De toepassing van de vereisten van causaliteit, relativiteit en toerekening bij de onrechtmatige overheidsdaad

Di Bella, L.

Summary of concluding observations

Application of the causality, relativity and imputability requirements to wrongful government acts

SUMMARY

Purpose of the research, issue and approach

This doctoral research focuses on the government's special position under the law of wrongful acts. The research was prompted by the existing unpredictability in answering the following question: when can the government successfully be held liable for wrongful acts? The assumption underlying this study is that such uncertainty is largely due to the ambiguity surrounding the doctrine of wrongful government acts. For the government to be liable for a wrongful act, the same requirements apply as for private parties, to wit, the requirements of Section 6:162(1) of the Dutch Civil Code (DCC). Thus, on the one hand, the subject encompasses private-law concerns. On the other hand, government acts typically have a public-law component to them as well. The public-law nature of government conduct not only affects the wrongfulness requirement, but also extends to Section 6:162(1) DCC's other requirements. In my research, I have charted how this is manifested in the current law. I did this by examining in which respects the requirements of Section 6:162(1) DCC are applied differently to wrongful acts by the government than to wrongful acts by private parties. This has provided greater clarity about the government's position under the law of wrongful acts and the scope of the government's liability for such acts. I then tried to ascertain the possible reasons for the distinction found.

The overarching issue presented by my research is:

To what extent does the government occupy a special position in terms of damages for wrongful acts by it, in the sense that the liability requirements for wrongful acts in Section 6:162(1) DCC are applied differently to the government than to private parties? How must the discrepancies found be assessed in light of the current paradigm of the law?

The comparisons described in the study relate to the relativity and causality requirements. These areas have given rise to a lot of discussion and criticism about the application of these concepts to wrongful government acts, and case law has not settled the matter yet. I have also considered the question of imputation of wrongful acts to the government (Section 6:162(3) DCC). Specifically, when the imputation requirement is applied to government decisions which are overturned, strict liability (or pseudo-strict liability) is created. Consequently, the application of the imputation requirement to the government is clearly different than the application of it to private parties. Before I investigated how the aforementioned substantive requirements are currently applied, I first examined the history behind the choice to include government liability for wrongful acts under Section 6:162 DCC, in order to gain more insight into the motivation for this choice, which is not an obvious one.

History

The notion that the government can be held liable under the Civil Code for violating private-law norms was accepted early on. There was much debate, though, about whether the government was or should be liable, too, if it transgressed public-law norms. This discussion can be sub-divided into different periods. From 1848 to 1910, the ideas regarding such 'public-law wrongful acts' were strongly linked to the discussion about the implementation of an administrative justice scheme. The intention then was that the doctrine would fall under such a scheme. There was a consensus of opinion that the civil-law wrongful act sections in the DCC did not apply to the government's violation of public-law norms and that a separate scheme was desirable in this regard. In those days, it went without saying that a scheme of government liability for public-law violations would have to differ from the sections in the DCC concerning wrongful acts. The primary reason mentioned was that the government acts in the public interest. However, the proposals for an administrative justice scheme did not, in the end, include any provisions about wrongful government conduct. The persons drafting these proposals felt that the substance of the doctrine was not yet sufficiently established and that it was too complex to be set out in the proposed administrative justice scheme.

It was apparent around 1910 that an administrative justice scheme would not be implemented any time soon. Yet discussions about the government's liability, or not, for violating public-law norms continued in the literature. In its famous *Guldemond v. Noordwijkerhout* decision in 1915, the Dutch Supreme Court expressly held that it was the civil courts that had jurisdiction to hear claims about civil-law violations, even if the underlying legal relationship was based on public law. Liability for public-law violations, however, was only accepted if the government had infringed an individual's personal private rights. The *Ostermann* decision in 1924 changed this. That decision accepted for the first time that the government's mere violation of a public-law statutory provision was wrongful within the meaning of the DCC. The fact that this wrongful act was committed to fulfil a public-law responsibility did not alter the situation. Obviously, the court sought in this way to fill in the gap in legal protection against the government. Starting with *Ostermann*, then, the civil-law wrongful act sections likewise became applicable to wrongful government conduct based on violations of public-law norms.

In a Royal Decree on 25 April 1947, Professor E.M. Meijers was instructed to formulate a new Civil Code. In connection with this, the question cropped up in 1953 whether specific provisions about wrongful government acts ought to be included in this. The then Minister of Justice did not think so. To his mind, the subject was still not ready for codification (even then), because its development was still in full swing in case law. He felt that a generally accepted, recognised formula for wrongful government conduct had not yet been devised. The government wondered, too, whether such a provision needed to be part of the DCC or an administrative justice scheme.

