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Optimizing the Societal Value of Tort Law by Meeting Justice Needs of All Stakeholders: Towards Restorative Tort Law

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Abstract

With their traditional focus on financial compensation, tort law systems worldwide struggle with the adverse effects the claims resolution process can have on victims of personal injury. It has therefore been argued that tort law systems should be more emotionally intelligent and more mindful of the non-financial needs of victims. In this debate, the perspective of the wrongdoer has been largely neglected. Drawing from empirical research on the personal experiences of wrongdoers in the Dutch personal injury practice and building on theories of procedural and restorative justice, this contribution argues that, to optimize the societal value of tort law systems, attention should be paid to the wrongdoer's perspective. A tort law system that lacks sufficient opportunity for wrongdoers to personally make amends is deficient both in terms of morality and justice, as it deprives both victims and wrongdoers of a chance at emotional and moral recovery from the injurious event. We therefore believe this represents a shared future for all of us: towards restorative tort law.

Keywords: restorative tort law; personal injury; restorative justice; procedural justice; relational repair

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1. Introduction

Traditionally, the main goal of tort law systems is to provide victims of personal injury with financial compensation for the damages caused by the injurious event. In Dutch legal practice, the past decades show a shift of focus. More and more, it is not just about addressing the financial needs of victims, but also about attending to their non-financial needs. This shift was triggered by empirical research among victims that identified intangible needs such as the need for acknowledgement, for information about how the injurious event came about, for the offender to be held accountable and/or for receiving an apology. This research also revealed the adverse effects of neglecting these non-financial needs in the resolution of personal injury claims. Specifically, the adversarial character of the claims resolution process appears to have a negative correlation with recovery and health outcomes (Elbers 2013; Elbers et al. 2015; Elbers et al. 2016; Thompson et al. 2019; Huver et al. 2007; Akkermans and van Wees 2007; Philipsen and Eshuis 2010; Lindenbergh 2013; Smeehuijzen et al. 2013; Hulst et al. 2014; Lindenbergh and Akkermans 2014; Grant et al. 2020; van Doorn 2024). This is, of course, in stark contrast with the fact that, through compensation, tort law is supposed to provide victims of wrongdoing with the necessary means to recover from their injuries.

In light of these counterproductive effects of the claims resolution process, that are not limited to the Dutch legal practice but occur in other jurisdictions as well, it has been

argued that tort systems should strive to at least minimize these anti-therapeutic effects and, preferably, to enhance their therapeutic value by better addressing the non-financial needs of victims of personal injury (Akkermans and van Wees 2007; Akkermans 2020). In Dutch legal practice, these insights led to numerous initiatives to increase the therapeutic value (or at least decrease the anti-therapeutic effects) of the resolution process, such as the development of codes of conduct for legal practitioners involved in the resolution of personal injury claims.[1]

In this contribution, we argue that, although such initiatives to improve the therapeutic value of tort law systems are very important for victims of personal injury (Section 2), they are insufficient, as long as they are solely victim-oriented. To optimize the value of tort law in a broader sense (that is, to optimize its societal value), attention must be paid to the justice needs of all stakeholders. In current legal practice in the Netherlands and, arguably, (see Section 3.5) in other jurisdictions, this is not the case, because one primary stakeholder has consequently been overlooked: the wrongdoer. This contribution therefore adds the wrongdoer's experiences to the debate (Section 3), then argues that justice requires their personal interests be taken into account as well (Section 4); subsequently, it explores the possible rights and obligations that could shape a restorative law of torts in the domain of personal injury claims resolution (Section 5).

2. A Shift of Focus: Addressing the Non-Financial Needs of Victims

Until recently, the practice of personal injury law has mainly focused on the financial needs of victims, that is, to provide them monetary compensation for damages. However, in the past two decades the Dutch practice of personal injury law has been influenced by the growing attention to the non-pecuniary needs of personal injury victims. A driving force behind these developments was the empirically substantiated awareness of the contrarian effects of tort law: it aims to provide personal injury victims with adequate financial compensation and to satisfy their justice needs, yet the claims resolution process appears to have anti-therapeutic effects on their wellbeing (Elbers 2013; Elbers et al. 2015; Elbers et al. 2016; Thompson et al. 2019; Huver et al. 2007; Akkermans and van Wees 2007; Philipsen and Eshuis 2010; Lindenbergh 2013; Smeehuijzen et al. 2013; Hulst et al. 2014; Lindenbergh and Akkermans 2014; Grant et al. 2020; van Doorn 2024). This insight prompted legal scholars worldwide to explore new theoretical frameworks, such as therapeutic jurisprudence, procedural justice and restorative justice. We will concisely define their key features here and elaborate on these frameworks in Section 4.

Starting with therapeutic jurisprudence, it is worth mentioning that this is less of a theory on justice, and more of a specific approach to law and legal practices. It can be characterized as 'the study of the law's healing potential' (Wexler and Winick 2008; earlier publications: Wexler and Winick 1991, 1996); it aims to identify the therapeutic and anti-therapeutic effects of law and legal practices.[2] Creating awareness for these effects enables scholars, practitioners and law- and policymakers to (re)design law and legal practices in such a way that their anti-therapeutic effects are minimized or, even better, their therapeutic effects promoted. Therapeutic jurisprudence is said to have a 'normative orientation', in the sense that it strives to enhance therapeutic effects of law and legal practices and reduce their anti-therapeutic effects as much as possible (Winick 1997, pp. 188–89; Birgden 2009,

[1] For medical liability cases: De Letselschade Raad (2023), *GOMA*. For other personal injury cases: De Letselschade Raad (2012), *GBL*.

[2] In the debate on improving the claims resolution process in Dutch legal practice, therapeutic jurisprudence is regularly referred to, pointing out the anti-therapeutic effects of the claims resolution process, e.g., by Huver et al. (2007); Akkermans and van Wees (2007); Van Wees and Akkermans (2007); Lindenbergh (2014); Ruitenbeek-Bart (2023).

p. 56; Vols 2019, p. 73). In this endeavor, the justice theories of procedural justice and restorative justice come into play.

The theory of procedural justice, introduced by Thibaut and Walker (Thibaut and Walker 1975), offers valuable insights to improve the process of claims resolution and thus serves as inspiration for scholars and practitioners in personal injury law. The theory of procedural justice tells us that, when it comes to perceived (in)justice in decision making processes, people are sensitive not just to the actual outcome of rules and procedures, but particularly to how they are treated in the process leading to that outcome.[3] It is important for those who are affected by rules and procedures, like claims resolution in personal injury cases, to be given a voice, to be treated with dignity and respect and to be assured of neutrality in the decision making process. Research shows the anti-therapeutic effects of neglecting these procedural justice needs of victims in the claims resolution process: it negatively impacts health and rehabilitation outcomes after injurious events (van den Bos 2005; van den Bos et al. 2014; Akkermans and van Wees 2007).

Whereas procedural justice is relevant for any decision-making process, restorative justice specifically deals with correcting the consequences of matters of injustice, such as criminal acts or wrongful injurious behavior. Over the years, a wide variety of views on the content of restorative justice and its practices have emerged (Johnstone and Van Ness 2007; Zernova and Wright 2007), and the term is not easily captured in an overarching, comprehensive definition.[4] In this contribution, we will build on the definition by Van Ness and Strong (provided that, for the topic at hand, the phrase 'criminal behavior' may be replaced by 'wrongful' or 'tortious' behavior):

> 'Restorative justice is a theory of justice that emphasizes repairing the harm caused or revealed by criminal behavior. It is best accomplished through cooperative processes that include all stakeholders.' (Van Ness and Strong 2015, p. 44).

