# “AND NEVER THE TWAIN SHALL MEET”?

## Literary Language in Dutch and English Supreme Court Judgments

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## Introduction

Why is it that the language of English Supreme Court judgments seems to so many Dutch people, professionals and non-professionals alike, much more accessible than the "legalese" produced by their own *Hoge Raad*? To name just one example, the judgment by the English House of Lords in the case of *Donoghue v Stevenson* is more than eighty years old, but Lord Atkin's opinion on the duty of care in tort law, with its famous Biblical metaphor "who is my neighbour?", still reads like a speech from a novel or a movie. On the other hand, the Dutch *Kelderluik* (1965) is difficult to read, with language that is often perceived as dry. A possible explanation could be that this is due to a difference in "literariness" between the English and the Dutch text. If this is true, it would follow that English Supreme Court judgments have more elements of literary language than Dutch ones.

The relevance of literature for law has been acknowledged for a long time, but this does not apply to literary language. While "Law and Literature" is a topic taught to students of law, "Law *as* Literature", which studies the literary elements in legal texts, does not hold such a privileged position. Lawyers often view the legal and the literary language as worlds apart, like east and west, and "never the twain shall meet". Yet, I want to argue that legal texts are indeed more "literary" than is often thought.

The research question in this thesis, whether English Supreme Court judgments are more "literary" than Dutch ones, and whether this applies more to older judgments than to more recent ones, will be answered in three chapters and a conclusion. The first chapter is a literature review. I will discuss features of Dutch and English legal language and briefly touch on the question if legal texts should be made more accessible. Next, I will talk about literary language and the notion of "literariness", which may be used when comparing English and Dutch judgments. I will give an overview of the criteria for literariness as proposed by Carter and Nash in their major work *Seeing Through Language* (1990), and subsequently show, in a brief analysis of excerpts from *Donoghue v Stevenson* and *Kelderluik*, that there is no sharp divide between literary and non-literary texts, but that one text is higher up on a "cline of literariness", as Carter and Nash phrase it, than the other. The discussion about literariness is linked to Aristotle's claim that literature is "more philosophical and relevant (σπουδαιότερον)" than history, as history only describes how things were, and literature how things might have been. It is particularly in the *obiter dicta* of a judgment that justices philosophise about this "what if", and therefore the question could be asked if *obiter dicta* are more often found in English than Dutch Supreme Court judgments, and if their language is

significantly different (more philosophical or literary) from that of the other parts of the judgment. Finally, I will discuss the differences between the Dutch and English Supreme Courts, and between the areas of law from which the cases for analysis will be taken: English tort law and the Dutch *onrechtmatige daad.*

The next chapter is a description of the methodology I used, the corpus of judgments for analysis, and the problems and limitations. I selected ten Dutch and nine English Supreme Court judgments to make up the corpus for analysis. With one exception, they are arranged in pairs, each pair dealing with an aspect of tort law. About fifty per cent of the judgments date from the twenty-first century; the other half are older, but not older than fifty years. The analysis will focus on stylistic and rhetorical features and make use of criteria for the establishment of a "cline of literariness" as proposed by Carter and Nash, with short excursions to their theory on the language of fiction and to speech act theory. In addition, *obiter dicta* occurring in the corpus will be investigated. The results will be discussed in the third chapter and, if possible, scored in tables.

Finally, I will answer the questions from this introduction by drawing conclusions with regard to the difference in literariness between Dutch and English judgments, and between older and more recent judgments. Striking or interesting findings and the relationships between these findings will be highlighted. My concluding paragraph will contain recommendations for legal writers, and for further research in this area.

# 1. Literature Review

## 1.1: Law as literature?

> "Read the literature of human nature. The lawyers can gain many points by reading" (address by Frank J. Loesch, President of the Chicago Bar Association, at Northwestern University Law School, 1905).

"I am told at times by friends that a judicial opinion has no business to be literature". This is the opening sentence of "Law and Literature", an essay written in 1925 by Benjamin Cardozo, who later became a justice of the US Supreme Court. Cardozo believed that there were more similarities between the literary and legal style than many people, especially lawyers, cared to admit. Starting from the assumption that "in matters of literary style the sovereign virtue for the judge is clearness" (700), he summed up a number of other requirements for a good court opinion, all derived from the areas of rhetoric: "The opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the terseness and tang of the proverb and the maxim. Neglect the help of these allies, and it may never win its way" (701-702; note that Cardozo himself also makes good use of alliteration here).