In 1963, the Administrative Decrees (Appeals) Act made it possible to appeal decisions by the central government to the Crown. The intention was that a substantive-law scheme for wrongful government conduct would be introduced at the same time as this Act. The draft scheme, called the 'Wrongful Conduct by Government Bodies Act', contained substantive criteria on wrongful government acts which should be applied by the civil courts. The major difference with wrongful acts under the Civil Code Transition Act was that the duty of care standard involved the duty of care 'befitting a public body'. Weight was explicitly given to the public interest and the government's discretionary power. The bill for the Wrongful Conduct by Government Bodies Act faced many objections and was not passed. The most important reason for its non-passage was that the government did not want to limit the civil courts. The old Administrative Decrees (Appeals) Act was replaced by a new Administrative Decisions (Appeals) Act in 1976. The new Act allowed appeals against decisions by both the central government and local governments to be lodged with an independent administrative court: the Judicial Division of the Council of State. The General Administrative Law Act took effect in 1994. Under Section 1:3 of this Act, general administrative law (including general procedural administrative law) has applied to government decisions since then. According to the legislature that enacted the General Administrative Law Act, in determining whether a damages claim on account of wrongful government conduct exists, administrative courts have to utilise the same requirements which the civil courts apply in resolving disputes concerning wrongful government acts. The legislative history of the Act did not delve into the question of how the government's special position impacted its liability for wrongful decisions. The legislative history of the 'Damage Compensation Act', which, with respect to wrongful decisions, became effective on 1 July 2013, likewise contains no comments about the circumstances under which the government is liable for wrongful decisions. The Act merely includes procedural provisions and jurisdictional provisions relating to wrongful government acts. Hence, a separate scheme for wrongful acts has yet to be implemented in the time since *Ostermann*. The literature has also devoted less and less attention to the desirability of a separate scheme. The existing situation is taken as the starting point, and the discussion has shifted to the government's special position within the framework of the civil liability requirements for wrongful acts. That the government represents the public interest, that it has discretionary power and that it possesses a monopoly position in some situations are often mentioned as specific features of the doctrine of wrongful government conduct. Only Van der Hoeven was still arguing for a separate scheme for wrongful government acts in 1989.

Ultimately, a separate scheme for government liability for violations of public-law norms was never adopted, even though there had long been unanimity about the desirability of such a scheme. The assumption was that the requirements for liability for public-law wrongful acts would deviate from the liability requirements for wrongful acts in the DCC. The legislative history is silent about the reason for this choice. Indeed, the legislature also assumed for a long time that the subject would be codified, but kept finding that the doctrine had still not been crystallised enough to be codified. The legislature did not indicate in the legislative history why they chose, in the end, not to institute a separate scheme. Nor did they address the question of what, in their view, the government's special position under the law of wrongful acts entailed, even though, from my perspective, the circumstances under which the government is liable for wrongful conduct and the scope of this liability are pre-eminently political (or legal-political) issues.

Different explanations for the lack of a separate scheme are conceivable: the system of administrative justice only came to apply to decisions; the civil courts now adjudicate government liability for violations of public-law norms based on the civil-law requirements; and this topic is politically sensitive and difficult, and no one wanted to stick his/her neck out on it. The legislature, it seems, has just kept putting off dealing with the issue. The court therefore had to (and still must) do the dirty work. In summary, it appears that the legislature did not consciously opt to use the same requirements for government liability for public-law violations as for liability for private-law violations. As a result, the statutory framework for and the explanation of this does not pay enough attention to the public-law aspects of wrongful government conduct. This is an important reason, I think, for the current problems. In my opinion, then, it is necessary to analyse how these public-law aspects are manifested in current case law and how the case law concerned should be assessed.

Causal connection, liability for decisions and administrative courts

General

The causality requirement is comprised of two elements. First, there must be a *condicio sine qua non* connection between the wrongful act and the damage. This is a minimum requirement for a causal connection to exist. The requirement means in any event that a causal connection will not be found if the damage would have occurred anyway even if the wrongful act had not been committed. Second, the doctrine of imputability in Section 6:98 DCC must be applied to further determine the causal connection. In assessing the causal connection, the court needs to ascertain first whether there is a *condicio sine qua non* connection; if so, the issue of imputability has to be considered.

Administrative courts state in their rulings that, in assessing whether a causal connection exists, they are following civil damages law and the wording of Section 6:98 DCC. However, in practice, administrative courts apply the causality requirement differently than civil courts do. First, administrative courts hardly make a distinction between the *condicio sine qua non* connection requirement and the imputability issue. This results in unclear rulings on the causality question. Seeking consistency with the civil law therefore makes sense to me. Moreover, for both of the aforementioned causal connection elements, administrative courts deviate somewhat from the usual application of the causality requirement.

