof: upon whom should be the burden of proof when it comes to an expression such as 'reasonably practical'? This can, at one and the same time, raise a substantive and a procedural question55. For in breach of statutory duty cases the facts can give rise both to a criminal and to a civil law action and this begs a question as to what a plaintiff must allege against a defendant. One cannot normally be guilty of a crime simply by someone alleging that an event took place - normally there has to be some element of individual responsibility. Equally one is not automatically entitled to damages simply because the defendant's act which led to the damage was unlawful54. 'Duty', in other words, has to be measured both against the 'right' of a worker (or whoever) envisaged by the statute and against the 'rights' of the person upon whom the duty is cast; and it is in this sense that one can talk about 'right' and 'duty' being correlative. That said, however, it must not be forgotten that the epistemological basis of both concepts reflects a difference between the language of ownership and the language of obligations and that is why civil liability issues are sometimes seen as arising from wrongs (breach of duty) and sometimes as arising from the interference with a right.

205. It is the flexibility that attaches to the concept of 'duty' that makes it

50 Highways Act 1980 s.58.
51 Water Act 1989, s.52(1) and s.56(1). See for Netherlands law e.g., Kir Utrecht 21 February 1991, Tijdschrift voor Consumentenrecht 1991, p.220-224, with reference to the Codex Justinianus Liber XI, tit.42 (r.o. 5.9).
52 See for Netherlands law L. Bier, Aansprakelijkheid voor bedrijfsongevallen en beroepsziekten (Deventer, 1988) and e.g., Jansen v Nefertas BV, NJ 1999, nr. 573.
a central concept in civil liability cases: it allows the courts to bring into play
a whole range of institutional, behavioural, damage and policy issues without,
seemingly, abandoning the idea of a legal rule. Accordingly before a person
can obtain compensation from someone who has caused him damage he must
normally show that the latter owed him a duty of care or was in breach of
some other duty imposed by statute (breach of statutory duty) or arising out
of some special responsibility such as an 'occupier's duty to passers-by'\textsuperscript{55}. The
term is also used in the analysis of three party situations where one person
sues another in respect of an act done by a third party (non-delegable duty).
'Duty' thus acts not only to describe a particular relationship between two
legal subjects ('A is under a duty to B') but also as a means of indicating the
actual content of the obligation owed ('A is under a strict duty to B'); it is a
term that appears to provoke in itself the right to a remedy. However this
appearance can sometimes be misleading in that the contents of certain duties
may simply be the result of the intervention of particular types of remedy.
Thus the 'duty' to disclose in insurance contracts founded in the equitable
remedy of rescission cannot in itself provoke a right to damages at common
law; in order to obtain such damages for non-disclosure (in addition to an
equitable remedy) a common law cause of action must be established\textsuperscript{56}.

§ 7 CONCLUDING REMARKS

206. Knowledge of law is not, then, just a matter of learning legal rules and
applying them logically to factual situations. Knowledge of law also involves
the appreciation of the systematic interrelation of legal institutions, legal
categories, legal relations and legal concepts. In Continental law these
categories, institutions and concepts have, on the surface at least, been
reduced to propositions arranged systematically in Codes (following, for the
greater part, the institutional system of Roman law) and it would thus appear
that they can be consistently applied via the syllogism. In English law,
however, although aspects of Continental legal science have found their way
into the reasoning discourse (particularly in the nineteenth century after the
abolition of the forms of action)\textsuperscript{57}, the institutions, categories and concepts
operate in a way that is much closer to the facts. They function as a means of
categorising and arranging the facts so as to 'reveal' the existence of a legal
remedy. Accordingly, in order to understand civil liability in English law it is
necessary to focus on the role of institutions (legal subjects and legal objects),
legal notions such as damage, interests, rights and duties and legal categories.

\textsuperscript{55} Mint v Good [1951] 1 KB 517.
\textsuperscript{56} Banque Keyser Ullmann v Skandia Insurance [1989] 3 WLR 25 (CA); [1990]
3 WLR 364.
\textsuperscript{57} GH Samuel, The Epistemological Impact of Civil Law on Nineteenth Century
English Law (forthcoming article).
15 LEGAL SCIENCE AND THE LAW OF OBLIGATIONS

§ 1 INTRODUCTION

207. The question whether private law doctrine is capable of incorporating the realities of society in a methodological and systematic way is important in einer sich wandelnden Gesellschaft (an ever changing society). From a methodological point of view conceptual and systematic aspects of private law and their effectiveness are of the utmost importance, and should not be underestimated: Das Feld beherrscht die fondauernde Auseinandersetzung zwischen inductiv-topischen und deductiv-axiomatischen Verfahren.1

However, the Sache Recht (the law as object) is principally unsuited for a comprehensive description of its underlying structure of legal principles.2 And the role of legal institutions and categories can vary according to the factual situation and all interests concerned; therefore it seems difficult - if not impossible - to incorporate private law in general, let alone the entire law, under one or more principles. Any classification of law will accordingly have an 'open structure', both to the number of principles to be applied and to its contents and the relevance thereof for specific areas of the law.3 And, as


4 Vrancken, o.c., p.200-201.
Vranken points out⁵, a purely conceptual classification (logical-axiomatic) of the law cannot exist, because human knowledge in general is by nature contextual (biased), limited and finite. Therefore classification of legal knowledge should not have the approach of the natural sciences as an ideal nor should it have recourse to an axiological or teleological open ended system with all its limitations and problems. However, argumentative reasoning within such a conceptual system of legal propositions presupposes that, in principle, a scientific and rational approach to legal knowledge and legal decision-making is possible. If science should be identified with the natural sciences, legal science and legal decision-making would not meet the requirement of rationality in the sense of logical-deductive and axiomatic argumentation. Nevertheless a scientific and rational approach to law is possible; as in all human sciences, the absence (impossibility) of a method that guarantees a just and right decision poses the necessity of a method for reasoning dealing with all perspectives, circumstances and facts available in a careful, unbiased and balanced way. And - even more important - the process of reasoning and the results attained should be justified through argumentation⁶. Within the limits of accepted legal rules and principles, legal reasoning should and could meet the requirements of legal science in that it is conclusive. And this requirement could be met via a method of argumentation that reveals the process of thought leading to a decision, as well as the exact basis of the decision. In this respect, legal concepts and categories in casu should be formulated within the context of all interests concerned. Furthermore, reasoning by analogy with regard to the realities of society, and the consequences of a decision can contribute to the argumentative force of legal science in general, and legal decisions in particular⁷.

The distinction between questions of fact and questions of law (cf. Ch. 5 § 2) is of importance for legal reasoning. The description of the facts and the formulation of legal questions are interrelated; lawyers, on the one hand, scrutinize facts through legal reasoning and legal classification⁸ and, on the other hand, legal knowledge deals with abstract principles, concepts and notions to be applied within a certain factual context. Therefore, both the argumentation leading to a decision and the description of the factual situation should be conceptualised and convincing. Several strategies are applicable, starting out from reasoning by analogy, through grammatical interpretation to systematic, logistic-historical, comparative, anticipatory or teleological interpretation⁹. Witteveen notes¹⁰ that English judges adhere to strict rules of interpretation based on statute or on the 'canons of

⁵ Vranken, l.c.
⁶ See Vranken, o.c., p.298-308.
⁷ Vranken, o.c., p.328-322.
⁸ WJ Witteveen, o.c., p.329-330.
¹⁰ O.c., p.347-348
interpretation'. He argues that Netherlands judges, too, operate strategically within the margins offered by the legislator and the accepted methods of interpretation; furthermore, Netherlands law offers a wider range of possibilities because these methods pose fewer restrictions when interpreting statutory law and legal rules in general. Nevertheless, *le droit est un système ouvert* - mais il est, précisément, *système*, et pose comme tel certaines exigences spécifiques (cohérence interne, continuité, etc.); dès lors, dire que le juge doit rendre publique sa «politique», c'est devoir faire la part, quand-même, de certaines fins immanentes au système, dont on peut se demander comment elles se composent exactement avec l'ouverture du système vers le contexte social.

208. In English law, the recent re-emphasis of the distinction between physical damage and patrimonial loss in the tort of negligence (cf. Ch. 13 § 9) is important not just for what it tells the comparatist about the kinds of interest to be protected, but also for what it reveals about the methods and techniques of the Common lawyer. The method adopted by the judges in the recent duty of care cases involving economic loss has been noticeably descriptive in approach. That is to say there has been little attempt to formulate either any principles regarding this kind of harm or any concepts that might be useful in anticipating and provoking decisions as to liability or its absence. Rules are applied directly to the facts themselves without, seemingly, recourse to legal institutions; and this means that it is difficult to talk in terms of a normative rationality capable of acting as any kind of major premise. The only principle that appears to be applicable is one operating at the level of presumption: if the harm is physical a duty of care is presumed to exist; if it is patrimonial a duty is presumed not to exist (cf. Ch. 12 § 4). In this latter situation, to overcome the presumption, a plaintiff must show sufficient 'proximity'.

