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## Compensating for psychiatric damage after disasters: a plea for a multifactor approach

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## 1 INTRODUCTION

Disasters are characterised – almost by definition – by substantial damage. It is precisely because of their scale that disasters result not only in a large number of victims, but in many different types of victims and in many different types of damages.

For instance, the Woerden disaster<sup>1</sup> is a good example of the potential variation in types of victims. Some were involved either directly or to a lesser degree with the factory that exploded, for example as owners, employees, customers, etc. Others were bystanders: demonstrators (active or passive) or chance passers-by. There were also public sector personnel involved in the disaster: fire fighters, police officers and rescue workers. Finally, there were the ordinary citizens who lived or were present in the neighbourhood where the disaster occurred. The Enschede<sup>2</sup> disaster had, if anything, even more victims, since it occurred in the centre of a densely populated residential area: examples of victims in this case were the residents themselves and their relatives elsewhere in the neighbourhood, the municipality and the country.

These are the victims. But the types of damage the disaster created also vary greatly. For example, some victims suffered personal injury (both pecuniary and non-pecuniary), damage to property, and business damage (such as loss of profit). The public at large suffered from environmental damage. In an earlier contribution to this book we dealt at greater length with the establishment of liability: i.e., who is liable and on what grounds. This present article centres on a particularly difficult issue of personal injury: is psychiatric

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1 The Disaster and Law Conference centred on a fictitious case: the Woerden disaster. This concerned an explosion at a chemical plant in the municipality of Woerden. The explosion was said to have caused great damage to the plant, to people on and near the site and, as a result of the release of clouds of toxic gas, to the inhabitants of the municipality.

2 The Enschede disaster was a real disaster. It occurred on Saturday 13 May 2000, two weeks before the conference. A firework factory located in a residential area of the city exploded and wiped out an entire district. Pecuniary damage was caused in a very wide radius of the factory. Over 40 people died and hundreds were injured.

damage eligible for reimbursement and, if so, whose psychiatric damage should be reimbursed?

As a result of the tragic aircraft crash in the Bijlmer neighbourhood of Amsterdam in 1992, the Netherlands has gained experience in handling cases involving large and varied damage. The Netherlands has, incidentally, suffered aircraft disasters on other occasions too.

A Boeing 747 cargo plane owned and operated by El Al Airlines crashed some ten minutes after departure into an apartment building in the Bijlmer neighbourhood of Amsterdam on 4 October 1992. The building was destroyed and many people lost their lives as a consequence of the crash. This accident raised questions about the application of international air law, its deficiencies, and the efficacy of recourse to national law, especially that of the United States and The Netherlands.<sup>3</sup>

More than 40 people died and dozens more were seriously injured when the plane crashed into the apartment building. The damage was substantial both in terms of human suffering as well as in damage to property. Although the human suffering can be partially expressed in terms of injuries and deaths, injuries from such an accident can range well beyond the physical. In the case of psychiatric damage, one first thinks of victims who were directly affected and who will, because of the accident, encounter problems of a psychiatric nature such as attacks of fear or anxieties.<sup>4</sup> But one also has to think of those victims who, although not directly affected themselves by the accident, have lost loved ones, or even have seen their loved ones being killed. These losses cause them to suffer mentally as well.

As far as the damage related to those directly affected – i.e., the occupants and owners of the apartments affected – the settlement of the damage claims proved not to be particularly complicated. Indeed, the extent of the compensation could be determined fairly easily using the normal methods. In order to avoid borderline cases, a circle was also drawn around the disaster area within which the so-called zone of danger was located. For all those whose goods and chattels were affected within the circle, Boeing and El Al agreed to be satisfied with relatively scant proof.<sup>5</sup>

One category of victim in particular, however, gave rise to legal questions, namely victims who were not affected directly and physically by the crash. The defendants and a number of victims were unable to agree on whether these victims too were entitled to compensation for damage and, if so, for what

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3 See further P. Mendes de Leon and S. Mirmina, *The International and American Law Implications of the Bijlmer Air Disaster*, *Leiden Journal of International Law* 1993, p. 111 et seq.

4 A study of survivors of the Bijlmer crash showed that seventy percent of those interviewed suffered from full or partial Posttraumatic Stress Disorder. I.V.E. Carlier and B.P.R. Gersons, *Partial Posttraumatic Stress Disorder (PTSD): The Issue of Psychological Scars and the Occurrence of PTSD Symptoms*, *J. Nerv. & Ment. Dis.* 1995, 183: p. 107-09.

5 See judgement of Amsterdam District Court, 19 July 2000, H 98.0820, at legal consideration no. 8.

damage. This is not really surprising: our 1997 article<sup>6</sup> noted that there were various theories in existence, particularly in the US and the United Kingdom; in other countries the problem had hardly even been considered.

In our previous article, we wrote that the reasonable foreseeability approach, as exemplified by a decision reached by the California Supreme Court, *Dillon v. Legg*,<sup>7</sup> appealed to us the most, at least in so far it amounted to a multifactor approach.<sup>8</sup> In the present article, we provide an update of our thinking on the question of whether or not victims outside the zone of danger are entitled to compensation for damage. We then go on to discuss and assess the recent decision of the Amsterdam District Court, which has now given judgement in the dispute between Boeing, El Al, and 23 plaintiffs who were outside the zone of danger. Finally, we make a proposal designed to strike a fair balance between the concerns regarding unlimited claims for emotional distress and the needs of injured victims of disasters.

## 2 INFLECTION OF EMOTIONAL DISTRESS

### 2.1 The concern with compensating for psychiatric damage

Psychiatric damage has become more and more a focus of attention over the last few years in liability law in general.<sup>9</sup> Mass disasters, such as explosions and air crashes, are no exception.<sup>10</sup> In addition to damage to property and physical injuries, psychiatric damage will occur in many such accidents. For example, one could imagine all sorts of anxieties and neuroses arising from an aviation accident, which would negatively influence a victim's daily life. The consequences could range from the fear of ever flying again to even more serious effects such as grave emotional distress, unemployment or divorce.

These possibilities apply, of course, to all those victims who sustained physical injury themselves.<sup>11</sup> But the number of potential victims will often

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6 Carel J.J.M. Stolker and David I. Levine, 'Compensation for Damage to Parties on the Ground as a Result of Aviation Accidents', 22 *Air & Space L.* 1997, 60.

7 441 P.2d 912 (Cal. 1968).

8 Stolker and Levine, *op. cit.* p. 67.

9 See, e.g., Michael J. Pangia, 'Posttraumatic Stress Disorder: Litigation Strategies', *J. Air L. & Comm.* 1999, 64, p. 1091.

10 See, e.g., Ruwantissa I.R. Abeyratne, 'Mental Distress in Aviation Claims – Emergent Trends', *J. Air L. & Comm.*, 2000, 65, p. 225; Note, 'Mental Injury' and the Montreal Convention 1999, *The Aviation Q.* 2000-1:51 (2000); Comment, The Aftermath of the Airplane Accident: Recovery of Damages for Psychological Injuries Accompanied by Physical Injuries Under the Warsaw Convention, 84 *Marquette L. Rev.* 227 (2000); Ruwantissa I.R. Abeyratne, 'Mental Injury Caused in Accidents During International Air Carriage – A Point of View', *The Aviation Q.* 1999-4: 206 (1999).

