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The (Non-Existent) Legal Risks of Apologising: Courts Do Not See Apologies as a Way to Accept Civil Liability

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Abstract: Psychological research shows that apologies can have many positive effects. However, in a legal context, the positive potential of apologies could be complicated when legal proceedings raise barriers to apologising. Ideally, legal proceedings should encourage wrongdoers to apologise rather than discourage them. There is still much debate about the legal consequences of apologising. According to popular wisdom, persons who face the prospect of being blamed for an act should avoid apologising. Offering an apology would be risky because the apology could be interpreted as an admission of liability. The question is whether this reticence is justified. For many jurisdictions, we still know little about the exact role that apologies play in judicial decision-making. This paper provides a detailed and structured overview of how apologies can play a role in judicial decision-making in a civil law legal system. A structured content analysis was conducted, in which almost 4,000 Dutch judgments were analysed. The research findings show that the role apologies can play in legal decision-making is much more complex than previously assumed in the literature. This study shows that different modalities can be distinguished. Apologies almost never appear to lead to negative legal consequences, and, in many cases, apologising actually has legal benefits for the provider of such apology. Also, the case law analysis highlights that there are ways to encourage apologising in legal proceedings.

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I Introduction

In recent years, much (empirical) research has been conducted on the interests and needs of victims in tort cases, for example, as a result of workplace accidents, medical errors, or natural disasters.[1] Although this research shows that financial compensation is considered important by victims, it does not always turn out to be the only, or primary, motive for initiating legal proceedings. Victims also have immaterial needs, such as a desire to know exactly what happened, wanting to prevent the same thing happening to someone else, and recognition from the wrongdoer.[2] Research has demonstrated that satisfying such immaterial interests helps victims to process and accept the event.[3] Failure to do so can place a psychological burden on victims, adversely affect their health and impede their recovery.[4]

Receiving an apology appears to be an important immaterial need that victims may have.[5] When an apology is offered, research shows that victims perceive and judge the wrongdoer more positively. In the eyes of victims, apologising wrongdoers have acted less intentionally, are held less responsible for the event causing the harm and are less likely to make the same mistake again in the future.[6] Apologies

1 See eg *FA Sloan et al*, The road from medical injury to claims resolution: How no-fault and tort differ (1997) 2 Law and Contemporary Problems (LCP) 50; *GK Hadfield*, Framing the Choice between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund (2008) 42(3) Law and Society (J L & Soc) 645; *J Moore*/*MM Mello*, Improving reconciliation following medical injury: a qualitative study of responses to patient safety incidents in New Zealand (2017) 26(10) BMJ Quality & Safety (BMJ Qual Saf) 788; *K van Doorn*/*C Dybus*, Are we really helping them: The needs of tort victims in mass litigation environments (2017) 8(1) Journal of European Tort Law (JETL) 100; *DR Hensler et al*, Compensation for Accidental Injuries in the United States [1991] RAND Report: Santa Monica 143; *KM Mazor et al*, Understanding patients' perceptions of medical errors (2009) 2(1) Journal of Communication in Healthcare (J Healthc Commun) 34*; KM Mazor et al*, Health Plan Members' Views about Disclosure of Medical Errors (2004) 140(6) Annals of Internal Medicine (Ann Intern Med) 409; *CP Reinders Folmer*/*H Van Boom*/*TM Desmet*, Beyond Compensation? Examining the Role of Apologies in the Restoration of Victims' Needs in Simulated Tort Cases (2019) 43(4) Law and Human Behavior (Law Hum Behav) 329; *RME Huver et al*, Slachtoffers en aansprakelijkheid. Een onderzoek naar behoeften, verwachtingen en ervaringen van slachtoffers en hun naasten met betrekking tot het civiele aansprakelijkheidsrecht. Deel 1: Terreinverkenning [2007] WODC.

2 *Huver et al* (fn 1).

3 See eg *Hensler et al* [1991] RAND Report: Santa Monica 143; *Sloan* (1997) 2 LCP 50–52.

4 *HJ Schneider*, Victimilogical developments in the world during the past three decades (2001) 45 International Journal for Offender Therapy and Comparative Criminology (Int J Offender Ther Comp Criminol) 449- 468 (Part 1) 539–555 (Part 2) and *A Cotti et al*, Medical law – Road traffic accidents and secondary victimisation: The role of law professionals (2004) 23 Medicine and Law (Med Law) 259.

5 *Huver et al* (fn 1) and *Reinders Folmer et al* (2019) 43(4) Law Hum Behav 329.

6 *JR Davis*/*GJ Gold*, An examination of emotional empathy, attributions of stability, and the link between perceived remorse and forgiveness (2011) 4(3) Personality and Individual Differences (Pers

also lead to a decrease in negative feelings, such as anger and resentment on the part of the victim, not only towards the wrongdoer but also towards the event causing the harm.[7] As a result, victims appear to be prepared to adopt a more constructive attitude, which can contribute to the resolution of the dispute in the sense that settlements are encouraged and costly procedures are avoided.[8] These positive effects have also been found in the field of alternative dispute resolution.[9] Furthermore, apologies have a positive effect on the intentions and expectations for the future relationship between parties and play a role in restoring trust.[10] Ultimately, receiving an apology contributes to the psychological and physiological recovery of victims.[11]

A Legal risks of apologising

In the literature, it is argued that the potential that apologies have for contributing to the resolution of a dispute is complicated by (the threat of) legal proceedings. In conflicts that may result in legal proceedings, apologies may be viewed as hazar-

Individ Differ) 392; *GJ Gold*/*B Weiner*, Remorse, confession, group identity, and expectancies about repeating a transgression (2000) 22(4) Basic and Applied Social Psychology (BASP) 291; *JK Robbennolt*, Apologies and settlement levers (2006) 3(2) Journal of Empirical Legal Studies (J Empir Leg Stud) 333 and *SJ Scher*/*JM Darley*, How Effective Are the Things People Say to Apologize? Effects of the Realization of the Apology Speech Act (1997) 26(1) Journal of Psycholinguistic Research (J Psycholinguist Res) 127–139.

7 *Robbennolt* (2006) 3(2) J Empir Leg Stud 333.

8 *JR Cohen*, Advising Clients to Apologize (1999) 72(5) Southern California Law Review (South Calif Law Rev) 1009; *D Shuman*, The Role of Apology in Tort Law (2000) 83(4) Judicature 180; *PH Rehm*/*DR Beatty*, Legal consequences of apologizing (1996) (1) Journal of Dispute Resolution (JDR) 115; *JG Brown*, Symposium: the role of apology in negotiation (2004) 87 Marquette Law Review (Marquette Law Rev) 665 and *D Schneider*, What it means to be sorry: the power of apology in mediation (2000) 17 (3) Mediation Quarterly (Mediation Q) 265.

9 *MK Dhami*, Offer and Acceptance of Apology in Victim-Offender Mediation (2012) 20(1) Critical Criminology (Crit Criminol) 45; *AJ Kellett*, Healing Angry Wounds: The Roles of Apology and Mediation in Disputes between Physicians and Patients (1987) 10 Missouri Journal of Dispute Resolution (Mo J Dis Res) 111 and *DL Levi*, The role of apology in mediation (1997) 72(5) New York University Law Review (NY Univ Law Rev) 1165.

10 See eg *Robbennolt* (2006) 3(2) J Empir Leg Stud 333; *Mazor* (2004) 140(6) Ann Intern Med 409; *M Bennett*/*D Earwaker*, Victims' responses to apologies: The effects of offender responsibility and offense severity (1994) 134(4) The Journal of Social Psychology (Soc Psychol) 457 and *Huver et al* (fn 1).

11 See eg *CVO Witvliet et al*, Retributive justice, restorative justice, and forgiveness: An experimental psychophysiology analysis (2008) 44(1) Journal of Experimental Social Psychology (J Exp Soc Psychol) 10, and *ME McCullough et al*, Interpersonal forgiving in close relationships: II. Theoretical elaboration and measurement (1998) 75(6) Journal of Personality and Social Psychology (J Pers Soc Psychol) 1586.

dous in light of possible legal consequences. This may cause parties to deal with apologies differently than in non-legal contexts. Various authors have argued that the fear of negative legal consequences prevents wrongdoers from apologising.[12] Wrongdoers fear that their apology will be interpreted as proof that they are to blame for the incident and that this will worsen their position in potential legal proceedings. In legal practice, this fear is said to be perpetuated by lawyers and insurance companies that explicitly instruct their clients not to apologise.[13]

In recent years, there has been an abundance of empirical research into the effects of apologies in a legal context. Initially, this research focused on criminal law.[14] However, there is also an increasing scientific interest in the interaction between apologies and civil proceedings.[15] These studies focus particularly (but not

12 *C Farmer*, Striking a Balance: A Proposed Amendment to the Federal Rules of Evidence Excluding Partial Apologies (2015) 2 Belmont Law Review (Belmont Law Rev) 243, 249, in which apologising is called 'legally dangerous', and *Cohen* (1999) 72(5) South Calif Law Rev 1011 ('although a physician may wish to tell a patient when he has made a mistake, lawyers often order doctors to say nothing'). See also *TH Gallagher et al*, Patients' and physicians' attitudes regarding the disclosure of medical errors (2003) 289(8) Journal of the American Medical Association (JAMA) 1001; *RM Lamb et al*, Hospital disclosure practices: results of a national study (2003) 22(2) Health Affairs (Health Aff) 73; *LC Kaldjian et al*, An empirically derived taxonomy of factors affecting physicians' willingness to disclose medical errors (2006) 21(9) Journal of General Internal Medicine (J Gen Intern Med) 942 and *S Landsman*, Reflections on juryphobia and medical malpractice reform, in: BH Bornstein et al (eds), Civil juries and civil justice: psychological and legal perspectives (2008).

13 *Cohen* (1999) 72(5) South Calif Law Rev 1023–1014, 1042–1046 and *P Vines*, The power of apology: mercy, forgiveness or corrective justice in the civil liability arena (2007) 1(1) Journal of Law and Social Justice (J Law & Soc Just) 1.

