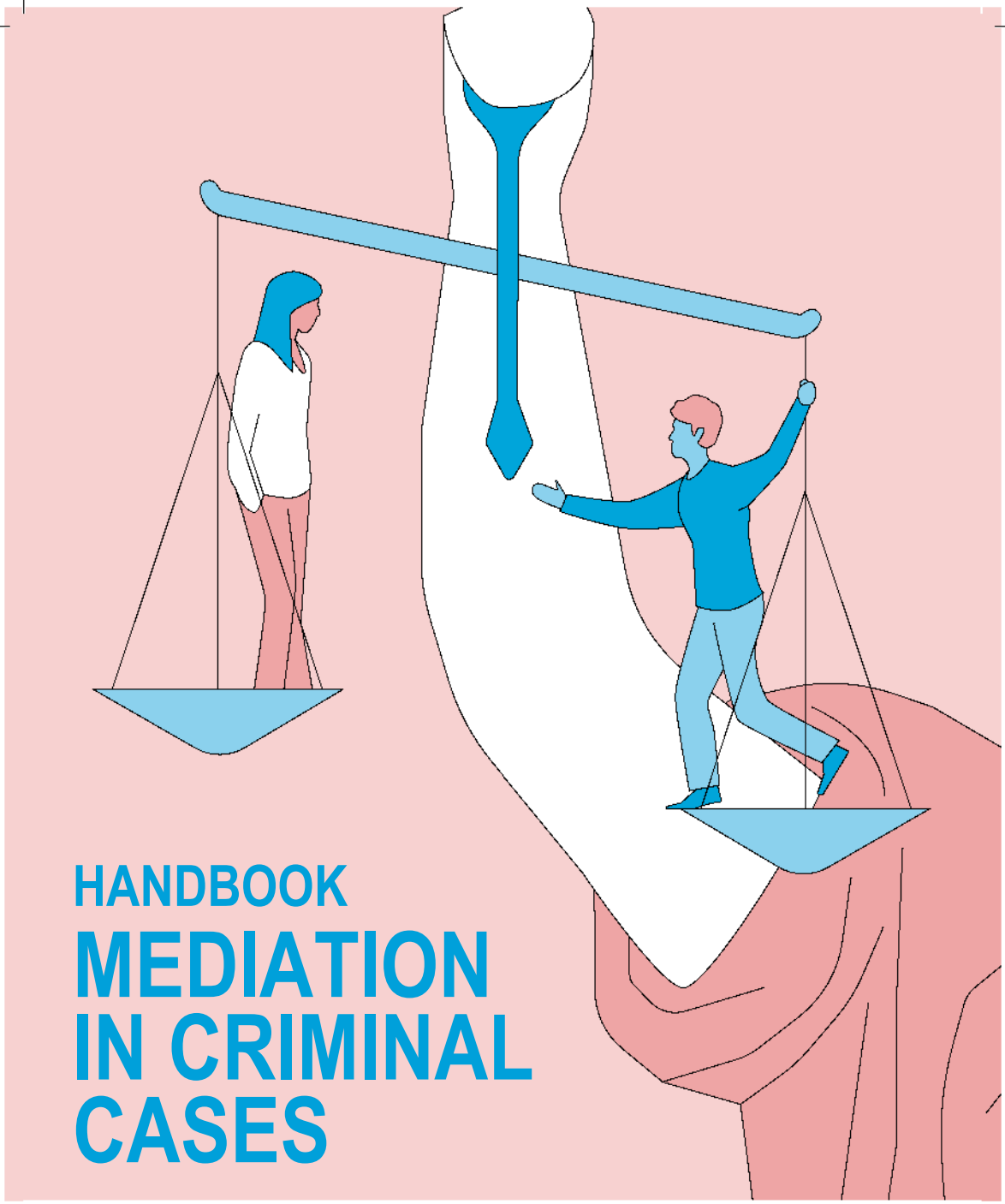

HANDBOOK
MEDIATION IN CRIMINAL CASES

HOGESCHOOL UTRECHT

HIER KOMT ALLES SAMEN

HANDBOOK

MEDIATION IN CRIMINAL CASES

Manual for the
criminal mediation practice

2nd edition 2024

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Jowan de Haan - www.jowandehaan.nl

Format
Claudia Druppers | concept & design - www.claudiadruppers.nl

Final editing
Sjoerd van der Linden - www.sjoerdvanderlinden.nl

ISBN
978-90-8928-150-0

Year of publication
2024

PREFACE

At a time of great social change in the social and legal spheres, with an emphasis on self-reliance and solution-orientation, professionals are challenged to contribute to effective and just solutions. When settling criminal cases, solutions are increasingly sought that not only do justice to the harm done, but that are also future-oriented. How can we ensure that victims feel heard and recognised and that recovery can take place? How can we prevent the recurrence of delinquent behaviour? Restorative justice, and also developments within restorative justice, such as mediation in criminal cases, are consistent with this.

Mediation between suspected offenders and victims is being used in a growing number of criminal cases. The professional supervising the mediation, the mediator in criminal cases, must have expertise in many fields.

During the studies 'Strafrechtmediation: geborgd in kwaliteit' [Mediation in Criminal Law: safeguarded by quality] (2017-2019) and 'Mediation in strafzaken: een bijzondere verantwoordelijkheid voor verdachte en mediator' [Mediation in criminal cases; a special responsibility for suspect and mediator] (2022-2024), conducted by the research groups 'Access to Justice' and 'Working in the Judicial Framework' of Utrecht University of Applied Sciences, research was conducted into the quality requirements to be met by mediators in criminal cases and the topic of a defendant taking responsibility during mediation in criminal cases.

Both studies were facilitated by grants from RAAK-Publiek from the National Taskforce for Applied Research SIA and realised in cooperation with the National Bureau Mediation in Criminal Cases, mediation officials from various courts, the Council for the Judiciary, the Public Prosecution Service, the Mediators Federation Netherlands (MfN), the Association of Mediators in Criminal Cases (VMSZ), Restorative Justice Netherlands, European Forum Restorative Justice, the Universities of Utrecht, Maastricht, Leuven, and Vrije Universiteit Amsterdam, judges, public prosecutors, criminal lawyers, victims, and suspects.

Thanks to the special cooperation between knowledge and field partners, these studies have led, among other things, to the present (practical) handbook for the (novice) mediator in criminal cases. This book aims to contribute to the enhancement and broadening of the knowledge of mediators in criminal cases.

Quirine Eijkman, Jacqueline Bosker, and Anneke Menger

INTRODUCTION

This handbook is written for both the practising mediator in criminal cases and the mediator aspiring to become one.

We hope that this handbook contributes to the mastery and/or deepening of the knowledge and skills required in the practice of the mediator in criminal cases. Because not all (novice) mediators in criminal cases are also lawyers, an attempt was made to word the legal information in this book in such a way that it can also be understood by non-lawyers. The MfN (Mediator Federation Netherlands) requires its mediators to have a high level of intellectual ability; which is reflected in this book as it is written for readers with a high level of intellectual ability.

Mediation in criminal cases is an evolving profession. This handbook is therefore also an evolving book. Should you have any recommendations for the further development of this handbook, we cordially invite you to share them with us.

The SIA RAAK research 'Criminal justice mediation: safeguarded by quality conducted by the research groups Access to Law and Working in Justice of Utrecht University of Applied Sciences (2017-2019) has shown that the mediator in criminal cases must not only master the proper professional attitude and skills but also that basic knowledge of the criminal proceedings, harm, compensation, and being able to write a good final settlement are very important. This is a complex matter in a complex process. The SIA RAAK research 'Mediation in criminal cases: a special responsibility for defendant and mediator' conducted by the research group Access to Law of Utrecht University of Applied Sciences (2022-2024) shows that defendants taking responsibility is an important part in the mediation process for achieving recovery and that mediators in criminal cases must have a proper toolbox at their disposal to be able to assist a defendant in taking responsibility and a victim in receiving it.

We hope this handbook will make the mediator in criminal cases aware that they are operating at the interface between civil and criminal law and that their actions may have (legal) consequences for the parties. We hope the reader enjoys reading this handbook and hope it will be of support to both novice and more experienced mediators in criminal cases.

Tanja van Mazijk LL.M. and Marion Uitslag LL.M.

ACKNOWLEDGMENT

Finally, we would like to thank Lydia Heuveling van Beek LL.M. (judge and deputy counsel), Erik Koster LL.M. (judge and mediator in criminal cases), Ron Gravenpart LL.M. (public prosecutor) Juliette Blanco LL.M. (public prosecutor) Anne Martine Westerhout LL.M. (mediation officer), Yolanda Overduin (committee secretary Schadefonds Geweldsmisdrijven), Dr Majda Lamkaddem (project leader and researcher Access to Law HU research group) Dr Marie Joshe Geenen (researcher Lectureship Access to Law HU), Babette van der Wielen LL.M. (researcher Lectureship Access to Law), Prof Dr Sven Zebel (endowed professor of Mediation VU), Antonietta Pinkster LL.M. (mediator in criminal cases), Judith Emaus LL.M. (director-officer Mediators Federation Netherlands), and Soumiree Verheijen LL.M. (OM policy adviser) for their advice in writing this book.

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1 A BRIEF HISTORY OF RESTORATIVE JUSTICE AND MEDIATION IN CRIMINAL CASES[1]

Prof Dr Jacques Claessen LL.M.
Endowed professor of restorative justice and senior university lecturer criminal law

1.1 INTRODUCTION

US restorative justice thinker Howard Zehr describes restorative justice as follows: 'Restorative justice is a way of achieving justice after a crime has been committed. This involves, to the extent possible, all parties with an interest in that particular crime in order to jointly identify and address harms, needs and obligations. The ultimate goal is to rectify faults as best as possible, in other

1 This chapter is based on Claessen 2010 and Claessen 2013. Several passages were used in a slightly edited form.

words: the aim is to repair the harm done as best as possible'.[2] This description concerns both the process and the purpose of restorative justice. 'Parties' should primarily include victims and offenders, their own social network as well as the community. 'Harm' refers mainly to (im-) material, relational, and moral damage. Restorative justice is not only about the harm and needs of the victim, but also about the harm and needs of the community and the offender, respectively[3]. Needs of the victim, related to the crime committed and the harm caused by it, may include telling their story, expressing emotions, asking questions to the offender, looking the latter in the eye, taking back control of their own life, making agreements with the offender about future contact and getting satisfaction from them in the form of compensation, a donation to charity and/or doing unpaid work. Needs of the community may include restoring calm and peace and preventing the same event from happening in the future. The offender's needs may include: telling their story, answering the victim's questions, showing who they really are, taking active responsibility, expressing regret and apologising to the victim, making amends (symbolically) and receiving help with issues that contributed to the crime (e.g. addiction, a mental disorder and/or debt). Furthermore, it is not only about the obligation - better: the responsibility - of the offender to repair the damage they have caused, but also about the responsibility of the community to take good care of both its victims and its offenders as well as to address community-level causes that led to the crime. Moreover, at least in my view, it is about the victim's responsibility to exercise a degree of reasonableness and fairness towards the offender. In fact, restorative justice requires every participant - however difficult this may sometimes be - to be open to the other. As already follows from the above, restorative justice not only has a reactive aspect (consisting of repairing the harm caused by the crime committed), but also a preventive aspect (consisting of removing the causes that led to the crime and consequently to the harm, so that new crimes and new harm are prevented).

Restorative justice has several manifestations, including: (a) group conferences, in which the community is represented in addition to offenders and victims, (b) contact between victims and offenders in the form of restorative mediation

2 H. Zehr, 'The little book of restorative justice', in: The big book of restorative justice, New York: Good Books 2015, p. 1-108, pp. 50 and 31

3 For the sake of convenience, in this chapter I use the term 'offenders', even though legally they are (often) suspects.

or mediation in criminal cases[4], and (c) criminal sanctions that are restorative or at least can be designed in a restorative way; for instance the compensation measure and community service and electronic (home) detention ('the ankle monitor'), respectively. These are sanctions that require the offender to work on one or more layers of recovery: self-recovery, recovery with their own social network, recovery with the victim and/or recovery with the community and society. Important conditions in the deployment of the restorative justice provisions mentioned under a and b are that the offender confesses or at least takes responsibility for the committed crime and that parties participate voluntarily in the sense that there is informed consent. Informed consent implies that each party is informed of the content and consequences of the various restorative justice provisions in such a way that they can make an informed choice regarding their participation in a particular restorative justice provision. While ideally (all) parties should be actively involved in restorative justice, maximalist restorative justice thinkers say there is also room for recovery when this is not the case. If - for whatever reason no mediated contact between the parties is possible, then, according to these thinkers, the Public Prosecutor or the judge has the task of sanctioning in the most restorative way possible. This is where the criminal sanctions mentioned in point c come into play. While repair is then neither voluntary nor complete, forced partial repair is, in the view of these thinkers at least better than the imposition of a classical punishment, such as a fine or a prison sentence, which consists primarily of intentional infliction of suffering aimed at retribution and deterrence - and in the case of imprisonment, also making someone harmless by means of incarceration[5].

Restorative justice has been increasingly prominent in Europe for some time. This is happening partly under the influence of regulations and recommendations from the European Union and the Council of Europe, respectively[6]. Meanwhile, restorative justice has also gained a foothold in the Netherlands. Since 2007, our country has allowed victims and offenders to talk to each other about the crime committed and its consequences - independently of the criminal case. This dialogue focuses mainly on emotional and relational recovery. Initially referred to as victim-offender dialogues, they now refer to restorative mediation before, alongside or after the criminal proceedings. Restorative mediation can be initiated at any time, albeit that it mainly plays a role in the police and enforcement phase, i.e. outside the criminal proceedings. Recovery mediations

4 The following section explains the distinction made in the Netherlands between restorative mediation and mediation in criminal cases.

5 J. Claessen, 'Pleidooi voor en uitwerking van een maximalistisch herstelrecht', Tijdschrift voor Herstelrecht 2020, 4, pp. 18- 30.

6 Framework Decision 2001/220/JHA; Directive 2012/29/EU; Recommendations 1999(19), 2018(8) and 2023(2).

are carried out in the Netherlands by mediators employed by 'Perspectief Herstelbemiddeling', a 'subsidiary foundation' of Victim Support Netherlands. After the introduction of Section 51h on restorative justice in the Dutch Code of Criminal Procedure in 2011, a successful mediation pilot in Amsterdam in 2013 and a number of equally successful mediation pilots across the country in 2015-2016, mediation in criminal cases was introduced nationwide in 2017. Different from restorative mediation, this restorative justice provision primarily plays a role in the prosecution and sentencing phase[7]. This is because it is the Public Prosecutor and the judge who can refer a criminal case to the court's mediation office, which then examines whether the case is in principle eligible for mediation. If that proves to be the case, two mediators will be appointed to continue the mediation process. This follow-up process consists of intake interviews with the accused and the victim separately and then, if so desired, a joint interview. In 2018, the then Minister of Justice and Security decided to set aside structural funding for this restorative justice provision; for restorative mediation, this had already happened. Like restorative mediation, mediation in criminal cases has now become an important restorative justice provision in the Netherlands. In conclusion, group conferences are as yet hardly used in the Netherlands in and around criminal law; however, sometimes there is XL mediation, in which support figures from both parties participate in addition to victims and offenders. With regard to maximalist restorative justice, the scientific community is advocating restorative community sentencing and restorative (electronic) detention. Recovery-oriented detention is already in practice in the form of training and courses, such as SOS, 'Puinruimen', and 'Dapper'. The introduction of a dressed-up form of electronic (home) detention is currently being discussed in the political arena.[8]

Why is restorative justice on the rise? In part because restorative justice provisions, such as mediation in criminal cases, can also be in the interest of victims, they appear to be more effective in terms of sustainable conflict resolution and recidivism reduction and they are less expensive than regular criminal proceedings. With the successful use of a restorative justice provision, regular criminal proceedings can be avoided or at least shortened. For example, after a successful mediation, the public prosecutor may decide to dismiss the case (conditionally) or settle it with a penalty order instead of taking the accused to court by means of a summons. Consequently, a successful mediation may result in a case being settled out of court. Using mediation at the level of the office of the public prosecutor can reduce the pressure the

7 Beleidskader herstelrechtvoorzieningen gedurende het strafproces 2020.

8 J. Claessen, E. Post & G.J. Slump, Herijking en verrijking van het strafrechtelijke sanctiestelsel met het oog op het terugdringen van de korte vrijheidsstraf – Burgerinitiatiefwetsvoorstel, The Hague: Boom juridisch, 2023.

the judge is under, allowing the latter to focus on more complex cases (e.g. cases with silent or denying suspects), albeit that mediation can also add value at the trial stage. Based on the Innovation in Criminal Procedure Act, it is currently possible in certain districts in pilot form for the judge to opt for a conditional case termination after successful mediation. They then decide - with consent from the Public Prosecutor and the defence - to terminate the case on the condition that the offender fulfils the agreements made during the mediation[9]. A substantive hearing of the case will then no longer take place, which also saves time. Mediation in criminal cases is also possible in the event of serious crimes. It is obvious that the judge will then, in principle, still impose a sentence, on the understanding that pursuant to Section 51H(2) of the Dutch Criminal Code they must take successful mediation into account in the context of sanctioning. Based on the aforementioned Innovation in Criminal Procedure Act, the judge should also justify how they should take this into account. Mediation in criminal cases effectively enables bottom-up, consensual 'sanction tailoring', while leaving the Public Prosecutor and the judge in charge, as it is and remains up to them to determine whether sufficient justice has been done, more specifically; whether or not the public dimension of the crime necessitates the imposition of further punishment in addition to the successful mediation.

The above shows that restorative justice in and around criminal justice has not been practised in the Netherlands for very long. However, those who think that restorative justice is a recent invention are mistaken. The remainder of this chapter, which provides a bird's-eye historical overview of how criminal law has developed in the Western world from antiquity to the present, will show that the foundations of restorative justice are in fact as old as humans themselves and that what is today considered alternative dispute resolution was until relatively recently the mainstream, or regular, response to crime. For a long time, a public criminal proceedings response was the exception to the rule. But how was crime responded to then? Why and when did a public criminal justice system emerge that took exclusive charge of handling crime? And why has that public criminal justice system for some time now been supplemented and enriched by restorative justice provisions, such as mediation in criminal cases? The remainder of this chapter seeks to provide answers to these questions.

9 J. Claessen & G.J. Slump, 'De invoering van de voorwaardelijke eindezaakverklaring als mogelijke einduitspraak in het kader van mediation in strafzaken', Tijdschrift voor Herstelrecht 2022 (1), pp. 94- 99.

1.2 CRIMINAL LAW IN PRE-MODERN TIMES (UNTIL C. 1500): PREDOMINANTLY PRIVATE CRIMINAL LAW

When consulting standard handbooks on criminal law, we usually see the following explanation for the existence of public criminal law. Punishing people who have culpably committed a crime is considered justified for retributive reasons (punishment is deserved because a crime was committed) and/or preventive reasons (punishment is necessary to prevent new crime). But since people who have been directly or indirectly victimised by crime do not, as a rule, know how to measure up in the process, punishing offenders should be left to the state. Self-interest has no place in a civilised society. While the state, too, may react unfairly to crime, it is less likely to react in this way than human victims or the community/society are. Public criminal law provides a protection for offenders as well as victims and the community/society that cannot be found outside it. That is the common view. However, history also provides evidence contrary to this view. Consider the state terror that took place partly through public criminal law in Europe during the French Revolution and in the 20th century under fascist and communist regimes. Moreover, public criminal law as we know it today, as a system in the hands of the government for the exclusive handling of all crimes, is only about two centuries old, while there is nothing to suggest that a continuous 'war of all against all' took place in the period before 1800. More to the point, during this time people often proved to be quite capable themselves - with the assistance and support of blood relatives and of spiritual and secular authorities - of resolving their conflicts arising from crime in a decent, sometimes even completely non-violent manner. The term 'self-interest' did not yet have the negative connotation that it has today[10]. So what did this original criminal law look like?

As a preliminary remark, in the very long period preceding the period 1200-1500, often called the pre-modern era or premodernity, our criminal law looked completely different from today. By pre-modern times, one can think of meanwhile lost cultures such as those of the Semitic peoples of the era of the Old Testament, the ancient Greeks and Romans and the Franks, Germanics and Anglo-Saxons. For cultures not affected by modern times, the same is true to this day. Consider the surviving cultures of the Māori in New Zealand, the Aborigines in Australia, the Papuans in New Guinea, the Inuit in Canada and Greenland, and the Native Americans on the American continent. Incidentally, I myself prefer speaking

10 F. Denkers, Oog om oog, tand om tand en andere normen voor eigenrichting, The Hague: Koninklijke Vermande, the Hague 1985.

of "traditional" instead of "premodern" or "primitive", as the latter terms actually imply a disqualification that I want to avoid. In my view, principally, not everything produced by modern times is better than what originates from the period preceding it, including in terms of criminal law. While on the surface there will certainly be (have been) differences in the way crime was and is responded to in the cultures mentioned, there is an important similarity, namely that what we nowadays refer to as criminal law and what we believe belongs exclusively to public law was and is viewed with private law eyes in the cultures mentioned[11].

Biblical Semitic and ancient Greco-Roman culture did not distinguish between private law and criminal law. The vast majority of crimes that today are labelled as criminal offences and are therefore an exclusive matter between government and perpetrator, were conceived as a matter between the parties involved during pre-modern times, with which the government had no business interfering in principle[12]. These crimes, ranging from theft and assault to rape and manslaughter, were regarded as interhuman conflicts that disrupted the peace that usually occurred among people. It was up to the perpetrators, the peace disruptors, themselves to restore the original peace between them and the victims/surviving relatives and the community. When a crime had been committed, this did not create a right of the government to punish the offender, but a commitment to pay damages (wergild) and (ritual) restitution by the offender towards the victims/surviving relatives. Proportionate retaliation by the latter was allowed, but only when the perpetrator and their family were unwilling to negotiate with the victims/surviving relatives on the compensation to be paid, when negotiations were started but came to nothing or when the perpetrator refused to honour the agreements made[13]. Compensation, restitution, and reconciliation by parties involved in the conflict were preferred to the use of physical force in the pre-modern era; they formed the core element within traditional criminal law[14].

But what about the law of retribution (the lex talionis) which can inter alia be found in the Codex Hammurabi (c. 1800 BCE), the Law of Moses (c. 1200 BCE), and the Roman Law of the Twelve Tables (c. 450 BC)? Does this law not call for proportional revenge when a

11 R.C. van Caenegem, Geschiedkundige inleiding tot het recht, deel II: publiekrecht, Deurne: Kluwer 1994, p. 29; J. Braithwaite, 'Restorative Justice', in: M. Tonry (ed.), The Handbook of Crime and Punishment, New York: Oxford University Press 1998, pp. 323-344, p. 323 and 334
12 H. Bianchi, Ethiek van het straffen, Nijkerk: G.F. Callenbach 1965, p. 29.
13 Bianchi 1965, pp. 30- 31.
14 R.C. van Caenegem, 'Straf of verzoening', Millennium 2001 (1), pp. 18-29, p. 19.

crime was committed? No, because the retaliatory rule of 'an eye for an eye and a tooth for a tooth' should not be interpreted literally but symbolically. It is 'a stylised legal formula' that primarily implies that the perpetrator of a crime is obliged to pay damages: 'an eye for the compensation of an eye and a tooth for the compensation of a tooth'[15]. As mentioned above, retaliation in the sense of proportional revenge was permissible only when the offender and their family were unwilling to negotiate with the victims/next of kin, when negotiations came to nothing or when agreements made were not honoured. The law of retribution is therefore not only about proportionality but also about subsidiarity: only when compensation and reparation had proved not to be an option was the application of physical force permitted.

Revenge was probably less frequent in premodernity than is often thought, now that it is all but inconceivable for revenge to provoke reprisal and reprisal from one party to provoke reprisal from another and so on, creating a spiral of revenge and reprisal (called feud or 'Kleinkrieg') that can seriously disrupt order. The threat of violence therefore seems to have acted mainly as a stick to get the conflicting parties at the negotiation table[16]. Moreover, to escape vengeance, the right of asylum existed: there were places to which offenders could flee and that offered them protection from overly vengeful victims/surviving relatives. To this end, the Israelites had free cities, the ancient Greeks and Romans had their temples, and in the Middle Ages there were the churches and monasteries - in addition to free cities like Culemborg and Vianen. Criminals could stay here provided they were willing to negotiate a solution to the conflict created by their crime[17]. Instead of an overriding ruling by an authority above the parties, during pre-modernity, the consensus reached through discussion and negotiation on compensation and repair between the parties involved in the conflict was central. While secular and spiritual authority figures were often involved in these discussions and negotiations, they mainly played a mediating, supervisory, and facilitating role.

15 H. Bianchi, Gerechtigheid als vrijplaats. De terugkeer van het slachtoffer in ons recht, Baarn: Ten Have 1985, pp. 32- 33.

16 H. Bianchi, 'Alternatieven voor of in het strafrecht', in: V.H. Davelaar-van Tongeren, N. Keijzer & U. van de Pol (red.), Strafrecht in Perspectief. Een bundel bijdragen op strafrechtelijk gebied ter gelegenheid van het 100-jarig bestaan der Vrije Universiteit te Amsterdam, Arnhem: Gouda Quint 1980, pp. 65-80, p. 78; T. Dean, Misdaad in de Middeleeuwen, Amsterdam: Pearson Education Benelux 2004.

17 H. Bianchi, 'Strafrecht en herstelrecht', Festus 2010 (2), pp. 19- 20.

So there was no public criminal law at all in pre-modern times? Yes, but this usually cruel criminal law with its public crucifixions, burnings, live burials, strangulations, hangings, beheadings, and floggings applied in principle only to crimes directed against the monarch/feudal lord. It therefore applied only to political crimes and thus constituted an exception to the private criminal rule[18]. It should be recognised, however, that in those very protracted pre-modern times, there were occasional periods when public criminal law also extended to crimes other than political ones. For instance the era of the great Roman emperors of the 2nd century AD, including Hadrianus and Marcus Aurelius, and of powerful medieval monarchs such as Clovis and Charlemagne[19]. These are periods of strong state authority and of rulers with rather imperialist ambitions. In addition, towards the end of pre-modernity, during the late Middle Ages (c. 1200-1500), governments increasingly started to take the reins in their own hands in terms of responding to crime. So they were obliging conflicting parties to sit down together at the negotiation table after a crime had been committed; compulsory mediation we would say today. Non-compliance with this obligation, which in practice amounted to taking the law into one's own hands, would be severely punished. And when talks and negotiations between the conflicting parties came to nothing, it was then up to the government to impose a punishment (kiss of peace) on the offender. By now, application of violence by victims/surviving relatives had been prohibited; the government had a monopoly on violence. Nevertheless, in the context of sentences imposed by the government, much attention was still paid to the needs of the victim at this time. For example, payment of compensation to the victim took precedence over payment of a fine to the government[20]. Nevertheless, during this phase, horizontal, private, restorative crime law gradually began to display vertical, public, and punitive traits. After all, when 'mediation' imposed by the government came to nothing, it was now the government that was allowed to punish the offender for their crime.

18 Bianchi 1965, p. 30; Bianchi 1985, p. 19.

19 E.J.M.F.C. Broers, Geschiedenis van het straf- en schadevergoedingsrecht, Apeldoorn/Antwerpen: Maklu 2012; R. Lesaffer, Inleiding tot de Europese rechtsgeschiedenis, Leuven: University Press Leuven 2008.

20 H. van Hall, 'Van private naar publieke bestraffing en de rol van opgelegde bedevaarten in een laatmiddeleeuws Limburgs rechtsboek', in: B. Van Hofstraeten et al. (ed.), Ten definitieven recht doende... LouIs BERkvens AMICORUM, Maastricht: Limburgs Geschied- en Oudheidkundig Genootschap 2018, pp. 105- 117.

1.3 CRIMINAL LAW IN THE EARLY MODERN PERIOD (C. 1500-1800): THE RISE OF PUBLIC CRIMINAL LAW

While some form of public criminal law has thus always existed even in pre-modern times, as an exception to the rule, it can be argued that public criminal law is well and truly a 13th-century invention of the Christian Church; it is a product of the Inquisition[21]. By means of this ecclesiastical court, the pope sought to track down, prosecute, try and, if necessary, sentence to death heretics, that is, people who held religious views that deviated from the doctrine promulgated by the church, if they continued to deny apostasy or refused to convert to the true faith. The secular authorities watched with interest as the church used this new criminal law to increase its power. While the church, with its inquisitorial procedure, exclusively combated the crime of heresy, secular rulers slowly but surely came to the idea that crime in general should be regarded not so much as an interpersonal conflict in which victims/surviving relatives can claim compensation from the perpetrator but primarily as a matter concerning the monarch/state and for which the latter can impose punishment on the perpetrator in retaliation and/or prevention.

When, around 1500, the European monarchs structurally managed to obtain sufficient resources to take law and order into their own hands, this heralded the decline of horizontal, private, restorative crime law and also the beginning of the systematic detection, prosecution, trial, and punishment by state authorities, the beginning of vertical, public, punitive crime law - in short, public criminal law[22]. Moreover, the increasing grip of governments on criminal law was accompanied by the introduction of cruel punitive practices consisting of public corporal and capital punishment, while the rack became an important tool of evidence[23]. European monarchs turned criminal law into public criminal law that served as an instrument of rule. Moreover, once the power of the monarch had thoroughly been established, this often led to some softening of the cruel punitive practices. However, this was far from always done for moral or humane reasons as much as for opportunistic reasons: in fact, overly cruel punishments proved ineffective in practice. They could lead to the people showing solidarity with the perpetrators and rebelling against the monarch[24]. It was not just coincidence that in 1789 the French Revolution

21 Bianchi 1965, p. 38-32; Bianchi 1985, pp. 21-22

22 C. Glaudemans, Om die wrake wille. Eigenrichting, veten en verzoening in laatmiddeleeuws Holland en Zeeland, Hilversum: Verloren 2004, p. 311.

23 R. Martinage, Geschiedenis van het strafrecht in Europa, Nijmegen: Ars Aequi Libri, 2002, pp. 23-25; M. Foucault, Discipline, toezicht en straf. De geboorte van de gevangenis, Groningen: Historische uitgeverij 2007, pp. 68-82; D. Garland, 'Wat is er met de doodstraf gebeurd?', Justitiële Verkenningen 2011 (1), pp. 11- 30.

24 Martinage 2002, pp. 41-42; Foucault 2007, pp. 10- 99.

started with the storming of the Bastille. This Paris prison had become the symbol of the cruel exercise of power by the Ancien Régime monarch.

Clever monarchs, who did not want to end up under the guillotine like the French King Louis XVI, had meanwhile turned their ears to the criminal-law reform proposed by several Enlightenment thinkers of the 17th and 18th centuries. Enlightenment thinkers such as the Frenchman Charles de Montesquieu and the Italian Cesare De Beccaria realised that public criminal law needed to be provided with more protective safeguards for citizens (think, for example, of clearly written and pre-declared criminal laws, the use of criminal law as a last resort and punishment in moderation if a criminal-law response proved unavoidable) and that criminal law should at the same time be made more efficient and effective in terms of repression and prevention of crime (by, for example, more emphasis on the certainty and speed of punishment than on the severity of punishment)[25]. It is noteworthy, by the way, that no Enlightenment thinker questioned public criminal law itself. Even during the Romantic movement in the 19th century, indeed a period characterised by glorification of and flight into the past, there were no (legal) scholars advocating a return to the horizontal, private, restorative criminal law of yesteryear. Apparently, taking the law into one's own hands had meanwhile been put into disrepute and was henceforth exclusively associated with disproportionate revenge. One did realise that punishment is controversial as it is essentially an intentional infliction of suffering. And deliberately hurting a person is a morally sensitive matter because of the basic moral norm 'Thou shalt not harm another', which can be derived from the universal Golden Rule: 'Treat another as you wish to be treated yourself'[26]. Therefore, from the era of Enlightenment onwards, to legitimise public criminal law, theories were devised that have retained their validity to this day, namely retributive theories (punishment is deserved because a crime has been committed) and preventive theories (punishment is necessary to prevent new crime).

Although public criminal law had been on the rise since around 1500, it continued facing competition from all kinds of settlement practices between citizens until around 1800, from the horizontal, private, restorative criminal law[27]. This is not surprising, by the way. After all, something that has existed since time immemorial simply cannot be eradicated overnight,

25 R. Foqué & A.C. 't Hart, Instrumentaliteit en rechtsbescherming. Grondslagen van een strafrechtelijke waardendiscussie, Arnhem/Antwerpen: Gouda Quint/Kluwer 1990.

26 J. Claessen, Herstelrecht: de kunst van een geëmancipeerde misdaadaanpak, The Hague: Boom legal, 2022.

27 Martinage 2002, p. 11-12 and 19.

especially not when that something usually functions as properly as it should. The system of compensation and restitution therefore managed to maintain itself, albeit to an increasingly lesser extent, until the French Revolution[28]. For example, a colleague once showed me a notarial deed from 1651, which laid down that after a manslaughter in an Antwerp tavern, the conflicting parties had agreed that the keeper of the tavern who had committed the manslaughter would pay 250 gold Carolus guilders to the surviving relatives of the victim. In addition, he would pay 12 gold Carolus guilders: six for the city's poor board and six for a meal in which both the perpetrator and their family and the victim's relatives would participate, to seal and celebrate the reconciliation. If the keeper complied with these obligations, the surviving relatives would no longer be able to sue them for manslaughter. However, everything shifted with the arrival of Napoleon Bonaparte about a century and a half later; he deemed the crime law in his empire to be outdated and disordered and he ordered the creation of a criminal code to be adopted, in modified or unmodified form, in most European states, including the Netherlands. Here, under the leadership of Napoleon's brother, King Louis Napoleon, the first national Criminal Code was introduced (1809-1811) and later, after annexation to the French empire, the French Code Pénal (1811-1813)[29]. Since then, crimes could only be dealt with through public criminal law. A crime was no longer regarded as an interpersonal conflict seeking restoration of peace, for which the offender should provide compensation to the victim/surviving relatives, but as a conflict between the government and the suspect focusing on proving the culpable violation of the rule of law, for which the perpetrator should be punished in retaliation and/or prevention. According to this public criminal law, at least in the Netherlands, the flesh-and-blood victim had to settle for the role of reporter and witness of the crime. Henceforth, for redress in the form of compensation, they had to go to the civil courts. Although Napoleon created peace courts with justices of the peace aimed at reconciliation and amicable settlements between parties, this almost exclusively concerned civil matters.