11 E.g., Richard A. Levy, 'Mental Stress and Physical Factors in the Terminal Phase of Fatal Aircraft Accidents', *J. Air L. & Comm.*, 65:45 (1999).

be a lot larger. The difficulty lies often with bystanders, who might have witnessed the accident, or relatives of passengers who, from a distance, were also victims of the disaster as a result of the harm done to their loved ones. Should any of these bystanders qualify for compensation of their psychiatric damage?

Cases involving such accidents have forced courts to examine the outermost limits of recovery for bystanders who, although themselves not physically injured, have nevertheless suffered extreme emotional shock and psychological injury. Scientific psychiatric research after the Lockerbie, Scotland air disaster has shown how severe that psychiatric damage can be.<sup>12</sup> However, courts in many countries, like the US, have often expressed a certain reserve in granting an award for damage to the psyche.

The arguments in favour of this caution are familiar. They usually fall into the following categories: (a) mental disturbance often will be of a temporary and slight nature; (b) psychiatric damage can be simulated;<sup>13</sup> (c) determining the nature and duration of the damage is often difficult; (d) the plaintiff may have an 'eggshell skull'; i.e., he/she may be especially vulnerable to psychiatric damage; (e) the emotional distress harm may become manifest at a time and place that is too remote from the alleged cause of the injury; and (f) there will be an infinite number of emotional distress claims filed in court; in denying claims, courts often raise the spectre of 'opening the flood gates' or starting down a 'slippery slope'.<sup>14</sup>

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12 See Neil Brooks and William McKinlay, *Mental Health Consequences of the Lockerbie Disaster*, *Journal of Traumatic Stress*, 1994, pp. 527ff.

13 Attitudes regarding the reality of psychiatric damage seem to be changing. For example, the last edition of what was once the leading US treatise on the subject, *Prosser and Keeton on Torts*, West Publishing Co., 5th ed., 1984, at 361, asserted: 'Mental disturbance is easily simulated, and courts which are plagued with fraudulent personal injury claims may be unwilling to open the door to an even more dubious field'. On the other hand, the successor treatise takes a more balanced view: 'In the past, at least, courts have often expressed concerns about the reality of emotional distress, but in most cases the reality or existence of the distress is not in doubt.' Dan B. Dobbs, *The Law of Torts*, West Group, 2000, p. 822-23.

14 See Sir Thomas Bingham MR in his foreword to Nicholas J. Mullany and Peter R. Handford, *Tort Liability for Psychiatric Damage*, The Law Book Company Ltd., 1993 (at p. vii): 'Underlying the cases has been the judges' concern that unless the limits of liability are tightly drawn the courts will be inundated with a flood of claims by plaintiffs ever more distant from the scene of the original mishap. So fine distinctions have been drawn and strict lines of demarcation established.' See also his comments in dissent in *M v. Newham LBC* [1994] 2 WLR 554, 573. *The Law Commission Consultation Paper No. 137, Liability for Psychiatric Illness*, HMSO 1995, discusses his comments in some detail in par. 2.6 and 2.7. There is further discussion of floodgates argument in par. 4.2-4.6. The Law Commission's subsequent report to the British Parliament, *Liability for Psychiatric Illness*, Law Com. No. 249, 1998, found, in par. 6.8, that it would be imprudent to take the risk of opening the floodgates to all reasonably foreseeable claims of psychiatric injury.

Nevertheless, in the United States and other countries such as Australia and the United Kingdom,<sup>15</sup> all these difficulties have *not* resulted in a general rule rejecting claims for compensation in cases of psychiatric damage. The well-known adage, 'the tortfeasor takes the victim as he finds him', is usually applied as a point of departure.<sup>16</sup> Furthermore, it is considered to be possible to distinguish fake cases from cases where genuine psychiatric damage occurred. For example, the British Law Commission's extensive report on psychiatric damage notes that the psychiatric profession recognises the possibility of false or exaggerated claims. However, the Commission report asserts that feigned symptoms can be detected with careful clinical evaluation. In addition, '[n]umerous tests have been developed which can help to ascertain whether an individual has faked or exaggerated psychological symptoms and whether he or she is a reliable informant. The tests are objective and are often scored by a computer.'<sup>17</sup>

## 2.2 Which victims have a right to compensation: various tests

Consider the range of potential victims with psychiatric damage as a result of major disasters: (a) victims who themselves also sustained physical injury as a result of the disaster (sometimes called primary victims); (b) victims who did not sustain physical injury, but who were near the disaster site and witnessed the accident, knowing that as they were in the zone of danger, they could have sustained physical injuries; (c) those who, while not within the zone of danger themselves, saw others, especially loved ones, being killed or injured; (d) victims who did not witness the accident but heard of it later and feared for the safety of others, particularly their loved ones; (e) the rescue workers who provided emergency aid after the accident; and (f) other victims.<sup>18</sup>

Although there is very little case law, Dutch law tends to be rather generous when it comes to compensation of psychiatric damage. This tendency is exemplified in the approach taken regarding 'compensation neurosis.' For example, in one case, Henderson, a student and member of a steel band, fell

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15 Mullany and Handford, *op. cit.* at p. 10 (England and Australia have been less reluctant than US courts 'open up the gates of liability'). For an analysis of the reluctance of the courts to grant emotional distress damages from a feminist point of view, see, e.g., Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 *U. Pennsylvania L. Rev.* 463 (1998); Elizabeth Handsley, *Mental Injury Occasioned by Harm to Another: A Feminist Critique*, 14 *Law & Inequality* 391 (1996).

16 For an argument that tort law should not 'equate thin skins and thin skulls', see Tony Weir, Book Review, [1993] *Cambridge L.J.* 520 at 521. See also *Lawson v. Management Activities, Inc.*, 81 Cal.Rptr.2d 745, 749 (Cal.App. 1999) (contending that 'tort law cannot countenance the doctrine of the "eggshell psyche"').

17 The Law Commission Report, *op. cit.* at par. 3.32.

18 See the categorisation of victims in The Law Commission Report, *op. cit.*, par. 2.12-2.60.

off a float during the carnival in Aruba. In the chaos, due to a misunderstanding, Gibbs, a deputy inspector of police, beat him several times with a baton. The victim developed a 'compensation neurosis'. The Dutch law professor Hans Nieuwenhuis points out that an actual compensation neurosis leads to a real, not simulated, disability. Similar to a victim who can not be condemned for the fact that he is suffering from exceptionally brittle bones, a person with compensation neurosis can not be condemned for the fact that he is suffering from an involuntarily, and non-culpable, need for compensation. The Dutch Supreme Court reached the same result, and supported Henderson's claim:

In an unlawful act, constituting of inflicting injury, the consequences of a reaction determined by the personal predisposition of the victim will be generally regarded as a result of the unlawful act and imputed to the perpetrator, even when this reaction is also caused by the neurotic need of the victim to receive compensation and even when the consequences are thereby more severe and last longer than normally would be expected.<sup>19</sup>

In settling the Bijlmer damage claims out of court, the victims with physical injury and who also have suffered psychiatric damage have had their injuries compensated. That group did not pose a problem because they fit within the most restrictive test, which is still applied by some American courts: those who can prove physical injury are also entitled to compensation for any resulting psychiatric damage.<sup>20</sup> It goes without saying that under Dutch law this – what the Americans call the *physical injury-test* – is a minimum test.