14 *S Bibas*/*RA Bierschbach*, Integrating Remorse and Apology into Criminal Procedure (2004) 114(1) Yale Law Journal (YLJ) 85; *T Eisenberg*/*SP Garvey*/*MT Wells*, But Was He Sorry? The Role of Remorse in Capital Sentencing (1998) 83 Cornell Law Review (Cornell Law Rev) 1599; *CL Kleinke*/*R Wallis*/*K Stalder*, Evaluation of a rapist as a function of expressed intent and remorse (1992) 132(4) Soc Psychol 525; *CJ Petrucci*, Apology in the criminal justice setting: evidence for including apology as an additional component in the legal system (2002) 20(4) Behavioral Sciences and the Law (Behav Sci Law) 337; *RB Pipes*/*M Alessi*, Remorse and a previously punished offense in assignment of punishment and estimated likelihood of a repeated offense (1999) 85(1) Psychological Reports (Psychol Rep) 246; *MJ Proeve*/*K Howells*, Effects of remorse and shame and criminal justice experience on judgements about a sex offender (2006) 12(2) Psychology, Crime & Law (Psychol Crime Law) 145; *JK Robbennolt*, What we know and don't know about the role of apologies in resolving health care disputes (2005) 21 Georgia State University Law Review (Ga State Univ Law Rev) 1009; *H Strang*/*LW Sherman*, Repairing the Harm: Victims and Restorative Justice (2003) 15(1) Utah Law Review (Utah Law Rev) 15 and *C Taylor*/*CL Kleinke*, Effects of severity of accident, history of drunk driving, intent, and remorse on judgments of a drunk driver (1992) 22(21) Journal of Applied Social Psychology (J Appl Soc Psychol) 1641.

15 For an overview, see *JK Robbennolt*, Apologies and civil justice, in: BH Bornstein et al (ed), Civil juries and civil justice: psychological and legal perspectives (2008) 195–231.

exclusively[16]) on civil liability cases. For example, how victims are influenced by an apology of the wrongdoer (or the lack thereof) in the decisions they must make has been the subject of research. This includes, for example, the decision to seek legal advice, the decision to initiate legal proceedings and the decision whether to settle and at what amount.[17] However, research has also examined the way in which other actors, who are involved in legal decision-making, are influenced by apologies, for example, a judge[18] or a lawyer[19].

As a result of this wide range of psychological research, attention to apologies has also increased in the legal domain. In order to safeguard the positive potential of apologies, it is argued that their position should be strengthened.[20] This has led to various initiatives in legislation, case law and literature. Most of these initiatives are aimed at facilitating or protecting apologies in civil legal proceedings.[21] In a number

16 For example, the research of *JJ Rachlinski*/*C Guthrie*/*AJ Wistrich*, Contrition in the courtroom: Do apologies affect adjudication? (2013) 98(5) Cornell L Rev 1189 and *JK Robbennolt*/*RM Lawless*, Bankrupt apologies (2013) 10 (4) J Empir Leg Stud 771 focuses (in part) on bankruptcy cases.

17 *M Etienne*/*JK Robbennolt*, Apologies and Plea Bargaining (2007) 91(1) Marquette Law Rev 295; *R Korobkin*/*C Guthrie*, Psychological barriers to litigation settlement: An experimental approach (1994) 93(1) Michigan Law Review (Mich L Rev) 107; *JM Leunissen*/*D de Cremer*/*CP Reinders Folmer*, An instrumental perspective on apologizing in bargaining: The importance of forgiveness to apologize (2012) 33(1) Journal of Economic Psychology (J Econ Psychol) 215; *JK Robbennolt*, The effects of negotiated and delegated apologies in settlement negotiation (2013) 37(2) Law Hum Behav 128; *JK Robbennolt*, Apologies and legal settlement: an empirical examination (2003) 102(3) Mich L Rev 460 and *Robbennolt* (2006) 3(2) J Empir Leg Stud 333.

18 *Rachlinski*/*Guthrie*/*Wistrich* (2013) 98(5) Cornell L Rev 1189 and *Robbennolt*/*Lawless* (2013) 10(4) J Empir Leg Stud 771.

19 *Cohen* (1999) 72(5) South Calif Law Rev 1009 and *JK Robbennolt*, Attorneys, apologies and settlement negotiations (2008) 39(13) Harvard Negotiation Law Review (Harv Negot Law Rev) 349.

20 See eg *A Allan*, Apology in civil law: A psycho-legal perspective (2007) 14(1) Psychiatry, Psychology and Law (Psychiatr Psychol Law) 5; *A Allan*, Apology in court in: DS Clark (ed), Encyclopedia of law and society: American and global perspectives, Sage Publications [2007] 78f; *A Allan*, Functional Apologies in Law (2008) 15(3) Psychiatr Psychol Law 369; *T Boccaccini et al*, I Want to Apologize, But I Don't Want Everyone to Know: A Public Apology As Pretrial Publicity Between a Criminal and Civil Case (2008) 32 Law & Psychology Review (Law Psychol Rev) 31; *BH Bornstein*/*LM Rung*/*MK Miller*, The Effects of Defendant Remorse on Mock Juror Decisions in a Malpractice Case (2002) 20 Behav Sci Law 393; *EA O'Hara*/*D Yarn*, On Apology and Consilience (2002) 77(4) Washington Law Review (Washington Law Rev) 1121; *Rehm & Beatty* (1996) (1) JDR; *Robbennolt* (fn 15); *DW Shuman*, The Psychology of Compensation in Tort Law (1994) 43 Kansas Law Review (Kansas Law Rev) 39; *Shuman* (2000) 83(4) Judicature 180; *P Vines*, Apologising to Avoid Liability: Cynical Civility or Practical Morality? (2005) 27(3) The Sydney Law Review (Syd Law Rev) 483; *Vines* (2007) 1(1) J Law & Soc Just 1; *P Vines*, The apology in civil liability: Underused and undervalued? [2013] (115) Precedent 28 and *H Wagatsuma*/*A Rosett*, The implications of apology: law and culture in Japan and the United States (1986) 20 Law & Society Review 461.

21 *R Carroll*, You can't order sorriness, so is there any value in an ordered apology?: An analysis of ordered apologies in anti-discrimination cases (2010) 33(2) University of New South Wales Law Jour-

of jurisdictions, for example, legal provisions that reduce or eliminate the (presumed) detrimental legal consequences of apologies (apology protection laws) have been introduced.[22] In addition, several legal scholars have advocated the creation of

nal (UNSWLJ) 360; *R Carroll*, Apologies as a Legal Remedy (2013) 35(2) Syd Law Rev 317; *BT White*, Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy (2006) 91(6) Cornell Law Rev 1274 and *AM Zwart-Hink*/*AJ Akkermans*/*K van Wees*, Compelled Apologies as a Legal Remedy: Some Thoughts from a Civil Law Jurisdiction (2014) 1 University of Western Australia Law Review (Univ West Aust Law Rev) 100–122.

22 See eg *YA Arbel*/*Y Kaplan*, Tort Reform through the Backdoor: A Critique of Law and Apologies (2016) 90(6) Southern California Law Review (South Calif Law Rev) 1199; *R Carroll*, When 'Sorry' is the Hardest Word to Say, How Might Apology Legislation Assist? (2014) 44(2) Hong Kong Law Journal (HKLJ) 491; *R Carroll*/*C To*/*M Unger*, Apology Legislation and its Implications for International Dispute Resolution (2015) 9(2) Dispute Resolution International (Disput Res Int) 115; *JR Cohen*, Legislating Apology: The Pros and Cons [2002] (70) University of Cincinnati Law Review (Univ Cincinnati Law Rev) 819; *VJ Corbett*, Why It's Better to Be Sorry than Safe: The Case for Apology Protection Legislation (2013) 36 Dublin University Law Journal (DULJ) 127; *Farmer* (2015) 2 Belmont Law Rev 243; *JS Heimreich*, Does 'Sorry' Incriminate? Evidence, Harm and the Meaning of Apologies (2012) 21(3) Cornell Journal of Law and Public Policy (JLPP) 567; *B Ho*/*E Liu*, Does sorry work? The impact of apology laws on medical malpractice (2011) 43 Journal of Risk and Uncertainty (J Risk Uncertain) 141; *B Ho*/*E Liu*, What's an Apology Worth? Decomposing the Effect of Apologies on Medical Malpractice Payments Using State Apology Laws (2011) 8(1) J Empir Leg Stud 179; *C Irvine*, The Proposed Apologies Act for Scotland: Good Intentions with Unforeseeable Consequences (2013) 17(1) Edinburgh Law Review (Edinb Law Rev) 84; *.E Jesson*/*PB Knapp*, My Lawyer Told Me To Say I'm Sorry: Lawyers, Doctors, and Medical Apologies (2009) 35(2) William Mitchell Law Review (William Mitchell Law Rev) 1410; *JC Kleefeld*, Thinking Like a Human: British Columbia's Apology Act (2007) 40(2) University of British Columbia Law Review (UBC L Rev) 769; *JC Kleefeld*, Promoting and Protecting Apologetic Discourse through Law: A Global Survey and Critique of Apology Legislation and Case Law (2017) 7(3) Oñati Socio-Legal Series (Onati Socio-Leg Ser) 455; *AC Mastroianni et al*, The flaws in state 'apology' and 'disclosure' laws dilute their intended impact on malpractice suits (2010) 29(9) Health Aff 1611; *D Maxwell*, The Apologies (Scotland) Act 2016: an innovative opportunity in the twenty first century or an unnecessary development? [2016] Journal of Personal Injury Law (JPIL) 79; *BJ McMichael*/*RL Van Horn*/*WK Viscusi*, 'Sorry' Is Never Enough: How State Law Apology Laws Fail to Reduce Medical Malpractice Liability Risk (2018) 71 (2) Stanford Law Review (SLR) 341; *A Orenstein*, Apology expected: Incorporating a feminist analysis into evidence policy where you would least expect it (1999) 28 Southwestern University Law Review (Southwest Univ Law Rev) 221; *M Pearlmutter*, Physician Apologies and General Admissions of Fault: Amending the Federal Rules of Evidence (2011) 72 (3) Ohio State Law Journal (Ohio State Law J) 687; *M Pillsbury*, Say Sorry and Save: A Practical Argument for a Greater Role for Apologies in Medical Malpractice Law (2006) 1(1) University of Massachusetts Law Review 171; *SE Raper*, No Role for Apology: Remedial Work and the Problem of Medical Injury (2011) 11(2) Yale Journal of Health Policy, Law, and Ethics (Yale J Health Policy Law Ethics) 267; *MB Runnels*, Apologies All Around: Advocating Federal Protection for the Full Apology in Civil Cases (2009) 46 San Diego Law Review (SDLR) 137; *Shuman* (2000) 83(4) Judicature 180; *L Taft*, Apology Subverted: The Commodification of Apology (2000) 109 Yale Law Journal (Yale LJ) 1135; *GH Teninbaum*, How Medical Apology Programs Harm Patients (2011) 15 Chapman Law Review (Chap L Rev) 307; *W Vandenbussche*, Introducing Apology

the possibility of enforcing an apology in court (apology as a legal remedy).[23] This possibility has been codified in legislation and judicial precedents in a number of jurisdictions.[24] It is striking that there is a binary discussion in the literature on these initiatives in which scholars argue for or against their introduction. This includes the normative question of whether it is desirable to protect or stimulate

Legislation in Civil Law Systems. A New Way to Encourage Out-of-Court Dispute Resolution, in: L Cadiet/B Hess/MR Isidro (eds), Privatizing Dispute Resolution. Trends and Limits, Studies of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, vol 18 (2019) 433–484; *Vines* (2007) 1(1) J Law & Soc Just 1; *PE Vines*, Apologies and Civil Liability in England, Wales and Scotland: The View from Elsewhere (2008) 12 Edinb Law Rev 200; *Vines* (2007) 1(1) J Law & Soc Just 1; *PE Vines*, Apologies as 'Canaries'-Tortious Liability in Negligence and Insurance in the Twenty-First Century, in: K Fairweather/R Grantham (eds), Private law in the 21st century (2017) 281–299; *M Wei*, Doctors, Apologies, and the Law: An Analysis and Critique of Apology Laws (2007) 40 (1) Journal of Health Law (J Health Law) 107 and *NL Zisk*, A Physician's Apology: An Argument Against Statutory Protection (2015) 18 Richmond Public Interest Law Review (PILR) 369.