The condicio sine qua non connection

The *condicio sine qua non* connection requirement is satisfied if the damage would not have occurred had the wrongful act not been committed. This is a factual question. The Council of State's Administrative Jurisdiction Division applies the criterion that there is no causal connection if, at the time the legally incorrect decision was taken, a lawful decision could have been taken which would have resulted in damage of the same nature and scope. The administrative body must prove that, instead of the overturned decision, a lawful decision could have been taken which would have led to the same damage. That a decision was taken later which was not overturned, without the relevant facts and circumstances having changed, is in principle prima facie evidence that such a decision could have been taken. Hence, the result of the extended decision-making process is, at the Division, only a factor in proving a *condicio sine qua non* connection. In contrast, the Dutch Supreme Court sees the outcome of the extended decision-making process as determinative for the lawfulness issue.

The Division's causality criterion implies that the damage did not result from the wrongful decision if it *could have been caused* by a lawful decision, too. As applied by the civil courts, the *condicio sine qua non* requirement means that a causal connection will not be found if the damage *would also have been caused* without the wrongful act. Applying this to liability for government decisions, then, a *condicio sine qua non* connection is absent if, instead of the wrongful decision, a lawful decision *'would have been taken'* which would have caused the same damage. This is therefore different from the criterion which the Division applies. The difference becomes apparent if the administrative body could have taken a lawful decision which would have caused the same damage, but would not have actually done this, so no damage would have been suffered. The question is whether this difference has any significant impact on the actual result of the *condicio sine qua non* test. I don't think so. Specifically, decisions are usually involved which – ignoring the procedural ground for reversal – could have generated the same substantive decision. It seems to me that, if an administrative body could have taken a lawful decision to the same effect, it often will have done so. After all, it actually took such a decision, albeit one with a procedural defect. Of course, it sometimes happens that the administrative body would have initially preferred to take a different decision, but wrongly thought that this was impossible, because, say, it assumed incorrect facts (and the wrongful decision was therefore not sufficiently substantiated). If multiple lawful options had been available in this situation, a similar, lawful decision might in fact have been taken. In reality, though, this would not have occurred if the administrative body had acted lawfully right away. Accordingly, the individual is indeed harmed by the different *condicio sine qua non* test in such cases, because the first situation (the Division's different *condicio sine qua non* requirement) provides no right to damages, while the second situation (the usual criterion) does.

Why, then, does the Division utilise a different *condicio sine qua non* requirement? The decisions do not mention anything about this. A possible reason might be that, generally speaking, it is not easy to figure out which decision would have actually been taken if the wrongfulness aspect is removed from the picture. Thus, it may be difficult to apply the 'classic' *condicio sine qua non* doctrine to liability for decisions if there are multiple lawful options. Such situations are typical in the law governing such liability. When the actual conduct is wrongful, it is often easier to reconstruct what would have happened had there been no wrongful act. If the government's existing discretionary power is supplemented with clear policy regulations, it may become possible to determine the outcome of the decision-making process with some measure of certainty. This will not always be the case, however. The aforementioned evidential problems will be obviated through the Division's criterion. It is simply easier to find that a lawful decision could have been taken (legally) than to ascertain what actually would have occurred if the administrative body had not acted wrongfully. With all this in mind, I believe that the clarity that the Division's deviating causality criterion offers should be decisive. Many evidential problems will thereby be avoided. This also benefits the injured party. Ambiguity about the facts generally leads to endless proceedings with uncertain outcomes. What's more, in my opinion, the difference between the two criteria will not be very big in practice. These reasons furnish adequate justification, I think, for departing here from the causality doctrine, as applied to actual conduct, in assessing liability.

Section 6:98 DCC's imputability doctrine
Section 6:98 DCC sets out the causal connection in more detail. Compensation may only be awarded for damage which is so related to the event on which the debtor's liability is based that it, partly in view of the nature of the liability and of the damage ensuing from this event, can be imputed to the debtor. This 'imputability doctrine' concerns a question of law. The legislature hoped that the doctrine would produce court decisions expressly indicating the arguments which the court had actually relied on to reach its conclusion about the causal connection. This was supposed to be based on objective requirements. Section 6:98 DCC mentions the nature of the liability and the nature of the damage as factors, which play a role in answering the imputability question. This list is not exhaustive. The imputability doctrine assumes a multi-factor approach. Using objective factors, viewed in connection with one another, the court must assess whether the imputation requirement has been met. In practice, the subrules which Brunner derived from the case law play a major role in fleshing out the reasonable application requirement.