Together with John Wigmore, who published a canon of legal novels as early as 1908, Cardozo can be said to have been one of the forerunners of the interdisciplinary "law and literature" movement, which tries to bring both together. The study of law and literature became an academic field in the 1970s, branching in two directions. Focusing on the analysis of (usually well-known) works of literature and their importance for law and lawyers, "Law and literature" reminds lawyers that "law is both inextricably bound to the literary culture in which it is practiced and significantly enriched by that unavoidable bond" (Weisberg 107). But it also shows them that literature can make them better lawyers. "Literatuur bevrijdt van oogkleppen, van een strikt egocentrische rechtsinterpretatie en leidt aldus tot aanscherping van het rechtsgevoel", Bart de Vos claims in his contribution to the *Liber Amicorum* for Hans Nieuwenhuis, a Dutch professor of civil law who also wrote extensively about law and literature (660). There are numerous publications in this field, and many universities offer courses on the subject. It is an elective in the second year of the Bachelor of Law course at Leiden University, its purpose being "to offer reflection on central concepts and principles of law", which should ideally lead to "a deeper insight into the works of literature and its

importance for thinking about law" (https://studiegids.leidenuniv.nl/courses/show/62387/recht en literatuur).

The other branch, "law as literature", analyses legal texts "as if they were literary works" (Gaakeer 15). In this field we also find a special interest for legal interpretation. Instead of stressing the difference between law and literature, scholars focus on the things they claim both have in common. James Boyd White argues that reading literature and law is basically the same: "Like law, literature is inherently communal: one learns to read a particular text in part from other readers, and one helps others to read it" (415). By sharing a text, a reading culture is at the same time maintained and developed. And just as a literary text is interpreted by its readers, legal texts are interpreted by lawyers.

Yet in practice, law and literature are considered worlds apart when it comes to legal and literary language. Legal language is often seen as a variety of general language, a more or less closed system with specific lexical, semantic and syntactic features, meant for use by specialists only. The nature of literary language is far more unclear, and attempts to define "literature" remain notoriously vague and are nearly always associated with writing: "[a] written work valued for superior or lasting artistic merit" (*OED,* s.v. "literature"), "A vague, all-inclusive term for … anything written, in fact, with an apparently artistic purpose, rather than merely to communicate information; or anything written and examined as if it had an artistic purpose" (Gray 163). Literary texts are defined by their language (in this context: style), and an analysis of a literary work often focuses on stylistic features, even though stylistics has often been condemned as "too 'objective' and run[ning] the risk of destroying the sensitivity of response that readers need" (Wales 279). As this response, which results from an affective appeal to the emotions of the reader, is considered an integral part of literature, "stylistics cannot tell us what literature is" (Foster, lecture December 2013). In contrast to legal language, with its characteristics that can be described fairly exactly, literary language seems to come in many varieties and degrees: "[it] can be different and yet not different from 'ordinary' or non-literary language; there is, as it were, a 'prototype' of literary language, and also numerous variants" (Wales 280). Texts are no longer seen as either "literary" or "non-literary", but more often considered in terms of "more" and "less literary". In the latter view, "literariness" is a matter of degree, and this suggests that it is possible to establish criteria for measuring this degree. As the texts for translation and analysis are primarily legal texts with possible literary qualities, both legal language and the notion of literariness will be further discussed in the next sections.

## 1.2: Legal language between precision and comprehensibility

> "I cannot conceive how any ordinary person can be expected to understand it" (Lord Denning, commenting on *Davy* v. *Leeds Corporation*, 1964).

The language of lawyers is a language for a special purpose (LSP), a variety of general language, used by specialists, a *vaktaal* (Nolta 6; Rayar 64). It shares many elements with, but also has characteristics that are unknown to, the general language (Nolta 6-7). Jeanne Gaakeer calls it a scholarly language, even an artificial language. It should be approached with care, as many of its concepts seem familiar, but may turn out to have entirely different meanings (20). Florijn also claims that lawyers "speak their own language" (5), but he prefers to call this kind of language a *register*, thus linking it more to a specific rhetorical situation than to a specific user: "Ik zou het een register willen noemen, een taalvariant die afhangt van de sociale rol van de spreker op het moment van uiting en van de onmiddellijke situatie waarin de uiting plaatsvindt" (6). Since there are various possible legal rhetorical situations (e.g. legislation, contract drafting, legal advice, court rulings), one might even conclude that there are subdivisions and that "legal language" is in fact a collective name for a number of varieties. However, there are no strict boundaries between these subdivisions and several sorts of texts may be used in one specific rhetorical situation. Florijn (11) gives an example of legal proceedings, in which the summons, written pleadings, pieces of evidence and the judgment play a part. Nolta also perceives a subdivision, but links it to the areas of law, claiming that concepts in criminal law often have a meaning that is different from the same concepts in, for example, civil law or administrative law (7). Subdivisions are therefore problematic.

Legal language has many elements of the general language: it is based on the same grammar, and its vocabulary has a large overlap with the general language. As a special language, it does not stand on its own either: David Crystal claims that legal language shares some features with other varieties of special languages, such as "a concern for coherence and precision", which is also found in science, and "a respect for ritual and historical tradition", which is shared with religion (347). He points out that legal language bears a grave responsibility towards the general public, as its statements may have a direct bearing on their rights and duties (ibid). The need to write (and speak) as clearly as possible has led to what Peter Tiersma calls a "quest for precision." In the course of this quest, lawyers have adopted a legal language with many peculiarities. As a result, they are sometimes said to build "muren van taal" (Nolta 5) and withdraw within, using the need for precision as an excuse for

building them in the first place (Tiersma 70) and the need for mutual understanding between members of the legal profession (Nolta 9) for maintaining them. Similarly, Van Boom suggests that "juristen in hun eigen taalwereld leven" (49), which also conveys the idea of a (language) world within the world.

