NEGLIGENCE UNDER THE NETHERLANDS CIVIL CODE—AN ECONOMIC ANALYSIS†

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INTRODUCTION

In the Netherlands, economic analysis of law has only recently begun to receive attention. This Article will apply economic analysis of law, as it has been developed in the United States, to Netherlands negligence liability law.

Economic analysis reduces reality into models which are intended to help explain and guide the law. The conclusions drawn from these models hold true within the models but can only be tentatively applied to reality. Even so, economic analysis will contribute to the understanding of Netherlands tort law by offering new explanations for some of the rules, and grounds of criticism for others. Almost as important, however, are the indirect insights provided by the use of economic analysis. The use of models requires a clarity of thinking which questions traditional core ideas in the law. The application of economic analysis to Netherlands negligence liability law will reveal that one of the core ideas behind Netherlands negligence liability, the distinction between unlawfulness and fault, is unnecessarily complicated.¹

The Netherlands has a civil law system. Its rules for tort liability can be found in the Civil Code Burgerlijk Wetboek ("BW") of 1838. In 1947, the Queen of the Netherlands requested Professor E.M. Meijers to draft a new civil code, the Nieuw Burgerlijk Wetboek ("NBW"), because it was generally felt that the law had outgrown the 1838 version.² The NBW has been completed and will

† The California Western International Law Journal could not verify the sources and quotations contained within this Article since they are in Dutch. The author has translated the quotations and takes sole responsibility for the Article's accuracy.

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¹ This result supports the findings in two recent publications on Netherlands tort liability, see generally G.E. van Maanen, ONRECHTMATIGE DAAD: ASPECTEN VAN DE ONTWIKKELING, OMSTREDEN, ZORGVULDIGHEIDSNORM (1986) (a historical analysis of Netherlands tort law) [hereinafter G.E. van Maanen, Onrechtmatige Daad]; and C.C. van Dam, ZORGVULDIGHEIDS-NORM EN AANSPRAKELIJKHEID (1989) (a comparative analysis of Netherlands negligence law).

² C.J. van Zeben, PARLEMENTAIRE GESCHIEDENIS VAN HET NBW, ALGEMEEN DEEL, VOORGESCHIEDENIS EN ALGEMENE INLEIDING 6-7 (1961).
become effective in 1992. The NBW is not intended to change the existing law. Rather, it has codified the law under the BW as it has developed over the last 150 years. In certain areas, however, where the courts or the doctrine were divided, the NBW has made explicit decisions and thereby, in effect, changed the law. To a certain extent the courts have already accepted these decisions as "good law." Therefore, applicable law can be found in both the BW and the NBW. Both codes are therefore discussed in the present tense. However, the main focus of this study is on the NBW.¹

This analysis of Netherlands tort law focuses on the grounds for negligence liability and for imputing negligence of the actor to another, so called vicarious liability. Section I presents a brief introduction to economic analysis of tort law. Section II provides an in depth analysis of Netherlands negligence liability law and the application of economic analysis. Section III discusses important areas of Netherlands vicarious liability by applying economic analysis. However, issues relating to causation, damages, products liability,⁵ and the influence of insurance on liability are beyond the scope of this Article.⁶ Finally, this Article concludes that economic analysis of negligence and vicarious liability in Netherlands tort law is consistent with economic principles.

I. ECONOMIC ANALYSIS OF TORT LAW

A. General Comments

In evaluating law, economic analysis focuses on efficiency; that is, the relationship between the costs and benefits of legal rules.⁷ An important assumption is that everything can be expressed in one uniform measure of value.⁸ Cost of care can include such intangible things as time, effort, and foregone pleasure. Accident losses can also include elements which the system of tort law does not acknowledge, at least not for compensation, such as loss of friendship in case of fatality.

In order to evaluate the law, the economist must set a goal for social welfare,
a social optimum, against which to measure the law. The social optimum is defined by the maximum utility derived from activities less the total accident costs.\(^9\) The measure for social utility will be the aggregate of the utility individuals derive from their activities. Total accident costs consist of the sum of the costs of care to prevent accidents and the expected accident losses.\(^10\) Expected accident losses are the probability that an accident will happen multiplied by the losses that result when an accident happens.\(^11\)

Social welfare is determined by two elements: costs of accidents and utility. The costs of accidents depends on the care people take when they engage in an activity. The utility people derive from an activity depends on whether, and to what extent, they engage in that activity. These two elements will be discussed in the following sections.

**B. Total Accident Costs**

The total costs of accidents are determined by the losses incurred when an accident occurs and the costs of the care taken to reduce the risk of an accident.\(^12\) To evaluate whether it is worthwhile to invest in taking the care, the (added) costs of care should be weighed against the (diminished) expected accident losses. It makes economic sense to require such care only when an extra unit of care diminishes the expected accident losses by at least as much.\(^13\) This can be demonstrated by Shavell’s model:\(^14\)

<table>
<thead>
<tr>
<th>Level of Care</th>
<th>Costs of Care</th>
<th>Accident Probability</th>
<th>Accident Losses</th>
<th>Expected Accident Losses</th>
<th>Total Accident Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
<td>0</td>
<td>40%</td>
<td>1000</td>
<td>400</td>
<td>400</td>
</tr>
<tr>
<td>Moderate</td>
<td>30</td>
<td>34%</td>
<td>1000</td>
<td>340</td>
<td>370</td>
</tr>
<tr>
<td>High</td>
<td>70</td>
<td>26%</td>
<td>1000</td>
<td>260</td>
<td>330</td>
</tr>
</tbody>
</table>

In this case the optimal level of care is "High." A high level of care results in the lowest total accident costs. Taking high care substantially reduces the chance of an accident. For the additional cost of 40, the expected accident losses is reduced by 80. It is therefore socially worthwhile to make this investment.\(^15\) Therefore, the liability rules governing a person’s conduct when engaging in this

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9. See, e.g., S. SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 21 (1987). This social goal follows from the choice to evaluate law by focusing on efficiency. If another social goal was chosen, the analysis may be different.
10. Id. at 7.
11. Id. at 6.
12. The extent of damage when an accident occurs is also a determination.
14. See S. SHAVELL, supra note 9, at 7.
15. By varying the figures, any level of care can be found to be optimal.
activity should induce a person to take a high level of care.\(^\text{16}\)

**C. Utility**

Next to the level of care, the utility people derive from participating in an activity is relevant for reaching the social optimum. This depends on whether, and to what extent, people engage in such activity. It is efficient for a person to engage in the activity only when the (extra) utility a person derives from engaging in the activity, or engaging more frequently in the activity, exceeds the (additional) costs of accidents. Shavell illustrates this idea through the following model.\(^\text{17}\) Assume the level of care is determined by the figures of the preceding model. Further assume that the actors are induced to take the appropriate degree of care. The cost of care is 70 and the expected accident loss is 260. Two more assumptions must be made. An increase in the level of activity will proportionally increase the expected accident losses, and an increase in the level of activity will increase the actor's utility.

<table>
<thead>
<tr>
<th>Level of Activity</th>
<th>Total Utility</th>
<th>Total Costs</th>
<th>Expected Accident Costs</th>
<th>Total Accident Costs</th>
<th>Social Welfare</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1</td>
<td>600</td>
<td>70</td>
<td>260</td>
<td>330</td>
<td>270</td>
</tr>
<tr>
<td>2</td>
<td>800</td>
<td>140</td>
<td>520</td>
<td>660</td>
<td>140</td>
</tr>
<tr>
<td>3</td>
<td>900</td>
<td>210</td>
<td>780</td>
<td>990</td>
<td>90</td>
</tr>
</tbody>
</table>

In this model the socially optimal level of activity is 1. The sixth column reflects the effect that the level of activity has on the social welfare. At level 1 the social welfare is highest. It would be a social waste if the actor would engage more than once in the activity, but also if the actor would not engage at all. The utility derived from engaging once in the activity (600) exceeds the cost incurred (330). Yet, after engaging once, the increase in utility derived from the activity (200) is less than the increase in total accident costs (330). Liability rules governing the actor's conduct when engaging in this activity should be such that the actor would be induced to participate exactly once.\(^\text{18}\)

One more aspect of utility must be discussed here. The implicit assumption so far has been that individuals are risk neutral, that is, that their decisions are only influenced by the expected losses, the potential magnitude of the losses multiplied by the probability of these losses. A risk neutral person is indifferent to the choice between a 0.1% chance of a loss of 10,000 or a 10% chance of a

\(^{16}\) See S. SHAVELL, supra note 9, at 6-17.

\(^{17}\) Id. at 21-23.

\(^{18}\) See generally A.M. POLINSKY, supra note 7, at 46-49; S. SHAVELL, supra note 9, at 21-30. Lander and Posner use a model with equations to demonstrate the same idea shown by Shavell's models. S. SHAVELL, supra note 9, at 54-62.
loss of 100. However, this may not always be the case. A person might be risk averse. Risk averse individuals will be influenced in their decisions by the potential magnitude of the loss. A person's attitude towards risk depends on the size of the loss in relation to the assets and the needs of that individual.

When a person is risk averse, a small chance of a large loss can decrease his or her utility more than a larger chance of a smaller loss. The liability rules therefore do not just affect social welfare through their influence on the expected accident losses. They also affect social welfare by determining who faces the magnitude of the loss. It will be socially beneficial to shift the loss away from people who are risk averse to people who are risk neutral. To simplify the analysis, the general assumption will be that individuals are risk neutral or at least that their attitudes toward risk are similar.

**D. Liability Rules Compared**

Liability rules can be distinguished in two categories: negligence liability and strict liability. The important distinction between negligence liability and strict liability is that negligence liability requires an assessment as to whether the defendant acted wrongfully, that is, contrary to what was required of him or her, while strict liability does not require this inquiry.

In the above model it does not make a difference whether the actor is subject to negligence or strict liability. Under the assumptions that courts, victims, and tortfeasors all have perfect information and that the court establishes the level of due care in accordance with the socially optimal level of care, a tortfeasor will take due care under either liability rule. If the negligence rule applies, he or she will not be found taking less than due care. Doing so would expose the tortfeasor to liability for the accident costs which he or she could have avoided for the lesser cost of care. If the strict liability rule applies, the tortfeasor will also take due care. Not taking the appropriate level of care would unnecessarily increase the tortfeasor's total cost of accidents. Taking too much care would have the same effect.