Some American courts, too, have gone further by modifying the physical injury rule into a 'physical impact test', so that even when there had been no infliction of injury, but sometimes just a slight 'touch', the judge could award damages for the psychiatric damage that occurred.<sup>21</sup> Alternatively, some states in the US have required proof that the psychiatric damage has led to a manifestation of physical injury.<sup>22</sup>

Courts in the US, however, constantly struggle with the question of whether plaintiffs with emotional distress claims must meet special restrictions. Therefore, the people who have not sustained physical injury but who nevertheless claim to have suffered psychiatric damage pose a problem. Will psychiatric

19 19 HR 8 februari 1985, NJ 1986, 137 (annotation by C.J.H. Brunner); AA 1985, 417 (annotation by J.H. Nieuwenhuis).

20 E.g., *In re Air Crash Disaster Near Cerritos, California (Estrada)*, 967 F.2d 1421 (9th Cir. 1992) (damages awarded for family killed when airliner crashed into home).

21 E.g., *Lee v. State Farm Mutual Insurance Co.*, 533 S.E.2d 82 (Ga. Sup. Ct. 2000) (confirming that Georgia follows the impact rule). Only five US states still follow the physical impact or injury test. See *Consolidated Rail Corp. v. Gottshall*, 512 US 532 n. 7 (1994) (citing cases).

22 Prosser and Keeton, *op. cit.*, at 364 credit the origins of this test to an Irish case, *Bell v. Great Northern Railway* [1890] L.R. 26 Ir. Rep. 428. The first US case applying this test was *Hill v. Kimball*, 76 Tex. 210, 13 SW 59 (Texas 1890). US courts do not have a clear rule as to what will qualify as a sufficient physical consequence from the damage to the psyche. See: *Payton v. Abbott Labs*, 386 Mass. 540, 437 N.E.2d 171 (1982) (surveying different standards).

damage also be compensated if physical injury or 'impact' has not accompanied the violation of the standard of care?<sup>23</sup> With the gradual recognition that psychiatric damage was an equally serious form of injury as physical injury, many courts and commentators have seen no justification in treating these cases differently. For example, the English author Munkman states:

Where a neurosis claim arises out of an accident, there has usually been some physical injury or at least shock, which would be actionable in any case, and neurosis supervenes afterwards; or else the accident aggravates an existing neurotic state. But there seems no reason why an action should not lie for causing neurosis alone in the absence of injury or shock (if such a thing is possible). A recognisable illness is something more than the unhappy or painful thoughts which, as already indicated, are not in themselves a subject of compensation<sup>24</sup>

In some jurisdictions, and also in the out of court settlement of the Bijlmer disaster, the more flexible '*zone of physical danger*'-test has been applied, instead of the 'physical injury' requirement.<sup>25</sup> Around the accident, a zone of danger is proclaimed. The claim will be permitted without proof of physical injury or impact as long as the claimant was within the zone of danger and possessed a 'reasonable fear of injury'.<sup>26</sup> With the help of this test, many cases of damage to the psyche can be dealt with. Most jurisdictions in the US now recognise the zone of physical danger rule as a minimum test for liability.<sup>27</sup> In settling

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23 See, e.g., *Summers v. St. Andrew's Episcopal School, Inc.*, 759 So.2d 1203 (Miss. Sup. Ct. 2000) (listing circumstances when injury is and is not required as prerequisite for recovery for mental anguish under Mississippi law); *Metro-North Commuter R.R. Co. v. Buckley*, 521 US 424 (1997) (interpreting Federal Employers' Liability Act to require manifested symptoms of disease in order to recover for emotional distress; mere physical contact with substance – asbestos – that might cause disease in the future does not qualify as a physical impact); *Longus v. Columbia Management, Inc.*, 664 F. Supp. 13 (D.C.D.C. 1987) (requiring a 'physical-injury causing impact' as pre-requisite to recover for emotional distress allegedly resulting from a gas explosion in an apartment).

24 John Munkman, *Damages for Personal Injuries and Death*, Butterworths 1993, at p. 128. The Law Commission Consultation Paper (1995), *op. cit.* note 14 above at par. 2.4), too, makes clear that the plaintiff must suffer a recognised psychiatric illness that, at least where the plaintiff is a secondary victim, must be shock-induced; transitory fear and anxiety are inadequate.

25 Probably the first case announcing this test was *Dulieu v. White & Sons*, [1901] 2 KB 669.

26 E.g., *In re Air Crash Disaster Near Cerritos, California (DiCosta)*, 973 F.2d 1490, 1494 (9th Cir. 1992) (allowing recovery for emotional distress to couple who feared for their own safety due to proximity to mid-air collision of two planes over their neighbourhood). But see *Lawson v. Management Activities, Inc.*, 69 Cal.App.4th 652, 81 Cal.Rptr.2d 745 (Cal. Ct. App. 1999) (denying recovery for emotional distress suffered by physically untouched spectators of plane crash who reasonably feared for their own safety as they witnessed plane fall out of the sky).

27 The American Law Institute adopted the zone of danger rule in Restatement (Second) of Torts §§ 313, 436 (1965). See, e.g., *Clohesy v. Bachelor*, 675 A.2d 852, 858 n. 9 (Connecticut Supreme Court 1996) (citing cases of 13 US states adopting the zone of danger rule) and 862 n. 11 (citing cases from 24 other states adopting even broader rule). The Supreme Court of the United States has adopted the zone of danger rule for cases arising under one



the Bijlmer disaster claims, application of the zone of danger test appears to have been the decisive factor for many victims (see, however, paragraph 3 below).<sup>28</sup>

### 2.3 A multifactor approach

Nevertheless, the zone of danger test does not always lead to satisfactory results. Many real victims receive no compensation because, at the time of the disaster, they were outside the zone of danger. Take, for example, a man who was at the time of the crash in the centre of Amsterdam. When he heard about the Bijlmer disaster, he immediately realised that his small children were at home in the disaster-stricken apartment building. After several hours it emerged that his children had survived. In the meantime, the man had become mentally a wreck. It is a fact that this victim was never inside the zone of danger. It is also a fact that the man has sustained some measure of psychiatric damage. But, according to the zone of danger test, he is not entitled to compensation, as he was outside that zone. The disagreeableness of this test is that it does not allow for the fear for the lives of children and partners. Here the zone of danger test works indiscriminately. Whoever was within the zone will easily get compensation, even when the psychiatric damage is slight; anyone outside the zone and has possibly suffered severe damage gets nothing at all.

For example, in the American case *Cohen v. McDonnell Douglas Corp.*,<sup>29</sup> a mother who died of a heart attack caused by learning that her son had died in a plane crash was denied compensation under Massachusetts law because she was a substantial distance from the crash and was told of the death rather than perceiving the accident herself. In contrast, a couple who were inside their house and merely heard a mid-air collision were allowed to recover for emotional distress under California law because they could have feared legitimately that the crashing air planes might have hit them or their home.<sup>30</sup>

As a result of the perceived unfairness created by both the physical injury and zone of danger tests, the courts of many American states require only that the psychiatric damage must have been 'reasonably foreseeable'. The classic

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particular statute, the Federal Employers' Liability Act, which protects railroad workers. *Consolidated Rail Corp. v. Gottshall*, 512 US 532 (1994). For recent commentary supporting the zone of danger rule, see Meredith A. Moore, South Dakota's Interpretation of Negligent Infliction of Emotional Distress and the 'Zone of Danger' Rule in *Nielson v. AT&T Corporation: A Dangerous Hybrid*, 45 *South Dakota L. Rev.* 379 (2000).