Some of the building blocks in the wall of legal language indeed enhance precision. Among the lexical and semantic features of Dutch legal language, Foster (lecture September 2015) and Nolta (11-12) name the use of specialist terminology, foreign words (often from Latin or French), and words that take on a new meaning. But others, such as archaisms, the omission of definite articles, the over-average use of nouns and pronouns, and a high degree of formality, tend to do more harm than good. Other impediments to understanding can be found in the area of syntax: long and complex sentences with many embedded clauses, indirect speech, and a preference for nominalisations and discontinuous structures. Participle clauses, unusual in contemporary Dutch, can still be found in Dutch legal texts.

English legal language shares all these characteristics with Dutch, with the addition of some more. It seems to have a preference for conjoined words and phrases (according to Tiersma, this is related to lawyers' need to anticipate every future contingency) and, in older texts, capitalisation of nouns. It also makes an extensive use of "implicit performatives" as *do, may* and *shall* (Sarcevic 137). While the English language in general has a rather strict word order, adverbials may appear in unusual places in legal English. Tiersma claims that even pronunciation and spelling may be different in legal English: "The legal profession, especially in England, has its own idiosyncratic way of pronouncing a few words" (51), and there are a few minor deviations in spelling (e.g. the omission of an *e* in *judg(e)ment* and other similar words). Crystal and Davy comment on the lack of punctuation that seems to be typical of English legal texts: "A public performance … was about the last thing likely to happen to those legal documents … whose chief function was to serve as written records, and hence the thinness of their punctuation" (200).

Tiersma explains deviating stylistic features in legal language as resulting from the need of lawyers "to set themselves apart from the mass of the population and to create group cohesion" (51). Nolta argues that the preference for tested and tried wordings may be explained by a reluctance to take risks, a wish to conceal uncertainty or, less friendly, the desire to impress outsiders (9). Crystal and Davy also point out that legal language may have purposes besides communication: "Of all uses of language it is perhaps the least communicative, in that it is designed not so much to enlighten language-users at large as to allow one expert to register information for scrutiny by another" (193-194). Information is

therefore limited to a relatively small group of insiders: “Emphasis on group cohesion necessarily excludes those who do not belong” (Tiersma 69). But those who do not belong may be directly or personally affected by a statute, a contract, or a judgment, and are supposed to know the law. As the maxim says, ignorance of the law excuses no one, but to know a law one has to understand what it says. And understanding legal language is not easy.

That legal language is often considered (too) complicated, especially for non-professionals, is reflected in a number of more or less unfriendly words that are used to describe this type of language. The English term “legalese” has acquired connotations of something that is not only typical of the legal profession, but also hard to understand. The *OED* limits its meaning to the *writing* of lawyers: “the abstruse and complicated technical language of legal documents” (*OED,* s.v. “legalese”). *Black’s* definition starts rather neutral: “the *peculiar* language of lawyers,” to continue with “esp. the speech and writing of lawyers *at their communicative worst*” (*Black’s*, s.v. “legalese,” italics added). “Supremecourtese”, “gobbledygook”, and “bafflegab” are just a few of many scathing synonyms (Crystal 376). These invectives seem to be restricted to the English language, as there is no Dutch equivalent for any of them. For “legalese” the term *jargon* is often used, either as part of a compound: *advocatenjargon*, or together with an adjective: *juridisch jargon* (*Van Dale*, s.v. “legalese”). In these combinations, *jargon* means *voor oningewijden moeilijk verstaanbare taal, vak- of groepstaal* (*Dikke Van Dale*, s.v. “jargon”), another pejorative term referring to the idea of lawyers living in their own language world.

In the last decades, campaigns for a more understandable language in legal texts have been launched. By the end of the 1970s, a plain-English movement emerged in the United Kingdom. Its target was not only legal language, but all kinds of official language whose “legalistic” phrasing has been based on the language of statutes. The campaign met with opposition from the legal profession in particular. Referring to the need for precision, critics argued that everyday language is often ambiguous and that legal documents first and foremost need to be clear (although in practice, statutory provisions or judgments can also often be explained in more ways than one). Another argument that was brought forward was that the public needs to have confidence in legal texts, and that this confidence is enhanced by a language that has proved itself throughout the ages. Though the legal profession obviously feels that the need for plain English cannot be ignored altogether (which has resulted in, for example, the publication of drafting manuals), the Plain English Campaign still has a lot of work to do in the area of legal language.