23 On the claiming of apologies and the admissibility of such an claim see: *Z Awaiz-Bilal*, The duty of candour and apologies as a legal remedy [2015] JPIL 7; *R Carrol*/*N Witzleb*, 'It's not just about the money' – Enhancing the vindicatory effect of private law remedies (2011) 37(1) Monash University Law Review (Mon L Rev) 216; *R Carrol*, Beyond Compensation: Apology as a Private Law Remedy, in: J Berryman/R Bigwood (eds), The Law of Remedies. New directions in het common law (2010) 323–385; *Carroll* (2010) 33(2) UNSWLJ 360; *Carroll* (2013) 35 Syd Law Rev 317; *J Neethling*, Die Amende Honorable (Terugtrekking en Apologie) as Remedie by Laster – Resente Ontwikkeling in die Regspraak (2009) 42 De Jure 286; *Vines* (2007) 1(1) J Law & Soc Just 1; *White* (2006) 91(6) Cornell Law Rev 1274; *S de Rey*, Excuseer?! Afgedwongen excuses in het aansprakelijkheidsrecht (2017) (4) TPR 1153; *Gijs van Dijck*, The Ordered Apology (2017) 37 OJLS 562.

24 There are differences in the way jurisdictions deal with this (see *De Rey* (2017) (4) TPR 1153 for an extensive overview). Sometimes legislators explicitly include the possibility of enforcing an apology as a remedy in the law. In some cases, this is a general liability remedy (see, for example, the Chinese 'Tort Law of the People's Republic of China' which includes the following under art 15: 'The methods of assuming tort liabilities shall include: ... 7. Apology ...'), whereas in other cases it concerns a special remedy whose application is limited to specific liability cases. The latter often involves anti-discrimination legislation. See, for instance, the South African anti-discrimination act 'Promotion of Equality and Prevention of Unfair Discrimination Act', which includes the following under Section 21: 'After holding an inquiry, the court may make an appropriate order in the circumstances, including ... (j) an order that an unconditional apology be made ....' (see *Neethling* (2009) 42 De Jure 286). Several Australian states have also introduced anti-discrimination legislation in which the possibility is created for judges to impose apologies by way of compensation (see extensively *Carroll* (2010) 33(2) UNSWLJ 360 and *ead* (2013) 35(2) Syd Law Rev 317; *Carroll & Witzleb* (2011) 37(1) Mon L Rev 216 and *Vines* (2007) 1(1) J Law & Soc Just 1). In some jurisdictions, the possibility to claim an apology in court has been accepted in case law (this is, eg, the case in Australia, Switzerland and Belgium (see the recent judgment of the Belgian Court of Cassation (Cass 26 November 2021 [C.20.0578.F]). In other jurisdictions, the legal enforcement of apologies is neither legally nor jurisprudentially regulated (eg Germany, France and the Netherlands).

apologies in a legal context.[25] What is often lacking in the scientific debate is a proper problem analysis. We know little about the role that apologies actually play in judicial decision-making. For example, the need for apology protection laws is based on an assumption about how apologies are dealt with in civil proceedings, the assumption being that the judge (or other decision-makers) will be influenced by the fact that one of the parties has apologised. More specifically, it is often assumed that in civil liability cases, the judge is more likely to hold parties who apologise liable for the damage that has been suffered. However, the extent to which this is the case has not yet been studied systematically. Before a discussion can be held about the added value of apology protection laws, more clarity will have to be obtained. This is particularly important because an increasing number of (especially common law) jurisdictions are introducing apology protection laws and, in other jurisdictions, the desirability of such legislation is being debated.[26]

B Defining apologies

The reference to 'apology' in judicial decision-making inevitably raises questions about its meaning. However, there is no ready-made answer to this question. Different definitions are used in social, psychological and legal (empirical) research.[27] Thus, it is not possible to provide one comprehensive *definition* of the concept of apology. Carroll recognises this by arguing that it is not very useful to adopt a binary 'is or is not' definition of apology.[28] Far better, she says, would be to look at the different elements that apologies can consist of. Other authors also recognise that there is no set concept, but that what should be understood by apology is context-dependent.[29] Distinguishing different elements recognises the reality that apologies

25 *V Geeraets*/*W Veraart*, What is wrong with empirical-legal research into victimhood? A critical analysis of the ordered apology and the victim impact statement (2021) 41 OJLS 59.

26 *Vandenbussche* (fn 22).

27 See also *LABM Wijntjens*, Als ik nu sorry zeg, beken ik dan schuld? Over het aanbieden van excuses in de civiele procedure en de medische tuchtprocedure (2020), which concludes, based on a meta-analysis of literature, that there are wide variations in how the term 'apology' is defined or conceptualised.

28 *Carroll* (2010) 33(2) UNSWLJ 360 and *ead* (2013) 35(2) Syd Law Rev 317.

29 See eg *D Slocum*/*A Allan*/*MM Allan*, An emerging theory of apology (2011) 62(2) Australian Journal of Psychology 83–92. ('... it appears as if an apology does not have a fixed content, and that what people who have been wronged require is not only individualistic, but also differs depending on the situation.'); *N Smith*, I was wrong: The meanings of apologies (2008) 24 ('The meaning of any apology derives from its particular actors and context ... .') and *A Allan*/*R Carroll*, Apologies in a Legal Setting: Insights from Research into Injured Parties' Experiences of Apologies after an Adverse Event (2017) 24

will always be shaped in their own and different ways in practice. In line with this, despite the fact that the definitions used in the literature differ in content, they identify common elements of an apology.[30] Expressions do not have to include all elements to qualify as an apology. However, apologies that include more elements will generally be more effective. Three *elements* are thereby most often mentioned as important elements of apologies: (1) acknowledgement of wrongdoing/acceptance of responsibility, (2) expressing (sincere) regret/repentance and (3) making a promise to act differently in the future/taking measures to prevent recurrence.[31] The first element, acknowledging a mistake or accepting responsibility, is described in the literature as the most important and powerful element of apologising.[32] At the same time, this is the element that is most associated with legal risks.[33]

C Research aim, scope and relevance

The aim of this study is to gain more insight into the extent to which, and the way in which, apologies play a role in judicial decision-making. In order to map this out, it is necessary to compare different procedures on this issue. This study examines the Dutch civil procedure and the medical disciplinary procedure. The choice of the

Psychiatry, Psychology and Law 10–32, 11f ('There is no singular definition of apology. (...) in reality an apology is a complex act capable of multiple forms of meanings. ... we work with a meaning of apology that recognises (sic) that there are components of an apology, and that what constitutes an apology in a particular situation and context is highly variable.'). See also *A Allan*, Functional Apologies in Law Psychiatry (2008) 15 (3) Psychology and Law 369–381 in which is illustrated that apologies can have different meanings in different legal contexts.

30 For an overview, see *Wijntjens* (fn 27) 38–40 which identifies 12 different elements based on a meta-analysis of the literature.

31 Other elements mentioned in the litertaure include: offering compensation/repairing the defect, affirming the shared values that have been violated/recognising the legitimacy of the violated norm, expressing emotions such as sadness, guilt or shame, giving a description of the harm, giving a description/confirmation of what has occurred, giving an explanation for what has occurred, expressing remorse/compassion for what the victim has had to endure; asking for forgiveness and indicating acceptance of the consequences (eg sanctions). See extensively with reference to literature *Wijntjens* (fn 27).

32 See, among others, *M Minow*, Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence, Beacon Press (1998) 115 and *WT Coombs*/*SJ Holladay*, Comparing apology to equivalent crisis response strategies: Clarifying apology's role and value in crisis communication (2008) 34 (3) Public Relations Review 252–257, at 253, which calls acknowledging responsibility the 'centrepiece of an apology'.

33 See, among others *Cohen* (1999) 72(5) South Calif Law Rev 1009, which associates responsibility assailing apologies with admission of liability. However, it is possible that offering apologies may be an acceptance of moral or causal responsibility for a particular event but not of legal responsibility.

civil procedure is obvious since the scientific debate on the role of apologies in law mainly focuses on this area. A comparison with the medical disciplinary proceeding was chosen because several Dutch authors suggest that the civil procedure and the medical disciplinary procedure can inspire each other as regards how apologies are dealt with.[34] Within these procedures, judges have to make different decisions and each of these decisions can be influenced by apologies in a different way. A structured analysis of how apologies influence decision-making in these proceedings is lacking in the literature. It is important to gain more insight into this, as the way in which judges deal with apologies can set a precedent for future cases. Litigants and their representatives will adjust their behaviour accordingly. This means that the role that apologies play in legal proceedings may influence the willingness of litigants to apologise. If it turns out that offering an apology entails legal risks, they will logically be reluctant to do so. On the other hand, they will be more inclined to apologise if this can have positive consequences on the proceedings.

The outcome of this study is not only relevant for the Dutch context. When foreign scholars refer to case law, they often refer to a few illustrative decisions within their own jurisdiction. The full extent to which apologies play a role in judicial decision-making has not been systematically and exhaustively studied for a particular legal system.[35] Moreover, the debate on the role of apologies in law is mainly conducted in the context of common law legal systems. This contribution provides a detailed and structured overview of the role apologies play in judicial decision-making in a civil law legal system (where apology protection laws have not yet been introduced). It thus provides a new and important empirical perspective to the international scholarly debate.