A complication of this model is that it is generally not possible for the courts

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20. *Id.* at 186-92.
21. *Id.* at 190, 207.
22. Landes and Posner justify this assumption by pointing out that in cases in which the potential losses are substantial, in relation to the wealth of the person at risk, risk neutrality can be created through insurance. W.M. Landes & R.A. Posner, *supra* note 13, at 57.
23. S. Shavell, *supra* note 9, at 6. This description of negligence includes intentional wrongful conduct. Sometimes strict liability may require an inquiry into the conduct of someone the defendant is responsible for. For example, an employer is liable for the harm caused by his or her employee only if the employee's conduct violated applicable norms of behavior. This form of liability is called vicarious liability.
24. Which liability regime applies does make a difference for the distribution of income.
to include in the standard of care the level of activity and the utility a person
derives from engaging in an activity. Both determining what the actual level of
activity is and determining what the optimal level of activity is present almost
unsurmountable evidentiary hurdles. If the optimal level of activity is not part
of the standard of care, the liability rules create different incentives for
preventing inefficient costs. Under strict liability, the actor will choose both the
optimal level of care and the optimal level of activity. The actor will be induced
to do so because his or her costs will equal the accident costs when engaging in
the activity. However, under negligence liability the result will not be optimal.
Under negligence liability, the actor will take due care, but will engage
excessively in the activity. Taking due care will prevent liability. The accident
costs when engaging in the activity will therefore remain where they fall and will
not influence the actor's level of activity.27

There are many more refinements to the model described above, taking into
account different aspects which make the model more realistic.28 For the exact
development of these refinements, there are various handbooks on economic
analysis referred to throughout this Article.29

II. NEGLIGENCE LIABILITY

A. The Goal of Tort Law

From the above discussion of economic analysis, it is apparent that economic
analysis perceives prevention of inefficient costs as the primary goal of tort
law.26 Laws governing liability should be aimed at inducing people to take
optimal care and participate in activities at an optimal level.31

In the Netherlands, little attention is paid to the aims of tort law. Generally,
"compensation" is perceived to be the goal of tort law.32 Prevention or
deterrence of certain conduct is not seen as a goal of tort law.33 Recently Van

26. A.M. POLINSKY, supra note 7, at 49; S. SHAVELL, supra note 9, at 25.
28. A fundamental complication of this model, not discussed in this Article, is taking into
account that plaintiffs can (be required to) take care also. With respect to this complication under
Netherlands law, see R.W. HOLZHAUER, supra note 6, at 130-32.
29. See generally W.M. LANDES & R.A. POSNER, supra note 13; A.M. POLINSKY, supra note 7;
S. SHAVELL, supra note 9; M. FAURE & R. VAN DEN BERGH, supra note 7; R.W. HOLZHAUER & R.
TEUL, supra notes 2, 3 & 7.
30. This includes optimal allocation of risk. Compare S. SHAVELL, supra note 9, at 192
("[A]location of risk is in principle just as important a determinant of social welfare as . . . the
reduction of accident losses.") Id.
31. See, e.g., S. SHAVELL, supra note 9, at 298.
32. A.R. BLOEMBERGEN, SCHADEVERGOEDING: ALGEMEEN, DEEL 1, 2 (Monografieen NBW B-
34, 1982); W.J. SLAGTER, DE RECHTSGROND VAN DE SCHADEVERGOEDING BI ONRECHTMATIGE DAAD
8, 187 (1952).
33. See A.R. BLOEMBERGEN, supra note 32, at 6-7; W.J. SLAGTER, supra note 32, at 186-87.
According to Van Dam, this holds true for most European writers. See C.C. VAN DAM, supra note
1, at 213 n.1. See also M. FAURE & R. VAN DEN BERGH, supra note 7, at 19. But see G.E.
LANGEMEIJER, DE GERECHTIGHEID IN ONS BURGERLIJK VERMOGENSRECHT 35, 73 (1983). For a
Dam pointed out that compensation alone provides an insufficient explanation or justification for tort liability.  

Compensation, as the goal of tort law, does not explain why damages can only be recovered through the tort system if the injury was wrongfully caused. If compensation was the primary goal, a system of strict liability would be more appropriate. This would mean that, whenever harm is caused, the one causing it would have to compensate the victim. Such a system was explicitly discarded by the drafters of the NBW. Only in an enumerated number of situations will liability be imposed regardless of whether the defendant's conduct was wrongful. Furthermore, if the objective of tort law is compensation, alternatives exist which would be less costly and more effective than tort liability. For example, the already elaborate Netherlands social insurance system could be expanded to cover any and all injuries inflicted by another.

According to economic analysis, compensation alone does not contribute to the social welfare. It merely shifts a loss from one person to another and, in doing so, creates unjustified administrative costs. The main goal of tort law should be prevention, not compensation. An important assumption of economic analysis is that people are guided by efficiency. They will act according to their best economic interest. Therefore, if individuals are required to bear the costs of their conduct, they will only engage in this conduct if it is efficient for them to do so. The threat of liability then deters people from creating inefficient costs.

Economic analysis also contends that, to a certain degree, the law in actual operation is consistent with the prevention of inefficient costs. Whether Netherlands negligence liability actually is consistent with the prevention of inefficient costs depends on the standard for wrongful conduct. If conduct is held to be wrongful when it causes inefficient costs, economic analysis may claim


34. C.C. van Dam, supra note 1, at 199-254.
35. Id. at 230-33.
39. See C.C. van Dam, supra note 1, at 234-37.
40. See generally G. Calabresi, supra note 38; R. Teul, supra note 7, at 9-10.
41. M. Faure & R. van den Bergh, supra note 7, at 34; S. Shavell, supra note 9, at 2; R. Teul, supra note 8, at 25.
42. For a critical discussion of this assumption, see G. Calabresi, supra note 38, at 107.

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vindication.44

B. Wrongful Conduct

Negligence liability is liability for wrongful conduct.45 Under Netherlands law, liability for wrongful conduct requires that the defendant (1) commits an unlawful act, and (2) that the act can be attributed to him or her. In the NBW, the core provision on tort liability states that "[h]e who commits an unlawful act towards another, which can be attributed to him, is obliged to compensate the damage the other suffered as a consequence thereof."46 The phrasing differs from the core provision of the BW which states that "[e]very unlawful act which causes damage to another obliges the person by whose fault that damage was caused to compensate it."47

The distinctive difference between the new and the old code is that the new code speaks of "attribution" where the old code speaks of "fault."48 The drafters did not intend to change the law by this different phrasing. Their intention was merely to codify the interpretation that courts and legal scholars have given the phrase "by whose fault" over the years.49

The understanding codified in the NBW is that tort liability requires a two-step analysis. First, it must be established that the act was wrong. Second, it must be established that the actor was wrong.50 To establish negligence liability, the requirement of unlawfulness qualifies the act, and the requirement of fault or attribution qualifies the actor.51

Professor Meijers, who drafted this part of the NBW, understood the BW's phrase "by whose fault" to require a state of mind of the actor which made his or her act reprehensible.52 This requirement for negligence liability was experienced to describe why the actor should be liable.53 The NBW therefore replaced the old phrase "by whose fault" with "attribution." The NBW currently provides: "An unlawful act can be attributed to its actor if it is due to his fault

44. In addition, economic analysis will also have to show that the rules for strict liability are consistent with the goal of prevention of inefficient costs. This is mostly outside the scope of this article.
45. See supra section I.D.
46. Art. 6:162 § 1 NBW. Apart from the two requirements singled out in this study, negligence liability also requires causation, damage, and a showing that the violated norm was intended to protect the damaged interest. A.S. HARTKAMP, VERBINTEINSENRECHT, DEEL III, DE VERBINTEINSEN UIT DE WET (1990).
47. Art. 1401 BW.
48. D.C. FOKKEMA, INTRODUCTION TO DUTCH LAW FOR FOREIGN LAWYERS 138 (1978); C.C. VAN DAM, supra note 1, at 73.
49. PARLIAMENTARY HISTORY, supra note 4, at 604, 629; C.H.M. Jansen, supra note 37, at 45.
50. PARLIAMENTARY HISTORY, supra note 4, at 618.
52. E.M. MEIJERS, ALGEMENE BEGRIPPEN VAN HET BURGERLIJK RECHT 300 (1948).
53. See infra section II.E.1.
or to a cause which is at his peril by virtue of a statute or the views current in society.\textsuperscript{54} In summary, the NBW maintains the two-step analysis of wrongful conduct, requiring both the act and the actor to be wrong, but the actor does not necessarily have to be "at fault" in order to be wrong.\textsuperscript{55}

\textbf{C. An Unlawful Act}

An \textit{unlawful act} is defined in the NBW as "an infringement of a right or an act or omission contrary to a statutory duty or contrary to what according to unwritten law is due in society. ..."\textsuperscript{56} This is a codification of the Hoge Raad's influential decision in \textit{Lindenbaum v. Cohen}.\textsuperscript{57} In that case, the Hoge Raad resolved the issue whether "unlawful" under article 1401 of the BW should be interpreted as "contrary to written law" or whether it has a broader application. The Hoge Raad held that "by unlawful act is to be understood an act or omission which infringes upon another's right, or conflicts with the defendant's statutory duty, or is contrary ... to the carefulness which is due in society with regard to another's person or property."\textsuperscript{58} The drafters of the NBW did not intend any substantive difference by describing "the care due in society" as "what according to unwritten law is due in society."\textsuperscript{59} For the sake of simplicity, this category is usually called "societal care."\textsuperscript{60}

"Infringement of a right" refers to the rights of others, such as the right not to be harmed or property rights.\textsuperscript{61} Even though contract liability is regarded as a species of tort liability, contractual rights are generally not enforced through tort liability but through the separate body of contract law.\textsuperscript{62} "Contrary to the actor's statutory duty" refers to a violation of any general duty derived from a statute, regulation, permit, or the like.\textsuperscript{63} This violation, like the violation of

\textsuperscript{54} Art. 6:162 § 3 NBW.
\textsuperscript{55} For a discussion of this, see infra note 106 and accompanying text.
\textsuperscript{56} Art. 6:162 § 2 NBW.
\textsuperscript{57} HR 31 Jan. 1919, NJ 1919, 161.
\textsuperscript{58} Translation provided by D.C. Fokkema, supra note 48, at 137-38. The Hoge Raad also held that an act or omission contrary to good morals constitutes an unlawful act. This clause was seldom used by the courts and was therefore ignored by the drafters of the NBW. C.C. Van Dam, supra note 1, at 73. According to Van Maanen, the impact on the extent of negligence liability of this decision was less than it appears at first glance, because both article 1402 of the BW (now preempted) and the requirement of "fault" in article 1401 of the BW were used to establish liability on unwritten law until this decision in 1919, G.E. Van Maanen, Onrechtmatige Daad, supra note 1, at 166.
\textsuperscript{59} \textit{Parliamentary History}, supra note 4, at 616. For an objection to this stylistic change, see C.C. Van Dam, supra note 1, at 73.
\textsuperscript{60} A.S. Hartkamp, supra note 46, at 45.
\textsuperscript{61} Id. at 37; C.H.M. Jansen, supra note 37, at 38-39; \textit{Parliamentary History}, supra note 4, at 614.
\textsuperscript{62} A.S. Hartkamp, supra note 46, at 8.
\textsuperscript{63} Id. at 35; \textit{Parliamentary History}, supra note 4, at 615.
societal care, can occur either by an act or by a failure to act. The term "unlawful act" is used to refer to both acts or failures to act when establishing unlawfulness. Violation of the care due in society is determined by a weighing of competing interests.

In this Article, according to the economic model, negligence liability should be imposed when the actor fails to take optimal care. The third ground of Netherlands unlawfulness, acting contrary to societal care, may turn out to be similar to this economic model. Before analyzing whether the Netherlands duty of societal care is comparable to optimal care under an economic analysis, it is necessary to understand how the duty of societal care relates to the first two grounds for establishing unlawful conduct: infringement upon a right and breach of a statutory duty.

Generally, whenever a person infringes upon the rights of another, or violates a statutory duty, that person has acted contrary to the care due in society. Whether this is actually the case depends upon the specific circumstances of the situation. If the provision violated was drafted to prevent the particular kind of harm suffered by the plaintiff, the case is clear. In that situation, the legislature has already weighed the interests of the parties and decided in favor of one of them. Thus, there is little discretion for the judge to evaluate whether the act was careless.

Yet, sometimes an act infringes upon a right or breaches a statutory duty but may not be considered contrary to the care due in society due to the circumstances of the case. A recurring discussion in the Netherlands is whether this can be considered an unlawful act. Beginning in 1938 with Smits, and as recently as Van Dam's 1989 study on negligence, a number of authors have argued that such an act should not be considered unlawful. The arguments, although along varying lines, can be summarized as concluding that only a violation of the standard of care should be considered an unlawful act. Proof of "infringement upon a right" or "breach of a statutory duty" should be considered a rebuttable presumption that the act indeed violated societal care. According to these authors, this is actually the way the courts deal with the problem.

