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Understanding private law. On the work of Hans Nieuwenhuis, 1944-2015

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Core Concepts in the Dutch Civil Code

Continuously in Motion

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In memoriam

Understanding private law. On the work of
Hans Nieuwenhuis, 1944 – 2015

Thijs Beumers, Clementine Breedveld-de Voogd, Alex Geert Castermans, Ewout Cornelissen, Ruben de Graaff, Matthias Haentjens, Joris Hermeling, Teun van der Linden, Gitta Veldt, Stijn Voskamp and Jeroen van der Weide ■

Hans Nieuwenhuis' work is difficult to capture in a single sentence. It aims to impart an understanding of private law which, Nieuwenhuis says, requires an awareness of time, space and balance. We measure his work by his own yardstick.

INTRODUCTION

Leopold Bloom, the well-known character in James Joyce's *Ulysses*, was a reader who derived pleasure from reading 'literature of instruction rather than of amusement'. He sometimes turned to Shakespeare:¹

'for the solution of difficult problems in imaginary or real life. Had he found their solution? In spite of careful and repeated reading of certain classical passages, aided by a glossary, he had derived imperfect conviction from the text, the answers not bearing in all points.'

Hans Nieuwenhuis, professor of private law at Leiden University, wrote texts of instruction and amusement. Initially it is the new Dutch private law that is the focus of his work, the heart of which is formed by his thesis (1979), inaugural lectures in Tilburg and Leiden (1980 and 1982) and a series of

■ All authors are attached to the University of Leiden's Institute for Private Law. A Dutch version of this contribution has been published in *Ars Aequi*: 'Hoe begrip van burgerlijk recht mogelijk is. Over het werk van Hans Nieuwenhuis', *Ars Aequi* 65-9, pp. 835-840. The authors wish to thank Willem van Boom, Margreet Duynstee, Jaap Hijma, Wouter den Hollander, Marte Knigge and Henk Sniijders for their input, Kath Starsmore for the translation and John Cartwright for his careful reading.

1 J.A.A. Joyce, *Ulysses*, Penguin Modern Classics 1969, p. 598.

inspiring annotations in the law journal *Ars Aequi* (1985-1992). But following his foray to the Supreme Court (1992-1996) he concentrates more and more on the influence of Europe, the world, other legal systems and cultures on the development of private law. Not in order to counter distorting influences on the structure and content of national private law, but time and again to understand this area of law in its time and context. The culmination of his work is formed by *Een steeds hechter verbond* [An ever closer union] (2015), a triptych on enemy stereotypes, alliances and spoils of war in which he paints a picture of Europe as a community of values.²

It is a work 'of amusement', thanks to the author's literary talent and inspiring associations. And 'of instruction', because of its many layers and surprising insights. Anyone reading his work does not do so simply, like Leopold Bloom, to find the solution to a complex problem, but does so to learn to understand the problem and to learn to find the law, often on the basis of ideas and images from world history and literature.

When asked, Nieuwenhuis counted his early work *Legitimatatie en heuristiek van het rechterlijk oordeel* [Legitimation and heuristics of judicial decisions] as one of his three – naturally *three* – favourite publications. The reader has to battle his way through a rather abstract discourse, in which the position of deduction and heuristics in judicial decision-making is determined. Nieuwenhuis challenges the view that the importance of deductive reasoning to a judicial decision is no more than a 'pious sham':³

'The "pious sham" does not exist. Arriving at a judicial decision involves two different activities. On the one hand the "finding" of the decision. This is certainly not a logical, linear activity running from the rule via the facts to the decision, but rather a confrontation between (draft) rules, (draft) views of the facts and (draft) decisions.

This confrontation continues until the case "fits", i.e. until an acceptable decision has been found which meshes with an acceptable rule which in turn is in tune with an acceptable view of the facts. On the other hand, there is a need to *shape* the *justification* of the decision.'

What, then, is the correct shape?

'Whether that shaping can be said to be a success does not depend on whether or not it is a true reflection of the search strategy actually employed by the court, but on the degree to which it provides insight into the extent to which the grounds justify the decision.'

2 J.H. Nieuwenhuis, *Een steeds hechter verbond. Europa op weg naar Europa* [An ever closer union. Europe en route to Europe], Amsterdam: Balans 2015.

3 J.H. Nieuwenhuis, 'Legitimatatie en heuristiek van het rechterlijk oordeel' [Legitimation and heuristics of judicial decisions], *RM Themis* 1976, pp. 494-515, p. 501.