Even though there are no legal provisions that explicitly state that judicial decisions have to be understandable or accessible for non-professionals (Nolta 19), there is some legislation in this field. For example, Article 6, paragraph 3 sub (a) of the ECHR, which states that everyone charged with a criminal offence has the right to be informed "in a language which he understands", can be given a narrow or a wider interpretation. The first thing that comes to mind here is the right to an interpreter, which is stated under (e) in the same paragraph. However, this article could also be applied to those who speak the same language as the court, but do not understand it because of incomprehensible language (Nolta 19), and even further, as a right to understandable language when dealing with the law in general. Provisions with regard to the right to intelligible legal language have also been adopted in Dutch law. Recent laws oblige banks, insurers and civil notaries to use understandable language in the communication with their clients. Book 6, article 238, paragraph 2 of the Dutch Civil Code stipulates that "The contractual provisions of a contract … must always be drafted in plain, intelligible language" (http://www.dutchcivillaw.com/legislation/dcctitle 6655.htm).

The DCC does, of course, not tell us what kind of language may be characterized as "plain", and for whom this language should be intelligible. Language trainers and bureaus try to provide the answers. For some, the notion of plain language is closely tied up with the Common European Framework of Reference for Languages (CEFR), an EU yardstick for measuring the language level of a person. Legal language is usually classified at C1 level, an advanced level that is said to be unintelligible for more than half of the adult population (Visser 307). Visser therefore suggests to use language at B1 level, also called *Jip-en-Janneketaal*, for legal texts. This has provoked a heated debate. Although the need for improvement is widely acknowledged, Klaassen argues that law itself may be too complicated for simplification: "uitspraken hoeven niet in 'jip-en-janneketaal' te worden geschreven. Hoewel de uitspraak gericht is tot partijen, is het recht regelmatig te ingewikkeld om een daarop gebaseerde beslissing, althans op het niveau van de Hoge Raad, in voor partijen daadwerkelijk begrijpelijke bewoordingen op papier te zetten" (145). Jan Renkema, a member of *Commissie Duidelijke Taal* that aims at improving the communication between government and citizen, warns against too much simplification in the rewriting of legal documents, which could lead to non-professionals making incorrect interpretations: "de eis van juridische precisie blijft altijd op gespannen voet staan met de eis van 'begrijpelijk voor iedereen'"(13). Renkema opts for clarification instead of simplification, recent authors reject both simplification and clarification altogether: "Zit er niet gewoon een limiet aan de mate van

begrijpelijk maken wanneer men het over het recht heeft? Juist de taal en de geleerdheid van zij die rechtspreken zorgen voor enige [sic!] afstand tot de burger, maar is die afstand zo erg?" (Nijenhuis 3). In the debate on the question whether legal language should be made accessible, the outcome for now seems that the prevalent opinion is that too much change may cause damage to the legal profession and even to the law itself.

### 1.3: Literature and the notion of "literariness"

> "It is the impossibility of defining it in any simple way that is its most defining feature" (Katie Wales).

Although "literature" lacks a clear definition, much has been written about what makes a text literature: the notion of "literariness". This term was first coined in 1919 by the Russian linguist Roman Jakobson, who claimed that "the object of literary science is not literature but *literariness*, that is, what makes a given work a literary work" (http://oxfordindex.oup.com, s.v. "literariness"). In this view, a literary work contains a variety of observable features, which are for the most part "deviations from ordinary usage" (Gray 161). "Ordinary" or "normal" is in this context usually considered equal to "most frequent in the statistical sense" (Carter and Nash 3). Literary language "will therefore either involve many unexpected abnormal elements; or unexpectedness will result from a text being organized in such a way that normal usages are made to be deviant" (ibid).

Miall and Kuiken argue that there is more to literariness than stylistics alone: "literariness cannot be defined simply as a characteristic set of text properties" (122). Instead, they propose a three-component model of literariness. Its first component is "the occurrence of stylistic variations that are distinctly (although not uniquely) associated with literary texts" (122). When these deviations from 'normal' language are found, they "push the relevant part of the text into the reader's attention, to place it as if in the foreground of a picture" (Grey 122, s.v "foregrounding"). The next, subsequent, components are readers' defamiliarising responses to foregrounding, as the reader is thrown out of its comfort zone and forced to give meaning to the unfamiliar, followed by "the modification or transformation of a conventional feeling or concept" (Miall and Kuiken 123). Though these components do not necessarily have to occur together, it is the interaction between the components that may bring about a "consequent modification of *personal* meanings" (121, italics added). The second and third component are therefore "specific to the individual reader" (134), an individual's subjective process, and this process may even be influenced by conditions outside the person of the

reader, for example, "what is regarded as beautiful by a culture or a society in any given period" (Wales 280).

