

Stichting PIV Annual report 2015

Rehabilitation First and Foremost!

Preamble

Already in 2015, there were discernible signs that the settlement of (traffic related) personal injury cases might look completely different in the (not too distant) future. Putting less emphasis on monetary compensation and more on compensation in kind and the instruction of rehabilitation coaches and/or case managers, has legitimately received a lot of attention and will certainly remain a topical item in the coming years.

Rehabilitation support works best if the first contact between the insurer and the victim takes place as soon as possible after the accident.

The implementation of a first party-insurance for traffic accidents could be an important trigger, in that the victim reports the loss to his own insurer.

The PIV deems it important to examine the possibilities of a direct insurance in more detail.

The phenomenon of the self-driving car also casts its forward shadow. Although no one knows exactly what the implications will be, there is no doubt that things will be different.

The consequence of these recent developments will be that the settlement of personal injury cases will have a reduced legal orientation and become more practically geared to the victim's specific needs.

As I will be retiring on 1st June 2016, I will not witness this in a professional capacity. I will definitely follow it from the sidelines, however, and I think many in The Netherlands with me.

Theo Kremer, director PIV

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1 Claims culture in 2016

Many people will admit that a claims culture is on the rise in our country, albeit not necessarily in the field of personal injury. It mainly concerns pecuniary losses, for example in relation to investments or financial products.

Zooming in on personal injuries, a number of things are noteworthy:

- The average claim amount is steadily rising;
- There is an increase in the number of claims relating to post traumatic stress disorder;

- The threshold to make claims is generally lower than in the past, even if the fault of a third party is not immediately obvious, or if there rests considerable contributory negligence on the side of the victim. This is probably based on the maxim 'nothing ventured, nothing gained'; and
- Claims are made against more and different parties, be it together with the primary negligent party or not.

A good example of a party that is increasingly held liable is the school. Up until the end of the last century, the school was practically only held liable for accidents during PE classes, where occasionally incidents with serious injuries occurred. In 2016, schools are faced with a diversity of claims, varying from accidents in the schoolyard (be it by a student or by a teacher) to claims for bullying.

There is also an increase in the number of claims against tour operators for accidents that occur during holidays -partly as a result of European regulations. These claims are certainly not always successful.

A relative newcomer to the parties against whom claims are instigated, is the co-owner. Such a claim succeeded for the first time in the so-called Hammock ruling, in which a seriously injured woman held her partner liable - as co-owner of defective premises - for the breaking of a pillar on the basis of art. 6:174 BW. The Dutch Supreme Court upheld the claim and ruled that the partner was liable for 50% of the woman's injury claim.

Immediately after this judgement, a debate developed in the legal literature about whether or not this ruling would impact other forms of co-ownership, and focussed in particular on art. 6:179 BW, which deals with (strict) liability for animals.

The PIV propagated that it could not be true, that if you get bitten by your own dog, and no prenuptial agreement is in place, you could recover 50% of your losses from your partner's personal liability insurer.

That said, there were also distinguished academics, who argued that, dogmatically speaking, and also in view of the Supreme Court's reasonings, there should not be any difference.

For daily practice, it was therefore best if the uncertain situation were to be quickly clarified. That was the reason why in proceedings brought before the District Court North Holland, in a case that revolved around a fall from a horse that belonged to both spouses, parties decided to apply directly to the Supreme Court for a preliminary ruling.

The Supreme Court gave this clarification in its judgement of 29th January 2016 and ruled that the strict liability imposed by art. 6:179 BW does not apply to persons vis-a-vis each other in their capacity of co-owner. In essence, that means that the legal doctrine that evolved from the Hammock-ruling, does not reflect on damages caused by (own) animals.

The Supreme Court, in its judgement, emphasised that the co-owner must also be aware of the animal's indigenous and unpredictable energy and the risks inherent to this.

In cases involving co-ownership of property this will be different, because the co-owner will generally not be aware of a hidden defect.