And yet what interests him most are the substantive grounds – civil law and civic morals. Nieuwenhuis poses the question: what does understanding private law require? The answer can be found in his speech to the meeting of the Literature department of the Royal Netherlands Academy of Sciences on 8 October 2007, his second favourite publication:⁴

‘spatial insight, an awareness of the passing of time and the ability to establish the weight of things which, as far as the balance is concerned, are at first sight *imponderable*.’

He is convinced that this triad actually exists in the world of law, and that it allows legal concepts to be rendered imaginable. Lawyers need this imagination in order to arrive at a considered judgment.

Virtually all of Nieuwenhuis’ publications contributed to the substantive strength of his readers’ work, by expanding their spatial insight and awareness of time, and by giving clear directions for the use of bathroom scales or balance. This common thread shows him to be a man who is utterly reliable. We have picked up the thread, in an attempt to interpret his legacy.

SPACE

According to Nieuwenhuis the spatial dimension of private law can be depicted in three ways. Jurists should define the space by focusing on departure *point* and goal and then checking the *line* along and *plane* across which the goal is to be reached.

Take the departure point of liability law that each party should bear their own loss. Only a claimant who successfully ‘hops’ along the requirements for liability arising from a tort reaches the other extreme of the spectrum, full compensation.⁵ These requirements may be construed in different ways: as a sharp *line* or as a *plane* with vague contours.⁶

Or contract law, which is:⁷

4 J.H. Nieuwenhuis, *Hoe is begrip van burgerlijk recht mogelijk? Drie vormen van voorstelling: ruimte, tijd, gewicht* [How can private law be understood? Three forms of representation: space, time and weight], Amsterdam, KNAW Press 2008, p. 8; also in *RM Themis* 2007, pp. 227-240, p. 228.

5 J.H. Nieuwenhuis, ‘Hinkelspel rond de boom der kennis van goed en kwaad’ [Hopscotch around the tree of the knowledge of good and evil], in: J.H. Nieuwenhuis, *Waartoe is het recht op aarde?* [What is the purpose of justice on earth], The Hague: Boom Juridische uitgevers 2006, pp. 5-32; also in: J.H. Nieuwenhuis & C.J.J.M. Stölker (ed.), *Vooruit met het recht* [Advancing the law], The Hague: Boom Juridische uitgevers 2006, pp. 1-18.

6 J.H. Nieuwenhuis, ‘Hoi topoi’, in: J.H. Nieuwenhuis, *Confrontatie en compromis* [Confrontation and Compromise], Deventer: Kluwer 2007, pp. 81-90

7 J.H. Nieuwenhuis, ‘Wat mogen koper en verkoper van elkaar verwachten?’ [What can buyer and seller expect of each other?], *WPNR* 1998, p. 157.

‘a forest of expectation. Sometimes the path comes to a fork: did the item sold come up to what the buyer was entitled to expect? Yes or no? But there are also open spaces, where the path can continue in more than two directions. Could the disappointed expectation be the fault of both parties? The position of the compass needle is in that case decided by the question of the extent to which the circumstances attributable to each party contributed to that disappointment.’

Nieuwenhuis leans towards the compass needle. Following his research into the principles underlying the law of contract (*Drie beginselen van contractenrecht* [Three principles of the law of contracts])⁸ he moves into the border regions between contract law and property law (*Uit de ban van hier en nu* [Breaking the spell of the here and now]),⁹ between contractual and non-contractual liability law (*Anders en eender* [Different and yet the same]),¹⁰ and between fault-based and strict liability (*De ramp op het Pikmeer* [The Pikmeer disaster]).¹¹ He describes the spatial planning of modern private law as a ‘system of transitional forms’, which can be found between ownership and obligation,¹² between non-performance and tort (a *mixed* right of action),¹³ but also between general termination and annulment.¹⁴ He traces rules back to principles which in turn are determined by the space in which they operate: by how the world *is* arranged and by how it *should be* arranged.¹⁵

The principal task of private law according to Nieuwenhuis is to ‘regulate legal relationships’, not to confer subjective rights which an interested party can use as it sees fit.¹⁶ He is interested in coordination between rules of law,

8 J.H. Nieuwenhuis, *Drie beginselen van contractenrecht* (dissertation, Leiden), Deventer: Kluwer 1979.

9 J.H. Nieuwenhuis, *Uit de ban van hier en nu. Ontwikkelingen op het gebied van de overdracht van roerende zaken bevattende tevens enige beschouwingen omtrent de status van overgangsvormen in het privaatrecht* [Breaking the spell of the here and now. Developments in the field of the transfer of movable goods, also containing some thoughts on the status of transitional forms in private law] (inaugural lecture Tilburg), Deventer: Kluwer 1980.