28 Bianchi 1980, p. 70.
29 Bianchi 2010, p. 20- 21.

1.4 CRIMINAL JUSTICE IN THE PRESENT TIME: HORIZONTALISATION OF PUBLIC CRIMINAL LAW

Since the hegemony of modern public criminal law in the Western world around 1800, a transition has taken place in this regard during the 19th century from corporal and capital punishment to the modern punishment par excellence: imprisonment. While corporal and capital punishments had been reserved for punishing political crimes up to and including the Middle Ages, during the Ancien Régime they had become the standard response to crime, executed by the executioner on the scaffold. After these punishments had increasingly been carried out 'behind closed doors' in the first half of the 19th century (to preserve peace among the population), they were replaced by (life-long) prison sentences, especially in the second half of the same century. In the Netherlands, corporal punishment was abolished in 1854, while the last death sentence during peace time was carried out in 1860 at the market in Maastricht. After a 10-year moratorium (imposition, but no enforcement), the death penalty was officially abolished in 1870, that is, in peacetime. In the meantime, the first prison had opened its doors in Amsterdam in 1850; other prisons followed. For a century, the Netherlands operated a regime of solitary confinement for prisoners. Instead of seeing humans as a social animal and 'hub of relationships', they were regarded as homo clausus, a self-contained entity that had to find their own inner light, to which the cellular prison model served[30]. The 1886 Criminal Code had only two main penalties: the fine and the deprivation of liberty: imprisonment for crimes and (principal) imprisonment for offences. The death penalty was not reintroduced. It was not until 2001 that community service was added to the criminal sanction arsenal as an independent main penalty. In standard handbooks on criminal law, the transition from corporal and capital punishment to (life-long) imprisonment is usually qualified as a moral step forward, just as the transition discussed above from a horizontal, private, restorative crime law to a vertical, public, punitive crime law. However, it is not only questionable whether this is an accurate representation (for instance, in traditional cultures, incarceration is considered highly inhumane, as it removes people from their communities), it is also questionable whether this transition was actually driven by humanitarian considerations. For example, the aforementioned philosopher Beccaria advocated the introduction of life-long imprisonment because he considered capital punishment insufficiently dissuasive, while the Dutch humanist Dirck Volckertsz. Coornhert was at the cradle of the house of correction, the forerunner of the modern prison, because he wanted a punishment worse than death[31]. In his book 'Surveiller et Punir', the French philosopher Michel Foucault puts forward that the birth of the prison primarily stemmed from the desire

30 H. Franke, 'Two centuries of imprisonment: socio-historical explanations and conclusions', in: M. Boone & M. Moerings (eds.), Dutch prisons, The Hague: Boom Legal Publishers, 2007, pp. 5-50.
31 P. Spierenburg, The Prison Experience. Disciplinary Institutions and Their Inmates in Early Modern Europe, New Brunswick/London, 1991, pp. 12-68.

of those in power to find a more efficient, smarter way of punishment[32]. According to Foucault, the panopticon devised by British philosopher Jeremy Bentham, which, among other things, has served as a model for the domed prisons in the Netherlands, shows the extent to which prisons revolve around the disciplining of delinquents. It was only after World War II that solitary confinement was exchanged for community regimes better suited to humans as social animals and 'hubs of relationships'. However, high recidivism rates show that prisons can be qualified as a failure from a special preventive point of view. To date, imprisonment is nonetheless a frequently imposed punishment, especially when adult perpetrators are involved. In the Netherlands, about 85% of cases involve a short prison sentence, i.e. a sentence of no more than six months. From a restorative justice perspective, incarceration is a controversial sanction as it implies exclusion and consequently makes recovery considerably more difficult. Especially in the case of short prison sentences, maximalist restorative justice thinkers therefore argue for alternatives such as restorative community service and restorative electronic detention.

Since the 19th century, modern public criminal law has undergone many changes in Europe, including in the Netherlands. For instance, the rise of the life and social sciences in the 19th century and the growth of economic transactions in the 20th century led to criminal law becoming more complex (think of the emergence of hospital orders ('TBS') for offenders not accountable by reason of mental disorders) and comprehensive (think of the emergence of economic criminal law). Moreover, the emergence of the risk society and the associated security state - as a successor to the welfare state - in the mid-1980s transformed criminal law from a last resort to a first resort in the hands of the government to address societal problems. Unlike the welfare state, in which the distribution of welfare is central, the risk society is about 'managing' risks that have greatly increased due to technological progress. This increase in risks has meant that wellbeing has given way to fear, and an almost insatiable desire for security has emerged in society, which is primarily the state's responsibility to provide - using mainly criminal law to that end. In the risk society, crime is regarded as a risk, the realisation of which should be prevented at the earliest possible stage. This has led criminal law to move forward (think of making preparatory acts and detection in the phase preceding a classic suspicion punishable by law). When crime does occur, punishment is increasingly dominated

32 M. Foucault, Discipline, toezicht en straf. De geboorte van de gevangenis, Groningen: Historische uitgeverij, 2007.

deterrence and social security through incarceration; retribution has become instrumentalised, as it were, in the sense that more retribution (think more and higher prison sentences) implies more deterrence and social security through incarceration. Since the terrorist attacks at the beginning of the 21st century, these developments have only continued. Despite all these changes, our criminal law has remained essentially the same: it is still public, vertical, and punitive in nature. Be it that for some time now, there have been important developments touching on the foundations of that criminal law, namely the return of the victim as well as the rise of restorative justice.

From about the 1980s onwards, the flesh-and-blood victim increasingly claimed their own position within public criminal law. The victim, as it were, rebelled against their expulsion from the criminal law when it became public, vertical, and punitive in nature. Although they are still not fully-fledged litigants equal to the accused, they have now acquired, partly under the influence of European regulations, a number of rights in the criminal proceedings, as a result of which, in a relatively short period of time, they hasve become important litigants whose interests should increasingly be taken into account when taking decisions in criminal proceedings. In the Netherlands in 2011, these victim rights were largely laid down in Title III.A (The victim) of the First Book (General Provisions) of the Dutch Code of Criminal Procedure (DCCP). This Code of Criminal Procedure provides a right to proper treatment and information, to inspection and joinder of procedural documents, to legal counsel, to an interpreter, the (now unlimited) right to speak, the right to join as an injured party and, finally, in Section 51h DCCP the 'right' to restorative justice provisions. In the new Dutch Code of Criminal Procedure, these rights will be included in Chapter 5 (The Victim) of Book 1 (Criminal Procedure in General).

These restorative justice provisions have now brought me to that other development: the rise of restorative justice, which is partly linked to the return of the victim. Although there were legal scholars arguing for what is now called restorative justice as early as the 1960s, namely Herman Bianchi and Louk Hulsman, restorative justice remained primarily an academic matter at that time. Many restorative law pioneers at the time drew inspiration from indigenous peoples like the Māori, Aborigines, Papuans, Inuit, and Indians. In fact, restorative justice is based on the foundations of traditional crime law known to these peoples, which we Europeans also knew before modernity, or modern times. Restorative justice first flourished in the Anglo-Saxon world under the name restorative justice. Since the turn of the millennium, the introduction of restorative justice provisions in and around criminal law has also gained momentum in Europe, including in the Netherlands.

By offering restorative justice facilities, such as mediation in criminal cases, something of the horizontal, private, restorative criminal justice of yesteryear is indeed embedded in public criminal justice. A certain horizontalisation of public criminal law is gradually taking place. The current situation with mediation in criminal cases is, in a way, reminiscent of the criminal law of the period 1200-1500, in which governments required conflicting parties to sit around the negotiation table and they imposed punishment only when parties could not reach a mutual agreement themselves. I did not add 'in a way' accidentally, as mediation in criminal cases currently only takes place on a voluntary basis, while a successful mediation does not necessarily mean that the government does not impose punishment, but rather that it factors the positive mediation result into its disposal.

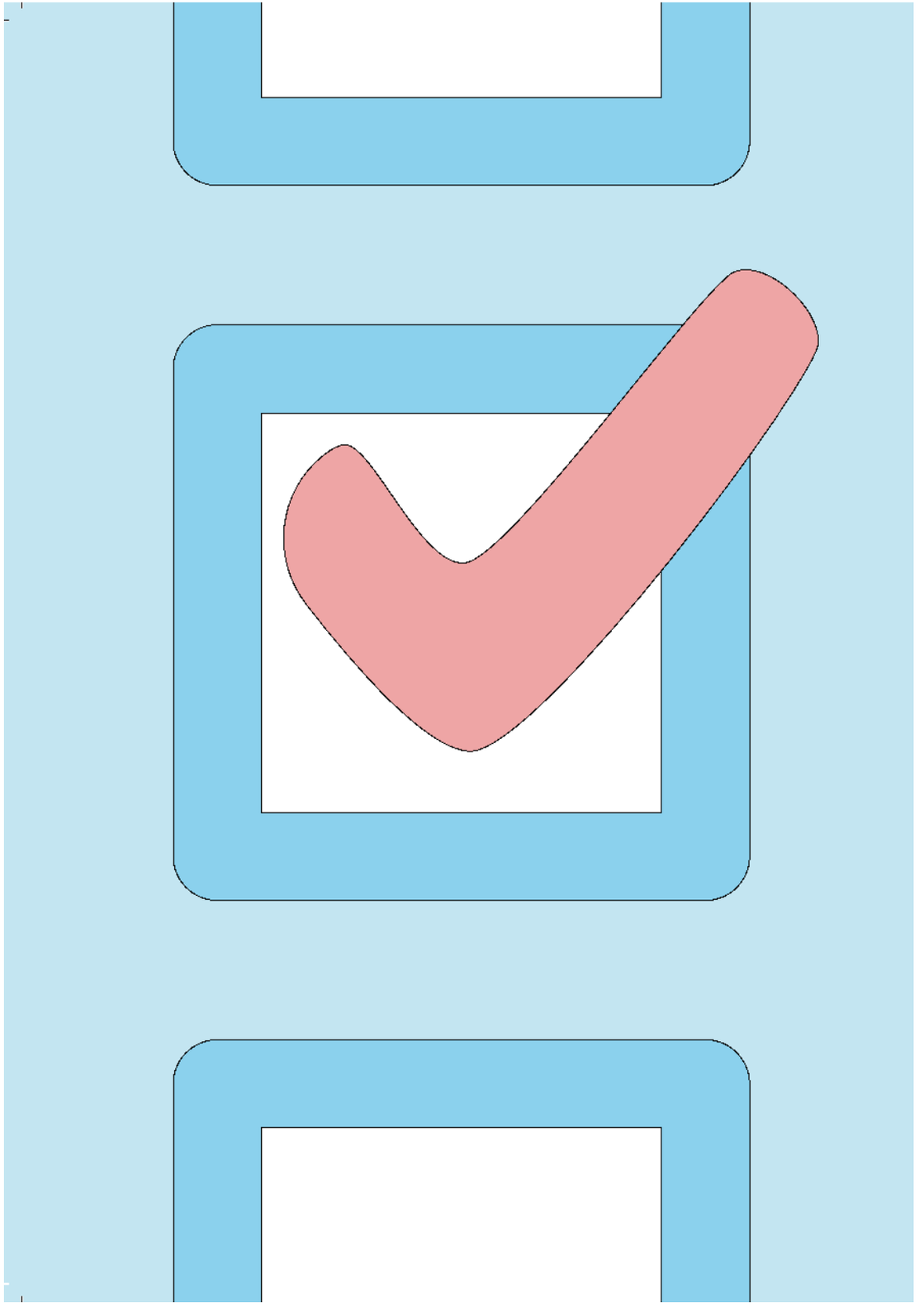
In the introduction, I mentioned why restorative justice is on the rise. It can be added that restorative justice fits well with a number of current social developments, including the centrality of the victim, not only in ethics but also in criminal law; the tendency for citizens to demand a greater say and active participation (democratisation, active citizenship, and the stimulation of personal responsibility, or empowerment, are related concepts); the call for more local, small-scale, easily accessible facilities and customisation; and the downsizing and retreating of the government in the participation society (often due to budget cuts)[33]. Seen this way, it is obvious that restorative justice will only continue growing and flourishing in the coming years. However, fairness dictates that restorative justice in the form of mediation in criminal cases takes place in only 1% of all criminal cases as yet[34]. Nevertheless, I am convinced that more awareness of the existence and added value of restorative justice provisions, such as mediation in criminal cases, will lead to a greater use of them not only among victims and offenders, but also among chain partners such as the police, the Public Prosecution Service, the judiciary, the legal profession, the probation service, and victim support as well as politicians, the media, and citizens. It took three centuries for modern public criminal law to claim hegemony around 1800. Meanwhile, we have been used to this system for two centuries. A shift towards a - yet again - more horizontal, private, restorative crime law therefore takes time.

33 J. Claessen, J. Blad, G.J. Slump, A. van Hoek, A. Wolthuis & Th. de Roos, Voorstel van Wet strekkende tot de invoering van herstelrechtvoorzieningen in het Wetboek van Strafvordering, inclusief Memorie van Toelichting, Oisterwijk: Wolf Legal Publishers 2018, p. 33.

34 C. van der Wilt, 'Mediation in de strafrechtspraak. Over drill rap, de eindezaakverklaring, discriminatie op de arbeidsmarkt en andere ontwikkelingen', Tijdschrift voor Herstelrecht 2023 (2), pp. 10-28.

1.5 OUTRODUCTION

It will not surprise the reader that, as a restorative justice thinker, I strongly support the (further) implementation of restorative justice provisions, such as mediation in criminal cases, in Dutch criminal law. Yet my story should not be taken as a romantic plea for a complete return to traditional criminal law. Let it be clear: criminal law also had/has all sorts of 'magical process elements' (resembling 'God's Judgments') and applications of physical violence between people that we have rightly considered outdated and inhumane since modernity. Hopefully, this story is an invitation for reflection: after all, our modern public criminal law does not appear to be the only possible answer to crime, nor always the best answer, either in terms of procedural form or sanctioning. Indeed, for centuries a completely different response to crime had been preferred. Alternatives to, modifications of, and additions to our modern public criminal law that are, at their core, based on centuries-old traditional criminal law deserve our serious consideration, in my view. What I advocate is a (further) synthesis of the best from both traditional *and* modern criminal law. It is mostly about implementing the effective components from traditional criminal law, which are in a sense timeless or at least translatable to our time, and include the participation of all parties and taking active responsibility, the effective channelling of emotions through mutual communication, the search for consensus on compensation and restitution, the reduction of the use of punitive violence, and the realisation of a lasting neutralisation of the conflict created from crime. Incorporation of these 'cherry-picked pre-modern powers' into modern criminal law can, among other things, revive the principle of subsidiarity (the 'modern' principle that criminal law should be the last resort), while at the same time realising 'modern' ideals such as autonomy, emancipation, and active citizenship also within criminal law. It would be a shame - because it would be selling people short - to simply ignore centuries-old traditional crime law, in which restorative justice as well as mediation in criminal cases appear to have their roots.



2 COMPETENCES

Marion Uitslag LL.M.

2.1 INTRODUCTION

This chapter discusses the competences that a mediator in criminal cases must meet. These competences follow from the SIA RAAK research 'Strafrechtmediation: geborgd in kwaliteit' ['Criminal justice mediation: safeguarded by quality'] conducted by the research groups Access to Justice and Working in Judicial Frameworks of the University of Applied Sciences Utrecht.

Mediation in criminal cases is a special form of mediation and entails a special responsibility for the mediator. In any form of mediation, the participants are parties to the conflict; usually they are both of the opinion that the other has crossed their personal boundary. But in mediation in criminal cases, the mediator is dealing with a defendant who has (often) violated not only the victim's personal norm, but also a societal norm. Moreover, mediation in criminal cases forms part of an ongoing criminal case and the results of the mediation can influence the further outcome of the criminal case.

The mediator in criminal cases should direct and supervise the mediation process between defendant and victim. On the basis of the separate intake interviews conducted with the victim and the defendant, they determine whether a joint conversation may be useful. Ultimately, the mediator must record the results of the conversation in the closing agreement that becomes part of the criminal file. The study by the Utrecht University of Applied Sciences examined what can be expected of the mediator supervising this process. Based on this research, a number of competences have been formulated, which are discussed in this chapter.

2.2 DETERMINATION OF COMPETENCES

The central research question of the SIA RAAK research 'Criminal justice mediation: safeguarded by quality' was: which quality criteria should mediators in criminal cases meet? This question was put to 47 respondents (representatives of mediator associations, mediation officials, judges, public prosecutors, criminal lawyers, mediators in criminal cases, victims, and defendants).
Respondents were deliberately chosen to look at the role of the mediator in criminal cases from different perspectives. The respondents indicated (during elaborate interviews) what it is that a mediator in criminal cases should know, be able to do, and what attitude they believe this requires.

The researchers translated this information into a set of nine competences. For this purpose they used Roe's competence model (2002), see figure 1. Subsequently, the competences were submitted for prioritisation to 22 experienced mediators in a Delphi study[35]. The aim of the Delphi study was to 1) reduce the total set of quality criteria from the interviews and 2) test them against practice. The participating mediators identified the competences and sub-competences further elaborated below as 'very important' or 'important'.[36]

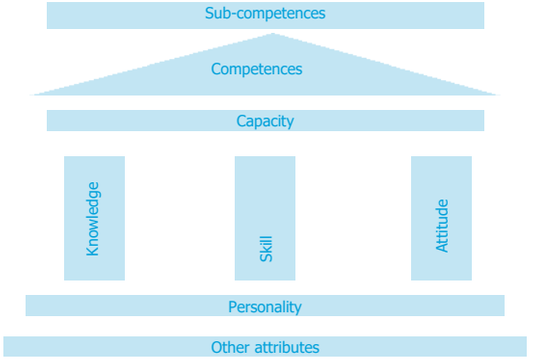


Figure 1 Roe's competence model (2002, p. 209)

35 A Delphi study is a research method in which the opinions of a large number of experts are sought regarding a topic on which there is no consensus. Through peer-to-peer feedback among experts, it is attempted to reach consensus after several rounds.

36 The account of this Delphi process can be found in the research report *Strafrechtmediation: geborgd in kwaliteit* Here you can also find the reactions concerning sub-competences, which are considered less important or on which no agreement was reached.

According to Roe's definition, a competence is "an acquired ability to adequately perform a task, role or mission". From this perspective, a competence is always associated with a *task* or role (in this context, conducting mediation in criminal law), is *learnt* by doing and always involves an integration of *knowledge*, *attitude*, and *skills*. In his architecture model of competences (see figure 1), Roe outlines how competences and sub-competences support the pillars of knowledge, attitude, and skills. Knowledge, attitudes, and skills are in turn (partly) determined by abilities, personality, and other characteristics of individuals such as values, interests, motives, styles of behaviour.

The competences and sub-competences that a mediator in criminal cases should possess obviously overlap with the competences and partial competences of mediators in general, i.e. mediators working in fields other than criminal law. Discussed below are all the competences and sub-competences that a mediator in criminal cases should meet. For each competence, the knowledge, attitude, and skills required of the mediator will be indicated[37].

2.3 THE COMPETENCES

The following competences emerged from the study. They have been prioritised as follows:

1. The mediator is able to write a correct and complete closing agreement.
2. The mediator is able to handle perpetrator-victim dynamics.
3. The mediator is able to regulate communication between parties.
4. The mediator is able to reflect on their own professional actions.
5. The mediator is able to ensure tenable agreements.
6. The mediator is able to keep proper records.
7. The mediator is able to inform parties.
8. The mediator is able to work with a co-mediator.
9. The mediator is able to communicate with the attorney-at-law of the parties.

2.3.1 The mediator is able to write a closing agreement

The closing agreement is the final element of the mediation. Once the closing agreement has been signed by both parties and forwarded to the referrer, the

37 An overview of all competences and subcompetences can be found in Appendix A.

closing agreement becomes part of the criminal file and is a formal procedural document. Under Section 51h(2) DPPC, the judge (in practice also the public prosecutor) must take the outcomes laid down in the closing agreement into account.

Listed below are the sub-competences that mediators should master in order to draft a proper closing agreement.

THE MEDIATOR IS ABLE TO WRITE A CLOSING AGREEMENT THAT:

- is administratively correct (think of public prosecutor's office and mediation number)
- has a clear and neat layout
- is written in clear, understandable language
- indicates how recovery was worked on
- describes the arrangements based on the S-M-A-R-T principles
- provides insight into the background of the incident and the interrelationship between the parties
- describes the creation of agreements
- sets out a reflection period before signature by the parties
- provides insight into the course of the mediation
- sets out that the parties were given the opportunity to consult an attorney-at-law/adviser
- states that both parties were informed of the role of the judge/public prosecutor regarding the further course of the proceedings

For the knowledge and skills required for the closing agreement, please refer to the following chapters: The closing agreement, Damages and compensation, and Types of damages. The knowledge, attitudes, and skills required are only briefly discussed below.

2.3.1.1 Knowledge

A mediator in criminal cases should be able to draft a proper closing agreement. According to the majority of mediation officers interviewed, this is the most important thing a mediator in criminal cases should know and be able to do. The closing agreement is a private law agreement that becomes part of the criminal file. Based partly on the agreements between two private persons (in this case, the suspect and the victim) recorded in this document, the prosecutor or the judge decides on the further disposition of the case. The mediator should be well aware that agreements set out in the closing agreement are, in principle, only applicable between the parties because

the agreements made cannot be enforced by criminal law. After all, it is ultimately the prosecutor or the judge who decides to what extent and in what way they take the outcomes of the mediation into account. For example, if it was agreed that the damages will be paid in instalments by the suspect and the victim has agreed to this, the victim will no longer be able to turn to judicial authorities if the defendant does not comply with these agreements.

2.3.1.2 Attitude

In drafting the closing agreement, the mediator pre-eminently demonstrates the ability to appreciate multiple perspectives and consider everyone's interests. The closing agreement is of and for the parties but also for the judiciary. In terms of language and perception, the agreement should suit the parties and at the same time provide clear information to the judiciary allowing the prosecutor or judge to reach an informed decision.

A. Service

A mediator should be aware of their position: it is not their own interest that this is about, it is about the interest of both parties. This calls for a service-oriented, flexible, non-coercive attitude. The mediator does ensure that they maintain control and give directions, provide options and ask questions, but they will not pressure or push the suspect to acknowledge responsibility. An enforced apology or acknowledgement of one's own part is of no use. This also means that the mediator must accept when agreements between parties do not work out.

B. Independent

Mediation in criminal cases is always tailor-made. The mediator will have to make choices within the given framework and always make an assessment of the situation and of what fits and what does not. "Nothing is allowed and yet everything is allowed" says a mediation officer when interviewed, "but the mediator is ultimately responsible for the mediation and it is the mediator's job to see how they guide the mediation." The mediation officers interviewed indicated that they like it when a mediator occasionally consults with them about a particular case, as long as this does not happen on a continuous basis. They appreciate a high degree of independence from the mediator.

2.3.1.3 Skills

Many skills come together when drafting a closing agreement:
writing skills, mediation skills, and legal knowledge.

2.3.2 The mediator is able to handle perpetrator-victim dynamics

Any mediator must be able to handle the dynamics between the parties.
Each area of mediation is characterised by a specific interplay of forces. In

a work-place related mediation, the relationship between employer and employee requires extra attention and in divorce mediation, the interaction between, for example, the one who wants a divorce and the one who (actually) does not want one is a concern. Similarly, the dynamics between a suspect and a victim is of a specific nature.

In criminal law, from the moment the crime is reported, those involved are placed in the role of either the victim or the suspect. The person who reports the crime is automatically a victim and the person alleged of having committed the offence is a suspect. This is not always justified. In practice, this is usually more nuanced. For example, if there is already a long-standing relationship between the parties and there is already a history of events. Or when a brawl occurs in which all involved play a role, but the person who first reaches the police and reports it is listed as the victim.

The role division between victim and suspect can be associated with 'the offended' and 'the offender', 'right' and 'wrong' and 'weak' and 'strong'. With this, the die is cast. But neither the role of victim nor that of the suspect helps the parties move forward. The aim of a mediator in criminal cases is to get the parties involved out of their victim or suspect roles and make the parties talk to each other as two *people*. Below are the sub-competences necessary to enable the mediator to handle these dynamics.

THE MEDIATOR IS ABLE TO:

- create a safe atmosphere
- ensure full participation for both parties
- empower both victims and suspects
- handle psychological problems
- prevent secondary victimisation
- respond to inequality
- confront parties

The knowledge, attitude, and skill aspects required in the above competences are described below.

2.3.2.1 Knowledge

Psychological knowledge can be divided into three categories: knowledge about (interaction between) humans, knowledge about psychological problems, and knowledge about the phenomenon of secondary victimisation as well as 'secondary perpetration'.

A. Psychology of human interaction

It is important that mediators have an understanding of human psychology, social psychology (interaction processes), and more specifically of the interaction between suspects and victims and, above all, of emotions that play a role in this.

B. Psychological problems

Mental health problems, whether combined with addiction or not, are relatively common among delinquents. Victims are also likely to have suffered trauma following the crime or suffer from post-traumatic stress disorder (PTSD). Knowledge about this is essential, especially about its potential impact on the offence, mediation, and the possibility of reaching tenable agreements.

C. Preventing secondary victimisation

A mediator in criminal cases should be well informed about victimisation, trauma, traumatisation and, in particular, secondary victimisation and the risk that mediation can contribute to it. Secondary victimisation involves a victim feeling victimised a second time for the same offence, for example by their victimhood not being heard and recognised, by the suspect's unwillingness to take responsibility for the event or by experiencing a lack of respect.

D. Preventing 'secondary perpetration'

Knowledge about perpetration and the complicated relationship between suspects and victims is also important. In criminal law, there are no victims without offenders and vice versa. Just as it is important to avoid secondary victimisation, it is also important to convey that a suspect is not on trial during the mediation process. Trial belongs in the judicial route and takes place only when deemed necessary, under the supervision of a judge.

2.3.2.2 Attitude

A mediator is expected to have a multifaceted attitude: hard and soft, directing and understanding, connecting and advancing. One mediator puts it as follows:

> *"I have to take control and be confrontational but at the same time be gentle and create a safe setting so that they can have an open and honest conversation."*

A. Neutral / Multiple-partisan

Neutrality is central to the theory and practice of mediation and is regarded as one of the basic principles of mediation. First of all, a neutral stance means a multi-partisan stance. That means that the mediator always continues to look from the perspective of both parties and assumes equality between both parties. This means that the mediator does not assume perpetrator/victimhood, but two parties who are encouraged in such a way that they "move towards a conversation where they speak to each other person to person". One mediator said the following:

> *"The conversation can actually only take place when people also feel a bit safe and that does not include disapproval or preference. That includes allowing people to be who they are."*

Suspects and victims are sensitive to a neutral stance of the mediator during the joint conversation. They feel it is especially important that both sides have their say equally. This is certainly underlined by an attorney-at-law who says:

> *"I really think complete impartiality is very important. No matter how serious the offence, if one chooses mediation, then as a mediator you should stay away from accusation and condemnation."*

B. Being unbiased

"The mediator has to be able to leave their judgements, prejudices, assumptions at the door," states one respondent. "They should not join the litigation and not start sentencing." That requires being able to face the fact that people occasionally do things that are not acceptable, but that it is also possible to put that right again. It is precisely this open and unbiased attitude that will give both parties sufficient confidence to be open about their own part in the case, it is believed. One judge put it as follows:

> *"It's almost a pastoral basic attitude. Just as you feel during confession when you are allowed to tell everything you are ashamed of and feel guilty about. That a mediator exudes that, in my view, is the most important basic ingredient."*

2.3.2.3 Skills

A. Handling (intense) emotions

A mediator:

> *"Emotions are an essential part of a mediation in criminal cases. As a mediator, you need to be able to tolerate, engage, and name the emotions in both the victim and the suspect. Without attention being paid to the emotions, mediation in criminal cases cannot be successful."*

While 'general' mediators must also be able to handle emotions, the difference for the mediator in criminal cases lies mainly in the intensity of the emotions and the need to handle them in such a way that the process remains safe. Mediators and mediation officers name a number of specific actions used to handle emotions:

- *Encourage*: making parties feel bold to raise certain issues. Both the victim and the suspect want to tell their own story. It is usually important for the victim to have the opportunity to ask the suspect questions: why was this done to me? Why me? Do they even know the implications of all this? Do they have any regrets? Often, victims want to make it clear to a suspect that they should never do this again. It is important for the suspect to be given the opportunity to apologise. Suspects want to make it clear that they are more than just a 'perpetrator' and want to make amends.
- *Allow space for emotions and the enduring of emotions:* a victim is often highly emotional. Sadness, helplessness, anger, and fear are common emotions. For a suspect, it is often about regret, shame, and sadness. It is important not to park these emotions or to talk someone out of them by showing understanding like, 'it will be all right' or 'but it's over now'. However, the mediator must be able to limit emotions if safety is compromised or if the emotional expressions only drive parties further apart (e.g. swearing out of anger or blaming).
- *Continue asking questions about emotions:* "What made you so incredibly angry?" or "What is the saddest part?", "Did you feel anything else besides anger?"
- *Name and mirror emotions:* "I hear/sense there is not only anger but also powerlessness, is that right?"
- *Translate and clarify emotions to create a somewhat mellowing effect:* "You say: are you in your right mind? You acted like an idiot ... do I understand you correctly if I translate this as "you don't understand in any way how and why they did this?"

Dealing with emotions requires the mediator not to be afraid of emotions. Dealing with emotions also means being able to deal with your own emotions. Emotions, after all, are 'contagious'. This is one of the reasons why people usually prefer to avoid emotions. If one of the parties is sad, their own sadness can also be triggered. If you yourself, as a mediator, are overcome by an emotion, you should be able to deal with this in a professional way, for example by naming it. Looking back on the interaction with the mediator(s), the interviewed victims and suspects find that dealing with emotions is important.

A victim reflecting on the mediators:

> *"Yes, they were calm, knowledgeable. They knew what to do. Yes, I felt safe but I am also not that scared. But the mediators also knew how to keep calm so there was no unpleasant atmosphere."*

B. Handling inequality

A basic premise of mediation is that parties experience a degree of equality when sitting at the mediation table. A criminal offence usually implies inequality; it is not without reason that one party is considered as a victim and the other as a suspect. Yet during the mediation conversation, it frequently happens that the suspect feels like the 'weaker' party; the one who has to apologise for their behaviour during the offence. This can tip the balance of power in favour of the victim during the mediation session.

Both the suspect and the victim should be able to participate fully in the mediation process. In doing so, it is important for mediators to properly assess how skewed the relationship between parties is. The latter also relates to whether a joint conversation between the parties is possible. First and foremost, it is important how the parties themselves view the possibility of engaging in conversation, but the responsibility for deciding whether a joint conversation will actually take place ultimately lies with the mediator. If the mediator considers that one of the parties is unable to have a joint conversation because, for example, one participant is focused on causing harm to the other, the mediator should decide that a joint conversation will not take place.

If a joint conversation does take place, it is important that the mediator creates a safe atmosphere in which both the suspect and the victim are not afraid to talk to each other. The intention is that the joint conversation will 'help the parties move forward' and, in any case, that the conversation will not result in secondary victimisation or cause unnecessary harm to the suspect.

EXAMPLE FROM THE MEDIATION PRACTICE

After the intake interviews, the mediators have the impression that the defendant is somewhat unwilling to deal with the case. They feel “that the victim is making too much of it”.

The mediators choose to speak to the suspect again - separately - and they put it to them that they doubt that a joint conversation can take place. This doubt, they explain to the suspect, stems mainly from your attitude. It seems like you feel you hardly bear responsibility for what happened. Startled, the suspect looks at them and replies: "Not at all, but I don't know how to say it and I'm afraid I'll cry. And I don't want that, the victim doesn't want that either."

Specific ways for dealing with inequality during the joint conversation, as mentioned by mediators and mediation officers, are:

- Using neutral terminology, e.g. 'people involved in events' or 'incidents' and, for example, not talking about 'suspects' or 'crimes'.
- Having a support figure brought along. This could be, for example, a parent, a friend or a partner.
- Naming and acknowledging the difference in position of the victim and the suspect.
- Getting parties out of their 'comfortable' roles if they stick to them too long. For example, getting a victim out of their victim role. Here, the mediation process itself is helpful. The fact that the victim participates in the mediation process, while the decision to participate or not is entirely up to them, gives them influence and control. Also, the roles at the mediation table are often very different from those during the offence. At the time of the offence, the victim was the vulnerable and dependent party; during the mediation, this regularly shifts. The suspect is often the one who is apologising and expressing regret and remorse, and the victim is in the more comfortable position of accepting this or not.
- Empowering the weaker party by: a) making them feel that they are being listened to b) showing that they can make their own decisions.
- Discontinuing mediation if progress is no longer being made. This is a decision to be made by the mediator if they believe that the mediation process strengthens rather than diminishes the roles of 'suspect' and 'victim'.
- Making equality a topic of discussion.

C. Preventing secondary victimisation

The role of victim is not a role to be envied and preventing secondary victimisation,

also known as re-victimisation, is of paramount importance. Secondary victimisation is closely related to 'handling inequality' discussed above and is often mentioned in the same breath. Victims are generally in a more vulnerable position and mediators should be mindful of this (without losing their neutrality in the process).

The intake interviews that the mediator has with the suspect and the victim separately give the mediator a lot of information, also about how the mutual relationship between the victim and the defendant is perceived. Usually, the mediator first speaks with the suspect to get an idea of what they want and can contribute to the joint conversation. However, the mediator may also choose to speak with the victim first, depending on the case and the questions the mediator wants to ask the victim and the defendant in the intake interview. Already during the intake interviews, the mediator should be alert to the risk of secondary victimisation. The mediator explores what the take of those involved is and what they want to repair. The mediator also checks the extent to which parties actually want to commit to the mediation (commitment) and whether the motives for participating in the mediation are sincere. In doing so, the mediator checks whether the defendant wants to take responsibility. The issue here is not whether the accused confesses, but whether they recognise their own part in what happened and want to make amends.

EXAMPLE FROM THE MEDIATION PRACTICE

In the intake interview, the accused honestly indicated that "their (criminal) case could benefit from the mediation" and that this was the reason why they participated in the mediation. Meanwhile they had not taken an interest in the victim nor considered what the victim might have wanted from them or what they could offer the victim. "Imagine," says the mediator, "that the victim asks you why you want to join the mediation and you give them the same answer you just gave me, do you think they would say: 'Well, then I would also like to join the mediation because it is apparently good for the person who abused me'? Or do you think they would say: 'Well if that's the only motivation ... then never mind'?" "The latter of course," replied the suspect. "Maybe then you should give it some more thought when imagining what you could do for the victim or what you would like if you were in their shoes and starting a conversation with the person who played a leading role in your assault."

In addition, it is important to examine what the victim themselves wants. The intake interview is the perfect moment to find this out. The victim is asked about their wishes and boundaries regarding the mediation. The mediator helps ensure that these boundaries are monitored and that the victim's wishes can be addressed during the joint conversation. Frequently occurring themes in this respect are: what does recovery look like for you? What does the damage consist of and how would you like to see it resolved? Are you afraid? What should be done or what can the accused do to alley your fear?

> *"Suppose you don't get the apology you so fervently hope for, could a conversation between the two of you still be meaningful to you ... and how?"*

D. Preventing renewed blaming (and shaming)

The role of the offender is also by no means a desirable one Therefore, it should not be the intention that the offender is repeatedly 'pushed back' into the role of the offender. An offender who apologises and does their best to repair the damage suffered also deserves support to come out of the role of offender. The point of a mediation process is therefore that the roles of the offender and the victim 'blur' and that there are two people sitting at the table who are willing to listen to each other, make amends and reach agreements with each other.

E. Sensitive/empathic

A mediator should be able to empathise with both parties and the situation. This requires a genuine interest in both the offender and the victim. When interviewed, a mediator stated that "above all, you sense what someone needs to move forward emotionally". Being able to 'empathise' also involves having a sense of relationships, knowing how to address someone and knowing what tone is appropriate at what time.

F. Calm

Victims and offenders in particular mention the importance of the mediator appearing calm. This has a positive effect on the course of the conversation and on the handling of the emotions of the parties. This also calms down the victim and the offender themselves, which makes it easier for the conversation to unfold. An interviewed victim recounts:

> *"Yes, they were so calm themselves and I was nervous but their attitude calmed me."*

2.3.3 A mediator is able to regulate communication between parties

The third competency, the ability of the mediator to be able to regulate the communication between parties applies to all forms of mediation.

The related sub-competences, shown below, also apply to other forms of mediation. However, the specific nature of mediation in criminal cases causes some sub-competences to be more important than in other forms of mediation, such as handling sociocultural differences (when victims and offenders come from very different backgrounds) or creating a safe atmosphere (when violent crime is involved, for example).