Administrative courts have not applied Section 6:98 DCC in the same way as civil courts. In my view, the key difference is that the foreseeability of the damage is not a factor at all for administrative courts. For civil courts, on the other hand, foreseeability is normally decisive in determining whether the damage can reasonably be attributed to the wrongful act. Administrative courts frequently deny damages claims, because, from their perspective, the damage was caused by circumstances other than the wrongful decision. Thus, in these cases, no causal connection is accepted, even when the damage according to 'civil' standards is not in any event too far removed from the wrongful act. Once again, the administrative courts have been silent as to the reason for this strict application of Section 6:98 DCC. It probably has to do with the desire to limit government liability. Still, the decisions I examined were, as a rule, not satisfying, because they did not sufficiently take into account the fact that the wrongful decision was certainly the cause of the damage to a greater or lesser extent. Apparently, it is a problem for administrative courts if the government has to foot the bill for all the damage here. In the case law I looked at concerning liability for government decisions, the damage resulted from the fact that the person's actions were based on the incorrect content of the decision. This 'extra' link between the wrongful act and the damage is in this way characteristic of such decisions. In these cases, a more nuanced outcome may be achieved if the government is held only partly liable. In calculating the percentage liability, the court can be guided by the degree to which the wrongful decision allowed discretion, or not, for acting or not acting. This approach does justice to the formulated chain of causality in the particular case.

Brunner's famed imputation factors otherwise hardly come into play in administrative case law on the application of Section 6:98 DCC. There is no multi-factor approach, which I find regrettable.

Administrative courts should, in my opinion, initially try to adhere more to Brunner's imputation factors. In doing so, they will be applying the imputability doctrine to liability for government decisions within a known, stable and well-developed framework. The remoteness between the wrongful decision and the damage seems to be very important in current administrative case law. Knowing the significance which should also be given to the foreseeability of the damage would clear matters up, since this factor represents a crucial piece of evidence between private parties under Section 6:98 DCC in attributing the damage to the wrongful act. Administrative courts could also develop their own imputation factors. Such factors could give proper consideration to the government's special liability-law position. In this way, rules and sub-rules on causality in cases involving liability for decisions would finally come into being. Greater legal certainty would result.

An important reason for adopting Section 6:98 DCC was that courts are required and are also able to support their rulings with the actual considerations underlying these rulings. In applying this section, courts can therefore openly and manifestly take into account the fact that the issue is about liability for decisions and, hence, government liability. To my mind, this makes Section 6:98 DCC particularly suitable for explicitly giving voice to the government's special position under liability law and giving weight to this where necessary.

Section 6:163 DCC's relativity requirement

Section 6:163 DCC provides that compensation need not be paid if the violated norm is not intended to protect against the damage which the injured party suffered. Under this section, the claim must be denied if (i) the violated norm is not intended to protect the claimant, as well as if (ii) the type of damage and (iii) the manner in which the damage arose falls beyond the scope of this protection. The Dutch Supreme Court has stated that whether Section 6:163 DCC or the violated norm is intended to protect against the damage for which compensation is sought must be answered based on the objective and intention of the violated norm. It is often not easy in specific cases to determine whether the damage falls within the protective scope of the violated norm. The legislature was aware of this. Accordingly, it suggested in the legislative history of Section 6:163 DCC that courts be cautious about denying claims for lack of relativity. The relativity defence should not be accepted if there is doubt or ambiguity about the protective scope of the violated norm. This cautious application of the relativity requirement was standard for a very long time. This is still so for violation of private-law norms. In the *Duwbak Linda* and *Iranian Refugee* decisions, however, the Supreme Court opted for a less cautious approach to government violation of public-law norms. It denied the claims brought against the government, because, it felt, the relativity requirement had not been satisfied, although, in my view, this holding was not logical. The Supreme Court set stricter relativity requirements than usual in these decisions. It ruled in *Duwbak Linda* that relativity was lacking, because it could *not* be inferred from the relevant regulations and explanation to these that they *were also intended* to protect third parties' individual property interests. In *Iranian Refugee*, the Court limited the protective scope of the violated norm to the primary objective of the norm. Generally, it is not only the objective that is important to the relativity question, but also the broader intention of the violated norm. Hence, because of the stringent application of the relativity requirement described above, a claim for compensation of financial loss is more likely to be denied on account of a lack of relativity if government violations of public-law norms are at issue. The legal-political argument for limiting government liability probably played an important role in this choice. The Supreme Court appears, then, to have used relativity as an instrument to avoid government liability which is too sweeping. These decisions have received a lot of criticism. I disagree with the rulings, too.

My criticism pertains first to the manner in which the Supreme Court used the relativity requirement in the aforementioned decisions to preclude compensation for financial loss. This constituted an undesirable development in the doctrine of wrongful government conduct. Let me explain. The legislative history of public-law regulations rarely discusses the damages issue and the financial interests of individual citizens explicitly, because the primary objective of such regulations is to foster a particular public interest. The situation is different to violations of financial-oriented provisions. Due to the nature of those provisions, the legislature is more inclined to talk about the financial position of individuals in the explanatory memorandum. In addition, the primary objective of such provisions is financial in nature. Consequently, the current application of the relativity requirement results in the government being liable if it violates financial regulations. In contrast, if the government violates a public-law norm intended to protect safety, even the parties directly affected are not entitled to compensation for their financial loss. Liability law thus sends the wrong message.

