

# Fees for Claim Settlement in the Field of Personal Injury: Empirical Evidence from the Netherlands

## Citation for published version (APA):

Faure, M. G., & Philipsen, N. J. (2010). Fees for Claim Settlement in the Field of Personal Injury: Empirical Evidence from the Netherlands. *Journal of European Tort Law*, 1(1), 75-101.  
<https://doi.org/10.1515/JETL.2010.75>

## Document status and date:

Published: 01/01/2010

## DOI:

[10.1515/JETL.2010.75](https://doi.org/10.1515/JETL.2010.75)

## Document Version:

Publisher's PDF, also known as Version of record

## Document license:

Taverne

## Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
- The final author version and the galley proof are versions of the publication after peer review.
- The final published version features the final layout of the paper including the volume, issue and page numbers.

[Link to publication](#)

## General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal.

If the publication is distributed under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license above, please follow below link for the End User Agreement:

[www.umlib.nl/taverne-license](http://www.umlib.nl/taverne-license)

## Take down policy

If you believe that this document breaches copyright please contact us at:

[repository@maastrichtuniversity.nl](mailto:repository@maastrichtuniversity.nl)

providing details and we will investigate your claim.

# Fees for Claim Settlement in the Field of Personal Injury: Empirical Evidence from the Netherlands

by

MICHAEL G FAURE AND NIELS J PHILIPSEN\*

*Abstract: Based on data supplied by five Dutch insurers for the years 2001–2006, the authors analyse the development of hourly fees charged by attorneys and other legal representatives (claims agents) in personal injury cases. The analysis focuses on cases that did not go to court but where, according to Dutch law, a fee shifting rule applies: that is, the (insurer of the) losing party must pay the costs of the winner's legal assistance. One may expect that such a fee shifting rule would to some extent restrict competition in the market. The data indeed appear to suggest that in the Netherlands fees of personal injury lawyers have increased rather dramatically in recent years: more than double price and wage inflation, and much more than the fees of, for example, a trustee in bankruptcy. We offer some explanations for this based on the well-known law and economics literature. Although the fee increase we found may indeed be related to the Dutch fee shifting rule, the data we collected (which all relate to recent years) did not allow us to make a sufficiently robust connection between the two. They do, however, provide a rare and valuable insight into modern personal injuries practice in the Netherlands.*

(2010) 1 JETL 75

## *I. Introduction*

In this paper we report on research executed for the Dutch Insurers' Institute on Personal Injury. The insurers wanted an investigation into the fees paid in the event of claim settlement in personal injury cases because they had the impression that lawyers' fees and more particularly the hourly rates charged have increased substantially since 2000.

The legal background for this is the following. According to Article 6:96 of the Dutch Civil Code, patrimonial damage includes the reasonable costs of claiming compensation out of court. This part of the damages is referred to as extrajudicial costs (*buitengerechtelijke kosten*). On the basis of Article 6:96, an injurer can thus be held liable to compensate for legal fees incurred out of court by the victim.<sup>1</sup> In the Netherlands, as in some other European legal systems, the victim of a tort can therefore claim compensation for extrajudicial legal fees from the

\* We are grateful to the participants in the 2008 Conference on Empirical Legal Studies (Cornell, 12–13 September 2008), to an anonymous reviewer prior to this conference, and to our discussant Herbert M Kritzer for useful comments afterwards. We are also grateful to two anonymous reviewers for JETL.

1 See *M Faure/T Hartlief*, The Netherlands, in: H Koziol/BC Steininger (eds), *European Tort Law 2003* (2004) 300–302.

injurer's liability insurer.<sup>2</sup> This possibility was introduced in a decision by the *Hoge Raad* (Supreme Court) of 3 April 1987.<sup>3</sup> However, after a new Civil Code was introduced in the Netherlands in 1992, the obligation of the (insurer of) the injurer to pay for such extrajudicial costs has also been laid down in Article 6:96 of the Civil Code. Compensation for these costs is subject to a so-called 'double reasonableness test': first, it should be reasonable that the victim in the particular circumstances called on expert help; second, the legal fees themselves have to be reasonable in amount. In practice, problems often arise concerning the question what 'reasonable' legal fees are, which results in many discussions between the injurer's liability insurer and lawyers representing the victim.

The goal of our research was to examine whether the fees paid to lawyers as part of the extrajudicial costs have indeed increased since 2000 and, if that is the case, whether it would be possible to examine whether this increase is higher than price increases in general or in similar (or at least comparable) legal services. Moreover, it was also obviously a goal of the research to try to provide possible explanations for the empirical evidence found.

Our research methodology is both theoretical and empirical. First, we examine on the basis of the law and economics literature what the expected effect would be of such a 'fee shifting rule'. Basic economic insight teaches us that, when lawyers are able to shift their fees to liability insurers, their incentives for reducing those fees will be low, given that in the relationship between the lawyer and the injurer's liability insurer competitive pressures do not force the lawyer to reduce his fees. It is this theoretical starting point (which will be explained in Section II) that will be tested on the basis of a detailed analysis of approximately one thousand files that have been provided to us by five liability insurers in the Netherlands. The goal is to provide an impression of the development of extrajudicial costs paid during the period 2001–2006.

This data analysis is supplemented by qualitative research concerning the development of extrajudicial costs. More particularly, in order to determine potential causes, we held interviews with chairmen of representative associations of personal injury lawyers in the Netherlands (consisting of attorneys only).<sup>4</sup> We also held an interview with Raoul van Dort, a lawyer who represents interests of victims of personal injury, but who is not an attorney. We refer in this paper to

2 In addition, there is also a possibility to obtain compensation for so-called process costs in the case of a legal procedure on the basis of Arts 237–240 of the Code of Civil Procedure. The general rule is, however, that it is the losing party who pays the costs.

3 Hoge Raad, 3 April 1987, *London and Lancashire v Drenth*.

4 One interview was held with Peter Langstraat, chairman of the Association of Personal Injury Lawyers (*Vereniging van Letselschadeadvocaten* – LSA); a second interview was held with John Beer, chairman of the Association of Attorneys of Personal Injury Victims (*Vereniging van Advocaten voor Slachtoffers van Personenschade* – ASP). The difference between these associations is that the members of the LSA include all types of personal injury lawyers, whereas the ASP consists of claimant attorneys alone.

this second category (legal assistance providers, not being attorneys) as ‘claims agents’.<sup>5</sup>

After a presentation of our analysis of case files in Section III, Section IV considers the development of fees for different and comparable services. Section V provides a comparison and analysis of the research results.

## *II. Theoretical starting points*

The first question that arises is whether, on the basis of the traditional law and economics literature, any prediction can be made about the effects of fee shifting, ie the fact that the victim’s lawyer will have his fees paid by the injurer’s insurer. Next, we address the market for legal assistance in personal injury cases and then discuss the relationship between the lawyer and the liability insurer as far as extrajudicial costs are concerned.