A MEDIATOR IS ABLE TO:

- structure the mediation
- handle sociocultural differences

2.3.3.1 Knowledge

A. Knowledge about culture/cultural differences

A mediator should know how criminal offences are perceived in different cultures and how this affects the perception of the offence or opportunities for recovery. Seen from a cultural perspective, for example, the question is whether an offender can or will take responsibility, apologise or whether a victim can accept apologies.

2.3.3.2 Attitude

A. Sensitive/empathic

A mediator must be able to empathise with both parties and the situation. This requires a genuine interest in both the offender and the victim. In this respect, an interviewed mediator states: "Especially that you sense what someone needs to move forward emotionally". A sense of relationships, knowing how to address someone and what tone is appropriate at what time is important.

B. Pro-active / with guts

It is reported in various interviews that mediation in criminal cases requires guts and the courage to continue asking questions, to be able to actually identify the problem. Moreover, more than in other types of mediation, mediation in criminal cases has to be 'sharper' because the mediation process in criminal cases has to be completed in a relatively short time and it has to reach a result reasonably quickly.

This also sometimes means having the guts to say "then we won't mediate" if a mediator notices that one of the parties is unwilling or unable to take responsibility for their own actions. Mediation in criminal cases is not just about coming to good agreements; parties, especially offenders, must also recognise their part in the case and take responsibility for it.

C. Energetic and tenacious

A mediator in criminal cases needs to stand firm. The subject of the mediation may be a very poignant event that may affect the mediator themselves. It often involves vulnerable people who have difficulty communicating. This requires perseverance, tenacity, and persistence from the mediator. One of the mediators interviewed:

> *"If you throw in the towel at the very first setback, don't start. This work is just complicated. People often have a screw loose, and some people aren't the best of communicators."*

D. Directive

Due to the relatively short time mediators in criminal cases have for supervising the mediation, mediators are compelled to be more directive. As one interviewed mediator puts it:

> *"I am more directive in criminal law than in other mediations, and that has to do with the compactness of the process. You have an intake with both parties and one joint interview and basically that's it. Not always, but most often it is. So you also don't have the time, as in a family case or an employment case, to think: 'I'll address that next time, or that will be covered in the third conversation.'"*

2.3.3.3 Skills

A. Communication skills

A substantial part of general mediation skills involves written (see also competence 1) and oral skills. To conduct a conversation, and especially to initiate a conversation between the offender and the victim, a criminal justice mediator uses a number of conversation techniques as described below.

B. Listening and (continue) asking questions

Listening and (continued) questioning are skills that every mediator in criminal cases must master to perfection. In the mediation manuals, this refers to LSD (listening, summarising, deepening) as a basic mediation technique.

C. Speaking the language of the other/connecting with parties

A mediator in criminal cases must connect with the language of the parties. This should be reflected during the conversations and in the closing agreement. Mediators in criminal cases must be careful not to use too much 'academic' language when communicating. They are dealing with a very diverse audience. It is important for the mediator to speak their language as this reduces the distance between the mediator and the parties,

allowing parties to feel heard and safe.

D. Connecting language
A mediator in criminal cases must not only speak the language of the parties, but this language must also be helpful to the conversation to be had. Mediation in criminal cases is about recovery and that requires connecting language. A mediator interviewed said:

"Summing you both up I can say: 'You indicate that they should never have done this and you indicate that you were heartily wrong.' But I can also say: 'So if you both could turn back time you would both be doing this very differently now'."

2.3.4 A mediator is able to reflect on their own professional actions

A mediator in criminal cases - like any other mediator - may be expected to reflect on their professional conduct. This competence is expressed in the sub-competences below.

A MEDIATOR IS ABLE TO:

- reflect on their own moral judgement
- continue developing and learning themselves

2.3.4.1 Knowledge

A mediator in criminal cases has sufficient knowledge to know when to seek advice from third parties. In other words, the mediator possesses self-knowledge. They know their own strengths and weaknesses and know when to ask for help.

2.3.4.2 Attitude

A. Being aware of own (moral) judgement
Interviewed mediators and mediation officials indicate that, specifically in mediation in criminal cases, it is important that mediators are aware of their own moral judgements about crimes and criminality and are able to not let those judgements play a role during mediation. The interviewed judges, criminal attorneys-at-law, and prosecutors also emphasise the importance of an open, unbiased, neutral attitude. One mediation official puts it this way:

"Sometimes you hear very absurd things. But your personal judgement does not show in your actions. These people are in that situation and you try to just get the best out of it for those involved."

B. A learning attitude
It is important to keep developing yourself and link this to the 'weight' that mediation in criminal cases has for victims and offenders. A mediator interviewed said:

"If someone is involved in a serious violent crime and is at risk of a long-term prison sentence, this mediation process is surely different than a mediation process involving an outplacement, reintegration or second track process. So the stakes are also much higher. That requires greater dedication but also knowledge of yourself as an instrument and the awareness that you have to keep evolving with each case you encounter."

2.3.4.3. Skills

Reflection skills are skills that involve reflecting on one's own thoughts, feelings, intentions, and behaviour and on those of the parties and being able to learn from them. The importance of awareness of one's own (moral) judgement and a mode of continuous learning play an important role here. Peer review is therefore indispensable for mediators in criminal cases.

2.3.5 The mediator is able to guarantee tenable agreements

As far as possible, the agreements recorded should be tenable.
This is detailed in the following sub-competence.

A MEDIATOR IS ABLE TO:

- involve the surrounding area in the mediation process where appropriate

2.3.5.1 Knowledge

A. Knowledge of different facilities
Perhaps it is too much to ask of any mediator in criminal cases to have good knowledge of the social map: it is constantly changing and is often organised locally. Nevertheless, the mediator should be aware of the various facilities that the defendant and victim may have access to. Consider, for example, the probation service, victim support, a safe house and so on. The mediator can use this knowledge in the mediation process, in particular to inform the parties or to formulate a request supported by the suspect and victim in the closing agreement regarding assistance for the offender (e.g. aggression training).

The parties' immediate environment can also be helpful when it comes to helping them fulfil the agreements made; for instance parents, a partner, a sibling. See also chapters 'The Court' and 'The Closing Agreement'.

2.3.5.2 Attitude

A. Attitude identifying needs for assistance and support

A mediator notices when more assistance and support is needed than the mediation conversation alone can provide. This could, for example, be about the victim indicating that they still have a lot of fears, but it could also be about the offender worrying about their own explosive behaviour. When the mediator notices that this is the case, they make it a subject of discussion and, if necessary, can refer to counselling agencies.

2.3.5.3 Skills

A. Providing information on assistance and support

If it becomes clear during the mediation that one or both parties would benefit from assistance or support in fulfilling the agreements made, the mediator may refer parties to other assistance and service agencies - think victim support, the probation service, social work and so on. The district police officer, neighbours, relatives or the housing association can also assist parties in fulfilling the agreements made.

This can occur, for example, when quarrelling neighbours know their agreements are even better secured if the district police officer is aware of the agreements made. An additional agreement could be that if another difficult situation does arise in the future, these neighbours will first turn to the district police officer. It is then up to the mediator to inform the district police officer, with the parties' consent, of course, of such an agreement.

However, there are also support and assistance agreements that a mediator cannot conclude. For example, while a mediator may indicate in a closing agreement that it would reassure both parties if the offender who has an alcohol problem were to attend a rehab programme, the mediator is not the one who can ensure this is done. However, in such cases, the mediator may include the wish of the parties in the request to the referrer. The mediator does need to make it clear to the parties that it is ultimately up to the prosecutor or the judge to take this into account or not. See also chapters 'The Court' and 'The Closing Agreement'.

2.3.6 A mediator is able to keep proper records

A mediator in criminal cases must have their own records in good order.

This is certainly important in the criminal-law context in which they operate. This competence is elaborated in the following sub-competences.

A MEDIATOR IS ABLE TO:

- prepare the mediation
- comply with the time limits of criminal law

2.3.6.1 Knowledge

The mediator knows what is expected of them in terms of documents and timeframe.

2.3.6.2 Attitude

The mediator is accurate.

2.3.6.3 Skills

A. Organisational skills

To properly structure the mediation, it is important for the mediator to have organisational skills. This is about scheduling and facilitating mediation talks and providing the documents for both the talks and for the further settlement of the criminal case in a timely and proper manner.

B. Good preparation for mediation

Mediation officials in particular insist on the importance of good preparation. They transfer a case to a mediator and then want the case to be in good hands. Mediators should read files forwarded by officials carefully and, above all, check carefully that all relevant documents are present because otherwise mediators will start the mediation with the wrong idea or will not be able to properly draft the starting and closing agreement.

C. Meeting deadlines

Mediation in criminal cases takes place during the criminal proceedings. This means that deadlines applicable in criminal proceedings are leading: there is little leeway. If deadlines do appear to be missed, it is important that the mediator reports this to the mediation officer in good time so that it can be discussed whether postponement is possible.

D. Proper record keeping

Any mediator, and thus also mediators in criminal cases, should keep proper records.

E. Proper handling of the mediation
A mediator ensures that the necessary documents are delivered to the parties (the starting and closing agreement and a termination notice) and to the court (the starting and closing agreement, the termination notice, confidentiality statements, and an account). Depending on what was agreed in the closing agreement, additional documents (e.g. proof of payment of compensation) must be provided.

2.3.7 A mediator is able to inform parties

Although informing the parties is a competence for all forms of mediation, this involves specific substantive knowledge and expertise regarding the criminal proceedings and mediations taking place in this context. This is elaborated in the following sub-competences.

A MEDIATOR IS ABLE TO:

- manage expectations about the role of the judge and prosecutor
- show the consequences of agreements made
- paint a realistic picture on legal phasing, compensation and so on
- make a good assessment of the possibilities of the mediation process

2.3.7.1 Knowledge

A. Basic knowledge of criminal law
One of the main differences between a 'regular' mediator and a mediator in criminal law is that the mediator in criminal law must have knowledge of criminal proceedings.

B. Knowledge of criminal-law proceedings
A mediator should know the different stages of the criminal-law proceedings and associated decision moments, as well as the roles of the different actors (judge and prosecutor) in these proceedings. Knowledge of criminal-law proceedings is important, among other things, to be able to make a good assessment of the parties' ability to influence the further course of the criminal case. The stage of the parties' criminal proceedings, for example, determines whether or not a dismissal is possible or whether a court ruling is irreversible. Mediators should, above all, realise that they work in an operational setting. This means that the criminal case is yet to be assessed and it has not yet been determined whether the accused will be convicted.

For example, there may be an exclusion ground due to which the act committed is not punishable by law or the accused is found not guilty.

This matter is further dealt with in the chapters 'The Prosecution Service', 'The Court' and 'Damages and Compensation'.

C. Knowledge of damages and compensation
Another important aspect related to legal knowledge is knowledge of damages and compensation (see sections 'Damages and Compensation' and 'Types of Damages'). Mediators in criminal cases must be aware of the possibilities and impossibilities regarding damages and compensation, who is able to join in criminal proceedings, the role of the CJIB (Central Judicial Collection Agency and the Criminal Injuries Compensation Fund. This information is important to properly inform both parties and assist the parties in reaching realistic agreements by which parties do not inadvertently give up any future rights. A judge interviewed said:

> *"I think you should know what to do and, more importantly, what to omit when it comes to claims settlement. This is a complicated matter. The mediator needs to know what they do not know. So they should not tread on slippery ice, as this could seriously short-change parties. It is also a mediator's job to inject some realism when it comes to compensation claims. Sometimes victims present sky-high claims, while it is estimated that there is no way these will be granted. Then it is good to give them some information in this respect. In addition, it is very important that you do not let people make agreements on damages that they may regret afterwards or that they cannot foresee the consequences of."*

2.3.7.2 Attitude

A. Role of the mediator
A mediator must be well aware of the role they play in the criminal justice process. A mediator may well provide some guidance and advice and 'find out what both parties see as their part', is the view, but it is not their task to establish the truth. A mediator does not make decisions when it comes to the outcomes of this process. This is the task of the prosecutor or the judge. The mediator takes a neutral position and is independent. This means that a mediator has no interests in the mediation and no ties to any of the parties. A mediator who was interviewed said:

> *"You do not belong to the judiciary, not to the court, you are just an independent mediator who has no interest in the outcome of the mediation in any way."*

2.3.7.3 Skills

As indicated earlier, it is important for a mediator in criminal cases to have sufficient legal knowledge. When interviewed, judges, prosecutors and mediators stated that mediators in criminal cases have the task to offer information. In particular, this concerns information on the phasing of the criminal proceedings (being able to answer questions from parties on 'how to proceed'), seeking advice from legal counsel and how parties should proceed with the agreements made.

The mediators interviewed also stress that while they can inform parties, it is up to the people themselves to decide. Informing also includes 'expectation management' about the further course of the proceedings after the mediation has ended. Mediators should clearly explain to the parties that it is the prosecutor or the judge who ultimately decides on the proceedings.

2.3.8 A mediator is able to collaborate with a co-mediator

A mediation in criminal cases is conducted by two mediators in an alternating composition. This is different from other mediations. This requires mediators in criminal proceedings to be able to work with other mediators. This competence is further elaborated in the sub-competences below.

A MEDIATOR IS ABLE TO:

- raise issues if they see that the co-mediator is not doing so
- stay on track with the co-mediator
- sense what is needed and give space to the co-mediator
- connect with the co-mediator
- make agreements with the co-mediator on the division of roles between the mediators

2.3.8.1 Knowledge

The idea behind this, according to mediation officials, is that a) knowledge and expertise are pooled in a complementary way (e.g. a mediator who received legal training works with a mediator who is trained as a psychologist); b) inexperienced mediators can learn from experienced mediators and c) in the event of an escalation, mediators can operate in pairs.

2.3.8.2 Attitude

A successful cooperation means that the whole is more than the sum of its parts. Good cooperation requires openness and clarity. Mediators must therefore be able to acknowledge the talents and capabilities of the other

mediator and use their full potential during the mediation. All this keeping in mind that the mediator should be of service to the process and parties and not to themselves.

2.3.8.3 Skills

To be able to work well with others, the mediator must have regulatory and communication skills.

A. Regulatory skills

Examples of regulatory skills include agreements on who drafts the documents, takes care of the administrative processing, and who is 'in the lead' during the mediation.

B. Communication skills

Communication skills are among the basic skills of all mediators. Collaborating mediators need to communicate well with each other. They see each other in action and see the other's qualities and areas for improvement. If this can be the subject of conversation, it can be the source of development and improvement for the mediator.

2.3.9 A mediator is able to communicate with the attorney-at-law of the parties

A mediation in criminal cases takes place during the criminal proceedings. This means that the final outcome of the criminal case is not yet clear and that the positions of both the accused and the victim are not yet established. In case the suspects and/or victims are assisted by an attorney-at-law, the mediator should be able to consult with the attorney-at-law of the parties.

2.3.9.1 Knowledge

A mediator knows when a case requires consultation with the attorney-at-law of one or both parties.

EXAMPLE FROM THE MEDIATION PRACTICE

The suspect states that they do not know whether they committed the offence or not. Two bystanders (friends of the victim) identified them as "the culprit", but they cannot (and don't want to) imagine that they have beaten up a girl. They are terribly embarrassed if they did. The victim states that they also don’t who they were hit by because in the pub it was dark and several people were fighting with

each other. Moreover, they immediately passed out. The victim is seeking non-material damages of €250 and compensation for damage to their glasses in the amount of €350. The suspect is willing to pay this.

In a case like the one above, it is important for the mediator to know that the fact may not be proved. This could have (major) consequences for the position of the suspect in the criminal case. Consultation with the attorney-at-law of the suspect can prevent the closing agreement from including something that may conflict with the defence that the attorney-at-law of the suspect wants to put forward. The same applies to the attorney-at-law of the victim.

2.3.9.2 Attitude

A mediator in criminal cases is willing to work with the attorney-at-law of (one of) the parties without losing their independent position.

2.3.9.3 Skills

A mediator can explain to the attorney-at-law of the parties how and with what intentions the agreements between the parties were reached. They may consult with the attorney-at-law of the parties in this regard.

2.4 PERSONAL CHARACTERISTICS AND CAPABILITIES OF THE MEDIATOR

Finally, the study reveals some personal characteristics and capabilities of mediators in criminal cases that cannot be categorised under the competences listed above. Among other things, intelligence is mentioned as an important capacity for mediators. Other personal characteristics mentioned were: authenticity, kindness, openness, incisiveness, empathy, worldly-mindedness, creativity, dedication, and commitment to people who find themselves in difficult situations. Furthermore, insight into human nature and people skills were identified as important aspects. A judge said:

> *"It is also very important to have some life experience and insight into human nature, especially in more complicated cases. To have gone through a certain amount of personal development. And to know your own pitfalls, and to be able to explore what's going on here and ask questions appropriately without letting your emotions get involved. In that respect, I think it is mandatory for all mediators in more complicated cases to have gone through some degree of personal development."*

3 THE DEFENDANT TAKING RESPONSIBILITY

Marion Uitslag & Meriem Kalter

3.1 INTRODUCTION

This chapter discusses the responsibility of the defendant during a mediation in a criminal case. This stems from the SIA RAAK research 'Mediation in Strafzaken: een bijzondere verantwoordelijkheid voor de verdachte' ['Mediation in criminal cases: a special responsibility for the defendant'], conducted by the research group 'Access to Law' of the HU Utrecht University of Applied Sciences (2022-2024). This study was conducted because the professional practice required more clarity on the concept of 'the defendant taking responsibility' and on how to deal with this during the mediation process. The study included interviews with judges, public prosecutors, mediation officers, mediators, criminal lawyers, victims, and defendants, each of whom deals with this issue in different ways.

In criminal proceedings, a defendant is called to account during the court hearing. But a defendant who participates in mediation in criminal cases is expected to contribute to repairing what has been 'broken' as a result of the offence of which they are suspected. Here, it is very important that the defendant takes responsibility for their part in the event.

This means that a denying defendant cannot participate in a mediation in criminal cases. The minimum condition for mediation in criminal cases is that the defendant acknowledges some responsibility, i.e. that they acknowledge involvement in the crime, and/or indicate that they have a share in it. This is in line with what is described in the Victim Directive[38].

38 Directive 2012/29/EU, art.12, 1c of the European Parliament and the Council of the European Union), a binding restorative justice instrument, which states that "the offender has acknowledged the basic facts of the case" ("acknowledge the facts underlying the case").

This chapter looks in more detail at the concept of the defendant taking responsibility. It also describes what taking responsibility looks like and how the mediator can support the defendant to actually take responsibility.

3.2 THE DEFENDANT TAKING RESPONSIBILITY IN CRIMINAL CASES

Taking responsibility is distinguished into passive responsibility and active responsibility[39]. Passive responsibility means that the defendant acknowledges having a share or involvement in the crime committed. This is also the minimum requirement to participate in mediation in criminal cases. Active responsibility implies that a defendant not only looks back ("I had a part in that") but also looks forward and is willing to make amends.

The study reveals that a defendant taking responsibility, is seen as something that is subject to change. A mediation process can contribute positively to this. This means that it is very common for a defendant, who takes only passive responsibility at the start of the mediation, to start taking active responsibility during the course of the medication and actually contributes to repair. This is also in line with previous research on VOM (victim offender mediation), which shows that constructive interaction with the victim can bring about a psychological change in a defendant such as taking more responsibility[40].

For example, a judge interviewed said: "You then sit face to face with the person who did something to you. And you are directly confronted with the consequences. It's then no longer possible to ignore it. Nor how this has affected this person. Then I think, if you have a well-developed conscience, that really hits you. And that can bring about lots of changes". A mediator said: "It's actually also a process in which that responsibility is really quite nice at the end, but it doesn't need to be there at the beginning."

Active responsibility - contributing to repair - can manifest itself in a number of ways during mediation in criminal cases:

39 Braithwaite, J. (2006). Rape, Shame and Pride: Address to Stockholm Criminology Symposium, 16 June 2006. Journal of Scandinavian Studies in Criminology and Crime Prevention, 7, 2-16.

40 Jonas-van Dijk, J. (2024). Opening the black box of victim-offender mediation: : Does participation in vom reduce offenders' risk of reoffending and, if so, how? Doctoral thesis, University of Maastricht.

1. by starting a conversation with the victim
2. by expressing regret
3. by repairing the damage suffered[41].

Item 1. Starting the conversation with the victim:
Mediators refer to an 'actual' meeting between defendant and victim and that means the defendant:

a. Is open to the victim's story by listening, being curious, and asking questions about the case.

b. Opens their mind to the victim. Often, the victim has questions about what happened, how and why it happened and what the meaning is for the defendant. Questions like "Why me?" or "Why did you do it?" and "How do you look back on this now?" play an important role here.

Item 2. Words of regret:
Apologising helps giving the victim recognition and let them know that something happened that should not have happened. The fact that it is the defendant (the perpetrator) who expresses regret before the victim has great added value.
"The whole world can say they shouldn't have beaten me up, I know that myself, but for them to say that to me themselves and for me to see that they mean it, that really has an impact." (Victim)

Item 3. Repairing the damage:
Damage is a broad term. It may involve material and immaterial damage (including psychological damage). Many victims feel that it is precisely the damage settlement, and particularly where it has financial consequences for the defendant, that is the litmus test for taking responsibility. "If they really mean what they say, they will also pay for the damage caused. Then they put their words into action." (Victim)

A question that frequently arises concerning payment of damages is whether the defendant's payment of damages is not an indirect admission of guilt. This question is particularly relevant when there is a partially denying suspect or when there are multiple suspects. 'You don't pay damages if you are not (solely or fully) responsible for this, do you?' (Defendant).
Als refer to chapters on Damages and Compensations and Types of Damages.

41 Armour, M. P., & Umbreit, M. S. (2005). The paradox of forgiveness in restorative justice. Handbook of Forgiveness. New York: Brunner-Routledge.Claessen, J., & Roelofs, K. J. M. M. (2020). Herstelrecht (voorzieningen) en mediation in strafzaken. In Handboek Strafzaken-online. Wolters Kluwer

3.3 WHAT FACTORS PLAY A ROLE IN THE DEFENDANT TAKING RESPONSIBILITY?

3.3.1 The defendant

A major decisive factor for whether a defendant can take responsibility is the person of the defendant. Defendants - like other people - come in different shapes and sizes. Some find it easier to 'give in' and be more flexible than others. Mediators deal with defendants from different (cultural) backgrounds, young people, elderly people, people with mild intellectual disabilities, highly intelligent people, people with psychiatric disorders, etc. If these people are willing to participate in criminal case mediation, and they are willing to engage in a conversation with the other person, then that is a starting point for recovery.

However, some defendants can express themselves more easily than others and are less 'plagued' by protective or defence mechanisms that prevent them from taking responsibility[42]. Defence mechanisms such as, for example, rationalisation, denial, avoidance, diminishing one's own share, shifting blame and projection aim to protect the ego from vulnerability. While it is exactly this vulnerability that leads to mellowing and provides access to one's own grief and shame. This also often opens the door to the other person, sparks softening and understanding in that other person and is helpful in the recovery process.

REAL-LIFE EXAMPLE

During the intake, Charles (defendant) said: "I only threw one punch and that was because Angelo (the victim) was behaving defiantly. I am not someone who just beats up *someone else". Angelo indicates that he was kicked so badly that he was left with a broken nose and eye socket. Both would like to start the conversation together in a mediation.*

The recovery process for a defendant or offender consists of four layers:
Layer 1: Self-recovery.
Self-recovery is about awareness and taking responsibility for the harm done to the victim, dealing with feelings of shame and guilt and increasing insight into one's own actions.

42 Gunnison, E., & Helfgott, J. B. (2011). Factors that hinder offender reentry success: A view from community corrections officers. International Journal of Offender Therapy and Comparative Criminology, 55, 287-304. Jonas, J., Zebel, S., Claessen, J., & Nelen, H. (2022). The psychological impact of participation in victim-offender mediation on offenders: evidence for increased compunction and victim empathy. Frontiers in psychology, 6531.

Layer 2: Victim recovery.
Victim recovery is about contact (physical or otherwise) with the victim or the surviving relatives.
Layer 3: Recovery of own network.
Recovery of one's own network involves restoring the relationship with the surroundings of the defendant, such as relationships with family members, neighbours, and friends.
Layer 4: Recovery with society.
Recovery with society is about the recovery of one's living environment or society at large such as, for example, doing volunteer work.
All these recovery layers have to be worked through one by one because the previous layer is a prerequisite for the next recovery layer[43].

What does this mean for the mediator?
During mediation, victim recovery (and recovery of their surroundings) is sought. This is not possible without self-recovery by the defendant. Only when there is self-recovery can a defendant take responsibility. Self-recovery allows the defendant to make sense of the offending behaviour by learning to deal with guilt and shame.

This means it is important for the mediator to pay attention to the recovery of the defendant. The intake interview is a perfect occasion for this. During this interview, the mediators only speak with the defendant. That means they can give the defendant all the space they need to tell their story and hear them properly.

REAL-LIFE EXAMPLE

In the case study, Charles said: 'I'm not someone who just beats up someone else'. This gives the mediator the opportunity to continue; 'Tell me, what do you mean by this?'

Chances are that Charles indicates that he is not a bad person or that (in other words) he is more than just someone who hurts someone else.

43 Hoek van, A. & Slump G.J. Restorative Justice in Europe, Resultaten van het veldwerk (workstream 2) *Deel 1: De implementatie en bekrachtiging van de Slachtoffer Richtlijn: state of the art, stappenplan en groeimodel, Deel II: Slachtoffer- en herstelgericht werken in de fasen van de tenuitvoerlegging: casestudy Justitiele Inrichtingen. 2013. This report can be* downloaded at www.restorativejustice.nl.

When Charles can express this, it becomes easier for him to then relate to what he did do wrong, in this case to the fact that he did hit the victim.
During the intake, the mediators also discuss with the defendant how they want to frame the conversation with the victim (the joint conversation). Some mediators distinguish between retrospective questions, future-oriented questions, and here-and-now questions.
Retrospective questions focus on the offence, the run-up to it and its consequences, and often relate to the defendant taking responsibility. Mediators encourage defendants to be honest and not give socially desirable answers. Questions such as "Looking back now, what would you do differently?" or "How do you think the other person felt at the time?" focus on awareness and self-responsibility. Future-oriented questions are mostly about repair. For instance, a question like: 'What do you think needs to be repaired and what do you want to contribute to this?' Here-and-now questions are about empathising with the other person and empathising with yourself. Questions such as: "What do you feel when you look back to the moment the crime was committed? What do you think happens to the other person when they remember it?" Here-and-now questions are very important to prepare for the confrontation with the other person, for example by asking a question like "What do you think it does to the other person to see you and speak with you?". If the defendant is clueless about this and says, for example, "no idea", the mediator can present a number of scenarios: suppose they are scared or suppose they are angry, forcing the defendant to consider these options. These and the following questions are helpful in steering this conversation in the right direction. For that matter, these are questions that can also (in part) be asked of the victim and are useful during the joint conversation[44].

1. What happened? (Facts)
2. How did it affect you? (Experience)
3. Who else has been hit? (Relationship)
4. What is your share in this? (Responsibility)
5. What could be your contribution? (Contribution to repair)
6. What do you expect from the other person? (Relationship)
7. What would you like to ask the other person? (Relationship)
8. What do you have to give? (Relationship)
9. Which topics are important and should be covered? (Facts)
10. What you say and show now, can you also show that in the joint conversation? (Relationship and taking responsibility)
11. What will you say later to prevent the conflict from flaring up again? (Preventing recidivism) (Relationship and taking responsibility)

44 Vzw oranjehuis Ligand, Stijn Deprez & Michael Michiels (2020), Beter samen! Herstelgerichtwerken in de jeugdhulp. Acco, Leuven.

There are also mediators who, during the intake interview with the defendant, play the role of the angry or sad counterparty in order to prepare the defendant for what may come and also to assess what the defendant is able to handle where victim reactions are concerned.

The topics of regret, apologising or saying sorry come up (almost) by default during the intake interview. Why, what for and to whom the apologies are made is explored in more detail. How apologies are made or how one expresses that they are sorry is very important. It matters whether it is sincere and has substance. This largely determines whether the apology is accepted by the other party. If making apologies or saying you're sorry is done pro forma or too easily, this can have the opposite of the desired effect.

Mike (defendant) said: "Okay well, then sorry about that". Saskia (victim) sat hunched over but now falls back in her chair and says: "If this is an apology, then we better stop immediately."

An example of a sincere apology: "I feel terrible about what happened to you and that I caused it. If I could turn back time I would erase this. But you can't. I'm really very sorry. And can I ask you please... is there anything I can do for you to make it up if only just a little bit?"

What makes an apology sincere and when does saying sorry has real meaning? This is largely linked to the non-verbal aspect; how does one's voice sound (flat or emotional), is the other person being looked at or not, does the facial expression and posture match what is being said? But it is also about the content of the apology. What is the apology made for? And are the apologies supported by concrete behaviour such as the offer to repair the damage or some other gesture of rapprochement to make the situation less tense for the other person? Such a gesture of rapprochement could take any form and could include, for example, an offer of the defendant to inform their circle of friends that the conflict has been resolved so that the victim would no longer have to fear the defendant's friends.

How can a mediator help the defendant to take responsibility?
Some defendants are very good at making excuses and others cannot bring themselves to say it. They need help. The questions "How much do you help?", "When do you do it?" and "In what way?" are interesting questions for the

mediators. Helping a defendant has to do with the mediator feeling that the defendant wants to but cannot, for example, because they are not so eloquent, because they cannot find the words or because apologising is not in their repertoire.

It is not always easy to discover the boundary to be set in this respect. For instance, it does not seem desirable to literally recite to the defendant what the defendant may say. But what could help here is the question: "What would you want the other person to do or say if you (or someone you love) were the victim in this case?"

REAL-LIFE EXAMPLE

As Charles continues to find it difficult to take responsibility, it helps to put him in the other person's shoes. "Imagine if you/your little brother/friend/father had suffered a broken nose and eye socket as a result of a confrontation, though perhaps he was also behaving a little defiantly, what would you want the person responsible for this to do during a conversation with you/your brother/friend or father?"

Sometimes a defendant, who has difficulty expressing themselves, says: "This was not the intention." The question of what the actual intention was, can sometimes be too difficult for the defendant. In that case, the following tentative remark by the mediator may help and lead to a relieved "yes" from the defendant: "Do you actually mean to say you're sorry you did this?"

Mediators regularly ask defendants: "Would you like to tell the other person in the joint conversation what you are telling me now (in the intake)?" and "Are you OK with me helping you in the joint conversation if you can't get your words right, or reminding you of what you told me during the intake?" In this way, the mediator assists the defendant in saying what needs to be said and to take responsibility.

In some cultures, 'offering an apology' is not easy. The question "If you made a mistake towards your family or friends, how do you make up for it in your environment/culture?" can help. When discussed in the intake, this information can, with the consent of the defendant, be provided in the intake interview held with the victim, so that the victim can be prepared.

During the intake, the mediator gives the defendant space. The defendant can tell their story, their doubts and struggles. The mediator takes an interest in the defendant and this allows them to present themselves as a person and to some extent relinquish their role of perpetrator. This makes it easier to then have a 'person-to-person' conversation with the victim. Such a conversation is also envisaged with the mediation process. That said, it does simultaneously appeal to the defendant's sense of responsibility.

And what happens if the defendant does not take responsibility?

And what happens if the defendant does not take responsibility, despite all the attempts of the mediator? The question then arises as to whether a joint conversation should take place. The answer to this question is ultimately up to the mediators, but the victim's opinion is of major importance in this situation. Mediators usually present this issue to the victim in the form of a 'suppose ... question': "Suppose the accused does not feel responsible, does not want to apologise or repair any damage and does not give what you may have hoped for, would you still want to have the conversation?" If the victim then states: "No, then I don't need to", the decision is fairly straightforward and the conversation does take place.

But often the victim says: "Yes, because I want to tell my story to the defendant". And then mediators are likely to facilitate the conversation between the defendant and the victim anyway.

3.3.2 The victim

The other protagonist in a mediation in criminal cases is the victim. Whether recovery occurs is partly determined by the victim. An open and cooperative attitude of the victim helps a defendant to take responsibility[45].

Is the victim able to initiate the conversation with the accused and show that they take them seriously? Is the victim capable of accepting apologies and can reasonable discussions be held with the victim about repairing the damage? In other words, the victim also bears responsibility for whether recovery can actually take place. The study found that the aforementioned recovery-oriented questions are also effective in this context during the intake with the victim. When the victim can step out of the victim role, the chances of the conversation between suspect and victim becoming a good one are increased.

45 Jonas-van Dijk, J. (2024). Opening the black box of victim-offender mediation: Does participation in vom reduce offenders' risk of reoffending and, if so, how? Doctoral thesis, University of Maastricht.

3.3.3 Subject matter of the criminal case and relationship between parties

The study also shows that the extent and manner in which responsibility should be taken by the accused is related to the subject matter of the criminal case.

There is a difference in taking responsibility in intentional or culpable offences. Intentional offences carry more weight. This 'weight' concerns the degree of intent and deliberate action during the offence. Culpable offences are usually offences that are generally referred to as an 'accident' and in any case 'unintentional'.

This also has an effect on the attitude of the parties at the mediation table. When it comes to intentional offences, the atmosphere is usually sharper and it is likely that more is expected of the defendant where taking responsibility is concerned. The responsibility of the defendant is also greater when it concerns an intentional offence than in the event of a culpable offence. In cases of culpable offences, there is sometimes no anger between parties. It is often a mistake or misunderstanding with major consequences. The conversation is usually about the consequences and what the people involved are able to do for each other.

An example of a culpable offence is a road traffic accident with a fatal ending. The consequences are dire but if no serious mistakes were made such as substance abuse, speeding or ignoring traffic signals then the intent is lacking. In these mediations, it is often not so much about what the defendant did wrong but about mutual pain. The bereaved are often keen to know what the deceased's last moments were like (for example, whether they said anything or were in pain) and talk about the impact of the accident on the lives of relatives. The defendant usually wants to tell that the event has also had a lot of impact on them. Responsibility (or taking responsibility) is not really the topic of discussion, it's about sharing pain.

Level of the relationship between those involved in a criminal case

Some criminal cases are characterised by a long-term relationship between defendant and victim. In the case of such a relationship, a pattern generally exists between the defendant and victim in which the victim may also have played a role in the escalation. This occurs regularly in neighbourly relations and domestic violence situations, for example. Neighbour disputes often involve a long-standing disturbed relationship where actions have been taken on both sides to make the other's life miserable. Who has actually crossed the line of criminal law in doing so may be a coincidence.

In situations of domestic violence, there is usually a completely skewed relationship between those involved, often existing for years and defined by fear, dominance, and dependence.

The theme in mediation is then mostly 'how do we get out of this destructive pattern in which we both play a role and what responsibility should each of us take in this respect?' The focus is then often on what both parties can do to break the negative pattern. Questions about what exactly happened, why and what everyone's story in that regard is, are of less importance. The focus is then mainly on how parties can make agreements with each other so that it does not happen again in the future.

When there is no relationship between the parties involved, for example in a random robbery, the victim will want to ask the defendant completely different questions. The anonymity of the defendant and the unexpectedness of the event are then the themes where the defendant can reach out to the victim. Taking responsibility by the defendant is then about explaining the how, what and why of the offence. In addition, the victim often lives with the question "why me?" which has contributed to a sense of insecurity and with respect to which the defendant can 'reassure' the victim.