Recent research has often focused on the third component. In her study on the effects of literariness on empathy and reflection, Koopman argues that, although there is a long tradition of belief in the ethical potential of literary texts, "it is still far from clear which textual features for which readers lead to increased empathy or deep thoughts" (82). She claims that "literariness may indeed be partly responsible for empathic reactions" (91). Particularly foregrounding, which she regards as a defining feature of literariness, may have a positive effect on empathic understanding. Koopman acknowledges that her research was limited, as she used only one feature of literariness and only one literary text (in two versions). Besides, her research is firmly rooted in the tradition of early stylistics with its focus on literary style as a deviation from non-literary, "normal" style.

More recently, the stress on the autonomy of literature with its dichotomy between literary and non-literary texts has given way to an approach in which literature is studied in relation to other forms of discourse. In their major work *Seeing Through Language* (1990), Carter and Nash argue that "the opposition of literary to non-literary language is an unhelpful one and that the notion of literary language as a yes/no category should be replaced by one which sees literary language as a continuum, *a cline of literariness* in language use with some uses of language being marked as more literary than others" (34, italics added). They present a set of criteria which can be used in determining the degree of literariness of a given text. Although the role of the reader is important: "one crucial determinant of a text's literariness is whether the reader *chooses* to read it in a literary way", the focus is on "text-intrinsic linguistic features" (35). Carter and Nash have found six of these features. I will discuss them briefly in relation to what is considered typical of legal texts. Next, the theory will be put to the test with two short excerpts from Supreme Court judgments.

1. *Medium Dependence*. "[T]he more literary a text, the less it will be dependent for its reading on another medium or media" (38). This means that the text can be read without necessary support of images of some kind or other, or of supporting text, e.g. keys or lists of abbreviations. Legal texts may be called medium-dependent for relying on a specific, "legal" vocabulary.
2. *Re-registration* (sometimes also called *genre-mixing*). "No single word or stylistic feature or register will be barred from admission to a literary context" (38). Legal language is explicitly mentioned, in that it is "recognized by the neat fit between language form and specific function" (ibid). However, this does not mean that legal

language never occurs in literary texts, as can be demonstrated from many novels with courtroom scenes. The opposite, the presence of literary elements in legal language, falls strictly speaking outside the "literary context", but may be considered an example of genre-mixing "from the other (legal) side".

3. *Interaction of Levels: Semantic Density.* The more different linguistic levels are at work in a text, the more the text will be perceived as literary. Carter and Nash see semantic density as resulting from "an interactive patterning at the levels of syntax, lexis, phonology and discourse" (39). The most outstanding form of patterning is contrast, but patterns may also consist of forms of repetition, e.g. anaphora or parallelism. The interaction of levels may result in "a potential reinforcement of meaning" (40), leaving room for more than one possible meaning. Whether these multiple meanings actually materialise, is of course dependent on the reader, and although readers of legal texts, especially professionals, usually have the literary competence to discern the patterning, they may reject the idea of more than one meaning to a legal text, as it is diametrically opposed to the requirements of precision and clarity.
4. *Polysemy.* Polysemy is "The capacity of words to have several separable meanings" (Gray 226). The reader is challenged to "perceive the implications consistently and intricately developing with the verbal pattern of the text", and interpret the text on more than one level (Carter and Nash 48). The opposite, monosemy, seems characteristic of legal texts: "monosemy… is closely connected with the need to convey clear, retrievable and unambiguous information" (41). The latter seems fully applicable to legal texts.
5. *Displaced Interaction.* Displaced interaction occurs when the reader has nothing else to do but to 'read' and interpret the text as he or she wishes. At first sight, this should be incompatible with legal texts which are certainly not meant for interpretation *as the reader wishes*. However, this does not mean that there is only one possible interpretation, as can be seen from Supreme Court judgments that are sometimes interpreted in more ways than one by lower courts.
6. *Discourse Patterning.* These patterns do not occur at sentence level, but can be located at text level in, for example, parallel structures like cross-sentential repetition. It is related to the patterns that can be discerned when linguistic levels interact (see 3), but here they are found at a higher level. Discourse patterning mainly aims at

reinforcement of meaning, and may be used to persuade a reader to see the writer's point of view. As such, it could be put to use in legal texts.

Some of these features were already mentioned in earlier work by Crystal and Davy: "the relatively high proportion of singularity features… the variability of modality… and, most important of all, the possibility of introducing any kind of linguistic convention without its being necessarily inappropriate" (79). Wales also refers to "structural coherence or patterning" and "expressive and connotative qualities of meaning" as defining qualities of literariness (279).

1.4: Carter and Nash put to the test

> "It is quite difficult to measure which text is more literary unless the two texts are of identical genre" (Andrew Yau-hau Tse).

In determining if and to what extent the criteria for literariness proposed by Carter and Nash are applicable to legal texts, I selected two excerpts from English and Dutch Supreme Court (or House of Lords, as the case may be) judgments of fairly equal length. The first example is from *Donoghue v Stevenson*, a landmark case "which is now seen as the origin of the tort of negligence in the modern [English] law" (Cartwright 37). The House of Lords ruled that a manufacturer (in this case, of ginger beer) owes a duty of care to the customer (in this case Mrs Donoghue, who fell ill after drinking ginger beer from a bottle which contained a decomposed snail). The paragraph below was taken from the speech made by Lord Atkin.