28 See, e.g., *Trouw*, October 4, 1995. Until the Bijlmer case was decided, no Dutch case law was available on this issue.

29 450 N.E.2d 581, 590 (Mass. Supreme Judicial Court 1983).

30 In re *Air Crash Disaster Near Cerritos, California (Dí Costa)*, 973 F.2d 1490, 1491 (9th Cir. 1992). The majority and dissenting opinions in a recently decided case in a state court in California debate whether the *Dí Costa* opinion correctly stated California law on this point. *Lawson v. Management Activities, Inc.*, 81 Cal.Rptr.2d (Cal.App.4th 1999).

example is a mother who sees her child die before her eyes in an accident, but is not herself in any physical danger.<sup>31</sup> The California Supreme Court rejected both the zone of danger-test and the physical injury-test in such a case in 1968: '[We see] no good reason why the general rules of tort law, including the concepts of negligence, proximate cause, and foreseeability, long applied to all other types of injury, should not govern the case now before us. Any questions that the case raises 'will be solved most justly by applying general principles of duty and negligence, and ... mechanical rules of thumb which are at variance with these principles do more harm than good.'<sup>32</sup>

In the *Dillon* case, the California Supreme Court noted that the law of torts holds a defendant answerable only for injuries to others that at the time were reasonably foreseeable to the defendant. Therefore, the court would be guided by factors such as the ones which applied to the facts of the *Dillon* case: a) whether the plaintiff was located near the scene of the accident as contrasted with one who was a distance from it; b) whether the shock resulted from direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence; and c) whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only distant relationship. Many US states have found *Dillon's* general approach to be persuasive.<sup>33</sup>

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31 British case law has wrestled with these issues frequently. The Law Commission Report, *op. cit.*, deals extensively with these precedents. For other recent discussion of the British case law, see, e.g., Nicholas J. Mullany and Peter R. Handford, *Hillsborough Revisited*, 113 L.Q.R. 410 (1997); H. Teff, *Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries*, 57 *Cambridge L.J.* 91 (1998); T. Feng, *Liability for Psychiatric Illness – The English Law Commission*, 7 *Tort L. Rev.* 165 (1999). See also Louise Belanger-Hardy, *Nervous Shock, Nervous Courts: The Anns/Kamloops Test to the Rescue?*, 37 *Alberta L. Rev.* 554 (1999) (reviewing Canadian law).

32 *Dillon v. Legg*, 441 P.2d 912 (California Sup. Ct. 1968).

33 At least 27 US states have adopted some form of the rule announced in *Dillon*. See *Clohesy v. Bachelor*, 675 A.2d 852, 862 n. 11 (1996) (citing cases from 24 other states following *Dillon*; Connecticut becomes 25th); *Marzolf v. Stone*, 960 P.2d 424 (Wash. Sup.Ct.1998) (following *Clohesy*); *Nielson v. AT & T Corp.*, 597 N.W.2d 434 (S.D. Sup. Ct. 1999) (following *Dillon*). The State of New York is the largest state jurisdiction in the US to have rejected the *Dillon* rule and to have chosen to retain the zone of danger rule. *Trombetta v. Conkling*, 626 N.E.2d 653 (N.Y. Court of Appeals, 1993). Another question that has arisen is whether the factors stated in *Dillon* were to be used as general guidelines in determining whether the emotional distress injury was foreseeable or whether the guidelines are actually strict prerequisites to recovery. Compare, e.g., *Thing v. LaChusa*, 48 Cal.3d 644 (California Sup. Ct. 1989) (treating factors as prerequisites) and *Blinzer v. Marriott International, Inc.*, 81 F.3d 1148, 1154 (1st Cir. 1996) (treating factors as prerequisites 'serve a critical function in keeping bystander liability within reasonable bounds') with *Marzolf, supra* (showing range of approaches in different states). See also Note, *Tort Law-New Mexico Limits Recovery of Negligent Infliction of Emotional Distress to Sudden, Traumatic Accidents – Fernandez v. Walgreen Hastings Co.*, 30 *New Mexico L. Rev.* 363 (2000).

The 'reasonable foreseeability' approach of *Dillon* is especially appealing where there is such a varied group of victims as in the Dutch Bijlmer disaster. This task should be performed under the reasonable foreseeability approach as originally created in *Dillon* itself, rather than the cases transforming the *Dillon* factors into formal prerequisites to recovery. Otherwise the courts will end up making the sort of arbitrary distinctions which have led to the abandonment of earlier tests such as physical impact or injury. For example, in *In re Air Crash Disaster Near Cerritos, California (Estrada)*,<sup>34</sup> the plaintiff was allowed to recover for her emotional distress which resulted from an aeroplane crashing into her home and killing her husband and children. Although her distress was foreseeable, and quite believable, she was able to recover only because she happened to arrive at the accident scene in time to see her house in flames and because she had good reason to believe that her husband and children were trapped in the house. She could not have recovered unless both of those facts were true.<sup>35</sup> Other victims who have sustained emotional distress under just slightly different circumstances have been denied recovery.<sup>36</sup>

## 2.4 Assessing the injury and damage

Despite the reservations that many US courts have expressed over the years in cases where psychiatric damage is not accompanied by physical injury, for two groups of cases a more liberal policy has been developed. First are cases involving mistakes in the circulation of shocking news, especially where someone's death has been wrongly announced.<sup>37</sup> Second are cases where a human corpse is negligently handled without due care and respect.<sup>38</sup> Prosser believed that courts have treated these cases with less reserve because of 'an especial likelihood of genuine and serious mental distress, arising from the

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34 967 F.2d 1421, 1424-25 (9th Cir. 1992).

35 Ibid.

36 E.g., *Marzolf v. Stone*, 960 P.2d 424 (Wash. Sup. Ct. 1998) (reviewing the spectrum of rules other courts have used to define liability for negligent infliction of emotional distress, and rejecting bright line rule limiting recovery only to those who have witnessed an accident); *McFarlane v. Wilkinson*, [1997] 2 Lloyd's Rep. 259 (English Court of Appeal rejects claims of plaintiffs who witnessed deadly series of large explosions and fires destroying a manned oil rig from vantage of support ship which never got closer than 50 metres to the rig).

37 E.g., *Chizma v. Mackie*, 896 P.2d 196 (Alaska 1995) (misdiagnosis of AIDS); *Johnson v. State of New York*, 37 N.Y.2d 378, 372 N.Y.S.2d 638, 334 N.E.2d 590 (N.Y. Ct. App. 1975) (hospital incorrectly notified daughter that her mother had died). Similarly, a court in Ontario, Canada, awarded damages to a widow who was informed that her husband had committed suicide when he had actually drowned in his bath due to negligent supervision in a mental hospital. *Jinks v. Cardwell*, [1987] 39 CCLT 168. See B. McDaniel, Liability of Hospital or Similar Institution for Giving Erroneous Notification of Patient's Death, 77 ALR 3d 501 (1977 and 1999 Supp.).