The second part of this definition of restorative justice shows its relatedness to the theory of procedural justice: they share the aim of active involvement of all stakeholders by giving them all a say ('voice') in the process of restoring the injustice. However, restorative justice is not just a process-focused theory; it is outcome-focused as well. It also strives for a just outcome, namely to repair (or restore) the harm caused by the wrongful behavior. In this sense, restorative justice bears some resemblance to corrective justice, albeit traditionally the latter is primarily concerned with restoring the balance that was disturbed by the wrongful act, by compensating for the victim's damages by imposing a proportionate burden on the offender. Therefore, in tort law, corrective justice is mainly reflected in the legal duty to compensate victims for their losses caused by the offender's wrongful behavior. Restorative justice, however, is not just concerned about restoration in terms of financial compensation, but also in terms of personal or relational restoration. As such, restorative justice seems to align better with therapeutic jurisprudence than corrective justice does, because it aims for restoration in this holistic sense and, thus, for enhancing the therapeutic value of legal practice.[5]

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[3] Literature on procedural justice and its key feature, 'voice', is abundant. Without aiming for completeness, we refer to Folger (1977); Lind and Tyler (1988); Bies and Shapiro (1988); van den Bos (1999); MacCoun (2005); Bobocel and Gosse (2015); Akkermans (2020, pp. 22–23). Particularly pertaining to the Dutch context, we refer to Huver et al. (2007); Klaming and Bethlehem (2007); Rijnhout et al. (2020); Ruitenbeek-Bart (2023, pp. 151–52, 688–90).

[4] Citing Braithwaite: "*Restorative Justice is Most Commonly Defined by What it is an Alternative to*." (Braithwaite 2002, p. 10) and Hill: 'It is impossible to articulate a definition of restorative justice that would satisfy all practitioners and theorists' (Hill 2008, p. 52).

[5] This distinction, with corrective justice primarily pertaining to financial compensation and restorative justice aiming at a more holistic form of restoration, is not as clear as suggested here, because there are scholars who advocate a more holistic approach of corrective justice as well, e.g., Encarnacion, who—through the concept of 'making amends'—also brings intangible aspects within the scope of corrective justice (Encarnacion 2014)

Currently, Dutch legal scholars and practitioners undertake various initiatives to improve the process of personal injury cases, such as developing codes of conduct for personal injury practitioners.[6] Substantive law itself is affected by these developments as well: there is a small but growing body of case law on 'wrongful claims handling' by liability insurers and the related phenomenon of 'secondary victimization' (van Boom 2011).[7] Furthermore, inspired by the psychological insights into what is called the 'healing power of apology' (e.g., Lazare 2004), the relationship between apologies and private law is discussed extensively by legal scholars and practitioners worldwide.[8]

It is this 'healing power of apologies' that brings us to the heart of this contribution: the position of the wrongdoer. Of all non-financial needs victims of personal injury may experience, the need for apologies is pre-eminently relational in nature, in the sense that it specifically calls upon the one who inflicted the injury. The need for apologies entails the need for affirmation (acknowledging responsibility for their norm violation and its consequences), the need for affect (expressions of sympathy and remorse) and for action (actually taking remedial measures) (e.g., Slocum et al. 2011, p. 86; Allan and Carroll 2016; Akkermans 2020, p. 22; Ruitenbeek-Bart 2023, sct. 3.2.3.2). It seems obvious that such needs can best be met by the wrongdoer personally. Yet, within the current Dutch legal practice, his or her liability insurer handles the personal injury claim and the wrongdoer generally does not participate personally (Ruitenbeek-Bart and Schijns 2014, p. 45; Akkermans 2020, p. 24; Ruitenbeek-Bart 2023, pp. 205–7). In fact, the system seems oblivious to the wrongdoer, to his or her role in addressing the justice needs of victims and, especially, to his/her personal interests in the aftermath of the injurious event. Likewise, legal scholarship in general has largely neglected the tortfeasor's perspective when studying tort law (systems), with the exception of medical malpractice cases, as we will illustrate in Section 3. A recent empirical study of the Dutch legal system fills this knowledge gap, as it sheds light on the personal experiences of wrongdoers, not just in medical malpractice cases, but also in traffic liability cases (Ruitenbeek-Bart 2023). This study provides new insights into ways to improve the resolution of personal injury claims and to better address the non-financial needs of victims.

3. Personal Experiences of Wrongdoers in Personal Injury Cases

3.1. Wrongdoers: Sidelined and Overlooked

Until recently, little attention was paid to the wrongdoer, albeit that in literature it was sometimes noted in abstracto that causing personal injury may indeed be an impactful event for wrongdoers as well, and that they themselves may also experience relational, victim-oriented needs (e.g., Huver et al. 2007, p. 49) When attention is paid to the wrongdoer's personal experiences, the debate generally revolves around medical liability cases and the impact health care professionals may suffer due to medical adverse events and their legal aftermath, including disciplinary measures (Alhafaji et al. 2009; Verhoef et al. 2015; Friele et al. 2017; Laarman et al. 2019; Bradfield et al. 2023; Ruitenbeek-Bart 2023, chap. 7; Cooper et al. 2024). Indeed, health care professionals are often referred to as 'the second

and Radzik, who advocates a 'reconciliation approach of corrective justice', claiming that 'corrective justice requires a form of reconciliation or relational repair' (Radzik 2014, p. 232).

[6] For medical liability cases: De Letselschade Raad (2023). For other types of personal injury cases: De Letselschade Raad (2012).

[7] Dutch case law already contains several examples of liability insurers held liable for 'wrongful claims handling' and having to pay an additional amount for non-pecuniary damages (e.g., Court of Appeal Arnhem-Leeuwarden 11 December 2018, ECLI:NL:GHARL:2018:10759; Court of Appeal Arnhem-Leeuwarden 26 May 2020, ECLI:NL:GHARL:2020:4043).

[8] The articles mentioned here are just a selection of publications on the relationship between apologies and tort law: Shuman (1994, 2000); Robbennolt (2003, 2006, 2008, 2009, 2013); Vines (2007, 2008); Allan and Carroll (2016); De Rey (2023); Wijntjens (2023).

victim' (Wu 2000; Wu et al. 2020). In the wake of these developments in the domain of medical liability law there is, however, a slowly nascent awareness of personal, relational and moral needs of other types of wrongdoers, such as causers of traffic accidents (Cohen 2005a, 2005b; Merecz et al. 2012; Ruitenbeek-Bart 2023).

The general assumption that causing injury may impact wrongdoers as well is rooted in psychological insights regarding wrongdoing and apologies, which demonstrate that apologies have 'healing power' (e.g., Lazare 2004) as they may alleviate the non-pecuniary needs of both victims and offenders (Tavuchis 1993; Shnabel and Nadler 2008). For victims, apologies may restore their sense of status and power, as they signal that the offender acknowledges his or her responsibility for the injustice caused. For offenders, apologizing may alleviate the psychological and moral discomfort they experience for having harmed someone, as it may restore their moral image and reduce feelings of guilt and shame (e.g., Benoit and Drew 1997; Witvliet et al. 2002; Lazare 2004; Shnabel and Nadler 2008; Witvliet et al. 2011; Carpenter et al. 2014).

The fact that causing injury also affects the offender is confirmed in the aforementioned qualitative study conducted in the Netherlands by one of the present authors among the parties at fault in medical liability cases (health care professionals) and road traffic liability cases (negligent/culpable drivers, henceforth referred to as 'negligent drivers') (Ruitenbeek-Bart 2023). This research also shows that they often demonstrate a willingness to somehow make amends, which is in line with the psychological insight into the benefits apologizing may have for offenders. The study furthermore shows that, in the legal aftermath of the injurious event, although the extent differs by liability category, the parties at fault are sidelined and their personal needs are overlooked.