### *A. Fee shifting in the law and economics literature*

Economists have paid much attention to the effects of a shifting of legal fees to the loser at trial. In the literature, this is often referred to as the ‘English rule’, although in practice the differences between the ‘American rule’ (each party bears his own costs) and the ‘English rule’ (the loser pays everything) may be smaller than is generally presumed.<sup>6</sup> Shavell shows that fee shifting has consequences for the incentives to sue: it leads to more suits when plaintiffs have higher probabilities of winning and to fewer suits in the reverse situation of lower probabilities of winning. And, when a suit is brought, fee shifting also has an underlying tendency to increase the likelihood of trial. Furthermore, Shavell argues that an effect of fee shifting is that parties will generally spend more on legal fees. The reasons are: first, that a party will not necessarily have to pay the bill of his own attorney and, second, that fee shifting increases the payoff from winning since in that case reasonably incurred legal fees can be recovered from the other side.<sup>7</sup> Cooter and Ulen support Shavell’s conclusions, adding that in those disputes where liability is conceded by the defendant and the parties only

5 For reasons of simplicity we refer to all parties providing legal assistance to victims during the claim settlement process as ‘personal injury lawyers’. However, since claims agents are not regulated, they do not necessarily have to be lawyers. Some of them certainly are, but it is not required. Attorneys on the other hand are always lawyers and in addition have to be a member of the Bar and are thus subject to legal ethics and regulation.

6 See *AW Katz*, Indemnity of legal fees, in: B Bouckaert/G de Geest, *Encyclopedia of Law and Economics*, Vol V: The economics of crime and litigation (2000) 63–94.

7 *S Shavell*, *Foundations of Economic Analysis of Law* (2004) 428–432. However, Shavell does not examine the relationship between the phenomenon of fee shifting and the hourly rates charged by lawyers.

contest the quantum of damages, the English rule discourages trials by penalising hard bargaining, even though it may increase the number of cases due to ‘false optimism’.<sup>8</sup>

In the Encyclopedia of Law and Economics, Katz discusses the (scarce) empirical literature on the effects of fee shifting.<sup>9</sup> The only relevant research where the effects of fee shifting have been empirically tested is by Snyder and Hughes<sup>10</sup> who report on a policy experiment in Florida between 1980 and 1985 using the English rule in medical malpractice cases. They found that, as a result of fee shifting, a significantly higher percentage of claims were withdrawn at an early stage of the litigation. This seems to correspond with the theoretical prediction that fee shifting discourages risk-averse plaintiffs with low chances of winning. They also found that defendants spent significantly more on each case and that, *ceteris paribus*, the likelihood that a case comes to court increases under fee shifting. Finally, Snyder and Hughes concluded that fee shifting benefits plaintiffs with high-quality or high-damage claims at the expense of those with low-quality or low-damage claims, and possibly at the expense of defendants.

This general law and economics literature provides a few interesting insights but does not deal with the more specific question we are looking into. In our specific (Dutch) case, there is no uncertainty as far as liability is concerned since, in the majority of cases, the liability of the injurer is admitted and it is also admitted that the defendant is obliged to compensate the total costs of the victim (including legal fees). Negotiations usually take place only with regard to the amount of the damages. The models we discussed above generally involve much more uncertainty since it is not known whether the case will be lost or won or what type of decision will ensue as far as legal fees are concerned. Therefore, in the remainder of this Section, we will take a different theoretical approach in order to analyse the possible effects of this shifting of extrajudicial costs to the insurer of the injurer. We first describe briefly the general market for legal assistance in personal injury cases and then focus on the particular characteristics of the relationship between the victim’s lawyer and the injurer’s insurer.

8 *R Cooter/RT Ulen*, Law and Economics (4th edn 2004) 425–427. For a modelling of this English rule, see also *CE Hyde/PL Williams*, Necessary Costs and Expenditure Incentives under the English Rule (2002) 22 International Review of Law and Economics 133.

9 *Katz* (fn 6) 83–88.

10 *EA Snyder/JW Hughes*, The English rule of allocating costs: Evidence confronts theory (1990) 6 Journal of Law, Economics and Organization 345; *JW Hughes/EA Snyder*, Litigation and settlement under the English and American rules: Theory and evidence (1995) 38 Journal of Law and Economics 225.

### B. Market for legal assistance in personal injury cases

The starting point for analysing the relationship between the victim and the lawyer in personal injury cases is information asymmetry: the lawyer is well informed of the nature and quality of the services he provides, whereas the victim usually does not have this type of information.<sup>11</sup> In personal injury cases, victims are moreover usually 'one shotters' rather than 'repeat players', so there is no learning effect. In the traditional law and economics literature, information asymmetry is considered a form of market failure, and therefore some kind of intervention in the market may be justified, for example, in the form of (self-) regulation.<sup>12</sup> However, economic scholarship has also criticised the (self-)regulation of the (legal) profession since there is always the danger that this may lead to a restriction of competition.<sup>13</sup>

For the potential victim of personal injury in the Netherlands there are three options for obtaining legal assistance. The first option is to use an attorney-at-law. In the Netherlands a specialisation has taken place as a result of which attorneys specialised in personal injury cases have gathered together in two associations.<sup>14</sup> Membership of these associations is subject to quality control. For example, to become a member of the Association of Personal Injury Lawyers (*Vereniging van Letselschadeadvocaten – LSA*), an attorney has to follow an intensive series of courses.

Second, legal assistance can also be provided by persons other than attorneys. The reason is that more than 95 % of personal injury cases in the Netherlands are settled out of court. The attorney's monopoly over advocacy in court hence does not prevent persons other than attorneys from representing the interests of personal injury victims. As aforementioned, we refer to such representatives as 'claims agents' in order to distinguish them from attorneys.<sup>15</sup>

A third possibility is that legal assistance can be provided through legal expenses insurance. In approximately 30 % of all personal injury cases in the Netherlands a legal expenses insurer is involved. In such cases, legal expenses insurers themselves provide legal assistance through lawyers (or other professionals) working for them and assisting the victim. The latter constitute a separate group which has not been further considered in our research.

11 For more details see *NJ Philipsen*, Regulation of and by Pharmacists in the Netherlands and Belgium: An Economic Approach (2003) 14–17. See also *PH Rubin*, Information Regulation, in: B Bouckaert/G de Geest, Encyclopedia of Law and Economics, Vol III: The regulation of contracts (2000) 271–295.

12 *AI Ogus*, Regulation: Legal Form and Theory (1994); *Philipsen* (fn 11) 9–45.

13 See further on this issue *CD Ehlermann/I Atanasiu* (eds), European Competition Law Annual 2004: The Relationship Between Competition Law and the (Liberal) Professions (2006).

14 The LSA and ASP. See fn 4.

15 See also fn 5.

There is hence, in principle, a large number of professionals active on the market for legal assistance in personal injury cases. Ex ante a (potential) victim has a large choice of available options. Whether the market is completely transparent and whether victims are fully informed of the quality of services provided is a separate issue which is not the focus of our research.<sup>16</sup>

As far as the victim's choice between an attorney or other legal representative is concerned, an important difference is that attorneys are subject to regulation and self-regulation whereas this is not the case for other professionals. Regulation of attorneys inter alia restricts the possibility of attracting clients via advertising, but more importantly also restricts the possibility of applying a result-based fee system.<sup>17</sup> In the Netherlands 'no win no fee' arrangements are prohibited;<sup>18</sup> for other providers of legal assistance, these limitations do not exist. Attorneys have therefore argued that they are at a competitive disadvantage because they are not allowed to offer 'no win no fee' arrangements to victims.<sup>19</sup> As a result of this disparity, the Dutch Competition Authority, the *Nederlandse Mededingingsautoriteit* – NMa, held that the regulation prohibiting 'no win no fee' violates competition law.<sup>20</sup>

An important element of the market structure is that, given the fact that the legal fees will be reimbursed by the injurer as extrajudicial costs, the victim seeking legal assistance should not necessarily worry about the price he pays for his legal assistance. Only when there is uncertainty concerning the question of liability is there a risk that the victim will have to bear the legal costs himself. The websites of law firms specialised in personal injury on the one hand, show the appropriate hourly rate in personal injury cases but they also indicate that in many cases these costs can be recovered from the liable party's insurer.<sup>21</sup>

The relatively small risk run by the victim relates to situations where liability is denied by the liable party or where no agreement on the amount of damages can

16 More particularly as far as claims agents are concerned, there is sometimes doubt as to whether they provide accurate information to victims and whether victims are always able to assess the quality of the services provided.