My second point of criticism has to do with the fact that the decisions mentioned concerned financial loss incurred by injured parties towards whom the government had acted wrongfully. They were the 'parties directly affected' by the violation of the norm. The biggest objection to the decisive role which the primary objective of the violated norm plays in such cases is that the public interest plays a prominent role in the objective of *any* public-law regulation. As a result, the generally insufficient relevant legal difference between the objective and the intention exists to ascertain whether the parties directly affected are entitled to compensation for their financial loss based on this difference. Public-law norms are indistinguishable in this regard. The choices which the case law makes on this basis are therefore, in my view, arbitrary and unconvincing. If the legislative history is silent, the '*direct economic consequence*' criterion which the European Court of Justice applied in *Jutta Leth v. Austria* should, in my opinion, serve as an inspiration in developing a more general vision about whether government violation of public-law norms can give rise to an obligation to compensate the financial loss suffered. Application of this criterion will enable directly affected parties to receive compensation for financial loss again in most cases.

Imputation

It is established case law that, if a decision is overturned, not only is the decision deemed wrongful, but it is also in principle imputed to the government. This is so, even if the government bears no blame whatsoever. This imputation rule is based on the 'generally accepted standards' provision in Section 6:162(3) DCC. Courts apply such strict imputation to the government, because, in their judgment, it is more reasonable to have the public pay for the damage ensuing from a wrongful decision than the affected individual citizen. Imputation to the government spreads the damage across the group and is therefore referred to as 'the spreading argument'. Further, the fact that contravened statutory regulations do not originate from individual citizens is, courts maintain, a reason to impute wrongful decisions to the government. The literature has mostly been favourable about the current case law. Yet critical voices can be heard, too. The most significant substantive criticism is that the spreading argument does not easily support far-reaching government liability. I share this view.

The stringent imputation case law for the government is more than 25 years old at this point. Societal views are intrinsically fickle. Recent case law on the causal connection and relativity requirements for wrongful government acts suggest a more circumspect government liability. Moreover, Section 6:162(3) DCC has evolved over time. For these reasons, I felt the time was ripe for investigating whether the current case law on imputation of wrongful decisions to the government needed to be 'updated'. Sure enough, that turned out to be the case.

With imputation by virtue of guilt within the meaning of Section 6:162(3) DCC, the perpetrator's knowledge, expertise and experience are of overriding importance. Thus, where there is wrongful government conduct, there is usually guilt. In particular, the government has exceptional knowledge, expertise and experience in the areas in which it is active. This knowledge, it seems to me, should be objectified, so that the degree of knowledge and experience in the specific case is irrelevant. In my opinion, administrative bodies should without question have expertise in the areas in which they take decisions. Objectifying guilt also avoids many thorny evidential and other problems in damages actions about how much expertise the particular administrative body ought to have. The 'update' proposed by me will therefore not entail any major changes. In most cases, the wrongful decision can be imputed to the government as usual, because there is culpability on its part. Given the government's position, this is, in my view, appropriate. Nor should this be changed, I think. As I see it, feeling the need to avoid dipping into taxpayer's money is legitimate if the government cannot be blamed in any manner whatsoever; culpability is not always an issue. The case law may have changed after the administrative body took the reversed decision. Additionally, when the formal duty of care principle is violated, it is sometimes so, I believe, that there is no culpability as meant by Section 6:162(3) DCC. This is especially true in environmental law. The government conducts an extensive survey into the environmental effects of a decision and drafts environmental impact reports. The court, though, sometimes states that certain information is missing and overturns the decision for this reason. My position is that it is not always realistic in such situations to claim that 'the government should have known this, because it is, after all, the government'. Sometimes, despite all its knowledge and experience, the government bears no blame. The next question is whether, in those instances where the government is not at fault, wrongful decisions can still be imputed to it under generally accepted standards.