34 For example, in her analysis regarding the question of whether apologising can constitute an acknowledgement of civil liability, Zwart-Hink refers to medical disciplinary case law for illustration and inspiration (*AM Zwart-Hink*, Moet wie excuses aanbiedt ook schade vergoeden?: Mythe en werkelijkheid over het verband tussen excuses en aansprakelijkheid (2017) (38) Nederlands Juristenblad (NJB) 2800). See also *EM Deen*, Centraal Tuchtcollege voor de Gezondheidszorg 08-03–2018, ECLI:NL:TGZCTG:2018:68 (X/Y). Het Centraal Tuchtcollege over de verantwoordelijkheid van zorgverleners bij schadeafwikkeling, het erkennen van fouten en excuses (2018) (0144) GZR Updates.

35 Although there are several publications analysing case law (see, among others, *Kleefeld* (2017) 7(3) Oñati Socio-Leg Ser 455 and *Van Dijck* (2017) 37 OJLS 562), these publications tend to focus on a single aspect in which apologies can play a role in legal decision-making, eg judgments in which apologies are imposed by a judge or judgments in which apologies are understood as an admission of liability. This contribution distinguishes itself from these publications by broadening the scope, in that it identifies the different ways (or modalities) in which apologies play a role in legal decision-making.

D Methodology: structured content analysis

The method used in analysing the judicial decisions can best be described as a structured content analysis.[36] This is a research method that is used to analyse and categorise texts or other research objects (such as images or sound recordings) in a systematic and replicable manner.[37] This method is also increasingly being used for the analysis of case law.[38] The first step in the systematic case law analysis was to select relevant judicial decisions. The methodology of conducting a structured content analysis requires that this be done in a systematic and transparent manner, so that the method can be repeated by other researchers.[39] For the two proceedings that are the subject of this research, all electronically published cases on the websites www.rechtspraak.nl and www.overheid.nl up to and including October 2018 were included. At that time, there were 140,056 civil cases and 8,283 disciplinary cases available in the online databases.[40] The cases were then screened using a number of keywords.[41] These keywords were chosen after an inventory of previously found case law in which apologies played a role. As shown above, the apology is a vague and context-dependent concept and it is therefore impossible to give a comprehensive definition of it. In the case law study, the qualification in the

36 See eg *K Krippendorff*, Content Analysis. An Introduction to Its Methodology (2013).

37 See *Krippendorff* (fn 36) 24 where 'content analysis' is defined as 'a research technique for making replicable and valid inferences from texts (or other meaningful matter) to the contexts of their use' and *A Bryman*, Social research methods (2012) 289 where the following definition is used: 'content analysis is an approach to the analysis of documents and texts (which may be printed or visual) that seeks to quantify content in terms of predetermined categories and in a systematic and replicable manner'. See also *MW Bauer*, Classical Content Analysis: a Review, in: MW Bauer/G Gaskell, Qualitative Researching with Text, Image and Sound (2000), in which an overview is given of the definitions used in the literature.

38 In fact, content analysis can be applied to all types of texts. See *MA Hall*/*RF Wright*, Systematic Content Analysis of Judicial Opinion (2008) 96(1) California Law Review (Cal L Rev) 63, which provides best practices for conducting a systematic content analysis of judicial opinions.

39 *Hall*/*Wright* (2008) 96(1) Cal L Rev 63, 79.

40 Via the websites www.rechtspraak.nl and www.overheid.nl. An important limitation is that not all civil decisions can be found here. Only a very small part of the case law is published. The decision as to whether or not a judgment should be published is made by the court itself. In other words, the decisions are not published purely by chance, but depending on the policy of the court. This implies that the selected civil decisions may not be representative for the entire population containing all other unpublished decisions. All rulings by the Medical Disciplinary Court are published. However, the online database used here (<Overheid.nl>) only includes decisions handed down since 2010. Therefore, decisions before that date are not included in this study.

41 A number of Dutch synonyms for the term apology ('excuses, spijt, verontschuldiging(en), sorry, berouw').

judgment itself was taken as the starting point. The decisive factor is thus that an expression in the ruling was qualified (by the judge) as an apology. How the apology was formulated or constructed could in most cases not be ascertained from the ruling. The search yielded 3,452 relevant hits for civil case law and 872 hits for medical disciplinary case law. After removing the double hits, respectively 3,117 and 821 cases remained.

The text of the selected cases was then coded. In this way, text fragments with the same code could be compared with each other in order to ascertain certain patterns in the case law. Coding of judicial decisions enhances the objectivity and replicability of the case law study. The coding of the cases took place in two stages. In the first phase, the cases were examined globally and an initial categorisation was carried out, focusing on whether or not the decision was relevant to the study. Decisions were indicated as relevant for the study when the decision showed that one or more parties had apologised or when the decision showed that no apology had been offered. After this first selection, 1,254 relevant civil decisions and 644 relevant medical disciplinary decisions remained (see Table 1).

Table 1: Overview of relevant hits

	Civil cases		**Medical disciplinary cases**	
	Number of cases	**% of the total number of relevant hits (n = 1,254)**	**Number of cases**	**% of the total number of relevant hits (n = 644)**
Decisions in which one (or more) of the parties apologised	915	72.97 %	563	87.42 %
Decisions in which no apologies were offered	358	28.63 %	96	14.91 %

In the second phase of the coding process, the cases were further analysed. By means of subsequent coding, additional (sub-)categories were created, corresponding with the different ways in which apologies played a role in the cases. To ensure that the coding was consistent, coding schemes were used. These schemes were initially derived from the literature on the role of apologies in judicial decisions and previously found case law in which apologies played a role. The analysis of this literature and case law led to expectations about how apologies may play a role in judicial decision-making, from which several codes were derived, such as apologies as a legal remedy and apologies as evidence. These codes were further refined during the coding process (for example, by drawing up new and sub-categories). Thus, a

combined deductive and inductive approach was used.[42] On the one hand, a number of codes were taken from the literature prior to the coding process, which can be qualified as a deductive approach. On the other hand, decisions that could not be labelled with the codes drawn up beforehand were analysed inductively. As the coding process progressed, it became clear that there are differences between the two procedures as to the role that apologies play in judicial decision-making.[43] For this reason, separate coding schemes were drawn up for both procedures.[44]

II Modalities of apologies in case law

The research output shows that the role of apologies in judicial decision-making is very complex and can occur in many ways. The scholarly debate so far has mainly focused on two questions. The first is whether apologies can imply an acknowledgement of liability and, related to this, the question of whether it is necessary to introduce apology protection laws.[45] It is striking that there is a black-and-white mentality in this discussion in the Netherlands. Authors either argue that the introduction of apology protection laws is desirable or that it is not desirable or necessary. The second question that arises in the literature is whether an apology can be claimed (by plaintiffs) or ordered (by judges).[46] This discussion too is characterised by a sharp contrast: authors either argue that apologies cannot be claimed or ordered in court or that this possibility exists or should exist. The structured case law analysis reveals that both binary discussions do not correctly reflect the complex reality. Apologies play a role in many different ways in the analysed case law. In addition, apologies do not always have a clear, decisive significance. My analysis shows that six different modalities can be distinguished in the way apologies play a role in judicial decision-making:

42 Traditionally, qualitative data analysis has been associated with the grounded theory approach, in which the researcher takes a purely inductive approach to data analysis (see eg *H Boeije*, Analyseren in kwalitatief onderzoek. Denken en doen [2014]). Nowadays, however, it is generally accepted that a deductive approach can also have added value in the analysis of texts. See, for example, the 'thematic framework' method described by *J Ritchie et al*, Qualitative research practice. A guide for social science students and researchers (2014). See for an example of a study in which an inductive and deductive approach are combined: *A van Staa*/*K de Vries*, Directed content analysis: een meer deductieve dan inductieve aanpak bij kwalitatieve analyse (2014) 19(3) Kwalon 46.

43 An example is that apologies in medical disciplinary proceedings cannot be claimed by the victim given the purpose of this proceeding.

44 For the final coding schemes, see *Wijntjens* (fn 27) Appendix 1 (in Dutch).

45 See fn 22.

46 See fn 23 and 24.

1. The court assesses whether apologies imply an admission of liability (or some other legal qualification).
2. The court uses apologies to establish certain facts (apologies as evidence).
3. The court assesses a party's claim to receive an apology.
4. The court assesses whether an (after-harm) obligation to apologise rested on one of the parties (in which case, the breach of this obligation leads to liability).
5. The court uses the fact that apologies have or have not been offered as a relevant circumstance to fill in open norms.
6. The court points out the importance of apologising in an *obiter dictum*.[47]

Table 2: Number of decisions found per category.

Category	Civil cases		Medical disciplinary cases	
	Number of cases	% of the total number of relevant hits (n = 1,254)	Number of cases	% of the total number of relevant hits (n = 644)
1. Apologies imply an admission of liability	11	0.88 %	13	2.02 %
2. Apologies as evidence	45	3.61 %	4	0.62 %
3. Apologies have been claimed	175	13.96 %	1	0.63 %
4. Breached obligation to apologise	1	0.08 %	60	9.32 %
5. Apologies as a circumstance to fill in open norms	160	12.76 %	166	25.78 %
6. Importance of apologising pointed out in an *obiter dictum*	1	0.08 %	3	0.47 %

Table 2 shows how often these categories occur. It is striking that the same categories emerge in civil and medical disciplinary proceedings. However, the degree to which, and the manner in which, these categories are interpreted differs. The categories will be discussed in the remainder of this article. Given the scope of the case law analysis, it is not possible to discuss all research findings in detail hereafter.[48] For that reason, I will focus primarily on the discussion of the civil case law, as I expect these research findings to be most relevant to the international debate. For the sake of comparison or illustration only, I sometimes refer to the medical disci-

47 *Wijntjens* (fn 27).

48 For a more detailed discussion of the case law analysis, see *Wijntjens* (fn 27) (in Dutch).

plinary case law. In Part III, I will first consider the categories that may hinder the offering of apologies (categories 1 and 2). Then, in Part IV, several possibilities for removing these obstacles will be mentioned. While the literature has mainly focused on the potential legal risks of apologising, the case law analysis shows that offering apologies is regularly encouraged or facilitated in court (categories 3 to 6). I will discuss these categories in Part V. This article concludes with the presentation of the main findings and presents directions for future research (Part VI).