3.4 THE JOINT CONVERSATION

In the joint conversation, repair takes shape. "This is where the magic happens" (Mediator). While repair is not always (fully) successful, it is usually a conversation in which a lot happens. As a rule, it is the first time the defendant and the victim see each other again after the offence and that last meeting was an unpleasant experience. This means the conversation is stressful for both parties.

The defendant is given the opportunity to actually face this other person to make up for something that has gone wrong because of their actions. Sometimes it is not until this conversation that it becomes clear to the defendant what the impact of their actions has been, for example, that the effect of purse snatching is not only that the victim has lost their money, cards, phone and photos and has experienced a lot of hassle as a result, but that the victim is scared, has lost their sense of security and has hardly gone outside since the offence, whereas before that time they took long walks daily.

This realisation puts more responsibility on the shoulders of the defendant than just the thought "I snatched a purse".

For the victim this means that, due to the conversation, they can take a different position from the (subordinate) position they occupied during the offence; the victim

can call the defendant to account and question them on this.

In this conversation, the mutual dynamic is all-important. Do those involved manage to listen to each other, question each other, create and restore some mutual understanding? All skills and techniques used in the intakes are also used in the joint conversation. It is the task of the mediator to create an atmosphere in which those involved can tell their stories, question each other, maintain balance in the conversation and raise repair-oriented issues.

3.5 THE CLOSING AGREEMENT

The closing agreement (see also chapter The Closing Agreement) describes the outcome of the mediation process. A central question for mediators related to the theme of responsibility is "How, in the closing agreement, do you describe the defendant taking responsibility without adding to the evidence?"

Mediators indicated that:
1.They stay close to what parties say. Use the language of parties. If a suspect says: "I thought it sucked when I heard about the state you were in" then this is written down, if possible with an explanation from the defendant and a response from the victim to this.

2.They describe whether and how the atmosphere of the conversation changes when the suspect shows interest in the victim, apologises or wants to make arrangements for recovery.

3.They don't sugar-coat it. If their views continue to differ and they do not come closer together, this is also recorded.

4.Compensation is regularly a difficult issue. For example, because specific knowledge is lacking on the part of the mediator and because immaterial damages are usually not a foregone conclusion. Another question is whether the defendant sufficiently understands what they are doing, especially if they are not supported by an attorney-at-law. Is it wise for a defendant who partially denies to pay damages? Is this then considered a disguised confession? A similar question may arise if there is a group crime and not all those involved participate in the mediation process: in such a situation, is it possible to agree on compensation while it has not been established who is responsible for what?

A similar question can be asked to the victim: does the victim sufficiently understand what they say 'yes' or 'no' to, especially if they do not have legal support.

The scope of the compensation claim is a hotly debated issue. Direct and demonstrable damages are clear and often no reason for discussion but where immaterial damages are concerned, things get trickier. This is much more difficult for the average layman to determine.
The role of Victim Support, which informs and advises victims also where their claim for compensation in criminal proceedings is concerned, is also a topic of discussion. Mediators see that Victim Support often applies high amounts for the assessment of immaterial damages, and that victims then strongly adhere to these amounts; as one mediator put it; "this gives the defendant the idea that they are now a victim of the victim's claim for damages and the victim wants to cash in on the offence". A good starting point during a mediation could be the following slogan: no one should get rich from a crime: neither the defendant nor the victim.

5. The type of case determines which specific aspects of taking responsibility receives extra attention. In the event of an intentional offence, the issue of taking responsibility plays much more of a role than in a culpable offence.

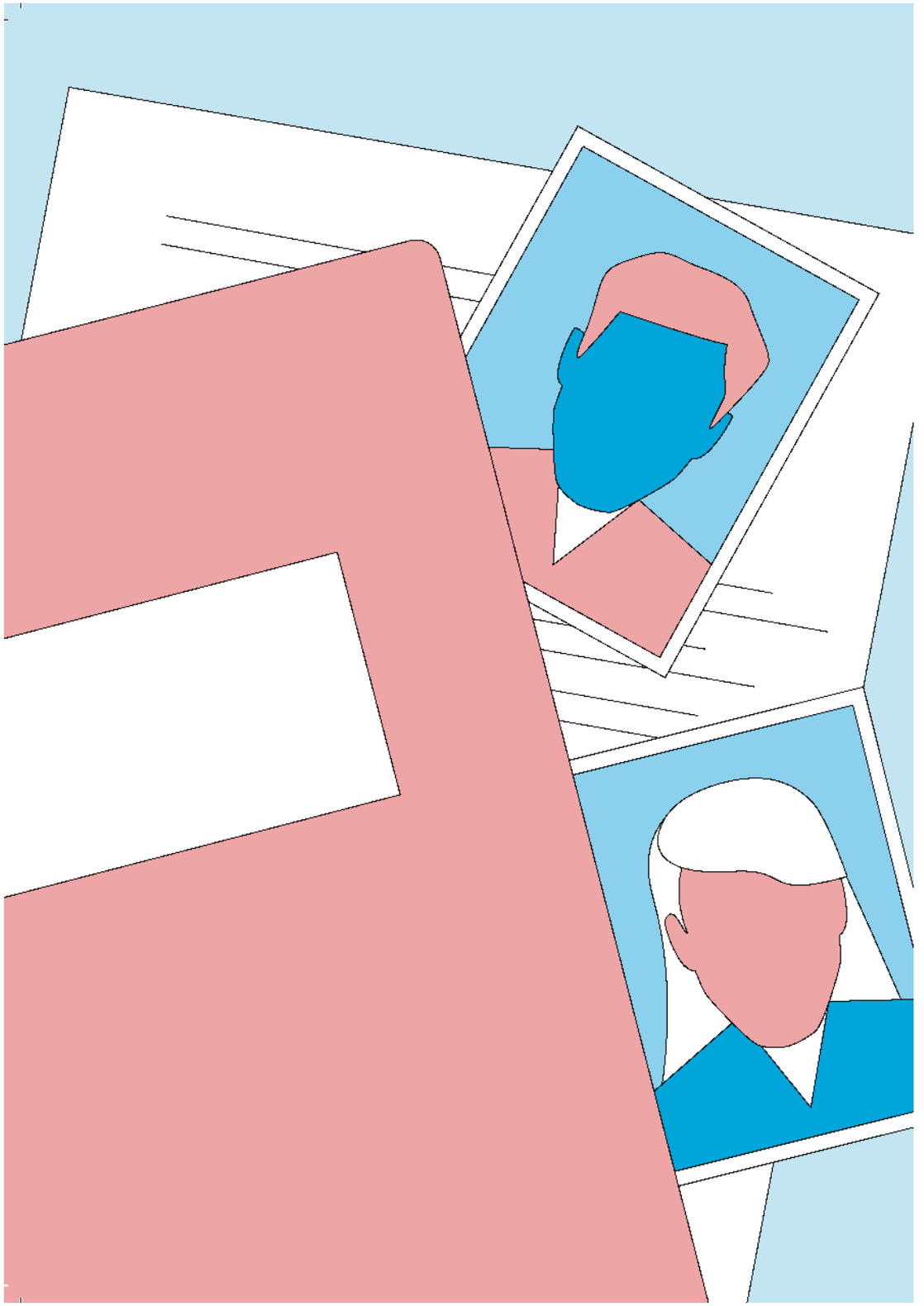
An offence that occurs in a long-term relationship often has as its core theme taking responsibility and breaking the disturbed mutual dynamic. When an offence plays out between people who do not know each other, responsibility is taken by the defendant giving an explanation of the how and why of what happened and specifically addressing why the victim was made a victim.

6. They point out to the defendant that their course of action during the proceedings has changed and discuss this with them when the accused takes more responsibility during mediation than during the hearing.

For example: the accused who explicitly denied during the interrogation that they kicked the victim ("Kicking no, I really didn't do that, I think that's cowardly") admits wholeheartedly during the mediation: "Yes, I kicked them and I very much regret that afterwards". In issues like these, mediators make this a topic of conversation. They point out to the defendant that their course of action during the proceedings has changed and discuss this with them. When a defendant explicitly indicates that they do want this to be included in the closing agreement, the mediators point out to them what the consequences are and check, as far as possible, whether the defendant can oversee this with or without the assistance of their attorney-at-law.

3.6 IN CONCLUSION

Taking responsibility is a crucial element of recovery. The mediation process is a means that promotes the taking of responsibility and mediators can use various interventions for this purpose. Mediators play an important role in 'de-offending' the offender and 'de-victimising' a victim so that the offender and the victim can have a 'person-to-person' dialogue.



4 THE PUBLIC PROSECUTION SERVICE

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4.1 INTRODUCTION

This chapter focuses on the process of a criminal case; in particular the phase at the public prosecutor's office. Of course, every criminal proceeding starts with a person reporting to the police, who is then called 'the victim'. The person charged is the suspect in the criminal case.

Dutch criminal law operates with the presumption of innocence, meaning that a suspect is innocent until proven guilty. In a criminal case, therefore, the (presumption of sufficient) evidence plays a crucial role: at the start of the proceedings, at the decision moments and when it comes to whether to refer to mediation. We therefore begin this chapter with 'Evidence'. This topic is explained using some common real-life situations. It then discusses the prosecutor's referral to mediation and the possible disposition decisions during the prosecution process. This includes special topics such as minors and the issue of judicial documentation and the certificate of conduct. Finally, there is a focus on damages resulting from the criminal offence.

4.2 EVIDENCE

In this section, we discuss evidence in a criminal case. Before a case can be referred to mediation, there must be sufficient lawful and convincing evidence. Without this evidence, the case will be dismissed with dismissal code 02 and no further prosecution will take place. Thus, this case can neither be referred to mediation, because mediation in criminal cases forms part of the defendant's criminal prosecution. Without sufficient

lawful and convincing evidence, no further criminal prosecution can take place.

Using examples of some common offences suitable for mediation, we discuss some evidentiary aspects.

4.2.1 Lawful and convincing evidence

Section 338 of the Dutch Code of Criminal Procedure describes that evidence that a suspect committed an offence can only be accepted by the court if the court has obtained a conviction on the basis of legal evidence that the accused committed that offence.

Section 339 of the Dutch Code of Criminal Procedure defines what lawful evidence consists of:

- Written documents (e.g. police reports, interrogations or findings or medical and/or expert statements)
- Own observation of the judge (everything the judge hears and sees in the courtroom during the hearing)
- Statements from the defendant (made in or out of court)
- Statements from witnesses (taken at hearing)
- Statements from experts (made at hearing)

It may happen that although there is sufficient legal evidence, the judge is not convinced. For example, when the defendant confesses, but the judge is convinced that the defendant is taking the blame for someone else. Or, for example, if witnesses state that they saw the suspect at the crime scene, but the suspect can prove that they were not there at that time. The prosecutor acts under the same principle as the judge. They will also consider whether there is sufficient legal evidence and whether they are convinced that the defendant committed the offence.

EXAMPLE: 'GARDEN PARTY'

Frans throws a big party in his garden. After the last guests have left, he cleans up the mess together with his wife Ella and her sister Celine. Ella has been drinking a lot which made Frans feel annoyed all evening. When Ella starts singing 'Have you got a minute for me' for the fifth time, Frans has had it. To silence Ella, he grabs her hard-handedly at the throat. After a few seconds Ella is able to tear herself loose and starts shrieking. Celine, who was washing dishes inside, comes running looking who is screaming and finds Ella in tears. Ella files a report of assault with the police. During police questioning, Frans denied having grabbed Ella by the throat. He states that Ella was drunk and made up the story. Celine gives a witness statement.

In this example, the evidence consists of Ella's report, the statement from defendant Frans and Celine's witness statement. All these articles of evidence fall under the category of documents. Celine's witness statement can serve as legal and conclusive evidence. Indeed, she heard the screams and found Ella in tears immediately afterwards.

Suppose that during the police investigation, it emerges that Ella and Frans are in the middle of a divorce and there is a dispute concerning the division of assets. Besides, Frans and Celine never liked each other. This may affect the evidentiary value of the witness statement. When Celine makes a statement it is legally an item of evidence, but given the circumstances, a prosecutor or a judge is not required to take this article of evidence into account in their decision. This is at the discretion of the prosecutor and the judge.

4.2.2 Assault

EXAMPLE: 'DISCO'

Two groups of students are on the dance floor in a nightclub. A scuffle breaks out. Marnix gets hit on the back of the head and falls. Two security guards intervene and separate the groups. John is kept separate in the office by a security guard and they are waiting for the police. The police are recording the report of the victim, Marnix. Marnix states that he was hit on the back of his head in the chaos, but he does not know by whom. Marnix has a big bump on the back of his head due to the blow. The security guards saw John waving his arms wildly, but did not see whether it was John who actually hit Marnix. John is drunk and declares to the police that a fight suddenly broke out on the dance floor. To protect himself, he tried to get away as quickly as possible. He says he may have bumped into someone when he tried to get away, but says he did not hit anyone. There is no camera footage.

In this case, we have several articles of evidence in the file, namely a police report, an injury, witness statements from the security guards and the statement of the accused. The question now is whether there is sufficient lawful and convincing evidence. The answer is: no. After all, there is a report and Marnix has an injury, but the report, the witness statements and John's statement do not indicate that John is the one who assaulted Marnix. After all, the security guards did not see John hitting Marnix. This case will thus be dismissed for lack of evidence. It would be different if the security guards had seen that John actually hit Marnix. Or if there were cameras in the nightclub and the assault was recorded on CCTV footage.

4.2.3 Destruction

EXAMPLE: 'DISAGREEMENT IN THE WORKPLACE'

Patricia and Samantha both work at a fast-food chain. Patricia and Samantha have been arguing for a while and after a long evening shift, Patricia wants to teach Samantha a lesson by wrecking her car. On that evening, Samantha walks to her car 15 minutes later than Patricia and sees that her wing mirrors are dangling sadly. Samantha immediately thinks Patricia did this. She walks back inside and reports this incident to her supervisor. Her supervisor tells her that

Kimberly has seen Patricia commit the destruction. Samantha files a report with the police. The police review the footage and Patricia is recognised ex officio by a community police officer from her neighbourhood. Patricia is questioned and she invokes her right to remain silent.

In this case, the file contains several articles of evidence, namely: a report, damage to the car, a witness statement (from Kimberly), camera footage and recognition by an official. All in all, that provides sufficient evidence to proceed to further criminal prosecution, despite the fact that the accused, Patricia, invoked her right to remain silent. Now suppose there was no camera footage, Kimberly did not give a witness statement because she had not been working that day and there was no recognition by an official, then there would be no lawful evidence and the case would have to be dismissed.

4.2.4 Theft and threats

EXAMPLE: 'MUSIC'

Every evening around seven o'clock, Benny practices the latest songs for the upcoming carnival season with his slide trumpet. His neighbour Jack is deeply annoyed by this. Jack has often said this to Benny. In fact, Jack meditates around that time. One evening, Jack has had enough and knocks on neighbour Benny's door. Benny opens the door, still holding his slide trumpet. Jack does not hesitate for a second and snatches the slide trumpet from Benny's hands. Jack runs out into the street, almost tripping over the neighbour Saskia who lives a few houses down the road. Benny runs after Jack and is eventually able to catch up with him. Benny asks Jack to give him his slide trumpet back, but Jack won't give it to him. Benny then angrily yells: "I'll bloody-well kill you!". Jack freaks out and the slide trumpet drops from his hands. Jack quickly flees into his home. Jack calls the police at home upset and reports a threat. When Benny hears this, he reports the theft of his slide trumpet. Neighbour Saskia reports as a witness and she states that she saw Jack running with the slide trumpet and that she heard the threat uttered by Benny. During police interrogations, both suspects confessed.

This case involves a police report and a subsequent counter police report. So the suspects are also victims. From an evidentiary point of view, these cases (the theft and the threat) are solved as there are two confessing suspects. The testimony of neighbour Saskia confirms the story. Even without this witness statement, there is sufficient lawful and convincing evidence. If both suspects were to deny and neighbour Saskia had seen nothing then it would have been one story against the other and the case would be dismissed due to lack of sufficient lawful and convincing evidence.

4.2.5 Public act of violence

EXAMPLE: 'STUDENTS'

On the last day of school before the summer holidays, Chantal, Elly and Jane are sneakily smoking a cigarette in the park opposite the school. A girl walks by, coughing badly because of the smoke. Chantal, Elly and Jane think the girl is acting up and Jane shouts: "Hey you, cut the comedy!" The girl, Rosanna, dares not respond and walks on. This really annoys Chantal, Elly and Jane.

They jump up and go after Rosanna. They are still quick to say to each other: "We'll get that coward," and grab Rosanna. Jane pulls Rosanna's hair, Elly punches Rosanna in the face several times and when Rosanna falls to the ground, Chantal kicks her in her stomach. Two passers-by pull the girls away from Rosanna and call 911. Unfortunately, they cannot prevent the three girls from running off. Rosanna reports to the police. Rosanna and the passers-by can give a good description of the three girls. The police then decide to go to the girls' school and inquire whether anyone saw or heard anything. It so happened that Hanneke received a video via social media showing the attack on Rosanna. Hanneke felt so sorry for Rosanna that she informed her mentor. The mentor reports to the police. The mentor has also seen the footage and recognises Chantal, Elly and Jane. Witness statements are taken from the passers-by, the mentor and from Hanneke. The three girls are being questioned as suspects. Jane denies she pulled Rosanna's hair and says only Chantal and Elly did anything. Chantal and Elly break during the interrogation. They are extremely sorry and state that all three of them attacked Rosanna.

In this case, the evidence is as follows: the report, four witness statements (passers-by, mentor and Hanneke), the footage and the two statements of confession made by Chantal and Elly. Again, this means that there is sufficient lawful and convincing evidence. Without this lawful and convincing evidence, the prosecutor will have to dismiss the case.

4.3 WHEN CAN MEDIATION BE REFERRED TO?

In section 4.2, we read that mediation can only be referred to if there is sufficient lawful and convincing evidence. Once this initial threshold is crossed, there are a number of moments within the criminal proceedings at which mediation can be referred to. Only the prosecutor or the judge can refer to mediation. We first discuss how and when the referral is made by the prosecutor. We then discuss the referral by the judge.

4.3.1 Prosecutor refers the case to mediation

EXAMPLE: 'SUPERMARKET'

While grocery shopping, a lady jumps the queue at the checkout. The gentleman behind objects and calls the lady to account. An argument ensues, the woman punches the man in the face and she runs out of the shop. Meanwhile, a customer in the supermarket sees what happens and calls the police. The police arrives at the scene, speaks to the man and bystanders (witnesses) and records the report by the man. Several officers go looking for the woman. In the car park, they see a woman who matches the description given by witnesses. The woman is detained and taken to the station for questioning. In this example, the accused confesses to have assaulted the victim. The police and/or Victim Support Netherlands inquire with suspect and victim whether they are open to mediation. This is the case.

The police then presents the case to the public prosecutor. The public prosecutor assesses whether there is sufficient lawful and convincing evidence. In this example, there is sufficient evidence and both the victim and the defendant are open to mediation. After this evidentiary determination, the public prosecutor may decide to refer the case to the court's mediation office.

A brief summary of what happened in this example:

- A criminal offence takes place
- The police then carry out the necessary investigative actions (recording a report if necessary)
- The defendant and the victim both indicate they are open to mediation and the public prosecutor refers the case to mediation.

At the time the public prosecutor refers the case to mediation, they have not yet made a disposition decision. That is, the prosecutor has not yet decided whether, for example, they are going to summon the accused or impose a penalty order or a discretionary dismissal. The public prosecutor will make their decision on the case only after the mediation office has provided feedback on the results of mediation. In section 4.4, we will elaborate on the different decision options.

The starting point is that on the basis of Section 51h of the Dutch Code of Criminal Procedure, the public prosecutor shall inform the victim and the accused as soon as possible that mediation is possible.

The police are usually the ones who ask the suspect and victim if they are open to mediation. In addition, the probation service, or in the case of a juvenile defendant, the Child Protection Council, may also ask the suspect if they are open to mediation. Victim Support Netherlands can present this question to the victim.

As discussed in the previous section, a referral to mediation always requires sufficient lawful and convincing evidence. The public prosecutor considers whether they find the case suitable for mediation. Whether the case is suitable for mediation varies from case to case and depends, among other things, on the willingness of the victim and the suspect. If the victim and/or accused are not open to mediation, the prosecutor will not refer the case to mediation. Mediation cannot take place against the will of the victim and/or the suspect.

For example, one reason not to refer a case to mediation is a case in which the suspect denies. A conversation between a denying suspect and a victim could lead to secondary victimisation. The victim then gets no recognition and mediation consequently does not solve problems, but may increase victimisation.

Four examples were discussed in section 4.2. In the first example (the assault case), the prosecutor will not refer the case to mediation because there is no lawful evidence. In the other examples, the prosecutor can refer the case to mediation, but the prosecutor will need to know whether the parties are open to mediation. If this is not the case, for example if Benny who threatened neighbour Jack is not open to mediation, then the prosecutor will not refer the case to mediation but will directly make a decision with respect to the disposition of the case. Section 4.4 discusses the available decisions for further handling.

4.3.2 Judge refers the case to mediation

In cases where the public prosecutor has not referred the case to mediation, but has directly summoned the defendant to appear in court, only during the hearing does the judge still have the option of referring the case to mediation. It may be that the public prosecutor did not consider the case suitable for mediation or that the parties were not open to mediation at the time. During the hearing, the judge may (still) refer the case to mediation if they consider that this will benefit the victim

and/or the defendant. The prosecutor and the judge both have their own discretion.

If the case is referred to mediation during the hearing, the judge will adjourn the case. This means that the judge will not yet give a judgement and will wait for the outcome of mediation. In such cases, the court often adjourns the case for a certain period of time. A new date for the hearing will then be set. In the meantime, mediation can be initiated by the court's mediation office. Once the mediation has been completed, the mediation office will give the results to the judge. In their ruling, the judge will then take the outcome of the mediation into account. This obligation to take cognisance is laid down in Section 51h(2) of the Dutch Code of Criminal Procedure.

4.3.3 Requests for mediation

During the entire criminal proceedings, the defendant, the victim and both their attorneys-at-law can request the public prosecutor and/or the judge to refer the case to mediation. It is preferable to do this as early as possible. During the hearing, an attorney-at-law may propose referral to mediation, but the judge can also suggest it themselves.

4.3.4 Flowchart

The flowchart below shows the steps that (can) be gone through in a criminal case in which the prosecutor refers a case to mediation.

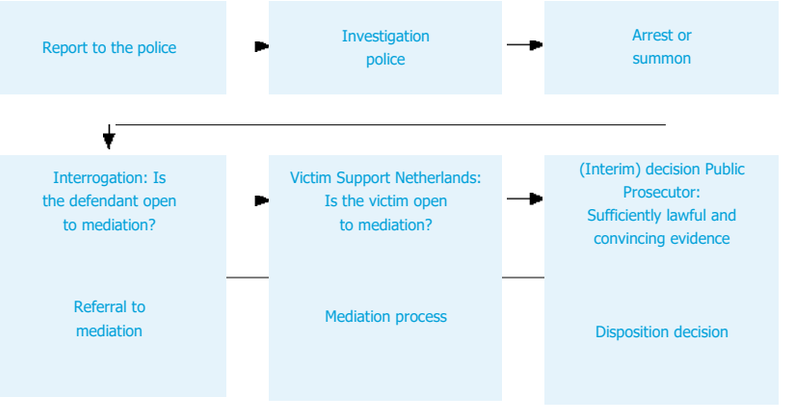


Figure 2 Flowchart of steps that can be completed. Note that this chart contains the most common steps and their sequence. Variations on this are possible.

4.4 PUBLIC PROSECUTOR'S DISPOSITION OPTIONS

When the investigation is complete and the public prosecutor has all the information they need, the public prosecutor will take a so-called 'disposition decision'. In this section, we discuss the different disposition options in a criminal case and the consequences this may have for the accused's judicial documentation.

4.4.1 Dismissal

If the public prosecutor decides not to prosecute a suspect (any further), this is referred to as 'dismissal'. The prosecutor can dismiss criminal cases (or only certain offences) until the court hearing (if any). If, for example, at the hearing before the judge the public prosecutor finds that there is insufficient evidence, they can ask the judge to acquit the accused. Acquittal means that there is insufficient legal and/or convincing evidence that the accused committed the offence charged. Thus, no conditions can be imposed either. The criminal case is then ended, except for the possibility of appeal. When a case has been dismissed, the prosecution may still be resumed in exceptional cases. For example, if new facts have come to light after the dismissal and therefore there may still be sufficient lawful and convincing evidence to allow further prosecution to take place[1]. Or, for example, if special conditions were imposed and these were violated. There are two types of dismissals: technical dismissals and discretionary dismissals. The following briefly explains the difference between these two dismissals.

4.4.1.1 Technical dismissal

If the public prosecutor finds that there is no real chance of a conviction, a technical dismissal will follow. Consider situations where there is insufficient evidence, cases where the prosecution is found to be inadmissible or where it is determined that the accused is not punishable. For example, the public prosecutor is inadmissible if the accused has died and the criminal case is still brought to court. Or, for example. the accused is not punishable if they cannot be blamed for the event or if they had a good reason (justification) for doing what they did.

In cases where the prosecutor decides to technically dismiss a case, they will not refer the case to mediation, as the accused will no longer be prosecuted.

1 Also, following a so-called 'Section 12 procedure' (Section 12 of the Dutch Code of Criminal Procedure), the public prosecutor may be ordered by the Court of Appeal to still proceed to (further) prosecution.

This means that if the case was referred to mediation, this will not be followed by a technical dismissal.

4.4.1.2 Discretionary dismissal

Discretionary dismissals are applied in cases where (further) prosecution is technically possible - i.e. there is sufficient lawful and convincing evidence - but there are other reasons not to (further) prosecute the suspect. For example, in cases where not only the suspect, but also the victim had a share in the offence. It also happens that after the offence has been committed, but before or after mediation, the relationship between the suspect and the victim has been restored. In other cases, the health condition of the suspect may make further prosecution inappropriate. An example is when a suspect suffers from a severe form of dementia and subsequently commits a criminal offence.

Discretionary dismissals can be imposed conditionally or unconditionally. With an unconditional discretionary dismissal, no conditions are imposed on the defendant and therefore an operational period is not required. In the case of a conditional discretionary dismissal, the prosecutor imposes general or special conditions on the accused.

How long the suspect must comply with these conditions is laid down in a so-called operational period. This operational period is imposed for a specific duration by the prosecutor. The operational period has no minimum but does have a maximum duration. In principle, the operational period can be imposed for a maximum of three years.

The general condition is that the suspect should not commit any criminal offence within the operational period. However, if the suspect does commit an offence, the public prosecutor will prosecute the suspect. There are several special conditions, such as an obligation to report to the probation service, a contact or exclusion order, compulsory (outpatient) treatment or an alcohol or drugs ban. The probation service and the police often supervise compliance with the special conditions described above. The prosecutor decides for each case what special condition(s) is (are) appropriate.

4.4.2 Penalty order

The penalty order is imposed without the intervention of a judge by the public prosecutor. The imposition of a penalty order means that the public prosecutor has established that the accused is guilty of the offence. The penalty order often consists of a fine or community service. This is governed by Section 257a of the Code of Criminal Procedure. The public prosecutor may impose community

service up to at most 180 hours, but this can only be done if the accused has been heard by the public prosecutor. This is done, for example, via a video link if the suspect is at the police office (also known as 'tele-hearing') or via an 'OM hearing' (Public Prosecution hearing; see next section).

The public prosecutor may also decide to impose a penalty order by which the accused has to pay compensation to the victim. The Public Prosecutor's Office leaves the collection of the fine and/or compensation to the 'Central Judicial Collection Agency' (hereinafter: CJIB).

If the accused disagrees with the imposed penalty order, they can object. How this works is explained in the penalty order. The case will then be submitted to the court.

4.4.3 Public Prosecution hearing (formerly: 'TOM' hearing)

In some cases, the public prosecutor does not directly impose a penalty order. For example, if the public prosecutor intends to impose community service on the accused or if the public prosecutor asks the probation service to submit a report on the accused. The public prosecutor, or a mandated (senior) public prosecutor's clerk, invites the accused to a Public Prosecution hearing (PP hearing). During the hearing, the public prosecutor hears the accused and may ask the accused questions. The prosecutor will then present the accused a proposal concerning the punishment. During the OM hearing, the prosecutor still has the power to dismiss the case if they are of the opinion that there is insufficient evidence or that there are other reasons to still dismiss the case.

Any compensation for the victim may also be taken into account during the 'OM hearing'. If the accused agrees with the prosecutor's proposal, the punishment will be imposed in the form of a penalty order. If the accused does not agree, they can oppose the penalty order, or the accused will be summoned. Even if the accused does not appear at the hearing, the accused will be summoned.

4.4.4 Summons

The public prosecutor may decide to summon the accused. This decision may be made immediately, for example when the offence is sufficiently serious or if one or more suspended sentences have already been imposed on the accused. It is also possible to proceed to a summons in the following cases:

- The accused has violated one or more (special) conditions imposed at the time of conditional dismissal
- The penalty order has not been satisfied by the accused
- The accused did not appear at the 'OM hearing'

If the prosecutor decides to summon the accused, the accused will receive a summons. The summons must be served. The prosecutor decides to which forum the case will be brought, for example to the police judge or to the multi-judge (criminal) division. The choice of forum depends on the expected punishment order. For example, a police judge can impose a maximum of one year's imprisonment and the three judges of the multiple-judge division can impose a prison sentence of more than one year.

The victim will be informed of the disposition decision of the public prosecutor. When the accused is summoned or receives an invitation for a PP hearing, the victim will receive forms on which they can indicate that they want to join the criminal proceedings as an injured party. This form concerns the 'Request for Compensation' and will have to be filled in by the victim if the victim wants compensation. More on this is discussed in section 4.7.

At the hearing, the public prosecutor will introduce the claim of the injured party. This means that the public prosecutor discusses and explains the claim if necessary. They will then ask the court to grant the claim, reject it (if the claim is not or insufficiently substantiated) or declare it inadmissible. The court will also decide on the injured party's claim in its judgement.

4.5 MINORS

If a suspect is under the age of 18 but has reached the age of 12, we refer to them as a juvenile suspect. For minors, the juvenile criminal law applies, in which, for example, the maximum sentences are lower than those within regular criminal law. The disposition options in criminal cases involving juvenile suspects are generally similar to the disposition options discussed in the previous sections. There are a few minor differences:

- The police and/or the public prosecutor may refer a juvenile suspect to 'Bureau Halt'. The 'Halt' sentence is an intervention for juvenile suspects. To qualify for Halt, a number of conditions must be met. For example, the damages should not exceed a specific amount (differs for each offence), the

suspect must be willing to cooperate and, in principle, the suspect should not be allowed to go to Halt twice for a crime. For other conditions and further information, please refer to the Halt website[2]. This website lists, among other things, the offences that are supposedly 'Halt-worthy' (e.g. vandalism, misuse of emergency numbers and committing overt property violence).

- We discussed the PP hearing in section 4.4.3. There is also a variant of this PP hearing for minors; it is called OTP (Summons to the Public Prosecutor's Office).
- If a juvenile suspect is summoned, the case is referred to the juvenile court instead of, for instance, the police court.

Mediation can also take place in criminal cases involving a juvenile suspect. It is then important that the parents consent to participation by the juvenile suspect in the mediation and that at least one of the parents is present at the conversations. If a juvenile suspect is referred to Halt, they cannot also be referred to mediation in criminal cases. Halt's programme includes restorative mediation. This restorative mediation is carried out by an employee of Halt.

Since Halt itself pays attention to restorative mediation, a referral to mediation combined with a referral to Halt would constitute two referrals. With respect to the options provided by Halt and mediation, it is important to realise that a successful trajectory at Halt will not be shown in the judicial records. A disposal decision that will be made after the mediation process has been completed will be shown in the judicial records.

4.6 JUDICIAL RECORDS AND CERTIFICATE OF CONDUCT

The judicial documentation and the Certificate of Conduct (hereinafter: VOG) is discussed below. Many suspects want to know the consequences an entry of an offence on the judicial records has for obtaining a Certificate of Conduct.

4.6.1 Judicial records ('criminal record')

The disposal decisions mentioned above may affect the judicial records of suspects. Judicial documentation is also referred to as a criminal record. An offence does not appear in a person's judicial records until the public prosecutor has made one of the aforementioned decisions. There are two exceptions. If the public prosecutor finds that someone has been wrongly classified as a suspect (technical dismissal with code 01) or if a minor has positively completed the Halt-process, those offences do not appear in the judicial records. The other disposition decisions such as technical and discretionary dismissals, the penalty order and the summons are always set out in one's judicial records.

So, if the public prosecutor has not yet made a decision and, for example, it only concerns charges that have been made against someone, this will not appear in that person's judicial records. If the offence was reported to the police, the suspect has been interrogated and the public prosecutor has decided to impose, for example, a penalty order on the suspect, then the offence is visible in the judicial records.

The judicial records for each criminal case show the following:

- Instance (e.g. police judge or public prosecutor of a specific public prosecutor's office) and the case number (also called public prosecutor's office number)
- The date of the decision
- The offence (with a referral to the applicable section of the law)
- The social classification (e.g. Domestic violence or Shopping theft)
- The date of the offence (or offence period)
- PV (the police district that took up the case)
- Status of the case (e.g. decision of a '(conditional) dismissal' or 'summoned' or in the case of a court conviction, final, and the date
- When a judge gives a sentence, it also states what decision the judge made

4.6.2 Certificate of Conduct (VOG)

Many suspects or convicted persons wonder, what consequences the content of their judicial documentation has for obtaining a Certificate of Conduct (VOG).

There is no single answer to this. If a VOG is required by an employer, the employer must inform Justis of the desired screening profile. This profile may vary with each employer and position. As soon as the employer has submitted an application to Justis, Justis will conduct an investigation into the judicial records of the person in question. Where no offences related to the position have been

2 www.halt.nl

committed then a VOG is issued by Justis. Obtaining a VOG therefore depends on the position and judicial history. When someone has questions about their judicial records and obtaining a VOG, it is advisable to refer them to Justis[3].

4.7 DAMAGE

Criminal cases often involve damages. In our example of the damaged car in section 4.2.3, Patricia is the one who is suffering the damage. As the owner of the car, she is the victim and the so-called injured party. We discussed overt violence in section 4.2.5. In that specific case, Rosanna is the one who suffers damages: she was abused by Chantal, Jane and Elly. Section 51f of the Dutch Criminal Code describes that the person who has suffered direct damages due to a criminal offence can join the criminal proceedings as an injured party. The damage suffered must be directly linked to the offence. An example is getting punched in the face and one's glasses breaking as a result. The broken glasses are directly related to the assault and are considered property damage. In this section, we discuss damages in criminal proceedings.

4.7.1 Material and/or immaterial

In this section, we discuss what types of damages the victim can be compensated for. There are two different types of damages: material and immaterial. Material damage is damage that can be directly expressed in monetary terms. For instance the costs Patricia has to incur to get her car repaired. In Rosanna's case, this could include damaged clothes, phone and/or other items. Rosanna may also have had to incur medical expenses and travel and parking costs. These are all examples of material damage. Material damage can for instance be proved by means of invoices, bank statements and/or receipts, so that the actual material damage suffered is identified as concretely as possible.

Immaterial damage cannot be directly expressed in monetary terms and is of a different nature than material damage. In Dutch, immaterial damage is also popularly referred to as 'smartengeld' (compensation for immaterial damages). Immaterial damages are regulated by the Dutch Civil Code (hereinafter: DCC), which in itself is remarkable: after all, our subject involves criminal proceedings. This is due to the fact that the victim can join the criminal proceedings as an injured party. The victim in criminal proceedings is not a party but a participant in the proceedings and contributes an element of civil law to criminal proceedings.