Reactions in the legal literature to this judgement varied and often referred to the fact that the injuries in the Hammock-ruling were catastrophic, whereas the injuries in the other case were less severe. It is debatable, however, if the Supreme Court, in a case that centres on legal doctrine, will be guided by the severity of the injuries. This prompts the question of where the line should be drawn.

The PIV, however, is satisfied with the ruling, especially because a different outcome would have opened the doors for all kind of fraudulent claims.

It is a known fact that many accidents take place within a domestic environment, for example falling down stairs, slipping or tripping in the bathroom, or during a walk in the woods. It cannot be that people, who fall victim to these mishaps, are given the opportunity to allege that an unexpected movement of their own pet animal was the root cause of the accident in order to claim 50% of the damages from their partner.

Even the Supreme Court feared an increase of claims if it had allowed co-ownership's liability in the ruling in question, but it does not go so far as to mention fraudulent claims: the Supreme Court uses the term "claims that are difficult to assess".

The remaining undecided question -which arose after the Hammock-ruling- is the liability of a co-owner for an accident resulting from defective (moveable) goods on the basis of art. 6:173 BW. An example would be a fall from one's (own) bicycle as a result of the handlebars shearing off. In its deliberations of the 29th January 2016-ruling, the Supreme Court does not immediately dismiss such a claim. Such a case will undoubtedly be brought before the courts and it would be wise for the legal representative to pick a case with serious injuries. The Supreme Court will then have the opportunity to reverse its earlier ruling in the Hammock case, by a general 'block' on co-ownership claims if that were to fit in with the claims culture after 2016? Time will tell.

2. 2015, the year of retribution.

"Rehabilitation instead of compensation".

2015 has been hailed by some as the year of rehabilitation in the personal injury settlement. "Rehabilitation above compensation" is a concept that is steadily developing. The PIV warmly embraces this trend. The PIV considers it important that initiatives are deployed that aim at a quicker convalescence of the victim.

On 18th June 2015 the 'Rehab Plaza' took place in Gouda. The meeting was an amalgamation of a seminar organised by a number of rehabilitation providers, and the Injury Plaza, which has often been organized by the PIV. The meeting carried the slogan "*Jointly looking for rehabilitation solutions*". The attendees were provided with details of the various rehabilitation providers and the services they have to offer in specific injury cases.

One of the speakers at the seminar was Dr. A.J. Akkermans – Professor of private law at the Vrije Universiteit in Amsterdam. He asserted: "*It is my firm belief that in time to come, we will look back at 2015 as the year in which rehabilitation has broken through*".

In saying so, he not only referred to the Rehab Plaza, but also to other meetings on this topic, such as the Symposium of the Dutch Association of Personal Injury Lawyers (LSA) in January 2015 and the Letselschade Raadsdag¹ in October 2014.

Providing rehabilitation assistance also featured prominently in various articles in the professional literature. "*Think rehab!*" according to Arno Akkermans as the title of his presentation. In his lecture Akkermans pointed out that rehabilitation is sometimes seen as a 'soft' undertaking, that do not fit in with the harsh legal world. He sees this as a gross misconception. In Akkermans' words: "*Also reasoning from a strictly legal perspective, it is manifestly clear that rehabilitation goes before compensation*".

There was also occasion for the participants in Gouda to discuss files or other important matters during the Personal Injury Plaza.

3 New PIV Agreement Cost of legal Assistance (BGK)

In 2015 insurers and legal representatives conferred about a new PIV Agreement (BGK) and about the PIV scale.

The PIV Agreement BGK exists since 2004. Earlier claim reviews had learned that there exists a correlation between the paid compensation and the cost of legal representation that the victim can claim on the basis of art. 6:96 BW. The research data formed the basis for the PIV-scale. Since then, the scale has been upped on a number of occasions in collaboration with the participating insurers and legal representatives.

The PIV Agreement BGK is a Model Agreement, on the basis of which insurers and legal insurers can conclude a bilateral agreement. The covenant contains, among others, stipulations about a retainer for legal costs.