64. Contrary to U.S. law, under Netherlands law it is a crime not to aid someone in danger. See Art. 459 Criminal Code. On the efficiency of liability for omissions, see W.M. LANDES & R.A. POSNER, supra note 13, at 145.
65. A.S. HARTKAMP, supra note 46, at 45.
66. C.C. VAN DAM, supra note 1, at 79-80.
68. Other participants in this discussion are cited by A.S. HARTKAMP, supra note 46, at 57-58.
69. B.J. ENGELEN, DE ROV VAN DE WETTELIJKE GEDRAGSNORM BIJ HET ONRECHTSMATIGHEIDSOORDEEL OP GROND VAN ARTIKEL 1401 BW RM THEMIS 208-24 (1986); C.C. VAN DAM, supra note 1, at 76-80. An example often cited in support of this position is Breda v. Nijs HR 25 Sept. 1981, NJ 1982, 315; C.H.M. JANSEN, supra note 37, at 38, claims that the Hoge Raad is inconsistent in this case.
The drafters of the NBW have not accepted the "Smits approach." The NBW cites all three grounds as independent grounds for establishing that an act was unlawful. The sole proof of either the infringement of a right, or the breach of a statutory duty, is sufficient to establish that the act was unlawful. However, the drafters acknowledged that under certain circumstances the consequences of this approach may be "unacceptable," so they designed several modifications to this general rule. It can be argued that the effect of these "modifications" is that the ultimate test for unlawfulness is whether the act violated due care.

According to the Secretary of State, the first two grounds for unlawfulness should be read to establish "prima facie evidence" of unlawfulness. This evidence can be rebutted by showing a defense justifying the act which infringed upon a right or violated a statutory duty. This "modification" is made by adding the phrase "except in as far as a ground of justification is present" to the phrase "an unlawful act is. . . ." The grounds of justification or defenses include at least the ones enumerated in the Criminal Code, but are not explicitly limited to those.

According to Meijers, "civil law, even more so than criminal law, has a need for recognition of other grounds of justification than those immediately derived from statutes." One of those unwritten grounds of justification, according to some authors, could be that the act "did not violate due care."

Whatever may be the precise grounds of justification admitted to rebut a prima facie unlawful act, it is clear that a separate weighing of interests can be made after it is established that the act "infringed upon a right" or "violated a statutory duty of care," to determine whether the act was unlawful. This is similar to the effect the "Smits approach" would have.

A second modification to the rigidity of the first two grounds of unlawfulness the NBW drafters allowed for was the requirement of attribution. As a general matter, according to Meijers, the defendant bears the burden of proof to deny that the act should be attributed to the defendant. However, when unlawfulness of the act is based solely upon infringement of a right or breach of a statutory

70. C.H.M. JANSEN, supra note 37, at 34, 39.
71. PARLIAMENTARY HISTORY, supra note 4, at 614-15.
72. Id. at 617.
73. Id. at 614-15, 626.
74. Art. 6:162 § 2 NBW.
75. Art. 40 Criminal Code.
76. PARLIAMENTARY HISTORY, supra note 4, at 617.
77. A.S. HARTKAMP, supra note 46, at 66; C.C. VAN DAM, supra note 1, at 86; Engelen writes that any ground of justification is an acknowledgement that the act did not violate due care. B.J. ENGELEN, supra note 69, at 224.
79. Hartkamp seems to say that this is precisely the idea. A.S. HARTKAMP, supra note 46, at 67.
duty, the court often requires the plaintiff to show that the actor was careless.\textsuperscript{80} This modification, therefore, tests whether the person, as opposed to the act, was careless through the requirement of attribution. As will be argued below, what establishes carelessness of the act and carelessness of the person is the same. Therefore, this modification through attribution does exactly what the "Smits approach" would do, namely, applying as the ultimate test for wrongful conduct a determination of whether the act was careless.\textsuperscript{81}

The NBW sets out three independent grounds for unlawfulness. Yet, there are serious doubts whether this approach is superior to the approach which holds that there is only one general ground for unlawfulness. In any case, the outcome of either approach is the same. Under the NBW, carelessness will be the ultimate test for wrongful conduct, whether it will be through the grounds of justification or through the requirement of attribution.\textsuperscript{82} The NBW's approach is unnecessarily complicated. Throughout the remainder of this Article, "unlawful act" will be used as synonymous with "lack of due care," "violation of the standard of care," and the like. The following section will analyze what constitutes lack of due care under Netherlands negligence liability law.

\textbf{D. Careful Behavior}

\textit{1. A Description by the Hoge Raad.} The Hoge Raad described the standard of care in a 1965 decision.\textsuperscript{83} In that case, an employee of Coca Cola Export Corporation, carrying a new supply of soda into the cellar of Cafe de Munt in Amsterdam, left the hatch to the cellar open. The plaintiff, on his way to the men's room, did not notice the open hatch and fell in and injured his leg. When this case reached the Hoge Raad, it described the standard of care as being: "the probability that the required attentiveness and care will not be taken [by the potential victims], the probability that harm will result, the possible extent of the harm, and the extent of the defendant's objection to taking appropriate safety measures."\textsuperscript{84}

These elements can be translated into the elements of the economic model. The first element, taking into account the likelihood that the victim will not take the required care, is part of the general probability of harm. "Required care" of the victim in this case refers to the victim's own duty of care.\textsuperscript{85} The extent of the harm speaks for itself. The defendant's objection to taking appropriate safety measures refers to the economic "cost of care." Here, the defendant had

\textsuperscript{80} \textsc{Parliamentary History}, \textit{supra} note 4, at 618.
\textsuperscript{81} \textsc{See C.C. Van Dam, supra} note 1, at 87; G.E. Van Maanen, \textit{Onrechtmatige Daad}, \textit{supra} note 1, at 226-27.
\textsuperscript{82} \textsc{C.C. Van Dam, supra} note 1, at 87.
\textsuperscript{84} \textsc{HR} 5 Nov. 1965, NJ 1966, annot.
\textsuperscript{85} The Hoge Raad held that the victim was also at fault, and thus reduced Coca Cola's obligation to compensate him by half.
taken some care; he had left some crates of soda in front of the hatch. The question was whether that care sufficed or whether he should have taken additional care. The court of appeals had determined that a simple barricade by chairs would have prevented the accident from happening. By not doing so, the Coca Cola employee was at fault. The Hoge Raad upheld the court of appeals' decision. In economic analysis terms, the costs of additional care were slight. Additional care would have substantially reduced the expected accident losses due to the reduction in the probability that harm would have occurred. Therefore, the defendant's behavior violated the standard of care. 86

2. A Closer Examination of Careful Behavior. In the literature, it is seldom explored what exactly constitutes societal or due care. This may be due to the fact that the exact standard of care depends on, among other things, the type of activity and the circumstances of the case. It is regarded as a question of fact, and academic lawyers, especially academic civil lawyers, seldom discuss issues of fact. However, Van Dam has discussed in more detail what constitutes careless behavior. 87 Van Dam's conclusions provide useful guidance for the analysis of Netherlands negligence liability law.

Van Dam distinguishes four elements that courts take into account when determining due care. These elements, like the elements stated by the Hoge Raad, are similar to the elements distinguished by economic analysis as relevant for tort liability. The elements distinguished by Van Dam are: (1) the character and extent of the injury; (2) the probability of the harm; (3) the objection to taking the necessary care; and (4) the character of the activity. 88

a. The Character and Extent of the Injury. The character and extent of the injury refers to the harm that is generally caused by certain behavior. By referring separately to the "character" and the "extent" of the injury, Van Dam implies that the character of the injury is a separate element in determining the standard of care. 89 Different kinds of injuries would then result in applying different standards of care. Van Dam's division appears to be aimed at the distinction between monetary injury and pain and suffering. It is based on the premise that pain and suffering is different from other forms of injuries because it has no monetary measure.

This distinction is unnecessary for the standard of care. When establishing the standard of care, the court has to weigh the care the defendant could have taken against the loss that resulted when such care was not taken. 90 In order to do so, the court has to have some perception of a standard which expresses both

86. Similarly R.W. Holzhauer, supra note 3, at 128.
87. C.C. Van Dam, supra note 1. Van Dam's study is not solely based on Netherlands tort law. He also uses comparative material of West German, French, and English tort law. Van Dam cites L. Bier, Aansprakelijkheid voor Bedrijfsongevallen en Bedrijfsziekten (1988).
88. C.C. Van Dam, supra note 1, at 110.
89. Id. at 111.
90. Id. at 223.
pecuniary and non-pecuniary values. Pain and suffering tends to weigh heavily in determining the extent of the injury, but it has no absolute or independent value which would prevent the court from offsetting it against monetary costs.\textsuperscript{91} It is therefore not necessary to identify the character or kind of injury as a separate element of the standard of care. The qualification "kind of injury" is part of the element "extent of the injury" with the understanding that personal injury tends to imply that the extent of the injury is significant.\textsuperscript{92}

Under an economic analysis, no distinction is made between different types of injuries. All are, by assumption, measurable in monetary terms. The appropriate award for personal injury may be determined by using the amount someone would be willing to pay to buy off a chance of getting hurt.\textsuperscript{93} This idea is problematic because it is difficult to establish what that amount would be.\textsuperscript{94} For the present discussion, all that is relevant is that if the injury which would be incurred in an accident includes personal injury or even death, the monetary expression of that injury will be high to very high. Therefore, under the economic model, lack of due care will easily be established when life and limb are at peril.

It may be concluded that tort theory and the economic model contain a similar interpretation of the extent of injury as one of the elements of the standard of care.

\textit{b. The Probability of Injury.} The probability of injury is the chance that harm may result from certain behavior. The probability that harm could follow from a certain act is relevant in relation to both the extent of the injury and the cost of care which would reduce the probability. This implies that the degree of probability of injury itself does not provide information on whether the behavior was careless.\textsuperscript{95} This is illustrated by an example of careless behavior the drafters of the NBW gave. If, without looking, a driver turns onto a road seldom used by other cars and an accident occurs, he or she will be held liable.\textsuperscript{96} The economic model offers an explanation for this result. Assume that the following figures would apply:

\begin{itemize}
\item \textsuperscript{91} G. \textsc{Calabresi}, supra note 38, at 17, 213. Calabresi points out that it is a myth that society is committed to preserving life at any cost. Van Dam points out that in the Netherlands courts, a tendency exists to let inflicting personal injury automatically establish unlawfulness. C.C. \textsc{Van Dam}, supra note 1, at 111.
\item \textsuperscript{92} The amounts of compensation for non-pecuniary harm are much smaller in the Netherlands than they are in the U.S. In 1985, the highest amount ever awarded was fl. 250,000 which equals approximately $125,000. 38 Verkeersrecht, No. 6, 1990, at 81 (Smartegeld).
\item \textsuperscript{93} W.M. \textsc{Landes} R.A. \textsc{Posner}, supra note 13, at 187-89; S. \textsc{Shavell}, supra note 9, at 234.
\item \textsuperscript{94} G. \textsc{Calabresi}, supra note 38, at 206.
\item \textsuperscript{95} The same holds true of course for the other elements of careless behavior.
\item \textsuperscript{96} \textsc{Parliamentary History}, supra note 4, at 343-44.
\end{itemize}
When an automobile accident occurs, it will cause a harm of 1000. The harm in this example could consist of injury to both the car and person and is therefore likely to be relatively large. The probability that an accident occurs is low (1%). The cost of preventing the harm, reducing the probability to zero or close to zero, is low (1) as was the case in the example above. Very little effort or time is involved in looking before turning onto a road. The model shows it is optimal to take care, since the total cost of accidents when the actor takes the appropriate care is 1 whereas the total cost is 10 when the actor does not take the appropriate care. Therefore, not taking care to prevent an implausible accident is, in this case, unlawful behavior.

c. Objectionability of Taking Care. The cost of care alone will not provide information on whether the standard of care is violated. Again, the elements of the standard of care are interdependent. An example of low cost of care in combination with high damage was just discussed above. An example of comparative high cost of care is presented in Bey v. Guyt. Mrs. Bey and Mrs. Guyt were both waiting at a bus stop. Mrs. Bey took a step backwards and bumped into Mrs. Guyt. Mrs. Guyt, an elderly lady, fell and broke her hip. The Hoge Raad called it "an unfortunate sequence of events" and did not hold Mrs. Bey liable.