3 www.justis.nl

Section 106 of Book 6 of the DCC states that an injured party may be entitled to compensation for loss that does not consist of pecuniary damage (i.e. immaterial damage). A number of conditions must then be met, including:

- the liable person (the defendant) must have had the intention to inflict the harm caused, or
- the injured party has suffered bodily injury, been harmed in their personal honour or reputation or has otherwise been affected.

The latter occurs, for example, when the offence represents a serious violation of a fundamental right. For example, the invasion of privacy in cases of stalking. There is then no physical injury or damage to honour or reputation, but the victim's privacy has been affected, with all the consequences resulting therefrom.

Therefore, if Rosanna from section 4.2.5 has physical injuries, she can claim compensation for immaterial damages. Neighbour Jack from section 4.2.4 was threatened. This could fall under the condition that Bennie intended to instil fear in Jack or under the condition relating to personally affecting Bennie by other means. If Jack can sufficiently prove that he suffered immaterial damages as a result, he could also claim compensation for these immaterial damages. Bennie had the intention to instil fear in Jack, thus fulfilling the first condition. Indeed, it is possible that Jack experienced moments of anxiety, has been feeling more wary and sleeping poorly since the incident. So you could also argue that Bennie seriously invaded Jack's privacy.

In each case, the substantiation of immaterial damages requires customisation. The consequences of the same offence may vary greatly between victims. It is important to identify the consequences as specifically as possible and then consider whether the consequences fall under one of the conditions. The victim is only eligible for compensation for immaterial damages if the consequences fall under one of the conditions.

4.7.2 When and how to recover damages in or outside the mediation process

In this section, we discuss when and how the defendant can compensate for damages. For this purpose, we distinguish between compensation for damages during the mediation process and compensation for damages outside the mediation process.

4.7.2.1 During the mediation process

It is preferable to settle damages between the parties during the mediation process as much as possible. This is because the parties can then discuss the damages with each other and directly agree or indicate willingness to compensate. For example, if the public prosecutor imposes a penalty order, this is of a mandatory nature and there is a chance that the accused may object. Due to this objection, it will take longer before the victim and the accused have clarity on the outcome of the criminal case. Another advantage is that in a number of cases, the damages can be settled quickly and the parties can close the damage part together.

If the damages are settled during the mediation, the agreements made in this respect are recorded in the closing agreement signed by the parties (see chapter 9). The public prosecutor takes note of the contents of this closing agreement.

In the mediation process, damages can be settled in various ways:

- The parties can settle damages directly during the joint discussion. For instance, the agreed amount can be paid in cash or transferred to the injured party's bank account right there and then. If so, the agreement states that the claim for damages has been settled. In the event of direct payment, it is advisable to have the closing agreement signed before the time of payment and to ensure that the parties waive the reflection period. This will prevent the defendant from having already transferred an amount and the victim from deciding during the reflection period not to sign the closing agreement.
- The parties can agree (and include this in the closing agreement) to settle the damages in the short term, for example within five days of the expiry of the reflection period. This allows the mediator to be notified of the settlement before the mediator forwards the closing agreement to the mediation officer.
- In cases where the defendant is willing to compensate for the damages, but is not financially able to do so immediately or in the short term, the willingness to compensate for the damages may be included in the closing agreement. The parties may then comment that they request the public prosecutor to impose compensation for these damages on the defendant. This can be done, for example, through a penalty order or as a special condition in a conditional dismissal. Please note that this concerns a request presented to the public prosecutor. This does not mean it is an obligation of the public prosecutor. The public prosecutor remains the authority that makes the decision with respect to the disposition of the case. If the public prosecutor does not have the damages compensated through a penalty order or conditional dismissal, the victim can challenge the defendant in civil-law proceedings on the basis of the closing agreement.

If the parties include the arrangement they made with respect to compensation for damages in the closing agreement and the defendant has settled the damages in accordance with the agreements made, the victim can no longer recover those damages from the defendant through the criminal proceedings. It is wise to discuss this with the parties during the conversations and include it in the closing agreement. The closing agreement is in principle a civil-law contract.

4.7.2.2 Outside the mediation process

If the damages are not settled during the mediation, the public prosecutor may decide to make the defendant compensate for the inflicted damages. The public prosecutor will approach the victim, possibly through 'Slachtofferhulp Nederland', to ask whether there are any damages and, if so, whether the victim wants to recover these damages from the defendant through criminal proceedings. If the victim wants to recover these damages, they must substantiate the damages they suffered. This substantiation can be given using the claim forms the victim receives from the public prosecutor. On these forms, the victim can indicate, among other things, what the damages consist of and what the consequences of the offence are/were for the victim. The victim can be represented at their own request by, for example, an attorney-at-law or an employee of 'Slachtofferhulp Nederland'.

The public prosecutor may decide that damages must be paid if the claim has been sufficiently substantiated. Damages can be compensated, as described in section 4.3.3, through a penalty order or by means of a special condition in a conditional dismissal.

If the public prosecutor decides to summon the accused, the judge will make a decision regarding damage if the victim has joined the proceedings as an injured party and filed a claim for compensation. The court may decide to fully or partially grant or reject the injured party's claim. The court may also declare the injured party (partially) inadmissible. This happens, for example, in cases where the damage is too extensive and too complicated to be dealt with during the criminal proceedings. Such treatment would then place too great a burden on the criminal proceedings, think, for example, of the time it takes to deal with the claim. If the court has declared the

injured party inadmissible (for part of the claim), the injured party can then present the claim to the civil court.

EXAMPLE: 'RATTLESNAKE'

Jimmy works at the zoo and has an argument with William, his colleague. Jimmy is a lion keeper and William works with reptiles. When William is cleaning the rattlesnake's enclosure, Jimmy is just having his break and he is watching the snakes. Since the terrarium is open, Jimmy seizes his chance to finally touch the rattlesnake. William is not taken in by this and while Jimmy still has his hand in the terrarium, William forcefully slams the lid shut. Jimmy's hand is broken. Jimmy's claim is discussed during the hearing. Jimmy states that he has severe mental health problems due to the abuse and is unable to work as a result. Jimmy is fired because he has ceased to show up at the zoo. Jimmy claims lost income, costs incurred for his therapies and he spent a week at a spa to recover from the shock. He also wants to recover the costs of this stay from William through the criminal proceedings.

In the above example, there is a chance that the court will find Jimmy inadmissible in his claim because it is not easy to determine whether the damages are directly related to the assault. The claim is too complicated to deal with during the criminal proceedings. If Jimmy is declared inadmissible in his claim, he can turn to the civil court.

If the victim has taken out insurance for the damage suffered, then the victim's insurance may be able to compensate the victim for the damage suffered. Such as, for example, when a car is vandalised. Recovering damages through the criminal proceedings generally takes longer than recovering damages through insurance, because in the criminal proceedings, for example, you have to wait for the prosecutor's disposition decision which is possibly followed by a court hearing and a subsequent court ruling. Once the victim knows who the suspect is, the victim's insurance company can try to recover the damage from the (the insurance of) the suspect.

If damages were paid by insurance, then these damages cannot also be recovered through the criminal proceedings. Only if not all the damages are compensated can the victim still try to recover the part of the damages not compensated by the insurance from the defendant through the criminal proceedings.

4.7.3 Amount of the claim

Determining the amount of material damages is relatively straightforward. Indeed, material damage must be substantiated. This can be based on, for example, a receipt from the repair, a damage report from the garage in case of a damaged car or by establishing the current market value of an item.

Determining the amount of the immaterial damages is more difficult and requires another practice. Section 106 of Book 6 of the Dutch Civil Code states that compensation for immaterial damages must be fairly assessed. What is fair is different in each case. Case law (previous court decisions) has shown that all the circumstances of the case must be taken into account. This means that account must be taken of, for instance, (the severity of) the injury, the (duration of the) effects on the victim's mental state. In this respect, consider the difference between a black eye and a broken leg. For example, there are victims who sleep a little worse for a few nights after a threat, but there are also victims who develop post-traumatic stress disorder (PTSD) after a threat. In addition, account is also taken of what damage amounts have previously been awarded by Dutch courts in similar cases. These rulings act as a kind of guideline in determining a reasonable and fair amount of damages. Such rulings can be searched for, for example, on the jurisprudence website[4] or in the 'ANWB Smartengeldgids' (ANWB Guide for Compensation of Pain and Suffering)[5]. The 'ANWB Smartengeldgids' lists verdicts with the awarded damage amounts.

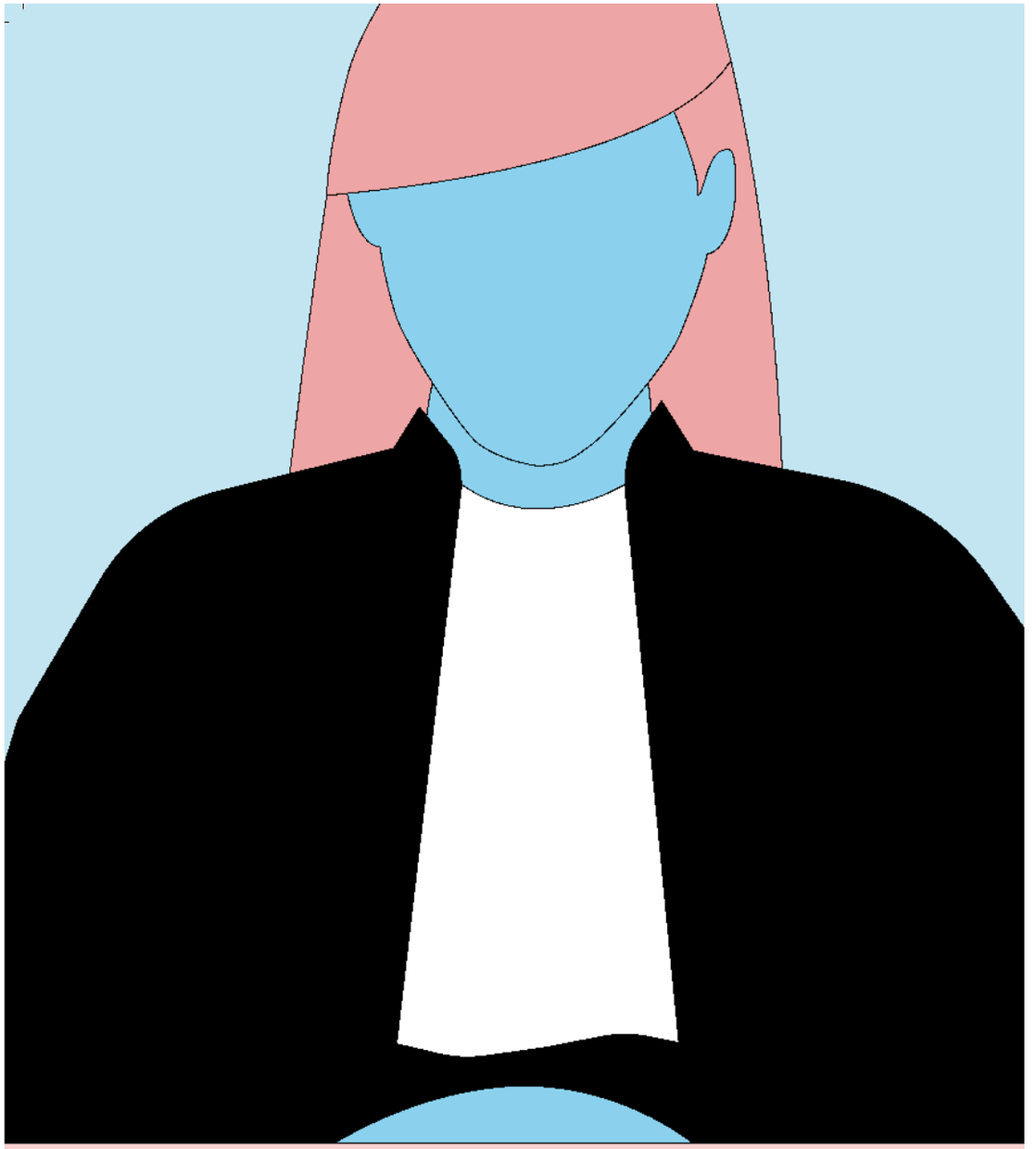
4.7.4 Compensation measure

In awarding compensation to the victim, the public prosecutor and the judge can impose the so-called compensation measure on the accused under Section 36f of the Dutch Criminal Code. This means that the accused must pay the compensation to the CJIB (Central Fine Collection Agency). The CJIB will collect the awarded amount from the accused and once they have received the money, they will credit the amount to the victim. This means that the victim does not have to collect the compensation amount from the accused themselves.

If the compensation measure has been imposed, but CJIB has not received compensation from the accused within eight months, the Dutch government will pay the compensation to the victim. This is also referred to as the advance payment scheme: the amount of damages is advanced to the victim. CJIB does continue its efforts to collect the amount from the accused.

In Chapter 5: 'The Court' and Chapter 6: 'Damages and Compensation' this subject matter is discussed in more detail.

4 www.rechtspraak.nl
5 ANWB Smartengeldgids (ANWB Guide for Compensation of Pain and Suffering), www.smartengeld.nl



5 THE COURT

Tanja van Mazijk LL.M.

5.1 INTRODUCTION

This chapter focusses on the criminal proceedings during its phase at the court. If the public prosecutor thinks the judge should decide on the case, they will forward the case to the court. The public prosecutor will then summon the defendant to appear in court. The court then decides first if the defendant is guilty and then what punishment they will be given. Just as with the public prosecutor, the presumption of innocence also applies here. A suspect is innocent until proven guilty.

We begin this chapter with a brief discussion of what happens at the court session. In the following, we discuss the decisions the judge can make, whereas the grounds for punishment and the (special) conditions and measures the judge can impose are also discussed. Finally, the role of the probation service is discussed.

5.2 AT THE SESSION

5.2.1 Single and multi-judge division

District courts and courts of appeal have single and multi-judge divisions. In a single-judge division, justice is administered by a single judge. In a multi-judge division, justice is administered by three judges. A multi-judge division decides on serious or complex cases and appealed cases.

5.2.2 The right to address the court

In certain cases, the victim (or the surviving relative of the victim) has the right to address the court. This right is granted to victims of more serious crimes so that they can make a statement during the criminal hearing. Whether the victim actually has the right to address the court depends on the type of crime. The victim always has the right to address the court in the event of:

- Offences for which the offender can receive a prison sentence of eight years or more
- A number of other offences such as sexual offences, stalking, threats and a traffic accident resulting in serious bodily injury or death.

5.2.3 The ruling of the judge

The single judge usually decides on the criminal case immediately at the end of the criminal hearing. The decision is called judgment or sentence. In criminal hearings on more serious offences, the multi-judge division does not immediately give its judgment. It does, however, announce the date on which the decision will be given. That is within 14 days of the hearing.

5.3 POSSIBLE COURT DECISIONS

The judge can acquit the accused, discharge the accused from all prosecution or impose a (suspended) sentence. All three options are discussed below.

5.3.1 The accused is acquitted

The accused will not receive any sentence because they are acquitted. This means that, according to the court, the offence has not been proven. It may also mean that the accused's guilt has not been proven. The criminal proceedings stop if the accused is acquitted and no appeal is filed.

5.3.2 The accused is discharged from prosecution

In a criminal case the court may rule that there is a ground for exemption from criminal liability due to which the accused cannot be punished, even though the offence has been proven.

A successful appeal for such an exemption from criminal liability results in the defendant being discharged from all prosecution (OVAR). This means that the offence has been proven but the accused cannot be punished.

Grounds for exemption from criminal liability are divided into grounds for justification and grounds for exemption from guilt.

5.3.2.1 Grounds for justification

A justification ground removes any unlawfulness (illegality) of an act. This means that a person has not committed an offence. In other words, someone did not break the law.

There are five justification grounds:

- **Force majeure as a state of emergency (Section 44 Criminal Code).** An example in this justification is someone breaking the speed limit on the road because they need to take their pregnant wife to the hospital as soon as possible.
- **Self-defence (Section 41(1) Criminal Code).** An example of self-defence is when someone is threatened with a knife and has to hit the offender with a bat to save their own life.
- **Authorised official order (Section 43(1) Criminal Code).** An example here is when a person is ordered by a policeman to go through a red light because the policeman needs to be at a specific location as soon as possible.
- **Legal requirement (Section 42 Criminal Code).** This resembles the justification ground of an authorised official order. Think of a policeman forcing a car into the curb. The policeman was following a legal requirement, apprehending the suspect, but was nonetheless liable for the damage to the suspect's car.
- **Absence of substantive unlawfulness.** An unwritten justification, which has emerged from case law. A well-known example of this justification is a veterinarian bringing healthy cows into contact with infected cows. This act is punishable, but they did this so that the healthy cows would develop antibodies against the infection. The Supreme Court ruled that the vet was not guilty even though their actions violated the law.

5.3.2.2 Grounds for exemption from guilt

If a defendant can successfully invoke a ground for exemption from guilt then they are not guilty and therefore not punishable.

The most well-known grounds for exemption from guilt are:

- **Mental disorder (Section 39 Penal Code)** To successfully invoke this ground for exemption from guilt, there must be a defective development or pathological disorder of the mental faculties. This could include someone with an intellectual disability who has committed a criminal offence. A suspect who has committed an offence when drunk or under the influence of drugs cannot invoke this ground.

- **Psychological force majeure (Section 40 Criminal Code).** Psychological force majeure must involve an external urge over which a person has no control. This means that the person is forced to make a certain choice. An example of this is when someone has to help commit a criminal offence because otherwise something will be done to them.
- **Excessive force in self-defence (Section 41(2) Criminal Code).** Excessive force in self-defence means that the exceeding of the limits of necessary defence is not punishable, if such exceeding has been the immediate consequence of a strong emotion. For example: a young woman is cycling on a country road in the dark when suddenly someone grabs her from behind. In response, she hits this person against the head with the chain lock. This is a disproportionate act compared to being grabbed from behind. She could, after all, have tried to escape on her bicycle. However, the judge has ruled that she cannot be blamed for the beating because this situation involved excessive force in self-defence.
- **Unauthorised official order (Section 43(2) Criminal Code).** This ground for exemption from guilt hardly occurs in practice. The case involves an accused who complied with an order which they did not know or did not need to know was an unauthorised order.
- **Absence of all guilt (AVAS).** AVAS (*'Afwezigheid Van Alle Schuld'*) is an unwritten ground for exemption from guilt arising from case law. This occurs when a person violates a legal requirement but did not know or did not need to know that this legal requirement existed. Consider someone accessing an area where access is prohibited while there are no signs indicating that access is prohibited.

5.3.3 The offender is sentenced

There are three main sentences:

- Prison sentence: the offender has to go to prison.
- Pecuniary penalty: the offender has to pay a fine.
- Community service: the offender must perform unpaid work for a certain number of hours.

5.3.3.1 Suspended sentence

A judge may impose a suspended sentence. A suspended sentence means that the sentence is imposed but with the condition that it will not be enforced now. The convicted person must then comply with the conditions set by the court for a certain period of time (usually two or three years). This period is called the operational period. If the convicted person does not comply with those conditions, the court may decide that the suspended sentence should still be enforced. The judge cannot impose a suspended sentence in all cases. If the offence is of such a serious nature that the convict should receive a sentence of more than four years, a suspended sentence is not possible. Apart from a prison sentence, the court can also impose other types of sentences wholly or partly conditionally, such as community service, the pecuniary fine and disqualification from driving.

The suspended sentence and the special conditions give judges and public prosecutors many options to design the sentence so that it is best suited to each individual case.

A. General and special conditions

It applies to all suspended sentences, that the person convicted may not commit another offence during their operational period. If the convicted person does, the court may decide that the suspended sentence must still be carried out. This agreement is called the general condition. In addition, the court may impose special conditions. For example, the person convicted may not be allowed to visit a specific neighbourhood (the location ban), to contact the victim (the contact ban) or to consume alcohol or drugs (the drugs and alcohol ban) during their operational period. Sometimes the judge determines that the accused should go into therapy or take a special course in order to learn to behave differently. Below are the special conditions mentioned in the law.

AN EXAMPLE OF A SUSPENDED SENTENCE

The court imposed a prison sentence of 12 months, six of which were suspended, with an operational period of two years and with special conditions requiring the accused to comply with the regulations and instructions of the probation service. In practice, this sentence means that the accused must serve six months in prison, and in addition they must abide by the agreements with the probation service for two years, and that they should not commit any new offences during that same period, otherwise they will still have to serve six months in prison. If the defendant is suspected of a new offence during the two-year operational period, the public prosecutor may request, in addition to a sentence for the new offence, enforcement of the suspended six-month prison sentence. The same can be requested by the public prosecutor if the probation service reports that the accused is not fulfilling the agreements with the probation service.

5.3.3.2 Measure imposed on the offender

The public prosecutor can also request the court to impose a measure. For example, the confiscation of goods such as narcotics, weapons or illegal copies of CDs or seizing crime profits, or imposing a compensation measure according to which the offender has to pay an amount to the victim. A special measure is detention under a hospital order, in Dutch abbreviated into 'tbs' ('*terbeschikkingstelling*'). The public prosecutor can request this measure in cases of offenders with mental disorders.

The judge can impose 'behavioural-influencing conditions' on someone. Someone then needs to work on their behaviour. For example, by following a violence and aggression training course. A person can also be imposed 'conditions aimed at care'. The offender is then placed under treatment at a mental health or addiction institution.

In practice, the judge has great freedom in imposing special conditions and measures, and combinations of sentences, conditions and measures are possible.

5.3.3.3 Special conditions and protective measures

The most common special conditions and measures are discussed below. Those conditions may involve compensation but also the behaviour of the offender. These special conditions and measures also apply to juvenile suspects.

The following special conditions and measures are addressed:

- Compensation, Reparation of Damage and Deposit of money in victim funds
- A no-contact order, Street or location ban, Obligation to report at a location, Obligation to report at an institution
- Prohibition to use drugs or consume alcohol, Admission to a care institution, Compulsory treatment, Stay in assisted living or social care institution, Participation in behavioural intervention
- Other conditions concerning the offender's behaviour, Electronic surveillance

A. Compensation (Section 14c(2) under 1 Dutch Criminal Code)
The first special condition is compensation for damages. Here, the court determines the period within which the compensation must be paid; this period may be shorter than the operational period. The court may also order that the compensation can be paid in instalments.

B. Recovery of damage (Section 14c(2) under 2 of the Dutch Criminal Code)
A second special condition is the obligation to repair the damage inflicted. This applies in particular when the perpetrator is unable to compensate the damage in cash, but is able and willing to repair the damage. It goes without saying that the victim must want this if it means perpetrator and victim are to have contact with each other as a result. In practice, therefore, this measure is rarely imposed. This condition may for instance be imposed in cases of vandalism involving graffiti on walls. Supervised cleaning of, for example, those walls could be made a special condition in a suspended sentence. Returning stolen goods is also an example.

C. Payment of a sum of money into victim funds (Section 14c(2)(3) and (4) of the Criminal Code) The third and fourth special condition is the deposit of a sum of money into a victim fund. In cases where victims do not appreciate compensation and in criminal cases where there is no clearly identifiable victim, the court may order the defendant to pay a sum of money into the 'Schadefonds Geweldsmisdrijven' or other victim funds.

D. No-contact order (Section 14c(2) under 5 of the Criminal Code)
The fifth special condition is an order for the accused to refrain from contacting certain persons or institutions (e.g. the victim). Such a no-contact order is often imposed in criminal cases involving domestic violence and stalking. A no-contact order can include any form of contact (physical, by telephone, letter or email, text or other messaging service, social media), whether direct or indirect.

E. Street or location ban (Section 14c(2) under 6 of the Criminal Code)
The sixth special condition is a prohibition on being at or in the immediate vicinity of a particular location. A street ban is a restraining order that is often imposed in criminal cases of domestic violence and stalking. A location ban may include the prohibition of coming within a certain radius of a certain point. For example, the prohibition to be within 100 metres of the victim's home.

F. Obligation to report at a location (Section 14c(2) under 7 Criminal Code)
As the seventh special condition, the court may impose an obligation on the accused to be present at a location at certain times or during a specific period of time. Examples include mandatory reporting at the police station at certain events.

G. Obligation to report at an institution (Section 14c(2) under 8 Criminal Code)
As an eighth special condition, the court may impose the obligation on the accused

to report to an institution, for example the probation service, at certain times.

H. Prohibition to use drugs or alcohol (Section14c(2) under 9 of the Criminal Code)
As a ninth special condition, the law grants the court the option to impose a ban on using drugs and/or consuming alcohol during the operational period. To check compliance with this condition, the convicted person must cooperate with urinalysis and/or blood tests.

I. Admission to a care facility (Section 14c(2) under 10 of the Criminal Code)
A tenth special condition is that, the court may order that the accused be admitted to a care facility. It will then be a forensic care institution: mental health, addiction and intellectual disability care.

J. Compulsory treatment (Section 14c(2) under 11 of the Criminal Code)
An eleventh special condition is that the court may order the accused to undergo treatment by an expert or a care institution. This will involve outpatient treatment (i.e. outside a care institution), but in addition to admission to a care institution, it may also involve inpatient treatment.

K. Staying in an institution for assisted living or social care (Section 14c(2) under 12 of the Criminal Code)
As a twelfth condition, the court may order that the accused will stay in an assisted living or social care institution. This will particularly concern defendants who are no longer able to live independently, such as the mentally disabled or addicts for whom admission to a care institution is insufficient.

L. Participation in behavioural intervention (Section 14c(2) under 13 of the Criminal Code)
As the thirteenth special condition, the court may require the defendant to participate in behavioural intervention courses and training. There are special training courses, such as social skills training, budgeting courses and so on, which should lead to the convict themselves being able to put their life in order, thus reducing the risk of recidivism.

M. Other conditions concerning the behaviour of the convicted person (Section 14c(2) under 14 of the Criminal Code)
This concerns conditions not yet mentioned above. Here, the judge has great freedom to apply customisation tailored to the proven fact and the person of the offender.

N. Electronic monitoring (Section 14c(3))
Electronic monitoring (EM) may be attached to each special condition. EM is more popularly known as the ankle bracelet. ET is more frequently used in the event of a street ban.

5.4 ENFORCEMENT OF THE SENTENCE

The enforcement of the sentence begins once the court order has become final.

The 'Dienst Justitiële Inrichtingen' (Custodial Institutions Agency) is responsible for carrying out prison sentences, juvenile measures and tbs, and manages facilities and centres where offenders are detained.

5.4.1 Facilities and centres for offenders

- Penitentiary institution (PI)
  Prison and detention centre for adults.
- Rijks justitiële jeugdinrichting (Custodial state institution for young offenders) (RJJI) Prison and detention centre for young offenders.
- Forensic psychiatric centre (FPC)
  (Tbs) patients are locked up in forensic psychiatric centres.

5.5 THE PROBATION SERVICE

The purpose of the probation service is to prevent and reduce criminal behaviour in suspects and offenders. The starting point is to manage the risks as much as possible and to encourage the offender or suspect to change their behaviour by influencing it favourably. To this end, the probation service works closely together with the judiciary, healthcare, police, prison and municipalities.

The probation service has the following tasks:

- To investigate whether the offender is offending again
- To advise the public prosecutor and the judge about what is needed to mitigate risks and prevent recurrence, and what intervention (measure, ban, community service or a combination thereof) is best suited.
- Checking whether the offender complies with the conditions attached to a measure, such as a no-contact order or location ban.
- Implementation of community punishment orders. Community punishment orders are designed to make offenders give society something in return by doing unpaid work.

5.5.1 Probation service advice shortly after arrest

Suspects in criminal cases may also come into contact with the probation service. Risks to the safety of individuals or society can be distilled from judicial data, behaviour, and the social environment. In that case, the prosecutor or the judge asks the probation service to issue an opinion in preparation for the criminal proceedings in order to minimise those risks.

During this 'early assistance, a probation worker makes an initial assessment of the Requests for assistance and the issues involved, with the aim of informing judicial authorities about the personal situation of the suspect. Risks relating to any casualties are also assessed. In its opinion to the judiciary, the probation service may suggest special conditions, for example a behavioural training or a location ban, to be imposed. The defendant then remains under supervision of the probation service until the court hearing.

If, in preparation for the criminal case, the judge or prosecutor instructs the probation service to issue its opinion on the suspect, the probation officer usually writes a report. The officer shall base their report on the information known about the suspect to the judicial authorities, including the official report drawn up by the police, interviews with the suspect and interviews with people close to the suspect.

5.5.1.1 Impact of mediation on the advice from the probation service

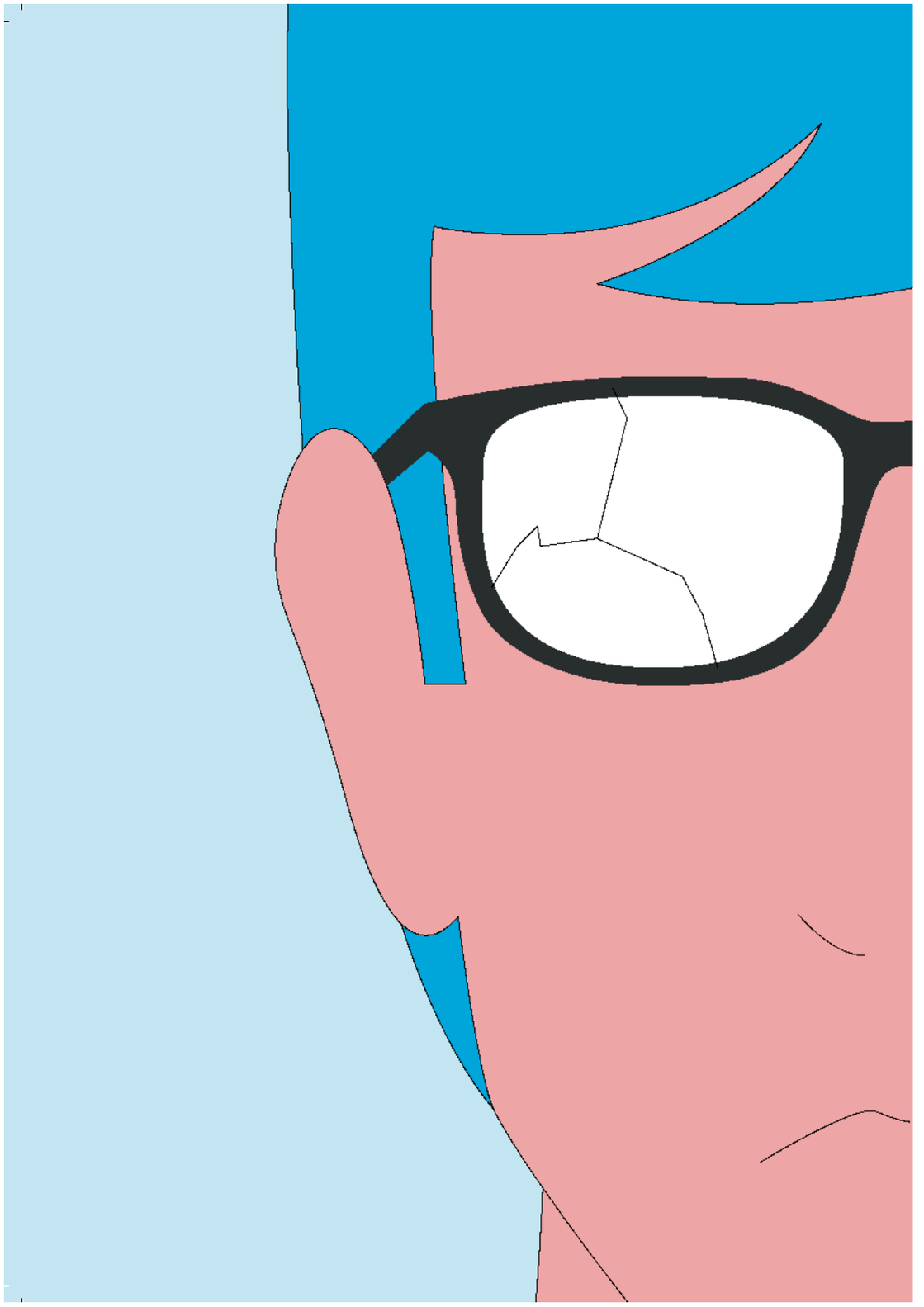
Agreements made during mediation in criminal cases can, if the suspect agrees, also be passed on to the probation service. The probation service can then take those agreements into account in its advice to the judiciary.

5.5.2 Supervision, electronic monitoring, community service and behavioural training courses

The probation service has other tasks besides issuing opinions. The probation service supervises and monitors the persons put under supervision. If necessary, this involves the use of an ankle bracelet. In addition, the probation service is responsible for carrying out community service sentences. Reclassering Nederland also conducts behavioural training to change the behaviour of suspects/offenders. To perform all tasks properly, the probation service maintains contact with partners in the care and criminal justice chain, such as municipalities, police, the judiciary, 'Veilig Thuis', the prison system, and forensic care.

5.5.3 Implementation of probation

The Probation Service is operated by Reclassering Nederland (RN), the Stichting Verslavingsreclassering GGZ (SVG) (Dutch Addiction Probation service) and the Salvation Army Youth Care & Probation. Salvation Army Youth Care & Probation offers professional assistane to youth, adults and families that have come or are at risk of involvement with the judicial system. The 'Stichting Verslavingsreclassering GGZ' provides counselling to addicts who have committed or are suspected of having committed a criminal offence.



6 DAMAGES AND COMPENSATION

Tanja van Mazijk LL.M.

6.1 INTRODUCTION

In this chapter, we address the handling and settlement of damages in criminal cases and the role that mediation can have in this respect.

We begin this chapter with a detailed discussion of the injured party claim. This is a procedure by which the victim can, in a relatively simple manner, join the criminal proceedings as an injured party in order to claim their damages. After this, we will focus on the substantive assessment of the claim for damages. The claim for damages is substantively assessed on the basis of the wrongful act. Finally, the compensation order is discussed.

6.2 CLAIMING DAMAGES IN CRIMINAL PROCEEDINGS: JOINING OF INJURED PARTY

This procedure was created to accommodate the victim or a surviving relative (hereinafter: the injured party). This procedure is free of charge and during the criminal proceedings the injured party can claim damages in a relatively simple way. Just as the closing agreement in mediation in criminal cases is a civil-law agreement in pending criminal case, the joining of the injured party is a civil-law procedure within the criminal proceedings.

Unlike civil courts, criminal courts have limited time and resources to assess damages. As a result, if the damages are too complicated, the criminal court will declare the injured party inadmissible. As a result, the criminal court will not handle the claim and the injured party will have to turn to the civil court to claim their damages.

6.2.1 Difference between rejecting and declaring inadmissible

If the criminal court rejects a claim for damages this does not mean that the court declares the claim to be inadmissible. If the court rejects the claim, the injured party cannot turn to the civil court to claim compensation from the offender. After all, in this case, the claim has already been substantively assessed by a judge. As a result, rejections of the claim for damages are very rare in practice; inadmissibility decisions, on the other hand, are very common. However, in the event of an inadmissibility decision, the injured party still has the option to take their claim to the civil court.

EXAMPLE: 'LOSS OF FUTURE INCOME'

An injured party named Guido joins the criminal proceedings against Rob, who has severely assaulted Guido. In addition to claiming compensation from Rob for medical expenses, Guido argues that he also suffered psychological injury from the assault, which prevented him from doing his job and from getting a renewal of his contract. The consequence is loss of revenue. In the future, Guido will also continue to face limitations. He claims all the resulting damages from Rob. Rob disputes Guido's claim.