§ 2 ANALOGY AND LIABILITY

209. The problem with a notion like 'proximity' is that, as the House of Lords has come close to admitting, it has little or no inherent normative value. It is incapable of being used to predict when one person will have

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11 O.c., p.362.
13 The essential question which has to be asked in every case, given that damage which is the essential ingredient of the action has occurred, is whether the relationship between the plaintiff and the defendant is... of sufficient 'proximity' per Lord Oliver in Murphy v Brentwood DC [1991] 1 AC 398, 486.
14 'Proximity' is, no doubt, a convenient expression so long as it is realised that it is no more than a label which embraces not a definable concept but merely a description of circumstances from which, pragmatically, the court conclude that
to compensate another for patrimonial loss negligently caused and as a result the technique used for reasoning in this area has had to fall back on analogy. Liability will be dependent upon the matching of one factual situation with some previous factual situation. At the level of legal science this approach represents something of a return to the days of the forms of action (cf. Ch. 2 § 2) and this suggests that the courts have decided to abandon the attempt to find a secure institutional base for the tort of negligence using a normative, or quasi-normative, structure of rationalised concepts. Instead the practitioner will have to rely upon unexpressed factual distinctions or similarities to be found in the precedents. Such unexpressed distinctions and similarities might, of course, relate to the broader context of legal science in which case it is possible that a distinction between commercial and consumer law (cf. Ch. 5 § 7), or between public and private law (cf. Ch. 5 § 8), might provide a valuable guide in separating the good analogy from the bad. And if this were to be the case then the gap between English and Continental methods might not be so great. Equally it may be a question of protected and unprotected 'interests' (cf. Ch. 12 § 4) and, here again, it will also be possible to go some way in framing an epistemological dialogue with Civil lawyers. However if the isomorphic structures to be found in the duty of care cases do not appear to conform with the traditional institutional patterns to be found generally in Western legal thought, then there will be a problem when it comes to legal reasoning and legal science with respect to the two great European legal families. It will become difficult for Civil and Common lawyers to communicate about civil liability in anything other than very general terms because, at the level of analogy itself, the patterns of rationalisations will be responding neither to similar institutions (legal subjects and legal objects) nor to similar relations (subjective rights).

§ 3 LEGAL SCIENCE

210. The reason for such a communication difficulty is to be found in legal science itself which, when looked at from a Western legal tradition viewpoint, has, as we have said, its roots in Roman law. As Jacques Ellul has observed, the great contribution of the Roman jurists to law is that they laid

a duty of care exists per Lord Oliver in Caparo Industries Plc v Dickman [1990] 2 AC 605, 633.

15 Perhaps... the most that can be attempted is a broad categorisation of the decided cases according to the type of situation in which liability has been established in the past in order to found an argument by analogy per Lord Oliver in Caparo Industries Plc v Dickman [1990] 2 AC 605, 635.

16 See e.g., Smith v Eric Bush [1990] 1 AC 831.


the foundations for a legal science; the law became a kind of reality imposed upon the chaos of social fact, putting it into order, and creating a structure which not only was resistant to the vagaries of chance but allowed for the insertion of normative as well as descriptive concepts. Now the important characteristic of this abstract structure is that it was framed around legal institutions between which flowed legal relations; it was a structure independent both of social reality - it was an abstract model which mirrored society - and of the actual positive rules of law themselves. Accordingly the same institutional model could function in a range of different societies each with different positive legal rules.

In Roman law itself the main architect of this system was the jurist Gaius who wrote in the second century AD. In his Institutes, a teaching manual, he subdivided law into three divisions - the ius personarum, ius rerum and ius actionum - and this was a categorisation along institutional lines in that, if one takes an 'institution' to be a social reality around which rules are framed, it was a classification around the institutions of legal subject (persona), legal object (res) and legal action or remedy (actio) (see nr. 195). Between these institutions Gaius gave expression to different kinds of legal relations (iura): between persona and res was the institutional relations of dominium, possessio and iura in re and between persona and persona there was the relation of obligatio later described by Justinian, in his own updated version of Gaius' Institutes, as a vinculum iuris. Between persona and actio there was also the important relation of interest which, when the actio and res merged into a general legal object, became, with the help of the dominium relationship between person and thing, the basis for the modern subjective right.

That this scheme was and is a genuine science is witnessed by its ability not only to explain the past as well as predicting - or going some way in predicting - the future but to develop its internal structures so as to move from one degree of rationality to another. The model can create its own legal subjects (personae) and legal objects (res). Thus in Roman law itself the

19 J Ellul, Histoire des institutions: 3 - Le Moyen Age (PUF, 9e éd., 1982), p.27.
23 Gaius 1.8; Digest 1.5.1; and see generally Jolowicz, Roman Foundations, op.cit., pp.61-81; Stein, pp.125-129.
25 Justinian 3.13pr.
26 See Digest 47.23.3.1. On the meaning of interest see Zimmermann, p. 826.
27 Jolowicz, Roman Foundations, op.cit., p.78.
28 M Villey, La formation de la pensée juridique moderne (Montchrestien, 4e éd., 1975), pp. 381-882, 671-672.
institutions of *persona* and *res* were extended to cover towns\(^\text{30}\) and obligations\(^\text{31}\) respectively; and while the importance of the former need hardly be stated it is worth stressing that in the case of *res incorporales* the Romans succeeded in setting in motion a development which could, if taken to its logical conclusion, actually undermine the fundamental distinction between personal and real legal relations. If a debt was no more than a 'right to' an actio *in personam* to enforce an obligation - that is to say a right to something owed - how could it also be a form of property, that is to say something capable of being owned? In other words once Gaius had admitted an obligation was a *res*, a form of property, it had to follow logically that it was something which could form a legal institution within the law of property and thus become the focus for property as well as obligation rules.

Interestingly it is English law, through the writ of debt\(^\text{33}\), which has developed the logic of the *chose in action* and thus the apparent eschewal of legal science in favour of a system of remedies which attach as much to descriptive facts as to normative concepts must not be allowed to mask the fact that Continental legal science is as we have just suggested not free from internal contradiction. This contradiction was well brought out when the English Court of Appeal once held that a promise to pay a debt, being a 'chose in action', was something capable of being owned and thus not subject to the *in personam* contractual rule of privity (cf. Ch. 9 § 7); and while this decision was reversed on appeal to the House of Lords\(^\text{34}\) the House has recently reasserted the idea that a debt is something capable of being owned\(^\text{35}\). The doctrine of tracing (cf. nr. 46) might well be available to turn an *in personam* obligation into an *in rem* right in any situation where, not do so, would give rise to unjustified enrichment\(^\text{36}\). By its very denial of legal science, English law can sometimes appear very scientific.

§ 4 LEGAL CONCEPTS AND LEGAL CLASSIFICATION

211. English law can, then, appear capable of making use of legal science when the occasion requires. However it tends to do so for practical reasons and so if the comparatist attempts to construct a science at the level of a system of categories and concepts difficulties soon emerge. Legal categories do not always relate to each other in terms of a logical structure and thus when it comes to distinguishing, for example, between public and private law


\(^{31}\) Gaius 2.14.


\(^{33}\) Milsom, pp. 257-265.

\(^{34}\) *Beswick v Beswick* [1966] Ch 538; cf [1968] AC 58.

\(^{35}\) *Lipkin Gorman v Karpnale Ltd* [1991] 3 WLR 10, 28-29.

\(^{36}\) *Lipkin Gorman v Karpnale Ltd* [1991] 3 WLR 10.
relations (cf. Ch. 13 § 2) logical contradictions quickly emerge out of the factual situations. Are public sector rents in respect of local authority accommodation a matter of private law rights or public law expectations? Is a nurse employed under the National Health Service employed pursuant to a private law contract or is the law applicable one arising from imperium? The logic, or lack of it, can also operate in reverse. If there is now an important distinction between the ius publicum and the ius privatum (cf. Ch. 13 § 2), is it rational that a public body should be able to sue in private law to establish an interest to a reputation? Or take the distinction between commercial and consumer law. If liability for patrimonial loss is dependent, inter alia, upon the commercial and consumer distinction, should the law of obligations be more concerned with providing compensation to those who are, by virtue of their status, seemingly entitled to be treated as proximate?

The difficulty with a structure of legal categories more descriptive than scientific (in the systematic sense) is that there is little context for the operation of normative concepts. Thus one purpose of a legal category is to import into law policy and aims considerations in respect of the empirical problems that that category is normally concerned with; and so, for example, the category of tort is concerned, inter alia, with accident compensation. Where this policy is not fulfilled it ought to be as a result of a normative concept that has a meaning and a function not just within the category of tort but within the law of obligations as a whole. Quite recently, however, an employee, seriously injured in a car accident, failed to obtain compensation from his employer's insurance partly because, vis-à-vis employer and employee, the latter's harm was in theory pure economic loss (cf. Ch. 13 § 9). The concept of an 'implied term', a key concept in the English law of obligations (cf. Ch. 9 § 6) and one that should have ensured that the employee on the facts of this particular case was in any normative way in the sense that it was unable to provoke a decision out of the facts in question which would have fulfilled the policy aims attaching not just to the categories of contract and tort but to the category of a law of obligations. The same situation can be found with respect to the category of public law. Although the category is said to exist in English law, there is still no structure of institutional relations underpinning the category capable of generating liability on the basis of risk or equality (cf. Ch. 5 § 8) and in this

40 See e.g., Smith v Eric Bush [1990] 1 AC 831.
41 Reid v Rush & Tomkins Group Plc [1990] 1 WLR 212.
42 Hepple & Matthews, pp. 199-203.
43 Compare Reid's case with Monk v Warby [1935] 1 KB 75.
respect English law stands in sharp contrast to the public law of France.\textsuperscript{44}