A. At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa", is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee

> would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

1. *Medium Dependence.* This part of the judgment can be read without support of images or other texts. It is a legal text, but there are but few "legal" words. The only examples are *negligence* and *injure*, which also occur in 'normal' language but have a specific meaning in law, and *culpa*, a Latin word meaning "fault". Non-professional readers will need to consult other media (e.g. a legal dictionary), but only to a minor extent.
2. *Re-registration.* In this text, a Biblical command (love thy neighbour) is interpreted as a rule which also applies in law. Lord Atkin's speech heavily relies on rhetoric: he tries to appeal to his audience by admitting that there are "general conceptions", and that it is only natural ("no doubt") that any offender must pay. This seems a *captio benevolentiae*, a way to capture the goodwill of the audience. In the next two sentences ("But acts … remedy") he stresses the point that there must be limits and that these are determined by rules of law. Then he moves from worldly to Biblical laws, drawing his audience in with a question ("who is my neighbour?"), repeated with a slight, but important variation ("*in law*"). In the last sentence he invites the audience to think along his lines (and of course agree!) by hedging his conclusion: "the answer *seems to be*…"
3. *Interaction of Levels: Semantic Density.* There is an implicit contrast between the Biblical neighbour and the neighbour "in law", but also an explicit contrast in the antithesis *general-particular*. Forms of repetition are found in conjoined phrases such as *acts or omissions*, but also in alliteration: *style it such, receives a restricted reply, avoid acts / or omissions*, and assonance: *range of complaints* and *extent of remedy*.
4. *Polysemy. Neighbour* can be understood in more ways than one (see also above). I found no other examples in this fragment.
5. *Displaced Interaction.* This text could be interpreted in several ways. It may be read as a speech with the purpose of persuading the (predominantly non-professional) reader, it might even try to appeal to the standards and values of this reader. Professionals will read it as an example of judge-made law, and as a precedent for future cases.

6. *Discourse Patterning.* On text level, this paragraph has an A-B-A structure, with a first person (*I*) at the beginning and the end and a second person (*you*) in the middle section.

The Dutch *Kelderluik* also concerns a tort case: when re-stocking a café an employee of Coca-Cola called Sjouwerman opens a trapdoor to a cellar. On his way to the toilet Mr Duchateau, a visitor of the café, falls into the cellar and breaks a leg. He brings an action against Coca-Cola, holding the company liable for creating a dangerous situation. The court of appeal holds that Coca-Cola has to pay only half of the damage caused by the accident, as Mr Duchateau had been careless as well. Coca-Cola then applies to the Supreme Court. The section below considers the second ground for cassation.

B. [Overwegende] dat alleen in het licht van de omstandigheden van het gegeven geval kan worden beoordeeld of en in hoever aan iemand die een situatie in het leven roept welke voor anderen bij niet-inachtneming van de vereiste oplettendheid en voorzichtigheid gevaarlijk is, de eis kan worden gesteld, dat hij rekening houdt met de mogelijkheid dat die oplettendheid en voorzichtigheid niet zullen worden betracht en met het oog daarop bepaalde veiligheidsmaatregelen neemt;

   dat daarbij dient te worden gelet niet alleen op de mate van waarschijnlijkheid waarmee de niet-inachtneming van de vereiste oplettendheid en voorzichtigheid kan worden worden verwacht, maar ook op de hoegrootheid van de kans dat daaruit ongevallen ontstaan, op de ernst die de gevolgen daarvan kunnen hebben, en op de mate van bezwaarlijkheid van te nemen veiligheidsmaatregelen;

   dat in de hier gegeven situatie, waarin Sjouwerman, door in de doorgang naar het toilet een kelderluik te openen, voor bezoekers die aan hun omgeving niet hun volledige aandacht zouden besteden, een ernstig gevaar had geschapen, hetwelk hij, naar het Hof overwoog, met eenvoudige middelen had kunnen voorkomen, het Hof door Sjouwerman te verwijten dat hij met de mogelijkheid van zodanige onoplettendheid geen rekening heeft gehouden en heeft nagelaten met het oog daarop maatregelen, als door het Hof aangegeven, te treffen, de maatstaven die voor de beoordeling van de schuld van Sjouwerman aan het Duchateau overkomen ongeval moeten worden aangelegd, niet heeft miskend;

dat derhalve ook dit onderdeel ongegrond is;