38 See Radhika Rao, Property, Privacy and the Human Body, 80 *Boston U.L. Rev.* 359 (2000).

special circumstances, which serves as a guarantee that the claim is not spurious'.<sup>39</sup>

The same may apply to our subject, major accidents: for the inherently shocking nature of exploding chemical plants or aviation accidents is self-evident.<sup>40</sup> The question may be more whether public policy will support extending liability to those emotionally or psychologically harmed indirectly by a horrifying accident.<sup>41</sup> A second, equally important, question is whether this damage can be insured against and at a reasonable rate.<sup>42</sup>

Under Dutch law, both the physical as well as the psychiatric damage are open to compensation.<sup>43</sup> The principal rule is that damage to the psyche will be imputed to the liable person, even when the psychiatric damage can also be blamed on the personal predisposition of the victim. Special personal circumstances regarding the victim do not break the chain of causation. It is, however, established case law in The Netherlands that any predisposition of the victim has to be taken into account when estimating damages and awarding compensation, because some forms of physical or mental disorder can increase the possibility of certain injuries.

Nevertheless, for American law the conclusion is that in general, plaintiffs who seek recovery for emotional distress arising from witnessing or learning of disasters such as airline crashes have not been successful very often.<sup>44</sup> It follows from the above that we disagree with the trend of these results. In our opinion, the issue of whether a breach of the duty of care has been accompanied by physical violation of the plaintiff, or the presence or absence of the factors identified in the *Dillon* case, can play a role in establishing the gravity and seriousness of the alleged psychiatric damage, but should not be a pre-requisite to recovery. We agree with the Australian authors Mullany and Handford that '[d]ifferences in the strengths of various types of claims can be reflected in the quantum of damages awarded rather than leading to

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39 Prosser and Keeton, *op. cit.*, at p. 362.

40 See Lee S. Kreindler, *Aviation Accident Law* (1997 revised edition) par. 6.04[1].

41 See *Hisplo v. Salt River Project Agricultural Improvement and Power District*, 5 P.3d 267 (Ariz. App. 2000)(making decision expressly on basis of policy that plaintiffs may not recover for entirely foreseeable emotional distress damages suffered by witnessing close friend and co-worker electrocuted and engulfed in a ball of fire).

42 For estimates on the increased cost of insurance premiums if psychiatric damages were more widely available, see Law Commission Report, *op. cit.*, at par. 1.12-1.13.

43 See article 6:106 Civil Code: 'The victim has the right to an equitably determined reparation of harm other than patrimonial (= pecuniary) damage ... if the victim has suffered physical injury, injury to honour or reputation or if his person has been otherwise afflicted...' *New Netherlands Civil Code, Patrimonial Law*, Translated by P.P.C. Haanappel and Ejan Mackaay, Kluwer Law and Taxation Publishers, Deventer – Boston 1990.

44 Kreindler, *op. cit.*, par. 6.04[6], discusses one such example. In *Bode v. Pan American World Airways Inc.*, 786 F.2d 669 (5th Cir. 1986), witnesses to an air crash were not allowed to recover under Louisiana law for their emotional distress.

the automatic exclusion of some actions ...'.<sup>45</sup> It might also be appropriate for the legislature to establish some arbitrary limits, such as a maximum amount of recovery per victim, or to choose to recognise certain types of claims rather than others.<sup>46</sup> We think that courts should not engage in this sort of line drawing in the name of what public policy supposedly demands, however. In the face of legislative inaction, courts should simply apply traditional tort tests, such as reasonable foreseeability and proven recognised injury, and should not endeavour to decide when liability decided on this basis will be too great for potential defendants to bear.<sup>47</sup>

It may be easier for courts to accept the application of the traditional tests when one considers what will be the treatment of a large group of potential emotional distress victims – professional rescue workers, including police officers, who can be involved in terribly stressful rescue operations. Take, for example, the case of the tragedy at a football match in England in 1989, where nearly 100 people were crushed to death and hundreds more were injured after a police officer negligently opened a gate and trapped a large part of the crowd in a confined space. The British House of Lords rejected the claims for psychiatric damage brought on behalf of other police officers who witnessed the events as they attempted to rescue the injured and attend to the dead.<sup>48</sup> In principle, this seems correct to us. To use the German concept once again, one can expect more 'physischer oder psychischer Widerstandskraft' ('physical or mental resistance') from professionals such as on duty police officers. Furthermore, it is more reasonable to expect them (or their employers) to insure themselves in advance – as they are in the Netherlands – than it is for potential victims of a disaster over which they will have had no control, such as witnesses to an air crash or an explosion. Jurisdictions in the US generally bar claims for rescue workers' injuries of any kind under the so-called 'fire fighter's rule', which is a specialised form of the concept of assumption of risk.<sup>49</sup> Thus, if these traditional rules continue to be followed, a large class of potential suits need not be considered.

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45 Mullany and Handford, *op. cit.*, at p. 312.

46 For example, the Law Commission's Report, *op. cit.*, at pp. 121-25, contains specific recommendations to the British Parliament for legislation to codify new liability rules for aspects of the law on negligently inflicted psychiatric illness, deliberately leaving much of the law to develop through judicial decisions.

47 *Jaensch v. Coffey*, 155 C.L.R. 549 (Austl. 1984) (opinion of Justice Deane) is an example of a high court justice taking this approach.

48 *White v. Chief Constable of South Yorkshire Police*, [1999] 2 A.C. 455, [1999] 1 All ER 1. The House of Lords addressed the psychiatric illness claims of other witnesses to this tragedy previously. *Alcock v. Chief Constable of South Yorkshire Police*, [1992] 1 AC 310; [1991] 4 All ER 907.

49 See Dobbs, *op. cit.*, at pp. 769-79. Dutch case law is not available.

### 3 THE BIJLMER CRASH AND THE JUDGEMENT OF THE DISTRICT COURT OF AMSTERDAM

As mentioned above, in the case of the Bijlmer crash Boeing (and El Al) were able to agree a settlement with most of the victims based on the zone of danger test. Victims who were within this zone were able in a number of cases to submit fairly scant evidence of their damage.

However, it was not possible to reach a solution satisfactory to everyone. It was no coincidence that the claims presented to the court for resolution were of people who were outside the zone of danger at the time of the crash. The court had to consider the claims of 23 plaintiffs. In the majority of cases the claims were for emotional distress; compensation for pecuniary damage was also claimed in a few cases, including one claim for repayment of moving expenses.

Before dealing with these individual claims, the Amsterdam court gave its opinion on the question whether the zone of danger approach was decisive. The court held that it was not:

Before dealing with the separate claims, the court will discuss the general defence submitted by Boeing with regard to the claims that have been submitted for non-pecuniary damage. The court would state at the outset that the test whether the plaintiffs were, at the time of the crash, within a radius of 100 metres of the place where the aircraft crashed (described by the parties as the 'zone of danger') cannot always be deemed decisive. The mere fact that people who were outside the zone of danger defined in this way can, in retrospect, be seen objectively not to have been in danger of their lives does not alter the fact that they may have suffered shock that can in certain circumstances be imputed to Boeing. In view of the exceptional seriousness and scope of the consequences of the crashing of an aircraft on two blocks of occupied apartments, the court considers it quite conceivable that a person may have suffered psychiatric damage if he or she was in the vicinity of the crash, albeit outside (or just outside) the zone of danger, and believed that he or she had to flee for his or her life or was confronted with the consequences in some other shocking way. There does not appear to be any reason why the standard infringed by Boeing should not extend to provide protection for the interests of these people.

In view of our earlier advocacy of a multifactor approach, it will come as no surprise that we endorse the reasoning of the court. It should be noted that the court did not *reject* the zone of danger approach. As is evident from the outcome of the many settlement procedures, this approach is very practical in many situations. But this does not mean that it is 'always decisive'.