As we will argue in the remainder of this contribution, these research findings present the Dutch legal practice—and, we believe, tort systems worldwide (see Section 3.5)—with challenging questions: what is the fitting place of the parties at fault in the claims resolution process, and to what extent and how should their personal interests be taken into account? These questions will be addressed in Sections 4 and 5. In the remainder of this section we first describe the aforementioned interview study and present its main results.

3.2. Interview Study on the Personal Experiences of Tortfeasors

While in recent years the personal experiences of victims of personal injury have been studied quite extensively, little was known about how tortfeasors deal with the injurious event and its legal aftermath or about their (experiences of) interactions vis-à-vis their victims. Ruitenbeek-Bart's research 'But what about the tortfeasor?'[9] provides insight into the tortfeasor's perspective through both qualitative research (interviewing tortfeasors and legal practitioners) and doctrinal (normative) research within the Dutch legal context. The main research questions were threefold:

i. What is the position of tortfeasors in the personal injury practice?
ii. How do they experience their position?
iii. How do these experiences influence the debate on improving the non-financial aspects of the personal injury process?

The first two questions were answered by doctrinal research and a literature study on the one hand, and a qualitative empirical study on the other hand. This interview study pertained to two of the major categories of personal injury cases, namely medical and road traffic liability cases. The third question was addressed by discussing the empirical findings

[9] Translated (main) title of Ruitenbeek-Bart (2023) (this research, including an English summary, is available via https://pure.eur.nl/en/publications/en-de-veroorzaker-dan-een-empirisch-juridisch-onderzoek-naar-de-p (accessed on 15 September 2025)).

in light of psychological insights on the one hand, and legal theory and (legal) philosophy on the other hand, which we will also touch upon later in this article (Section 4).

As for the interview study, in both liability categories two groups of respondents were interviewed: actual tortfeasors (medical professionals and people who caused a road traffic accident) and legal practitioners working for (medical or road traffic) liability insurers or for hospitals. The study consisted of 86 interviews with 93 respondents:[10] 25 health care professionals and 30 practitioners in medical malpractice cases, and 27 road users and 22 practitioners in traffic liability cases.[11]

To answer research question (i), the tortfeasors (doctors and road users) were asked to describe the medical or traffic incident and the frequency and nature of their interaction with the victim and the legal practitioner following this event. To answer research question (ii), they were asked to reflect on three themes:

- Legal aspects: how did they experience the legal aftermath (including disciplinary and criminal law, if applicable)?
- Relational aspects: how did they experience their interactions with the victim('s family)?
- Personal aspects: how did the event and its legal aftermath affect them personally?

To capture the position of tortfeasors from another relevant perspective, interviews with legal practitioners (in medical liability cases and road traffic liability cases) were also included in the study. These respondents were not only asked to describe, in general, their interaction with those held liable, but also how, in their experience, the personal injury event may affect the tortfeasor and whether (and how) they themselves pay attention to the tortfeasor personally during the claims handling process.

3.3. Traffic Liability: Experiences of Road Traffic Offenders

The aforementioned research outcome that the parties at fault are sidelined and their personal needs overlooked, is most prominent in road traffic liability cases. As one of the practitioners, a claims adjuster in traffic liability cases, pointed out:

> 'Well, the insurer basically takes over the case and the insured party gets sidelined.' (Ruitenbeek-Bart 2023, p. 524 (translated by authors)).

Indeed, the personal injury claim will be handled by the liability insurer and the traffic violator is usually not involved in the resolution process at all. In fact, the insurance contract typically holds a provision stating that the claims resolution is at the sole discretion of the insurer. What this comes down to in practice is that the responsible party will only be contacted when the insurer needs information about the circumstances under which the accident took place, in order to assess liability for it. The responsible party's involvement is usually limited to submitting the insurance forms, sometimes followed by brief contact with the insurer to provide some clarification on how the accident came about. So apparently, in practice, negligent drivers are sidelined and ill-informed, which is also substantiated by the fact that virtually none of the respondents knew the current status of the liability claim against them (Ruitenbeek-Bart 2023, scts. 9.2.3 and 10.5.2).

This "off-field position" of negligent drivers is not per se problematic in light of the financial resolution of personal injury cases as this, of course, is taken care of by the liability insurer. However, this position is unsettling in light of their non-financial aspects, particularly because the interview study also demonstrates that negligent drivers experience non-pecuniary needs of their own, some of which specifically relate to the victim. Firstly, responsible parties are concerned about the victim's wellbeing. In minor accidents,

[10] Regarding the category 'practitioners', in some interviews two respondents (colleagues) participated.
[11] For a more elaborate description of the research design and methodology see Ruitenbeek-Bart (2023, chap. 6 (in Dutch)).

addressing this need for information about the victim does not seem too difficult, as the parties involved may be able to talk to each other and exchange some personal information and experiences. In major accidents, however, when the victim (and perhaps the traffic violator as well) is taken to hospital, the violator is not kept informed of the victim's fate, in light of privacy rules. In addition to this informational need, respondents generally demonstrated a willingness to get in touch with the victim or his/her family, to show sympathy, to answer questions victims may have and/or to account for their contribution to the injurious event. In some cases, respondents did get in touch (mostly with help from a professional mediator) and these respondents very much appreciated this interaction with their victims. However, the study also demonstrates that such victim–offender contact is often not easily established and several respondents expressed their sorrow about not ever having spoken to the victim or his/her family. In addition, the interview study also reveals the substantial impact traffic accidents may have on negligent drivers personally (Ruitenbeek-Bart 2023, sct. 9.5). These onerous effects were often attributed to lack of victim–offender contact or to not knowing about the victim's fate, as the following quotes from traffic offenders illustrate:

> 'I mean, I could talk about it, but every now and then I felt tears sting my eyes, because I couldn't get in touch with that boy. And with his family, and that was eating me up inside.' (Ruitenbeek-Bart 2023, p. 490 (translated by authors)).

> 'Yes, I try to put it away and it's better than before, but I still feel the stress. That doesn't go away. I feel like I can only come to terms with this it when I have talked to those people; when I can also tell my story.' (Ruitenbeek-Bart 2023, p. 491 (translated by authors)).

Multiple respondents reported being burdened with feelings of guilt and shame. In the aftermath of the accident, many experienced psychological problems, such as stress and sleeplessness, and temporary occupational disability. Quoting one of the respondents:

> 'I would envision it every day. And then I saw him hit that truck and get under my wheels. And then I'd go crazy. . . I went to sleep, but I had nightmares about it. Nightmares.' (Ruitenbeek-Bart 2023, p. 478 (translated by authors)).

Some even reported having had suicidal thoughts, with the accident not necessarily being the primary cause, but surely a contributing factor to this troubled state of mind.

3.4. Medical Liability: Experiences of Health Care Professionals

Although the position of health care professionals confronted with medical malpractice claims differs in many ways from the position of negligent drivers, their experiences are similar in various aspects.

Firstly looking at the differences, it is noted that health care professionals are more involved in the claims resolution process than negligent drivers. Obviously, this difference can be explained by the different relationship with the victim, since for health care professionals this originates in the doctor–patient relationship. This relationship is regulated by law, which imposes a special duty of care that extends to the legal aftermath of medical errors. This duty of care entails the professional standard of open disclosure: the health care professional must be transparent about (presumed) patient safety incidents.[12] In light of this duty of open disclosure, the Dutch Code of Conduct in medical liability cases encourages health care professionals to apologize to the patient when the medical duty

[12] In Dutch law: art. 10 Wet kwaliteit, klachten en geschillen in de zorg; Laarman (2017, pp. 351–59); Ruitenbeek-Bart (2023, sct. 3.3.3).

of care was, in fact, breached.[13] Furthermore, in medical liability cases, and unlike traffic liability cases, the input of the offender (here, the health care professional) is a necessity: without it, the legal practitioner will not be able to assess whether the medical duty of care has indeed been violated. Citing one of the hospital lawyers:

> 'Our doctors are always notified when a claim is filed. And we ask them to respond to the claim, or any other issues that they think are important. Then we discuss this with them, check their story with the patient's status, and try to come to a critical assessment of the claim.' (Ruitenbeek-Bart 2023, p. 313 (translated by authors)).