In this case, there is a good chance that the criminal court will interpret Guido's claim as too complicated and declare Guido's claim to be inadmissible. In fact, it is too difficult to estimate these damages and it takes too much time to deal with it properly. If the criminal court has declared Guido's claim inadmissible, Guido can take his claim for damages to the civil court.

EXAMPLE: 'GLASSES AND JACKET'

Guido argues that the assault caused his glasses to break and that he had to have his jacket cleaned. He also claims that he now has a scar inflicted during the assault, which justifies a compensation for damages of 5,000 euros.

To his joining form, he attached receipts from the optician and the dry cleaner and also added a photograph of the scar.
The judge, finding Rob guilty of the assault, granted Guido's claim because it was simple in nature and a direct consequence of the (proven) assault. However, they are of the opinion that the amount claimed is too high, compared to known similar cases. They moderate the amount to 500 euros.

Can Guido now present a claim for the remaining 4,500 euros that he believes he is entitled to, to the civil court? If the criminal court rejected the rest of his claim, then no, he cannot. But if the criminal court declared Guido inadmissible for the remaining 4,500 euros, he can. Of course, it is then not certain whether the civil court will award this claim.

6.2.2 Who can join?

Not everyone can join as a party to the proceedings. Briefly stated, this right only accrues to parties who have suffered direct damages from the offence that the accused is charged with. Section 51f(1) DCCP states who can join as a party in criminal proceedings: "A person who has suffered direct damages from a criminal offence may join the criminal proceedings as an injured party in respect of their claim for compensation."

6.2.2.1 Suspects aged 12 and 13 years

Victims of suspects aged 12 and 13 (at the time the offence was committed) can also join as injured parties. Under civil law, a suspect of this age is not liable for damages (Section 6:164 of the Dutch Civil Code). The minor's parents or guardian are liable for the damages suffered.

6.2.3 Method of submission

There are two ways in which the victim can join the proceedings as an injured party.

- **Joining prior to court session** This joining can be effected exclusively in writing by means of a form that the public prosecutor sends to the victim when the proceedings are instituted against the accused (Section 51g(1) DCCP). This form is called the 'Verzoek tot Schadevergoeding' (criminal injuries compensation form).

- **Joining at the court session.** Such joining shall be made by presenting a statement of the claim and the grounds on which it is based to the

court (Section 51g(3) DCCP). If the victim chooses to join the proceedings during the hearing, they can also do so orally (Section 51g(3) DCCP). The Victim Support Desk can assist the victim with the filing of the claim for compensation.

6.2.3.1 Special criminal injuries compensation form

In most cases, the injured party submits their claim prior to the hearing, but may also join the proceedings at the hearing, up to the prosecutor's closing speech demanding the sentence (the claim). To make it as easy as possible for the injured party, there is a special criminal injuries compensation form that the prosecutor will attach to the court file. This form explains how a claim for damages should be substantiated.

The question of whether an injured party wants to join the proceedings is often already raised at the time of the report. If the injured party indicates that they want to join, the judiciary will inform the injured party of the development in the criminal case and invite them to submit a criminal injuries compensation form. Even if the person reporting has not indicated that they want to join the proceedings as an injured party, the judiciary sends a so-called 'victim letter', asking if the injured party wants to be kept informed and/or join. If so, the injured party will receive a criminal injuries compensation form.

6.2.4 Admissibility of injured party

The injured party's claim is admissible only if a sentence or order is imposed on the accused, or if Section 9a of the Criminal Code is applied (guilty, no sentence). This means that the injured party will be declared inadmissible in case of an acquittal or a dismissal of all charges without imposition of a measure. See above 5.3.2.1: Grounds for exemption from sentence.

6.2.4.1 Direct result

There must be direct damages. This is, inter alia, stated in Section 51f DCCP. Direct damages are deemed to exist when someone is affected in an interest protected by the violated section of the criminal law. Simply put, there must be a logical connection between the proven actions of the accused and the harm suffered by the injured party.

EXAMPLE: 'DAMAGED BIKE'

Supreme Court 27 January 2015 ECLI:NL:HR:2015:134
In this case, the injured party was the victim of a proven assault. One of the items of damages for which she claimed compensation was damage to her bike. She had dropped this bike when she saw the later perpetrator approaching and she wanted to flee because she was scared. The Supreme Court considered that "the damage to her bike suffered (by the person concerned) is so closely related to the proven assault by the accused that this damage must reasonably be regarded as directly inflicted on (the person concerned) due to the proven offence".

EXAMPLE: 'RAM RAID AFTER THEFT'

Supreme Court 29 May 2012 ECLI:NL:HR:2012:BR2093
The suspect was convicted of a (attempted) ram raid, in which a car had been used. Although the suspect was not charged with the theft of this car, the court imposed the compensation order for the damages suffered by the owner of the car (including items missing from the car) with the consideration that there was only a small period of time between the theft of the car and the ram-raiding that, together with the absence of a reasoned explanation by the accused, it had to be assumed that they were also liable for the damage to the car and the missing goods.

6.2.4.2 Disproportionate burden

As mentioned above, criminal courts have limited time and resources to assess damages. If the damages are too complicated, the court may declare the injured party inadmissible. This means that the criminal court will not consider the claim for damages and will refer the injured party to the civil court.

EXAMPLE: 'LONG-TERM EXPLOITATION'

Supreme Court 3 July 2012 Supreme Court 3 July 2012, ECLI:NL:HR:2012:BW3751.

The case involved suspected human trafficking, in which the injured party had claimed damages in the amount she had to pay to the defendant for each day that she had worked. The Court had proved that the victim had been exploited for eight years, earning an average of 1,000 euros a day. The claim amounted to over €1.5 million and was extensively substantiated. The defendant's defence was that the charges were denied, or at least the amounts are totally unfounded or that the claim was not simple in nature. The Court ruled that responsible consideration and assessment of the claim constituted a disproportionate burden on the criminal proceedings. The Supreme Court upheld this judgment of the Court.

6.2.4.3 Splitting the claim

Often, a claim of an injured party contains several items of damages. These items are dealt with separately by the court and in the judgment, in respect of each individual item, it is made clear what amount is awarded and/or rejected or in respect of which items the injured party is declared (partially) inadmissible or rejected. The court may also split the claim from the injured party into a simple and a complicated part. They then award what is simple and otherwise declares the injured party inadmissible.

6.3 SUBSTANTIVE ASSESSMENT OF THE CLAIM FOR DAMAGES

If the injured party is admissible, then the court must assess the substance of the claim. The injured party's claim is assessed by the court under civil-law. By reason of an unlawful act, the defendant must be liable for the damages suffered by the injured party. The above also applies to the public prosecutor who imposes a compensation measure in a penalty order.

6.3.1 Unlawful act

Unlawful acts are regulated by Section 162 of Book 6 of the Dutch Civil Code. It states that "the person who commits an unlawful act against another which is attributable to them must repair the damages suffered by the other

in consequence thereof". For a defendant to be liable by reason of an unlawful act, five requirements must be met.

- **An unlawful act must have been committed.** If the criminal court finds that the accused has committed a criminal offence and is punishable for it, then an unlawful act is deemed to have been committed.
- **This unlawful act can be imputed to the accused (suspect).** If the criminal court declares the offence proven and the accused is punishable for it, then the act can be imputed to the accused. In short, if the perpetrator committed the act, the act is imputed to them.
- **There must be (some) damages suffered or to be suffered.** This goes without saying: has the injured party suffered damages?
- **There must be a causal relationship between the damages and the (unlawful) act.** In simple terms, this means that there must be a logical connection between the event and the damages. The injured party must prove that the damages resulted from the proven unlawful act.
- **There is no obligation to pay damages if the infringed standard does not serve to protect against the damages as suffered by the injured party (relativity requirement).** Simply put: The injured party will not receive compensation for their stolen iPhone if the defendant is only sued for stalking.

6.3.2 Acquittal, discharge from all prosecution, damages

6.3.2.1 Acquittal

If the court deems that it has not been proved that the accused committed the offence charged, the accused is acquitted. There is then no violation of a statutory provision and the criminal court does proceed to the handling of the injured party's claim. The injured party is then inadmissible. However, a standard of care may have been breached, giving rise to an unlawful act. That is for the civil court to decide. This means that the injured party must then institute claim proceedings with the civil court. It should be noted here, however, that there is very little chance that the civil court will still award damages in the event of an acquittal.

6.3.2.2 Discharge from all prosecution ('OVAR')

If the court finds that the accused did commit the offence they are charged with, but that they cannot be punished for the offence, the accused is discharged from all prosecution (see above 5.3.2: The defendant is discharged from all further

prosecution). Here, the same applies as in the event of acquittal. Even in this event, the criminal court will declare the injured party inadmissible and the injured party can still institute action for damages at the civil court because a breach of a standard of care may apply here.

6.3.2.3 Difference between acquittal and discharge from all prosecution ('OVAR')

- **Acquittal:** a first-aider applied cardiac massage very inexpertly, causing permanent medical injury to the injured party. The criminal court may then rule that any criminal intent to assault, causing grievous bodily harm, is lacking. As a result, the element deliberately was not proven and acquittal follows.
- **Discharge from all prosecution ('OVAR'):** in this same case, the criminal court may also rule that there was intent but that the offender only meant well. Depending on the actual acts, the criminal court may then argue that although it was done intentionally, the act is still not punishable. The criminal court could also say that the offence is punishable but the offender is not punishable because of the good intentions that are evident from their actions.

6.3.3 Group liability

Section 166 of Book 6 of the Dutch Civil Code regulates the liability of persons in case the tort was committed by a group. Under this section, the injured party can hold all members of the group liable for the complete damages. This is called joint and several liability. The member of the group who paid the damages can then recover the damages for which they are not responsible from the other members of the group. This is called right of recourse.

6.3.4 Children under 14 and 14- and 15-year-olds

Under Section 164 of Book 6 of the Dutch Civil Code, children up to the age of 14 cannot be liable by reason of an unlawful act. The parents or guardian do then have risk liability for the damages caused by the active behaviour of their child. This means they are responsible for the wrongful conduct of the child and must pay compensation to the injured party. The injured party can file their claim for compensation during the criminal proceedings in the juvenile court and in the civil court.

For 14- and 15-year-olds, both they themselves and their parents or guardians may be liable for an unlawful act committed by them. In such a case, however, the latter can only be sued by the injured party in civil proceedings.

6.4 THE COMPENSATION MEASURE

The compensation measure, like the injured party's claim, is designed to accommodate the victim. The compensation measure involves the Central Fine Collection Agency (CJIB), on behalf of the state, collecting the compensation awarded by the court for the victim. In practice, granting the injured party's claim is almost always accompanied by the imposition of the compensation measure. The public prosecutor may impose a compensation measure when issuing a penalty order. Thus, there must be a conviction or a penalty order to arrive at the imposition of the compensation measure. The public prosecutor is responsible for enforcing the compensation measure.

6.4.1 Compensation measure procedure

Any amount paid to CJIB by the offender will be transferred to the victim's account. If the offender does not pay, CJIB first sends reminders to receive payment of the compensation. With each reminder, the amount claimed is increased by default charges. Subject to conditions, the offender may be granted a payment arrangement. If payment is still not made after reminders and a possible payment arrangement, CJIB will hand over the claim to a bailiff with instructions to impose an attachment. An attachment can, for example, be imposed on the offender's salary, benefits, savings or belongings.

6.4.2 Alternative imprisonment

If it turns out that the offender has insufficient capacity to pay the compensation, the CJIB can enforce the alternative imprisonment that is attached to non-payment. The court *should* order that non-payment shall result in an alternative prison sentence. If the offender does not pay the amount due, the alternative imprisonment shall be enforced. This does not involve a new court session. The public prosecutor may immediately order this. The maximum period for alternative imprisonment s one year. This alternative imprisonment serves as a coercive measure to still get the offender to pay up. However, the term 'alternative imprisonment' is somewhat misleading, as the imprisonment does not replace the obligation to pay compensation. This claim still stands after the term of the imprisonment. After the offender has served their prison sentence and the CJIB has ultimately failed to make the offender pay, the victim themselves can still decide to make use of a bailiff.

6.4.3 Multiple perpetrators

If multiple perpetrators have to pay the compensation, CJIB requires of all offenders that they pay the whole amount. If one of the perpetrators has

paid, then they can recover the overpayment from the other offenders (see also 6.3.3: Group liability).

6.4.4 If the perpetrator still has not paid after a period of eight months: Advance payment scheme for victims

Has the offender still not paid eight months after the judge's or prosecutor's decision became final? Then, in accordance with the regulations of the 'Voorschotregeling slachtoffers' (Victim's Advance Regulations), the CJIB always pays the compensation or part of it to the victim.

Currently, these are the main rules of the 'Voorschotregeling slachtoffers':

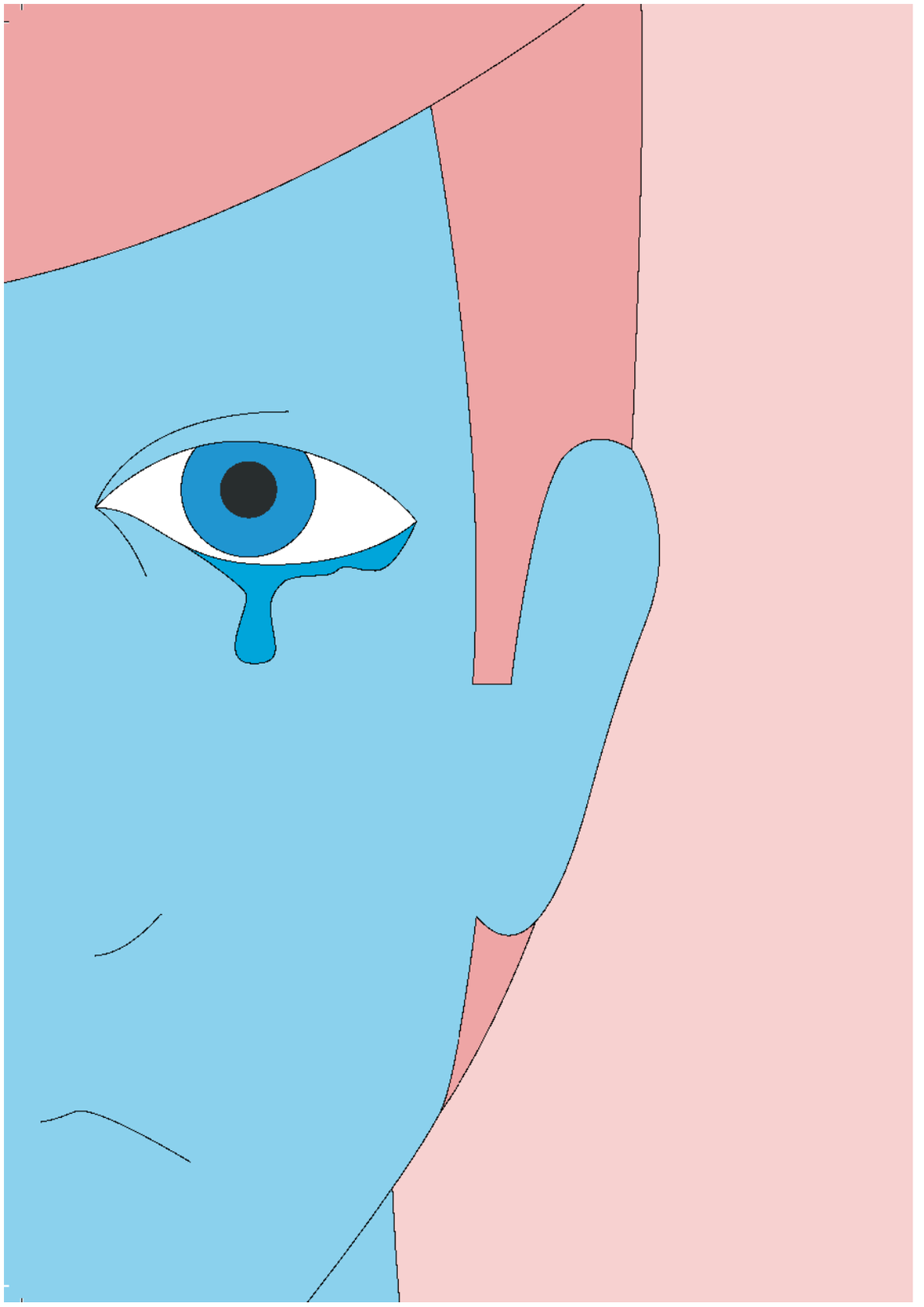
- Victims of a violent or sex crime will be paid the entire amount of compensation by the CJIB.
- Victims of other crimes will be paid compensation up to a maximum of €5,000 by the CJIB. So if the judge decides that the offender must pay, for instance, €7,000, then the CJIB will pay €5,000 of that amount.
- If the CJIB has paid an amount of compensation, the offender still has to pay the entire compensation to the CJIB. Take the example above where the offender has to pay €7,000. If the offender then pays this to the CJIB, the victim will receive the remaining amount of €2,000 from the CJIB. The CJIB will keep the amount €5,000 that it had advanced to the victim. There is no question of the victim getting double pay-outs.
- The 'Voorschotregeling slachtoffers' applies only to individuals and sole traders, not to companies or institutions.

6.4.5 Offenders under the age of 14

The compensation measure may not be imposed on offenders who were younger than 14 at the time the offence was committed. The parents of these offenders cannot be subjected to the compensation measure either.

6.4.6 Alternative imprisonment for juvenile offenders

In the event that juvenile offenders are concerned, the court is not obliged to impose alternative juvenile detention. When the court does impose alternative juvenile detention, it is subject to a minimum of one day and a maximum of three months per compensation measure.



7 TYPES OF DAMAGES

Tanja van Mazijk LL.M.

7.1 INTRODUCTION

This chapter discusses the different types of damages. We also cover how those damages are assessed.

There is no definition of 'damages' in the law. However, Section 95 of Book 6 of the DCC sets out that damages are divided into property damage and other losses. This chapter first explains what is meant by property damage and other losses. We then discuss how damages are assessed and concluding we discuss reasons for the court to reduce the amount of damages.

7.2 FINANCIAL DAMAGES

Simply put, financial damages are damages to assets expressed in monetary terms. Section 96(1) of Book 6 of the DCC states that financial damages comprise 'incurred losses and lost profit'. A suffered loss can include a damaged bicycle, damaged dental braces or a stolen car, but also the medical expenses incurred by the injured party, such as the cost of treatment, the deductible, reasonable costs of transport, payments of medicines and extra costs incurred in a hospital.

Lost profit, for example, is the loss of working capacity that deprives a person of income. Of course, there must then have been actual loss of revenue. If a person has an employer who has continued to pay wages, there is no loss of income. An example of deprived profits is the owner of a lunchroom who has been beaten up and as a result has to close their business for three months because they cannot work.

Other financial damages include:

- Reasonable costs to prevent or limit damages
- Reasonable costs to establish damages and liability
- Reasonable costs to obtain satisfaction out of court
- Shifted loss

7.2.1 Reasonable costs to prevent or limit damage

The person who suffers damages must, within reason, limit the said damages as much as possible. This may entail costs, and to the extent those costs are related to the damages suffered, those costs are eligible for compensation.

EXAMPLE: 'FOAM EXTINGUISHER'

During a New Year's party at A's house, A and B are having an argument. B gets so angry that they set fire to A's carpet. To extinguish the fire, A uses a foam extinguisher. B must also reimburse the foam extinguisher.

Sometimes victims also try to be reimbursed for general costs of preventing damages; for example, costs of an alarm system, extra locks and so on to prevent a break-in. These costs are usually not eligible for reimbursement.

7.2.2 Reasonable costs to establish damages and liability

This includes costs such as having a medical report or a damage assessment drawn up or the costs of a specialised agency making a calculation in respect of loss of earning capacity. However, the costs incurred must be necessary and reasonable; this is at the discretion of the court.

7.2.3 Reasonable costs to obtain satisfaction out of court

This refers to out-of-court costs. These are the costs incurred *before* a case is brought to court. This includes compiling the file, making inquiries, drafting and sending reminders, handling substantive correspondence, making settlement proposals and conducting settlement negotiations. This does not include the costs of the proceeding.

7.2.4 Shifted loss

Shifted loss is also covered by financial damages. The victim is often not the only one who suffers damages. An examples are a parent who incurs medical expenses for their child or an employer who has to continue paying wages as a result of an employee's disability. In the case of shifted loss, persons other than the victim themselves can, under certain conditions, claim compensation for expenses incurred on behalf of the victim.

In the event of the victim's death, next-of-kin who were (partly) financially supported by the deceased can claim these costs from the liable person. Estimating living expenses is a complicated calculation based on the hypothetical situation that the victim would not have died. This should take into account not only the current situation but also the future situation. Account should be taken of various factors, including the neediness and age of the children and the financial situation then, now and in the future. Funeral expenses may also be claimed.

7.3 OTHER DAMAGES

Damages other than property damage refer to immaterial damages. Compensation for immaterial damages is also known as 'smartengeld' (compensation for pain and suffering).

Immaterial damages involve mental injuries. The extent of these damages is much more difficult to determine than for property damage. The court has a great deal of discretion in determining immaterial damages. It then takes all the circumstances of the case into account. This means that each situation is assessed differently and there are no set amounts. Immaterial damages are more likely to be assumed if there are physical injuries.

7.3.1 Bodily injury

In the event of bodily injury, immaterial damages are more likely to be assumed than in cases where there is no bodily injury. For example, if an assault has resulted in a broken jaw or other injury and the victim argues that they have had sleepless nights and no longer dare to go out on the streets alone, this may in principle be sufficient to claim and be awarded immaterial damages. The victim then does not have to prove that they suffer from a disorder that in psychiatry is regarded as a result of the assault.

7.3.2 No bodily injury

If there is no bodily injury, there must be "defamation of character or harm to the person otherwise". It is much more difficult to demonstrate that this is the case. For offences that do not involve bodily injury, for instance threats, stalking, insults or theft with violence but without injury, as well as sex offences and deprivation of liberty without demonstrable bodily injury. In these cases, in order to be eligible for compensation for immaterial damages, the injured party must have suffered mental injury. The test applied by the courts is strict: a "mere psychological discomfort" or feeling hurt is not enough. There must be a mental affliction that can be objectively diagnosed and the injured party must present sufficiently concrete data to demonstrate this is the case.

The Supreme Court has ruled that exceptions may be made to the above principle in view of the particular seriousness of the norm violation and the impact thereof on the victim. Consider, for example, attempted aggravated assault, which did not necessarily involve bodily or mental injury as referred to above. In that case, compensation for immaterial damages is still possible due to the particular seriousness of the norm violation and its impact on the victim. The offence constitutes such a serious infringement of a fundamental right (here, the right to self-determination and physical integrity) that it should be considered in itself as affecting the person in other ways. As a result, compensation for pain and suffering may be applicable here even in the absence of an affliction recognised in psychiatry.

EXAMPLE: 'NO INJURY'

An example of attempted aggravated assault in which immaterial damages of 750 euros were awarded, even though no physical and objectively diagnosed psychological injury was suffered, concerned a case in which the defendant had collided with a police officer. The officer had not suffered any physical injury nor objectively diagnosed psychological damage in the process. What was important in this case was that the accused seriously endangered the victim's health and safety, and the victim indicated that they feared for their life during the incident, that they realise they were lucky and that the incident had a great impact on them, which sometimes still hinders them when on duty.

7.3.3 Emotional loss

Emotional loss is also a form of immaterial damages. Emotional loss refers to the suffering and pain a person experiences when a loved one dies or suffers serious and permanent injury. Relatives and loved ones of victims with serious and permanent injuries can receive compensation for the suffering and pain they experience as a result of the event.

Not all loved ones are entitled to compensation for emotional loss. This regulation applies only to the immediate circle of loved ones, such as the victim's partner, children and parents. The compensation is a one-off payment under the 'Wet Affectieschade' (Emotional Loss Act). Different categories with corresponding compensation amounts have been identified. The amount of the compensation depends on the relationship to the victim.

The 'Schadefonds Geweldsmisdrijven' can also grant survivors of victims of violent crime an allowance for emotional loss. This payment also consists of a fixed amount. In the event that a payment is made under the 'Wet Affectieschade', this will be set off with any payment made from the 'Schadefonds Geweldsmisdrijven'.

7.3.4 Shock injury

Shock injury is also a form of immaterial damages. Shock injury refers to mental injury suffered when experiencing a shocking event without being a victim oneself. The shock must be so severe that it results in impairment of health. In other words, this concerns injury to other persons than to the 'direct' victim. Shock injury must involve an illness recognised in psychiatry as one resulting from intense emotional shock caused by observing the crime or by direct confrontation with the serious consequences thereof. An example of a case in which shock damages were awarded is the case of a deceased linesman. In this case, their son, who had witnessed the violence exercised towards their father and suffered psychological injuries as a result, was awarded compensation of 25,000 euros in respect of immaterial damages.

7.4 ASSESSMENT OF DAMAGES

The court has relatively wide discretion in determining the amount of damages to be compensated. Thus, the court may estimate damages if they cannot be accurately determined.

The basic principle in calculating the extent of the obligation to pay compensation is that the full damages should be compensated and that, to the extent possible,

the injured party should be put in the condition it would have found themselves if the damaging event had not happened.

There are a number of exceptions to the principle that full damages must be compensated. The main exceptions, such as deduction of collateral benefits, own fault and mitigation, are discussed below.

7.4.1 Assessment of property damage

The starting point is that the victim is compensated for the damages that they actually suffered. This means that the injured party should not be worse off, but also not benefit from the compensation to be imposed. In assessing damages, the court estimates the reasonable costs involved in restoring the damaged property, or the replacement value of the property at that time.

The victim does not have to prove that they actually had the item repaired. However, the extent of the (reasonable) repair costs must be made plausible. For this purpose, a quotation can suffice. Indeed, a receipt is not necessary, although for substantiation, especially of higher amounts, a quotation or receipt can be very handy. This is all the more true when the amount of the damages is disputed. If a receipt is missing, the court can estimate the damages (Section 97 of Book 6 of the Dutch Civil Code).

If the item has actually been repaired, any increased value of the item will be taken into account in determining the amount of compensation. Conversely, a loss of value can remain even after repair: a repaired car is worth less than a comparable car that has not suffered damage. This difference is also eligible for reimbursement. After all, the intention is to compensate the victim for the damages that they have actually suffered.

If the repair costs are so high that they exceed the current market value of the object, then it concerns a total loss. In that case, the amount of the damages will be set at the current market value of the object. The same applies when an item cannot be repaired properly (a torn piece of clothing, for example). If no information can be found on the price of a comparable item on the market, the replacement value can be considered. This will often involve taking the new price of a comparable item and then deducting a percentage (new for old). In the case of damages to antiques, rare coins and paintings, for example, the court will have to assess the value. Of course, a valuation report or purchase receipt will be very helpful in this regard.

Furthermore, eligible for reimbursement are the costs involved with doing without a specific item. Examples include costs of a replacement vehicle when a vehicle is vandalised, telephone costs, loss of income, as well as the continuation of a subscription that can no longer be used (e.g. in the case of a stolen phone). These costs are estimated specifically and are only eligible for reimbursement if the costs were reasonably incurred and the costs themselves are reasonable.

7.4.2 Assessing damages that have not yet occurred

Under Section 105 of Book 6 of the Dutch Civil Code, an injured party can also seek compensation for damages they will suffer in the future. Consider, for example, someone who is injured by another person to such an extent that they will remain disabled for their entire life. This person suffers an ongoing injury for many years consisting of future doctor and nursing costs and loss of income because they will no longer be able to work. Determining this type of damage is usually complicated and often requires the assistance of experts (medical specialist, labour expert, arithmetician). These damages often also involve intervention by a health insurance company. These cases almost always lead to civil proceedings.

7.4.3 Assessing immaterial damages

The amount of damages to be awarded for pain and suffering is not always easy to estimate. Grief and sorrow are difficult to express in money and every case is different. The judge has to estimate these damages and thus has great discretion. They may take all the circumstances of the case into account. This freedom even goes so far that the court may decide not to award damages.

The following are two examples from case law where a high amount of immaterial damages was awarded.

EXAMPLE: 'SULPHURIC ACID

In 2012, as part of the criminal proceedings, the District Court of The Hague awarded a compensation of €150,000 in immaterial damages to the victim who had been doused with sulphuric acid by the accused, resulting in gruesome disfigurement for life.

EXAMPLE: 'MOLOTOV COCKTAIL'

In 2015, in a criminal case, the Gelderland District Court awarded immaterial damages amounting to €200,000 and €150,000 respectively to two victims who had suffered very serious burns from a Molotov cocktail. In this case the three suspects were convicted of (instigating the) co-perpetration of attempted murder and arson with mortal danger.

The above amounts are rare when it comes to the amount of immaterial damages to be awarded. In practice, criminal courts do not readily award such large sums in the context of the injured party's claim. Even though all the parties involved would like to have something to hold onto, there is no set list of amounts for immaterial damages. Of course, reality is complicated and cannot be forced into a list of categories. However, this does not apply to emotional loss. Surviving relatives of a victim who are entitled to compensation will receive a one-off lump-sum payment. The amount of that payment depends on the relationship to the victim (see above 6.5.2.3: Emotional loss).

When assessing immaterial damages (other than emotional loss), the court compares cases. It considers what compensation for damages judges have ordered in the past in similar cases. Further resources are:

- **The 'ANWB Smartengeldgids'**
  The 'Smartengeldgids' published (annually) by the ANWB lists the most important court decisions in concrete similar cases.
- **The injury list of the 'Schadefonds Geweldsmisdrijven'**
  There is also the Injury List of the 'Schadefonds Geweldsmisdrijven'. This list was prepared for the award and amount of payments from the 'Schadefonds Geweldsmisdrijven'. The 'Schadefonds Geweldsmisdrijven' can make payments to victims of serious violent crimes or their surviving relatives. The amount paid is a compensation for the damages (both material and immaterial) they suffered due to the injuries caused by the crime or death.
- **BOS damage**
  The Public Prosecution Service has developed a standards system for claims for damages in criminal proceedings (BOS damages). This system of standards has been incorporated in a computer programme that, on the basis of a number of variables to be entered, determines the amount for which the prosecution supports an injured party's claim. The BOS damages system is designed to determine damage amounts for common criminal offences.

7.4.4 Non-monetary compensation for damages

Although monetary compensation is the main rule, the court can in theory also award compensation that is not monetary. Consider the order to repair or restore a damaged item. In practice, this does not often occur, as execution problems may arise here: if the defendant does not comply with the obligation imposed on them within the stipulated or reasonable time, the injured party still has to claim monetary compensation in the civil court.

According to juvenile criminal law, a community service sentence can be imposed on a juvenile, requiring them to repair the damages caused by the offence (Section 77h(2) under a of the Criminal Code). This sentence can only be imposed if the victim has indicated their consent.

7.5 REDUCTION OF THE COMPENSATION AMOUNT

Reasons for the court to reduce the amount of the compensation are offsetting benefit, own fault and mitigation. These reasons are discussed below.

7.5.1 Offsetting benefit

Section 100 of Book 6 of the Dutch Civil Code states that if the same event has resulted in a benefit for the injured party in addition to damages, then, to the extent reasonable, this benefit must be taken into account when determining the damages to be compensated. Simply put, if the injured party not only suffers damages but also gains a benefit from the damaging event, then that benefit must be set off. So what benefits should you think of?

The main benefit is a pay-out from non-life insurance. This pay-out is classified as a benefit. Any amount paid by health insurance will be offset against the claimed compensation. The insurance company will succeed to the rights of the injured party and claim the damages paid to the injured party from the defendant. This is called subrogation. The compulsory excess and any contributions paid by the injured party then remain as damages to be claimed by the injured party. Incidentally, the injured party is not obliged to claim compensation from their insurance company. They may waive this

because, for example, this would lead to the loss of a no-claim discount.

Subject to specific conditions, the 'Schadefonds Geweldsmisdrijven' can make a one-off lump-sum payment to victims of serious violent crimes or their surviving relatives. If a victim receives compensation (for example, from the offender, an employer or insurance), and the victim has previously received compensation from the 'Schadefonds' for the same damages, the 'Schadefonds' will claim a refund of the money from the victim who received the amount twice.

7.5.2 Own fault

Section 101 of Book 6 of the Dutch Civil Code simply states that the offender's compensation obligation can be reduced by the injured party's own fault. Own fault also includes a failure to mitigate damages. Consider, for example, an injured victim who neglects their injuries or fails to seek timely medical treatment. The resulting damages are attributable to the victim's own fault.

To illustrate, two examples from case law are given below.

EXAMPLE: 'IN COMPANY'

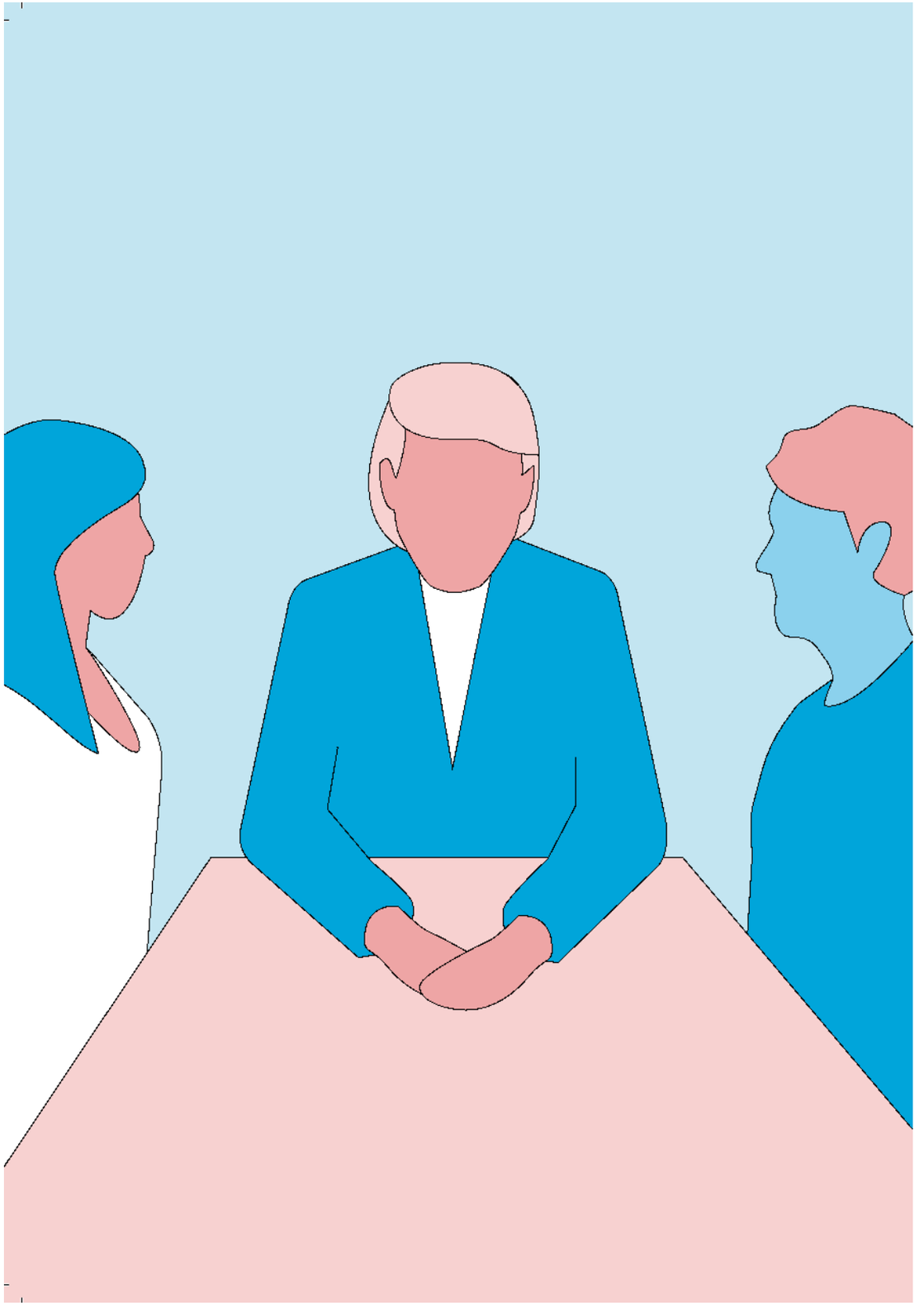
A went to B's house to collect their daughter's belongings, accompanied by a whole group of persons, namely their son, brother, two cousins, and a friend. B put the stuff in the hallway of the apartment building. Then an argument arises between A and B and there is a fight. In this fight, B hits A on the head with a piece of wood. The court ruled that this was A's own fault because that they themselves caused a threatening situation to arise and that this situation had escalated by coming to B's home with six people when they only came to pick up some of their daughter's belongings. According to B, these persons entered B's home unnecessarily as A's daughter's belongings had already been located in the hallway of the apartment building. The court ruled that B only had to pay 50% of A's damages based on the successful defence based on own fault. The remaining 50% therefore remains for A's account.