III Legal obstacles to apologising

Do the legal procedures that have been the subject of this research create legal obstacles to apologise? The case law study reveals that obstacles do exist, but that the consequences often drawn from this should be strongly nuanced.

A Legal obstacle 1: apologies and admission of liability

The main assumption made about apologies is that offering an apology could constitute an admission of civil liability. Dutch legal scholars have often argued that this may indeed be the case through the application of the will-reliance doctrine.[49] This doctrine is applicable when a declared will does not correspond with the inner will. In that case, a party may be bound by its declared will if the other party has justifiably relied on it. In the context of apologies: when a wrongdoer apologises, he does not necessary intend to acknowledge liability. However, when the victim justifiably understands the apology as an admission of liability, the wrongdoer is bound by the appearance of his intention.[50] Whether an apology should be interpreted as an acknowledgement of liability depends on the circumstances of the particular case. This would mean that an apology could be an admission of liability even if it was not intended by the provider. When a statement is qualified as an admission of

49 This is advocated in: *KP Hoogenboezem*/*MC Hees*, Het verbod tot erkenning van aansprakelijkheid (2014) 154 (7025) Weekblad voor Privaatrecht, Notariaat en Registratie (WPNR) 638; *LABM Wijntjens*, Excuses en aansprakelijkheid: In hoeverre en op welke wijze beïnvloeden excuses het oordeel van de rechter? (2016) 147 (7092) WPNR 82 and *Zwart-Hink* (2017) (38) NJB 2800.

50 In Dutch law, an acknowledgement of liability is seen as a legal act under private law, causing the will-reliance theory to apply. In support of this view, reference is made to case law of the Dutch Supreme Court: HR 27 April 1984, ECLI:NL:HR:1984:AG4799, NJ 1984/789; HR 10 January 1992, ECLI:NL:HR:1992:ZC0470, NJ 1992/606 and HR 19 September 2003, ECLI:NL:HR:2003:AF8270, NJ 2003/619. See on the legal status of apologies in other civil law jurisdictions, *Vandenbussche* (fn 22) sec 5.1.

liability, the implications are far-reaching. The legal consequences of an admission of liability are that the provider of the admission becomes liable towards the injured person. A single statement establishes liability, regardless of whether a reasonable judge would reach the same conclusion. The case law of the Dutch Supreme Court even shows that the provider of the admission or his insurer are still bound by the acknowledgement of liability if the expert report on which the acknowledgement is based turns out to be incorrect.[51]

But is this theory reflected in practice? Only two examples in the over 3,000 civil cases were found. The first one was a decision in which the court decided that a pension provider, by sending a letter of apology, had acknowledged that a pensioner was entitled to a pension benefit (which, in retrospect, turned out to be too high).[52] This was not an admission of liability, but an acknowledgement of a pension entitlement. The case does illustrate, however, that the application of the will-reliance doctrine may result in certain legal consequences being created by offering an apology. However, the Court itself emphasises in this case that this should not be assumed too quickly:

> 'In view of these far-reaching consequences, it should not be assumed too quickly that there is indeed justifiably trust ....'[53]

The reason why the Court decided that the apology implied an acknowledgement of the pension entitlement lies in the special circumstances of the case. Important here was that the promise in the apology letter was confirmed several times and that subsequently it was also acted upon. It is also noteworthy that, in assessing the value that may be attached to the apology letter, the court attributes significance to the fact that the letter was consciously written and not automatically generated. The same applies to the fact that the letter was written by an expert. Under these circumstances, it may rather be assumed that what is written in the apology letter is also correct.

In the second judgment, the court decided that a personal injury agency had acknowledged a professional error by sending an apology letter.[54] The court ruled that this letter could reasonably be interpreted by the receiver as an acknowledge-

51 HR 10 January 1992, ECLI:NL:HR:1992:ZC0470, NJ 1992/606 and HR 19 September 2003, ECLI:NL:HR:2003:AF8270, NJ 2003/619.

52 District Court of Maastricht 27 July 2011, ECLI:NL:RBMAA:2011:BR5240.

53 District Court of Maastricht 27 July 2011, ECLI:NL:RBMAA:2011:BR5240, para 3.2.

54 District Court of Assen 1 February 2006, not published. A description of this case can be found in the decision of the Court of Appeal of Amsterdam of 22 March 2011, ECLI:NL:GHAMS:2011:BQ1733, in which the personal injury agency and the professional liability insurer opposed each other in an indemnity proceeding, and in *Hoogenboezem*/*Hees* (2014) 154 (7025) WPNR 638.

ment of a professional error by the personal injury agency. One of the decisive factors was the legal expertise of the personal injury agency.

These two court decisions show that by applying the will-reliance doctrine, an apology may, in exceptional circumstances, lead to certain legal consequences and even to an admission of liability. The fact that only two court decisions were found in which this is the case, however, shows that these are the (unlikely) exception to the general rule. The court decisions also show that an apology should not be judged in isolation, but in conjunction with the wording chosen in the statement. The decisive factor is ultimately whether there is a legitimate expectation that the statement in question is an admission of liability. In this respect, it is important to note that in the judgments found in which an acknowledgement was accepted, the justified confidence was not only based on the apology offered, but also on various additional circumstances. For example, in both cases, the apology was offered by a professional party and, according to the judge, the recipient could therefore attach more value to it. No judgments were found in which it was decided that an apology offered by a non-professional party constitutes an acknowledgement of liability (or any other legal qualification). For this reason, it is doubtful whether apologies in these cases can imply an admission of liability at all.[55] In addition, it may be important that the statement in which an apology is given was drafted consciously (and thus not automatically). The fact that the content of the apology is later confirmed and acted upon is also a circumstance that may be of importance. After all, under these circumstances, the recipient may attach more value to the apology.

In most of the decisions that have been found, however, it was ruled that the apology offered by a litigant did not constitute an admission of liability or any other legal qualification. In most cases, it was considered decisive that the provider, by apologising, had not taken responsibility for the allegedly wrongful conduct.[56] In two cases, the apology and the admission of liability were even explicitly separated. In these cases, the apology was regarded only as immaterial reparation. This was, for example, the case in a decision in which the Child Protection Board apologised to the parents of children who had been placed in care.[57] According to the court, the

55 Zwart-Hink goes so far as to call the (legal) expertise of the provider of the apology a 'supporting circumstance'. On this basis, she concludes that certain statements – including apologies – by a non-lawyer, such as a doctor, should be assessed differently (*Zwart-Hink* (2017) (38) NJB 2804 f).

56 Court of Appeal 's-Hertogenbosch 22 December 2015, ECLI:NL:GHSHE:2015:5332; District Court of Rotterdam 13 May 2009, ECLI:NL:RBROT:2009:BJ2081; District Court of Midden-Nederland 21 December 2016, ECLI:NL:RBMNE:2016:6696; District Court of Zutphen 14 January 2009, ECLI:NL:RBZUT:2009:BH2385; District Court of Midden-Nederland 16 August 2017, ECLI:NL:RBMNE:2017:4114; District Court of The Hague 27 February 2018, ECLI:NL:RBDHA:2018:4259; Hof 's-Hertogenbosch 8 May 2018, ECLI:NL:GHSHE:2018:1989.

57 District Court of The Hague 3 February 2016, ECLI:NL:RBDHA:2016:502.

letter of apology could not be understood as an acknowledgement of liability but only as an acknowledgement of the parents' feelings:

> 'The Court also notes that the mere fact that the Board has indicated that it agrees in retrospect with the points of complaint declared well-founded by the Complaints Committee and the National Ombudsman does not imply, contrary to the parents' opinion, an acknowledgement of civil liability with corresponding damages. Accordingly, the State emphasised that in doing so, the Board only intended to acknowledge the parents' feelings and to emphasise that the Board will take to heart the suggestions made by the National Ombudsman for improving the working method.'[58]

In another case, the court ruled that a hospital board's letter of apology to a patient did not constitute an admission of liability:

> 'Nor does the letter from the hospital's Board of Directors constitute an admission of liability. The letter merely acknowledges that the doctors involved acted carelessly. Apologising by a hospital is seen by patients as very important and should be strictly separated from acknowledging liability, because otherwise hospitals will omit these apologies, which are so important to patients. The spirit of the letter from the Board of Directors is clearly aimed at making apologies and not at acknowledging liability.'[59]

The case law discussed in this section shows, in summary, that apologies can only be considered as an acknowledgement of civil liability under specific circumstances and in exceptional cases.

It is striking that, in the analysed medical disciplinary case law, this issue is dealt with in a fundamentally different way. The disciplinary tribunals clearly and consistently rule that apologies offered by the practitioner cannot constitute recognition of disciplinary culpability. It is the disciplinary tribunal which, based on all the facts established in the disciplinary proceeding, decides whether the disciplinary standards have been breached.[60] The subjective opinion of the professional himself (which can be expressed by offering apologies) is not decisive in this regard. This is very clear, for example, in a case involving a patient who had been in intensive care for quite some time due to a complicated and difficult recovery after the removal of his right lung.[61] At some point, this patient was transferred to a ward in another hospital, where he died shortly afterwards. The reproach of the patient's wife (and the complainant in this proceeding) basically boils down to the fact that

58 District Court of The Hague 3 February 2016, ECLI:NL:RBDHA:2016:502, para 4.18.

59 Court of The Hague 25 October 2012, ECLI:NL:RBSGR:2012:BY2540, para 4.3.

60 In the Netherlands, these are laid down in the law 'Wet op de beroepen in de individuele gezondheidszorg' (wet BIG).

61 RTG Amsterdam 25 May 2018, ECLI:NL:TGZRAMS:2018:118.

the transfer should not have taken place. The disciplinary tribunal ruled that the transfer was justified at the time and that no disciplinary reproach can be raised. The fact that the defendant had indicated that – with the benefit of hindsight – he should not have proceeded with the transfer does not change anything:

> 'It is the tribunal's task to independently assess whether the defendant has remained within the bounds of reasonably competent professional practice. In this assessment, the tribunal has taken into account all the facts and circumstances known to it, including the expert assessments submitted in these proceedings. This also includes the defendant's own assessment. The defendant is very much to be praised for entering into discussions with the complainant, among others, and for taking a critical look at his own actions. His conclusion that he should not have proceeded with the transport (given the later knowledge of F's death) does not mean that his actions were substandard at the time of the transport decision. It might have been better, but that is not the standard for disciplinary liability.'[62]

The tribunal ruled that it is up to the tribunal itself to assess whether, in the specific case, there is evidence of disciplinary culpability. The defendant's own views on this (as well as assessments by other experts) may be included in the decision but are not decisive. Next, the tribunal emphasises that critical reflection on one's own actions and the offering of apologies by healthcare providers cannot be equated with an acknowledgement of disciplinary liability. This is important for all parties involved and for the quality of healthcare:

> 'It is of great importance for all parties involved and for the quality of healthcare that healthcare providers can reflect critically on their actions and, if necessary, apologise for them, without automatically admitting disciplinary liability.'[63]

The foregoing also applies if the professional, by apologising to the patient, has aroused the legitimate expectation that he can be reproached with a disciplinary action.[64] Therefore, in contrast to civil law, the will-reliance doctrine does not seem to be applied here, at least not in the 821 cases studied. Unlike in civil law, in medical disciplinary law, liability cannot be established by offering an apology. This method of assessment can therefore serve as inspiration for the judicial assessment within other proceedings.