Notwithstanding these differences in terms of personal involvement (or lack thereof) in the claims resolution process, the experiences of doctors and negligent drivers are similar in various ways. Firstly, there is ample evidence that, for health care professionals, the mere fact of being involved in an adverse medical event (regardless of whether this event is the result of an actual medical error) may cause psychological damage to the doctor(s) involved, such as depression, temporary or permanent occupational disability and even suicidal thoughts (Alhafaji et al. 2009; Verhoef et al. 2015; Friele et al. 2017; Laarman et al. 2019; Bradfield et al. 2023; Ruitenbeek-Bart 2023, chap. 7; Cooper et al. 2024). As pointed out before, doctors are even called 'second victims' of the adverse event (e.g., Wu 2000; Dekker 2013; van Gerven et al. 2016; Wu et al. 2020; Nydoo et al. 2020; Brölmann 2021; Ong et al. 2025)[14], with—of course—the patients and their families being the first victims. In light of the reported experiences of traffic offenders, this term also seems fitting for that category of wrongdoers, as they can experience similar psychological effects after being involved in injurious traffic accidents.

Secondly, both types of wrongdoers generally are empathetic towards the victim and demonstrate a willingness to somehow make amends. To doctors, this attitude comes quite naturally, as they are professionally geared towards care for the patient's wellbeing and this professional attitude is not easily set aside when an adverse event takes place. However, in the legal aftermath of such an event, doctors often feel hindered in communicating with their patient. The adversarial character of legal proceedings, such as personal injury claims, does not just affect the patient's wellbeing negatively, but the doctor's as well. The mere fact that their professional conduct is under scrutiny (did they fail to meet the professional standard?) and they are being called to account imposes a psychological burden on the health care professional(s). This seems to be exacerbated by the critical tone of voice that is often used by patients and/or their representatives to put forth the claim, as one of the doctors pointed out:

> 'Nobody sets out to harm another. Willfully and knowingly. And then things happen that you don't want to happen, or that shouldn't have happened, and yes, it's always very difficult when that happens. But if you are then portrayed as if it doesn't bother you at all, you know, that hurts.' (Ruitenbeek-Bart 2023, p. 336 (translated by authors)).

These adverse effects of the adversarial nature of legal proceedings were already known from research pertaining to disciplinary proceedings (e.g., Alhafaji et al. 2009; Verhoef et al. 2015; Laarman et al. 2019; Friele et al. 2017; Brölmann 2021), but Ruitenbeek-Bart's study demonstrates that being involved in a personal injury claim is also burdensome

[13] Recommendation 12 of the GOMA (De Letselschade Raad 2023, p. 15) recommends that health care professionals express sympathy in cases of adverse events, and—when necessary and appropriate—offer apologies.

[14] This is just a selection of publications on health care professionals as second victims, as literature on this topic is abundant. See, for instance, the website of a research group at KU Leuven, dedicated to this topic: https://secondvictim.be (accessed on 15 September 2025).

(Ruitenbeek-Bart 2023, scts. 7.4.3 and 7.4.4), and negatively affects the doctor–patient relationship. Citing one of the doctors participating in her interview study:

> 'Well of course, the moment this lawyer's letter is on your desk, you think: "Wow—and certainly given the tone of voice—they certainly exaggerate that!" You also start to blame the patient somewhat; it reflects badly on the patient.' (Ruitenbeek-Bart 2023, p. 312 (translated by authors)).

Despite the fact that in health care open disclosure is actively promoted at present, doctors still feel unsure about what they can and cannot say to a patient, for fear of negative legal consequences. A difference of opinion with the hospital's lawyer may also cause discomfort for doctors—for instance, when the doctor wants to accommodate the patient financially, but the lawyer legally sees no obligation to do so. Focusing on the doctor–patient relationship, the study shows that doctors feel vulnerable in relation to patients who file a complaint or seek financial redress. Being the professional, they are expected to respond adequately and empathetically, but this can be very difficult in a situation where their personal performance is questioned. So on the one hand, doctors are empathetic towards their patients and understanding of their anger and unwillingness (or incapability) to show some sympathy for the doctor, yet they may also feel that the impact they experience personally is disregarded by the patient or his/her legal representative. They may even be (or become) reluctant to empathetically reach out to their patient, especially to patients whose claim they consider unreasonable or who approach them in a very blameful manner (Ruitenbeek-Bart 2023, sct. 7.5.2). Several respondents reported that their patient refused to speak with them, depriving them of an opportunity to explain what happened and—in general—to tell their side of the story.

3.5. Personal Experiences of Wrongdoers: Opportunities and Challenges

Overall, the interview study shows that most respondents—in both categories of responsible parties—demonstrate a willingness (and sometimes even a desire) to somehow accommodate the victim's personal needs, for instance by answering questions or by apologizing. In short, they demonstrate a willingness to make amends. However, in several ways, responsible parties were not able to act upon this willingness.

In traffic liability cases, the main problem is that offenders are often completely sidelined and cannot find proper ways to reach out to their victim to make amends. In medical liability cases, the health care professionals are not sidelined (as much), but for them, it can be especially challenging to navigate the dynamics of the (adversarial) resolution process. In some cases, they may feel hindered from communicating openly with the patient for fear of legal consequences. In other cases, they may be confronted with unresponsive patients who refuse contact or are angry and/or blameful. In both categories of liability, albeit in very different ways, an initial willingness to make amends often is not adequately substantiated, making it difficult for wrongdoers to deal with the moral debt of having inflicted injury and the consequential feelings of guilt and shame.

As we will set forth in the next section, we believe that these personal experiences of wrongdoers lay bare a moral deficit of the current personal injury claims resolution process: the Dutch tort law system does not facilitate 'making amends' by the wrongdoer personally.

Furthermore, we suspect that it is not just the Dutch legal practice that is afflicted with this moral deficit, but other jurisdictions as well. Of course, additional empirical research in other jurisdictions is required to verify this assumption, but the existing body of knowledge gives reason to believe the situation in Dutch legal practice is not unique. Firstly, as for medical malpractice cases, it is noted that the onerous effects of adverse events and their legal aftermath, occur in many other countries as well, illustrating that the phenomenon of 'second victimhood' is certainly not limited to the Dutch context. Secondly, the fact that

Ruitenbeek-Bart's interview study shows that traffic offenders reported personal, relational and moral needs similar to those of doctors,[15] combined with the fact that these needs align quite well with psychological insights into the impact of wrongdoing and on apologies and reconciliation in general, give ground to the idea that second victim-effects can be expected among other categories of wrongdoers and within other jurisdictions. Lastly, the scarcity of legal literature that specifically looks at personal injury cases through the lens of the wrongdoer[16] illustrates that (except for medical malpractice cases) this is a blind spot in tort law systems worldwide.

Therefore, we argue that, in order to achieve justice as fully as possible, tort law systems should facilitate 'making amends'. Elaborating on the theoretical frameworks mentioned in Section 2, we will set forth the idea that this requires tort law systems also to be attentive to the emotional and moral needs of wrongdoers. We should look beyond the framework of traditional tort law, which is grounded in corrective justice, and advance toward a model informed by restorative justice: restorative tort law.