\section*{§ 5 LEGAL EPISTEMOLOGY}

212. Many of these questions involving the elements of legal science - that is to say the institutions, categories, concepts and techniques - raise the more fundamental question of what it is to have legal knowledge.\textsuperscript{45} One answer to this question might be to say that knowledge of law is simply knowledge of legal propositions - knowing rules and principles (cf. Ch. 14 § 1). However the brief discussion of legal science (cf. Ch. 14 § 3) should indicate that the position is much more complex. Some might argue that knowledge of law is impossible without a knowledge of the elements that go to make up legal discourse and this, in turn, will involve a knowledge of the history of this discourse. For 'history offers a good means of analysis in separating, through the date and circumstances of their apparition, the diverse elements which have contributed to the gradual formation of the notions and the principles of [a science].\textsuperscript{46} Others might argue that law is simply a matter of syntax and logic, on an analogy with language, and does not need to be studied diachronically;\textsuperscript{47} all that is required is a knowledge of its contemporary internal structure.\textsuperscript{48}

The foundation of these epistemological debates\textsuperscript{49} have their roots outside of law - in semiotics and in the natural sciences - and so it is pertinent to ask if law, as a discourse, is anything special. One response here is to be found in the distinction between a science and its object and if this structure is applied to law it soon becomes evident that law is the object of its own science.\textsuperscript{50} There are important implications flowing from this. First, if legal discourse is both a science and the object of science it may be that an historical or comparative approach to legal knowledge is the only one that is of value; the 'object' of science, having no external reference, is simply the product of the history of a science. Secondly, if the history of legal science has no external object other than itself, then the reasoning processes associated


\textsuperscript{45} C Atlas, \textit{Epistémologie juridique} (PUF, 1985).


\textsuperscript{47} Ibid., pp. 33-36.


\textsuperscript{49} See e.g., KR Westphal, \textit{Hegel's epistemological realism} (Dordrecht/Boston/London, 1989), but also TW Adorno, \textit{Against epistemology: a metacritique} (tr. by W Domingo, Oxford, 1982).

\textsuperscript{50} X Linant de Bellefonds, \textit{L'informatique et le droit} (PUF, 2e.ed., 1985), p. 81; C Atlas, (o.c.), pp. 31-36.
with the science arguably become much more important because they go to make up both the 'science' and the 'object'; and if these reasoning processes themselves are historically determined, or at least have their roots in particular stages of legal development\(^{51}\), then in order to understand legal science and legal reasoning these stages must themselves be understood.

Such arguments might, of course, be equally applicable to the natural sciences now that the science and object of science dichotomy itself is in the process of being rejected\(^{52}\). And so any peculiarity of law need not prevent the legal epistemologist from, once again, returning to the history of the sciences in general in the hope of discovering something about his or her own particular science. Legal science, even if it is a discourse about itself, need not be studied in historical isolation from the other sciences. And what these histories can contribute to law is the possibility of stages of development more sophisticated than merely the traditional division between science and pre-science. If Blanché is correct, all sciences start out from a descriptive stage in order to arrive, after passing through an inductive and deductive stage, at an axiomatic one\(^{53}\); and if this historical structure is applied to the history of legal science it has important implications for those in search of a new ius commune. It is arguable that the difference between the Common law and the modern Civil law is that the former remains trapped in an inductive - sometimes even a descriptive\(^{54}\) - stage of reasoning while the latter, thanks to the Humanists, Natural lawyers and Pandectists, has gone on to reach an axiomatic stage\(^{55}\). And this would explain, in turn, the apparent 'inner relationship' between English and Classical Roman law\(^{56}\); they both share the same stage of epistemic development, they both are systems of legal thought that subscribe to the idea of ex facto ius criitur rather than ex jure factum oritur\(^{57}\).

§ 6 LEGAL REASONING AND LEGAL CATEGORIES

213. Legal epistemology might, accordingly, explain why English law finds it difficult on occasions to escape from a descriptive approach to problem solving (cf. Ch. 13 § 9). All the same the absence of a coherent and strictly logical legal science does not mean that legal categories and legal concepts do not and cannot play an important role in English legal reasoning. In fact even in a descriptive and inductive system like that to be found in England legal

\(^{51}\) See e.g., HJ Berman, Law and Revolution: The Formation of the Western Legal Tradition (Harvard, 1983).
\(^{52}\) Blanché, supra, p. 122.
\(^{53}\) Ibid., p. 65.
\(^{54}\) Samuel, What is it to Have Knowledge of a European Public Law?, o.c.
\(^{55}\) R Blanché, Le raisonnement (PUF, 1973), pp. 219-220.
\(^{56}\) Pringsheim [1935] CJ 437.
\(^{57}\) Digest 50.17.1; P Dubouchet, Sémiotique juridique (PUF, 1990), pp. 39-40.
categories can be of fundamental importance in the reasoning process even if the categories themselves do not actually relate to each other in the same systematic way as in Civilian legal thought.

Take for example the contractual requirement of an intention to create legal relations. If such a requirement can be used, as we have suggested (cf. Ch. 7 § 4), to reclassify a problem from 'contract' to some other area this raises some interesting questions about legal reasoning. To what extent are categories defining the facts themselves? Can categories be used in themselves to determine legal problems? Are there facts which can be classified as 'contractual' despite the absence of some key element such as offer and acceptance or consideration? Now normally with this kind of question one is either in the realm of the interpretation of contracts (cf. Ch. 6 § 5) or, if a remedy is forthcoming, in quite a different category of the law such as tort (cf. Ch. 12 § 1). Yet if a remedy is given in a 'contractual' situation despite the absence of a key element a gap is opened up between legal technics and the policy of any particular legal category.

From a legal technics position one way to smooth over this kind of problem is to have recourse, expressly or impliedly, to a law of obligations which will then eclipse the tort and contract difference. Yet in a more descriptive system this can often only make the law more uncertain, if not more complex, in that the detailed categorisation of facts can often help with the application of the law. The sale of a cabbage is very different from the hire of a super tanker just as the latter is different from the hire of an employee. Take the problem of the 'free gift' with every four gallons of petrol. If a motorist buys four gallons does he or she become legally entitled to the gift? If so, is this because there is a contract of sale to buy four gallons plus a free gift; because there is a separate collateral contract concerning the gift; or because in not receiving the gift the motorist has suffered damage by relying upon the garage's statement? If there is no legal entitlement, is this because the statement is a 'mere puff'; because there is no consideration for the gift; or because there is no special relationship between the motorist and the garage concerning the statement? It is easy to see that there is much room to manoeuvre and that there is no 'right answer' in terms of legal technics.

Is there a right answer in terms of the aims and policies attaching to the various legal categories? Before any answer can be given here there is a further complicating factor. Often these kind of disputes do not arise as a result of private law litigation at all: they arise by operation of public law.

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58 See e.g., Smith v Eric Bush [1990] 1 AC 831.
59 See e.g., Shepherd & Co Ltd v Jerom [1987] QB 301.
60 Esso Petroleum Ltd v Commissioners of Customs and Excise [1976] 1 All ER 117 HL.
Thus the free gift can give rise to tax problems\textsuperscript{61} and goods in shop windows, or on the supermarket shelves, can attract the criminal law\textsuperscript{62}. Ought such cases to be decided upon principles, and thus policies, attaching to the law of contract or indeed the law of obligations? Surely the 'right answer' would have to take as much account of public as of private law (cf. Ch. 5 § 8)\textsuperscript{63}.

No doubt one could have recourse to some meta-category concept (by which is meant a concept which transcends any particular legal category) such as a 'right' in order to solve the hard case. But even the use of rights will not necessarily allow one to escape from the legal categories in issue. For, as we have seen, rights in English law are defined only in terms of causes of action (cf. Ch. 2 § 6, Ch. 14 § 5) and causes of action by the application of the law\textsuperscript{64}. In fact 'many rules which are recognised as rules of substantive law could be classified merely as rules of practice' because 'on a practical level the existence of a right depends upon the existence of a remedy for its infringement'\textsuperscript{65}.

Perhaps a more practical meta-category concept might be the notion of an 'interest' given that 'legitimate interest' is a requirement often to be found in the law of actions\textsuperscript{66} (cf Ch. 14 § 4). And, indeed, it has been argued that rights themselves are nothing more than legally protected social interests\textsuperscript{67}. The great advantage of an interest is that it can be used to motivate those remedy cases where the actual substantive law might be ambiguous and time of the essence (cf. nr. 40); and there is no doubt that it can also have a creative role in deciding more general questions of actionability\textsuperscript{68}, especially in the field of public law where the notion of legitimate interest often functions to protect class rights\textsuperscript{69}.