62 RTG Amsterdam 25 May 2018, ECLI:NL:TGZRAMS:2018:118, para 5.5.
63 RTG Amsterdam 25 May 2018, ECLI:NL:TGZRAMS:2018:118, para 5.5.
64 RTG Amsterdam 20 April 2012, ECLI:NL:TGZRAMS:2012:YG2398.

B Legal obstacle 2: the evidential status of apologies

The case law analysis highlights a second legal obstacle to apologising, namely the acknowledgement of certain facts.[65] It is an obstacle that occurs in both of the procedures that have been analysed. Although this impediment has received virtually no attention in the literature, it occurs much more frequently. The case law analysis shows that apologies that acknowledge facts are regularly used as evidence. An important finding is therefore that apologies can have evidential value. In the decisions in which apologies serve as evidence, the court uses the apology to substantiate certain facts on which the decision is based. At first glance, this seems to be a strong legal obstacle to apologising. However, after further analysis of the case law, a different picture emerges. In the decisions found, in addition to the apologies, other arguments were mentioned. Apologies may therefore have evidential status, but the observation that I have been able to make from the structured case law analysis is that courts deal with this in a nuanced manner. Apologies are not given decisive importance.

A few examples can illustrate this. In the first case, the plaintiff claimed that she had been sexually abused by the defendant.[66] The court ruled that the plaintiff had succeeded in proving this claim and referred to several pieces of evidence, including a letter in which the defendant had apologised. The defendant says in this letter:

> 'The things that happened from me towards you should never have happened. I am the one who went too far. I am sincerely sorry for what happened and, if possible, I apologise for it.'[67]

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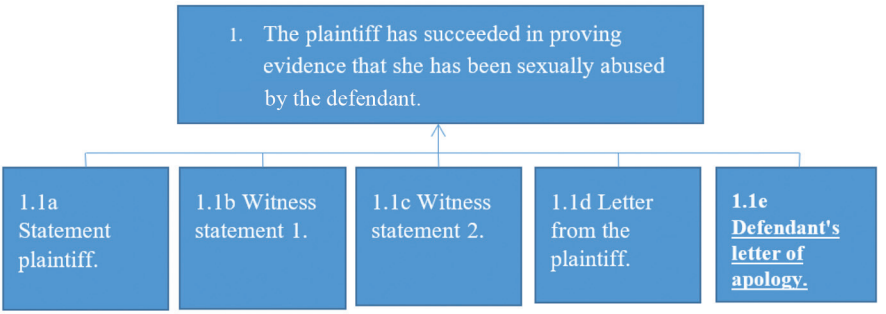
65 An element of apologising is often the acknowledgement of one or more facts. The literature mentions 12 different elements that can make up an apology – *Wijntjens* (fn 27). One of these elements is giving a description/confirmation of what happened. Acknowledging the facts also seems to be a basic condition without which other elements that are regarded as important components of apologies cannot be fulfilled. After all, acknowledging a mistake/responsibility or making a promise to act differently in the future can only take place if clarity is provided about what actually happened. Apologising, without stating the facts, is therefore described in the literature as ineffective (See ia *R Carroll*/*C To*/*M Unger*, Apology Legislation and its Implications for International Dispute Resolution (2015) 9 (2) Disput Res Int 115).

66 District Court of Arnhem 14 March 2012, ECLI:NL:RBARN:2012:BW0516. See for other examples: Court of Arnhem-Leeuwarden 24 March 2015, ECLI:NL:GHARL:2015:2179; Court of Amsterdam 24 November 2008, ECLI:NL:GHAMS:2008:BG5150; Court of Arnhem 16 October 2001, ECLI:NL:GHARN:2001:AD4916; Court of The Hague 25 February 2014, ECLI:NL:GHDHA:2014:1524; District Court of Noord-Nederland 24 February 2016, ECLI:NL:RBNNE:2016:716; District Court of Rotterdam 26 September 2016, ECLI:NL:RBROT:2016:7329; District Court of 's-Hertogenbosch 25 February 2009, ECLI:NL:RBSHE:2009:BH4029 and Hof Arnhem-Leeuwarden 5 October 2016, ECLI:NL:GHARL:2016:8079. The extensive analysis can be found in *Wijntjens* (fn 27) sec 5.2.1.1.

67 District Court of Arnhem 14 March 2012, ECLI:NL:RBARN:2012:BW0516, para 2.7.

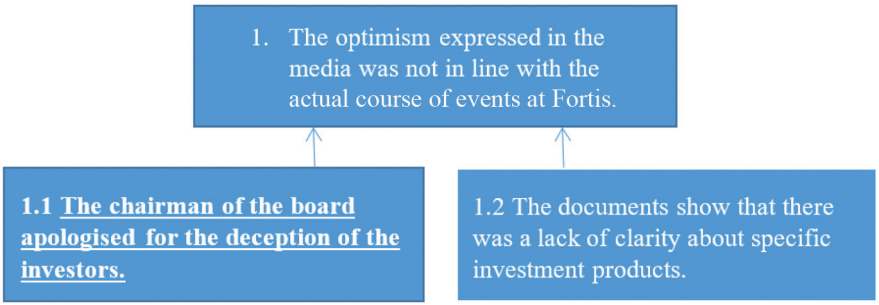
The court ruled that the pieces of evidence, 'viewed together', were sufficiently strong indications that sexual abuse had taken place. The decision of the court is therefore based on all the evidence as a whole, including the apology letter. Only all the pieces of evidence together can support the decision of the court (Schedule 1). In other words, the decision is not solely based on the apology offered by the defendant.



Schedule 1: Argumentation diagram for district court of Arnhem 14 March 2012, ECLI:NL:RBARN:2012:BW0516.

In the second example, an Association of Stockholders and a number of shareholders had asked the court to investigate the policy of Fortis, a large Dutch bank.[68] In their opinion, Fortis had harmed its shareholders by issuing several reassuring statements during the financial crises, which subsequently turned out to be incorrect. The court ruled that there were indeed indications that Fortis had acted incorrectly during that period. According to the court, the optimism expressed by Fortis in the media did not reflect the reality of its situation. The court substantiates this judgment by referring to two arguments. First, reference is made to a statement given by the then CEO of Fortis during an informative shareholders' meeting. In this statement, he apologised for the deception of the investing public. Secondly it was mentioned that, even at the height of the crisis, there was uncertainty about specific investment products. According to the court, both arguments individually provided sufficient evidence that Fortis had acted incorrectly. As in the previous case, the apologies did not have any decisive significance in the court's judgment (Schedule 2 below). After all, the judgment could also be based on the other argument mentioned by the court. The judgment of the court was again not solely based on the apology that had been offered.

68 Court of Appeal of Amsterdam 24 November 2008, ECLI:NL:GHAMS:2008:BG5150.



Schedule 2: Argumentation diagram for Court of Appeal of Amsterdam 24 November 2008, ECLI:NL:GHAMS:2008:BG5150

The examples illustrate that when evidence shows that a party has apologised, the court may use this to support the facts on which the decision is based. However, it is not true that the entire decision is based on the fact that an apology has been offered. In the decisions found, other arguments were also mentioned and the apologies were often used to support a single part of a larger factual complex.

IV Opportunities to remove the obstacles

The case law analysis shows that there are hardly any legal obstacles to apologising in the procedures that were investigated. The chance of negative legal consequences as a result of offering an apology is therefore very small, at least in Dutch law. Nevertheless, it cannot be ruled out that perpetrators feel inhibited in offering an apology because of this slight chance, however minimal it may be. After all, perpetrators and their lawyers or insurers will usually want to remain on the safe side. For this reason, this section examines whether the remaining obstacles can be removed.

Firstly, attention will be drawn to a solution that is frequently put forward in the literature: the introduction of apology protection laws.[69] 'Apology protection laws' is a collective term for legal provisions that reduce or eliminate the (presumed) detrimental legal consequences of apologies. In view of the case law analysis, I argue that the introduction of such legislation into Dutch civil law is not necessary and is also disproportionate. When we look at the apology protection laws that have been introduced in other jurisdictions, it appears that, in most cases, the explicit statement that apologies cannot imply an admission of liability is part of this

69 See fn 22.

legislation. Thus, it seems that this can indeed remove the first legal obstacle that has been identified. However, there are also disadvantages to the introduction of apology protection laws. The literature, for example, points out that such legislation may not be effective, may conflict with the primary functions of liability law and may even harm the interests of injured parties.[70] In addition, as a civil law jurisdiction, the Netherlands does not have an extensive system of evidence exclusion rules, which are well known in common law jurisdictions where apology protection legislation has been introduced. This makes it difficult for such legislation to fit in with Dutch civil (procedural) law.

A more simple solution may be preferable. The possibility that apologies imply an admission of liability could simply be removed by introducing an interpretation rule. Interpretation rules are rules accepted in case law or codified in legislation that prescribe a certain method of interpretation of a contract provision or, more generally, of a statement. In this case, the interpretation rule should imply that apologies may not be interpreted by the recipient as an acknowledgement of liability. The application of the will-reliance doctrine would mean that the recipient of the apology could not legitimately expect the apology to constitute an admission of liability. Explanation rules are not uncommon in Dutch contract law.[71] The introduction of an interpretation rule would therefore, in my opinion, be more in line with the Dutch legal system compared to the introduction of an apology protection law. The basis for such an interpretation rule can already be discerned in the case law.[72]

70 *Arbel*/*Kaplan* (2016) 90(6) South Calif Law Rev 1199; *Corbett* (2013) 36 DULJ 127; *Farmer* (2015) 2 Belmont Law Rev 243; *Jesson*/*Knapp* (2009) 35(2) William Mitchell Law Rev 1410; *Mastroianni et al* (2010) 29(9) Health Aff 1611; *McMichael*/*Van Horn*/*Viscusi* (2018) 71 (2) SLR 341; *Raper* (2011) 11(2) Yale J Health Policy Law Ethics 267; *Teninbaum* (2011) 15 Chap L Rev 307; *Wei* (2007) 40(1) J Health Law 107 and *Zisk* (2015) 18 PILR 369. See also *Pearlmutter* (2011) 72 (3) Ohio State Law J 687 and *Runnels* (2009) 46 SDLR 137 who argue for a different arrangement of apology protection legislation in the United States, namely at the federal level.