The participants to the agreements are, generally speaking, very positive about its effectiveness. As a result of the agreement there are no longer discussions about the legal fees, which is beneficial to the settlement climate, so that time and energy can be devoted to the victim, who, after all, is the party who really matters in the settlement process.

¹ Annual congress of the Personal Injury Board.

Talks conducted between parties revealed that they deemed it important to retain the agreement, but it was made clear from the insurers' side that the scale no longer (fully) fits in with the current claims settlement process. Especially in minor cases, the legal costs are disproportionate to the work performed. It was argued from the insurers' side that minor injury cases are currently settled more leniently and that – particularly in the smaller cases – there are standardized compensations for many items of claim. The legal representatives countered that they lose money on the more serious cases. Key to the new scale was that legal costs stood in better proportion to the compensation amount in each individual case.

Agreement was finally reached on a new PIV-scale, in which the scale is reduced for cases up to € 10,000 and increased for cases between € 10,000 and € 30,000. It was also decided that the PIV-scale applies to compensation amounts up to € 250,000. A transitional scheme applies. The higher € 1 million-scale, underwritten by fewer participants, is discontinued.

Another important change relates to the advance payment scheme. The basic retainer of € 5,000 that applied in 2015, will be reduced to € 4,000 in 2016 and even further thereafter. Legal representatives can, on the other hand, demand a yearly interim payment for medical disbursements. Here, too, the point of departure is that the outlays in a particular case are better geared towards that individual claim file.

The new PIV Agreement runs from 2016 to 2019.

4a PIV Personal Injury Statistics

Registration of data

Data for the PIV Personal Injury Statistics is submitted once the personal injury claim is settled. The participating insurers only register the paid personal losses. Reserves for and payments to social insurers are not included in the PIV Personal Injury Statistics.

The following heads of claim are registered in the personal injury statistics.

- General damages
- Loss of earning capacity
- Household assistance
- DIY compensation
- Legal costs

Insurers who supply data 'manually', also register the 'total personal claim' in the system. This is the aggregate of the abovementioned heads of claim, augmented with the victim's other items of claim such as medical costs, care costs (nursing), clothing etc. Vehicle damage is not included.

Additional information

In order to analyse the effects of, among others, policy changes, covenants, process agreements and legal developments, insurers additionally list other information such as:

- the nature of injuries
- the type of legal representative
- the type of claim
- processing times

This enables insurers to gain insight into the effects on the claims burden of, for example, a swift and pragmatic claim settlement.

New system

Because both the PIV and the insurers are so enthusiastic about the new system that was introduced for the PIV Satisfaction Survey, the PIV Board of Management decided to commission a similar system for the PIV Personal Injury Statistics. The former system has been available for the participating insurers since 2015. Analogical to the Satisfaction Survey, the data on the system allows the PIV and participating insurers to make a variety of analyses. This was previously contracted out to an external party, who made these analyses through Excel calculations. That was expensive and time consuming.

By means of the built-in filters, it is possible to make these analyses easily and quickly via the system. The participating insurers can also use the analyses for benchmark comparisons.

In order to support insurers in using the new system, a training session will be held in 2016 for all users. By way of example two graphs, that can easily be devised with the system, have been included below.

Linking systems

The ultimate goal is to link the data of the PIV Personal Injury Statistics with that of the Satisfaction Survey. That means that the analyses from the injury statistics can be complemented with the satisfaction ratings. A start is planned for 2016.

1. Graph showing average claim burden of the five heads of claims in all whiplash cases and the whiplash claims with a running time less than 6 months.
2. Graph of heads of claim in cases of € 1,500 to € 5,000 with legal representation.

4b Satisfaction Survey

Participants to 2015 Satisfaction Survey

Interest in the PIV Satisfaction Survey is rife. Two insurers were added to the list of participants in 2015. The survey is presently conducted by twenty two insurers. The vast interest in the PIV Satisfaction Survey is in part stimulated by the Keurmerk Klantgericht Verzekeren (KKV) [Certification Customer orientated Insurance]. But there are also a number of companies without the certification who partake in the Satisfaction Survey. By participating in the PIV Satisfaction Survey, the insurers gain insight into what they do well and what can be improved upon. The companies can also compare the results with the benchmark.