10 J.H. Nieuwenhuis, *Anders en eender. Beschouwingen over samenloop van wanprestatie en onrechtmatige daad* [Different yet the same. Thoughts on the convergence of non-performance and tort] (inaugural lecture Leiden), Deventer: Kluwer 1982.

11 J.H. Nieuwenhuis, *De Ramp op het Pikmeer. Bezwaren tegen de geest van het postmoderne aansprakelijkheidsrecht* [The Pikmeer disaster. Objections to the spirit of post-modern liability law] (inaugural lecture Groningen), Deventer: Kluwer 1997.

12 *Uit de ban van hier en nu*, p. 112. In Nieuwenhuis’ view there are various types of ownership transfer of movable goods, with transfer and actual handover being ‘decoupled’. He refers to transfer by means of ‘traditional papers’ (bill of lading, warehouse warrant), retention of title and delivery in advance. See *Uit de ban van hier en nu*, p. 8.

13 Nieuwenhuis supports the view that in the event of convergence between non-performance and tort there is a ‘mixed right of action’. See *Anders en eender*, pp. 27-30.

14 J.H. Nieuwenhuis, ‘Vernietigen, ontbinden of aanpassen (I), Wat is het lot van teleurstellende overeenkomsten?’ [Nullify, terminate or modify (I), What is the fate of disappointing contracts?], *WPNR* 1995, pp. 23-26, part II (and conclusion), *WPNR* 1995, p. 37-41.

15 *Drie beginselen van contractenrecht*, p. 41.

16 *Anders en eender*, p. 15.

not simple solutions. He opposes both the unconditional exclusivity of contract law and the unlimited competence of a claimant to rely on the rule most favourable to him.¹⁷ He describes the maxim *lex specialis derogat legi generali* as a ‘totally unreliable compass’: a specific rule does not automatically override a general rule.¹⁸ The sharp distinction between fault-based and strict liability is ‘totally unsound’: ultimately it is a question of whether a person could have acted in a manner other than he did,¹⁹ based in Nieuwenhuis’ view on the tort category of ‘infringement of a right’.²⁰ The landscape of remedies too has become ‘less rough’. Instead of general termination and annulment, modification of the agreement is preferred, e.g. by lowering the purchase price or reducing reciprocal performances.²¹

‘So, dissolution and annulment only if the tears of the disappointed contracting party cannot be dried in any other way.’

Yet Nieuwenhuis himself also has to make choices. In *Uit de ban van hier en nu* he introduces the concept of ‘contractualising the transfer of ownership’ in Dutch private law.²² Nieuwenhuis’ aim with this concept is to entice the legislator to scrap the requirement of the transfer of possession when delivering movable goods and to embrace the so-called real agreement, so as to create as great a degree of flexibility as possible for the parties: ‘in with the real agreement, out with the requirement of handing over possession.’²³ Brunner praises Nieuwenhuis’ ability to let off brilliant fireworks, but adds that they may dazzle the reader.²⁴ The tide is against Nieuwenhuis. When the new Dutch Civil Code was introduced the legislator stuck to the acquisition of possession as the form of delivery of movable goods and the legitimating function of possession.²⁵ Nonetheless, the additional requirement of a real agreement is still defended by many, even if this requirement is not explicitly laid down in the law.

17 See also J.H. Nieuwenhuis, ‘They still rule us from their graves’, *WPNR* 2007, p. 5.

18 See later also J.H. Nieuwenhuis, ‘Fraudulent thoughts. On the position of the general and the particular in law’, *RM Themis* 1997, pp. 41-42; J.H. Nieuwenhuis, ‘The fraudulent transfer seen as a claim under tort’, in: L. Timmerman (ed.), *Vragen rond de faillissementspauliana* [Questions concerning the action to set aside a fraudulent conveyance] (Insolad Yearbook 1998), Deventer: Kluwer 1998, pp. 51-64.