17 For details, see *MG Faure/FJ Fernhout/NJ Philipsen, Resultaatgerelateerde beloningsystemen voor advocaten* (2009).

18 Even though at the beginning of 2008 the Minister of Justice allowed a (limited) experiment with result-based fees.

19 Interview with LSA chairman, Peter Langstraat on 10 September 2007.

20 NMa, Case 560/87 (Engelgeer-NOVA), 21 February 2002.

21 See, for example, the website of Moree Gelderblom Attorneys (the law firm of LSA chairman, Peter Langstraat): 'The hourly fee in personal injury cases is € 215–265. However, in many cases it will cost you nothing, since in the large majority of the cases in which the adverse party is liable, the extra procedural costs (being the costs which are made until the case comes before the judge. In many cases, we never will have to go to court since the case is settled) will be completely paid by the liable party or his insurer. The procedure therefore in those cases costs absolutely nothing to the victim' <<http://www.mglaw.nl/tarieven/htm>>.

be reached through negotiation and a court case is therefore necessary. In such cases, there is still a risk that (a part of) the legal fees will have to be borne by the victim himself, particularly in the case where he loses at trial. However, in those cases (in fact, the large majority) where liability is undisputed, the injurer's insurer has to compensate the extrajudicial costs (legal fees). As a result, the price to be paid should not be a decisive factor *ex ante* for the victim. There is still, as we have indicated, a difference in the choice between an attorney or another provider of legal services: a risk-averse victim could (particularly in the situation where liability is not admitted) choose to limit his risks by making a 'no win no fee' arrangement with a claims agent.

### *C. Relationship between the lawyer and the injurer's insurer*

The choice of lawyer is obviously made by the victim; the insurer of the liable party (who afterwards has to pay the lawyer's legal fees as extrajudicial costs) has no influence on this decision. Apart from the 'double reasonableness test' we referred to above, there are few reasons for the lawyer to limit his legal fees. Even though personal injury lawyers are usually 'repeat players' and may deal regularly with similar insurers, this will not provide them with any incentive to reduce their fees for the simple reason that it is not the insurer of the injurer who chooses the lawyer in the next case.

It can therefore be expected that the lawyer, within this system where his fees can be billed to the insurer as extrajudicial costs, will have little incentive to reduce them. Notwithstanding this theoretical starting point, the interviewees in our study maintained that their billing behaviour<sup>22</sup> is not influenced by the fact that their fees can be billed to the insurer. They therefore argued that there is in principle no incentive to inflate their fees.

The relationship between the lawyer and the insurer may thus be qualified as a quasi-monopoly or 'situational monopoly' in the sense that, in this particular situation, the insurer has no influence on the lawyer who is chosen by the victim and can hence (as a monopolist) charge monopoly prices for the fees provided. Of course, the insurer will try to pass on the legal fees charged by the lawyer via its insurance premiums. The shifting of the victim's legal fees (and the potential for consequent overbilling) may lead to a loss of efficiency (because of inefficiently high claim settlement costs in personal injury cases) and to a redistribution of costs to the general group of insureds.

The position of the insurer in this particular situation is comparable to that of insurers covering health costs under certain social insurance schemes. In that situation too, patients can (within regulatory limits) freely choose the provider of their health care services and bill the cost to their insurer or a social security

22 Both as far as the hourly rate and as far as the hours charged are concerned.



agency. In health economics it has been argued that this system provides few incentives to cost reduction to the provider of health care services.<sup>23</sup> The policy response to the fear of the increasing social costs of health care has usually been regulation of the tariffs applying to health care services.

The question of course arises whether in the system of claims handling in personal injury cases in the Netherlands the shifting of legal fees to the injurer's insurer will (in the absence of regulation on tariffs) lead to a similar social loss resulting from increased administrative costs. It was that particular question which constituted the starting point of our empirical analysis.

### *III. Empirical study*

#### *A. Database*

##### *1) The selection of the files*

In the framework of our research for the Dutch Insurers' Institute on Personal Injury, we were provided with many personal injury cases by five liability insurers who are active in the personal injury market in the Netherlands.<sup>24</sup> The starting point was to select 240 files from every insurer, ie 40 files for each year in the period 2001–2006. This gave us a representative selection of 200 files for every year. In the Netherlands on a yearly basis there are approximately 50,000 personal injury cases; in approximately half of these cases (25,000) a lawyer is active. Given the fact that we aimed at a reliability level of 95 % and an error margin of 10 % (on the basis of current statistically accepted standards), this meant we needed at least 96 files for every year.<sup>25</sup>

The files were selected by the insurance company on the basis of a random sample, meaning that every file had exactly the same probability of being selected. In order to obtain this result, we asked insurers to provide us with a list containing case numbers for each of the years 2001–2006. We subsequently executed the selection randomly.

##### *2) Description of the total database*

Our database consists of 1,043 files covering the period 2001–2006. In a small number of files several lawyers were active, each using different tariffs. In ad-

23 See generally *CE Phelps*, Health economics (2009) ch 10. See also, *DM Cutler/RJ Zeckhauser*, The Anatomy of Health Insurance, in: AJ Culyer/JP Newhouse (eds), Handbook of Health Economics (2000) 563–643.

24 Aegon, Delta Lloyd, Fortis ASR, Univé and ZLM Verzekeringen.

25 See, for example, *BL Bowerman/RT O'Connell*, Business statistics in practice (2007).

dition there were a few files which only provided information on the total amount of extrajudicial costs, without mentioning the hourly rate charged. Therefore the database of 1,043 files provided a total of 1,063 observations concerning hourly rates. Of these 1,063 observations (representing 1,063 interventions by a lawyer), 489 concerned an attorney-at-law and 574 cases concerned other legal representatives (claims agents). The database equally provides information concerning the type of cases concerned. The large majority of the 1,043 files concerned traffic accidents, but there were a few cases dealing with accidents at work, general liability and corporate liability. The 1,043 cases can be classified as follows:

Table 1 Type of cases

Type of case	Number of cases
Traffic	901
Employers' liability	51
General liability	39
Corporate liability	41
Medical	1
Other	9
No information	1

In order to estimate the complexity of cases, the database also provides some information on the question whether there was discussion concerning the liability of the injurer and the number of expert reports. Regarding the question whether liability was disputed, the response was (in as far as this question was answered) 'yes' 119 times and 'no' 905 times. As far as the number of expert reports which were used are concerned, the following observations were made in the 1,043 cases:<sup>26</sup>

Table 2 Number of expert reports

Number of expert reports	Number of cases
0	641
1	215
2	64
3	27
4	8
5	2
6	4
7	1
13	5
No information	76

26 Our database also provides information concerning the starting point and date of (almost all) files. We, however, have eliminated this information here, since it is less relevant for our current analysis.