This result is consistent with the economic model. The probability of harm in taking one step backwards without checking to see if anyone is behind you may be debatable, but it cannot be extremely high. Mrs. Guyt suffered substantial personal injuries, thus the extent of the harm was rather high. Yet it seems fair to say that, generally, when we take one step backwards, the risk of injury is relatively minor. Mrs. Guyt was more vulnerable than the average person. Therefore, even though her injury was substantial, the injury considered in the standard of care in these situations may be less. If that is the case, looking over our shoulder every time we take a single step backwards may be too high a cost, compared to the low probability of knocking someone over when doing so multiplied by the injury which would generally result.

d. Character of the Activity. Van Dam's last category is "the character of the activity." This element plays a key role in determining the standard of care. To illustrate this, he describes how the standard of care will be less rigid when

<table>
<thead>
<tr>
<th>Care</th>
<th>Costs of Care</th>
<th>Probability of Harm</th>
<th>Expected Accident Losses</th>
<th>Total Accident Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Care</td>
<td>0</td>
<td>1%</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Care</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

99. C.C. VAN DAM, supra note 1, at 120, 131.
the activity, by its character, does not impose a great danger in society (e.g., walking), whereas the standard of care will be very high when the character of the activity is dangerous (e.g., driving an automobile).\(^{100}\) Van Dam's illustration is not convincing to show that "character of conduct" is a separate element for the standard of care. It is true that the relative danger accompanying certain conduct has a substantial influence on the appropriate standard of care. However, this is already incorporated in the standard of care through the elements "extent of the injury" and "probability of the injury."

In accordance with Van Dam, it can still be argued that the character of the conduct has a key role in determining the standard of care. The required care (the relative weight of the elements of the standard of care) is determined case by case and depends on the conduct at issue. There is no general careful behavior. Whether it suffices to look over your shoulder when participating in an activity will depend on the type of activity in which you are participating.\(^{101}\)

3. **Summary.** An act is unlawful when it is contrary to the care due in society. The elements that constitute a careless act are consistent with the economic model. The standard of care is a function of the cost of care, the probability of injury, and the extent of injury. Netherlands negligence liability law can therefore be said to be consistent with the economic aim of preventing inefficient costs.

This is not meant to say that courts actually make their decisions based on figures derived from an economic calculation of care.\(^{102}\) But the conclusion that the decisions made are consistent with this calculation adds insight into the law and thereby increases the ability to evaluate it.

Thus far, maximizing utility, as relevant to the standard of care, has not been discussed. Economic analysts acknowledge that this aspect in determining optimal care is even more difficult, if at all possible, to incorporate into the standard of care.\(^{103}\) For activities in which the derived utility is important in establishing due care, strict liability may be the preferred form of liability. Strict liability would induce the actors to incorporate the utility of their activities in determining their optimal level of care.\(^{104}\) First, however, the requirement of attribution is addressed.

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100. *Id.* at 131.

101. The character of the activity may be relevant to the aspect of care that has not yet been discussed, namely taking care by participating less in an activity or by not participating at all. This will be discussed in *infra* section II.F.1.

102. "The claim is hardly made that individuals or courts think in terms of the mathematical goal of minimizing a sum. They obviously do not do anything so unnatural. Rather, they appear to gauge the appropriateness of behavior by a rough consideration of risk and the costs of reducing it, ordinarily on the basis of felt notions of fairness." (footnote omitted) S. Shavell, *supra* note 9, at 19.

103. *See supra* section 1.D.

104. S. Shavell, *supra* note 9, at 26, 31-32.
E. Attribution

From the preceding discussion, it is clear that the Netherlands standard for unlawful conduct resembles the economic standard of care. However, as stated above, Netherlands negligence liability is based on two requirements. In order to establish wrongful conduct, the actor must commit an unlawful act, and the unlawful act has to be attributed to the actor. This section will discuss what the requirement of attribution adds to the already established unlawful act.

1. The Requirement of Attribution. Under the BW, the actor had to be "at fault" in order to be liable for an unlawful or careless act. The NBW has expanded the fault requirement. An actor is liable if the unlawful act can be attributed to the actor either: (1) by the actor's fault; (2) by virtue of a statute; or (3) by virtue of the views current in society. Even so, the core requirement in both codes, qualifying the actor as opposed to the act, is fault. The other two grounds for attribution are intended as modifications where fault was experienced to describe why the actor should be liable.

The requirement of fault was experienced as ill-fitting in situations where the actor was held liable for an unlawful act, but in which the word "fault" seemed like an undeserved reproach. "Certain factors exist that the actor will be held accountable for even though the actor in this specific instance cannot be reproached for that factor." The drafters give as an example that an inexperienced driver may be held liable for making a mistake an experienced driver would not have made. Under the NBW, the unlawful act will, in such circumstances, be attributed to the actor "by virtue of the views current in society" rather than by his or her "fault."

At the same time, the BW "fault" excluded liability the drafters felt should not be excluded. A mental patient may not be able to perceive the wrongfulness of his or her actions, in which case "fault" is absent. The general rule under the BW is that liability is then denied. Attribution "by virtue of a statute" is used by the drafters of the NBW to decide this issue on the capacity to commit an unlawful act. The NBW includes a provision stating that unlawful acts will be attributed to mental patients, regardless of their actual capacity to understand the wrongfulness of their actions.

The following sections will discuss attribution of an act to the actor due to

105.  See supra section II.B.
106.  See art. 6:162 § 3 NBW.
107.  Professor Meijers in his memorandum to the parliament concerning the draft of article 6:162 § 3 NBW, PARLIAMENTARY HISTORY, supra note 4, at 618.
108.  Id.
110.  It is also used in article 6:167 § 2, a very specific provision not relevant for this study. See G.E. VAN MAANEN, ONRECHTMATIGE DAAD, supra note 1, at 202.
111.  Art. 6:165 NBW.
fault in two different interpretations: a subjective sense and an objective sense. Then, attribution by virtue of a statute and attribution by virtue of the views current in society will be examined.

2. **Fault in the Subjective Sense.** The first problem with fault qualifying the actor as opposed to the act, is that it is unclear whether this should be a subjective or an objective test. When used as a subjective test, it refers to the individual's state of mind at the time of the tort. When fault is used as an objective test, it refers to a general standard of carelessness of the actor.\(^{112}\)

The parliamentary history does not explicitly state whether fault should be read in a subjective or an objective sense.\(^{113}\) Hartkamp, author of the leading treatise on the NBW, writes:

> The requirement of fault in articles 1401 and 162 must be understood in a subjective sense. . . . Even though it is true that generally for the inquiry into fault it suffices to establish what can be expected of someone in similar circumstances as the actor, this does not deny that in the end, decisive is whether the actor in this case can be reproached for his act. In the new law attribution by virtue of the current social views or a statute may be available if reproachability is not present.\(^{114}\)

According to Hartkamp's reasoning, the defendant will be relieved from liability if he or she can show a lack of subjective fault.\(^{115}\) The act may have been unlawful, but the actor was not reprehensible in doing so. Therefore the conduct was not wrongful.

Under the BW, lack of subjective fault only relieves the actor from liability in those cases where the defendant does not understand the nature of his or her actions due to tender age or mental disorder.\(^{116}\) The defendant has to show a "total lack of awareness of the unlawfulness" of his or her actions.\(^{117}\) These situations are provided for differently in the NBW. As discussed above, an unlawful act will be attributed to a mental patient regardless of the patient's understanding of the nature of his or her behavior.\(^{118}\) On the other hand, the NBW states that an unlawful act cannot be attributed to a child under the age of fourteen.\(^{119}\) A child will not be held liable in negligence regardless of

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112. C.C. VAN DAM, _supra_ note 1, at 143; E.M. MEIJERS, _supra_ note 52, at 301.
113. C.C. VAN DAM, _supra_ note 1, at 83-84.
114. A.S. HARTKAMP, _supra_ note 46, at 72 (emphasis in original).
115. See also G.H.A. SCHUT, _ONRECHTMATIGE DAAD_ 110 (1985), cited by C.C. VAN DAM, _supra_ note 1, at 84.
116. C.C. VAN DAM, _supra_ note 1, at 84.
118. See _supra_ section II.E.1; art. 6:165 NBW.
119. Art. 6:164 NBW. The parents or guardians of a child who commits an unlawful act will be held strictly liable, Art. 6:169 NBW. See _infra_ section III.A.
whether or not the child understood the act to be wrong.\textsuperscript{120} Therefore, lack of subjective fault will not relieve anyone from liability under the NBW.\textsuperscript{121}

One of the reasons Hartkamp takes the position that fault should be understood in a subjective sense, which is so obviously at odds with the adjudicatory reality, might be the ambiguity with which Meijers, the author of the original draft, approached the choice between subjective and objective fault. Even though, according to Meijers, negligence liability requires a "state of mind of the actor" which renders the act "reprehensible,"\textsuperscript{122} this is generally an objective test.\textsuperscript{123} He then continues by pointing out that this objective test does not replace the subjective test, but rather serves as an addition. "[W]hen the understanding was present with the acting person . . . an inquiry into what the normal person would have been aware of is not necessary."\textsuperscript{124} According to Meijers' understanding, subjective fault is the primary reason for attributing the act to the actor, but objective fault suffices.\textsuperscript{125}

Lack of subjective fault does not relieve anyone from liability. Subjective fault can therefore not be considered a requirement for liability resulting from wrongful conduct. However, it may still play a role in establishing liability. Contrary to the common law, Netherlands tort law does not have a separate doctrine of intentional torts. The distinction between "fault" and "intent" is generally not considered relevant for imposing liability.\textsuperscript{126} Yet a person is obviously at fault when he or she intended to injure another or acted with reckless disregard with respect to the risk of injuring another.\textsuperscript{127} In those situations subjective fault is likely to be relatively easy to prove. When subjective fault is easy to prove, it will aid in establishing that the act was contrary to the care due in society and therefore unlawful.\textsuperscript{128} The important Hoge Raad decision in \textit{Lindenbaum v. Cohen}\textsuperscript{129} is a prime example of a court taking the subjective fault of the defendant into account in establishing that the behavior was unlawful.\textsuperscript{130} Lindenbaum and Cohen were both in the publishing business. Cohen had bribed Lindenbaum's servant to inform him about what was going on at Lindenbaum's office, to provide him the names of Lindenbaum's clients, and to supply Cohen with copies of Lindenbaum's offers to his clients.

\begin{footnotes}
\item 120. A child will not be held liable for intentional torts either.
\item 121. A possible exception was discussed, and discarded, \textit{see supra} section II.C.
\item 122. E.M. MEIJERS, supra note 52, at 300.
\item 123. \textit{Id.} at 501. For a similar mix of subjective and objective tests, see W.J. SLAGTER, supra note 32, at 16, 18.
\item 124. E.M. MEIJERS, supra note 52, at 302.
\item 125. \textit{Similarly} G.E. LANGEMEIJER, supra note 33, at 32-33.
\item 126. A.S. HARTKAMP, supra note 46, at 69-70. An exception is article 6:170 \S 3 which will be discussed in III.B.
\item 127. Compare the common law "intentional torts." "[I]ntent . . . denote[s] that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." \textit{RESTATEMENT (SECOND) TORTS} \S 8a.
\item 128. \textit{See also} G.E. VAN MAANEN, ONRECHTSMATIGE DAAD, supra note 1, at 227.
\item 129. HR 31 Jan. 1919, NJ 1919, 161.
\item 130. \textit{See supra} section II.C.
\end{footnotes}
Cohen, obviously, was trying to get an advantage over his competitor through unfair means. The court of appeals, in accordance with earlier opinions of the Hoge Raad, denied Lindenbaum's action for damages against Cohen because no statute provided that Cohen's actions, including breaching the duty of confidentiality, were unlawful. The Hoge Raad then changed its former rigid opinion as to the requirements for establishing unlawful behavior and held that unlawfulness does not require violation of a statute but can be established when behavior "is contrary . . . to the carefulness which is due in society with regard to another's person or property."\(^\text{131}\)

In summary, subjective fault is relevant for Netherlands tort liability. Yet the legal scholars and the drafters of the NBW have misinterpreted the role subjective fault plays. Subjective fault is not a separate requirement for liability. It is "merely" a relevant factor in establishing unlawfulness.