71 The old Civil Code even included general rules of interpretation. In the present Civil Code, there are no longer such rules, since the legislator considered them self-evident and superfluous (*CJ van Zeben*/*JW du Pon*, Parlementaire geschiedenis van het nieuwe burgerlijk wetboek. Boek 6 Algemeen gedeelte van het verbintenissenrecht [1981] 916). The present Civil Code does contain special rules of interpretation. See eg art 6:238 subsec 2 of the Civil Code (explanation *contra proferentem* in the context of the explanation of general terms and conditions of a contract with a consumer). In addition, interpretation rules and principles are discussed in case law and literature (see also references *M Vriend*, Commentaar op art. 6:248 BW, in: RJQ Klomp/HN Schelhaas (eds), Groene Serie Verbintenissenrecht Wolters Kluwer rev 2.12.2).

72 See District Court of The Hague 25 October 2012, ECLI:NL:RBSGR:2012:BY2540; District Court of The Hague 3 February 2016, ECLI:NL:RBDHA:2016:502 and District Court of Overijssel 6 March 2019, ECLI:NL:RBOVE:2019:1243.

The introduction of an explanation rule removes the first legal obstacle mentioned, but this does not apply to the second obstacle mentioned. After all, the introduction of an explanation rule does not prevent courts from using apologies to substantiate facts on which they base their decision. I argue, however, that it is not necessary to remove this second legal obstacle. Two arguments can be offered here.

First of all, the case law analysis shows that courts are very nuanced in their use of apologies as evidence. Not a single decision which was exclusively based on an apology was found. The court always refers to additional evidence. In addition, the extra-judicial admission of facts does not imply that these are definitively established in court. Counter-evidence may be provided by the defendant. Therefore, the defendant is free to claim, and if necessary, prove that the facts he had acknowledged by offering an apology are incorrect or must be interpreted differently.

Secondly, the means by which the evidentiary risks associated with apologising can be eliminated are disproportionate. In order to achieve this, far-reaching apology protection legislation would have to be introduced, which would exclude facts that have been acknowledged by an apology from evidence. Of all the jurisdictions where apology-protective legislation has been implemented, there is only one in which such a far-reaching form of protection has been chosen[73] and even here, in exceptional cases, the acknowledged facts associated with the apology may still be used as evidence. Protecting apologies that acknowledge facts is controversial for a good reason. Such a broad protection of apologies can work to the disadvantage of victims. After all, victims have an interest in introducing facts that have been acknowledged by the party responsible for the damage as evidence. Such a far-reaching form of 'excuse-protecting' legislation may therefore lead to victims being denied access to justice. In view of the nuanced way in which the court treats apologies as evidence, I consider this a disproportionate measure.

It can be argued that Dutch civil courts already apply the proposed rule of interpretation de facto given the limited number of cases in which apologies qualify as an admission of liability. However, judges would do well to make the application of that rule explicit so that there can be no misunderstandings about the legal consequences of apologising.

73 See art 8(2) of The Hong Kong Apology Ordinance 2017. Dozens of common law jurisdictions have introduced apology protection legislation. For an overview and further references, see *Carroll*/*To*/*Unger* (2015) 9(2) Disput Res Int 115 and *Kleefeld* (2007) 40(2) UBC L Rev 769.

V Encouraging or facilitating apologies in court decisions

On the other hand, the research results show that apologising is stimulated and even facilitated in the decisions that have been analysed. Hereafter, I will discuss the various categories in which this was the case. First of all, the possibility of claiming an apology (by plaintiffs) and imposing it (by judges) will be discussed (section A). Other decisions show that failure to apologise can have legal consequences. These decisions address the question of whether a breach of the obligation to apologise can lead to liability (under civil law or disciplinary law) (section B). In addition, I found decisions in which the fact that an apology was offered (or not) was taken into account as a circumstance in the interpretation of an open standard (section C). Finally, some decisions were found in which the court refers to apologies in an *obiter dictum* (section D).

A Claims for an apology

By analysing the civil case law, many decisions were found in which the offering of an apology by the opposing party was claimed (n = 175). In the literature it has been argued that claimed apologies are (almost) always rejected in Dutch civil courts.[74] The results of the case law analysis reveal a more nuanced picture. Although in the majority of the cases, claims for an apology are rejected, quite a few decisions were found in which such a claim was allowed (n = 27). An illustrative example is a case in which the claimant had chatted with the defendant, whereby the defendant had posed as a thirteen-year-old girl.[75] On her website, the defendant had published (among other things) texts of chat sessions, a photograph of the claimant and personal details of the claimant. The court ruled that by making these statements on her website, the defendant had acted wrongfully towards the claimant. The claimed prohibition of the publication was awarded.

74 See, among others, *Van Dijck* (2017) 37 OJLS 562 and *S de Rey*, Court-Ordered Apologies under the Law of Torts? Non-Monetary Relief for Emotional Harm – A Comparative Outlook from a Western European Perspective. Apologies in the Legal Arena – A comparative perspective San Lazzaro di Savena (2021) 203–249.

75 District Court of The Hague 20 June 2007, ECLI:NL:RBSGR:2007:BA8830.

This also applies to a rectification on the website of the defendant and a letter of apology[76] to the claimant:

> 'The foregoing leads to the conclusion that the claim with respect to the requested prohibition of publication appears to be neither wrongful nor unfounded. This means that this part of the claim will be allowed. This also applies to a rectification on the defendant's website and a letter of apology as stated below.'[77]

Nevertheless, in most cases, such a claim is rejected (n = 148).[78] The main reasons given by the court for this are: (1) that apologies are expressions of personal feelings and therefore cannot be enforced;[79] (2) that enforced apologies are not effective, for example because they are insincere or have no value;[80] (3) that the enforcement of apologies conflicts with the freedom of expression;[81] and (4) that there is no legal

76 The text included: 'It has never been my intention to unjustly accuse and publicly shame anyone. Therefore, I have removed the information from the website and I apologise for the damage and inconvenience that I have caused.'

77 District Court of The Hague 20 June 2007, ECLI:NL:RBSGR:2007:BA8830, r.o. 3.5.

78 Only in 52 cases did the court make a substantive assessment of the apology claim. In the other cases, the court did not make a substantive assessment because, for example, the entire claim was rejected. The admissibility of apologies as a legal remedy was therefore not addressed in these cases.

79 District Court of 's-Hertogenbosch 7 November 2003, ECLI:NL:RBSHE:2003:AN7740; District Court of Alkmaar 15 December 2005, ECLI:NL:RBALK:2005:AU8188; District Court of Zutphen 5 September 2007, ECLI:NL:RBZUT:2007:BB3200; District Court of Zutphen 23 January 2008, ECLI:NL:RBZUT:2008:BD0543; Court of First Instance of the Netherlands Antilles 2 February 2009, ECLI:NL:OGEANA:2009:BH1997; Court of First Instance of the Netherlands Antilles 13 February 2008, ECLI:NL:OGEANA:2008:BD9190; District Court of The Hague 7 April 2008, ECLI:NL:RBSGR:2008:BC8732; District Court of Breda 23 March 2010, ECLI:NL:RBBRE:2010:BL8517; District Court of Leeuwarden 18 August 2010, ECLI:NL:RBLEE:2010:BN6111; District Court of Leeuwarden 27 April 2011, ECLI:NL:RBLEE:2011:BQ3207; District Court of Leeuwarden 14 September 2011, ECLI:NL:RBLEE:2011:BT2357; District Court of Utrecht 2 December 2011, ECLI:NL:RBUTR:2011:BU6603; District Court of Leeuwarden 15 February 2012, ECLI:NL:RBLEE:2012:BV3785; District Court of Breda 6 December 2012, ECLI:NL:RBBRE:2012:BY6447.

80 District Court of 's-Hertogenbosch 7 November 2003, ECLI:NL:RBSHE:2003:AN7740; District Court of Zutphen 23 March 2005, ECLI:NL:RBZUT:2005:AT3298; District Court of Zutphen 13 April 2005, ECLI:NL:RBZUT:2005:AT4667; District Court of Zutphen 18 July 2005, ECLI:NL:RBZUT:2005:AU1424; District Court of Zutphen 5 September 2007, ECLI:NL:RBZUT:2007:BB3200; District Court of Zutphen 23 January 2008, ECLI:NL:RBZUT:2008:BD0543; District Court of Rotterdam 25 March 2008, ECLI:NL:RBROT:2008:BC7942; District Court of Breda 23 March 2010, ECLI:NL:RBBRE:2010:BL8517; District Court of Leeuwarden 14 September 2011, ECLI:NL:RBLEE:2011:BT2357; District Court of Leeuwarden 15 February 2012, ECLI:NL:RBLEE:2012:BV3785; District Court of Rotterdam 21 November 2012, ECLI:NL:RBROT:2012:BY4993; Court of First Instance of Curaçao 15 April 2013, ECLI:NL:OGEAC:2013:BZ7339; Court of The Hague 8 November 2016, ECLI:NL:RBDHA:2016:13311 and Court of Rotterdam 11 October 2017, ECLI:NL:RBROT:2017:7943.

81 District Court of Leeuwarden 7 March 2003, ECLI:NL:RBLEE:2003:AF5497; District Court of Zutphen 5 September 2007, ECLI:NL:RBZUT:2007:BB3200; District Court of The Hague 29 November

basis on which a claim for an apology can be based.[82] These arguments have already been critically assessed in the literature.[83]

B Breach of the obligation to apologise

I also found decisions in which the question of whether a breach of the obligation to apologise can lead to liability was addressed. In the Netherlands, the basis for such an obligation for medical incidents can be found in a code of conduct on openness after medical incidents.[84] This is a code of conduct in which, among others, recommendations are made regarding the settlement of claims in the event of medical incidents. Recommendation 8 of the code is important with regard to apologising after a medical incident:

> 'If the investigation into the cause of the incident reveals that an error occurred, the healthcare provider acknowledges this error and apologises to the patient.'