### B. Hourly rates

We will first analyse the development of the average hourly rate which was billed to the insurers without considering the number of hours charged.

#### 1) Hourly rates in the total database

Table 3 below provides the average hourly rates for each of the years 2001–2006 as they appeared from our database. The number of observations changes for every year.<sup>27</sup> The reasons are that (a) information on the hourly rates charged was not given in every file, (b) there are files where more than one lawyer was active and (c) most files run over several years, which increases the probability of having more observations in more recent years.

Table 3 Average hourly rates (entire database)

Year	Number of observations	Average hourly rate	Increase compared to the previous year	Increase (2001=100)
2001	85	€ 149.39		100.00
2002	217	€ 159.21	6.57 %	106.57
2003	363	€ 165.35	3.86 %	110.68
2004	491	€ 172.60	4.38 %	115.54
2005	555	€ 180.21	4.41 %	120.63
2006	568	€ 185.90	3.16 %	124.44

As Table 3 shows, on average, the hourly rates increased in the period 2001–2006. The highest increase took place in 2002, the year after the Euro was introduced. The last column in Table 3 shows the cumulative increase. This hence shows that, in the entire period, the average hourly rate billed to insurers increased by 24.44 %.

#### 2) A comparison between attorneys and claims agents

The average hourly rates charged by attorneys are, as Table 4 shows, higher than the values found for the entire database (attorneys and claims agents together). On average the hourly rate of an attorney is approximately € 20 higher than the hourly rate of a claims agent (see Table 5). However, the differences seem to become smaller over time. Claims agents' fees have increased more rapidly in relative terms. When comparing the average hourly

27 In order to eliminate the problem of having separate samples for each year, we also conducted an analysis where we calculated only price increases within specific cases (ie for the same personal injury lawyer). The results are quite similar to the ones presented in Table 1, although the number of observations is obviously lower.

rates in the period 2001–2006 one notices an average increase of 21.76 % in the amounts charged by attorneys, whereas the corresponding increase is 28.77 % for claims agents.

Table 4 Average hourly rates (attorneys)

Year	Number of observations	Average hourly rate	Increase compared to the previous year	Increase (2001=100)
2001	42	€ 160.11		100.00
2002	114	€ 168.35	5.14 %	105.15
2003	187	€ 176.48	4.83 %	110.22
2004	255	€ 181.70	2.96 %	113.48
2005	267	€ 189.58	4.34 %	118.41
2006	248	€ 194.95	2.83 %	121.76

Table 5 Average hourly rates (claims agents)

Year	Number of observations	Average hourly rate	Increase compared to the previous year	Increase (2001=100)
2001	43	€ 138.91		100.00
2002	103	€ 149.10	7.33 %	107.34
2003	176	€ 153.52	2.96 %	110.51
2004	236	€ 162.76	6.02 %	117.17
2005	288	€ 171.52	5.38 %	123.48
2006	320	€ 178.88	4.29 %	128.77

### 3) Analysis based on the median

In this Section we present the results of the calculation of the median for attorneys, claims agents and the entire database. Table 6 shows that the median in the period 2001–2006 increased by 22.78 % for attorneys and by exactly 25 % for claims agents. When attorneys and claims agents are taken together, the median in the period appears to have increased by a little more than 20 %. These numbers correspond with the numbers provided earlier on the basis of the averages.

Table 6 Median hourly rates

Year	Attorneys	Claims agents	Entire database
2001	€ 158.82	€ 140.00	€ 149.74
2002	€ 166.50	€ 150.00	€ 154.00
2003	€ 175.00	€ 152.00	€ 162.00
2004	€ 185.00	€ 160.00	€ 170.00
2005	€ 193.00	€ 170.00	€ 175.00
2006	€ 195.00	€ 175.00	€ 180.00

#### 4. Claims agents: further analysis of the cases

In the analysis presented so far, we of course used all observations provided to us by the insurers. A large majority of lawyers appear more than once in the database and some firms also appear quite frequently. Statistically this does not cause any problems for the reason that the database provides randomly selected cases and therefore provides a correct image of the probability that an insurer will be confronted with a particular firm. However, we also examined whether there is a particular influence on hourly rates of relatively large (in the sense of frequently used) firms compared to smaller (in the sense of less frequently used) firms. We performed this exercise for the claims agents by excluding the 10 largest (in the sense of most frequently used) claims bureaus. The results are as follows:

Table 7 Hourly rate and median of claims agents (excluding the 10 largest firms)

Year	Average hourly rate	Increase %	Median hourly rate	Increase %	Number of observations
2001	€ 128.65		€ 128.00		17
2002	€ 140.75	9.40 %	€ 137.50	7.42 %	38
2003	€ 144.07	2.36 %	€ 138.88	1.00 %	66
2004	€ 153.67	6.66 %	€ 150.00	8.01 %	85
2005	€ 162.39	5.67 %	€ 160.00	6.67 %	104
2006	€ 169.37	4.30 %	€ 168.50	5.31 %	124

A comparison of these numbers with the numbers presented in Tables 5 and 6 above shows that the averages and medians are systematically lower when the most frequently encountered firms are excluded from the selection. An obvious conclusion therefore is that a few of these larger firms use tariffs which are higher than average. However, the numbers also show that the relative increase of hourly rates with these (relatively) smaller firms is structurally higher than for the entire database. In the entire period 2001–2006, the average hourly rate increased by 31.65 % (compared to 28.77 % in Table 5) and the median increased by 31.64 % (compared to 25 % in Table 6). It seems that there is a ‘catching up’ effect as a result of which the smaller firms have adjusted their tariffs closer to the tariffs charged by the larger players.

#### C. Relationship between extrajudicial costs and damages

We also examined the relationship between the total amount of extrajudicial costs paid by the insurer and the damages awarded (compensation received by the victim). The total extrajudicial costs consists of the legal fees charged by the attorney or claims agent (the number of hours worked times the hourly rate)

and overhead costs, including VAT. In order to calculate this relationship, we set up a new database consisting of those personal injury files for which both the start and end date is provided. In addition, we only selected those files which provide the total amounts of extrajudicial costs and where the amount of damages paid to the victim is known. This left a selection of 746 cases. For each of these files, the relationship between the total extrajudicial costs and the damages paid to the victim was calculated. Next, on this basis, the average and the median were determined. Table 8 provides the results for the entire database as well as separately for attorneys and for claims agents. The Table also provides information on the average duration of a case.

Table 8 Ratio of extrajudicial costs/damages (all cases)

	Average	Median	Duration in months (average)	Number of observations
Total	51.80 %	38.80 %	21.97	746
Attorneys	47.70 %	35.84 %	23.50	336
Claims agents	55.15 %	40.77 %	20.71	410

Table 8 clearly suggests that the ratio of extrajudicial costs to damages is (on average) substantially higher for claims agents than for attorneys. Table 9 shows how this relationship between extrajudicial costs and damages has evolved in recent years. We selected the files on the basis of the year in which they started.