Normally, the nature of the perpetrator's conduct and the capacity in which the perpetrator acts are relevant to imputation pursuant to generally accepted standards under Section 6:162(3) DCC. The 'direct benefit principle' comes into play with the nature of the conduct. This principle means that the person who benefits from the wrongful conduct should likewise bear the risk for it. The direct benefit principle should, in my opinion, also be relevant for the imputation of wrongful decisions to the government based on generally accepted standards. Strict imputation to the government is a consequence of the fact that the decision benefits the public interest. When the wrongful decision is imputed to the government, the damage is borne by the public, for whose benefit the acts were performed. The notion that the government acts in the public interest is a little too simple, however. The government typically acts in the public interest, but some decisions are nevertheless prompted by the interests of individual citizens. I advocate the following system of imputation of wrongful decisions based on generally accepted standards, in which weight is given to the direct benefit principle. If the government has acted for the public's benefit, the public should be responsible for the damage, due to the nature of this conduct. Conversely, if the decision does not benefit the public, the government should not bear the risk. A distinction can be made, then, under the direct benefit principle, between wrongful decisions which can and cannot be imputed to the administrative body, based on generally accepted standards. The decisive element is whether the decision in question was primarily taken to benefit the public or whether it mainly served the interests of particular individuals. Accordingly, this distinction in imputation pursuant to the direct benefit principle means that imputation to the government is more logical if the decision concerned (or its substance) primarily furthers the public interest and less so if it mainly benefits individual persons. In doubtful cases, the balance may swing towards imputation to the government, as its capacity as the government suggests broad imputation.

This approach has the following specific implications. With respect to decisions in which on a one-to-one basis, usually financial relationships between individuals and the government are at stake and in which there are no interested third parties, a general distinction can be made between decisions requiring the individual to pay for the public's benefit and decisions which are requested by individuals claiming public money. The first type of decisions unmistakably benefit the public and may be imputed to the government under generally accepted standards, even if the government bears no blame at all. The second category primarily benefits individual citizens. It seems justifiable to me that the damage suffered because of such decisions be paid for by the individual pursuant to the direct benefit principle.

It becomes more complicated if third parties are involved in the decision. It must be remembered that, under the direct benefit principle, what matters is whether the perpetrator engaged in the wrongful conduct to benefit himself/herself. With government conduct, the issue is therefore whether the government took the decision to benefit the public or whether individuals' interests dominated. The refusal to grant a permit/licence, I assert, mainly benefits the public. After all, the refusal to grant permission to engage in an activity is always linked to the public interest (say, nature or spatial planning) and/or third-party interests. Hence, imputing the wrongful refusal to the government is no problem under generally accepted standards. On the other hand, granting a permit/licence primarily benefits the applicant and his/her immediate surroundings. I make this assertion with some hesitation, because the public would have benefitted as well from the wrongly allowed activity: constructing a residential district or operating a factory, for example, boosts employment and the economy. Nonetheless, I venture to say that a granted permit/licence primarily and in the first instance benefits the applicant concerned. A defensible argument can, in my estimation, therefore be made for making the individual citizen pay for the damage caused by a wrongly granted permit/licence, because this wrongful act cannot be imputed to the government under generally accepted standards. Perhaps there are cases in which such a result cannot really be defended. This may be so if protection of a public interest was a major consideration. Of course, the court can decide then to have the public pay for the damage. Both the nature of the conduct and the capacity of the government point to imputation to the government here.

This doctoral research has assumed that, when Section 6:162 DCC is applied to a wrongful government act, the normal application of this section should be adhered to as much as possible; at the same time, the public-law aspects of government conduct should be kept in mind. Adhering to the normal application of imputation under Section 6:162(3) DCC based on generally accepted standards means that, in determining whether a wrongful decision can be imputed to the government, the direct benefit principle must be taken into account. This is quite possible in practice. Having that principle play the suggested role in wrongful decisions, moreover, gives appropriate importance to the public interest for purposes of Section 6:163 DCC. The temporary and limited increase in legal uncertainty ensuing from the proposed adjustment to the current case law will ultimately make decisions on wrongful government conduct more predictable and is therefore justified.

CONCLUDING OBSERVATIONS

The government's special position under the system in Section 6:162 DCC

The government's liability for wrongful public-law violations is predicated under current law on the private-law wrongful acts section 6:162 DCC. I am convinced that this was an interim, not a conscious, choice by the legislature. Wrongful government conduct is consequently based on a provision which is not necessarily appropriate here. This situation raises various obstacles. Due to its private-law character, Section 6:162 DCC does not give adequate attention to the government's special position under liability law. Whether the government can successfully be held liable in a specific case for wrongful conduct is not predictable enough under the current case law.

The government's special position under the current case law: conclusion and my own views

As regards the causality, relativity and imputation requirements, my research shows that these requirements are applied differently to wrongful acts by the government than to wrongful acts by private parties. Various reasons exist for the differences found.

The criterion which administrative courts utilise to establish the factual causal connection for liability relating to decisions deviates from the usual '*condicio sine qua non*' requirement. This difference can be justified by the dissimilar factual situation for decisions in this regard. Put simply, if there are multiple lawful options, it is often extremely difficult to figure out which decision would have actually been taken if the wrongfulness is taken out of the equation.