4. Theoretical Foundations for Addressing the Responsible Party's Interests as Well

4.1. Tort Law Systems Should Address the Interests of Responsible Parties

As mentioned in Section 2, victims of personal injury experience relational needs specifically pertaining to their offender. They wish for the offending party to acknowledge their norm violation, for instance by apologizing, and want them to take responsibility for the consequences and to commit to refraining from the wrongful behavior. In short, they expect the responsible party to make amends. This expectation reflects a basic norm dictated by both morality and justice: offenders ought to make reparations or redress for their wrongdoings. Quoting Cohen, it is 'indeed (. . .) hard to imagine a more basic ethical dictate or psychological prescription than voluntarily assuming responsibility when one has harmed another.' (Cohen 2005b, p. 904).

Legally, this duty to make amends primarily consists of a duty to provide victims with financial compensation, but as mentioned above, most apparently in the context of medical liability and, at least in the Netherlands but also in general, tort law increasingly aims to restore victims in non-financial ways as well. This development to more emotionally intelligent claims resolution is grounded in theories of justice, namely in procedural justice and restorative justice, and aligns well with the normative orientation of therapeutic jurisprudence to enhance the therapeutic value of law and legal practices. Given the relational needs of personal injury victims, these theoretical frameworks or approaches also provide compelling normative grounds to argue that tort law (practice) should actively encourage liable parties to fulfill their moral and legal duty and make amends for the harm they caused. After all, engaging the wrongdoer in the claims resolution process to that end can benefit the non-financial restoration of victims of personal injury and thus enhance the therapeutic value of (the legal practice of) tort law on their behalf.

In our opinion however, there are more fundamental reasons to better include the offender's personal perspective. Tort law (practice) should not just do so in order to better attend to the victim's interests; it should do so because it should be responsive to the

[15] For psychological research pertaining to the psychological impact of causing personal injury in traffic see Merecz et al. 2012; for anecdotal evidence see: https://www.newyorker.com/magazine/2017/09/18/the-sorrow-and-the-shame-of-the-accidental-killer (accessed on 15 September 2025).

[16] In legal doctrinal/philosophical literature, Cohen (2005a, 2005b) and Radzik (2003, 2007, 2014) drew attention to the importance of addressing the moral needs of offenders in tort law in general (that is, not specifically pertaining to medical malpractice cases). We are not familiar with other literature that explicitly takes the tortfeasor's personal perspective.

personal and moral interests of the offender as well, regardless of whether this also benefits the victim.

First of all, we must bear in mind that the injurious event may in itself have been a very traumatizing experience for the responsible party, regardless of their degree of blameworthiness, for which they might need (psychological) support to come to terms with that. Furthermore, an important factor in their personal recovery process may be their interaction with the victim. In this respect, it is worth mentioning that several respondents attributed the psychological burdens they experienced, that may be characterized as 'second victim'-effects, to the fact that they were unable to make amends. Moreover, for those who did get the chance to meet their victim(s), this interaction alleviated the psychological burden they experienced. These experiences strongly suggest that being mindful of the emotional and moral interests of responsible parties can be beneficial to their personal recovery from the injurious event. As mentioned in Section 3, one of their moral needs is the need to make amends. In fact, the interview study shows that responsible parties often do not just demonstrate a willingness to make amends, but may even experience a personal need or desire to do so. Tort law systems should utilize this aspiration for making amends, especially since this proverbial knife can cut both ways. Facilitating and stimulating responsible parties to somehow make amends in the aftermath of the injurious event helps them to pay their moral debt and, at the same time, meet the relational and moral needs of their victims. As we set forth in the following paragraphs, being mindful of the personal interests of responsible parties can be grounded in theories of justice as well as in morality.

4.2. Restorative Justice and Its Purpose of Addressing the Justice Needs of the Party at Fault as Well

In Section 2, we mentioned that scholars have mostly turned to two distinct yet related theories of justice, namely procedural justice and restorative justice, to normatively justify the shift of focus to making claims resolution processes more therapeutically intelligent on behalf of victims. The same theories provide fruitful insights and guidance for assessing the fitting place of liable parties in tort systems. In our view, this is particularly the case for the theory on restorative justice, as it overlaps with most of the other theories and thus seems to combine several important aspects of justice in one approach. With the theory of corrective justice, restorative justice shares an outcome-oriented concern for correcting matters of injustice. Since it also advocates for active involvement of all stakeholders in the process, it also aligns well with the theory of procedural justice. Restorative justice furthermore relates to therapeutic jurisprudence, as it strives for restoration, not just in terms of financial losses, but also in terms of personal or relational restoration. Therefore, from hereon we build on the insights restorative justice provides into how to properly engage responsible parties in the legal aftermath of injurious events.

In light of the topic at hand, we start by emphasizing the inclusive nature of restorative justice. This inclusiveness is highlighted by Braithwaite: '[r]estorative justice restores victims, restores perpetrators and restores communities. It is about the idea that because crime hurts, justice should heal.' (Braithwaite 2002, p. 11). In other words, it is part of the essence of restorative justice that all stakeholders are involved in the process of addressing the norm violation. That obviously includes the responsible party. As the instigator of the injustice for which restoration is needed, the responsible party is just as much a primary stakeholder as the victim is. As such, he or she needs to be involved personally, so that he/she can be held accountable for the consequences of his/her actions.

As Braithwaite's use of the term 'crime' indicates, his quote pertains to the domain of criminal law, where restorative justice is often presented as an alternative to the more traditional view on criminal law that is rooted in retributive justice (e.g., Zehr 1990, p. 10;

Roche 2007). Retributive justice centers mainly around punishment of the perpetrator, whereas restorative justice aims at restoring both victims and offenders (and communities). The fact that, even in criminal law, restorative justice is put forth to advocate to not just attend to victims' needs, but also to address the intangible interests of the perpetrator (such as their interest of rehabilitation) strengthens our conviction that the responsible party's personal interests should be incorporated in tort law systems as well. Personal injury cases mostly center around norm violations of a lesser degree of blameworthiness compared to criminal cases; generally, the injury will not have been inflicted intentionally. This is, however, only a difference in degree, not in nature: both crimes and torts are matters of injustice and require some form of restoration of its consequences. In both cases, the restoration process should at least include the primary stakeholders and, particularly, should not systematically disregard the one who inflicted the injury. For criminal law practice, this requires including the defendant in the restoration process; for tort law systems, this requires engaging the party at fault. In fact, we believe this is all the more important for ('mere') tortious wrongdoers, since the psychological and moral burden of unintentional infliction of injury may be even more severe than that of intentional infliction. Research indicates that, compared to intentional wrongdoers, unintentional wrongdoers generally experience more guilt and are more willing to apologize.[17] In our view, this gives all the more reason to include tortious offenders in the healing potential of a restorative approach to personal injury cases (Ruitenbeek-Bart 2023, p. 688).

Another feature of restorative justice, related to its inclusiveness, that is worth exploring here is that it essentially is reciprocal in nature. Restorative justice advocates that stakeholders should treat each other respectfully, and in doing so it calls upon the other stakeholders not to neglect the personal interests of the offender. Focusing on personal injury cases, this means that restorative justice not only requires that the responsible party accounts for his or her wrongful actions in the appropriate manner (e.g., he/she must make amends), but equally that all other stakeholders in the resolution process act appropriately when calling the responsible party to account. This view aligns well with the justice needs reported by responsible parties, namely that they (too) wish to tell their side of the story ('voice'; a factor of procedural justice), and that they want to (be able to) make amends (to restore; a factor of restorative justice).