19 J.H. Nieuwenhuis, ‘De tuinman en de dood’ [Death and the gardener], *RM Themis* 1989, pp. 193-201, also in J.H. Nieuwenhuis, *Confrontatie en compromis. Recht, retoriek en burgerlijke moraal*, [Confrontation and compromise. Law, rhetoric and bourgeois morality] Deventer: Kluwer 2007, pp. 129-140.

20 *De ramp op het Pikmeer*, pp. 19-22.

21 *Vernietigen, ontbinden of aanpassen (I)*, p. 25.

22 *Uit de ban van hier en nu*, p. 18.

23 *Uit de ban van hier en nu*, p. 9 and 83.

24 C.J.H. Brunner, ‘J.H. Nieuwenhuis/Uit de ban van hier en nu, inaugural lecture Tilburg University’, *RM Themis* 1982, pp. 36-43.

25 Sec. 3:90(1) *BW*.

In *Anders en eender* Nieuwenhuis formulates three points of view to coordinate the convergence of non-performance and tort: a gap in the one regulation should be plugged by a norm from the other cause of action, a general rule should defer to a concrete rule, in the case of two concrete provisions the contractual rule should prevail.²⁶ After all, problems of concurrence are encountered more often at a fork in the road than in an open space in the woods. Even though Nieuwenhuis stresses that it is 'a typology and not a chest of drawers', it again meets with criticism from Brunner, who argues that Nieuwenhuis is in danger of ending up in the 'camp of the exclusive', if he isn't already in it.²⁷

So can we expect no sharp lines from Nieuwenhuis? Far from it. Not everything can be mixed and merged. His criticism is severe when the Supreme Court fails to settle a point or draw a sharp line but instead uses the plane for the figure of precontractual liability²⁸ and for the figure of proportional liability.²⁹ Two *inclined* planes, according to Nieuwenhuis, that are at odds with the system of the law, which after all allows an offer to be retracted and prohibits the award of damages if the requirement of causality is not met, or at least not in full.³⁰

The requirement of causality presented a problem for the DES daughters as well. They were unable to prove which manufacturer had supplied the medication their mothers had taken during pregnancy and which later in life caused cancer in these daughters. In their case it is not the plane, liability according to market share, but the sharp line that is appropriate: reversal of the burden of proof, applying section 6:99 of the Dutch Civil Code (*BW*). Even though this solution too, just like proportional liability, undermines 'one of the traditional pillars of the law of liability, the requirement that it be established that the defendant did actually cause the damage'.³¹ The line of reason-

26 *Anders en eender*, pp. 32-40.

27 C.J.H. Brunner in his discussion of Nieuwenhuis 1982, *WPNR* [weekly journal] 1983, p. 659.

28 HR [Supreme Court] 18 June 1982, ECLI:NL:HR:1982:AG4405, *NJ* [Dutch Case Law] 1983/723 (*Plas/Valburg*).

29 HR [Supreme Court] 31 March 2006, ECLI:NL:HR:2006:AU6092, *RvdW* [Judicial decisions online] 2006/328 (*Nefalit/Karamus*).

30 J.H. Nieuwenhuis, 'Point of no return', *RM Themis* 1989, pp. 467-468; J.H. Nieuwenhuis, 'Disproportionele aansprakelijkheid' [Disproportional Liability], *RM Themis* 2006, pp. 177-178.

31 J.H. Nieuwenhuis, 'Alternatieve causaliteit en aansprakelijkheid naar marktaandeel' [Alternative causality and liability according to market share], in: *Productenaansprakelijkheid. Preadvieszen uitgebracht voor de Vereniging voor Burgerlijk Recht* [Product Liability. Preliminary recommendations issued for the Dutch Society for Private Law], Koninklijke Vermande publishers: Lelystad 1987, p. 15.

ing can be discerned in the Supreme Court's ruling,³² much to the author's satisfaction.³³

So with Nieuwenhuis legal rules have both an open and a closed dimension. Open, because they are 'responsive to external influences and imperfect'.³⁴ For example, the impact of social, medical and technological developments has been to bring agreements on surrogacy into the spatial domain of contract law.³⁵ But closed as well, part of and confined by the system and the systematics of the law. An embryo created through *in vitro* fertilisation is not a natural person outside the womb and according to Nieuwenhuis is not covered by the fiction of section 1:2 *BW*.³⁶ A woman cannot be a little bit pregnant; section 1:2 *BW* contains a – literally – *spatial* boundary. For the time being at least, because private law is a living thing.