The case law analysis shows that medical professionals who violate this recommendation act in breach of medical disciplinary law.[85] They risk the imposition of a measure by the medical disciplinary tribunal (such as a warning or reprimand).[86] No civil decisions were found in which the violation of the obligation to apologise led to civil liability, but, in theory, this is possible. After all, codes of conduct such as

2007, ECLI:NL:RBSGR:2007:BB9002; District Court of Zutphen 23 January 2008, ECLI:NL:RBZUT:2008:BD0543; District Court of Rotterdam 25 March 2008, ECLI:NL:RBROT:2008:BC7942; District Court of The Hague 7 April 2008, ECLI:NL:RBSGR:2008:BC8732; Court of Appeal Amsterdam 19 June 2008, ECLI:NL:GHAMS:2008:BE9682 and District Court of Rotterdam 21 November 2012, ECLI:NL:RBROT:2012:BY4993.

82 District Court of Dordrecht 18 February 2010, ECLI:NL:RBDOR:2010:BL4339; District Court of Amsterdam 30 June 2010, ECLI:NL:RBAMS:2010:BO1998; District Court of Leeuwarden 31 August 2010, ECLI:NL:RBLEE:2010:BN6133; District Court of Almelo 11 February 2011, ECLI:NL:RBALM:2011:BP5559 and Court of Appeal of The Hague 7 October 2014, ECLI:NL:GHDHA:2014:3210.

83 See fn 23 and 25.

84 Gedragscode Openheid medische incidenten (GOMA). In addition, reference is made to the KNMG handbook 'Dealing with incidents and complaints – what is expected of doctors?'. The most recent version of November 2018 does not explicitly recommend apologising, but it does emphasise the importance of providing openness after medical incidents: 'To prevent harm to patients, and to minimise damage that has already occurred, it is actually important to inform patients proactively, promptly and honestly about incidents and complications.' (p 9).

85 See, among others, RTG Zwolle 8 August 2014, ECLI:NL:TGZRZWO:2014:104, r.o. 5.5.

86 If the disciplinary board comes to the conclusion that there is a question of disciplinary reproach, various measures can be imposed on the practitioner (art 48 wet BIG).

the GOMA quoted above can give substance to open standards[87] (for example, the standard of due care of art 6:162 Civil Code) or to a (medical treatment) contract between parties.[88] Non-compliance with the recommendation to apologise as laid down in the code of conduct could therefore constitute a wrongful act or breach of contract.[89]

C Implementation of open standards

The case law analysis brought dozens of decisions to light in which the fact that an apology was (not) offered is considered a relevant circumstance in the interpretation of an open standard in the civil code.[90] In this respect, the fact that a party has apologised is regularly considered in his favour. This turns out to be relatively common in liability cases and cases in which the parties have a long-term relationship with each other. It appears that apologies can be seen by courts as an indication that a party to the proceedings has learned from their mistake and will behave differently in the future.[91] In addition, apologies are sometimes seen as a measure to limit damage.[92] Furthermore, in some cases, the fact that an apology was given is taken into account as a mitigating circumstance in the assessment of immaterial damage.[93]

On the other hand, failure to apologise can be held against a party in civil proceedings. In these cases, the failure to apologise is cited as an aggravating circumstance. An example is a labour law ruling.[94] According to the court, the failure of the employee to apologise implied that the employer could proceed with immediate

87 Deviation from a code of conduct without proper substantiation may constitute a violation of that open standard. See among others, HR 12 January 1996, ECLI:NL:HR:1996:ZC1955, NJ 1996/683 (*Kroymans/Sun Alliance*) and HR 2 March 2001, NJ 2001/649, sec 3.3.3 (*Thrombosis*).

88 See, among others, *I Giesen*, Alternatieve regelgeving en privaatrecht (2007) and *M Menting*, (R) Evolutie in het privaatrecht? Enkele beschouwingen over de rol van private regelgeving en de invloed van het EVRM naar aanleiding van HR Achmea/Rijnberg (2015) (4) Nederlands Tijdschrift voor Burgerlijk Recht (NTBR) 104.

89 On this subject, see *Zwart-Hink/Akkermans/van Wees* (2014) 1 Univ West Aust Law Rev 100–122.

90 Eg Reasonableness and Fairness (art 6:2 of the Dutch Civil Code). This article stipulates that the creditor and debtor must act in accordance with the requirements of reasonableness and fairness.

91 See eg Court of Appeal of The Hague 30 March 2007, ECLI:NL:GHSGR:2007:BA3474, sec 1.7.

92 Eg District Court of Utrecht 11 January 2008, ECLI:NL:RBUTR:2008:BC1662 and District Court of Middelburg 27 October 2010, ECLI:NL:RBMID:2010:BO9540.

93 See also District Court of The Hague 12 December 2001, ECLI:NL:RBSGR:2001:AD7073 ('In determining the compensation to be awarded for this, the court will also take into account that the Foundation, as previously considered, has offered sincere apologies').

94 District Court of Haarlem 9 February 2012, ECLI:NL:RBHAA:2012:BV3039.

dismissal without giving the employee the opportunity to tell his 'story'. The cases discussed in this section therefore result in a double incentive: offering an apology is rewarded, while not offering an apology is punished.

D The court refers to apologies in an *obiter dictum*

Finally, some decisions were found in which apologies were referred to in an *obiter dictum*. An *obiter dictum* is a consideration that is not essential to the decision.[95] Considerations of this type may be intended to refute objections by the party ruled against or, for example, with a view to the formation of the law, to provide argumentation for a point of view that is not under discussion between the parties in the dispute.[96]

An illustrative example concerns a case in which a parents' claim for admission to education for their child was upheld.[97] Nevertheless, the judge saw it fit to address the parties in an *obiter dictum*:

> 'This decision does not have to prevent [the child] from apologising sincerely in writing to Stebo [the school] for what happened ....'[98]

The quoted consideration is clearly not argumentative, in the sense that it has no function in resolving the dispute that was brought before the court. The question can be raised as to what purpose the court intended this consideration to serve. The remark that the decision does not have to prevent the pupil from apologising for what happened in writing seems to be aimed at stimulating the pupil to apologise. The court looks beyond the legal dispute and tries to restore the relationship between the parties, among other things, by stimulating the apology. By doing so, the court facilitates the cooperation between the parties in the future. It also appears that the court wants to make clear that the fact that the parents' claim is upheld does not exempt the pupil from taking responsibility for the incident (and that apologies are still in order). This is also expressed in the opinion on the settlement of the legal costs:

95 This definition is in line with the definition used by Plug (*HJ Plug*, Wat wordt ten overvloede overwogen? De functie van overwegingen ten overvloede in rechterlijke beslissingen (1995) (1) Tijdschrift voor Civiele Rechtspleging 5).

96 See on the different functions in Dutch law, *Plug* (1995) (1) Tijdschrift voor Civiele Rechtspleging 5.

97 District Court of Utrecht 2 January 2001, ECLI:NL:RBUTR:2001:AA9454.

98 District Court of Utrecht 2 January 2001, ECLI:NL:RBUTR:2001:AA9454, sec 3.8.

> 'It is considered appropriate to compensate the costs of the proceedings between the parties. To that end, it is considered that the conduct of [the child], culpable in itself, was the cause of the dispute which arose between the parties.'[99]

If we look at these considerations together, it becomes clear how the court feels about the pupil's behaviour. Although the pupil was vindicated, he is seen as the cause of the dispute that arose between the parties, for which apologies are in order. As a result of these considerations, the school, as the losing party, may find the decision more acceptable.

The case law analysis shows that there are only a handful of such decisions. Nevertheless, these decisions highlight how courts can creatively stimulate the offering of apologies and, as such, they illustrate well how courts can look beyond the legal dispute and try to address the underlying conflict.

V Conclusion

The systematic case law analysis that has been presented in this article shows that the emphasis placed on the legal risks of apologising is unjustified, at least for the Dutch legal system. In fact, it appears that apologising has a multiplicity of positive consequences. Not only does apologising have positive consequences for the victim in general, but apologies also have positive legal consequences for the provider of the apology. The fact that an apology has been given often turns out to be to the advantage of the provider. In short, the legal risks (if any) are dwarfed by the positive effects of apologising. The results of this study are not only relevant to Dutch legal practice but also to the international scientific debate. Apologies are a complex phenomenon, with different components and layers. This study shows that different modalities can be distinguished as regards the role that apologies play in judicial decision-making. It is important to separate these modalities within the scientific debate. In addition, it would be interesting to see whether these modalities also exist in the case law of other jurisdictions. The complex reality observed in the way apologies play a role in judicial decision-making requires a nuanced solution for potential problems. The literature often advocates the introduction of apology protection laws. This study proposes that this is neither necessary nor desirable, at least for the Dutch legal system. This possibly also applies to other jurisdictions. It is therefore recommended to first conduct a proper problem analysis before proceed-

99 District Court of Utrecht 2 January 2001, ECLI:NL:RBUTR:2001:AA9454, sec 3.9.

ing to introduce such legislation. The method used in this study can serve as a guideline for conducting such a problem analysis in other jurisdictions.

In addition, the research results raise more fundamental questions about the functions of tort law and the place that should be given to the immaterial needs of litigants. The research results of this study highlight how a specific need of parties, namely the offering or receiving of apologies, can be given a place in tort law. I have shown that there are possibilities to simulate or facilitate apologies. An extensive change in the law is not even necessary for this. In my opinion, the more fundamental discussion about the place of immaterial interests in tort can only take place after it has been made clear how these immaterial interests could actually have a place. This study provides a contribution to that end. This study additionally shows how the 'appeasement function'[100] of tort law can be fulfilled without offering financial compensation. In most cases, this function is given shape in the law of damages through the granting of immaterial compensation. However, there are other means by which appeasement can be provided. Receiving an apology is a very good example of this. This research provides insight into how apologies can be facilitated in legal proceedings. It could be argued that the imposition of an obligation to apologise is more satisfying than the awarding of a monetary claim. After all, when a monetary claim is awarded, there is often no direct relationship between the liable party and the injured party due to the intervention of an insurance company. This undermines the personal character of the reparation. Compensation then only has a symbolic value (namely recognition), which may also be covered by the compensation function. This is different when imposing the obligation to apologise since offering an apology is a personal act that cannot be performed by a third party, such as an insurer.

100 *G Williams*, The Aims of the Law of Tort (1952) Current Legal Problems (Curr Leg Probl) 137.