3. Fault in the Objective Sense. From the preceding discussion, it is clear that fault in a subjective sense is not required and that fault in the objective sense suffices for attributing the act to the actor and establishing wrongful conduct. There has been surprisingly little discussion on what exactly establishes fault as distinguished from unlawfulness or carelessness. Pitlo writes that fault applies when the actor can be "morally and psychologically reproached for his act." According to Jansen, fault is the core of negligence liability which is established both in "the case in which the actor knew that he was acting unlawfully and the case in which the actor did not know, but . . . should have known."\(^\text{132}\) Again, Van Dam has the most elaborate discussion on what qualifies the actor as opposed to the act for liability.\(^\text{133}\) Van Dam distinguishes two elements: (1) possibility of knowledge; and (2) capability of avoidance.\(^\text{134}\) Possibility of knowledge refers to the chance that harm may result from certain conduct. According to Van Dam, a person can only be required to take such care as to prevent harm if it is possible for this person to be aware of a chance that harm may result.\(^\text{135}\) This does not require a precise awareness of the probability of harm in a specific case. "It suffices that it is possible to know that certain conduct creates a general risk, which can result in damage to another."\(^\text{136}\)

Capability of avoidance refers to the capability of the actor to prevent the harm from occurring. A person cannot be considered to be careless for not avoiding harm if such avoidance was not possible. This is not limited to his or


\(^{132}\) C.H.M. Jansen, supra note 37, at 46 (emphasis in original).

\(^{133}\) Van Dam does not use the word "fault," but rather speaks of the carelessness of the actor as opposed to the carelessness of the act. Thus, he includes both attribution due to fault and attribution by virtue of the views current in society in his discussion.

\(^{134}\) C.C. Van Dam, supra note 1, at 133-42. Van Dam refers to HR 9 Dec. 1966, NJ 1967, 69 and Scholten's annotation distinguishing "knowledge and capability" as the requirements for reproachability. See also W.J. Slagter, supra note 32, at 9, 15.

\(^{135}\) C.C. Van Dam, supra note 1, at 133.

\(^{136}\) Id. at 134.
her capability at the moment of the accident. Also relevant are the preventive measures that could have been taken before the accident took place.\textsuperscript{137}

The elements of fault, as distinguished by Van Dam, can be translated into the economic model for determining optimal care. "Possibility of knowledge" is the actor's possible awareness of the probability of the harm and the extent of the harm if harm were to occur. "Capability of avoidance" is the cost of care.

The elements which are taken into account to determine whether the actor was at fault are the same as the elements which are taken into account to determine whether the act was careless. Societal care was found to be a function of the expected accident losses (the probability of harm multiplied by the extent of the harm if harm were to occur) and the cost of care.\textsuperscript{138}

In order to attribute an unlawful act to its actor, fault in an objective sense suffices. This means that courts will not inquire into the state of mind of the actor at the time of the act, but rather will inquire into the knowledge of the expected harm and the ability of a reasonably prudent person under similar circumstances to avoid such harm. Since unlawfulness or carelessness of the act are established by the same factors as fault of the actor, and since both require an inquiry into what a person in general would know and be capable of, unlawfulness and fault are really the same. Once unlawfulness is established, fault can be established.\textsuperscript{139} Therefore, it follows that fault in the objective sense is not a separate requirement for liability from wrongful conduct.

4. Attribution by Virtue of a Statute. Attribution by virtue of a statute is a completely separate matter from attribution due to fault of the actor or attribution by virtue of the views current in society. Attribution by virtue of a statute is not a requirement for liability, but rather a way to avoid establishing either fault or the views current in society which would justify attributing the act to the actor. The legislature has used this provision to address the problem of whether someone acting under the influence of a mental or physical disorder can be considered to have acted wrongfully. Under the BW, mental disorder excuses a person from liability for an unlawful act when, due to the disorder, the actor totally lacked awareness of the unlawful character of his or her behavior.\textsuperscript{140} A physical disorder generally does not excuse the actor. Someone who is, for example, blind or deaf is required to take care in accordance with that disability.\textsuperscript{141} The Parliament chose to change these rules.\textsuperscript{142} Under the

\textsuperscript{137} Id. at 135.

\textsuperscript{138} See supra section II.D.3.

\textsuperscript{139} Slagter acknowledges that this is the result of using an objective test. This leads him to the conclusion that the test for "fault" is subjective. W.J. SLAGTER, supra note 32, at 10-11.


\textsuperscript{141} A.S. HARTKAMP, supra note 46, at 79; H. SCHOORDUK, supra note 78, at 364. For the common law, see W. PROSSER & P. KEETON, supra note 33, at 175-78.

\textsuperscript{142} The Parliament did so in 1953, Vraag 16; PARLIAMENTARY HISTORY, supra note 4, at 638.
NBW, the fact that a person who causes injury has a physical or mental disorder does not prevent the attribution of the act to him or her. During the parliamentary debate, Meijers explained the choice as follows:

It is . . . not a matter of moral liability, but a matter of compensation. If a person, even a mentally disturbed, with sufficient assets, causes damage to another, who is aware of nothing, than it is a fair principle that, if not the person, at least his assets are liable for the damage caused.

There are two corrective provisions to this harsh rule. A third party may have a duty to supervise the actor. Insofar as breach of this duty constitutes an unlawful act against the victim, both the actor and the supervisor will be liable for the injury. Contrary to the ordinary rules of contribution, the supervisor will have to carry the burden alone, at least to the extent of his or her liability. The second correction is the new general power of mitigation of damages that the courts have under the NBW. One of the circumstances for which this general power is explicitly intended includes liability for acts committed under the influence of a mental or physical disorder. Whether a third party is liable next to the actor may be relevant for courts in exercising this power.

In summary, attribution by virtue of a statute is used to instruct courts to disregard any possible mental or physical disturbances in establishing whether an unlawful act was committed. Under the BW, courts may sometimes relieve a mentally disturbed tortfeasor from liability because he or she could not be held at fault. Under the NBW, mental disturbances will not relieve anyone from liability. The mentally or physically disturbed tortfeasor has a right to indemnification if, and to the extent that, his or her supervisor's carelessness also caused the unlawful act.

5. Attribution by Virtue of the Views Current in Society. The last ground for

143. Art. 6:165 NBW. Contrary to the general tort provision, article 6:165 only attributes unlawful act to mentally and physically disturbed persons. In this situation, an omission to act cannot establish unlawful behavior. A deaf person who does not hear a cry for help from someone who is drowning will therefore not be held liable. A.S. HARTKAMP, supra note 46, at 79. C.C. VAN DAM, supra note 1, at 177.

144. PARLIAMENTARY HISTORY, supra note 4, at 641-42.

145. Based on art. 6:162 NBW. A.S. HARTKAMP, supra note 46, at 82.

146. This may be the legal guardian or a hospital: "Occupational therapy is brilliant, but one always needs to consider that the necessary measures to protect the safety of third parties have to be taken. Failure to do so will be a ground for . . . liability." PARLIAMENTARY HISTORY, supra note 4, at 642.

147. Ordinarily the contribution among defendants, who are held jointly and severally liable, is based on their comparative negligence; arts. 6:101 & 102 NBW.

148. Art. 6:165 § 2 NBW; PARLIAMENTARY HISTORY, supra note 4, at 661.

149. Art. 6:109 NBW.

150. PARLIAMENTARY HISTORY, supra note 4, at 642.
attribution is attribution by virtue of the views current in society. This catch-all provision is designed to impose liability where fault cannot be found and where no statute provides for attribution. Authors who interpret the requirement of fault in a subjective sense understand fault in an objective sense as attribution by virtue of the views current in society. Authors who interpret fault in an objective sense understand that the views current in society allow the court to attribute an act to its actor without, or regardless of, fault. In either case, no situation can be imagined where the act would be considered unlawful but would not be attributed to the actor for lack of the views current in society since once unlawfulness of the act is established, fault, too, can be established.

6. Attribution and the Standard of Care. The drafters of the NBW intended to codify two requirements for liability resulting from wrongful conduct: (1) the act must be wrong (unlawful); and (2) the actor must be wrong (fault). Because "fault" was found as too limited a ground for liability, the drafters expanded the qualification of the actor by using "attribution" instead. As will be discussed in this section, this was not the appropriate response to the problems with fault as a second requirement for liability.

Originally, during the first eighty years after the BW was introduced, the elements of "unlawfulness" and "fault" in article 1401 BW were not as clearly distinguished. Both elements referred to wrongful conduct as a whole. According to Van Maanen, who did an extensive study of the development of negligence liability, no real indication can be found that "fault" was read to refer to the actor as distinguished from the act, or requiring that the actor could be reproached for committing the unlawful act. "In as far as specific reproachability was being required it can be interpreted as a closer, more refined testing of the behavior in a specific case." Van Maanen's analysis leads to the conclusion that liability without the actor being at fault, in the sense of worthy of reproach, is not a novelty. Requiring

151. See cite in ILE:2 from A.S. HARTKAMP, supra note 46, at 72.
153. The commonly held understanding is that the NBW has expanded liability for wrongful conduct by allowing for such liability without "fault" on the side of the actor and that such expansion is required by "modern times" with increased technology etcetera. PARLIAMENTARY HISTORY, supra note 4, at 618. A.S. HARTKAMP, supra note 46, at 21. Schut, Schuld en Risico, WEEKBLAD VOOR HET PRIVAATRECHT, NOTARIAAT EN REGISTRATIE, No. 5045, 1969, at 270; W.J. SLAGTER, supra note 32, at 1-2.
154. According to Van Maanen, during the period between 1838 and 1919, the distinction between the two was not considered important and "was messed around with." G.E. VAN MAANEN, ONRECHTMATIGE DAAD, supra note 1, at 104. Article 1401 BW was, as most of the Netherlands Civil Code, a translation of the French Code Civil. However, article 1382 of the Code Civil does not contain the word "unlawful."
156. Id. at 116. According to Van Maanen, "fault" generally referred to wrongful conduct. Fault may have also been read to require that the actor had the mental capacity to understand the wrongfulness of the act in order to hold him or her liable. Id. at 71, 104.
fault of the actor (or attribution of the act to the actor) to be established separately from the unlawfulness of the act is a new development.\footnote{157}

The preceding sections have shown this development to be unsuccessful. "Fault" or "attribution" is not a separate requirement for liability under Netherlands negligence law. Once it is established that the act violated due care and is thus unlawful, the actor will be liable for the wrongful conduct.