TIME

Understanding private law is impossible without a conception of time. After all, the law matures. It is the work of man, like the construction of cathedrals. Through increasing ingenuity people were able over the centuries to raise cathedrals higher and make them lighter. In the same way ideas in the law – like freedom of contract – are the work of man, in which growth, maturity and decay can be discerned.³⁷

It is in literature, among other places, that Nieuwenhuis finds the views held by society. To be precise, in the books that have found a sustained response, with the number of reprints counting more than high sales figures. It is a

'list of narrative prose which every jurist should read and re-read, not because it will benefit their general development and speaking and writing skills, but more so because this canon constitutes the foundation of unwritten law: reasonableness

32 HR [Supreme Court] 9 October 1992, ECLI:NL:HR:1992:ZC0706, *NJ* [Dutch Case Law] 1994/535.

33 J.H. Nieuwenhuis, 'Eenzame hoogte: het DES-arrest' [Lonely Heights: the DES ruling], *Ars Aequi* 2010, pp. 417-419.

34 *Anders en eender*, p. 13.

35 J.H. Nieuwenhuis, 'Promises, promises. Over contracten en andere afspraken' [On contracts and other agreements], *NJB* [Journal for Dutch lawyers] 2001, edition 37, pp. 1795-1799.

36 'Het kind waarvan een vrouw zwanger is wordt als reeds geboren aangemerkt, zo dikwijls zijn belang dit vordert [The child a woman is expecting shall be deemed to have already been born whenever its interests so dictate].'

37 *Hoe is begrip van burgerlijk recht mogelijk* [How can private law be understood], p. 18.

and fairness as pillars of the law of contract and the unwritten duty of care as a cornerstone and touchstone of the liability arising from an unlawful act.³⁸

We do not come across *Ulysses* in the list, but we do find Greek tragedies. Where the 'tragic core of the law' demands a response to injustice that has been done, the *Oresteia* turns out to be an exercise in revenge imposed by the gods.³⁹ The Laws of the Twelve Tables dictate an eye for an eye, a tooth for a tooth. These days it is the acknowledgement by the tortfeasor that his actions were wrong, whether or not accompanied by compensation for the damage caused. So Leopold Bloom assessed the possible responses to his wife's adultery:⁴⁰

'What retribution, if any? Assassination, never, as two wrongs did not make one right. Duel by combat, no. Divorce, not now. Exposure by mechanical artifice (automatic bed) or individual testimony (concealed ocular witnesses), not yet. Suit for damages by legal influence or simulation of assault with evidence of injuries sustained (selfinflicted), not impossibly.'

We are clearly dealing with advancing human insight which, as always, needs perfecting.

Timeless works help us in formulating social views and in the process of fleshing out unwritten law. Furthermore, they sharpen the empathy we need to pass judgement in concrete cases. The Old Testament – you cannot get more timeless – is a source often consulted, for example, to gain an understanding of the tensions between fault and risk. In his valedictory address, Cain – Am I my brother's keeper? – and Abel form the introduction to a discourse on the increasing role of strict liability and the decreasing role of fault.⁴¹ Previously, Job had been discussed in order to be able to understand the 'claim culture', just as Deuteronomy 23:20 – You may not charge interest if you lend something to a brother – stood model for views held in society, together with the Koran and Shakespeare's *The Merchant of Venice*, incidentally.⁴²

European private law too is a living thing, which in Nieuwenhuis' work shows itself through the canon of literature. In his last book Nieuwenhuis

38 J.H. Nieuwenhuis, 'De zeven zuilen van het ongeschreven recht' [The seven pillars of unwritten law], *NJB* 1999, p. 2130. This theme is also the focus of J.H. Nieuwenhuis, *Orestes in Veghel. Recht, Literatuur, Civilisatie* [Law, Literature, Civilisation], Amsterdam: Uitgeverij Balans 2004, see pp. 7-10.

39 *Orestes in Veghel*, pp. 13-26.

40 James Joyce, *Ulysses*, Penguin Modern Classics 1969, p. 654

41 J.H. Nieuwenhuis, *Paternalisme, Fraternalisme, Egoï'sme. Een kleine catechismus van het contractenrecht* [Paternalism, Fraternalism, Egoism. (valedictory speech Leiden), Leiden: Leiden University 2009, p. 11; also in *NJB* 2009/1711. Cain and Abel also feature (more extensively) in *Orestes in Veghel*, pp. 57-76.