Table 9 Ratio of extrajudicial costs/damages (development 2001–2006: all cases)

Year	Average	Median	Duration in months (average)	Number of observations
2001	46.01 %	29.76 %	33.89	87
2002	52.76 %	38.79 %	30.30	123
2003	53.84 %	39.22 %	25.72	155
2004	51.89 %	41.39 %	18.85	169
2005	52.96 %	40.95 %	14.08	142
2006	50.19 %	43.32 %	7.72	70

The Table shows that the median of the extrajudicial costs/damages ratio has substantially increased over the years. The average also seems to have increased, but more gradually. This can easily be explained by the fact that there were some cases where the extrajudicial costs/damages ratio was extremely high, which quickly influences the average. These extreme cases exercise less influence on the median. In this case, a trend analysis of the median provides more reliable information than the average. One important nuance has to be stated concerning the data provided: it seems that the average duration of a personal injury file shows a decreasing trend. That is, however, not the result of the fact that cases on average take a shorter time (we do not have sufficient

data to assess that). It is exclusively the result of the fact that in this database we only included files which were closed. Cases which continued to run after 2006 were not included in this database.

We expected that the ratio of extrajudicial costs and damages would to some extent depend upon the amount of the damages. It was anticipated that the extrajudicial costs/damages ratio would be substantially higher in the case of accidents with low damages than in the case of high damages. Therefore, we made a subdivision into the following four groups:

1. damages lower than or equal to € 5,000
2. damages greater than € 5,000 but lower than or equal to € 10,000
3. damages greater than € 10,000 but lower than or equal to € 25,000
4. damages greater than € 25,000.

Table 10 Ratio of extrajudicial costs/damages (size of damages)

	Average	Median	Duration in months (average)	Number of observations
<i>1. Damages ≤ € 5,000</i>				
Total	86.24 %	70.09 %	15.38	287
Attorneys	84.84 %	71.02 %	16.84	107
Claims agents	87.07 %	69.41 %	14.51	180
<i>2. Damages &gt; € 5,000 and ≤ € 10,000</i>				
Total	45.55 %	41.74 %	22.38	150
Attorneys	46.86 %	44.18 %	22.93	65
Claims agents	44.55 %	41.02 %	21.97	85
<i>3. Damages &gt; € 10,000 and ≤ € 25,000</i>				
Total	27.75 %	24.89 %	24.68	159
Attorneys	28.64 %	25.71 %	24.83	83
Claims agents	26.77 %	24.63 %	24.53	76
<i>4. Damages &gt; € 25,000</i>				
Total	17.64 %	15.45 %	31.28	150
Attorneys	18.85 %	16.55 %	31.43	81
Claims agents	16.22 %	15.26 %	31.12	69

This Table clearly shows that the extrajudicial costs/damages ratio decreases in the case of higher damages. The Table also shows that the extrajudicial costs/damages ratio in the case of low damages is higher for legal representatives than for attorneys, whereas the result is exactly opposite in the case of high damages.

#### *IV. Tariff development of other comparable services*

We attempted to compare the development of legal fees charged as extrajudicial costs with the development of other prices/fees charged in the same period. Unfortunately, the data available in the Netherlands in that respect are scarce. We attempted, for example, to provide an indication of the development of hourly rates generally charged by attorneys in the same period, but did not obtain accurate information. There is some general statistical information available concerning the evolution of lawyers' fees in the Netherlands which we will discuss below (in Section IV.D). However, these data are not very precise and therefore not very reliable. We obtained accurate information on the development of the consumer price index (Section IV.A), the development of wages on the basis of collective labour agreements (Section IV.B) and the development of the hourly rates charged by trustees in bankruptcy in the same period (Section IV.C).

##### *A. Development of consumer price index 2001–2006*

Statistics Netherlands (*Centraal Bureau voor de Statistiek – CBS*) keeps information on inflation which is generally based on the consumer price index (CPI) for families. Although Statistics Netherlands takes 2000 as the starting point (100), re-calculations with 2001 as the base year provide the following information concerning the development of the consumer price index:

Table 11 Consumer Price Index

Year	CPI
2001	100.00
2002	103.26
2003	105.47
2004	106.72
2005	108.54
2006	109.79

##### *B. Development of wages*

Statistics Netherlands also publishes results on the development of wages paid as a result of collective labour agreements in the Netherlands. Taking again the year 2001 as a starting point (100), we found that such wages developed as follows:



Table 12 Wages Index

Year	Wages
2001	100.00
2002	103.64
2003	106.51
2004	107.85
2005	108.62
2006	110.82

### *C. Fees charged by trustees in bankruptcy*

The legal fees for a trustee in bankruptcy are fixed after negotiations with the Netherlands Order of Attorneys by a directive determined by judges dealing with bankruptcy cases. There is a so-called basic hourly fee which can be adjusted, taking into account inter alia the number of years of experience of the trustee in bankruptcy involved.

For the purposes of our research, it is interesting to mention how the hourly rate has developed over the years. The data from this Table will subsequently be compared with the development of the hourly rates for personal injury lawyers.

Table 13 Legal fees for trustees in bankruptcy

Year	Hourly rate
1 January 1999	€ 137.95 (f 304) <sup>28</sup>
1 January 2000	€ 148.39 (f 327)
1 January 2001	€ 152.47 (f 336)
1 January 2002	€ 158
1 January 2003	€ 165 <sup>29</sup>
1 January 2004	€ 170 <sup>30</sup>
1 January 2005	€ 171 <sup>31</sup>
1 January 2006	€ 172 <sup>32</sup>
1 January 2007	€ 176 <sup>33</sup>

28 The 'f' stands for guilders, the currency used in the Netherlands before the introduction of the Euro. The amounts have been converted to Euros.

29 The figures for 1999–2003 are based on *EH de Jonge-Wiemans et al* (eds), *Advocatenmemo 2003* (2003) 76.

30 Art 24 of the Directive concerning Legal Fees for Trustees in Bankruptcy, July 2004 version.

31 Based on <<http://rechtennieuws.nl>>, accessed on 13 June 2007.

32 *Tijdschrift voor Insolventierecht* (2006) 66.

33 Based on <<http://tijdregistratie.voor-curatoren.nl>>, accessed on 13 June 2007. The *Advocatenmemo 2007* mentions the same amount.

### D. General evolution in lawyers' fees

Since 2002 Statistics Netherlands has published information on the evolution of prices paid for particular services. A difference is made between standard hourly fees and hourly fees which have actually been charged. The latter are based on annual data from law firms that advise their clients in civil and criminal matters. Statistics Netherlands publishes yearly and quarterly figures but they do not run parallel since they have a different base year and, moreover, the sample includes different law firms and the quarterly data do not contain the standard hourly rate. Statistics Netherlands itself maintains that the numbers only have a tentative character.<sup>34</sup> The figures published are as follows:

Table 14 Lawyers' hourly rates (annual data)<sup>35</sup>

Lawyers; annual price index (2002=100)				
	Price index actually charged hourly fees		Price index standard hourly fees	
	Hourly fee per year	Difference	Hourly fee per year	Difference
Year	2002=100	%	2002=100	%
2002	100	.	100	.
2003	105	5	105	5
2004*	106	1	110	5
2005*			113	3

Table 15 Lawyers' hourly rates (quarterly data)<sup>36</sup>

Lawyers; price index actually charged hourly fees (4th quarter 2003=100)			
	Price index	Difference (quarter)	Difference (year)
Period	4th quarter 2003=100	%	
2004 4th quarter	102	-1	2
2004	103	.	.
2005 1st quarter	103	0	0
2005 2nd quarter	105	2	1
2005 3rd quarter	105	0	2
2005 4th quarter	107	2	4
2005	105	.	2
2006 1st quarter	109	2	6
2006 2nd quarter	110	1	5
2006 3rd quarter	110	0	5
2006 4th quarter	111	1	4
2006	110	.	5

34 See the document 'prijsindex advocatuur' at <<http://www.cbs.nl>>.

35 Statistics Netherlands, Voorburg/Heerlen, 13 June 2007.

36 Statistics Netherlands, Voorburg/Heerlen, 13 June 2007.

These data are in other words not very useful since they do not cover the same period as our research (2001–2006). Additionally, the absolute numbers (hourly fees) are not given. Moreover, the yearly fees do not match well with the quarterly figures. Even though these Tables seem to indicate that there has generally been an increase in lawyers' fees, the data are not reliable enough to draw any firm conclusions. Hence, we will not take these numbers into account in our subsequent analysis.