Administrative courts, particularly, the Central Appeals Tribunal, approach 'legal causality' under Section 6:98 DCC more narrowly than civil courts. They deny damages claims quite frequently, even though the damage is not too far removed from the wrongful decision under 'civil' standards. The usual imputation requirement that the damage was foreseeable to the government plays no cognisable role for administrative courts. Apparently, they fear that the government's liability would be too extensive if the government had to compensate such damage. Case law typically focuses on a formulated chain of causality. The individual has actually suffered damage, because he/she or another individual acted pursuant to a wrongful decision. According to the administrative courts, the damage is not caused by the wrongful decision in those instances, but by the individual's actions. My belief, however, is that this is still an inadequate justification for the difference with private parties, as the situation causing the damage stemmed from the wrongful government conduct. If the wrongful decision makes certain action mandatory or affords hardly any latitude to act differently – for example, if deviating from the decision would have legal consequences – then the damage suffered by the individual must, to my mind, certainly be attributed to this decision. Partial government liability might offer a solution in other situations.

In applying the relativity requirement, the Dutch Supreme Court has set more stringent conditions for finding relativity when the government violates a public-law norm than when private parties overstep private-law norms. In the *Duwbak Linda* case, it assumed that relativity was lacking if it could not be inferred, from the violated regulation or the explanation to it that the regulation was also intended to protect against the damage suffered. In *Iranian Refugee*, the Supreme Court merely looked at the primary objective of the violated statutory rule and ignored the broader intention, which specifically supported the presence of relativity. Both decisions departed from the normal circumspection prescribed by the legislature in denying a claim for lack of relativity. Administrative courts have followed the Supreme Court's interpretation as regards the protective scope of immigration law. Administrative case law does not otherwise give any indication of a limited perspective on the objective and intention of public-law norms. The Supreme Court has not given a reason for the difference with private parties as described above. Here, too, case law is probably based on the fear that the government's liability will be too far-reaching. I would argue, however, that such case law has brought about an undesirable development regarding wrongful government conduct. It has caused the liability threshold for compensating property damage and financial loss to be the lowest when the government contravenes a regulation which protects people's financial interests, and higher, the more public safety is implicated.

For this reason, I propose that, if the legislative history says nothing about this, the '*direct economic consequence*' criterion should be employed to determine whether the financial loss suffered falls within the protective scope of the public-law norm violated by the government. This criterion detaches the question of whether the public-law provision transgressed by the government can result in a duty of compensation from the primary objective of this provision. This would avoid the problems described concerning application of the relativity requirement. The criterion can therefore, I feel, properly serve as a touchstone in applying Section 6:163 DCC. The relativity requirement for government liability can, just as with private party liability, otherwise be used to keep out of the proceedings parties who indisputably fall outside the protective scope of the violated norm.

Finally, established case law, which makes imputation to the government concomitant with reversal of the decision, is actually more stringent than normal. This strict imputation to the government can be explained by the fact that the government acts in the public interest. When the wrongful decision is imputed to the government, the damage is borne by the party for whose benefit the acts were performed, to wit, the public. Making liability for decisions consistent with the normal application of this requirement seems appropriate to me. This will not lead to much change in practice. The wrongful decision can usually be imputed to the government by virtue of guilt. In those cases in which the government is not at fault, the direct benefit principle must be a factor in analysing whether imputation is called for based on generally accepted standards. The damage is then paid for by the public if the wrongful decision was truly taken to benefit the public interest. In this way, the proposed adjustment would be more in line with the rationale underlying the strict imputation case law. I also believe that there would be less of a tendency to compensate for the strict case law on the imputation requirement with inappropriate limitation of liability by using the causal connection and relativity requirements if the government cannot be blamed for its wrongful conduct. The system of liability for wrongful government acts would thereby be more balanced and would as a whole be improved.

In summary, then, there are various reasons why the requirements examined are applied differently to wrongful acts by the government than to wrongful acts by private parties. Factual differences play a role in establishing a *condicio sine qua non* connection. Section 6:98 DCC's relativity requirement and imputation doctrine are applied more stringently to keep government liability within limits. The public interest is also a factor in the deviating case law. Regarding the relativity requirement, the primary objective of public-law regulations to represent the public interest ensures that the government gets past this requirement more often than private parties. With respect to imputing the wrongful act to the perpetrator, the fact that the government acts in the public interest is precisely a reason for stringent government liability. The differences observed primarily arise for liability for wrongful decisions.

Suggestions for improvement

I see two options for improving the predictability, consistency and logical development of the case law on wrongful government conduct.

First, I advise courts to be more open about the role which the government's special position plays in giving substance to and applying Section 6:162 DCC's liability requirements. The legislature, after all, left it to the courts to shape the government's special position regarding liability for wrongful conduct, so that legal-political decisions and decisions creating new law are inevitable. Still, I get the feeling with the current case law that courts are trying to deny this special position by desperately acting as if they are following the customary application of the wrongful-conduct liability requirements, even though that is not really the case. This generates decisions which are unpersuasive, because there is not enough substantiation for the decision. This is no surprise, either. It is as if the courts are trying to squeeze the wrongful government conduct doctrine into the mould of 'ordinary' wrongful acts. The courts would do well, I contend, to indicate in their decisions how their judgment is influenced by the fact that the case pertains to government conduct. This will make the court decisions about wrongful government conduct more convincing.