This position means that ultimately each case must be assessed on its own merits. But it was here that the court proved much stricter. In cases where compensation for pecuniary damage was claimed, the claim was refused because the items of damage had been insufficiently specified. In respect of a claim for compensation for removal expenses (totalling DFL 25,000), the court held that:

Boeing has, in the view of the court, rightly disputed the causal connection between the removal and the related costs. It has, after all, been submitted that the reason for the removal was that [Plaintiff 1] did not wish to be continually reminded of the disaster and there were many empty flats. Although these are understandable reasons for the removal, the connection with the Bijlmer disaster is too remote to hold that Boeing must reimburse the costs connected with the removal. For this reason alone this part of the claim of [Plaintiff 1] must be rejected, quite apart from the fact that [Plaintiff 1] has not provided a sufficient specification of the relevant costs.

And finally, as regards the claims for compensation for non-pecuniary damage, only two of the plaintiffs were successful. Each of them received an amount of DFL 5,000. In eleven cases, the claim was, however, refused because it had been insufficiently proven. This was so even in the two cases in which the victims were able to file a certificate showing that they were suffering from post-traumatic stress disorder; evidently their story was not deemed sufficiently reliable.

#### 4 A FURTHER ANALYSIS

##### 4.1 A victim-oriented approach

The current Dutch law on compensation was codified in 1992 when the new Civil Code became law. In the case of compensation for damage resulting from injury, the manner in which the courts interpret and apply the rules is regarded as 'victim-friendly' or 'victim-oriented'.

For example, the rules relating to the causal connection are applied relatively flexibly (see section 4.3 below). In addition, the rule that 'the tortfeasor must take the victim as he finds him' generally works very much to the advantage of victims.<sup>50</sup> That one victim is more sensitive than the other and therefore will be more susceptible to mental traumas is mostly immaterial. This rule is generally accepted although, for example, the German judge will sometimes require 'ein Minimum an physischer oder psychischer Widerstandskraft' ('a minimum of physical or mental resistance'). If this is missing the claim will be rejected.<sup>51</sup> Finally, psychiatric damage is being accepted increasingly easily as a 'normal' item of damage, and indeed even as a 'stand-alone injury'.

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50 For example, in the case of a victim that had to be decided by Amsterdam District Court, it was found that the aircraft crash had caused her to relive earlier traumatic experiences. The psychologist to whom she had gone for treatment regarded the victim as a so-called second-generation victim: born in a semi-Jewish environment shortly after the war. According to this expert, this had to some extent shaped her personality, including her 'mental state'. As Boeing did not dispute her statement, the court proceeded on the assumption that it was correct.

51 For further German case law, see Hermann Lange, *Schadensersatz*, J.C.B. Mohr (Paul Siebeck) Tübingen 1990, at p. 132 and 141 ff.

## 4.2 No frivolous claims allowed

As against this, the Dutch courts also have a number of instruments at their disposal with which they can submit the claim of a victim to critical scrutiny. We have already encountered three of them in the judgement of the Amsterdam court. For example, the plaintiff must make out a plausible case for his claim and must provide sufficient proof, failing which the claim (or possibly part of the claim) will be dismissed. 'Making out a plausible case' refers not only to the mental state of the victim (all statements by experts were accepted by the court and were also not disputed by Boeing) but also to the resulting items of damage. As the majority of the victims were unable to provide sufficient proof of their psychiatric injuries, all these claims were dismissed.

## 4.3 Issues of causation

In addition, the causal connection between the disaster and the psychiatric injury and between the injury and the specific items of compensation must be plausibly demonstrated. For example, the court dismissed the claim of one of the victims, which related to her removal to a safer place, because it deemed the costs 'too remote'.

It is important to pause and consider for a moment the requirement of proximate cause. It is ultimately a matter of what damage (reasonably) can be attributed to the tortfeasor as a consequence of the event causing the damage. Article 6:98 of the Dutch Civil Code employs a so-called multifactor approach. It is not only the *foreseeability* of the damage that is important, since other factors also play a role. Article 6:98 itself offers the court two factors from which it can perhaps decide the extent of liability: it must consider the *nature of the liability* and the *nature of the damage*. A fourth factor is the *remoteness* of the damage: it may be so remote that imputation of liability can no longer be justified. A fifth factor that can play a role is the extent of *culpability*. For example, damage that is caused intentionally is more eligible for compensation than damage caused by a slight degree of negligence. It follows that the court will have to arrive at decision based on the reasonableness criterion – and explain its reasons for its decision.

We would like to consider two of these factors at rather greater length. The *nature of the liability* can be a reason to define the extent of the liability more narrowly or indeed more broadly. Let us first examine an example of a closer connection. In some situations, the legislature has imposed strict liability. Such cases involve a departure from the rule that tortious liability depends on an element of culpability of the tortfeasor (fault). Where there is strict liability, there may be reason to define the limits of liability more narrowly or, to put another way, to impute less damage.



*The nature of the damage* is found in practice to be of great importance in the process of imputing damage to the debtor. The damage that a person suffers may result from the death of another person, from injury, from damage to property, from damage to the environment, from a loss of business, and so forth. Each case involves a different type of damage. In the case law, personal injury can be seen to have a very high priority. It is therefore likely to be imputed to the tortfeasor. In the case of damage to property or to a business, the courts may well be more restrained.

It follows that the courts that assess the facts, the Dutch district court in the first instance and then the court of appeal, have a large margin of discretion in arriving at a reasonable judgement. We will return to one of these factors in section 5 below.

#### 4.4 Bereavement damages (*affectieschade*) allowed?

Finally, the court dismissed a claim in part because bereavement damages (in Dutch: *Affectieschade*) are not allowed under Dutch law. In the case of one of the victims, post-traumatic stress disorder was, according to a statement of the psychologist, the result of a combination of being present at the extreme edge of the zone of danger and the death of a close woman friend in the conflagration. In so far as the latter factor was responsible for the suffering, the court held that the damage was not eligible for compensation.<sup>52</sup> The court therefore chose to exclude bereavement damages.

We see various problems associated with the bereavement issue. For example, it would be virtually impossible to determine in the case of a specific victim who is acknowledged to suffer from a recognised psychiatric illness to what extent the consequent damage is attributable to either the disaster or to the relationship with another (deceased) victim. The court did not make any attempt whatever to make a distinction, but simply fixed the amount of damages (DFL 5,000).