## *V. Comparison and analysis*

### *A. General remarks*

It is clear from the data presented that one has to be extremely cautious in drawing conclusions. We did have representative data which provide statistically relevant information on the evolution of extrajudicial costs paid by liability insurers to attorneys and claims agents in the period 2001–2006. This at least makes it possible to provide 'hard' evidence of the evolution of those fees in the period we examined. It is, however, much more difficult to examine whether the relevant increase in the fees is connected to the fact that they have been shifted to the tortfeasor's insurer. To examine this, we would also need data on fees charged by personal injury lawyers in cases where such fee shifting does not exist. In fact, interviewees declared that fees charged by them (at least by attorneys) are no different when they can be recovered as extrajudicial costs from a liability insurer than when this is not the case. Also, although we can show a relatively high increase in extrajudicial costs in the examined period compared to, for example, the consumer price index or the fees of a trustee in bankruptcy, this does not necessarily prove that it has been caused by the fact that personal injury lawyers can shift their fees as extrajudicial costs to the liability insurer.

The data are thus primarily interesting to describe specific evolutions; the search for causes of these developments (in legal fees) is more speculative and therefore should be interpreted with caution at a normative level.

### *B. Development of extrajudicial costs*

Table 3 provided an overview of the evolution of extrajudicial costs paid in the period 2001–2006 by liability insurers to personal injury lawyers. Generally, it showed an increase between 2001 and 2006 of 24.44 %, a result which was statistically robust. It is striking that the largest increase could be found in 2002 (with 6.57 %). Since the Euro was introduced on 1 January 2002, this seems to provide support to those who claimed that the introduction of the Euro would have an inflationary effect.

We also made a distinction as far as the development of hourly rates of attorneys and claims agents is concerned. A comparison of Tables 4 and 5 shows that the average hourly rate charged by attorneys is approximately € 20 higher than the fees charged by claims agents.<sup>37</sup> However, a comparison of Tables 4 and 5 also shows that the relative increase in the hourly rate was greater with claims agents than with attorneys. Whereas the increase in the hourly rate between 2001 and 2006 was 21.76 % for attorneys (Table 4), Table 5 shows that, in the same period, the increase in the hourly rate for claims agents was 28.77 %.

A similar result also follows when addressing the median hourly rates, which can be seen in Table 6. For attorneys, the median hourly rate increased from € 158.82 in 2001 to € 195 in 2006, an increase of almost 23 %. In the case of claims agents, the median hourly rate was € 140 in 2001 and increased to € 175 in 2006, exactly 25 %. We also showed, by excluding the ten largest firms from the database of claims agents (in Table 7), that average hourly rates are substantially higher for the entire database of claims agents when the ten largest firms are excluded, thus showing that the largest firms charge relatively higher hourly rates. There is, however, a ‘catching up’ in the sense that over the years these differences become smaller.

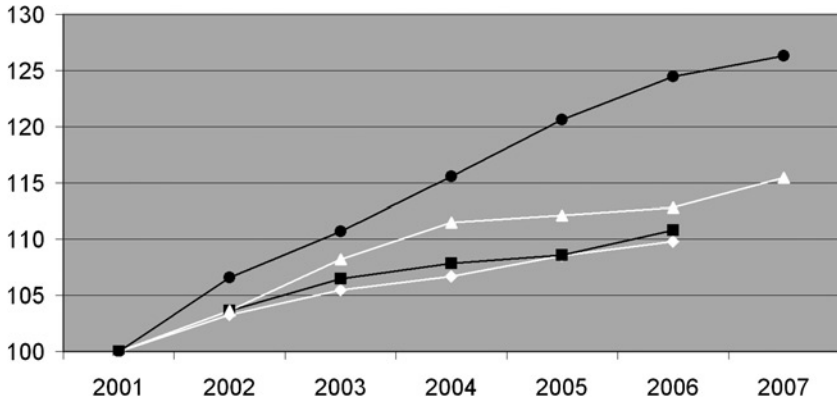
### *C. Comparison to the evolution of other prices and services*

More interesting than the mere analysis of the evolution of the extrajudicial costs is the question whether these costs have risen not only in absolute terms, but also relative to the evolution of other prices and services. We gave details (in Table 11) of inflation in the same period based on the consumer price index and established that consumer prices had increased between 2001 and 2006 by 9.79 %. Wages paid on the basis of collective labour agreements increased by 10.82 % in the same period (see Table 12). The simple conclusion is therefore that legal fees paid as extrajudicial costs have increased substantially more than both consumer prices and wages: in fact, more than twice as much (24.44 %).

In addition, Table 13 provided an overview of the evolution of fees charged by other legal professionals, specifically, trustees in bankruptcy. In the same period the trustee’s (basic) fee increased from € 152.47 to € 172: an increase of 12.81 %. The simple conclusion is therefore that legal fees paid as extrajudicial costs to personal injury lawyers by liability insurers increased by (almost) twice as much. The fees paid to trustees in bankruptcy hence increased more than the consumer price index and wages, but substantially less than legal fees paid as extrajudicial costs. This can also be shown in the following graphs:

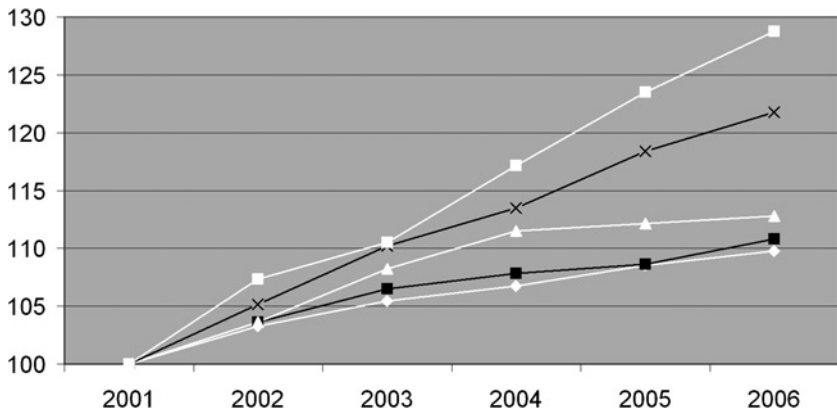
37 For example in 2006 the hourly rate of a claims agent was € 178.88 whereas the hourly rate for an attorney was € 194.95.

Graph 1 Comparative evolution of tariffs 1 (2001 = 100)



Here, the curves represent, respectively (from top to bottom): fees paid to personal injury lawyers, fees paid to trustees, wage inflation, and price inflation.