My second recommendation has to do with how the public-law aspects of wrongful government acts should be seen in applying Section 6:162 DCC. The differences ought to fit within the statutory system. My preference would be for applying Section 6:162 DCC to wrongful government conduct in such a manner that the normal application of Section 6:162 DCC is adhered to as much as possible. At the same time, the courts should openly consider the government's special liability-law position in the proper, familiar way. This offers the best possibility, I think, for achieving a more consistent and logical evolution of the wrongful government conduct doctrine. The point is: which requirements under Section 6:162 DCC's system are appropriate for giving expression to the government's special position in terms of liability for wrongful acts? These requirements may be utilised to demarcate the scope of government liability for wrongful acts in a predictable manner. I have a couple of recommendations in this regard.

In my opinion, the reasonable imputation doctrine in Section 6:98 DCC is a particularly good instrument for giving the special aspects of government conduct their due. The idea is to create recognisable causality rules and subrules for government conduct. The government's special position can openly play a role in this respect. The scope of government liability for wrongful acts can be regulated here in predictable fashion, without undermining the statutory system in Section 6:162 DCC.

The remoteness between the wrongful decision and the damage seems to be very important in current administrative case law. Greater clarity about this imputation factor in relation to liability for wrongful decisions is advisable. Knowing what significance is given to the foreseeability of the damage would clear matters up, since this factor represents a crucial piece of evidence under Section 6:98 DCC for imputation between private parties.

Because of the prominent role played by the representation of the public interest in the objective of public law, the relativity requirement is, in my view, less suitable for demarcating the scope of government liability for wrongful acts in a predictable manner. If the relativity requirement is accorded too much significance in determining the scope of government liability, this will therefore result in arbitrary, unconvincing decisions, especially if the case deals with persons towards whom the government did act wrongfully. The objective of public-law norms should thus be broad.

The requirement for imputing wrongful acts to perpetrators can play a limited role in defining the scope of government liability for wrongful conduct. The government's special position warrants broad imputation in this regard. Only if the government is entirely blameless regarding a wrongful decision which primarily serves an individual citizen's interest should imputation based on generally accepted standards not be in order, because the reason for strict imputation will disappear then.

This proposal for an active role for the causality requirement and a cautious application of the relativity requirement in demarcating the scope of national government liability has a secondary advantage. It is in keeping with the European Court of Justice's approach to the subject. European government liability for violations of EU law also assumes a broad objective for public-law norms and a stringent causality requirement. The proposed approach would avoid impermissible and undesirable differences between the two systems of government liability.

In the chapters on suggestions for improving the predictability, consistency and logical development of the case law on wrongful government acts, I have stated each proposal as specifically as possible and useful. The practical application needs to be fleshed out in court decisions, since only the courts can make allowance for all the relevant circumstances of the cases. A more detailed theoretical formulation is neither possible nor appropriate at this time, and would be superficial and arbitrary. What is more, such a formulation implies certainty. A certainty which does not actually exist.

A separate statutory scheme for wrongful government acts?

The second chapter reveals that there was unanimity in the first half of the previous century about the desirability of a separate statutory scheme for wrongful government acts based on violations of public-law norms. And yet this scheme was never introduced. Around 1950, the Minister of Justice remarked that a generally accepted, recognised formula for wrongful government conduct had not been devised yet. He also felt that the case law was not definitive enough for codification. In recent decades, the legislature has apparently not contemplated further whether a separate statutory scheme for wrongful government acts is desirable. Instead, the discussion has shifted to the government's special position within the context of the civil requirements for liability for wrongful conduct.

This study cannot be concluded satisfactorily without at least raising the question about what the situation is now: is a separate statutory scheme for wrongful government acts desirable? If so, has the case law now been crystallised enough for codification?

Unfortunately, I cannot answer these questions. It is not apparent from this research whether a separate statutory scheme for wrongful government acts would be better than the present requirements in Section 6:162 DCC. For that matter, there is very little chance that legislators will decide in the near future to codify the substantive requirements for liability for wrongful government acts. The subject remains unruly and politically sensitive. Tellingly, substantive, wrongful government conduct is the only aspect of government liability not addressed in the Damage Compensation Act.

Should the topic ever be codified, this research contains some useful suggestions. For instance, the research shows that the remoteness between the damage and the wrongful act plays a distinctive role in the current case law in defining the scope of government liability for wrongful decisions. Further, if the subject is codified, it may be worthwhile to know that the objectives of public-law norms are insufficiently different to determine liability on this basis.