42 J.H. Nieuwenhuis, *Het vierspan, Eigendom, Contract, Persoon, Staat*, [The team of four, Ownership, Contract, Person, State] Zutphen: Paris 2013, pp. 155-161.

searches for the pillars on which the European community of values rests. In the first part, *enemy stereotypes*, he focuses on armed struggle as the father of the peoples of Europe. Some enemies came from outside:

‘These enemies were after European territory. Persians demanded land and water from the Greek city states as a mark of subjection. Carthaginians stood before the gates of Rome (*Hannibal ad portas*), Huns and Moors got as far as Paris in the fifth and eighth centuries respectively.’⁴³

Other enemies were chosen by the peoples of Europe:⁴⁴

‘In 326 BC the Indian king Poros was forced to battle against Alexander the Great and his allies. In the first century AD the Berber kingdom of Mauretania was annexed by the Roman Empire. In 1521 Hernan Cortes defeated the Aztec army of king Cuauhtemoc. Mexico City rose out of the ashes of the conquered capital Tenochtitlan.’

These centuries of conflict marked the continent and, according to Nieuwenhuis, should be cherished. War constitutes the cradle of European art and literature, which depicts and describes the public enemies of olden times. Through these we get to know others, and hence ourselves and our *allies*:⁴⁵

‘Literature is an essential deepening of language, understood to be our temple. Dreverhaven, Boorman and Havelaar are as much a part of our idiom as the grammatical rule that brands “Them are right.” as unconventional and the semantic convention that determines the meaning of “snigger” (half-concealed mocking laugh). Literature is our window onto the outside world, our neighbours’ temples of language. “Many cities did he visit, and many were the nations with whose manners and customs he was acquainted.” As an armchair traveller with *Crime and Punishment* in our hand we get to know St. Petersburg in the nineteenth century through the eyes of Raskolnikov better than with the aid of a Baedeker of that period.’

Through imagination we acquire an understanding of the shared values of the European community, a *spoil of war* cherished and defended by Nieuwenhuis:⁴⁶

‘Values constitute the foundation of the European Union, but they are also windows offering a view of an alluring prospect: an earthly paradise of freedom, equality and fraternity. The fact that the horizon is beyond reach is no reason not

43 *Een steeds hechter verbond*, p. 23.

44 *Een steeds hechter verbond*, p. 23.

45 *Een steeds hechter verbond*, p. 146.

46 *Een steeds hechter verbond*, p. 19.

to continue along the path taken in 1957 in Rome towards an ever closer union between the peoples of Europe.'

A passionate plea for Europe, and even for a European Civil Code – and that in spite of the spirit of the time, which is dominated by euroscepticism and deregulation. It is characteristic of Nieuwenhuis, who was especially interested in the follow-up questions. How do we put meat on the bones of the European integration project? How can *European* private law be understood?

WEIGHT

An awareness of space and time is not enough. Ultimately lawyers need to balance interests. And that is what they really do. Interests have a *real* weight.⁴⁷

'The weight of an interest is the argumentative force that interest develops in a legal dispute.'

In many places in his work Nieuwenhuis searches for seemingly imponderable interests. His attention is drawn by new reproduction techniques. How should the law deal with agreements on surrogate motherhood? Is an agreement to give birth to a child and to hand it over to someone else immoral and hence void (art. 3:40 *BW*)?

'The conclusion that handing over the child is an immoral act is difficult to maintain in an era in which fertility clinics engage in implanting embryos from commissioning couples into surrogate mothers with the approval of the minister of health. Indeed, the unmistakable purpose of this socially accepted form of medical service is that after birth the child will be handed over to the commissioning couple.'⁴⁸

As a result of all the progress made it is no longer even certain who the mother of the child is: the genetic mother or the birth mother? But have we come to the point where the performance of agreements on surrogacy can be enforced at law?⁴⁹

A considered judgement regarding the enforceability of surrogacy agreements comes down to the weight and the balancing of the interests of the child and of all its parents concerned at the time the surrogate mother changes her mind. If there has been no performance at all of the agreement, it will be impossible to hold the surrogate mother to the agreement. Obliging the woman to undergo implantation of the embryo is going too far for Nieuwenhuis. But

47 *Hoe is begrip van burgerlijk recht mogelijk*, p. 24.

48 *Promises, promises*, p. 1797.