Graph 2 Comparative evolution of tariffs 2 (2001 = 100)



In this graph the curves represent the following (from top to bottom): fees paid to attorneys, fees paid to claims agents, fees paid to trustees, wage inflation, and price inflation.

*D. The relationship between legal fees and damages*

Further research addressed the relationship between the total amount of extrajudicial costs paid by liability insurers and the amount of the damages

received by the victim. Table 8 showed that, when all cases in the period 2001–2006 are taken together, the average ratio of costs to damages, expressed in percentage terms, was 51.80 % and the median was 38.80 %. The amount of extrajudicial costs as a proportion of total damages appeared to be higher for claims agents (55.15 %) than for attorneys (47.70 %). It appeared moreover that, especially in cases with low damages, claims agents are relatively expensive. The word ‘relative’ in this particular context refers to the fact that, in small value cases, the amount of extrajudicial costs seems to be higher for claims agents than for attorneys (even though the differences are small). The reverse is true for cases where the damages are high: in these cases, attorneys are relatively expensive – at least, the extrajudicial costs/damages ratio is higher than it is for claims agents. Again, the differences are not very large.

We calculated the results for four different groups of damages awards arranged by size (Table 10). When the total amount of damages was higher than € 25,000 it appeared that the average percentage of extrajudicial costs was 17.64 % (with a median of 15.45 %) whereas in cases where the damages were lower than or equal to € 5,000, the extrajudicial costs were 86.24 % (with a median of 70.09 %). Not surprisingly, when lower awards are made, the extrajudicial costs/damages ratio is high.

Looking at a trend for the years 2001–2006 one can notice a slight increase in the ratio of extrajudicial costs to damages. However, one has to be careful when interpreting these data since the average duration of each case decreased over the period surveyed whereas the number of cases involving small amounts of damages increased. This is of course due to the fact that the database only contains information relating to six years and files that were open at the end of this period were excluded.

### *E. Comparison of the absolute amounts*

The numbers presented so far have shown that extrajudicial costs increased relatively rapidly, especially when compared to the evolution of other prices. It is, however, far more difficult to judge whether legal fees charged as extrajudicial costs are high compared to other services. Analysing the information presented on various personal injury lawyers’ websites, the fees charged to private clients (who were in some cases injurers and their liability insurers) seem to be no different from the tariffs charged as extrajudicial costs. One could additionally ask the question whether the relative price charged by personal injury lawyers is expensive compared to other services. Table 3 showed that in 2006 the average hourly rate of a personal injury lawyer was € 185.90 (€ 194.95 for an attorney and € 178.88 for a claims agent). This is slightly higher than the hourly rate charged by a trustee in bankruptcy (€ 172

in 2006), but then again, the services performed by personal injury lawyers may require a type of expertise which could justify this (small) difference.

Finally, one could also examine the hourly rates charged by other experts who are involved in the settlement of personal injury claims. Some data are available (but unfortunately not the evolution of rates over time) for example, for medical advisers. The hourly rates charged by members of the Association of Attorneys of Personal Injury Victims (*Vereniging van Advocaten voor Slachtoffers van Personenschade* – ASP) for experts was (in 2007) on average € 175. Insurers state that the hourly rate paid to a medical adviser or labour expert was approximately € 130.<sup>38</sup> Even though hard data on these issues are lacking, it seems that hourly rates charged for experts other than personal injury lawyers are systematically lower.<sup>39</sup> One has to stress, however, that the fact that personal injury lawyers seem systematically to charge higher hourly rates than other experts can hardly be due to the fact that their legal fees can be charged to the liability insurer as extrajudicial costs. Indeed, the costs of other experts involved in the claims settlement (like medical experts and labour experts) can also under certain circumstances be shifted to the liable party's insurer.

#### *F. Evaluation*

As we indicated in Section II, fee shifting leads to a situation whereby the price charged for legal services is to a large extent not subject to competition. The reason is that, in most cases (where liability is not disputed and the case does not go to court), the insurer of the liable party will pay the legal fees of the victim's lawyer. Our data showed that only in 119 of the 1,043 cases was liability disputed; in 905 files this was not the case. Moreover, even in those cases where liability was disputed, in a majority of them there was no trial. As a result of this fee shifting, the lawyer has very little incentive to advertise with low fees in order to attract clients. First of all, it may even have a negative marketing effect since it could signal low quality. And second, it appears that lawyers are advertising the fact that in most cases their fees can be shifted to the insurer of the liable party, as a result of which the price should not be a decisive element for the victim.

Only in those cases where victims would be highly risk averse and they take into account the small likelihood that part of the legal fees would be charged to them (in the event that they lose at trial) could the fee be a decisive issue. In that case, a risk-averse victim may have incentives to opt for legal assistance

38 These estimates are based on questionnaires we sent to the participating insurers.

39 This becomes clear also when looking at the websites of various law firms specialised in personal injury cases who advertise the fees charged both for the personal injury lawyer dealing with the case and for other experts involved in the settlement of the claim.

through a claims agent for the reason that claims agents are allowed to use ‘no win no fee’ arrangements (thus substantially reducing the risk for the victim) whereas attorneys (ie members of the Bar) are not.

The crucial question in our study is of course whether the relatively sharp increase in legal fees charged as extrajudicial costs can be attributed to the very fact that these costs are shifted to the insurer of the liable party. A related question is whether there may be explanations for this increase other than fee shifting.

We will attempt to answer these questions in Table 16 below by providing on the left side ‘no’ arguments, holding that there is no relationship between the increase in extrajudicial costs on the one hand and fee shifting on the other; on the right side, we give the ‘yes’ arguments, holding the opposite, namely that there is such a relationship.

Table 16 Relationship between fee shifting and increase of extrajudicial costs

No	Yes
Increase only observed in 2001–2006; fee shifting possibility already introduced in a decision of 1987, confirmed in the Civil Code in 1992.	Data from before 2001 are lacking. Perhaps increase already started earlier than 2001. It is very likely that the market of personal injury lawyers only realised the commercial consequences of the fee shifting rule in the second half of the 1990s.
Lawyers do not charge more to insurers as extrajudicial costs than they do to other clients. Hourly fees are the same for everyone.	For many lawyers who specialise in personal injury cases (especially those only representing victims) extrajudicial costs are their main business, given that 95 % of cases are settled. Hence, hourly fees charged as extrajudicial costs can set the price for other legal fees as well.
Statistics Netherlands data seem to indicate that lawyers’ fees generally have increased in the Netherlands in the same period.	These data are, as indicated above, unreliable since the yearly data and the quarterly data do not match.
Services of personal injury lawyers have become more complicated over the years; hence, the increase in the hourly fee.	There is no indication that services did become more complicated. If more complicated, it would justify more hours, but would not explain why hourly fees have increased.
A higher fee results from lawyers providing a better service and being able to work fewer hours.	Data concerning the relationship between extrajudicial costs and damages show that also total extrajudicial costs (as a percentage of damages) increased slightly.
No statistically relevant relationship proven between fee shifting and price increase.	No reason other than fee shifting can explain why, in the period 2001–2006, legal fees charged as extrajudicial costs increased 2.5 times more than inflation and 2 times more than fees of trustees in bankruptcy.