\textsuperscript{61} See \textit{Esso}, above.
\textsuperscript{62} \textit{Fisher v Bell} [1961] 1 QB 394.
\textsuperscript{63} The rôle of the judge in Netherlands public law is seemingly developing towards \textit{afwegingsjurisdictie}: the point of departure for a public law decision ought not to be the question whether a \textit{iuris vinculum} exists between the civilian and the government, but whether it makes sense to deal with this relationship as being a legal relationship. Then, given such a legal relationship, decisions in public law can be based on the values underlying the system of law. Accordingly, the law offers the possibility to bring together these values, especially when dealing with fundamental rights and freedoms. And the social context of this mechanism (\textit{juridiseren}) ought not to be disregarded, cf. R de Lange, \textit{Publiekrechtelijke rechtsvinding} (Zwolle, 1991), p.240-241.
\textsuperscript{64} \textit{Esso Petroleum Ltd v Southport Corporation} [1956] AC 218, 238, 241.
\textsuperscript{65} Oliver LJ in \textit{Techno-Impe}x \textit{v Gebr. Van Weelde} [1981] 2 WLR 821, 837.
\textsuperscript{66} See e.g., \textit{Nouveau Code de Procédure Civile} art. 31; Netherlands Civil Code s. 3: 303.
\textsuperscript{67} O Ionesco, \textit{La notion de droit subjectif dans le droit privé} (Bruylant, 2e\textsuperscript{e}d., 1978), paras. 70-72, 90, 99.
\textsuperscript{68} See e.g., \textit{Caparo Industries Plc v Dickman} [1990] 2 AC 605, 626, 632, 652, 654.
\textsuperscript{69} See \textit{Local Government Act 1972} s.222.
All the same it would be idle to think that the notion of an interest can in itself solve legal actionability problems because the confrontation of economic and social interests in a competitive society is the problem rather than the solution. And thus one is often forced back to abstract notions such as rights, duties and liberties just to solve, in a rational way, the social problems of competing self-interests. In truth the notion of an interest inhabits a twilight zone between the facts, the remedies and the substantive rules of law as expressed through legal categories and its role in legal reasoning must be understood in this more limited context.

214. An alternative approach to rights and interests - and one that the common law seems specifically to have adopted (cf. Ch. 5 § 2; Ch. 14 § 6) - is the concept of 'duty'. What is the duty of the defendant towards the plaintiff in any particular set of facts? The great advantage of this meta-category concept is that not only does it actually describe a relationship between two legal subjects, but it is a device whose legal level can be varied so as to facilitate a liability within particular sets of facts (cf. Ch. 5 § 2; Ch. 14 § 6). Duty, then can play the same role as obligation in French law. However the problem with duty is that it cannot of itself provide a reason for granting a remedy in private law; all it can do is to establish a legal relationship between two parties and set the terms of the factual requirements. Whether, then, a garage is under a 'duty' to supply a 'free gift' will still partly depend upon legal technicalities to be found within particular categories of law. But that said, what 'duty' can do in the context of the 'free gift' problem is to eclipse the public/private dichotomy that is often to be found in the area of consumer protection law. It can reinforce legal reasoning by shifting attention off the technicalities of consideration, intention to create legal relations, trade descriptions etc., and on to the 'duties' of sellers towards customers in the market place. In this way 'duty' could well be seen to be dictating the right answer (de lege ferenda) to the problem of the 'free gift'.

The point of raising these questions is not so much to enter upon a discussion of the relationship between law and philosophy or law and economics as to show that even in the common law it is not possible to escape from the role of legal categories in legal reasoning. In French law it is sometimes easier to switch categories for policy reasons because the Code civil functions, 'axiomatically', at a high level of abstraction and Cour de cassation judgments are very curt. Similarly judgments of the Netherlands Hoge Raad, although in length more substantive than the French Cour de cassation decisions, do not give dissenting opinions, and the legal reasoning leading

70 J. Velt, WPNR (1991) 5996 and 5997.
71 Nicholas, in Harris & Tallon, pp 18-19.
73 JEFM Duynste, Dissenting and concurring opinions revisited, NJB 1990, pp. 49-52.

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to a decision is often undisclosed. Yet in English law the category may be expressing some implied premise. For example consumer 'rights' can be expressed by framing liability in contract rather than tort, while the commercial interest can be protected by preferring tort to constitutional law or, indeed, contract to tort. Accordingly the combination of technical rules such as offer, acceptance, consideration and intention to create legal relations, as technical as such rules may be, must often be understood in this wide category context. For while such technical rules are vital to an understanding of contract, the categories themselves are one means of injecting important policy issues into legal reasoning without actually abandoning legal techniques (cf. nr. 98).

§ 7 OBLIGATIONS AND LEGAL SCIENCE

215. English law may, then, lack a legal science in the sense of a coherent interrelating system (cf. Ch. 14 § 3) and it can function on occasions at an almost descriptive stage of development. That is to say at a stage where legal propositions (rules) are attached to material objects (tigers, ships, a wall, trees and the like) rather than to a legal institution like persona or res which, between them have, have rationalised legal relations. However this does not mean that it lacks a set of legal techniques which use the language of legal science and thus the role of legal categories does remain of relevance in any comparative survey of English and Continental law. In the context of the present survey the scientific question centres on the role of a law of obligations. Is this a category capable of supporting concepts that relate to the notion of an obligation rather than to the discrete categories of contract and tort?

There are two approaches. Either the comparatist can search within the categories of contract, tort and remedies for some common denominator that can be used, inductively at first, as the basis for a vinculum iuris, or such a notion can be imposed, so to speak, from outside. The problem with the latter approach is that one might be trying to harmonise two sciences at two quite different stages of development. In other words the conceptual structure of the two families might not yet be ready for harmonisation. However the problem with the first approach, as this survey of the law of obligations has tried to indicate, is that the Common law does not seem to have developed the same institutional structure as that to be found in the Romanist systems and thus there is no guarantee that English law will ever be capable of

75 Lockett v A & M Charles Ltd [1934] 4 All ER 170.
76 Gulf Oil (GB) Ltd v Page [1987] Ch 327.
77 Thomas Marsh (Exports) Ltd v Guinie [1979] Ch 277.
arriving at a stage where the law of obligations is going to have some common meaning. In other words the absence of a general theory of obligations, along with the absence of a concept such as the subjective right, might be symptomatic of a more fundamental problem facing the comparatist keen to search for a new ius commune.

In truth the development of common law of obligations throughout Europe might depend on whether one is an optimist or a pessimist. The optimist might see the English attitude to moveable property (cf. Ch. 2 § 4; Ch. 13 § 8) as a more realistic one than the rigid division between iura in rem and iura in personam; the tort of wrongful interference with goods might well transgress the logic of the Institutes and the Codes, but modern forms of property have gone far in undermining the strict division between real and personal rights in the Civilian systems themselves. The pessimist, on the other hand, might see the English attitude as a major obstacle to the development of a common legal science. Alternatively the optimist might find in the concept of 'duty' and in the notion of obligatio much that is similar; equally, however, the pessimist might see 'duty' as being rooted in a system of language rather than in a system of institutions and, consequently, of little value when it comes to the idea of a vinculum iuris. In any event the point must be stressed, when it comes to the question of harmonisation of the law of obligations, that it is not just a question of comparing rules or comparing categories; there is a more fundamental problem at the level of legal science. And if this problem is not properly addressed then any apparent harmonisation between English law and Continental law will remain, at best, simply a superficial meeting of two rather different mind sets.

216. That said, the Netherlands Civil Code offers an interesting perspective for legal science. Communication between Civil and Common lawyers is difficult because English law may lack a legal science in the sense of a coherent interrelating system. Thus, communication beyond the level of very general terms is hindered and at the level of analogy the patterns in Civil and Common law show little resemblance. However, owing to the post-axiomatic approach of Civil law, the Netherlands Civil Code is inducive to the accepted principles governing vermogensrecht in general and verbintenissenrecht (cf. nr. 10: abstrakte Rechtsprinzipien). It could be argued that the character of

79 Dubouchet, o.c., pp. 119-179; Linant de Bellefonds, o.c., pp. 125-126.
81 Cf. AS Hartkamp, Wetsuitleg en rechtsuitoepassing na de invoering van het nieuwe Burgerlijk Wetboek (Deventer, 1992), p.27-28: Blijkens art. 3: 12 moet de rechter bij de vaststelling van hetgeen redelijkheid en billijkheid eisen, rekening houden met de algemeen erkende rechtsbeginselen, met de in Nederland levende rechtsvoertuigen en met de maatschappelijke en persoonlijke belangen die bij het gegeven geval zijn betrokken; en Gelet op het uitgangspunt dat de draagwijdte van elke geschreven regel mede door het ongeschreven recht wordt bepaald, heeft de rechter dus de taak zijn oordeel steeds mede te laten ruisten.
Netherlands Civil law dictates that communication between a Netherlands Civil lawyer and a Common lawyer should have recourse not to meta-category concepts, but to an inductive and sometimes even descriptive stage of problem solving and legal reasoning. Its flexible structure consists of new and open-ended categories, rules and standards, especially in the law of obligations (cf. nr. 55). This flexibility is strengthened by a variety of points of departure for the classification and legitimation of ‘old’ and ‘new’ obligations. Reasoning by analogy is secured by statutory provisions (cf. nr. 70) but the Code does not exclude the use of reasoning per analogiam by the judge when applying the law. And the doctrine of the rules of reasonableness and fairness pervades the entire vermogensrecht. In the Netherlands law of obligations, this structure is complemented by substantive rules of civil procedure, closely linked to le droit subjectif. Finally, it is primarily the duty of the judge to safeguard the autonomy and equality of the parties in civil proceedings and the judge has to qualify the facts in the context of his statutory duty to apply the law within the boundaries the rule of law provides. When dealing with ‘open-ended’ concepts and categories and when accounting for the decisive role of specific circumstances of the case and customary law, this implies reasoning by analogy and reference to precepts, if possible (cf. nr. 32). In this, the rules of substantive civil procedure and the distribution of the onus of proof are closely connected to the interpretation of the law in terms of a narrative.

op een belangenafweging, waarbij enerzijds de concrete, naar billijkheid beoordeelde belangen van partijen een rol spelen, maar anderzijds ook de eisen van het maatschappelijk verkeer en de gevolgen van de beslissing daarvoor. Nevertheless this freedom of interpretation ought to be based on the purpose (raison) of the applicable legislation (Hartkamp, p.30).