49 *Promises, promises*, p. 1797-1798.

the situation changes if implantation has resulted in pregnancy, due to the genetic relationship of the embryo and the commissioning parents. The situation changes again when the pregnancy is full-term and the child has already been handed over to the commissioning parents and grows up with them. As Nieuwenhuis writes, in that case a court ruling holding the woman to her original promise deserves serious consideration.⁵⁰

Nieuwenhuis regularly turns his attention to the *Valkenhorst* case law, in which the Supreme Court decided that the right of a child that had come of age to know from whom it was descended was not absolute, but that its interest did in principle weigh heavier than the interest of the mother to respect for her private life.⁵¹ When during lectures he talked about the Evans case, he invariably lowered his voice and said: ‘On any view the 10th October was a terrible day in Natallie Evans’ life’. He continued by saying that it was not the opening sentence of a novel by Jane Austen, but the first sentence, literally, of the judgment in the said case, in which the Court had to rule on the question of whether Natallie Evans, contrary to her ex-partner’s wishes, could have the embryo they had created implanted.⁵²

In his essay ‘Who fathered me?’ Nieuwenhuis wonders whether genetic selection should be allowed, starting with gender selection. Should parents be given the right to determine what the gender of their next offspring should be? Or have we here reached the boundary of human interference in the domain of life and death? Nieuwenhuis is clear on this point: it should be allowed. He considers the risk of mass selection of one of the two genders to be extremely small; family balancing will in most cases be the motive, as for most people having a child feels like receiving a gift.⁵³

‘This is countered by the fact that future spouses have an interest in to some extent regulating the stream of gifts. Three gourmet sets is too much of a good thing. A wedding list placed on internet (...) offers a solution. So why not open up the possibility (...) on the occasion of IVF treatment of opting for a son?’

Three daughters and three gourmet sets. Of course they are disparate quantities, but that does not mean that the choice of ‘not another daughter’ is imponderable. Will allowing ‘deselection’ of an embryo on the grounds of gender lead to other selections, on grounds of the risk of breast cancer, of intelligence or athletic abilities? On this point Nieuwenhuis takes the quickest exit: this type of selection is for the time being pure science fiction, *we will*

50 *Promises, promises*, p. 1798.

51 HR [Supreme Court] 15 April 1994, ECLI:NL:HR:1994:ZC1337, NJ 1994/608, with note WH-S. Cited in *inter alia*: J.H. Nieuwenhuis, *Kant & Co*, Amsterdam: Uitgeverij Balans 2011, pp. 58-60; J.H. Nieuwenhuis, ‘Kinderwens’ [Desire to have children], *RM Themis* 1999, p.73-74; *De zeven zuilen van het ongeschreven recht*, [The seven pillars of unwritten law] pp. 2134-2135.

52 *Kant & Co*, pp. 11-15.

53 *Kant & Co*, pp. 64-73, p. 70.

cross that bridge when we come to it. Anyone reading Nieuwenhuis will not always be given the solution, but will always be handed arguments.⁵⁴ *Impponderables*, interests that cannot be weighed, do not exist for a lawyer, as long as the right questions are asked.

Thus Nieuwenhuis writes about the Baby Kelly ruling, in which the question arises as to whether there is any such thing as the right not to be born, and whether it is possible to bring a claim for a handicapped life:⁵⁵

'Is Kelly suffering a loss? Is living, with or without a handicap, not more valuable than not living? I am fairly certain that this question, put in this way, cannot be answered, at least not in a way that can count on broad support. I myself retain the best of memories of the years *prior to my birth*.'

Anyone who misses out on income as a result of an unlawful act committed by another is entitled to compensation for loss of income. Their lost working capacity is calculated in *concrete* terms. From the traditional point of view this requires a *truthful* prediction of the person's hypothetical working capacity and hence an investigation into all relevant personal circumstances. In the case of a 50-year-old paving contractor with incipient knee complaints the loss will probably be considerably lower than in the case of a young woman with an academic education. But does this do justice to the position of the victim? The victim not only has an interest in remaining ignorant of intimate information concerning his or her hypothetical life: an increased risk of cancer, a predisposition to psychological disorders, their chances on the matrimonial market. It could also be that the victim would benefit far more from maximising the possibilities *after* the accident, than from a claim based on a picture of the victim's life if the accident had not happened.⁵⁶ In this way an understanding of the interests to be balanced and their weight will ultimately lead to an alternative to the previously standard solutions.