This notion of reciprocity and treating each other respectfully in the resolution process is in line with an important conception from legal philosophy: the so-called 'second-order virtues'. Wrongful infliction of personal injury (violation of a first-order norm) imposes a moral and legal debt on tortfeasors towards their victims. Then the 'second-order virtues' come into play: virtues pertaining to 'how we respond to the moral shortcomings of ourselves and others.' (Watson 2013, p. 283). A highly appreciated response to one's own shortcomings is to apologize to those who were (negatively) affected by them. The current emphasis on apologies and how to stimulate the offering thereof in personal injury cases aligns well with this morally virtuous response. In fact, even the legal duty to compensate reflects a (moral) second-order virtue, namely to (financially) restore the negative consequences of one's wrongdoing. More generally, the idea that tort law systems should facilitate liable parties to give substance to the second-order virtue of personally making amends will not meet much resistance (although achieving this is a continuous endeavor).

For the personal injury practice, the idea that the claims resolution process (and its practitioners) should also be responsive to the liable party's personal needs is a novelty. However, it is—in our view—no less important. For '[i]t is part of the very essence of our blaming activities that we treat wrongdoers as responsible moral agents in their own right.'

[17] This is, for instance, illustrated by Leunissen et al. (2013): the feeling of guilt—and, as a result, the willingness to offer an apology—is stronger in cases of unintentional infliction of harm than in cases of intentional infliction.

(McGeer 2013, p. 177). In other words, wrongdoers should be treated right. This requires that tort law systems provide them adequate opportunity to account for their actions and to make amends. This opportunity should be provided to them, not just because this will contribute to the emotional recovery of victims, but also because wrongdoers themselves may benefit from this emotionally, psychologically and/or morally. Wrongdoers run emotional and moral risks when they cannot act upon this willingness or desire to make amends, for 'the guilt of not making amends, even if not consciously recognized, can be haunting.' (Cohen 2005a, p. 254). This is, in fact, illustrated by the personal experiences of responsible parties (outlined in Section 3), many of whom had a hard time dealing with psychological and moral burdens of wrongful infliction of injury.

When a tort law system systematically lacks sufficient opportunity for the parties at fault to personally make amends, we must conclude that the system is afflicted with a deficit, both in terms of morality and of justice. If, on the one hand, tort law imposes a duty on responsible parties to make amends, yet on the other hand does not give them adequate opportunity to do so, then the legal system does not only fail victims but also responsible parties, as it deprives them both of a chance of emotional and moral recovery from the injurious event.

Meanwhile, in light of the experiences of both health care professionals and negligent drivers presented above, it is highly questionable whether, in the current legal system, wrongdoers are given adequate opportunity to make amends. Also, it is quite clear why this is the case: the current tort systems are not designed to engage responsible parties in the process and thereby enable them to make amends. The system is traditionally geared towards providing financial compensation to victims, which is the insurer's task. For that goal, the personal involvement of the responsible party is generally not necessary, or can and will be limited to providing the insurer with the necessary factual information regarding the injurious event. In light of financial compensation (and of distributive justice), the role of liability insurers is undoubtedly important. Especially in severe cases, responsible parties would never be able to personally carry the financial burden of liability for personal injury. However, the non-financial justice needs of both victims and responsible parties shed light on an important downside of the current system: it eliminates the need for active taking of responsibility by the responsible party personally. This is nicely put into words by Voyiakis:

> 'Just like a good safety measure removes the need for the exercise of individual skill in avoiding accidents, a good system of liability may remove the need for people to take responsibility for such accidents when they do happen.' (Voyiakis 2021, p. 285).

Current personal injury practices are, in fact, an illustration of a 'stolen conflict'. This phrase, introduced by the Norwegian sociologist and criminologist Christie, reflects the phenomenon whereby the settlement of conflicts is taken away from those originally involved in the conflict by legal institutions and professionals, such as the judiciary or legal practitioners (Christie 1977; Radzik 2007; Becx 2020). This is the case in the resolution of personal injury claims, as one of the primary stakeholders—the responsible party—is structurally sidelined. As mentioned before, this "off-field position" of the responsible party is not per se problematic in light of financial restoration of personal injury victims, but it does hinder achieving emotional and/or relational recovery for victims and responsible parties. The experiences of victims and offenders demonstrate the negative implications this 'stolen conflict' phenomenon can have for both of them, emotionally, relationally and/or morally.

Carrying the metaphor further, we believe the solution to this deficit in tort law systems is to give the 'stolen conflict' back to the primary stakeholders. That includes properly

engaging the liable party. In this regard, it is encouraging that the personal experiences of responsible parties lay bare a willingness to somehow make amends with their victims. This willingness indicates there are opportunities for them to contribute to the emotional recovery of victims of personal injury. However, their experiences also show that these opportunities are currently under-utilized. Therefore, to optimize the societal value of tort law and meet the justice needs of all stakeholders, tort law systems must strive to also include the perspective of the wrongdoer in the claims resolution process, in order to (at least) enable and (perhaps even) encourage them to make amends. In the next section we explore ways to do so.

5. Exploring Possible Rights and Obligations Constituting a Restorative Law of Torts

5.1. Tort Law Is Ultimately About Rights and Obligations

In this section, building on the aforementioned insights into the moral value of making amends (also) for the responsible party, we offer some exploratory thoughts on how tort law systems and their professional stakeholders could engage responsible parties in the claims resolution process and address their justice needs as well. A central feature of a restorative law of torts is the personal contact between the victim and the responsible party. It must be acknowledged, however, that such contact does not lend itself to legal compulsion. The personal freedom and autonomy of those involved must, naturally, take precedence. Viewed in this light, the primary task is to ensure that the legal system no longer obstructs—and instead actively facilitates—the possibility for those involved in an incident to also be involved in its resolution and to come into contact with one another. Given the deplorable state of affairs in this regard, legal compulsion is by no means indispensable: activities such as informing, involving, encouraging and accommodating the parties will already bring about substantial improvements.

On that basis, we could have limited the following exploration to an inventory of activities that might be undertaken to stimulate such encounters, without further reflection on whether any legal obligations might arise in this regard. In this contribution, however, we intend to go one step further and offer a preliminary exploration of the kinds of legal obligations that might be conceivable in this context. The ways in which the various national jurisdictions of civil law and common law countries conceptualize this may differ to some extent, but it seems safe to say that tort law forms part of the law of obligations. As a result, we believe it would be inevitable that operationalizing the proposed broadening of tort law's mission would ultimately raise the question of what legal obligations could be assumed to rest upon the various stakeholders. Our aim is not to provide a blueprint—which would require practical experience that has yet to develop—but rather to stimulate further reflection and discussion. We believe that the development of the law in the direction set out here can best take place gradually.

At this point, a number of important distinctions must be made. First, between the various persons involved: between victims, liable persons and professionals, such as legal representatives, liability insurers, hospital lawyers and perhaps even employers of professional drivers and others. Second, between types of activity, such as providing information, providing assistance and engaging in actual personal contact. Third, between degrees of normative force: legally enforceable obligations, best-efforts obligations and purely moral obligations to which no legal sanction is attached. Table 1 does not purport to be exhaustive but may serve to illustrate these distinctions.

Table 1. Possible activities and normative force by actor in a restorative law of torts.