Fault in a subjective sense is not required. An inquiry into the state of mind of the actor will not relieve the actor from liability, except in a limited number of cases under the BW. Fault in an objective sense is already established by establishing that the actor violated due care. No separate inquiry into a person's general state of mind can relieve the actor of liability. In so far as such inquiry is relevant, it can be made to establish whether the act violated due care. Therefore, even if courts were to interpret fault only in the limited subjective sense, they would always find that the views current in society would attribute the act to the actor because the actor would be held at fault under an objective standard. Finally, attribution by virtue of a statute is, by its nature, not a separate requirement.

Contrary to the way the BW is interpreted and the way the NBW is set out, the conclusion must be that Netherlands negligence liability does not have two requirements. Liability for wrongful conduct is liability for actions contrary to the care due in society. Rather than expanding the grounds which qualify the actor as opposed to the act, the drafters should have abolished the two-step analysis of wrongful conduct.

This is not to say that "fault" or "attribution" are not mentioned in court opinions—they are.\footnote{158} But any considerations made with respect to fault of the actor could, and therefore should, have been made with respect to the unlawfulness or carelessness of the act.\footnote{159} Splitting up wrongful conduct into two separate elements unnecessarily complicates the analysis of Netherlands negligence liability.

Fault or attribution is not a separate requirement for liability. Yet the considerations made with respect to fault or attribution, both by courts and legal scholars, do serve a function. They modify or refine the assessment of due care to match the specific circumstances of the case, or rather of the defendant at hand.\footnote{160} The different grounds for attribution serve as instructions to the court

\footnote{157} Also, J.M. Van Dunné, Verbintenissenrecht in Ontwikkeling 244-47 (1985); and J.C. Van Oven, Onrechtmatigheid en Schuldplicht 3278-80 (1932).

\footnote{158} See, e.g., HR 22 June 1979 NJ 1979, 535 annot., VR 1979 83 (liability for damage caused by dangerous object requires both fault and unlawfulness); HR 26 Sept. 1986, NJ 1987, 253, annot., AA 1987, 164, annot. (the fault of the government is, in principle, established by committing an unlawful act); HR 26 Jan. 1990, nr. 13858, RvW 1990, 38 (the government is at fault because it should have taken into account the possibility that its unlawful behavior lacked a ground for justification).

\footnote{159} J.M. Van Dunné, supra note 157, at 243, 247; G.E. Van Maanen, Onrechtmatige Daad, supra note 1, at 226-27. Van Maanen proposes to discard article 6:162 § 3, G.E. Van Maanen, Onrechtmatige Daad, supra note 1, at 228-30. See also C.C. Van Dam, supra note 1, at 184.

\footnote{160} Compare Van Maanen's comments on the interpretation of fault in the period 1838-1919, cited above. See also C.C. Van Dam, supra note 1, at 183-5.
concerning which personal circumstances of the defendant it must take into consideration and which personal circumstances it may or must disregard in determining whether the defendant violated due care.

The court must disregard a defendant’s mental or physical disorder in establishing whether the act that caused injury was contrary to societal care. The court may disregard any other personal circumstance, but the court may not disregard the defendant’s subjective fault. The defendant must be held liable if it is clear to the court that the defendant committed the unlawful act intentionally or with reckless disregard of the harm that was substantially certain to occur.

F. Economic Analysis of Wrongful Conduct

The preceding sections show that under Netherlands law, liability for wrongful conduct or negligence is liability for acting contrary to the care due in society. The Netherlands standard of care was found to be consistent with the economic model of optimal care. This section applies economic analysis to the standard of care modified by the instructions given to the court about which personal circumstances of the defendant it may or may not take into account. First, the objective standard of care will be discussed. Second, the fact that, under the NBW, courts must disregard mental and physical disorders in establishing due care will be examined. Finally, the fact that courts may not ignore subjective fault in assessing whether due care was taken, when it is sufficiently obvious to come to its attention, will be addressed.

1. Objective Standard of Care. According to economic analysis, optimal care is a function of the cost and the benefits of an individual’s activities in society. If perfect information on each individual’s costs and benefits were available, that would be the standard courts would use. However, it is generally costly, if not impossible, to acquire such information. Rather than not holding an actor liable, which would result in underdeterrence, courts use a general or objective standard of care to determine liability to save administrative costs.

Aside from saving administrative costs, economic analysis distinguishes another policy objective which an objective standard of care might serve. Courts generally have difficulty including in the standard of care the utility people derive from participating in various activities. Even if they can, they also have difficulty in assessing the actual level of participation in activities when determining whether the actor participated optimally. By requiring a level of care that is above the individual or even the average level of care, courts induce

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161. Art. 6:162 § 3 seen in connection with 6:165 NBW.
162. Art. 6:162 § 3 NBW.
163. See supra section II.D.3.
164. W.M. LANDES & R.A. POSNER, supra note 13, at 123-26; S. SHAVELL, supra note 9, at 73-74.
165. See supra section I.D.
participants to take the utility they will derive from participating in the activity into account in deciding what level of care to take. People who cannot live up to this standard are, in effect, subject to strict liability.

Under Netherlands negligence law, an objective standard of care suffices for imposing liability. The explanation provided by economic analysis, that the use of such a standard is a way of diminishing administrative costs while preventing underdeterrence, seems very plausible. The following two examples illustrate that requiring a high standard of care is used in Netherlands negligence liability as a way to induce people to take into account the utility they derive from participating in activities which impose high costs on society.

Driving a car imposes high costs on society. The standard of care applied by Netherlands courts for people who decide to participate in this activity is the standard of the "perfect driver." The driver of a car cannot make any mistakes, not even in a very critical situation. In one case, a deer suddenly jumped out on the road in front of a car and the driver reacted by swerving over to the left lane. Unfortunately another car was driving on that side of the road. A fatal collision resulted. The Hoge Raad held the driver of the first car liable because he could have swerved over to the right and thus avoided the accident.

Another example of the use of a higher than average standard of care is found in the recent explosion of pollution liability cases. Polluters are held liable in tort for the clean up cost imposed on the government when the pollution imposes a serious threat to the population or to the environment. The trend in these cases seems to be an application of a very high standard of care. If a substance brought into the soil is poisonous, or damaging in some other way, the responsible person or organization tends to be held liable for the cost of cleaning up, regardless of whether the polluter knew that the substance was dangerous.

Both cases exemplify situations in which the activity engaged in is likely to impose high costs on society even if an actor takes the necessary level of care. By requiring a standard of care which, for most participants, effectively comes down to strict liability, society induces the participants to take into account the full extent of the cost of these activities. This will influence the participation in

167. Id. at 128. S. SHAVELL, supra note 9, at 75.
168. C.C. VAN DAM, supra note 1, at 151.
170. Based on Art. 21 Interimwet BodemSanering and Art. 1401 BW.
these activities in a way that is, according to economic analysis, socially desirable.\textsuperscript{173}

2. Mental and Physical Disorders. Under the BW, those people who lack all awareness of the unlawfulness of their behavior cannot be held liable. Under the NBW, the court must disregard the fact that the defendant suffered from a mental disorder in establishing whether the act was unlawful. The standard of care is therefore always that of a sane person. From the perspective of deterrence, the BW approach seems to make more sense. As far as people are open to deterrence through the tort system, they will be held liable according to general standard of care. Those people who cannot be deterred, because they "lack all awareness" of the unlawfulness of their behavior, should not be held liable since this will not reduce the number of torts committed by them.\textsuperscript{174} Shifting the loss from the victim to the tortfeasor does not appear to be efficient.

The NBW's abolishment of this defense may be defended by a different economic argument. The defense of "lack of all awareness" requires an inquiry into the defendant's state of mind. The fact that the lower courts are divided as to what exactly establishes total lack of awareness\textsuperscript{175} supports the impression that this inquiry is not an easy one. The cost of this inquiry is avoided by disregarding the individual's mental disorder in all cases.\textsuperscript{176} Which regime is the most efficient is not immediately clear. It depends on the administrative costs incurred in holding mentally incompetent persons liable and in distinguishing who qualifies as mentally incompetent for the sake of negligence liability.

The parliamentary history does not refer to administrative costs as a reason for disregarding all mental disorders in the standard of due care. It refers to fairness. In those situations where the tortfeasor has sufficient assets to compensate the victim, it is considered unfair if the loss is not shifted.\textsuperscript{177}

This fairness consideration can be supported by economic analysis. If the actor lacks awareness of the unlawfulness of his or her act and the threat of liability, he or she probably also lacks awareness of the risk. Compared to the victim, the actor is then less risk averse. Social welfare increases when the risk is shifted from people who are more risk averse to people who are less risk averse or risk neutral.\textsuperscript{178} Under these conditions, holding mentally disturbed tortfeasors

\textsuperscript{173} The fact that most drivers will be insured for this kind of liability does not frustrate this analysis. When a person is considering whether to engage in an activity, he or she will weigh the added insurance premium against the added utility he or she would derive from the act, instead of weighing the added expected accident losses against the added utility. \textit{See} S. SHAVELL, \textit{supra} note 9, at 186-245 on the effect of insurance on accident law.

\textsuperscript{174} \textit{See also} Scholten who wrote that "the law poses norms, prohibits violating them, and in doing so can only be aimed at and is only aimed at those who can be expected to conduct themselves according to certain norms. It is foolish to speak of duty to someone for whom duties are unthinkable . . . . Finally, one forgets that liability law also has to work as a deterrent." P. SCHOLTEN, \textit{VERZAMELDE GESCHREften}, DEEL IV 171-72 (1954).

\textsuperscript{175} C.C. VAN DAM, \textit{supra} note 1 and the court opinions cited there.

\textsuperscript{176} W.M. LANDES & R.A. POSNER, \textit{supra} note 13, at 128.

\textsuperscript{177} \textit{See} cite in I.E.4.

\textsuperscript{178} S. SHAVELL, \textit{supra} note 9, at 190.
liable instead of leaving the loss with the victims would increase social welfare.

Deterrence can explain the liability of the supervisor of the mentally disturbed tortfeasor. If a mentally disturbed person lacks awareness of what constitutes unlawful behavior, it is the supervisor's responsibility to prevent such person from causing injury. Contrary to the liability of parents for the careless acts of their children, the supervisor's liability is explicitly limited to the liability for his or her own wrongful conduct and is therefore not strict liability. The fact that the mentally disturbed committed a tort does not automatically mean that the supervisor was careless. That has to be proven separately.

This can be explained using economic analysis. Strict liability imposes the full cost of the activities of the mentally disturbed person on the supervisor. Generally, strict liability will limit the activity of the liable person. A person will only engage in an activity if the (added) utility of the activity outweighs the (added) costs imposed by that activity. Therefore, the cost imposed on society will be optimal. However, if a potential supervisor decides not to assume the responsibility for one or more mentally disturbed persons because of potential liability for behavior beyond the control of the supervisor, there will be less supervisors overall and the number of torts is likely to increase rather than decrease. Contrary to the situation with children, the number of mentally disturbed in the world is independent from the decision of people to assume responsibility for them. Therefore, strict liability would be inefficient in these situations.