82 See R de Lange, Publicrechtelijke rechtsvinding (Zwolle, 1991), p.17-24: The indeterminacy of the law can be seen as one of the most intricate characteristics of modern legal systems. It results in uncertainty about the way generally formulated rules ought to be applied in a specific case. There is, on the one hand, a functional and, on the other, a pragmatic aspect to this indeterminacy. The functional aspect (no norm provides information about the motives involved in its observance) is as such not a problem for the judge deciding in a specific case. Nevertheless for anyone studying the law as it develops in society the exact interpretation of decisions is problematic. The pragmatic aspect (pragmatic indeterminacy arises from the fact that we cannot infer from the validity of a norm the appropriateness of its application in all situations) is problematic in the context of normative argumentation. And a strictly axiomatic approach as opposed to the weighing of all arguments in the context of the circumstances of the case limits the argumentative force of legal discourse. Although the opposite approach offers more situation sense, it is in contradiction with the desire to rationalise the application of the law. Therefore a combination of both approaches, based on the principle of equality and analogy offers the best solution, provided the decision is rational (motivated and argumentated) in a moral and practical way (De Lange, p.9 and 12).

83 Cf. F Ost & M van de Kerchove, Entre la lettre et l’esprit (Bruxelles, 1989), p.44: Bien qu’elles ne régissent pas exclusivement l’activité d’interprétation de la norme juridique, mais également l’administration de la preuve des faits, on peut encore citer d’autres règles relatives à l’activité juridictionnelle, telles que celles
coherence\textsuperscript{84}(cf. Ch.).

217. The famous Netherlands lawyer Meijers had put his mind to the recodification of the Netherlands Civil law from 1905\textsuperscript{85}. His objections to the Civil Code of 1838 were well known\textsuperscript{86}. In 1947, Meijers was asked to draft a new Netherlands Civil Code\textsuperscript{87} and he accepted the invitation without hesitation, in the knowledge that in the Netherlands, la majorité considère toujours le droit civil comme un système, qu’on ne peut comprendre ni appliquer conformément à la justice, si on ne le décrit et on ne l’explique comme un tout\textsuperscript{88}. In 1948, Meijers described two circumstances for recodification: la première circonstance c'est l’incohérence du droit moderne, créée par un trop grand nombre de lois nouvelles modifiant le code et par un nombre toujours croissant d'arrêts... and the second motif en faveur d'une révision générale du Code civil se rencontre aussi dans d'autres pays que la Hollande. C'est l'influence, toujours croissante encore, de l'élément de l'intérêt public dans le droit civil\textsuperscript{89}. In his work, Meijers decided for a systematic approach to private law (theoretical and abstract), and not for the case-orientated method as can be found in the Institutes of Justinian. Although several other eminent lawyers have continued Meijers' work over the past years, his approach is still recognisable in the Civil Code, giving an open-ended system of concepts, notions and legal rules. The abstract and systematic foundations of Netherlands Civil law imply reliance on the courts to interpret the law in a rational way, within the context of its social function. And in choosing this approach, the question whether statutory law has priority over case-law was decided by way of compromise: some legal problems are best solved by the legislator, other problems should be left to the courts to decide\textsuperscript{90}. And the Netherlands Civil code seems well balanced between general rules and detailed provisions, although that sometimes, very specific rules are seemingly preferred, especially in the field of standard contract terms legislation.

\textit{qui prévoient l’obligation de motiver les jugements, le principe du contradictoire et le respect des droits de la défense, dont le rôle contraignant - même partiel - n’est pas discutable en ce qui concerne le déroulement de la procédure suit par l’interprétation judiciaire.}


\textsuperscript{85} See Wiersma, WPNR 5504 (1986), p.22-32.

\textsuperscript{86} See e.g., EM Meijers, \textit{Het feilloze deel van ons Burgerlijk Wetboek, Verzamelde privaatrechtelijke opstellen} (VPO), eerste deel (Leiden, 1954), p.93-98.

\textsuperscript{87} See on the history of the recodification of Netherlands Civil law NJB 1992, nr. 1.

\textsuperscript{88} EM Meijers, \textit{La réforme du Code Civil Néerlandais}, VPO, Eerste deel, p.159-169.

\textsuperscript{89} Meijers (o.c.), p.163.

218. Thus, the modern law of obligations re-emphasises the need for argumentative legal reasoning (cf. nr. 30). And it is at the level of technique and by describing the patterns of legal thinking that the categories of the law of obligations may become the threshold of a legal science capable of addressing the problems of harmonisation between English law and Continental law.

§ 8 CONCLUDING REMARKS

219. The absence of a general theory of obligations (cf. Ch. 5 § 10), and of rights (cf. Ch. 13 § 7), does not in itself discredit the use of the category of 'law of obligations' in English law. The term is useful both for bringing together contract, tort and a number of remedy cases (cf. Ch. 4 § 3) and for providing a framework for the growth of new substantive areas of law such as unjust enrichment (cf. Ch. 11 § 4). In other words the term 'law of obligations' can be useful for emphasising the similarities for example between compensation claims irrespective of whether they are founded in contract or in tort. However English lawyers must be careful not to make a 'category mistake' when using the term. For the notion of a law of obligations is expressing something different from the categories of contract and tort and this is true in relation not only to the positive rules within each of these latter categories but to the specific aims and policies that attach to contract and to tort respectively. Complex liability cases involving a range of different types of obligation and action91 might well benefit from a proper appreciation of the differing roles both of damages and debt (cf. Ch. 4 § 1) and of the categories contract, tort and unjust enrichment in that these specific remedies and categories can function with great precision at the factual level.

On the other hand it is by no means clear that an abstract category such as obligations would always be helpful in a legal system where factual categorisation and the application of rules often function at a low level of generality (cf Ch. 7 § 5). Indeed this has recently been recognised by the courts in the area of banking where duties flowing between banker and customer are so closely shaped by the factual realities surrounding the relationship, and so closely defined by contractual concepts, that the importation of tort or maybe even restitution ideas can simply be unhelpful92. This point, by way of conclusion, is worth developing a little further.

91 See e.g. Lister v Romford Ice & Cold Storage Co [1957] AC 555.
92 Tai King Cotton Mill Ltd v Liu Chooing Hing Bank Ltd [1986] AC 80; cf. Lipkin Gorman v Karpnale Ltd [1991] 3 WLR 10. Problems relating to the 'banking contract' and the question whether specific statutory rules for banking contracts are necessary in the Netherlands have recently been discussed by C van Ravenhorst, De bankovereenkomst (1991).
220. In most Continental legal systems the notion of a law of obligations has a specific purpose. It helps, first of all, to define the fundamental distinction between real and personal rights. And while it is true to say that this Roman-inspired dichotomy is by no means wholly absent from English law, there is nevertheless in the area of moveable property such a blurring of contract, tort and property (cf. Ch. 2 § 4) that it is often unrealistic to apply strict Roman learning. Furthermore the law of obligations in for instance France and the Netherlands functions differently in complex liability problems. It operates at a much higher level of abstraction and so the way facts are categorised in these systems tends to be along lines that express institutional relationships rather than typical fact situations. The Continental jurist is much more likely to think about liability in terms of people and things (for example liability for motor vehicles) and thus the aims and policy considerations are not so closely fixed, as they are in England, to the categories themselves. This allows principles of liability to emerge simply out of the juxtaposition of legal institutions - of persons and things - and, in turn, such an approach requires a private law system where movement between the various types of obligation is much more fluid and not attached to the concrete facts themselves. This perhaps is one reason why a theory of an abuse of rights has emerged more easily in France (cf. Ch. 13 § 7). In the Netherlands, the Civil Code develops these principles even further, especially in respect to the sources of obligations (cf. Ch. 5 § 1) and to the foundations of liability rules (cf. Ch. 5 § 5). A theory of abuse of rights in the field of the law of obligations is held to be unnecessary for Netherlands law when applying the statutory rule of s. 6: 248 (cf. Ch. 13 § 7).

None of this is to argue that the one system is better or worse than the other. Flexibility in French law is at the level of rights, whereas in England it is at the level of remedies and in Netherlands law, the Civil Code offers a very flexible instrument for the law of obligations in general. The point to be stressed is that a term like 'law of obligations', if transplanted into a system whose methodology is different, is unlikely to yield much fruit. The history of Civilian legal thought is a history of legal institutions and concepts and the idea of a law of obligations must be understood within the historical and intellectual context of a system of rights and of obligations. Thus a 'right' probably developed out of the institutional idea of a iuris vinculum (legal chain) between persona (legal subject) and res (legal object), and so one talks of a 'right to' something, while an obligatio was founded on a similar institutional bond between subjects93 which subsequently transcended the law of actions to establish a direct legal relationship between two legal subjects. The modern law of obligations is not, then, a matter of factual situations whose main institutional focal point is a legal remedy (cf. Ch. 2 § 6): it is part of an abstract system of legal relations flowing between abstracted notions of legal subjects and legal objects94.