Reliability

Because the Satisfaction Survey forms part of the Keurmerk Klantgericht Verzekeren (KKV) [Certification Customer orientated Insurance], the manner in which it is executed is closely monitored. It is imperative for the certification that the survey is carried out in accordance with the reliability requirements.

The transfer of data must be exact and is therefore closely monitored during the year. Moreover, the data transfer must comply with the pre-determined potential and the coverage -distribution over the teams- must be in order.

Furthermore, the response rate is relevant to the reliability score. In order to attain good response figures, it is essential that the questionnaire is sent out in time.

Digital distribution of the questionnaire has had a positive influence on the response rate. In 2015, the paper version had a response score of 23.7% as opposed to 33.1% for the digital one. It is therefore important to encourage the use of e-mail addresses.

Methodology of the Satisfaction Survey

The questionnaire for the PIV Satisfaction Survey consists of more than forty questions. The Satisfaction Survey therefore delivers an abundance of information about the claims settlement process.

A new system for the Satisfaction Survey was developed and implemented in 2014. It allows the PIV and the participating insurers to make various analyses with the information available in the system. It demonstrates how insurers 'score' on items such as communication, claims handling and response times. Insurers can, for example, also monitor how prejudiced parties experienced the involvement of legal representatives, why they sought help from a legal representative and what, in their opinion, goes smoothly in the claims settlement process and where improvements can be made. Insurers can also get concrete improvement suggestions from the system or even get feedback information per team. This enables the insurer to measure the satisfaction ratings in relation to specific policy and/or initiatives.

All satisfaction ratings from the last number of years have been input into the new system, so that trends can be made visible.

Graphs

The system makes it possible to produce all kinds of graphs, for example graphs for specific aspects of the certification, graphs in relation to individual questions, and graphs depicting trends. A few example graphs are depicted below.

Because of the system's flexibility and its user friendliness, a similar system was built in 2015 for the PIV Personal Injury Statistics. The long term plan is to link both systems and to introduce a similar system for SVI-claims (Passenger Loss Insurance).

Graph satisfaction ratings 'Processing times' 2015

Graph on specific question: 'main reason to instruct a legal representative'

Graph depicting trends in satisfaction ratings of the handling of neck complaints

4c PIV Audit

For the purpose of the KKV Certification, the PIV conducts a biennial audit on behalf of the Stv. The audit covers the adherence to and compliance with the certification norms for the handling of personal injury claims. These norms are based on the GBL 2012 (Code of Conduct for the Handling of Personal Injury Claims). The PIV Audit goes further than a mere check of the certification requirements. Areas of special emphasis, respectively opportunities to improve the claims settlement process, are also mentioned in the audit report.

Results 2015 audits

In 2015 the PIV audited nine companies. Five companies passed the audit outright. It means that these insurers are in control of their processes. The certification norms are part of their KPI's and quality checks. Some insurers carried out a pre-audit, in order to pre-determine how the company stands with regard to the certification standards. Improvement programmes were commenced before the actual assessment, so that their results were already noticeable during the audit.

The audit also had added value for those insurers who passed successfully. All audits have generated tips and points of improvement that can be picked up by the insurer. It is commendable that insurers are happy to embrace suggestions for improvements. One insurer, for example, even changed the medical authorisation while the audit was still in progress, so that it fully complied with the targeted medical authorisation of the Medical Paragraph by the time the audit was concluded.

Four insurers did not immediately obtain the PIV accreditation following the audit. In three cases the audit was repeated. During the repeat audit, the auditors assessed the improvement actions and their implementation. One insurer did not complete the PIV audit in 2015 and a repeat audit is planned for 2016.

Importance of the certification norms.