The supervisor has no right to indemnification against the actor. This is also in accordance with the economic model. The supervisor is held responsible for torts committed by an actor who lacks awareness of the norms. Personal liability will not have a deterrent effect on this person. Indemnification of the supervisor from the actor would therefore serve no allocative benefits and would cause inefficient administrative costs.

Under the NBW, courts also disregard physical disorders. This can be understood from the economic perspective to the extent that the actor can prevent accidents due to his or her physical disorder. For example, a blind person can carry a cane to avoid walking into things and also to alert others. But according to the parliamentary history, in establishing due care the intention is also to disregard unexpected physical disorders, such as a heart attack without warning. These accidents cannot be deterred. Under an economic analysis, administrative costs might again support this rule. But in this case, the

179. See infra section III.A.
181. A.S. HARTKAMP, supra note 46, at 82; H. SCHOORDUK, supra note 78, at 372.
182. For an economic analysis of the different common law rules, see W.M. LANDES & R.A. POSNER, supra note 13, at 127.
183. As an example, the parliamentary history presents the situation in which someone, due to a physical shortcoming, suddenly loses consciousness while crossing the street, and thereby causes an accident, PARLIAMENTARY HISTORY, supra note 4, at 661.
184. But see W.M. LANDES & W.M. POSNER, supra note 13, at 130.
fairness considerations of the drafters for this rule do not have an economic analysis substitute. There is no reason to expect that the tortfeasor would be less risk averse than the victim.185

Whether the rules instructing courts to disregard mental and physical disorders in establishing the on the way courts handle their general power of mitigating damages.186 This mitigation power is limited to situations in which the consequences of full liability would "obviously be unacceptable." In the parliamentary history, the liability for harm caused under the influence of a physical or mental disorder is the first example of situations in which mitigation of liability may be called for.187 The sole reason that the act was committed under influence of such a disorder does not suffice for mitigation of the liability, but "when the liability of the [mentally or physically disturbed] actor is not covered by insurance and the actor does not have much assets it may be unacceptable that he has to bear the full burden of the liability."188 If the courts use this mitigation power to bring the test of someone's mental or physical capacities back into the question of liability, the savings in administrative costs will be substantially less.

In summary, the NBW rules of liability for mentally and physically disturbed are potentially efficient because of the savings in administrative costs. These savings may offset the inefficient effects of these rules which hold those tortfeasors liable who cannot be deterred. With respect to mentally disturbed persons, the potential efficiency of these rules is supported by the fact that shifting the loss to the mentally disturbed tortfeasor is generally socially beneficial because such a tortfeasor is likely to be risk neutral, or at least less risk averse than the victim. The rules of liability for people with a physical disorder are not supported by a similar consideration.

3. Subjective Fault. Subjective fault implies that the actor was aware of the potential harm of his or her act and could have easily refrained from the act. It is not necessary to establish subjective fault in order to hold someone liable for an unlawful act. Therefore, subjective fault will only be brought to the court's attention in those cases where it is obvious. It may become obvious from the defendant's statements (e.g., "I wanted to hurt him because I didn't like his face,") from witnesses (e.g., "He told me he wanted to hurt him because he didn't like his face,") or from circumstantial evidence (e.g., the defendant drove 60 miles per hour through a densely populated area for no apparent reason). The court cannot disregard these circumstances when brought to its attention. If someone

185. As far as supervisors are held liable for failing to prevent the tort, the same explanation holds true for supervisors of the mentally disturbed.
186. Art. 6:109 NBW.
187. PARLIAMENTARY HISTORY, supra note 4, at 449, 624. One of the reasons the Hoge Raad has not interpreted the liability of mentally disturbed in the BW in anticipation of the NBW, is probably the connection between this type of liability and this new mitigation power. A.M.J. VAN BUCHEM-SAPENS, supra note 5, at 44; C.C. VAN DAM, supra note 1, at 179.
188. PARLIAMENTARY HISTORY, supra note 4, at 449.
intends to harm another, or acts with reckless disregard of the harm that is almost certain to result, he or she should bear the burden of the resulting harm and consequently compensate the victim.\(^\text{189}\)

Economic analysis can support this moral conception. The intent to cause harm will substantially raise the probability of harm. The benefit or utility of the act may be high to the actor but is socially not recognized as valid. For example, a soccer supporter might derive intense pleasure from injuring a supporter for the opposing team, but this is not considered to contribute to the welfare of society.\(^\text{190}\) The socially recognized utility of the act is zero and the cost of not engaging in the act (cost of taking care) is also zero. It is therefore socially optimal if the actor refrains from the act. The liability rules should be aimed at inducing the actor to refrain from these acts.

Not all intentionally inflicted injuries create inefficient costs. If someone acts in self-defense, the probability of harm may be great but the cost of refraining from the act is high because it includes the injury that the actor would otherwise suffer.\(^\text{191}\) Such an act should not be, and is not, considered unlawful.

**G. Summary**

Netherlands negligence liability is based on a violation of the standard of care. The legal standard is comparable to the economic standard of care. Many aspects of the way the standard of care is assessed are consistent with economic analysis. Both are based on the expected accident losses in relation to the cost of care to prevent such losses. In assessing the appropriate care, courts generally use an objective standard. The economic advantage of that choice is that it saves administrative costs. This objective standard may actually be above average level of care. This will induce people who tend to expose society to high costs to take the utility of their activities into account when deciding whether to participate. Under the NBW, courts have to use the standard of care of a sane and able-bodied person. They cannot take into account that the actor may have acted under the influence of a mental or physical disorder. The main economic advantage of this instruction is its potential to save administrative costs. Finally, courts must take into account that the actor might have intentionally caused the injury. This is economically understandable because the injury in these cases tends to be substantial while both utility and cost of preventing the accident are mostly absent.

**III. Vicarious Liability**

This section discusses liability for the wrongful or negligent conduct of

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189. Punitive damages are not awarded under Netherlands tort law. Damages may be higher in case of an intentional tort through the rules of causation and damage assessment. A.S. HARTKAMP, supra note 46, at 69.

190. See generally S. SHAVELL, supra note 9, at 146-47.

another, so called imputed negligence or vicarious liability. It focuses on two important areas of vicarious liability under Netherlands law: (1) the liability of parents for the wrongful conduct of their children; and (2) the liability of employers for the wrongful conduct of their employees.\footnote{192}

A. Parents

Under the BW, both the parents and the child may be held liable for a tort committed by the child.\footnote{193} Parents or guardians are held liable for the torts of their children under a rebuttable presumption of negligent supervision.\footnote{194} Under the NBW, a child under the age of fourteen cannot be held liable for negligence. The wording of the applicable clause is rather cryptic; it states that "an act\footnote{195} of a child that has not reached the age of fourteen cannot be attributed to it as an unlawful act."\footnote{196} It seems to imply that a child under the age of fourteen cannot commit an unlawful act.\footnote{197} Yet parents or guardians are held unconditionally liable for the injuries caused by an act of such a child which "could be attributed to it as an unlawful act but for its age."\footnote{198} Therefore, these clauses are generally construed to mean that a child can commit an unlawful act but cannot be held liable for it.\footnote{199} The child will commit an unlawful act when it violates the general standard of care applicable to adults. This can be interpreted to mean that the child's age and accompanying perceptions are to be disregarded in establishing due care.\footnote{200} With respect to children between the age of fourteen and sixteen, the BW regime applies. Parents are liable for the unlawful acts attributable to those children under a rebuttable presumption of fault on the part of the parents.\footnote{201}
Under the BW, the victim of an injury caused by a child often finds no recovery.\(^202\) This was experienced as unsatisfactory by victims as well as by parents. Parents often felt morally obliged to compensate the victim, yet had no legal obligation to do so and therefore no claim accrued on their liability insurer.\(^203\) The Netherlands Association of Liability Insurers remedied this situation. They included in their standard policy coverage for both intentionally and negligently committed torts by children.\(^204\) The impact of these insurance policies is extensive since approximately eighty-five percent of the households in the Netherlands carry liability insurance.\(^205\)

According to the parliamentary history, the justification to hold parents or guardians strictly liable is that:

on the one hand authority and control by the legal representative [of the child] can be regarded in general to be of direct influence on the conduct of the child and yet on the other hand reasonable control goes accompanied with the necessity to leave the child a certain freedom, which implies that risks are necessarily taken, of which, in principle, third parties should not become a victim.\(^206\)

The insurance practice is also named as an important consideration for holding parents strictly liable.\(^207\) The parliamentary history also refers to the advantage that risk-liability will abolish the difficult evidentiary questions that negligence liability, both of the child and the parents, causes.\(^208\)

Strict liability of the parents for the wrongful conduct of their children is a form of vicarious liability. Vicarious liability is, according to economic analysis, a remedy when tort liability provides insufficient deterrence for the actor because he or she lacks sufficient assets.\(^209\) Vicarious liability holds someone other than the actor liable; someone who can observe the level of care of the actor and control it. The better the second party's ability is to control the actor's behavior, the better this substitute for tort liability will work.\(^210\)

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203. See H. Schoordijk, supra note 78, at 370-71.


205. Id. at 1141. In 1974, at the time of the drafting of this part of the NBW, approximately 80% of the households insured for liability. Parliamentary History, supra note 4, at 679. Compare these figures with West Germany 60%, Belgium 55% and France 60-65% cited by F.T. Oldenhuis, supra note 197, at 7.

206. Parliamentary History, supra note 4, at 678.

207. Id. at 656. According to the parliamentary history, "insurance of risk liability will as a rule be available and indicated for the parent." Parliamentary History, supra note 4, at 679; also F.T. Oldenhuis, supra note 197, at 9.

208. Parliamentary History, supra note 4, at 656, 679.

209. S. Shavell, supra note 9, at 170-72.

It can certainly be argued that, generally, children lack sufficient assets to be deterred from inefficient behavior by tort liability. More importantly, however, is that children generally lack the awareness of norms to receive optimal incentives from tort liability. Parents are in a position to remedy this because they can exercise control over the child's conduct. To the extent that the parents can exercise control over the child's activities, vicarious liability may provide incentives to assure that the child takes optimal care. For example, a parent will take into account the full cost of liability in deciding whether to allow a child to ride a bike to school, to play in the street, or to play with a B.B.-gun. Yet, parents are only to a limited extent able to control the conduct of their child. Part of growing up is finding out when to obey and when not to obey instructions. The parliamentary history acknowledges this. Parents cannot fully control a child's behavior. To the extent that they cannot do so, the liability for a child's unlawful acts is strict liability. The advantage of strict liability is that the liable person will measure the full costs of accidents imposed on society by his or her participation in an activity against the utility he or she will derive from the activity. Landes and Posner recognize the limitations of influencing behavior through tort liability in this situation: "[I]t is unlikely that imposing liability on parents would significantly affect people's choice of whom to marry or how many children to have; in other words, activity level adjustments do not seem to be a promising method of reducing torts by children."