English legal thinking is very different and has its roots in a selection of administrative sets of facts where development was by way of descriptive analogy and not by gradual axiomatization. Each type of object could, and still can, play its own specific role in any particular factual situation and thus it is perfectly possible, where say damage is done by an object, to have different rules for different objects. Damage done by a tree may be governed by a different rule than one dealing with damage done by a flagpole. Indeed the question of liability for damage done by oil pollution on the high seas may depend entirely upon whether the court decides that a supertanker is analogous to a car or to a smelly horse in the street. Even in contract one finds a similar approach: thus the existence or non-existence of a contractual bond is more likely to be dependent on the wording and contents of specific letters than on the question of whether there was any actual agreement between two legal subjects and this means that legal reasoning, even in the higher courts, can be a matter of minute and detailed analysis of particular facts.

No doubt changes are taking place. All the same even if there has been something of a rapprochement between English law and the codified systems over the past century or so, the empirical approach has not yet been abandoned and this is why it is better to start with the English law of actions (cf. Ch. 4 § 3) and work from there towards promises (cf. Ch. 6 § 2) and towards types of things. To think in terms of some abstract chain, whose metaphorical existence has never been an English historical or epistemological truism, is not, it must be said, a worthless task. It can aid the teaching of law. Yet it must be remembered that, just as the teaching of science is different from the practice of science, the teaching of law is different from the practice at the commercial bar. And it is the commercial bar, rather than the university (cf. Ch. 2 § 6), which has been the major epistemological influence on English legal scholarship.

97 Gibson v Manchester City Council [1979] 1 WLR 294.
98 See on this rapprochement JH Merryman, On the convergence (and divergence) of the civil law and the Common Law, in: Cappelletti (ed.), New Perspectives, pp. 295-233. The approximation (rapprochement, Rechtsgleichung) of laws being one of the objectives of the European Communities (EEC-Treaty Article 100/100A) its goal is to have such laws enacted in the Member-States, that economic freedom within the EC is maximized, not to uniform law, see Van der Velden & Florijn (o.c. nr. 5), Netherlands reports to the XIlth International Congress of Comparative Law, (1990) p. 43. Nevertheless, the unifying force of EC-directives and the development towards a possible European ius commune (cf. nr. 8) ought not to be underestimated.
221. Yet a comparative survey such as this one ought not to end on a pessimistic note, especially a survey hoping to contribute to a new *ius commune*. And so the point must be stressed that whatever the differences between Civil law and Common law concerning the level of abstraction, both legal families nevertheless make use of a legal science. One science might appear to be more concrete - or perhaps one might say more intuitive - than the other, but *le concret, disait Langevin, c'est de l'abstrait rendu familier par l'usage*\(^{101}\).

If English lawyers can move away from the idea that the law of contract and tort is based directly on factual events so as to recognise that they are really dealing with an interplay of institutions (*persona*, *res* and *actiones*), then it might be possible to see that there is a common *discours scientifique* between the Common law and the Civil law (cf. e.g., Ch. 12 § 4 and Ch. 13 § 2). Equally if Civil lawyers can re-incorporate the institution of the *actio*, making it a social reality around which rules can develop, they will have taken a major step towards understanding how the English legal mind functions. This, of course, is an epistemological exercise and, as such, it is one that might not appeal to the practitioner\(^{102}\); but in the law schools of Europe such an exercise should be a welcome challenge for those disenchanted with the current state of legal theory and legal philosophy\(^{103}\).

To say that law is a subject that owes much to natural sciences is not to claim that law is a science as such. There are great differences between the natural sciences and the human sciences\(^{104}\). As for all human sciences, the object (rules and facts) of law and legal reasoning is not given, but determined by the nature of these rules and facts as well as by the-values, motives and goals of the jurist applying the law. Normative aspects of the law and the changes in the law as it develops should not interfere, therefore, with the need for scientific, methodical and rational legal reasoning, and legal doctrine should focus - to a greater extent than a judge - on the systematic and dogmatic aspects of this legal reasoning. In addition to this, positivistic aspects of the law and teleological arguments are also important\(^{105}\). No doubt legal reasoning and the object of legal science in the Common law seems to be different from the Civil law tradition. Yet if *rapprochement* is to be achieved between the two legal families in Europe this can only be done at the level of *l'esprit scientifique*, even if harmonization through EC-law increases. And once it is recognised that the gap between these families is not one between two quite different sciences - it is more a question of different degrees of


abstraction and rationality - then the easier it is to see that there is an epistemological situation ripe for exploitation by the law schools of Europe. English law, as should be evident from this survey, has never really got beyond the inductive stage of epistemological development (cf. Ch. 12 § 2), while Netherlands law is at a post-axiomatic stage, that is a stage where the legislator has to recognise that legal propositions are no longer to be treated like mathematical axioms (cf. Ch. 5 § 1). The task for the law schools is to bridge the gap between the inductive and the post-axiomatic.

In natural sciences such a bridging might appear impossible. But is the same true of legal discourse where the distinction between science and object of science is much more ambiguous? Hopefully this survey has indicated that the Common law of obligations is capable of being reduced to a systematic set of legal propositions and legal institutions even if, as indeed was the case in Classical Roman Law, the system itself is by no means coherently developed in terms of a strict logic and hierarchical consistency between legal subjects and legal objects. Equally the references to Netherlands law should indicate that logic and hierarchy are no longer ends in themselves when it comes to applying the law of obligations to real life factual situations (cf. Ch. 12 § 3). The epistemological truth seems to be that an important part of the law of obligations in the two legal families is the application of a set of techniques (cf. e.g., Ch. 7 § 5) whose form and substance can no longer be expressed as a dichotomy between the a priori and the empirical. The just decision is as much a question of institutional relations as empirical experience (cf. Ch. 5 § 1 and 5).

222. In conclusion one can say, then, that the civil law tradition has provided the European jurist with the notion of a system of rules logically and coherently arranged and this is obviously true in the law of obligations (as it is, for that matter, in the law of property). Yet epistemologists also know now that it is not a system of rules which defines reason and rationality; it is the system’s capacity to institute un nombre indéfini. And it is in understanding this nombre indéfini that the common law can inject its contribution in that it has developed a legal science which has perfected, via the actio, the semi-concrete science of experience. English law, in other words, is closer to the facts than is the law contained in Continental codes. The law of obligations may not exist in form in English law (cf. Ch. 5 § 10), but there is a substance out of which a more systematic legal science might well, at some future date, wish to escape (cf. e.g. Ch. 11 § 1). And it is in the aiding of such escapes from older forms of thinking that the new European

107 Ibid., p. 84.
108 Zimmerman, pp. 913-914.
109 Blanché, science actuelle, op.cit., p.124.
110 Merryman, p. 219-222.
law school\textsuperscript{11} might find, not just its role, but the foundation for a new European \textit{ius commune}.

SUMMARY

This work on the comparative law of obligations has two main aims. The first aim is to give an account of the English law of obligations in the comparative context of the (new) Netherlands Civil Code; the object here is to set out in as systematic way as possible the general principles and the conceptual framework of the English law of contract, tort (delict) and quasi-contract with reference to this position in some of the Civil codes, in particular to Netherlands law. The hope is to produce material that not only will be informative in its own right, but will act as a basis for the induction of focal points - and obstacles - relevant to the search for a new European ius commune.

The second purpose is to formulate some epistemological conclusions. Using the English and Netherlands law of obligations (chapters 5-13), together with some material on civil procedure (chapters 3-4), the final section of the work (chapters 14-15) discusses legal science and legal reasoning in the context of the (Continental) European legal tradition; the object here is to show not only how English and Netherlands legal science are at different stages of epistemological development but how, in the case of Netherlands law, the development is moving into a new scientific stage. If, as Robert Blanché claimed, all the sciences move from a descriptive to an axiomatic stage via, respectively, an inductive and deductive stage, an interesting question arises as to whether the new Netherlands Civil Code, with its open-ended rules and 'vague' norms, can be characterised as moving into a post-axiomatic development. The question which then follows is whether English law, which might be said to be marooned in the inductive stage of development, has an important contribution to make to this post-axiomatic thought.

After some extensive Preliminary Remarks about the notion of a Law of Obligations, the Netherlands Civil Code and the epistemological concerns of the thesis (chapter 1), the book embarks upon an Introduction designed to familiarise the reader trained in the Continental tradition of Civil law with some of the difficulties to be encountered in the Common Law (chapter 2). These difficulties are explained, where possible, either through the use of history or through the adoption of notions familiar to the Civil lawyer.

The two chapters that follow are concerned more with procedural, rather than substantive, aspects of private law (chapters 3-4). The distinction is of particular relevance in the present work because the English law of obligations, assuming that such category is a suitable one for the Common law, cannot properly be understood without a thorough knowledge of both the
legal process and the law of remedies. Because of the absence of a Roman law and a university tradition in the history of English legal thought, the modern English law has found itself without the notion of *le droit subjectif*; instead it has tended to use as an organising concept the institution of the legal remedy (*actio*). *Ubi remedium ibi ius*. Consequently aspects of the law of obligations have been developed within what a Roman lawyer would call the Law of Actions and this is why a chapter on legal remedies precedes the discussion on the substantive law of obligations (chapter 4). In English law the *actio* remains a legal institution active both in substantive and in procedural law.