But even more important than this *practical* objection is an objection of principle to the exclusion of bereavement as a ground for compensation. Why should serious mental injury caused to a great extent by the fact that a relative has died as the consequence of a tort *not* be eligible for compensation? For example, The Hague Court of Appeal recently allowed a claim by the parents of a murdered child against the murderer. The parents had suffered very serious mental distress as a result of the murder and the court properly did

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52 Compare, e.g., *Krouse v. Graham*, 19 Cal.3d 59, 562 P.2d 1022 (Calif. Sup.Ct. 1977) (disallowing claim for mental anguish due to wrongful death, while allowing claim for recovery for mental anguish resulting from plaintiff witnessing an impact in which his wife was killed).

not dismiss the claim on the ground that it simply concerned compensation for bereavement.<sup>53</sup>

This division, as reflected in the Dutch court decisions, is mirrored when one looks at the law in other jurisdictions. For example, under US law, the mental anguish and grief experienced by survivors as a result of the death of a loved one generally are not considered compensable injuries.<sup>54</sup> Even in those few US states recognising such recovery, it is typically compensable only if the grief is 'more than normal'.<sup>55</sup> Similarly, in many European countries, such as the Scandinavian countries and Germany, as well as under the common law, bereavement damages ('affectieschade') as a result of the loss or injuring of a loved one are not compensable.<sup>56</sup> However, in certain other countries, such as Belgium, France, Scotland, and Spain, a rather small and fixed amount of money (sometimes called solatium) is awarded to specified relatives for bereavement, regardless of whether any such damage was actually suffered.<sup>57</sup>

In the Netherlands, the Leiden researcher dr. Siewert Lindenbergh is promoting such a solution.<sup>58</sup> He suggests an amount of ca. 10.000 Euro.<sup>59</sup> It seems as if this approach is gathering support in the Netherlands. However, we do not belong to these supporters. What really should be at issue is whether the injury is sufficiently serious. This is why we have previously suggested the use of the more general principle of recognised psychiatric illness. What is presently described as bereavement damage will often not fulfil the requirements of this definition. The German Bundesgerichtshof uses the term 'Gesundheitsverletzung' and requires that the injury:

über noch im Bereich normaler Reaktion liegende Erscheinungen von Schmerz, Treuer und Niedergeschlagenheit hinaus unmittelbar zu einer 'traumatischen' Schädigung der physischen und psychischen Gesundheit geführt hat.<sup>60</sup>

Bereavement damage will not generally satisfy the requirement of '*Schmerz*' i.e., more than normal. But, we want to emphasise that the possibility of

53 *The Hague Court of Appeal* 26 April 2000.

54 See, e.g., *Sea-Land Services v. Gaudet*, 414 US 573, 586-87 n.17 (1974).

55 *Potts v. Benjamin*, 882 F.2d 1320, 1326 (8th Cir. 1989). See generally G. Boston et al, *Emotional Injuries: Law and Practice* West Group 1998 6-57 – 6-63.

56 What is compensated, though, is damage for the loss of support (material damages) suffered by certain individuals, such as the spouse and the minor children (art. 6:108 CC). Non-pecuniary damages, or material damages suffered by victims not mentioned in art. 6:108 are not entitled to compensation. See also Peter B. Kutner, 'Damages for Injuries to Family Members: Does Reform Mean Abolition?', 1 *Torts L.J.* 231 (1993) (reviewing law and reform proposals in many countries).

57 See, e.g., *The Law Commission Consultation Paper No. 148, Claims for Wrongful Death* (1997); Peter B. Kutner, *Reforming Wrongful Death Law*, 7 *Torts L.J.* 1 (1999) (both reviewing availability of bereavement damages in many countries).

58 S.D. Lindenbergh, *Smartengeld*, Kluwer Deventer 1998. p. 174 ff.

59 *Idem*, p. 217. Recently: S.D. Lindenbergh, 'Smartengeld voor naasten', *NJB* 2001, p. 61 ff.

60 BGHZ 56, 163, 167 (11 May 1971).

compensation for bereavement damages ('affectieschade') should not be *excluded*.

#### 4.5 Our opinion

The general picture is therefore that although the Amsterdam court does not wish the victims to continue to labour under the yoke of the zone of danger test, it will examine carefully whether the claims should actually be granted. We wholeheartedly support this approach, without wishing to express an opinion on the correctness of the decision which the court went on to make in each of the cases. Appeal is still possible and, furthermore, we have too little information to form our own judgement on the individual outcomes.

To return to the question of the different tests, our preference would be for a multifactor approach. Arbitrarily drawing a circle around the area where the disaster occurred (the zone of danger) should not be decisive.<sup>61</sup> The way in which the circle is drawn is not a matter which should escape the judgement of the court, if only because the circle is in fact often drawn by the party that is liable. In addition, victims in personal injury cases deserve individual assessment of their cases. However, for settlement purposes, the parties would be free to apply different standards in so far as it concerns proof of the damage. The parties might agree to take a more accommodating approach within the circle and a stricter approach outside it. One could say as a rule of thumb that the further the victim was situated beyond the zone of danger the more critical the parties and, if necessary, the court should be in granting any claim and determining the compensation. Various legal instruments are available to the court for this purpose. We do not therefore categorically reject the zone of danger approach. In practice, the settlement procedure has proved to function very reasonably. But it cannot be decisive.

We also advocate that compensation should be awarded only in cases of serious mental injury, supported by evidence that the victim is suffering a recognisable psychiatric illness.<sup>62</sup> We would not therefore wish compensation to be paid for bereavement in so far as this is tantamount to lesser forms of 'mental suffering' which constitute a 'normal' reaction to the suffering or loss of others. Bereavement damages, the emotional damages suffered by a third party as a consequence of the death or serious suffering of a loved one should be compensated, but only if there is *proximate cause* between the tragic event (the disaster) and the bereavement damages, leading to a *recognisable psychiatric illness*. We, therefore, reject solutions as chosen in several European countries (such as France, Belgium and Spain), where a rather small and fixed amount

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61 See, e.g., *Sullivan v. Ford Motor Co.*, 2000 WL 343777 (S.D.N.Y. 2000) (establishing extent of zone of danger through testimony of competing expert witnesses).

62 The Law Commission Report, *op. cit.*, at par. 5.1-5.6, also endorses this requirement.

of money is awarded, even if there is no recognisable psychiatric damage. The proposed solution also avoids the problem noted by others that the bereaved sometimes have perceived symbolic awards as an insulting statement about the low intrinsic value of the deceased.<sup>63</sup> Unless the legislature comes under periodic pressure to increase the value of the symbolic award, it will become embarrassingly low over time.<sup>64</sup>

In short, we would advocate a system where (i) by means of a multifactor approach it is decided whether or not an alleged victim, who was not directly and physically affected by the event, has in principle a right to claim compensation, and (ii) where by means of assessing the seriousness of the injury and by carefully considering the requirement of proximate cause (a strong indication of proximate cause would of course be the loss of a loved one), the amount of compensation (material damages in the first place, and, see however below, non-pecuniary damages) is determined. This, in our opinion, also applies to victims who suffer because of the loss or the injuring of a loved one, regardless of the family links (*affectieschade*). What should be decisive is the seriousness of the psychiatric illness. The loss of a loved one is, in our proposal, no more and no less than one of the possibilities that might lead to the development of a serious psychiatric illness. It should not be a separate heading that needs special legislation, such as in France, Spain and Belgium.

#### 4.6 A zone of emotional danger approach?

The Dutch author Verhey would go much further than we have proposed, however. In an interesting article, he proposes a Zone of *Emotional Danger*. Anyone within this zone at the time of the disaster should be eligible to compensation for damage due to mental injury. He departs completely from the zone of danger:

Rejecting the 'Zone of Physical Danger' means bidding farewell to thinking which has not yet torn itself away from the notion of the dualism of body and spirit. Psychiatric damage is compensated in this approach only in so far as the victim was himself in physical danger.<sup>65</sup>

We are, however, not in favour of exchanging the physical danger test for an emotional danger test. This would be simply yet another attempt at alleged clarity. Verhey's proposed test would need further delimitation and definition.

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63 *The Law Commission Report No. 148*, op cit., at 81; Kutner, op cit.