Surprisingly, the drafters of the NBW do not agree. Imposing strict liability on parents is in accordance with their responsibility for bringing a child into society. Parents not only have the duty to raise the child and care for it, they also have the duty to bear the cost of doing so, especially "in a society in which, as is increasingly the case, it was the parents' own decision whether and how many children they wanted." Another economic explanation of the choice of liability rules mentioned by the drafters regarding children and their parents is saving administrative costs. The fault based rules of the BW require two different and complicated inquiries. Both the level of care taken by the child and the level of care taken by the parents need to be examined. Under the NBW, the costs of these inquiries will

211. A.S. HARTKAMP, supra note 46, at 118; H. SCHOOREN, supra note 78, at 369-70.
212. Langemeijer writes that 
"[h]e who ... chooses, in a matter of speaking, to occupy a wider space in society than that of his person alone ... [e.g., employers, parents] ... may be required to have the awareness that this implies risk to his fellow men. ... [H]e has ... the duty to do anything within his power to reduce these risks. [This duty] does not guarantee that harm will not occur, [but] it reduces the chance that harm will occur." G.E. LANGESEIJER, supra note 33, at 73 (emphasis in original).
213. See cites above and PARLIAMENTARY HISTORY, supra note 4, at 656.
214. W.M. LANDAS & R.A. POSNER, supra note 13, at 121. Contrary to employers, parents lack the possibility of termination of the relationship. Sending the child to a boarding school will not relieve the parents of their liability.
215. PARLIAMENTARY HISTORY, supra note 4, at 679. The drafters acknowledge that this is different for guardians who are not the child's natural parent. This situation is comparable with the argument against strict liability for supervisors of mental patients. See supra section H.F.2.
216. PARLIAMENTARY HISTORY, supra note 4, at 679.
be reduced. Children will be held to the general standard of an adult. Liability is imposed on parents without any inquiry into their care. Both these changes will tend to raise the number of claims with respect to harm caused by children. The attitude of the insurance companies can be taken as an indication that, in this case, the savings in administrative costs caused by simplifying the liability regime outweigh the costs of extra claims.217

This situation is probably different for children between the ages of fourteen and sixteen. The drafters explicitly mention parents' lack of control over this age group as a reason for not holding parents vicariously liable. "Parents or guardians are . . . generally not in the position to preclude children of this age from certain activities, and often cannot be required . . . to take measures which would render such activities in general impossible."218 Holding parents strictly liable for the torts of this age group may raise the number of claims without beneficial effects on the number of torts committed.

In summary, Netherlands liability rules holding parents strictly liable for the negligent acts committed by children less than fourteen years of age are supported by economic analysis. Where parents are able to control the behavior of their children, vicarious liability will provide incentives for parents to assure that children take due care. Where this is not the case, strict liability will give the parents incentives to consider whether they want children in the first place. Finally, the liability rules for children and their parents save administrative costs. Whether parents actually need the threat of liability to be induced to assure that their children take optimal care, and whether or not potential liability rules will influence parents' decision on how many children to have, does not need to be answered here. There is no reason here to, as Landes and Posner do, deviate from the general assumption of economic analysis that behavior is controlled by a cost-benefit analysis.219 For this study, it is relevant that the rules for liability and the considerations for imposing this form of liability, as expressed by the drafters of the NBW, are consistent with economic analysis.

B. Employers

When an employee, in the course of his or her employment,220 causes injury by taking insufficient care, both the employer and the employee are liable.221 Under the BW, employers are held liable under an unrebuttable presumption of

217. Aantjes-Cozijnse & Klosse, supra note 204, at 1142. Aantjes-Cozijnse and Klosse expect that the NBW premiums for liability for children will rise contrary to the expectations expressed by the government in the parliamentary discussion.

218. PARLIAMENTARY HISTORY, supra note 4, at 680.

219. Their position may be influenced by the fact that the common law does not hold parents vicariously liable for their children's torts.

220. The literal text of article 6:170 NBW is more complicated than this. This description suffices. Compare F.T. OLDENHUIS, supra note 197, at 42-43, 63-66.

fault. Under the NBW, employers are held strictly liable for their employees' torts. In effect, both regimes are the same. The employee is liable based on the general tort provisions.

The employee who pays the damages has a right of indemnification against the employer. The employer has no right to indemnification against the employee, except when the harm was intentionally caused by the employee, or where the employee acted with "conscious recklessness" or when "the circumstances of the case indicate differently."

No consensus exists on the reason or justification for holding employers vicariously liable. In Sweegers v. Van de Hout, the Hoge Raad justified these general rules as a protection of employees based on the experience that employees, working daily with machines and tools, are easily tempted to not always take the required safety measures. The Hoge Raad also identified protection of the victim as a reason for holding the employer vicariously liable. According to Hartkamp, the rule of vicarious liability stems to a large extent from the desire to provide the victim with a solvent debtor. To enhance his point, he recites the fact that sixty-five percent of the businesses in the Netherlands are insured for liability claims. His impression is "that because of fairness considerations and in the interest of the community, the interests of the employer are made subservient to the interests of the injured."

Economic analysis identifies as the primary reason for vicarious liability of the employer, that it will provide better incentives for the employee to take care than personal liability is apt to do. This idea is based on the assumption that the employee lacks sufficient assets to pay a tort judgment. Optimal deterrence is frustrated when the tortfeasor's assets are less than the loss he or she may cause. By holding the employer liable for the employee's torts, the

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223. Art. 6:170 NBW.
224. Art. 1401 BW and Art. 6:162 NBW.
225. Art. 6:170 § 3 NBW.
226. A.S. HARTKAMP, supra note 46, at 132-33; F.T. OLDENHUIS, supra note 197, at 96; PARLIAMENTARY HISTORY, supra note 4, at 711. Meijers refers, among others, to the common law experience with vicarious liability. PARLIAMENTARY HISTORY, supra note 4, at 711-12.
227. HR 9 Jan. 1987, NJ 1987, 948, annot., AA 1987, 477, annot., Kwartaalbericht Nieuw BW 1988/1 31, annot. The Hoge Raad refers to Article 170 § 3 NBW to illustrate the general rule that employees are only required to carry (part of) the burden of liability for damage caused on the job, either to the employer, a third party or to the employee him or herself, when the employee was at "gross fault."
229. A.S. HARTKAMP, supra note 46, at 133.
230. See supra section III.A.
231. This can be demonstrated as follows:

<table>
<thead>
<tr>
<th>Care</th>
<th>Cost</th>
<th>Probability</th>
<th>Expected Accident Losses</th>
<th>Expected Liability (assets=20)</th>
</tr>
</thead>
<tbody>
<tr>
<td>care</td>
<td>5</td>
<td>15%</td>
<td>15</td>
<td>0</td>
</tr>
<tr>
<td>no care</td>
<td>0</td>
<td>25%</td>
<td>25</td>
<td>5</td>
</tr>
</tbody>
</table>
employer will have an incentive to insure that the employee takes due care or else to fire the employee. Whether, and to what extent, vicarious liability will provide the right incentive depends on the extent to which the employer can exercise control over the employee.232

Under Netherlands law, vicarious liability of the employer is for accidents caused by employees in the course of their employment, and is thus based on the control the employer can exercise over the employees' conduct.233 Indeed, "[the] limitation of the liability of the employee for afflicted damage leaves unaffected the possibility to impose on him because of his conduct other sanctions such as disciplinary measures and discharge."234 Furthermore, the employee does have to contribute to the liability payments when the injury was the result of his or her intent or conscious recklessness, unless the employer encouraged or ordered the reckless act of the employee.235 This is consistent with economic analysis because it provides an exception to the liability of the employer for the situation in which he or she cannot exercise control.236

The explanation provided by economic analysis is more satisfying than Hartkamp's justification for vicarious liability for employers, which is based on the assumption that employers are less risk averse than victims. Even if this might be true for a majority of employers (due, for example, to insurance), there is no indication that the status of the victim is of any relevance to the employer's duty to compensate. This is likely to result in inconsistent (and inefficient) hardships when the employer is risk averse and the victim is more or less risk neutral. Therefore, this alone is not a sufficient justification for vicarious liability for employers.237

The argument that the employee has insufficient incentive to take care due to a lack of assets does not explain why employers have no right to indemnification against the employee.238 Economic analysis may give an explanation for this rule. The conclusion that the employee lacks incentive to take due care because the employee has insufficient assets depends on the assumption of risk neutrality. Most people are not risk neutral, especially not when their whole wealth is at stake. A threat of liability to the extent of the employee's wealth is therefore

The loss that will result if an accident occurs is 100. It is efficient to take care since the cost of care is 5 and the reduction in expected accident losses is 10. Yet, if the tortfeasor's assets are less than 20, he or she will not take care since the expected liability payments are less than the cost of taking care. See S. Shavell, supra note 9, at 167.


233. The literal test of article 6:170 § 1 is: Where an employer has control over an employee's conduct, such an employee is liable, based on the legal relationship between the employer and the employee, for harm to a third party caused by the attributable unlawful act of an employee if the risk of the occurrence of such an act was increased due to the nature of the employees task.


238. Both would be efficient. S. Shavell, supra note 9, at 171.
just as likely to create overdeterrence as it is to create underdeterrence. Because of overdeterrence people will take too much care, or even decide not to engage in the activity at all, both of which would be a social waste. More importantly, as far as people do not have a choice whether to engage in employment or not, they would be forced to put their whole wealth at risk. Generally, the employer's assets will be larger and they are therefore better able to bear the risk. In relation to the employee, the employer is then less risk averse. Social welfare will be maximized by letting the risk fall with the least risk averse party, in this case the employer. 239

Finally, the rule against indemnification by the employer against the employee saves inefficient administrative costs. Optimal incentives are provided by the system of vicarious liability for the employee to take due care. As a general rule, indemnification would not contribute to social welfare. 240

The drafters of the NBW may have had related arguments in mind. The general rule that employers have no right to indemnification against the employee for unintentional torts has a broadly formulated exception. The last sentence of article 170, section 3 NBW reads that "[f]rom the circumstances of the case, seen also in the light of the nature of [the employer and employee's] relationship, a different result may follow...." The relationship of the employer and the employee is explicitly mentioned as a reason to deviate from the standard way of dividing liability. The examples the parliamentary history present to illustrate this exception are consistent with the economic analysis of vicarious liability. The drafters cite a case in which a CEO of a corporation commits a tort, and a case in which torts are covered by employee's liability insurance. 241 The parliamentary history does not explain these examples; but they can be explained through economic analysis. A CEO generally controls a corporation instead of vice versa. Liability of the corporation without a right of indemnification by the CEO would have an adverse effect on optimal deterrence. In the case where the employee is covered by liability insurance, the employee will be risk neutral. If the employer is more risk averse than the employee, denial of the right to indemnification would decrease social welfare.

In summary, economic analysis supports the Netherlands rules of vicarious liability of employers for the torts of their employees. The Netherlands rules are based on, and limited by, the control the employer has over his or her employee. Vicarious liability provides optimal incentives to the extent that the employer can control the employees' activities. Furthermore, the rules of indemnification between the employer and the employee increase social welfare because they are aimed at letting the risk fall with the least risk averse and they prevent inefficient administrative costs.

239. Id. at 172; Sykes, supra note 232, at 1235-36.
240. S. Shavell, supra note 9, at 174.
241. C.J. van Zeben & J.W. Du Pon, supra note 6, at 728. The drafters name as a third example that the employee uses his or her own car in the execution of his or her task. Both the insurance and the control argument seem applicable here.
C. Summary

The rules for vicarious liability are supported by economic analysis. Optimal incentives are provided for children and employees to take due care through the rules of vicarious liability of the parents and the employers. Arguably, strict liability will provide potential parents with incentives to take into account the costs that uncontrolled activities of children impose upon society. The rule of holding employers liable rather than employees for unintentional torts committed in the course of their employment is economically justified since this spreading of risk increases social welfare and avoids inefficient administrative costs.

CONCLUSION

Economic analysis of negligence and vicarious liability in Netherlands tort law has shown that they are, in many respects, consistent with economic principles. Netherlands tort liability can be conceived as aimed at maximizing utility while minimizing costs.

Economic analysis, however, does not replace the traditional analysis of law. Many aspects of the legal system can also, or sometimes better, be explained by reasoning not related to economic principles. This does not lessen the fact that economic analysis of law has proven to be of independent relevance to the analysis of Netherlands tort law.