The relevance of the category of the law of obligations to English law is the next topic to be considered (chapter 5). This analysis is conducted within the context of a number of more general categories and divisions all of which might help to define, externally and internally, the possible boundaries of an English law of obligations. Where possible the categories from Continental (Roman inspired) legal science are employed, but certain categories and conceptual ideas peculiar to English law are also considered; the aim of this chapter is to produce a general theory context within which the serious obstacles to the idea of an English law of obligations can be aired at an early stage. These obstacles are considerable because English law conceives of substantive law only through the categories of contract and tort; there is no notion of a general *vinculum iuris*.

The following part of the book is taken up with an examination of the general principles of contractual obligations within the comparative context of the Netherlands Civil Code (chapters 6-10). The main objective here is to set out as systematically as possible the principles concerning the formation (chapter 7), contents (chapter 9) and discharge (chapter 10) of contracts. However, before concentrating on these principles, an introduction to the law of contract examines the more general issues associated with the subject (chapter 6); accordingly there is some discussion of freedom of contract, interpretation of contracts and the like. Moreover because English contract law is based essentially on the idea of promise rather than agreement separate treatment is required for vitiating factors (chapter 8); for a defect in consent is not *per se* fatal to the formation of the contractual bond.

Non-contractual obligations are, in terms of the actual rules applicable, covered in less depth than contractual obligations for two reasons. First because there is a number of areas such as quasi-contract and unjust enrichment (chapter 11) where the law of actions is still the dominating characteristic and no clear right-creating category of liability has yet emerged from the case law and statutes. The area of law is thus complex and does not easily lend itself to discussion in terms of right-creating propositions, Secondly because a subject such as the English law of non-contractual compensation liability has yet to find a single unifying principle or set of principles; there is still a debate as to whether it is a law of *torts or tort* (chapters 12-13). The
reasons for these difficulties are examined and some useful comparisons are made with Netherlands and French legal thought. Moreover there are also discussions on the relevance to English law of general ideas such as abuse of rights and liability for persons and for things. However non-contractual debt and damages claims have to play roles which cut across the categories of Roman legal science - categories such as ius publicum and ius privatum - and this in turn creates problems of legal rationalisation. It is very difficult to establish a set of systematic propositions in an area of law that is often not just descriptive and case-orientated in its approach to legal liability but unclear in any remedial sense as to the difference between personal, real and constitutional rights. Discussion of non-contractual debt and damages claims looks, accordingly, at the English law from, where possible, the institutional position adopted by a French lawyer.

The final part of the book moves to the level of legal knowledge, legal reasoning and legal science in the law of obligations (chapters 14-15). The concern here is to look at some of the epistemological questions that arise out of the comparison of the English and Netherlands law of contract, tort (delict) and unjust enrichment. The roles of legal institutions, categories and concepts are examined in relation to Roman law, modern Civil law, and the modern Common law and it is emphasised that knowledge of the law of obligations is not just a matter of learning propositions (rules and principles). Knowledge of the law of obligations involves an appreciation of the interrelationship of institutions (persona, res and actiones), institutional relations (ownership, obligations), concepts and categories and it is this interrelationship that is crucial not just to an understanding of how legal reasoning functions but to any development of a new ius commune.

The development of such a ius commune within the European Community will not be easy. For the notion of a law of obligations, and the systematic structure within which it gains its meaning, has only a limited relevance for the Common law. Part of the problem lies with the different stages of epistemological development; yet even if English legal thought was to progress from its empirical approach towards an axiomatic stage the different historical tradition of English law means there is no guarantee that the Common lawyers would produce a scientific discourse (un discours scientifique) that would match the legal science of the Continental jurist. All the same there does exist an epistemological situation ripe for exploitation by the law schools of Europe. Given that Netherlands legal thought appears to be moving towards a post-axiomatic stage the idea that legal propositions are like mathematical axioms can be abandoned and this means that the task is now to bridge the gap between the inductive and the post-axiomatic.

Perhaps such a task might appear impossible. Yet it must be remembered that when it comes to legal discourse the distinction between science and object of science has always been, at best, ambiguous; consequently the scientific systems in law are not at the mercy of the physical
world in quite the same way as they may appear to be in some of the natural sciences. The scientific systems in law are capable of development in a way that is no longer reliant upon a dichotomy between the *a priori* and the empirical. It is, in other words, more a matter of technique founded upon a set of institutional relations themselves continually evolving so as to produce a supposed empirical experience. It is here that the window of opportunity exists. The Civil law tradition has provided the European jurist with the notion of a system of rules logically and coherently arranged and this is perhaps most striking in the area of the law of obligations; the Common law, on the other hand, has perfected, via the Law of Actions, a semi-concrete science of experience which for its part has brought it closer to the facts. Now the great value of a system is to be found not so much in its ability to organise (as important as this is), but in its ability to institute *un nombre indéfini*; and once it is appreciated that it is in the understanding of this *nombre indéfini* that the Common law can inject its contribution the easier it becomes to see that a scientific *rapprochement* is possible. The law of obligations may not exist in form in English law, but there is a substance out of which a more systematic legal science might well, at some future date, wish to escape. And the task of the new European law school is to aid such escapes not just in systematising the substance of English law, but in fully exploiting the possibilities of a post-axiomatic Continental legal science.
SAMENVATTING

Dit proefschrift bevat rechtsvergelijkinge beschouwingen over het Engelse verbintenissenrecht. De doelstelling van deze studie is tweeledig. Allereerst wordt het Engelse verbintenissenrecht beschreven in het rechtsvergelijkend perspectief van het (nieuwe) Nederlandse Burgerlijk Wetboek, uitgaand van de gedachte dat een dergelijke classificering geschikt is voor de Common law. De bedoeling hiervan is om zo systematisch mogelijk de algetrouwne beginselen en basisbegrippen van het Engelse recht betreffende overeenkomsten, onrechtmatige daad en 'quasi-contracten' weer te geven onder verwijzing naar vergelijkbare structuren in landen met gecodificeerd Burgerlijk recht, met name Nederland. Het uitgangspunt is dat het beschikbare materiaal niet alleen op een praktische en bruikbare wijze wordt beschreven, maar tevens dat hiermee de basis wordt gelegd voor de introductie van de kernpunten - en belemmeringen - bij de ontwikkeling van een nieuw Europees ius commune.

De tweede doelstelling van dit onderzoek is het formuleren van een aantal kennistheoretische bevindingen. Met gebruik van het Engelse en het Nederlandse verbintenissenrecht (hoofdstukken 5-13), samen met burgerlijk procesrecht (hoofdstukken 3 en 4), worden in het afsluitende gedeelte van het boek (hoofdstukken 14 en 15) rechtswetenschap en juridisch redeneren besproken in samenhang met de (Continente) Europese juridische traditie. De bedoeling hiervan is niet alleen duidelijk te maken dat de Engelse en Nederlandse rechtswetenschap zich bevinden in verschillende fasen van kennistheoretische ontwikkeling, maar ook dat deze ontwikkeling zich voor wat betreft het Nederlandse recht in een nieuw wetenschappelijk stadium heeft begeven. Er van uitgaand dat elke wetenschap zich ontwikkelt van een beschrijvend naar een axiomaatisch niveau via respectievelijk een inductie en een deductieve methode (cf. Robert Blanché), doet zich de vraag voor of het nieuwe Nederlandse Burgerlijk Wetboek (met zijn open regels en 'vage' normen) kan worden gekenmerkt als post-axiomaat. Daaruit volgt de vraag of het Engelse recht, dat zich in een inductief stadium bevindt, een belangrijke bijdrage zou kunnen leveren aan dit post-axiomaatistische denken.

Na enige - vrij uitoeferge - Inleidende Opmerkingen over het begrip Verbintenissenrecht, het Nederlands Burgerlijk Wetboek en de kennis-theoretische invalshoek van het proefschrift (hoofdstuk 1), vangt het boek aan met een Inleiding bestemd om de lezer die geofend is in de Continentale traditie van het Burgerlijk recht vertrouwd te maken met enkele problemen die men ontmoot bij de bestudering van de Common law (hoofdstuk 2). Deze
problemen worden uiteengezet en verklaard, waar mogelijk, door ze te plaatsen in historische context of door begrippen te gebruiken die bekend zijn bij Continentale (Civil law-)juristen.

De twee daarop volgende hoofdstukken betreffen vooral procedurele aspecten van burgerlijk recht (hoofdstuk 3 en 4). Deze aspecten zijn voor het onderhavige onderwerp van bijzonder belang omdat het Engelse verbintenissenrecht niet op de juiste manier kan worden begrepen zonder gedegen kennis van zowel het procesrecht als de regels met betrekking tot rechtsvordering. Door de afwezigheid van [een] Romeins recht en het ontbreken van een universitaire traditie in de geschiedenis van het Engelse juridisch denken is het moderne Engelse recht verstooken gebleven van het begrip subjectief recht (le droit subjectif); in plaats daarvan is het Engelse recht geneigd geweest zich te richten op het gebruik van het instituut van de rechtsvordering (actio) als structurerend denkbeeld. Ubi remedium ibi ius. Als gevolg daarvan zijn onderdelen van het verbintenissenrecht ontwikkeld in het kader van het actiërecht. Dit is de reden dat een hoofdstuk gewijd aan rechtsvordering voorafgaat aan de bespreking van het materiële verbintenissenrecht (hoofdstuk 4). In het Engelse recht blijft de actio een juridisch instituut dat betekenis heeft in zowel materieel als procedureel opzicht.