According to the certification project group, which consists of managers of various insurers, the norms provide for a good framework for them to focus on. Because the certification norms are deemed important, they can be used as the catalyst to implement in-house changes. An example of change is the actions that were taken towards the mandated brokers. Partly as a result of the current certification norms, the insurers were forced to look at the process of payments carried out by mandated brokers. The contracts with these brokers prescribe strict time scales for following up on payment requests. Compliance with these criteria is therefore also monitored in the audits.

Moreover, brokers have implemented procedural changes, such as appointing contact persons or separate e-mail accounts for personal injury claims. Another positive step is the pre-notification of a large indemnity payment to the broker, so that they can ensure that sufficient funds are in place. One company reports that the intensive collaboration with the supervisory broking division has greatly improved the internal relationship between the departments.

Notable examples

Apart from the inroads that were made with the payments by brokers, the audits have led to other improvements

- Exchanging claim adjusters' reports with the prejudiced party or his/her legal representative. In addition, payment requests are generally passed on immediately by phone or by mail to the claims handler. Sometimes a dedicated e-mail address is used for this.
- Incentives have been taken to improve the relationship with legal representatives. Some insurers, for example, arrange 'settlement meetings' with legal representatives, appoint dedicated claim handlers, stimulate the instruction of one joint medical advisor and implement schemes whereby a second opinion is sought in case of discussion about the legal costs.
- Closer collaboration between claim handlers and mentors. This has led to a reduction in the number of conferences on a given case. An internal peer review on items such as empathy and a pro-active and solution-oriented approach is the norm for a number of insurers.
- More emphasis for mediation. Not only is the number of mediations on the increase, but also the number of claim handlers who follow mediation courses or who specialise in mediation.

Points of attention.

Apart from the positive aspects, the audits have also revealed a number of items that can be improved upon.

- Clarity about the claim adjuster's mandate must be evident. The adjuster's mandate is not always clearly defined and communicated to the claim handlers. It is stimulated through the audit that the mandate is laid down in SLA's and working documents, so that it is carved in stone for all to see. Claim adjusters can also clearly state the mandate in their reports and should do so more often. It regularly happens that the claims adjuster recommends an advance payment in his report, whereas he has actually committed to the payment.
- Simplifying the process of sending medical information. In the 2015 audits, all insurers complied with the strict separation of the medical trajectory. This could be made more efficient, however, for example by using a separate PO-box or a dedicated e-mail address for the medical unit. This ensures that medical information is delivered directly to the medical unit. This saves extra actions and time.
- Sending out the injury brochure features regularly as a point of attention. In minor injury cases or in cases where a legal representative is involved, the brochure is sometimes not sent out, or failure to send the link to the online brochures was noted. Some folders do not contain information about subjects such as fraud, privacy legislation or a satisfaction survey.
- When liability is admitted, due attention should be paid to the fact that the prejudiced party sustained injuries through no fault of his own / as a result of the tortuous act of the insured (Project Apologies to the Victim by the Vrije Universiteit).
- The Collective Market Agreement number 15 must be more actively invoked if a legal representative does not reply to letters and e-mails.

Changes in audit and certification standards

In 2016, the project group KKV and Injury Settlement will critically examine the manner in which the audit is conducted, as well as the certification standards. The project group wants to examine if, and how, the current norms can be made even more effective and if the audit can yield more qualitative input. Another endeavour is to make the audit less taxing for the insurers.

5 The PIV as Knowledge Centre.

5a. Topical information via PIV-sites

The PIV's websites (www.stichtingpiv.nl and www.pivkennisnet.nl) feature current developments in the field of liability and the handling of injury claims on a daily basis. All jurisprudence that is relevant to the personal injury settlement can be found on these sites. The PIV regularly receives judgements from insurers and lawyers that have not been published elsewhere. These are placed on the sites, so that others can take cognisance of them. Apart from jurisprudence, the sites give quick and clear access to existing regulations, market agreements and Codes of Conduct.