	Victim[18]	**Liable Person**[19]	**Victim's Representative**	**Liability Insurer**
Providing information to victim	-	Obligation	Obligation	Obligation
Providing information to liable person	Best-efforts	-	Obligation	Obligation
Involving victim in resolution	-	Best-efforts	Obligation	Obligation to offer
Involving liable person in resolution	Best-efforts	-	Obligation to offer	Obligation
Providing assistance to victim in establishing personal contact	-	Best-efforts	Obligation	Obligation
Providing assistance to liable person in establishing personal contact	None	-	Obligation	Obligation
Engaging in personal contact	Best-efforts	Best-efforts	Obligation to facilitate	Obligation to facilitate
Offering an apology to victim	-	Best-efforts (Zwart-Hink et al. 2014)	-	Obligation

Much of what follows may vary significantly between jurisdictions—not only in terms of which legal obligations might be conceivable, but especially with regard to how legal foundations for such obligations can be identified within the doctrinal framework of each legal system. Since we are undertaking an exploration of possible future law, the specific trajectory by which the law of a given jurisdiction might develop in the suggested direction is, likewise, likely to vary considerably.

5.2. Victims and Responsible Persons

To begin with what must remain a fundamental distinction, the victim and the liable party are not in equivalent positions. The relationship between them is, by its nature, asymmetrical. The responsible party may have fallen victim to misfortune—possibly in combination with the all-too-human tendency to be insufficiently attentive, or worse—but he or she is still a second victim; the primary victim being the one who has suffered a breach of a legal norm that, in principle, entitles him or her to full compensation. As illustrated by Table 1 above, there are several activities for which the liable party may bear greater normative responsibility than the victim—such as providing information to the other party, involving the other party in the resolution process, and offering support in establishing personal contact. The victim can never be subject to more than a best-efforts obligation (Ruitenbeek-Bart 2023, sct. 16.7.3), whereas, in regard of some activities, full legal obligations are conceivable for the liable party. What stand out most, however, are the significantly stronger obligations that may be imposed on the professional actors involved (Ruitenbeek-Bart 2023, scts. 16.7.4 and 16.7.5; Ruitenbeek-Bart 2024). We will elaborate on this in Section 5.3.

[18] It is assumed here that the victim is a natural person. Things may be different when it is a corporate or institutional entity that has sustained damage.

[19] It is assumed here that the liable person is a natural person. Things may be different when it is a corporate or institutional entity that has caused damage.

As for the liable party, when it comes to the overarching obligation (not explicitly included in Table 1) to pursue a form of settlement that takes into account not only one's own moral and psychological needs, but also those of the other party, a legal basis can readily be found in the general duty to restore the victim to their original position as far as possible. This objective requires not only compensation for financial loss but also, insofar as feasible, the accommodation of the victim's non-financial needs. In medical liability cases, these types of obligations are already reflected in the GOMA, the Code of Conduct on Medical Incidents (De Letselschade Raad 2023). This code was drafted by professional actors operating in the field of medical liability cases and provides guidelines for them regarding the settlement of such cases. Notably, the GOMA does not just call upon legal professionals to adhere to its guidelines, but also upon the health care professionals (that is, the liable party) involved. Being professionals themselves, for doctors, this obligation is easier to construct and uphold in practice than for non-professional offenders such as negligent drivers. In our view, this does not alter the fact that a similar general duty to restore rests upon non-professional offenders, and that the fulfilment thereof should be facilitated and encouraged within the personal injury practice (see Section 5.3).

We believe that, even for the victim, such an overarching obligation to also take into account the moral and psychological needs of the other party should amount to more than a purely moral one. Although it is not very common to consider duties of this kind resting upon victims in the aftermath of an injurious event, it is also relatively straightforward to identify a legal basis in Dutch for imposing the types of obligations suggested above on the victim. Pursuant to the principle of reasonableness and fairness (Articles 6:2 and 6:248 of the Dutch Civil Code), or under Article 6:101 (contributory negligence), additional duties may apply to all parties to an obligation—and existing obligations may be set aside—including the victim. The principle of reasonableness and fairness is indeed reciprocal in nature: it calls upon the debtor of an obligation (here, the offender) as well as the creditor (here, the victim) to act reasonably and fairly towards the other party (Ruitenbeek-Bart 2023, scts. 16.4 and 16.7.3). Thus, this principle also affects the injured party during the phase of damage settlement who, for example, is required to cooperate in mitigating the damage, may not unreasonably delay compensation, must avoid incurring unnecessary costs, and may, in some cases, be obliged to cooperate in reaching a reasonable arrangement or settlement. When it comes to the intangible interests of the responsible party, this reciprocal obligation for victims to act reasonably and fairly can, however, only be assumed in the weaker form of a best-efforts obligation. A victim can never be held to any specific result. The only sanction we consider conceivable is the loss of certain rights that are closely symmetrical to the failure to comply. For instance, if a victim fails to restrain his or her emotions to the extent necessary for workable communication with the responsible party, he may forfeit his entitlement to personal contact. Or, quoting Radzik:

> 'If the victim continually refuses or makes it clear that he will never accept amends, then the wrongdoer cannot fulfil her duty. She is now morally excused from making amends.' (Radzik 2003, p. 332).

In this respect, one might even draw an analogy with the legal concept of creditor's default or delay (Ruitenbeek-Bart 2023, p. 768; Radzik 2003). Fortunately, in the vast majority of cases, it may be expected that no sanctions will be required to secure the victim's cooperation.

One primary pathway through which obligations on the part of the offenders to accommodate the victim's justice needs—and vice versa—might crystallize is through the introduction of new provisions in codes of conduct. The GOMA, the Dutch Code of Conduct on Medical Incidents mentioned earlier, already holds a provision stating that all parties are expected to take on a 'benevolent, proactive and self-reflective at-

titude' (De Letselschade Raad 2023, recommendation 1). Acknowledging the fact that medical malpractice cases can be emotionally strenuous for both patients and doctors, the GOMA emphasizes that 'it is important that all parties continue to strive to deal with each other respectfully and as benevolently and expeditiously as possible.' (De Letselschade Raad 2023, p. 19). The Dutch Code of Conduct for the Handling of Personal Injury Claims (the GBL), pertaining to other personal injury cases, does not hold similar provisions yet, but amendments in that direction have been advocated for (Ruitenbeek-Bart 2024). Dutch case law tends to follow the standards set out in widely supported codes of conduct such as these. In common law jurisdictions, comparable legal foundations for duties of the victim may perhaps be found in doctrines such as mitigation of damages, contributory negligence after the event, equitable principles, abuse of process, or the duty of good faith in settlements. We refrain from speculating on the pathways through which obligations of the kind discussed here might crystallize in jurisdictions other than our own. That said, it is, of course, perfectly conceivable that legislation will, at some point, prove necessary.

5.3. Professional Parties

When it comes to constituting a restorative law of torts, we believe the most significant new obligations are to rest with the professional actors involved. This is justified not just because, unlike victims and offenders, their personal freedom and autonomy are not at stake, but also because they bear primary responsibility for the performance—and possible failure—of tort law as a functioning system of justice. Therefore, it is considerably less problematic to assume legally enforceable obligations resting on the professional actors involved, to accommodate the justice needs of both the victim and the liable party. In fact, particularly in light of the 'stolen conflict' phenomenon (see Section 4.2), we believe it is part of the societal responsibility of legal professionals on both sides to enhance the therapeutic value of the claims resolution process. Let us elaborate on what this responsibility may entail.

Where the victim is represented by a lawyer or other legal advisor, this practitioner naturally has, first and foremost, a duty of care towards his or her own client, which includes accommodating the client's non-financial justice needs (Grant et al. 2020). If tort law is to concern itself not only with the justice needs of the victim but also with those of responsible parties, it is only a small step to expect legal professionals to contribute to that broader objective—and to accept that they may also owe a duty of care to the liable party. For practitioners representing victims, this may entail discussing with them the option of (mediated) contact with the other party. In this respect, we recall that the non-financial interests of their client often substantially coincide with those of the liable party, and, even when their needs do not coincide, the victim's representative should treat the wrongdoer respectfully. Pertaining to the latter, the representative's duty of care includes adopting a respectful tone of voice, being mindful of the fact that the infliction of injury generally was not done intentionally, and the injurious event may have considerable impact on the responsible party.