Vervolgens wordt de betekenis van de voorgestelde classificatie van het Engelse verbintenissenrecht besproken (hoofdstuk 5). Dit wordt onderzocht in het kader van een aantal meer algemene classificaties en indelingen die nuttig kunnen zijn teneinde de mogelijke grenzen van een Engels verbintenissenrecht aan te geven. Waar mogelijk wordt gebruik gemaakt van begrippen uit de Continentale (op het Romeinse recht geïnspireerde) rechtswetenschap, maar tevens worden enkele classificaties en basisbegrippen besproken die typisch zijn voor het Engelse recht. In dit hoofdstuk wordt een algemeen theoretisch kader gegeven waarbinnen zwaarwegende bedenkingen tegen de idee van een Engels verbintenissenrecht worden beschreven. Deze bedenkingen zijn aanzienlijk omdat het Engelse recht slechts door middel van de begrippen contract en tort materiële regels formuleert; de gedachte van een algemene vinculum iuris is onbekend.

Het daaropvolgende gedeelte van het boek (hoofdstukken 6-10) begint met een onderzoek naar de algemene beginselen van contractuele verbintenissen in het Engelse recht in het rechtsvergelijking perspectief van het Nederlands Burgerlijk Wetboek. Het belangrijkste doel hiervan is zo systematisch mogelijk weer te geven de beginselen betreffende het ontstaan (hoofdstuk 7), de inhoud (hoofdstuk 9) en het tenietgaan (hoofdstuk 10) van verbintenissen uit overeenkomst. Voorafgaand aan de beschrijving van deze beginselen worden meer algemene onderwerpen besproken (hoofdstuk 6) die verband houden met het Engelse overeenkomstenrecht, zoals de contractsvrijheid, interpretatie van overeenkomsten en dergelijke. Aangezien het Engelse overeenkomstenrecht in principe meer gebaseerd is op de idee
van *promise* (toezegging) dan van *agreement* (overeenstemming) is afzonderlijke behandeling van de omstandigheden die een overeenkomst ongeldig (mets) doen zijn noodzakelijk (hoofdstuk 8); een gebrek in de toestemming is namelijk niet *per se* fataal voor het tot stand komen van de contractuele gebondenheid.

Niet-contractuele verbintenissen worden, althans voor zover het gaat om de in het Engelse recht concreet toepasselijke regels, in dit onderzoek om twee redenen met minder diepgang behandeld dan contractuele verbintenissen. Allereerst zijn er verschillende gebieden in het Engelse recht, zoals *quasi-contract* en ongerechtvaardigde verrijking (hoofdstuk 11), waar het actienrecht nog immer het overheersende kenmerk is. Jurisprudentie en wetgeving bieden geen duidelijk aanknopingspunt voor het ontstaan van een begrip als aansprakelijkheid als bron van rechten in Continentale zin. Het rechtsgebied betreffende niet-contractuele verbintenissen is bijzonder complex en leent zich moeilijk voor een bespreking in termen van rechtskundige doopprocessen. Ten tweede dient het Engelse recht betreffende schadeloosstelling voor niet-contractuele aansprakelijkheid vooralsnog een en makend beginsel of stelsel van beginselen te ontwikkelen. Er wordt nog steeds gedebatteerd over de vraag of het begrip onrechtmatige daad als zodanig bestaat dan wel of het gaat om verschillende typen onrechtmatige daad (law of *torts or tort*, hoofdstuk 12 en 13). De oorzaak van deze problemen wordt onderzocht, waarbij gebruik wordt gemaakt van een aantal nuttige vergelijkingen met het Nederlandse en Franse rechtsdenken. Tevens wordt de betekenis voor het Engelse recht besproken van algemene enkele denkbeelden als misbruik van recht en aansprakelijkheid voor personen en zaken. Echter, niet-contractuele schuldeisen schadevorderingen (*debt and damage claims*) vervullen in het Engelse recht een functie die nauw staat op de indelingen van begrippen uit het Romeinsrecht denken (zoals *ius publicum* en *ius privatum*). Dit levert vervolgens problemen op bij het juridisch rationaliseren van de desbetreffende regels. Het is niet eenvoudig op systematische wijze regels en begrippen weer te geven in een rechtsgebied dat veelal slechts beschrijvend en causatieoriënteerd is. Bovendien ontbreekt in het Engelse recht een duidelijke ontwikkeling van het verschil tussen persoonlijke, zakelijke en staatsrechtelijke rechten. Waar mogelijk wordt bij de bespreking van niet-contractuele schulden schadevorderingen het Engelse recht daarom benaderd vanuit het perspectief (de institutionele positie) van een Franse jurist.

Het afsluitende gedeelte van het boek betreft juridische kennis, juridisch redeneren en rechtswetenschap in het verbintenissenrecht (hoofdstukken 14 en 15). Het gaat hierbij om het beschrijven van enige kennistheoretische vragen die zich voordoen bij het vergelijken van het Engelse en het Nederlandse recht betreffende overeenkomsten, onrechtmatige daad en ongerechtvaardigde verrijking. De rol van juridische instituten, classificaties en begrippen wordt onderzocht in verband met Romeins recht, modern Continentaal recht en de moderne *Common law*. Met nadruk wordt daarbij gesteld dat kennis van het verbintenissenrecht niet slechts een zaak is
van het leren van proposities (regels en beginselen). Kennis van het verbintenissenrecht betekent het waarderen van de onderlinge verhouding tussen instituten (persona, res en actiones), institutionele betrekkingen (eigendom, verbintenissen), begrippen en beginselen en juist deze onderlinge verhouding is bepalend voor niet alleen het begrijpen van juridisch rederen maar ook voor de ontwikkeling van een nieuw ius commune.

De ontwikkeling van een dergelijk ius commune in de Europese Gemeenschap zal niet eenvoudig zijn. Voor de Common law heeft de idee van een systematisch geordend verbintenissenrecht in de Continentale traditie slechts beperkte zin. Dit wordt ten dele veroorzaakt door het afwijkende stadium van kennistheoretische ontwikkeling waarin het Engelse recht zich bevindt. Echter, zelfs indien het Engelse juridische denken zich zou ontwikkelen van een empirische benadering naar een axiomatisch stadium houdt dat geen garantie in dat tussen Common lawyers en Continentale juristen een zinvol wetenschappelijk discours (un discours scientifique) zou kunnen ontstaan. Al met al kan gesteld worden dat de geschetste kennistheoretische situatie rijp is voor exploitatie door de law schools van Europa. Gelet op de omstandigheid dat het Nederlandse juridisch denken een ontwikkeling vertoont in de richting van een post-axiomatisch stadium en de gedachte worden verlaten dat juridische proposities gelijk zijn aan mathematische axioma's. Bij de ontwikkeling van een ius commune betekent dit dat een verbinding tot stand moet worden gebracht tussen (Engels) inductief en (Nederlands) post-axiomatisch rechtsdenken.

Wellicht is een dergelijke opdracht onmogelijk. Men moet daarbij echter niet vergeten dat, wanneer het gaat om logisch juridisch denken, het verschil tussen rechtswetenschap en het voorwerp van deze wetenschap altijd dubbelzinnig is geweest. Wetenschappelijke systemen in het recht zijn niet onderworpen aan de macht van de fysieke wereld in dezelfde zin als dit schijnbaar het geval is bij natuurwetenschappen. De wetenschappelijke systematiek van het recht kan zich ontwikkelen op een wijze die niet langer noodzakelijk berust op de tweedeling tussen het a priori en het empirische. Met andere woorden, een juridisch wetenschappelijk systeem is meer een technische zaak: techniek gebaseerd op institutionele relaties die zelf voortdurend in ontwikkeling zijn, waardoor een empirische ervaring wordt bewerkstelligd. Juist op dit gebied kan de rechtswetenschap zich verder ontwikkelen. De Continentale traditie heeft de Europese jurist voorzien van een raamwerk van regels die op logische en samenhangende wijze zijn gerangschikt, en dit is wellicht het meest treffend op het gebied van het verbintenissenrecht. De Common law heeft op haar beurt via het actienrecht de semi-exakte wetenschap van ervaring geperfectioneerd en dichter bij de feiten gebracht. De belangrijkste waarde van een systeem is niet zozeer het organiserend vermogen (hoe belangrijk ook), maar juist het vermogen om een onbepaald aantal gevallen (un nombre indéfini) te institutionaliseren. Daarom dient te worden onderkend dat de Common law op dit punt een bijdrage kan leveren die een wetenschappelijke toenadering (rapprochement) mogelijk
maakt. Alhoewel het verbintenissenrecht naar vorm in het Engelse recht onbekend is, bestaat wel degelijk een materie waaruit in de toekomst een meer systematische rechtswetenschap zou kunnen voortkomen. En de opdracht aan de nieuwe Europese law school is niet zozeer gelegen in het systematiseren van de materie van het Engelse recht, maar in het ten volle benutten van de mogelijkheden die de post-axiomatische Continentale rechtswetenschap biedt.
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Curriculum Vitae

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