This Table shows that many arguments could be advanced to hold that it is not because of fee shifting that legal fees charged as extrajudicial costs increased so dramatically in the period 2001–2006.<sup>40</sup> However, a main weakness of all of these arguments is that no other convincing argument can be presented that could explain the drastic increase we have observed. Even though we realise that we cannot formulate hard conclusions based on our statistical evidence,<sup>41</sup> we are tempted to believe that, in the absence of other explanations, it is the ability of personal injury lawyers to charge their legal fees as extrajudicial costs to the liability insurer of the tortfeasor which provides the major explanation for the increase we observed.

Finally, we should mention that there may be other social consequences related to fee shifting. First of all, our data indicated (see more particularly Tables 9 and 10) that legal fees charged as extrajudicial costs constitute a relatively large percentage of the damages paid by liability insurers. A consequence is that where on average 50 % of payments made by liability insurers goes to personal injury lawyers in the form of extrajudicial costs, this unavoidably also has consequences for premiums charged and hence for the social costs of particular activities. A well-known economic consequence is that an excessively low activity level may be the result since socially desirable activities become too costly.

A related issue is that, as a result of fee shifting, discussions between personal injury lawyers and liability insurers often concern the issue of extrajudicial costs. Interviewees (insurers and personal injury lawyers) provided us with examples of cases where parties acted strategically.<sup>42</sup> As a result of this, parties have discussions about the amount of legal fees charged as extrajudicial costs instead of focusing on the real issue at stake, namely the claim settlement. The mere fact that it is the insurer of the liable party who has to pay the fees of the victim's lawyer may understandably create the setting for perverse incentives and strategic behaviour. Many interviewees therefore held that the fee shifting rule in the Netherlands has a negative influence on the effectiveness of the claim settlement process itself. Even though payment of the personal injury lawyer's fees as extrajudicial costs and the settlement of the victim's claim are

40 And of course the 'no' arguments listed in Table 14 were advanced to us both during interviews we held with personal injury lawyers and in press releases after the publication in the Netherlands of our research results.

41 For the simple reason that we have no observations of a 'control group' which would consist of a study of the evolution of legal fees for personal injury cases where such fee shifting is not possible.

42 For example personal injury lawyers maintaining that they are only willing to convince their client to accept a settlement if the insurer formally agrees to pay the legal fees charged by the lawyer as extrajudicial costs, or insurers arguing that they will only pay the personal injury lawyer's invoice if he can convince his client to accept the offer made by the insurer.

two different issues which should in theory be separated, in practice this is not always the case.

### *VI. Concluding remarks*

We focused on a remarkable rule of tort law in the Netherlands according to which the extrajudicial costs incurred by victims (in practice legal fees paid to the personal injury lawyer before trial) can be charged to the liability insurer of the tortfeasor. This rule came into being as a result of a decision of the Hoge Raad in 1987 and was later incorporated into the Civil Code. The main reason behind this rule is of course the wish to provide further protection to victims of accidents: if victims have to incur substantial extrajudicial costs to obtain damages, a large part of these costs would be lost as legal fees and little compensation would remain for the victim.

The goal of our paper was not so much to address the efficiency of this fee shifting rule as it has been introduced in the Netherlands as to examine empirically some of its effects based on data with more than 1,000 observations for the period 2001–2006.

We started from the theoretical prediction that fee shifting as described will lead to higher prices for the simple reason that the so-called ‘double reasonableness test’ to which fee shifting is subjected cannot replace normal competitive forces which would drive down legal fees to efficient levels.

The data show that legal fees charged as extrajudicial costs in the period 2001–2006 were indeed high when compared to inflation (2.5 times higher) and also when compared to other legal services such as those provided by a trustee in bankruptcy (2 times higher). Even though other explanations for this increase have been advanced, we tend to believe (we cannot make this belief statistically robust) that this increase is due to fee shifting. The most important reason for this belief is that there are no other adequate reasons which would explain the relatively sizeable increase in legal fees charged as extrajudicial costs. However, even though an implication of the research may be that legal fees charged as extrajudicial costs are probably inefficiently high, our study does not allow such a conclusion for the simple reason that data to compare actual fees charged with efficient fees were not available.

The data also showed interesting differences between fees charged by claims agents (legal representatives who are not attorneys) and attorneys (members of the Bar). Although claims agents are still cheaper (but the difference is small) the relative increase of legal fees charged as extrajudicial costs has been much greater for claims agents than for attorneys. Also the percentage of extrajudicial costs to total damages is higher for claims agents than for attorneys.

Although we did not submit fee shifting to a full economic analysis (also including game theory), we indicated that this fee shifting may have a few potentially adverse effects. First, the increase showed by our data analysis leads to the conclusion that social costs of claim settlement may become too high. Second, this is supported by the fact that a relatively high percentage of the money paid by liability insurers consists of extrajudicial costs (on average in the examined period approximately 50 %). And third, fee shifting may create perverse incentives for lawyers (and liability insurers) to behave strategically to the detriment of the quality and effectiveness of the claim settlement procedure.

A quick glance at the Netherlands' two neighbouring countries makes clear that the Dutch system is exceptional. In Germany, where fee shifting (of judicial costs) to a losing party is possible under rigorous conditions, strict regulation of attorneys' fees exists. In Belgium, as a result of a change in case law (allowing the recovery of lawyers' fees from the losing party) a legislative intervention followed, providing strict regulation of the legal fees which can be recovered as a result of fee shifting. The argument was that fee shifting should only be possible if legal fees were regulated.

These arguments may also play a role in the Netherlands at the policy level: the data show that if (for distributional or other reasons) the policymaker wishes to shift extrajudicial costs of victims to the tortfeasor (and his insurer), there may be increased social costs resulting from this fee shifting and a lack of competitive pressure. If the policymaker still wishes to keep fee shifting (for victim-protection reasons) but desires to limit some of the potentially adverse effects we indicated (price increases and strategic behaviour in claim settlement), this may call for some kind of regulation. This could either take the form of an agreement (a so-called covenant) between personal injury lawyers and liability insurers, provided that this complies with the requirements of competition law, or a regulatory intervention (as in Belgium and Germany).

Finally, our research also showed that there are undoubtedly other issues related to legal fees and claim settlement procedures that merit further research. First of all, decision making by victims concerning the choice of a particular personal injury lawyer could be subject to further economic (also game-theoretical) analysis. Particular attention could in that respect be paid to the effects of fee shifting on the victim's choices, but also to the question whether result-based payments are possible. The role played by legal expenses insurance in claim settlement (which we excluded from our analysis) could also be the subject of further research.

In general, our research showed that (as economic analysis often indicates) particular legal interventions may have undesired (sometimes referred to as 'adverse' or even 'perverse') effects. In this particular case, the shifting of legal fees charged as extrajudicial costs was introduced in the interest of victims. It

may, however, have led to substantial increases in legal fees and to strategic behaviour in the claim settlement process. The consequences may not only be an increase in social costs; at the distributional level one can also question the effectiveness of fee shifting. The primary winners of the arrangement seem to be personal injury lawyers who can charge higher fees, the effects of which will be felt by the entire community of policyholders paying higher premiums. Victims seem at first sight to be better off, but a large part of the damages paid by the insurer goes to their lawyers who may, moreover, have perverse incentives to accept a settlement too easily (in order to be able to claim the fees). Whether victims are ultimately better off with the current system or with a contingent fee system (which is still largely prohibited in the Netherlands for attorneys) is highly doubtful. These and related issues merit further research.