EXAMPLE: 'WHO STARTED?'

Peter and Jan have an argument and Jan hits Peter first. Then Peter hits Jan with a belt. In doing so, Peter damaged Jan's eye so badly that Jan became partially blind. Peter is being prosecuted for aggravated assault as a result of the incident and Jan is seeking damages as an injured party. In this case, Peter is held liable for 80% of the damages. After all, he hit Jan's face with a belt and that is why his eye was so badly damaged. However, Jan is not entirely off the hook. He struck the first blow. Therefore, he bears 20% of his own guilt. Nevertheless, Peter must pay the entire damages to Jan, given Jan's youthful age and the difference in the violence used, it is unacceptable by the standards of reasonableness and fairness that part of the consequences of the belt blow should be borne by Jan. And so Peter should also have to compensate Jan for the 20% part of the damages.

7.5.3 Moderation

The third reason for derogating from the principle that the damages suffered by the injured party should be fully compensated is the court's power to moderate the compensation obligation. Courts will not easily moderate damages and will only do so in exceptional cases. The fact that an offender does not have sufficient means and cannot pay the damages is not in itself a reason to moderate the compensation.



8 LEGAL ASPECTS PLAYING A ROLE AT THE MEDIATION TABLE

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8.1 INTRODUCTION

It is not for mediators in criminal cases to engage in truth-telling or move parties in a particular direction. However, mediators in criminal case do have a duty of care towards the parties. This duty of care applies to both the victim and the suspect, for instance if there are doubts as to whether the victim and suspect may have been designated as such too easily, because the person reporting the crime is simply designated as the victim and the person against whom the crime has been reported is simply designated as the suspect. The mediator should not 'push' parties further into a particular role just because the legal system has already done so.

The duty of care of mediators in criminal cases for the parties also applies with regard to what mediators record in the closing agreement. A mediator in criminal cases should be well aware of what they are doing and in what context they are doing it, so that they can properly inform the parties about the consequences of what they agree between themselves. After all, the closing agreement that the mediator in criminal cases will largely write by hand on the spot not only has civil-law consequences but can also affect the further course of the criminal proceedings. Mediators in criminal cases should not only have the proper right professional attitude and master the

competences described in Chapter 2: Competences, but also have basic knowledge of criminal law proceedings, unlawful acts, and compensation for damages.

In this chapter, we discuss again some of the key issues that mediators encounter or have to take into account at the mediation table.

8.2 THE CRIMINAL PROCEEDINGS

Mediators in criminal cases need to know what stage of the criminal proceedings a case is in, what disposition decisions can be made by the referrer at that stage, and what (legal) options the offender and victim still have at that stage. Indeed, at (almost) every stage of the criminal proceedings, the outcomes of mediation can still influence the further course of the criminal proceedings.

8.2.1 Influence of mediation on the decision of the public prosecutor

At the moment a public prosecutor refers a case to mediation, in most cases they have not yet made a disposition decision. This means that the public prosecutor has then not yet decided whether to dismiss the case, impose a penalty order themselves or refer the case to court.

The public prosecutor will make their decision on the case only after they have been informed of the outcome of the mediation.

Obviously, at this stage, the outcome of the mediation can have a major impact on the further course of the criminal proceedings. The public prosecutor may decide not to prosecute the case until the hearing at the criminal court. A reason for the prosecutor not to prosecute a case may be, for example, that the defendant has already compensated the victim for the damages and the offence committed was not very serious. These are cases that the mediator in criminal cases encounters on a regular basis. Particularly in these cases, the outcome of mediation will be able to influence the further handling of the case. The public prosecutor may also impose special conditions (such as e.g. a location ban, contact ban, drug and alcohol prohibition or a duty to attend therapy or a behavioural course, see 5.3.3.3. In the event of a conditional dismissal or penalty order a sentence is imposed on the defendant. The outcomes of the mediation may even influence these forms of disposition. The public prosecutor may take the outcomes of the mediation into account when considering the severity of the punishment or the special conditions to be imposed.

8.2.2 Impact of mediation on the judgment of the court

If the public prosecutor has summoned the accused, a judge must give their decision on the case. A judge can refer the case to mediation before and during the hearing. If the judge refers the case to mediation prior to the hearing, the judge will wait to hear the case until they have received feed-back on the results of the mediation. If the judge refers to mediation during the hearing, they will adjourn the case and will not give their decision until they have received feed-back on the mediation results.

As in the phase with the prosecutor, it is not yet certain at this stage whether the accused will actually be convicted. The judge can still acquit the accused or decide to dismiss all prosecutions on the grounds that there is a ground for exemption from criminal liability. If the court decides to sentence the accused, it may attach special conditions to the sentence, such as a location ban, a contact ban or drugs and alcohol ban or a duty to attend therapy or a behavioural course. Just like the public prosecutor, the court may take account of the mediation outcome when determining the severity of the sentence or the special conditions to be imposed. The court may decide to give different or lighter sentences to a defendant who has shown insight, expressed remorse and already compensated any damages to the victim.

8.2.3 Influence of mediation on the advice from the probation service

The outcome of the mediation may also influence the advice the probation service gives to the public prosecutor or the judge. If the probation service is involved in a case, the probation service may, with the consent of the parties, include the mediation results in its opinion to the judiciary. If the mediation results show that there is real understanding on the part of the offender and recovery between the parties, the probation service can, for example, take the mediation results into account when estimating the probability of recidivism. If according to the mediation results, for example, the suspect is willing to attend an aggression training course, the probation service may also include this in its opinion to the public prosecutor or the judge. The public prosecutor and/or the judge may adopt this advice and impose the aggression training course as a special condition to a (partly) suspended sentence, so that there is a criminal-law stick to ensure that the agreements of the parties are actually complied with.

8.3 COMPENSATION FOR DAMAGES

Paying compensation to the person who has suffered damages is also a form of recovery. If parties settle damages during the mediation, this can have benefits for

both parties. The parties may consult together (possibly after consulting with their advisers) on the amount of the damages and immediately agree or indicate willingness to compensate. Sometimes this can have the advantage for the accused that the public prosecutor will then dismiss the case. It may benefit the victim, because the victim does not have to wait for the penalty order or the court's verdict and is immediately compensated for their damages.

It is not the mediator's role to persuade the accused in any way to pay the compensation sought by the victim during the mediation. After all, the accused may not be sentenced in the criminal trial, either because there is insufficient evidence, or because there are grounds for exemption from criminal liability.

8.3.1 Compensation amount

The basic principle in compensation is that the victim is compensated for the damages they have actually suffered. This means that the injured party should not lose out but should also not benefit from the compensation measure to be imposed. The mediator must ensure that the compensation agreed upon is an obvious one: not too low, to avoid secondary victimisation, but not too high either. In the event of damages to an item of property, the starting point is to compensate the reasonable costs necessary to repair or replace the item. If the parties cannot agree on those costs, ask the victim to request a quote or, if the case has already been repaired, to present the receipt.

If the damages can still not (yet) be determined, for example because the final medical condition is not yet clear, or because the claim is too complex, it is wise not to settle the compensation during the mediation.

If damages were paid by an insurer, the victim cannot also recover these damages from the defendant. The victim can then only recover only the part not reimbursed by the insurer from the defendant. Consider, for example, the excess applicable in health insurance or the dental costs of someone over 18 who does not have supplementary insurance for this.

8.3.2 Amount of immaterial damages

Determining the extent of immaterial damages is complicated. After all, it is not fixed and will have to be determined by the court on a case-by-case basis. It is common for Victim Support (Slachtofferhulp) to assist the victim in estimating the damages suffered. This often includes the item immaterial damages. In practice, it appears that the estimation of those damages by Victim Support is often rather high.

This can create false expectations in the victim. It may be wise to remind the victim that Victim Support's estimate of damages will almost never be directly adopted by the court. If parties do not reach an agreement at the mediation table, it is ultimately up to the parties themselves and/or their attorneys-at-law to estimate the amount of immaterial damages.

8.3.3 Payment of compensation in instalments

The closing agreement is a civil-law agreement exclusively between the parties (see Chapter 9: The Closing Agreement). This means that neither the public prosecutor nor the judge is obliged to take over the agreements mutually reached by the parties. In the event that the defendant wants to pay the compensation to the victim but cannot do so in one go, it is tempting to agree that the defendant may pay the compensation amount to the victim in instalments. However, this involves a risk. If the defendant does not comply with the agreements made and does not pay the agreed compensation to the victim, the victim will still have to initiate civil proceedings in order to get their damages paid. This is an undesirable situation for the victim and should be avoided whenever possible. It is therefore the mediator's job to emphatically alert the parties to this risk.

In case the parties expressly choose to agree on payment by instalments, the mediator may request the public prosecutor or the judge to include payment by instalments as a special condition. This does not mean that the referrer will actually do so. If the referrer does not include it as a special condition and the defendant does not pay, the victim will still have to apply to the civil court to get their damages paid. Those civil proceedings will then be based on the parties' agreements in the closing agreement. It is therefore not the case that in civil proceedings, the amount of damages can be challenged again.

8.3.4 Final discharge

The mediator should be very careful when including a final discharge in the closing agreement. With a final discharge, both parties declare that they have nothing more to claim from each other and (in principle) no claim can be made for any compensation in the event of future damages. Final discharge is often included in a settlement agreement to prevent the parties from wanting to change the agreed final amount in retrospect. See Chapter 9: 'The Closing Agreement' for more information on the settlement agreement.

If the parties reach an agreement with regard to a part of the damages, and not yet with regard to another part of the damages (for example, because the state of affairs is not yet final), then the mediator should not include a final discharge. At most, there is then a partial agreement and discharge (not final discharge) with respect to the part concerned.

In mediation in criminal cases, the victim will be the one to grant the defendant (final) discharge for the part of the damage they have paid to the victim.

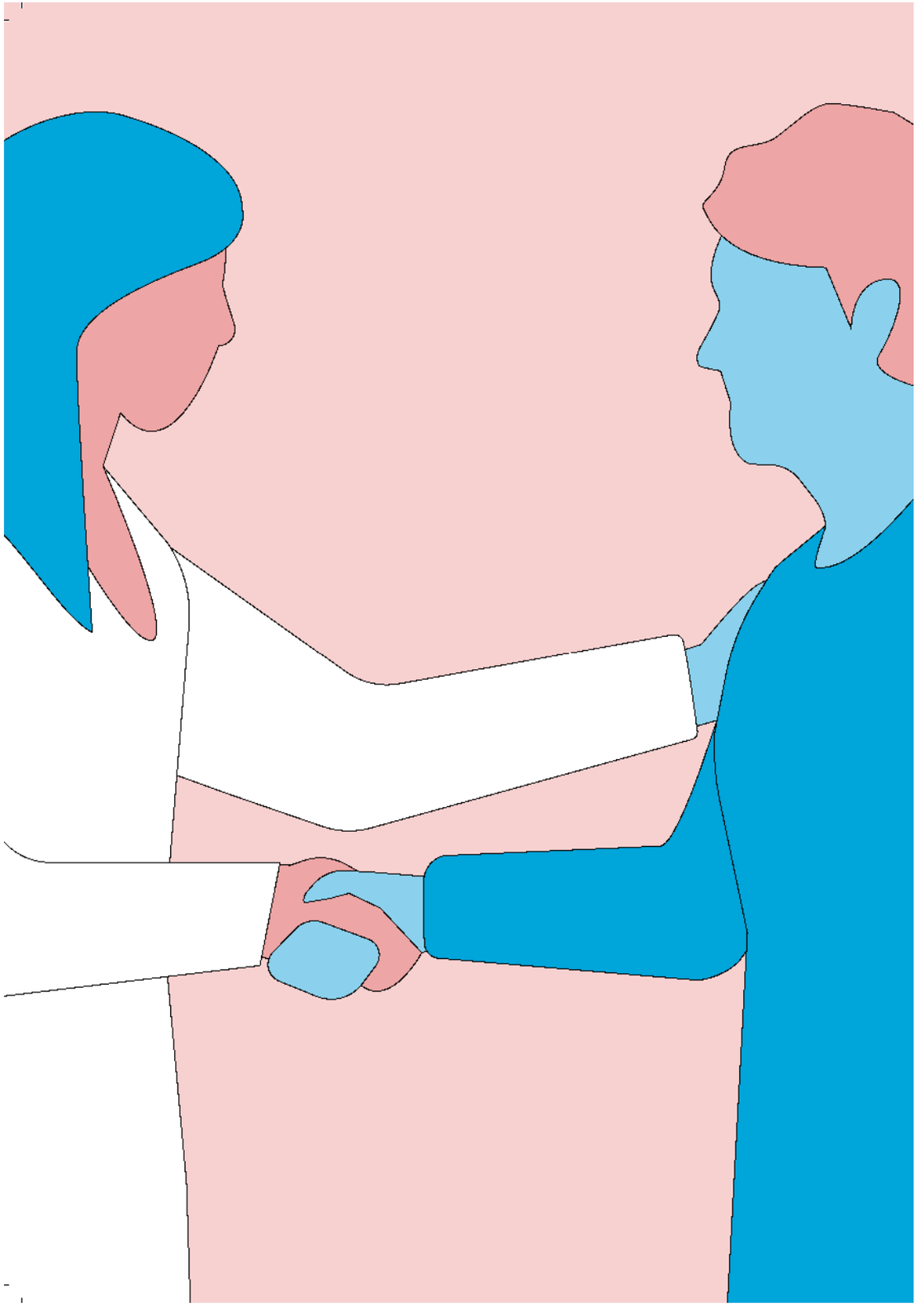
EXAMPLE: 'HEAD INJURY AND PROPERTY DAMAGE'

During a scuffle, the victim suffered a head injury. Doctors cannot foresee how this injury will develop in the future. In addition, the victim's scooter was also damaged. Suppose the victim substantiates with receipts that the damage to the scooter is EUR 350 and the accused immediately pays this amount. In this case, you could include in the agreement that the victim discharges the defendant for the damage to the scooter. This means that the victim can no longer claim anything from the defendant for the damage to the scooter. As the final state of the victim's head injury has not yet been determined and therefore it is not yet certain what loss the victim might still suffer as a result, you should not grant (final) discharge for this loss.

If nevertheless, the option is chosen to grant (final) discharge, it must be very clear what the (final) discharge is being granted for and it must also be clear that the parties know what they are doing. It is the mediator's job to properly inform the parties in this respect and remind the parties that they should submit their agreement to their (legal) advisers before agreeing. Indeed, the parties should not unknowingly forfeit future rights without realising.

8.3.5 Compensation and a confessing defendant

A suspect is an offender only when it has been irrevocably established that the suspect is guilty and they have been convicted. Since mediation in criminal cases takes place during criminal proceedings, it has not been irrevocable established that the suspect is guilty. This raises the question of whether, by paying compensation to the victim, the suspect involves themselves in an awkward conflict of interests. Acts committed by a defendant in a civil-law context (read: mediation) could potentially be used against the defendant in criminal proceedings. In case the defendant does not dare to pay damages for fear that this will be construed as confessing, it is wise to let the defendant consult with their attorney-at-law. A solution could be found by including in the closing agreement that while the defendant is willing to pay an amount of compensation in the mutual relationship with the victim, the defendant further takes the position that they cannot be blamed in a criminal sense. See also Chapter 9: 'The Closing Agreement' on the issue of the confessing defendant.



9 THE CLOSING AGREEMENT

Tanja van Mazijk LL.M.

9.1 INTRODUCTION

In this chapter, we discuss the closing agreement. The closing agreement is the final part of mediation in criminal cases. Once signed by the parties and sent to the judiciary, the closing agreement is deemed a procedural document and part of the criminal file. The closing agreement consists partly of standard provisions and partly of a customised section to be filled in by the mediator. This customised section should be written by the mediator on the spot. In this section, the mediator describes, among other things, whether and how recovery has taken place, the agreements made by the parties and what the parties want to ask the referrer. The closing agreement must be clearly written and substantively/legally correct because what is recorded in the closing agreement may have both financial and legal consequences for the parties.

9.2 THE STARTING AGREEMENT

A mediation in criminal cases begins with the signing of the starting agreement. The starting agreement is made part of the closing agreement by the following provision contained in the closing agreement:

> *"The previously signed starting agreement (dated ....) by which this mediation commenced shall form an integral part of this closing agreement."*

The starting agreement consists of standard provisions. Important provisions from the starting agreement deal with confidentiality and the voluntary basis. Both the starting agreement and the closing agreement state that the parties participate in the mediation process on a voluntary basis. The voluntary basis forms the core of any mediation, including mediation in criminal cases. Particularly in mediation in criminal cases, the mediator should inquire whether the parties are truly participating in the mediation voluntarily and not because they feel pressured by each other or by the judiciary.

By signing the starting agreement, the parties are bound by the obligation of confidentiality. Any other attendees at the mediation will sign a confidentiality agreement at the start of the mediation.

As the major provisions of the starting agreement are also included in the closing agreement, the starting agreement is not separately discussed here. What is said below about the closing agreement also applies to the starting agreement.

See Appendix B for a sample starting agreement.

9.3 THE CLOSING AGREEMENT

9.3.1 A civil-law agreement in criminal proceedings

The closing agreement is a civil-law agreement that forms part of pending criminal proceedings. The parties are relatively free to reach agreements together and record them in the closing agreement. Those agreements can range from greeting each other in the future to paying compensation. It is important to note that, in principle, these agreements only apply between parties and should not be enforced under criminal law but under civil law. If one of the parties does not comply with their agreement, the other party will have to go to the civil court to enforce compliance unless the public prosecutor or the judge includes the agreement as a (special) condition in a penalty order or sentence.

It goes without saying here that not all agreements are legally enforceable. Thus, while agreements to compensate for damages suffered are legally enforceable, greeting each other is not. Hereafter, when discussing the sample agreement, this matter will be discussed further.

9.3.2 Section 51h(2) DCCP

The moment the closing agreement is signed by both parties and has been forwarded to the referrer, the closing agreement forms part of the criminal file and thus is a formal procedural document. Under Section 51h(2) DCCP the judge (and in practice also the public prosecutor) must take the closing agreement into account.

Section 51h of the Code of Criminal Procedure:

1. The public prosecutor shall encourage the police to inform the victim and the accused of mediation options at the earliest possible stage.
2. If mediation between the victim and the accused has resulted in an agreement, the court takes this into account when imposing a sentence or measure.
3. The public prosecutor shall promote mediation between the victim and the convicted person after ensuring that this has the consent of the victim.
4. By general administrative measure, rules can be set on mediation between the victim and the accused or between the victim and the convicted person.

Does this mean that the public prosecutor or the judge must comply with the wishes of the parties and do as the parties request? No, because in the end the public prosecutor or the judge remains responsible for the disposition decision and/or the sentence to be imposed.

9.3.3 Source of information for referrer

The closing agreement is an agreement of the parties. After all, they are the ones who sign this agreement and therefore it is important that the agreement is drafted in terms that can easily be understood by the parties so that the accused and victim understand what they are agreeing to when they sign the closing agreement. At the same time, the closing agreement is also for the referrer, being the public prosecutor or the judge.

The closing agreement is the only source of information for the referrer about what happened between the parties during the mediation and what they want to impart to them as a result. Indeed, all those involved in mediation in criminal cases are bound by the duty of confidentiality. Mediators are bound to this duty of confidentiality by virtue of Article 6 of the MfN (Mediator's Federation Netherlands) Rules of Conduct and Article 7 of the MfN Regulations, and the accused and the victim are bound in the same way by virtue of the fact that they signed the starting agreement at the beginning of the mediation which sets out that they are obliged to maintain confidentiality. Any other attendees at the mediation are bound by the duty of confidentiality after having signed a confidentiality agreement.

Because the public prosecutor and/or the judge can only get all the information about how the mediation between defendant and victim went from the presented closing agreement, it must actually include all the information relevant for the public prosecutor and/or the judge. This means that the mediator needs to paint a representative picture of how the mediation went and describe the agreements between the parties clearly and properly, otherwise the referrer will not know what to take into account and that may have consequences for both the person reporting and the defendant.

9.4 THE MEDIATION ENDS WITHOUT A CLOSING AGREEMENT

Should the parties fail to reach an agreement, the case will be returned to the public prosecutor or the judge at the state it was in. Given the confidentiality of the mediation process, they will then only be informed that the process was not successful, without explaining the underlying causes.

9.4.1 Unilateral statement

Sometimes in such an event, the so-called 'unilateral statement' is used. This statement is not as unilateral as it sounds, as a unilateral statement may only be sent by the mediator to the referrer if both parties agreed to it. This prevents the further disposition of the criminal case from being improperly influenced (in favour of one party).

So what can be included in a unilateral statement? For example, the accused could express regret and indicate to the victim that they need not be afraid anymore. The victim could tell how they experienced what happened and what the consequences are. The fact that both parties must agree to submit the unilateral statement prevents unwanted information from being provided to the referrer. Nevertheless, the mediator must remain vigilant and ensure that mutual accusations and anger are not included in the information sent to the referrer.

9.5 CONTENT OF THE CLOSING AGREEMENT

Using a sample agreement, we look at what should be included in the closing agreement and why. We distinguish between the standard provisions and the customised part of the closing agreement to be filled in by the mediator themselves.

In the standard section we set out a number of key provisions that (must) be included in every closing agreement regardless of the underlying issue. These are the pre-printed provisions that the mediator does not have to fill in on the spot.

The customisation part is written by the mediator on the spot. The relevant text is different every time because every case is different. Now again, it is not the case that every mediation in criminal cases is completely different. A number of themes occur in almost every mediation. We will use those themes to guide the customisation part. For instance, the referrer would like to know whether recovery has taken place, whether any compensation has been settled, whether arrangements have been made and whether the parties have any wishes regarding further settlement. The customisation section below elaborates on all these issues.

Below is a sample closing agreement, which we will explain and discuss article by article. First, the most common standard provisions are discussed. The standard provision is in a box with the explanation underneath. After discussing the standard provisions, we will discuss the customisation part of the closing agreement.

9.5.1 Standard provisions

9.5.1.1 Title

CLOSING AGREEMENT ON MEDIATION IN CRIMINAL CASES (Also settlement agreement?)

A. Is a closing agreement a settlement agreement?

In practice, the terms closing agreement (sometimes called final agreement) and settlement agreement are used interchangeably. However, the closing agreement is not by default a settlement agreement.

B. What is the difference between a closing agreement and a settlement agreement?

A closing agreement is an unnamed agreement, that is, an agreement that is not specifically mentioned or regulated by law. So there are no special legal rules governing a closing agreement. Besides unnamed agreements, the law also recognises so-called named agreements. These are agreements that are specifically named in law and have their own special terms. The settlement agreement is a named agreement and therefore has its own specific statutory regulation set out in Section 900 of Book 7 of the Dutch Civil Code. According to this

section, a settlement agreement is aimed at ending or preventing a dispute or uncertainty about the relationship between parties.

C. Legal implications of naming the agreement a closing agreement or settlement agreement

If the closing agreement is referred to as a settlement agreement, this has legal implications. This has to do with the fact that due to the legal regulations concerning a settlement agreement, legally enforceable agreements such as, for example, the payment of damages cannot be challenged, or can only be challenged in very exceptional cases. Suppose that in the closing agreement, the defendant and the victim stipulate that the defendant will pay the victim a specific amount for damages. Because the defendant cannot pay the money in one lump sum, and the parties expressly state that they both want to agree on payment in instalments, the parties include in the agreement that the defendant will pay the amount in 12 monthly instalments of 1,000 euros. Each month to be paid no later than the last day of the month, noting that if payment is not made on time, the agreed amount is due in full. Two weeks after signing the settlement agreement, the defendant receives new information about the case, which leads them to believe that they do not owe the damages at all. The defendant then refuses to pay and the victim turns to the civil court to seek compliance with the agreement. In this case, the designation 'settlement agreement' is favourable to the victim and not to the defendant. Under Section 900 of Book 7 of the Dutch Civil Code, the court has less freedom to set the agreement aside. Parties are thus more strictly bound by what they have agreed.

D. How should the mediator in criminal cases deal with this?

The mediator must be well aware of the rights of both parties. Precisely because neither the parties nor the mediator can foresee the further course of the (criminal) case, it is strongly recommended to only refer to the closing agreement as a settlement agreement if this is the express wish and intention of the parties. If not, do not include in the closing agreement that it also concerns a settlement agreement.

E. Enforcement

Parties can also register the closing agreement with a civil-law notary. The agreement then becomes enforceable, as a result of which the amount due can be collected by a bailiff.

Both from a financial and restorative justice point of view, it is not desirable that, after the mediation, parties still have to go to court and/or a bailiff to have to claim fulfilment of their agreements.

The mediator is therefore well advised to ensure that the parties do not agree on things that could cause problems afterwards.

9.5.1.2 Case number and mediation number

This case is registered under:

- Mediation number:
- Case or official report number:

For the numbers to be entered, please refer to the documents sent by the mediation officer.

9.5.1.3 Parties

- Party A against whom a report has been filed: (or: suspect)
- Party B by whom a report has been filed: (or: injured party)

Do *not* enter the address and place of residence of the parties. This is in connection with the privacy of parties. Just the name of the parties suffices. Of course, this also applies to the starting agreement. In some cases, the parties may not even want their names to be mentioned in the agreement because they do not want the other party to know their name. In such a case, the official report number, a public prosecutor's office number or cause list number or the registration number of the court's mediation office is sufficient.

The above provision can, of course, be adjusted if parties have filed mutual reports or if multiple victims are parties to the mediation.

Please note that if parties are minors, they can only enter into a mediation process if they are accompanied by their parent or guardian or if explicit written consent of a parent or guardian has been given to participate in the mediation. Minor refers to a young person who is not yet 18 years of age. When a minor is involved, the parent or guardian must also sign.

EXAMPLE:

"Party A, against whom a report was made, during this interview accompanied by their legal representative(s)/parent(s) Mr…….. and/or Mrs/Ms……..."

9.5.1.4 Referrer

The public prosecutor/judge/examining judge

Delete as applicable. Please refer to the documents sent by the mediation officer stating who the referrer is.

9.5.1.5 Supervised by

The mediation was supervised by Mr/Mrs/Ms.....and Mr/Mrs/Ms ..... both MfN-registered mediators.

This provision needs no further explanation. However, sometimes the mediator listed second is referred to as co-mediator or duo-mediator. This relates to terminology introduced by the mediation officers indicating that the mediator, referred to as 'co', is still learning and has done less than 10 mediations in criminal cases. When 'duo' is mentioned, these are generally two experienced mediators in criminal cases. The prefixes co- or duo- can also be omitted.

9.5.1.6 Referral starting agreement

1. The previously signed starting agreement (dated:) by which this mediation has commenced forms an integral part of this settlement agreement.

Due to this provision all provisions of the starting agreement become part of the closing agreement. The confidentiality provision from the starting agreement is therefore also part of the closing agreement.

9.5.1.7 Informed consent

2. At the start of the mediation, the parties were informed about the possible consequences of participating in this mediation. They know that the handling public prosecutor or the judge, in the further disposition of this case, may take into account the outcome of this mediation as set out in this settlement agreement.

The above provision refers to so-called 'informed consent'. Only after thorough explanation by the mediation officer and mediator do the parties participate in the mediation and sign the closing agreement. In doing so, the mediator should also check whether the parties have understood everything correctly and whether they know what consequences participation and signing the closing agreement may have for the parties. By signing the closing agreement, the parties declare that they understand and agree to everything.

9.5.1.8 Referrer decides on course of the criminal proceedings

3. The parties request the handling public prosecutor or judge in accordance with Section 51h of the Dutch Code of Criminal Procedure to take the outcome of this mediation into account. Parties know that they are only making a request and that the public prosecutor or judge will ultimately decide.

This provision once again makes it clear to the parties that the referring judicial authority will ultimately decide on the further course of the criminal case. Parties should know that they cannot force the public prosecutor or the judge to adopt what they have agreed together and requested of the referrer. While the parties may request the referrer to take into account the outcome of mediation under Section 51h DCCP, it is up to the referrer in what way and to what extent they will do so.

9.5.1.9 Customisation section

This is where the customised section written by the mediator is inserted on the spot. For the sake of clarity, this customisation section is discussed below in subsection 9.5.2.

9.5.1.10 Reflection period and further handling

4. After signing this closing agreement, the parties will have five working days for reflection if they wish. This reflection period gives parties the opportunity to discuss the closing agreement with their counsel.

5. In this case, the parties do/do not want to make use of the reflection period.

6. If the parties make use of the reflection period, they will inform the mediators in writing no later than within five working days whether the mediators may submit the closing agreement to the referrer.

7. The closing agreement shall only be submitted subject to the approval from both parties. If one of the parties does not consent to submission, or has not given any notice, the closing agreement will not be submitted.

8. If written consent is not received from both parties, the mediators draft a notice that the mediation has ended and send it to the Mediation Office. In that case, this notice does not contain any information on the reason for termination.

9. If, for any reason, the mediators do not submit the closing agreement, the mediator will send notice to the parties. The closing agreement shall in that case be deemed not to have been concluded or to have lapsed with immediate effect from the time of such notification.

10. The parties are expressly advised that they can submit this closing agreement to their attorney-at-law/counsel for advice.

The closing agreement in mediation in criminal cases is drawn up on the spot and often also signed on the spot. This is for practical reasons, as it prevents the parties from having to come to court again for a signing session. Parties usually sit at the table without (legal) counsel and, because they sign on the spot, have usually not had an opportunity to consult with their (legal) counsel on the content of the closing agreement. The aforementioned reflection period, which takes effect after the parties signed the closing agreement, is intended to give the parties another opportunity to consider whether they really want it, to seek advice or submit it to legal counsel. If at least one of the parties involved opts for a reflection period, it is in force and the reflection period also applies to the other party. If the reflection period has started, the closing agreement, even if already signed, is not yet final. The closing agreement will not become final until both parties have again given their approval for this agreement, whether or not after consultation with their (legal) counsel.

Making use of the reflection period is a responsibility that does not rest with the parties alone. If the mediator has doubts, for example, about the correctness, feasibility or possible consequences of what the parties have agreed, they would be well advised to urge the parties to make use of the reflection period and seek legal advice before finally approving of the closing agreement. Not only because it is undesirable for parties to sign agreements they later regret, but also to limit/exclude the mediator's own liability. During the reflection period, parties can propose minor adjustments or changes, which both parties must then agree to or withdraw their approval of the already-signed closing agreement.

9.5.1.11 Considerations on reflection time

A. First choose whether or not to have a reflection period, and sign afterwards The provision regarding the option of a reflection period is part of the closing agreement and a decision on this must *be made first* before the closing agreement is signed. To illustrate, an example:

EXAMPLE: 'PAYMENT WITHOUT AGREEMENT'

In their closing agreement, the parties agree on a compensation amount that is to be paid. They sign the closing agreement and the accused transfers the agreed amount of compensation to the victim on the spot. The victim then asks for a reflection period and this is also granted. If the victim withholds their approval of the agreement during the reflection period, the compensation has been paid by the defendant, while the closing agreement has not been concluded and cannot be submitted to the referrer. In conclusion, no closing agreement will be sent to the referrer and in the further disposition of the criminal case the referrer will not be able to take account of the compensation that has already been paid.

B. Reflection period used

In case the parties do opt for the reflection period, the mediator must keep the signed agreement under wraps (not yet sent it to the parties and the referrer) because the closing agreement is not yet final. That is, the parties

still have to give their written approval before the mediator can submit the closing agreement. So the mediator prevents the parties from having in their possession a signed closing agreement that has not yet been finalised.

C. Reflection period applies and parties do not respond within the reflection period

It regularly happens that parties opt for the reflection period and do not respond in writing within five days to give their approval. In practice, in such situations, the mediator seeks contact, by phone or email, with the non-responding party. The mediator can then ask why there is no response, whether more time is needed and why that time is needed. If necessary, the mediator (after approval from the other party) may grant an extension of the reflection period.

D. No reflection time and all has been settled

In case the parties have indicated that they do not want to use the reflection period, have signed the closing agreement and have dealt with arrangements such as payment of damages on the spot, the closing agreement is final. The mediator can send the final agreement directly to the parties and the judiciary.

E. No reflection period but parties need time to comply with a compensation agreement

It may also happen that parties do not opt for the reflection period because they fully agree with the arrangements in the closing agreement, but need more time to fulfil arrangements before the agreement is sent to the judiciary. In these situations, the mediator must hold the closing agreement until the agreements are met. The example below illustrates this:

EXAMPLE: 'SCREENSHOT'

Angela's glasses were broken by the blow Rodrigues gave her. During the mediation, Angela submits a receipt for the repair of the glasses and Rodrigues wants to reimburse them. The agreement sets out that Rodrigues will pay Angela the cost of the glasses within two weeks of the mediation session. Rodrigues will transfer the agreed amount to Angela's account. The closing agreement provides that the agreement is final on the date Rodrigues has fulfilled his obligation. He will send the mediator a screenshot of the payment transfer to Angela The mediator will hold the signed closing agreement until Rodrigues has paid and the mediator has received the screenshot from Rodrigues. After this, the mediator will send the closing agreement, including the appendices, to the parties and referrer and they can conclude the mediation. It is then clear to the public prosecutor or the judge that the agreement on damages has been fulfilled.

9.5.1.12 Liability of mediators

11. The parties themselves are responsible for what they agree with each other. The mediators are not liable for what the parties have agreed with each other.

12. Should the mediators, under the heading of professional liability, be called to account in respect of the contents of this agreement, the mediators' obligation of confidentiality shall lapse to the extent necessary to defend themselves against such claims. The mediators' liability under their professional liability insurance is always limited to the amount paid by the professional liability insurance in the relevant case.

Provisions 11 and 12 cannot be read in isolation. In these provisions, the mediator excludes their liability. Article 10.1 of the MfN Regulations states that the mediator must ensure that what the parties have agreed is properly recorded in an agreement, whether by or with the assistance of an expert third party. But the content of the agreement is and remains the responsibility of the parties themselves to the exclusion of the mediator. Further to this, Article 10.2 states that the mediator is not liable for the content of the agreement to be concluded by the parties nor for any resulting damages.