1. *Medium Dependence.* The dangerous situation referred to in this text is described (elsewhere in the judgment) in such a complicated way that photos of the interior of the café had to be made to elucidate the situation. In addition, the Court of Amsterdam even made a local inspection (*descente*). This text also relies heavily on a legal lexicon, especially nominalisations (*niet-inachtneming, hoegrootheid, bezwaarlijkheid*), and conjoined words and phrases (*oplettendheid en voorzichtigheid, of en in hoever*).
2. *Re-registration.* Here is indeed "a neat fit" between the language form and the specific function of the text. This part of the judgment is in fact (part of) one long sentence with a number of considerations and a conclusion, each one beginning with *dat.* Though this Supreme Court judgment was also orally pronounced, its text seems to have been composed more for reading than for hearing – let alone pronouncing.
3. *Interaction of Levels: Semantic Density.* There are some striking patterns of repetition: *dat* at the beginning of each consideration and the conclusion, and *op* in the second paragraph (parallelism). However, these repetitions are also part and parcel of this kind of judgments.
4. *Polysemy.* There are no examples of polysemy. Each word in this text seems to have been chosen because of its unambiguous quality.
5. *Displaced Interaction.* An unambiguous text should lead to a single interpretation. The reader of this text has no room for interpretation and can only follow the reasoning of the court.
6. *Discourse Patterning.* The conclusion in the last line seems to have grown out of the three preceding paragraphs.

A preliminary conclusion may be that text A is higher up on the cline of literariness than text B. However, as some points have been scored on the third and sixth criterion, text B cannot altogether be qualified as a non-literary text.

There is a significant difference between the contents of these texts. The Dutch text minutely describes *what actually happened*: Sjouwerman did not foresee that some visitors would not pay proper attention to the open trapdoor and therefore did not take adequate precautions. On the other hand, the English text leaves room for contemplation and philosophising on *what might be*: what would happen if every offender should be obliged to

pay damages? How far should a duty of care go? The questions in the text, a rhetorical device that is well-known from Plato, invite the reader to think along with the author. We can say that the English text is not only more literary, but also more philosophical in nature, and that the Dutch text is predominantly historical. This corresponds with a dichotomy that was already noticed by Aristotle in his *Poetics*. He claimed that the historian describes "the thing *that has been*" and the poet (who would nowadays be the writer of literature) "a kind of thing *that might be*". It therefore follows for Aristotle that poetry (or literature) is more philosophical and more elevated (φιλοσοφώτερον καὶ σπουδαιότερον) than history, since "poetry relates more of the universal, while history relates particulars" (http://www. loebclassics.com.ezproxy.leidenuniv. nl:2048/view/aristotle-poetics/1995/pb_LCL199.61. xml).

The dichotomy between what has been and what might be is also manifest in the legal system. In both the UK and in the Netherlands, lower courts primarily deal with facts. In considering questions of law and interpreting the judgments of the lower courts, the highest courts have some room to operate on a more abstract level. A comparison between the Supreme Courts of the Netherlands and the UK learns that there are many similarities, but also many differences in the way they are organised, the way their judgments come into being, and the contents of these judgments.

### 1.5: The Supreme Courts of the Netherlands and the UK compared

> "Cassatie is een Franse uitvinding. Het idee had exportwaarde en werd gecopieerd in Spanje, Griekenland, Portugal, Italië, België, Nederland – en Vietnam" (Marc Loth and Marijke Kooijman).

The Supreme Court of the Netherlands, the *Hoge Raad der Nederlanden*, is the highest level of the Dutch judiciary. It hears appeals in civil and criminal cases and cases under tax law. As a court of cassation, "it considers only questions of law concerning the legality of proceedings in lower courts … It does not consider facts and appeals on facts" (Sarcevic 124). Cassation is only possible "if there has been a violation of the law or breach of procedure" (Foster 150). In general, the cassation procedure aims at enhancing and protecting the uniformity and evolution of the law, and at judicial protection (https://www.rechtspraak. nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden).

Cases for the Supreme Court are usually heard by a panel of five justices, or three justices in minor cases. The justices are assisted by the Procurator General's Office (*parket*), consisting of one procurator general and 25 advocate generals, who do preparatory work for the members of the Supreme Court by giving independent advice on how to rule in the cassation proceedings at hand. The Dutch term for this is *conclusie nemen* (delivering an advisory opinion). The advisory opinion is important because of its informative function: it explains a case from another position than the parties'. This position should be both independent and academic, but may also identify alternative possibilities of disposal (De Graaff et al. 28).

The justices who deal with the case deliberate on the proceedings in chambers, in closed session. Who carries the most weight in these deliberations, who adds what to the original opinion, which part is amended or left out altogether remains unknown to the reader of the final judgment; article 7, paragraph 3 of the Judiciary Act (*Wet RO*) stipulates that everybody involved is sworn to secrecy. An essential part of this "secret of chambers" (*geheim van de raadkamer*) is that alternative ways of disposal, dissenting opinions, or underlying policy considerations are not included in the judgment. Alternatives are left out: "Er zijn boeken te vullen met gedachten, varianten en regels die de uitspraak niet hebben gehaald" (de Graaff et al. 59), and dissenters are met halfway by writing a 'flat' (*smal en ondiep*, ibid.) judgment. Currently, a lively debate on the desirability of more extensively stating the grounds of Supreme Court judgments is going on, its outcome yet unsure (see De Graaff et al., and "*Mag het een overweginkje meer zijn?*" in *Ars Aequi*, September 2016).