Once in a while Nieuwenhuis appears to have little time for *weight watchers*. In his research into the possibilities of multicultural law he advises the working members of the *Netherlands Lawyers Association* not to weigh precisely interests based on religion or ideology. Multicultural law would benefit more from

54 Other examples: freedom of contract and human dignity, justice and welfare, and written and unwritten law. See J.H. Nieuwenhuis, *Waar toe is het recht op aarde?*, The Hague: Boom Juridische uitgevers 2006, p. 27 and 46-48, and *Orestes in Veghel*, pp. 39-56, respectively.

55 J.H. Nieuwenhuis, 'Hellend vlak, Kelly en de claimcultuur' [Inclined plane, Kelly and the claim culture], *NJB* 2003, p. 1381.

56 J.H. Nieuwenhuis, 'Wat is waarheid? Waarheidsvinding en privacy in het letselschaderecht' [What is truth? Establishing the truth and privacy in personal injury law], in: D.H.M. Peeperkorn (ed.), *Waarheidsvinding en privacy* [Establishing the truth and privacy], The Hague: Sdu uitgevers 2005, pp. 83-95.

mutual acknowledgement as a fully fledged participants in society, which confers rights and obligations that are the same for everyone.⁵⁷

HIS SEASON WAS SPRING

In the end everything has its basis in his third favourite, *Hoofdstukken Vermogensrecht* [Chapters on private law]. From the foreword:⁵⁸

‘A first acquaintance with positive law requires a firm line of reasoning. Time and again questions of law are answered with yes or no, words many a mature lawyer has long forgotten.’

To continue:

‘Putting things into perspective is the next step. We need to pave a way for transitional forms of, for example, ownership and right of action, unlawful acts and non-performance. This is only possible after the contours of these legal concepts have first been sufficiently sharply defined. The emphasis here is totally on this preparatory work.’

To the last Nieuwenhuis was involved in educating and training young lawyers. For more than forty years first-year students of law have been reading his *Hoofdstukken*. Shortly before his death foreign master’s students followed him on a cycling tour of the bulbfields north of Leiden, after taking a course on *Comparative Tort Law*. He had planned another tour with young colleagues to Louvain, Belgium. Two days after his death on 18 June 2015 they went, following his directions.

What have we gained from this preparatory work and from putting it into perspective? The question of valorisation can be answered by the decision of judge Woolsey who eleven years before Nieuwenhuis was born had to pass judgment on the morality of *Ulysses*, the book written by James Joyce. Should this book full of obscenities be suitable for the eyes of the judge’s youngest daughter? Should it be judged by the more liberal standards of Learned Hand? Woolsey was convinced that the time was ripe for according greater weight to the integrity of the author. Although the decision does not reveal how he arrived at this judgment – with ‘something stronger than sherry’ and ‘a

57 J.H. Nieuwenhuis, *Multicultureel recht: hoe is het mogelijk?* [Multicultural law: how is it possible?] (Handelingen Nederlandse Juristen-Vereniging 2008-I), Deventer: Kluwer 2008, p. 164.

58 J.H. Nieuwenhuis, *Hoofdstukken vermogensrecht* (11th edition, edited by M.C.I.M. Duynstee and O. Nieuwenhuis), Deventer: Kluwer 2015, Foreword to the first edition.

dripping razor in his left hand⁵⁹ – the grounds bear witness to spatial understanding, awareness of time and an ability to balance.⁶⁰

‘The words which are criticized as dirty are old Saxon words known to almost all men and, I venture, to many women, and are such words as would be naturally and habitually used, I believe, by the types of folk whose life, physical and mental, Joyce is seeking to describe. In respect of the recurrent emergence of the theme of sex in the minds of his characters, it must always be remembered that his locale was Celtic and his season spring.’

Hans Nieuwenhuis: *his season was spring*.

Further reading

Otto Nieuwenhuis has placed the annotations, articles, books, lectures and reports of Hans Nieuwenhuis on a special website at Leiden University. The majority is open access. The readers are cordially invited to visit <www.law.leidenuniv.nl/nieuwenhuis>.

59 K. Birmingham, *The most dangerous book, The battle for James Joyce's Ulysses*, New York: Penguin Books 2014, pp. 319-328.

60 District Court for the Southern District of New York 6 December 1933, 5 F.Supp. 182 (*United States/One Book Called 'Ulysses'*).