Provision 12 is taken from Article 7.6. of the MfN Regulations. This states that if complaint, disciplinary or liability proceedings are brought against the mediator, the duty of confidentiality lapses to the extent necessary to defend oneself against the claims and/or turn to one's professional liability insurance.

Under the MfN Regulations, mediators are not required to take out professional liability insurance, but a condition for mediating in court (including criminal cases) is that mediators are registered with the 'Raad voor de Rechtspraak' (Council for the Judiciary). Registration with the 'Raad voor de Rechtspraak' requires liability insurance. This means that mediators in criminal cases must have taken out such insurance. The insurer then sets

the requirement for the mediator to prevent and limit their damages as much as possible. If the mediator has taken out this insurance, the insurer will require the mediator to prevent and limit their loss as much as possible. Excluding liability is not possible, limiting liability usually is, but ultimately the judge will decide whether and for what amount the mediator is liable. Lawsuits in which the mediator is held liable by the court are (currently) almost non-existent. Two (published) cases are known so far in which a mediator has been held liable due to the provision of wrong information with adverse financial consequences for the parties. Both cases involved divorce issues and not criminal cases.

The mediator in criminal cases also deals with agreements that can have financial and legal consequences for the parties. Especially if parties do not make use of their reflection period and do not seek legal advice, it remains to be seen whether a mediator in criminal cases can exclude or limit their liability simply by the above provision.

9.5.1.13 Submit to court

> 5. The parties are free to submit the starting agreement and the closing agreement to court if necessary.

This provision allows parties to submit the closing agreement to the civil court in order to enforce compliance from the other party. For example, if compensation for damages agreed in the closing agreement are not paid by the defendant or other legally enforceable agreements that are not fulfilled.

Article 10.3 of the MfN Regulations states that the parties shall jointly determine the extent to which the content of the agreement to be concluded remains confidential. In any case, the content of the concluded agreement may be submitted to the court if that is necessary to demand performance thereof. Article 3 of this closing agreement states that the mediator will send the agreement to the mediation office of the court. The mediation office then requests the referrer to attach the closing agreement to the criminal file.

9.5.1.14 No confession

> 6. Anything that is recorded in this agreement expressly does not constitute a confession within the meaning of criminal law.

It is not the intention that the closing agreement can be used as evidence in the criminal case against the will of the parties. What is recorded in the closing agreement could count as evidence in further criminal proceedings. Moreover, a confession can also have an impact if there are damages that may be compensated by an insurance company. The mediator must therefore take care not to include matters in the closing agreement that could, unintentionally, negatively affect the defendant's position in the criminal proceedings. Therefore, for example, do not copy the full description of the offence from the official report. This could inadvertently be construed as a confession by the accused.

So what about the accused taking responsibility or apologising? Isn't that also a form of confession? It could be. Therefore, the mediator must always be careful to word the accused's apology and assumption of responsibility in such a way that it is not a confession. Writing that the accused regrets what happened still says nothing about what it exactly was that they did and it is therefore not a confession. In practice, the mediator will have to choose the right words and wording each time when writing down what motivates the parties and what the parties agree on; bearing in mind that the mediator has a duty of care for both parties.

9.5.1.15 Signature for agreement

> 7. The parties agree to the contents of this agreement and confirm this by signing this agreement.
>
> **Signed:**
>
> Place: Date: .....
>
> Party A: Party B: .....
>
> Mediator
> (initials for approval)

Normally, the signing of a closing agreement is the sealing of agreements and the completion of a (mediation) process. In a mediation in criminal cases, the process is completed by 'issuing'

the signed agreement to the parties and sending the documents (starting and closing agreement) to the judiciary. If a minor (up to the age of 18) is involved, the parent or guardian of this minor must co-sign.

9.5.2 The customisation section in the closing agreement

9.5.2.1 Introduction

> *Outcome of the joint conversation*
> The parties have discussed and agreed on the following and they wish to bring this to the attention of the public prosecutor and/or the judge:

The customisation section in the closing agreement starts with the above provision. This is the part of the closing agreement that the mediator has to write on the spot, all by themselves. As every case is different, there are no pre-printed standard provisions for this. Time and again, the mediator themselves will have to find the right words to properly describe the results of the mediation for both the referrer and the parties.

A number of themes come up in almost every mediation. We will use these themes as guideline when discussing the customisation section.

9.5.2.2 General tips for writing the customisation section

- Use clear and simple language. Not only the referrer needs to understand what parties have sought to record. The parties themselves also need to understand what they themselves have agreed. Don't use ; 'weighty' words if not necessary.
- Don't use legal terms if you don't have to, and certainly not if you yourself don't know what exactly it means and the implications it may have.
- Make the agreements between parties as SMART as possible. SMART is an abbreviation that stands for Specific, Measurable, Acceptable, Realistic and Time-bound. Simply put, this means that it must be clear what it is that the parties want to achieve with the agreement and that the agreement is realistic and feasible.
- Check what you have written down for language errors before sending it to the referrer.

9.5.2.3 Guideline for writing the customisation section

The following is a guideline for the mediator when writing the customisation section. This guideline consists of a breakdown of the customisation section according to themes that the referrer would like to see in the closing agreement, where possible. The following themes are covered:

- The mutual relationship of the parties and the history of the incident
- The recovery between parties
- The agreements made
- Damages and compensation
- Involvement of environment/assistance
- Request to referrer

Finally, a number of sample agreements are attached for illustrative purposes.

A. Briefly describe the mutual relationship of the parties and the history leading up to the incident

Describing the mutual relationship of the parties and the past history aims to reflect the context of what happened. It matters if the parties have been neighbours for 20 years or if they happened to bump into each other while going out. See the examples below.

B. Describe the recovery between parties

Simply put, repair means "to fix or make good again something that has been broken". Recovery in mediation in criminal cases is a broad concept. You can think of restoring the relationship between parties, but also, and this may apply to only one of the parties, restoring trust, restoration of pain through recognition, restoration of freedom and security as due to the subsiding of fear and so on. The perception of the parties and the impact the event has had on them is the guiding element.

C. Sketch a real picture

Recognise that recovery is not always possible, but that agreements on how to deal with each other can also be very valuable, bring peace and prevent escalation. Don't sugarcoat it and describe what happened during the conversation as honestly as possible. Doubt or difficulty may also be appropriate. Ultimately, parties must be able to approve and the referrer wants to be given a fair picture of the case.

EXAMPLE: 'A FAIR PICTURE'

"Ann is still upset and cannot just get over what happened. However, she does feel good about having had this conversation with Bas" or "Even though Ann is not entirely convinced by the apology by Bas, she feels good about having had this conversation".

D. Questions helpful in describing recovery

- Why did the person reporting report to the police, what did the person reporting want to achieve by doing so?
- What makes parties want to participate in the mediation and conversation? What do they want to achieve with the conversation?
- Looking back on the incident, what does the accused think about what happened?
- Do they take responsibility for what happened, are they sorry and do they want to apologise?
- How did the injured party experience the incident?
- According to the injured party, what happened?
- How do they look back on that now?
- If apologies have been offered, do they accept them?
- Did the conversation increase mutual understanding?
- To what extent do parties want to make agreements on, for example, damages or interaction in the future?
- How was the atmosphere during the interview?
- How do parties look back on the conversation? (e.g.: "Parties indicated that they felt relieved and shook hands afterwards.")

E. Tips for describing recovery

- Briefly and concisely describe what the parties have told you about the significance to the parties of the incident.
- If possible, describe the emotions and atmosphere expressed during the mediation.
- Describe whether and how the defendant feels responsible for the consequences of the incident.
- Describe whether and how the defendant apologises.
- Describe whether (mutual) understanding was created. And if so, what is it that the parties understand about each other?
- Describe the recovery of the victim (e.g. the victim is less afraid, dares to walk the streets again and so on).
- If necessary, describe how the mediation will be completed.
- Describe the atmosphere at the end of the mediation, if appropriate (e.g. how the parties parted, said goodbye and so on).

F. Agreements made

The mediator must properly and clearly record the agreements made by the parties. The mediator must realise that not all agreements are legally/practically enforceable. For example, consider the agreement that parties will greet each other when they meet. During the mediation conversation, parties are free to speak and free to make agreements. This allows them to come up with creative solutions that a judge would not be able to impose. Consider, for example, two footballers who fought with each other and

who then agree to go to each other's team together and to apologise to the other team members. The aforementioned example of the two footballers is a *non-* legally enforceable agreement. However, agreements on compensation for damages, for example, are *indeed* legally enforceable agreements. Failure to honour those agreements does have legal consequences. Therefore, it is important that these agreements are correctly legally recorded so that parties do not run into trouble afterwards. Ensure all agreements between parties are recorded in accordance with the SMART principle where possible.

G. Compensation for damages

Paying compensation to the person who has suffered damages is also a form of recovery. If parties settle the damages during mediation, this can provide advantages for both parties. The parties may consult together (possibly after consulting their advisers) on the compensation amount and either agree directly or indicate a willingness to compensate. Sometimes this can have the advantage for the accused that the public prosecutor will then dismiss the case. It may benefit the victim, because the victim does not have to wait for the penalty order or the court verdict and is immediately compensated for their damages.

The mediator must have knowledge of damages and compensation because the mediator may make mistakes with regard to this subject that may have unwanted juridical and financial consequences for the parties. Important aspects here include the payment of damages in instalments and the use of the term 'final discharge' in the closing agreement. Because damages and compensation is a complex subject, it is dealt with separately in chapter 5: 'Damages and Compensation'.

In the closing agreement, mention whether there are damages or compensation and what the parties have agreed on this.

H. Environment/assistance involved

At the start of the mediation, it is important to find out from the parties whether and which agencies are involved. Agencies involved can be the probation service, 'Veilig Thuis', the community police officer, the housing association, counselling for people with mild intellectual disabilities and so on. These bodies can provide support and assist the parties in honouring their agreements. So ask the parties whether you inform these agencies of the agreements made and whether they may support compliance, and document this in the closing agreement. For the role of the probation service, see chapter 4: 'The Court'.

Also record that the defendant is willing to accept therapy or help if that is the case. The mediator may then write, for example, that the defendant is willing or both parties are willing to seek help from a therapist or divorce mediator, follow an aggression training course et cetera. The referrer could potentially take this into account in the further disposition of the case.

I. Request to referrer

As mentioned above, no agreement reached between the parties will by definition be enforceable on the basis of criminal law, as it is the public prosecutor/judge who shall determine in what manner they will or will not take account of the agreements set out in the closing agreement. This does not prevent the parties from expressing their wishes regarding the further course of the proceedings. This need not just be a request for further prosecution, the waiver of prosecution or sentencing or not. In their request, parties can also express that they want to agree on a restraining order or behavioural intervention, such as admission to a care institution, attending an aggression training course and so on. In this context, see also chapter 4: 'The Public Prosecution Service'.

If the conversation went well, the parties usually ask the public prosecutor not to prosecute further or they ask the public prosecutor/judge to not impose a sentence. Parties should realise that such a request is not always realistic. Think in particular of more serious cases, cases with a social impact or a suspect with an (extensive) criminal record. These and other factors play an important role in the further disposition of the case.

Parties may also request further prosecution or a judgment because they do want the suspect to be punished or for the court to give an opinion, for example, because of the seriousness of the offence. Parties may also ask the public prosecutor or the court to assess/settle the damages because they cannot agree between themselves or because the damages are too complex.

In any case, try to make the parties' request to the referrer as personal as possible. Two examples to illustrate:

EXAMPLE: 'REQUEST NOT TO PROSECUTE'

"Claudia indicates that the conversation has done her good and that mutual understanding has been created. It can now bring this issue to a positive conclusion. Therefore she wants to ask the public prosecutor not to prosecute Ellen any further, but she also knows that it is up to the public prosecutor/court to decide whether or not to proceed with the prosecution."

EXAMPLE: 'REQUEST FOR JUDGEMENT'

"Peter indicates that the conversation has given him more clarity and he is happy that John has apologised. Peter wants to let the judiciary judge the case further."

9.5.3 Examples customisation section of a closing agreement

A perfectly written closing agreement does not exist. Writing the customisation part remains a personal matter: every mediator has their own style and every situation is different. Time and again, a mediator will have to make their own professional choices in this respect and, where possible, describe the above-mentioned components in the customisation section of the closing agreement. Below are six simple examples of how the mediator could write the customisation section of the settlement agreement. These examples are for illustrative purposes and are adaptations of existing closing agreements from practice. Only the texts in the boxes are actually part of the closing agreement.

CASE 1: PARCEL DELIVERER

Explanation of background (not part of the closing agreement)

Hans is a parcel deliverer. Rudy arrived in his car feeling irritated. He felt Hans was blocking the road with his van and walked towards Hans, pulled the door open and wanted to pull Hans out of the car. He yelled at Hans a lot. Many local bystanders who know Hans well were present and they pulled Rudy away. During the intake Rudy says that he feels terribly ashamed. Rudy is an addict and has multiple mental illnesses for which he has been under treatment for years. Rudy also indicates that he does not want to mention this because he himself does not consider it a reason to justify his behaviour. He has also already written to Hans that he sincerely apologises.

The parties have discussed and agreed the following which they wish to bring to the attention of the public prosecutor and/or the court:

A. *Parties' mutual relationship and history of the incident* Hans Hofe (person reporting) and Rudy Roor (accused) do not know each other. At the time of the incident, Hans was working as a parcel delivery driver for UPS. It was during the busy holiday season that Hans briefly blocked the street which Rudy got very angry about. Hans wanted to clear the street by driving around the block but was blocked again by another car. Then Rudy got very angry and went to Hans.

B. *During the mediation*
Rudy is deeply sorry. He should not have approached Hans, this scared Hans badly. Rudy thinks he really shouldn't have done this but he was tense, which he himself does not think is a good explanation. Rudy has already written a letter of apology to Hans about this, which Hans received through the community police officer. Hans read Rudy's letter and this letter actually made it all right for Hans.

Rudy also says he would be very sorry if Hans felt scared due to what happened. Hans indicates that Rudy has nothing to worry about. He is not scared, nor was scared then.

Hans says the neighbourhood where he delivers knows him well and likes him, so bystanders exaggerated what happened a bit. Hans has actually come to the interview for Rudy; because what happened was a bit exaggerated by onlookers, he also wants Rudy to be able to wrap it up properly.

Rudy says he was very stressed during the event. Rudy has mental health problems. He takes medication for this and is under treatment, but he says this does not justify his behaviour at the time. Hans feels touched that Rudy is so sorry and for Hans everything is really settled. He again tells Rudy that he is doing really fine.

Both are happy to have been able to tell each other that it is okay. They are relieved and Rudy is emotional. He is very grateful to Hans.
They shake hands and pat each other on the back. It's fine.

C. *Agreements made*
The parties have indicated that agreements are not necessary.

D. *Damages and compensation*
Rudy has indicated that he wants to compensate all damages, if any.
Hans says there's really no need because he hasn't suffered any damages.

E. *Request to the referrer*
Hans wants to request the public prosecutor to not prosecute Rudy any further. Hans and Rudy had a good talk and as far as Hans is concerned, the matter has been properly completed with the conversation. Hans and Rudy both know this decision is ultimately up to the public prosecutor.

CASE 2: THE SNACK BAR

Explanation of background (not part of the closing agreement) Together with a group of friends, Paul (a minor) caused inconvenience on and around the terrace of Josh's snack bar. When Josh called him on it the second time, Paul got so angry that he kicked over a table and shouted that he would kill Josh with a knife. This went too far for Josh and he reported it.

The parties have discussed and agreed the following which they wish to bring to the attention of the public prosecutor and/or the court:

A. *Mutual relationship of parties and history of the incident*
Josh owns a snack bar. Paul goes to school in the street where Josh's snack bar is located. Paul regularly hangs out with a group of friends at Josh's snack bar. A few weeks before the incident, something had occurred on the terrace in front of Josh's snack bar. Paul was there with some friends and they were making some noise with music. Actually, they had no reason to be there. Josh addressed the group and asked them to leave. Paul then behaved impudent towards Josh. That irritated Josh. Josh then told the boys to stop coming into the snack bar. Paul had not taken this as a snack bar/terrace ban, as, it now appears, Josh had intended it to be.

After this, Paul just returned to the snack bar unaware of the ban, otherwise he would not have gone to the snack bar. When Josh, after a few weeks' holiday, was back working at the snack bar, he saw Paul on the terrace again and wanted to issue Paul with a snack bar/ terrace ban as yet. Paul did not take this very well. Things then got out of hand and Paul was still given a one-year snack bar/terrace ban.

B. During the mediation

On 2 July 2019, Paul Potter and Josh Johnson spoke to each other following the events on 4 April 2019. Paul's father, Mr T. Potter, was also present during the conversation.

Paul is sorry and apologises for the things he shouted, both the first and the second time. He explains that when he gets angry, he then becomes verbally strong/aggressive. He cannot remember it very well afterwards, but he does know that he has gone too far and that he really does not mean the things he shouts when he is angry.

Josh says he believes Paul did not mean what he shouted but that he reported it to set a boundary. He is keen to have this mediation conversation so that Paul learns from it. He does not think he needs punishment.

Paul's father says that he also likes the fact that there is such open discussion and tells Josh that he is always welcome to address him in the future, should he be troubled by the youngsters. Father also indicates that he would have liked to have this conversation earlier; then the issue could surely have been resolved earlier or differently.

Paul tells Josh he wants to buy him a cake to apologise. Josh thinks this is a good idea and says Paul should then come and bring it to the snack bar himself. Paul is fine with that.

Josh thinks the mediation session went well. He appreciates the apology and does not think it is necessary that Paul is prosecuted any further. He also thinks there is no need for the snack bar/terrace ban to remain in place. Officially, this applies until 12 August 2020.

C. Agreements

Paul's father and Josh agree that Josh will speak to him should he be troubled by Paul in the future. For this purpose they exchange phone numbers. Paul buys a cake for Josh and brings it to Josh at the snack bar.

D. Damages and compensation

There are no damages.

E. Request to referrer

Josh requests the prosecution not to prosecute Paul any further. As far as Josh is concerned, the case is properly concluded by the mediation session. Josh also requests the police/public prosecutor to lift the snack bar/terrace ban. The parties agree that if this request is granted, Paul will report to Josh the first time he returns to the snack bar. Together they will then tell the other staff that he is welcome again.

After the interview, everyone is relieved. Everyone is able to go on. Paul is welcome back again in Josh's snack bar. The purpose of the conversation was to be able to understand each other better and that worked out. Afterwards the parties shook hands and agreed that if they met on the street they would greet each other.

CASE 3: SHORT-TERM FRIENDSHIP

Explanation of background (not part of the closing agreement)

Johnny and Marc were friends for a short while, but quarrelled because Marc was convinced that Johnny had stolen his new iPhone. Records show that Johnny hit Marc with knuckle dusters. Although there is evidence of this, Johnny does not admit this during the interview. Marc feels strongly disappointed about this and is still furious at Johnny, but at the same time wants the conversation because he no longer wants to be afraid of Johnny or his friends. Both boys are minors and therefore the mothers of both boys are present during the interview.

The parties have discussed and agreed the following which they wish to bring to the attention of the public prosecutor and/or the court:

A. *Close relationship of parties and history of the incident* Previously, Johnny and Marc were friends. In June 2018, Marc's new iPhone disappeared, during an evening at the home of friends. Marc suspects Johnny of having stolen it. Since then, there has been hostility between them. In March 2019, things escalated when the boys met. As a result, Marc sustained substantial injuries, which he reported to the police. To this, Johnny later filed counter-claims.

B. *During the mediation*
On 6 June 2019, Johnny van Roer and Marc van Bosse spoke following the events. The mothers of both boys were present at the intake interviews and, after the boys first spoke together, they joined them later.

The incident has had and continues to have a considerable impact on Marc. He suffered a concussion and therefore had to miss tests. In the end, he did pass his mavo exam. He actually wanted to go on to havo at the same school, but he was 0.1 points short. The school therefore did not admit him, which was partly because of the hassle with Johnny. He is still very disappointed about that and that is partly why he is still angry and irritated.

Johnny offers to tell school that it will not happen again, but the question is whether this could still be useful or add anything, besides it is now too late. Johnny comments that it should never have escalated. Johnny did not want to cause Marc any serious injury. Marc doubts whether this is true. According to Johnny, he had to defend himself. In this respect, they both have different perceptions.

It had already been quite big a step to sit down with each other. While it cannot be fully resolved, it was still good to talk to each other today.

C. *The agreements made*
It is difficult to make agreements on how to proceed. Marc is actually still too angry and has little faith in the future. Johnny indicates he no longer visits Dronten and Eemland.

That gives Marc some peace of mind. If they meet in the future, they will leave each other alone. They will also tell their friends to leave the other person alone, not to seek them out, provoke and challenge them. Anyway, the group of friends from back then broke up.

F. *Damages and compensation*
Parties indicate they do not want to settle damages at the table but want to leave that to the judiciary.

G. *Request to referrer*
Marc is keen to leave the verdict on the case to the judiciary. Marc adds that he filed a report because of the severity of the injuries.

After the conversation, the mothers exchange phone numbers and the parties shake hands. The mothers indicate that the conversation gave them both more clarification. Should the need arise in the future, they can call each other.

CASE 4: NEIGHBOUR'S DISPUTE

Explanation of background (not part of the closing agreement)
Ann, Shelley and Janice - in the aforementioned order - have been living next to each other for years. This went well in the beginning, but lately the relationship has deteriorated. This led to an incident where Shelley assaulted Ann quite badly. They live in an old neighbourhood in a big city and Ann is a newcomer who is viewed with suspicion. There is also clearly a difference in background. Shelley dislikes Ann and thinks Ann is a 'haughty bitch' who looks down on her and her family. Shelley has been in contact with the police before, Ann has not. When Shelley abused Ann, Janice stood by and helped Ann. She then also took a few blows from Shelley, but Janice does not need compensation.

The judge referred the case to mediation at the hearing. Ann and Janice are not confident that a good solution will be found, but still want to participate in the mediation because the current situation is intolerable and the mediation may provide some relief.

The parties have discussed and agreed the following which they wish to bring to the attention of the court:

A. *The parties' mutual relationship and history of the incident* Ann, Shelley and Janice - in the above-mentioned order - have been living next door to each other for years. This went well at first but lately the relationship has deteriorated due to their gossiping. This led to the incident on 5 February 2019.

B. *During the mediation*
Shelley indicates that she regrets what she has done. She was angry and indicates that she thought Janice and Ann were gossiping about her just outside her window. She heard them laughing very loudly and heard her name. That made her very angry.

Janice and Ann comment that they should not have stood under Shelley's window laughing and that it was not their intention at all to make Shelley angry.

All indicate that they suffer from the poor relationship between them. Their relationship used to be relaxed and they all miss that. Shelley would like things to be as they were, but Ann and Janice say they need time to incorporate what happened.

C. *The parties make the following agreements:*
Everyone agrees there should be peace and quiet. They want to achieve this with the following agreements:

1. They leave each other alone and no longer gossip about each other.
2. Parties do not approach each other directly but through community police officer Jan van Harmelen or Bo Knokke from 'Rust in de Buurt' ('Peace and Quiet in the Community').
3. Parties will not (again) involve the rest of the neighbourhood in (any) difficulties.
4. When other neighbours ask about the incident, they say it was resolved by mutual agreement.
5. The mediators will inform the neighbourhood police officer and Bo Knokke from 'Rust in de Buurt' of the agreements.
6. The mediators also inform the housing association 'Woon Fijn' (in the person of Janny Smith) of the agreements made.

G. *Damages and compensation*
Ann's glasses were broken and the window in her front door was broken. Ann submits invoices of the repair costs. Shelley shows willingness to pay for the damages to Ann's glasses and front door. She transferred the sum of 550 euros to Ann on the spot. The mediator will attach proof of payment to this agreement. Ann also asks for immaterial damages, but Shelley does not want to pay them and leaves this matter to the judge's discretion.

H. *Request to the referrer*
Ann and Janice want the court to handle this case and the immaterial damages. Shelley has indicated that any conviction will not affect the fulfilment of agreements set out in this agreement.

TWO OPTIONAL TEXT SAMPLES TO USE FOR NEIGHBOUR DISPUTES

Rick and Ron agree that Rick will no longer access Ron's property. Both request the public prosecutor and/or the court to take this agreement into account in any (conditional) sentencing or other disposition decision.

Jimmy and Brian agree to address and greet each other calmly from now on. Jimmy will not turn his radio louder than setting 3 after 11 pm. If Brian does experience nuisance from Jimmy, he will discuss it with neighbour Annie, who will then contact Jimmy. Neighbour Annie present at the interview indicated her agreement with this.

CASE 5: TWO FRIENDS

Explanation of background (not part of the closing agreement)
Claudia and Ellen are attending the same secondary school. They used to be friends,

but due to gossip in the group of girlfriends, they started quarrelling. This led to some shoving, Ellen pushed Claudia against the ground and Claudia's phone broke.

The parties have discussed and agreed the following which they wish to bring to the attention of the public prosecutor and/or the court:

A. *The parties' mutual relationship and history of the incident* Claudia and Ellen area attending the same school, the ABC College, a school for pre-vocational education in Vissedrecht. They have been friends for two years. But they started quarrelling because there was a lot of gossiping in their group of friends. The argument got out of hand and during the incident, Claudia's mobile phone broke.

B. *During the mediation*
Claudia finds it difficult to have a conversation with Ellen. Claudia has been afraid of Ellen since the incident. Her sleeping is disturbed and she is afraid to go to school because she is afraid of running into Ellen. She hears from others that Ellen is still angry and wants to get back at her. When Ellen hears this, she gets quiet and says that this was never her intention and that she does not want to get back at Claudia at all. Ellen was surely angry because Claudia should not have made fun of her with their friends, she trusted Claudia, but she regrets pushing Claudia so hard. She had not wanted that, and she certainly didn't want Claudia's mobile to fall to pieces.

Claudia is glad Ellen is no longer angry and she is sorry for what happened. Claudia also understands that Ellen was angry and she regrets saying those things about Ellen, she is also ashamed of that because they always had such a good time together.

C. *Agreements*
Together they agree that they will say to their mutual friends that it is okay now and that they don't want to do any more gossiping. When they meet, they greet each other and maybe in the future they will have a drink together again.

G. *Damages and compensation*
The cost of repairing Claudia's phone is 85 euros. Ellen transferred this amount to Claudia on the spot. The mediator has attached the invoice and proof of payment to this closing agreement.

H. *Request to the referrer*
For both, the case has now been properly closed. They are glad they were able to talk to each other and that they made up. Claudia therefore requests the prosecutor not to prosecute Ellen any further. Had she known she would not be able to withdraw her report, she would not have filed a report at all. Both Claudia and Ellen are aware that this decision is ultimately up to the public prosecutor.

CASE 6: ALCOHOLIC BROTHER

Explanation of background (not part of the closing agreement)
Jim and Michael are brothers. Jim is addicted to alcohol. He is divorced and has lost his job. He is aggressive and due to this he has been in trouble with the law on several occasions, For some time now, Jim has also been threatening his parents who are already in their 80s. The last time Jim was with his parents, his father called Michael to ask if he wanted to come because they were afraid of Jim. Michael came. He asked Jim to behave somewhat calmer towards their parents because they were getting scared of his behaviour. Jim then got even angrier and threatened Michael, pushed his father over (who suffered a tear in his hip in the process) and smashed a chair against the wall. Michael subsequently filed a report in consultation with his parents, as they hope that Jim will amend his behaviour. They are no longer able to reach Jim. The case has been referred by the prosecutor.

The parties have discussed and agreed the following which they wish to bring to the attention of the public prosecutor:

A. *Mutual relationship and history of the incident*
Jim and Michael are brothers. Michael has filed charges against his brother Jim because of an incident that occurred on 4 June at the house of their parents.

B. *During the mediation*

Michael feels very bad that he had to report on his own brother but he feels he has no other choice. Michael is eager to have this conversation with Jim because he hopes to be able to reach Jim and make some good agreements. He does not want Jim to be punished but he does want Jim to receive help. It cannot go on like this, as far as Michael is concerned.

Jim understands that Michael has filed a report. He himself also thinks he has really gone too far. He feels terrible that he pushed his father to the ground and that his own parents became afraid of him. Jim also indicates that it cannot go on like this. After the divorce and the loss of his job, Jim has become increasingly depressed and seeks refuge in alcohol more frequently. He does want to quit but has so far failed to do so.

C. *Agreements made*

Jim acknowledges that he has an alcohol and aggression issue and will seek help for this. Michael thinks it is very important that this will be monitored. Jim indicates that he agrees to this monitoring because he cannot do it on his own. Jim does not object to supervision by the probation service and wants to be admitted to a clinic.

D. *Damages and compensation*

There are no damages.

E. *Request to referrer*

Jim and Michael agree that Jim needs help and
the parties request the public prosecutor to take the agreement between the parties into account in the further disposition of this case.

ACCOUNTABILITY AND CONSULTED LITERATURE

Several authors contributed to this book. Authors are listed under the title of chapters or sections they wrote.

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APPENDIX A - COMPETENCE PROFILE

Mediators in criminal cases master the following competences:

COMPETENCE A: THE MEDIATOR IS ABLE TO WRITE A CORRECT AND COMPLETE CLOSING AGREEMENT.

The mediator is able to write a closing agreement:

- that is administratively correct
- that has a clear and neat layout
- is written in clear, understandable language
- indicates how recovery has been worked on
- describes the arrangements based on the S-M-A-R-T principles
- contains no legal inaccuracies
- provides insight into the background of the incident and mutual relationship between the parties
- describes the creation of agreements
- specifies a reflection period before signature by the parties
- provides insight into the course of the mediation
- sets out that the parties were given the opportunity to consult an attorney-at-law/adviser
- states that the parties were informed of the role of the judge and the public prosecutor

COMPETENCE B: THE MEDIATOR IS ABLE TO HANDLE PERPETRATOR-VICTIM DYNAMICS.

The mediator is able to:

- create a safe atmosphere
- guarantee full participation for both parties
- empower both suspect and victim
- handle psychological issues
- prevent secondary victimisation
- respond to inequality
- confront the parties

COMPETENCE C: THE MEDIATOR IS ABLE TO REGULATE THE COMMUNICATION BETWEEN PARTIES.

The mediator is able to:

- structure the mediation
- handle sociocultural differences

COMPETENCE D: THE MEDIATOR IS ABLE TO REFLECT ON THEIR OWN PROFESSIONAL ACTIONS

The mediator is able to:

- reflect on their own moral judgement
- continue to develop themselves and keep learning

COMPETENCE E: THE MEDIATOR IS ABLE TO GUARANTEE TENABLE AGREEMENTS.

The mediator is able to:

- involve the surroundings in the mediation process where appropriate

COMPETENCE F: THE MEDIATOR IS ABLE TO KEEP PROPER RECORDS.

The mediator is able to:

- prepare the mediation
- comply with the time limits of criminal law

COMPETENCE G: THE MEDIATOR IS ABLE TO INFORM PARTIES.

The mediator is able to:

- manage expectations about the role of the judge and public prosecutor
- make the parties understand the consequences of the agreements made
- paint a realistic picture of the legal phasing, compensation etc.
- make a good assessment of the possibilities of the mediation process

COMPETENCE H: THE MEDIATOR IS ABLE TO WORK TOGETHER WITH A CO-MEDIATOR.

The mediator is able to:

- raise issues if they see that the co-mediator has not seen them
- stay on track with the co-mediator
- sense what is needed and give space to the co-mediator
- connect with the co-mediator
- agree on the division of roles between the mediators

COMPETENCE I: THE MEDIATOR IS ABLE TO COMMUNICATE WITH THE ATTORNEYS-AT-LAW OF THE PARTIES.

APPENDIX B - STARTING AGREEMENT

STARTING AGREEMENT ON MEDIATION IN CRIMINAL CASES

Public prosecution number/Police-report number:

Mediation number:

THE UNDERSIGNED

The following party against whom a report was filed:
A: [Name of party 1]
and
the following party who filed that report:
B: [Name of party 2]

AND THE MFN REGISTRY MEDIATORS:

C: [Name of mediator 1]

and
D: [Name of mediator 2]

Introduction

- The parties were referred to mediation by the public prosecutor/judge.
- The aim of this mediation is for the parties to enter into a dialogue with each other about the event that gave rise to the report in order, if possible, to reach agreements on recovery, the future and/or settlement of damages suffered.

HEREBY AGREE:

Principles for mediation

6. Mediators are neutral, independent and should serve all parties involved. Mediators have had access to the record of the report and the record of the first interrogation, respectively, with the consent of the parties.
7. The parties voluntarily participate in the mediation process. The parties and also the mediators can end the mediation at any time.
8. Everything discussed during mediation is confidential. The signing of this mediation agreement means that all parties undertake to maintain confidentiality. Information exchanged during the mediation, that would not have been known to the parties if the mediation had not taken place, cannot be disclosed outside the mediation without the consent of all parties, nor can it be used in the ongoing criminal case, or in any other proceedings or court case.
9. Mediators will ensure that persons and advisers who are not parties to the mediation but who will nevertheless be involved, will sign a confidentiality agreement. This does not apply to attorneys-at-law because they are bound to a duty of confidentiality subject to disciplinary law.
10. The parties themselves decide on the outcome of the mediation. They have the right to thoroughly read through the agreements and check them with the help of their own attorney-at-law or adviser before signing.
11. Participation in mediation cannot be construed as an admission of a criminal offence.

The result of the mediation

12. Agreements are recorded in writing in a closing or settlement agreement.
13. The closing or settlement agreement is binding and may include a request to the public prosecutor or the court. The closing agreement shows what was discussed during the mediation and on what considerations the parties based their agreements.
14. Before signing, the parties will be given the opportunity to be advised by their attorney-at-law or adviser. The parties shall ensure that their advisers also comply with the duty of confidentiality in this respect.
15. Once signed, the closing or settlement agreement is a public document, which means that the mediation office sends it to the court and/or the handling public prosecutor and the document is added to the ongoing criminal file.

Completion of mediation

16. Within five working days of receiving the signed closing or settlement agreement, the mediator will send it to the mediation office of the court.
17. If a closing or settlement agreement is not concluded, the mediators draft a notice that the mediation has ended and send it to the mediation office. This notice does not contain any information concerning the reason

of termination, unless all parties wish to give information in this respect.

8. The termination notice may be accompanied by statements the parties wish to add to the criminal file through the mediator.
9. The termination notice will be added to the criminal file.

Other provisions

18. Mediators are members of the Mediatorsfederatie Nederland (MfN) and must therefore comply with the MfN's rules of conduct and regulations. These rules can be accessed at http://mfnregister.nl /login-register-mediator/conditions/ (and possibly reference to own website).
19. Mediators are bound to a duty of confidentiality unless the mediation gives them knowledge of possible future criminal offences.
20. By signing this agreement, the parties authorise the mediators to contact their attorney-at-law or adviser only to the extent relevant to the outcome of the mediation.
21. Personal data - As part of the mediation, it is necessary for the mediator to process personal data relevant to the matter at hand by including them in the file. This may include sensitive and/or special personal data of parties. By signing this agreement, the parties expressly authorise the mediator to process their personal data in accordance with the mediator's privacy statement (you have already received the mediator's privacy statement by email). This consent is necessary to be able to start the mediation. As already mentioned in point 12, once this mediation in criminal cases has been completed, the documents are submitted to the mediation officer who then ensures that the documents are added to the criminal file. Further information will not be provided to the mediation office unless consent is given and this consent is in writing.

Signatures

Drawn up in two originals and signed in [place] on [date}

mediator A: [Name of mediator 1]	party C: [Name of party 1]
mediator B: [Name of mediator 2]	party D: [Name of party 2]