As for liability insurers, in the Netherlands it is already accepted that they should pay attention not just to the financial needs of victims, but also to their intangible needs. This duty of care is grounded in a social responsibility attributed to liability insurers regarding victim protection. Although their primary task is to provide their contractual counterparty—the insured party—financial security in case of liability, in doing so, they also ensure victims have the necessary financial security after injurious events. Mindful of the adverse effects of neglecting the non-financial needs of victims, this responsibility has increasingly come to include these needs. Breaching this duty of care can have legal

consequences, as is illustrated by the Dutch case law on wrongful claims handling by liability insurers and secondary victimization through the claims resolution process.[20] Regarding the topic at hand, we believe that, similar to what may be expected from the victim's representative, the liability insurer's duty of care towards the victim also entails actively promoting contact with the other party.

This 'other party' is, of course, the contractual counterparty of the insurer. Consequently, a duty of care with respect to the non-financial interests can easily be grounded in their contractual relationship, which is also governed by the principle of reasonableness and fairness (Article 6:248 of the Dutch Civil Code). Given this contractual relationship, it is actually quite remarkable that liability insurers have not paid more attention to the personal interests of their own insured. However, currently, it is not very common to consider their contractual duty towards the liable party from this angle and its precise scope and content remain under development. Firing a shot across the bow, we believe liability insurers should make an effort to reach out to their insured and better engage them in the resolution process. The liability insurer seems the most logical party to do so, and to inform them about possibilities for (mediated) contact with the victim. Another aspect of their duty of care is to attend to the personal needs of wrongdoers, for whom the injurious event may very well be very traumatic, leading to psychological and/or social problems. In this respect, the general personal injury practice can adopt best practices from the domain of medical malpractice, where peer support is more and more common after adverse medical events (e.g., Vanhaecht et al. 2021; Aubin et al. 2022; Fall et al. 2024). Likewise, liable parties in other types of injurious events should not be left out in the cold but should be guided to appropriate support systems to deal with the emotional aftermath thereof.

5.4. Promoting Victim–Offender Contact by Enthusing Professional: A Dutch Example

Exploring potential grounds for moral and legal obligations, as we did in the previous section, is one thing; actually getting professionals engaged to actively facilitate and encourage contact between victims of personal injury and their wrongdoers is another. For many practitioners, this requires a different mindset, for they will have to broaden their attention to tending to the personal needs of the victims and even of the wrongdoers. We realize this is quite an endeavor, but we gladly take this opportunity to showcase a project we are both involved in as a source of inspiration.

The project is called 'Project Herstelbemiddeling' ('restorative mediation') and was initiated by De Letselschade Raad, a Dutch branch organization that undertakes numerous activities to enhance the resolution of personal injury claims, such as developing the GOMA and the GBL. This project aims to promote the theme 'victim–offender contact' within the personal injury practice, in order to advance its facilitation by legal professionals on both sides.[21] This is done via publications in (legal) magazines, via presentations at conferences for personal injury professionals and, most importantly, via in company information sessions for claims handlers and for victims' representatives, where participants will discuss their (potential) role in this matter. These sessions are provided by members of the project group, including (besides (one of) the authors of this article) a policy officer from De Letselschade Raad, a policy officer from Verbond van Verzekeraars (the Dutch trade association of insurers), and—depending on the hosting company—either a claims handler or a victims' representative from companies that participate in the project and have already incorporated the theme 'victim–offender contact' in their day-to-day work. During these sessions, the importance of contact for either party is highlighted by means of storytelling:

[20] E.g., Court of Appeal Arnhem-Leeuwarden 11 December 2018, ECLI:NL:GHARL:2018:10759; Court of Appeal Arnhem-Leeuwarden 26 May 2020, ECLI:NL:GHARL:2020:4043.

[21] See: https://deletselschaderaad.nl/activiteit/project-herstelbemiddeling/ (accessed on 15 September 2025).

stories of actual victims and offenders who reached out to each other and shared their stories, whose stories were collected through empirical research. Then either the claims handler or representative shares the best practices they have incorporated in their own company. Another valuable contribution to these sessions comes from a mediator who explains the process of restorative mediation,[22] thereby lowering the threshold that the professionals on either side may experience to guide their clients towards this mediated form of contact. The project group also encourages companies to appoint ambassadors who will continue to motivate their colleagues to pay attention to victim–offender contact in their day-to-day work.

The activities of the project are ongoing, and there is clearly a degree of enthusiasm. Although there is not yet a clear picture of the actual results, several issues can already be identified that warrant further consideration when encouraging professionals to facilitate victim–offender contact. A first concern, frequently raised by participants in the aforementioned information sessions, and one that has both legal and practical aspects, is that such initiatives must comply with privacy rules. Another issue is that promoting and facilitating victim–offender contact would require claims handlers to deviate from their current practice, in which the offender (their insured) is entirely absent, and instead involve the offender (their insured) in the process. Claims handlers should, by default, also provide their insured with information about victim–offender contact, inquire into their views on the matter, and ideally even attend to their personal wellbeing. As mentioned earlier, this calls for a genuine change in mindset. Finally, adequately integrating communication with the insured into the claims handling process will further raise practical challenges that have not yet been explored. Addressing these challenges will require additional time and a thorough evaluation.

6. Conclusions

With its traditional focus on financial compensation, the Dutch personal injury practice struggles with the adverse effects the claims resolution process has on victims of personal injury. In this respect, the Dutch legal practice is not unique; tort law systems around the world are afflicted with these adverse effects. It has therefore been argued that tort law systems should at least strive to minimize these anti-therapeutic effects and, preferably, strive to enhance their therapeutic value by better addressing the non-financial needs of victims.

However, to optimize the value of tort law in a broader sense, that is, to optimize its societal value, attention must also be paid to the wrongdoer. Currently, that is not the case. In fact, in current Dutch legal practice and presumably in other jurisdictions as well, wrongdoers are sidelined as the liability insurer takes the lead and their personal interests are neglected.

The wrongdoer being sidelined is a lacuna, if only because several victims' needs are relational in nature: they call upon the one who inflicted the injury to—in short—make amends. Thus, it is in the interest of victims that responsible parties are personally involved in the aftermath of an injurious event. The wrongdoer being sidelined is, however, not just a lacuna in light of the victim's interests, but also in itself. The wrongdoer is a primary stakeholder par excellence and is therefore entitled to be engaged in the aftermath of the injurious event and not to have his or her personal interests disregarded in the process. After all, morality requires that wrongdoers be treated as moral agents; (restorative) justice requires them to be engaged in the resolution process properly. Therefore, a tort law system that systematically lacks sufficient opportunity for the liable party to personally make

[22] The organization that is involved in this project is Perspectief Herstelbemiddeling (https://perspectiefherstelbemiddeling.nl/) (accessed on 15 September 2025).

amends is deficient both in terms of morality and of justice. Addressing this lacuna requires tort law systems and their practitioners to promote and facilitate (mediated) personal contact between the parties involved in injurious events.

We cannot speak for all jurisdictions around the world, but for the Netherlands, this step is a logical continuation of developments that have been underway for decades. Nevertheless, it crosses an important traditional boundary and adds an entirely new dimension to tort law. However different the tort law systems of the world may be in all their theoretical and practical details, the societal need to address the justice needs of all those involved is likely universal. We therefore believe this represents a shared future for all of us: towards restorative tort law.

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