5b PIV-Bulletin

In the six editions of the PIV-Bulletin that appeared, extensive coverage was given to the various seminars that took place in 2015 about restitution orientated case management. Articles also appeared about whiplash, limitation, anti-fraud investigations, employers' liability for work related accidents and recent jurisprudence.

5c PIV Current Developments Lecture 2015

Our annual Current Developments Lectures took place on 30th September 2015 and 1st October 2015. The sessions are mainly intended for past students of the modules Knowledge and/or Aptitude of the former PIV Personal Injury Course, the OSR Moderate Injuries Course (Middelzwaar Letsel: MzL), and the NIBE-SVV Severe Injuries Course (Zwaar Letsel: Zwl).

Chris van Dijk, of Kennedy Van der Laan Advocaten, took those present through the jurisprudence of the previous year. He also dwelt on fraud in personal injury cases and explained what rules and regulations personal injury claim handlers and adjusters must abide by.

Dr. Arvin Kolder, of Punt Letselschade Advocaten and lecturer at the *Rijksuniversiteit Groningen*, ventured -as a personal injury lawyer representing victims- 'into the lion's den' and gave an overview of the jurisprudence in whiplash cases, as well as his own opinion on the subject. In keeping with tradition, the lectures were concluded with an elaborate buffet.

5 d PIV Annual Conference 2015

The theme of the 2015 PIV Annual Conference was 'Do All Roads Lead to Rome'?

The question mark relates to new approaches of personal injury compensation: abstract, concrete or perhaps other? The general principle in compensating personal injuries is that the concrete losses are compensated. Establishing this loss can be a complex, protracted and taxing process. During the annual conference, the question was raised if determining the loss can be simplified by a more abstract approach. The standardisation of various items of claim has already simplified and accelerated the indemnification process and has led to fewer discussions. Are there potentially more opportunities here?

PIV-director Theo Kremer, in his opening speech, stated that 'full compensation' is an outdated concept in the world of personal injury settlement. We would do the victim more justice, if from now on we spoke of the 'most complete possible compensation'. This compensation can take a concrete or abstract form. Especially the more severe injuries will always require individual solutions.

Prof. Dr. Siewert Lindenbergh asserted in his introduction that physical rehabilitation and compensation sometimes intertwine and occasionally even get in each others' way. Physical recovery is the goal, compensation is a means to this goal. The one can influence the other.

Dr. Bart Holthuis, chairman of the Compensation Commission Sexual Abuse Cases in the Catholic Church, set out in his presentation the experiences gleaned with the compensation scheme, which is based on five categories of abuse. His conclusion was that the scheme has proven to be a workable one in everyday practice.

Prof. Dr. Albert Verheij set out the latest developments surrounding the proposed bill Affection and Care Damages.

Chris van Dijk, solicitor with Kennedy Van der Laan, made the attendees acquainted with some statistical data in the personal injury field.

Dr. Jaap Sap – a judge with District Court Central Holland (Utrecht) spoke positively about the guidelines of the Personal Injury Board and in particular the new Personal Injury Guideline 'Computation of Dependency Compensation'. In his opinion, these guidelines provide consistent direction to all parties, including the judiciary.

During the round table discussion at 'the table of Lindenbergh and van 't Hek', the panel members Theo Kremer, Marco Zwagerman and Albert Verheij, debated developments surrounding the compensation for pain and suffering.

The final speaker at the PIV Annual Conference was Dr. Ben Tiggelaar – management teacher and behavioural expert. He discussed the study of and the unruly practice of effective change.

Last but not least, the annual PIV Giraffe was awarded. It goes to a person or organisation who has 'stuck out his or her neck' and has thus set in motion a valuable step in the personal injury industry. This year, the PIV Giraffe was awarded to Jessica Laumen-de Valk, actuarial and employment expert with Laumen Expertise. She received the price for her active commitment in developing the new computational method for calculating dependency claims. In short, a new standardisation model, which fitted in perfectly with the theme of the Annual Conference.