64 See, e.g., Alberta Law Reform Institute, *Non-Pecuniary Damages in Wrongful Death Actions – A Review of Section 8 of the Fatal Accidents Act 11, 43 (Report No. 66, 1993)* (calling for legislature to increase amount of statutory bereavement damages from \$3000 and to seek review of amounts at least once every five years).

65 A.J. Verhey, *Shockschade*, *NJB* 1999, at 1416.

Where are the boundaries of such a zone of emotional danger? And even such boundaries do not, in our view, provide any value added in relation to the multifactor approach which we advocate. In this subject matter it is, perhaps more than in any other, a case of *ius in causa positum*.

If a court perceives the need for a limiting test, a zone of physical danger provides much more certainty than a zone of emotional danger. Coincidentally, this is demonstrated by the manner in which the Bijlmer disaster was handled. In so far as the victims were inside the zone of danger fixed by Boeing and El Al, they received compensation. A court was clearly not necessary for this purpose. What remained was a handful of cases the seriousness of which might be sceptically questioned by an outsider (see the judgement of the court). We cannot form a real opinion about this, but the small number alone – ultimately seventeen – does not indicate the necessity of introducing a vague test of this kind. A zone of danger determined on a reasonable basis is evidently sufficient in a settlement stage. What is important – and the court recognised this correctly – is that a zone of danger ‘should not automatically be decisive’.

## 5 A (HARSH?) PROPOSAL: NO NON-PECUNIARY DAMAGES

Nonetheless, the question arises of whether the multifactor approach entails the risk of unleashing a flood of claims. This question needs to be considered much more carefully in the case of large-scale disasters than in the case of accidents that result in only a few victims. This is because the fact that the claim is not subject to any physical limit (the Amsterdam court has, after all, rejected the notion that the zone of danger is automatically decisive) combined with the fact that the nature of the damage is ‘psychiatric’ (a form of injury that is by its very nature potentially ‘unlimited’) means that there is a real danger of a flood of claims.

It was for this reason that we suggested in the conclusion to our 1997 article that a differentiation could be made on the basis of the type of damage and in particular that a distinction should be made between pecuniary and non-pecuniary damage. Psychiatric damage may result in both *pecuniary* damage (e.g., doctors’ fees, loss of income) and in *non-pecuniary* damage (e.g., stress and other emotional suffering). Of the two – compensation for pecuniary damage and compensation for non-pecuniary damage – the former deserves in our view the greater priority. The absence of compensation for pecuniary damage places a heavier burden on the everyday life of the victim (particularly if this damage is not covered by insurance) than the absence of compensation for non-pecuniary damage.

Our suggestion therefore is that, particularly in the case of victims outside the zone of danger in large-scale disasters, a legislature (by statute or treaty) might choose to distinguish between pecuniary and non-pecuniary damage claims. If the legislature concludes that the potential flood of claims is too great

and arbitrary choices have to be made, it might adopt a more generous approach to the claims for compensation for pecuniary damage caused by psychiatric injury than to the claims for compensation for non-pecuniary damage, which a legislature might well conclude deserve lower priority. We pointed to this possibility in our article on aviation accidents.<sup>66</sup> Ultimately, if choices need to be made, the victim benefits more – in our view – from a reimbursement of pecuniary damage than for a reimbursement for pain and suffering.

We expect that this type of legislative limitation on recoverable damage will, however, be more acceptable in the various European legal systems than in the United States.<sup>67</sup> In Europe, the concept of damages for pain and suffering has a mostly symbolic value; the amount of such damages is seldom as closely related to the seriousness of the injury as it is in the US. In addition, in the US, the damages for non-pecuniary loss in effect serve as a source of payment of fees for the plaintiffs' attorneys, which would not be recoverable from the defendants under prevailing American rules. For example, in July 2000, the United States Congress passed legislation *restoring* the availability of non-pecuniary damages in commercial airline crashes for the wrongful death of passengers. The legislation took effect retroactively so that the relatives of victims of the crash of TWA Flight 800 in July 1996 could benefit from the liberalised damage rules.<sup>68</sup>

The situation in the Netherlands is that not only the legislature can determine this priority (as in the American Death on the High Seas Act), but also possibly the court. In section 4.3, we discussed earlier the causality article in the Dutch Civil Code. Article 6:98 of the Civil Code indicates a number of factors which the court must take into account when deciding on the question of whether there is an adequate causal connection between certain items of damage and the event leading to the disaster. One of them was the *nature of the damage*. This factor provides the court with the opportunity to differentiate between different types of damage. It may, for example, be more inclined to conclude that there is a causal connection in cases of personal injury than, for example, in cases of damage to property. And in our view, it can also differentiate between different types of personal injury, for example between pecuniary and non-pecuniary damage. Our proposal would be that in cases

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66 Stolker and Levine, *op. cit.*, at p. 69.

67 See also David F. Partlett, 'Tort Liability and the American Way: Reflections on Liability for Emotional Distress', 45 *Am. J. Comparative L.* 171, 178 (1997) (book review), contending that Mullany and Handford's proposed "solution of turning liability on a showing of 'recognized psychiatric illness' is a reasonable prescription for Commonwealth jurisprudence but incompatible with the rivened foundation of emotional distress liability in the United States."

68 P.L. 106-181 sec. 404, modifying Death on the High Seas Act. For judicial interpretation of the Act's possible application to the TWA crash prior to its recent modification, see: *In re Air Crash Off Long Island, New York, on July 17, 1996*, 209 F.3d 200 (2d Cir. 2000).

in which the physical and/or emotional distance is greater (the victim was undeniably outside the zone of danger) but in which psychiatric damage can nonetheless be established, the court should be more inclined to allow compensation for pecuniary damage than for non-pecuniary damage.

The award of DFL 5,000 (a limited amount even by the standards of Dutch law on pain and suffering) by Amsterdam District Court in two cases may be an example of this differentiation.

## 6 CONCLUSION

The inherently shocking nature of major disasters, such as exploding chemical plants or commercial aviation accidents, is self-evident. We believe that it is not appropriate arbitrarily to refuse to extend liability to compensate all those who suffer serious psychiatric injury as a result of such disasters. Companies operating aircraft, chemical plants and the like can foresee the possibility of a substantial number of victims, if they are found to be liable for the disaster. Thus, they may owe a duty of care to many more people than those who happen to have been in the Zone of Danger at the time of the disaster.

Therefore, in this article we have advocated a multifactor approach for courts to use in determining which victims of disasters should be given compensation. Only those who are suffering from a serious and recognised psychiatric illness should even be eligible for compensation. In establishing whether any recognised psychiatric illness was proximately caused by the disaster, courts should be able to consider – as guidelines, not as rigid requirements – factors such as the victim's tie of love and affection to someone physically injured in the disaster, the victim's closeness in space and time to the incident or its aftermath, and the means by which the victim learned of the disaster. Although we believe that a Zone of Danger approach is ultimately too arbitrary, we recognise the possible merit of such an approach as a tool in attempting to settle a large number of claims which may arise from a single large disaster.

Finally, we propose that if the legislature determines that the extent of compensation for psychiatric damage as a result of accidents or disasters must be limited, for victims who have suffered recognised psychiatric illness only, recovery for pecuniary damage should take precedence over non-pecuniary damage. We do not support approaches, as taken by some European legislatures, where a token sum of money is awarded, regardless of whether there is in fact any damage suffered.

We believe that these recommendations will balance the needs of victims who have endured real injuries while meeting the concerns of those who fear unleashing the detrimental economic effects of unlimited liability.