Dutch Supreme Court judgments have become much shorter in the past decades. Nowadays, the advisory opinion is published in a separate document. The body of a judgment in a civil-law case is usually divided into four sections: the proceedings in the lower judicial authorities (whose judgments are only referred to, not included in the text), the cassation proceedings, the assessment of the grounds for cassation, and the decision. The language that is used in these judgments by the highest judicial authority often serves as an example for lower courts. This implies that Supreme Court judgments should always be perfectly clear to every professional within the judiciary. However, this is not always the case. According to Nolta, there is a direct relationship between the special position of the Dutch Supreme Court as a cassation court and its use of language: "de regel dat de Hoge Raad geen beslissing meer over de feiten mag nemen, is op sommige punten bepalend voor zijn taalgebruik" (46). It has to make an interpretation of the judgment of the lower court, and in this interpretation often uses words as *kennelijk* and *klaarblijkelijk* when expressing what this court must have meant

(46-47). It also has a preference for double negation. Wordings such as *niet onbegrijpelijk* or *niet onjuist* leave room for words with another purport, whereas the opposite (*juist*) would have excluded alternatives (ibid).

The Supreme Court of the United Kingdom is the final court of appeal for all United Kingdom civil cases and criminal cases from England, Wales and Northern Ireland, reassessing judgments on both facts and on points of law. It was created in 2009 as the successor of the Appellate Committee of the House of Lords to make the highest level of the judiciary independent from Government and Parliament. The twelve Lords of Appeal in Ordinary or "Law Lords", members of the House of Lords, were transferred to the Supreme Court and became its first justices; the former Lord Chief Justice took on the title of President of the Supreme Court. Nowadays, justices are directly appointed on recommendation of a selection panel, to which candidates may apply.

Appeal cases "on arguable points of law of the greatest public importance" (http://www.bailii.org/uk/cases/UKSC) can only be brought to the Supreme Court if permission to appeal is obtained, either from the Court of Appeal or from the Supreme Court itself. An appeal is usually heard by a panel of five justices (or more in cases of major importance). After the appeal hearing, for which parties have to present their documents to the Court, judgment is given. Each justice contributes his or her opinion to the judgment, so that not only the majority can present their arguments, but dissenting opinions may also be voiced.

Judgments written by the UK Supreme Court are usually much shorter than those by its predecessor, the House of Lords. Justices may now indicate their agreement with another opinion in the heading of that opinion, rather than in the text of their own opinion. Normally, an UKSC judgment consists of a title page, a page with a list of counsel, the body of the judgment and optional appendices. The body of the judgment is made up of one or more opinions: one if all judges indicate agreement with this opinion, more if there are comments or dissenting opinions. There are no hard and fast rules for the structure of these opinions: "Opinions may be structured by the use of unnumbered italicized headings and sub-headings, but the structure of such headings is optional … and there is no common vocabulary for these headings such that the reader might be able to easily identify the part of the judgment which deals with the facts, with the judicial history of the case, and so on" (Hanretty 41).

The Supreme Courts of the Netherlands and the UK share a number of characteristics. Both are the highest courts in the areas of civil and criminal law. Their decisions are binding on lower courts. In both Courts, cases are dealt with by a panel of justices. Access to both Courts is not unlimited, though the conditions for permission differ. However, there are also

large differences, which have a direct impact on the wording of the judgments. The justices of the Supreme Court of the UK all express their own opinion in the judgment. It is therefore clear which position a certain justice has taken on a specific case: he or she may be one of the majority or have a dissenting opinion. This is not at all clear in a Dutch Supreme Court judgment. Owing to the secret of chambers, not only the opinion of the individual justices, but also the authorship of judgments is always unclear (if the advisory opinion is published, it states the name of the advocate general or procurator general who wrote it, though).

Under the doctrine of precedent (*stare decisis*), former precedents must be abided by when the same points arise again in litigation (*Oxford Dictionary of Law*, s.v. "stare decisis"). In English law, the *ratio decidendi*, the "part of a judgments that represents the legal reasoning" (*Oxford Dictionary of Law*, s.v. "precedent"), is considered binding on lower courts if it is directly based on the facts established at law and directly underlies the final decision (Zwalve 80); in Dutch law, it is more theoretical, consists of general principles and is not strictly binding. Both English and Dutch judgments may also contain elements which are not part of the *ratio decidendi*. These are called *obiter dicta*: remarks that are made "in passing". They are not relevant to the decision, but lower courts may take *obiter dicta* into account when dealing with a similar case, especially when they have been laid down by the Supreme Court. *Obiter dicta* are often philosophical in nature, considering *what might have been* if the facts had been just very slightly different and sometimes even hinting at the possibility of a different outcome in that case. Of the 471 cases in the UKSC database, consulted on 15 October 2016, 183 instances of the word *obiter* were found, which is about 18.68 per cent of all cases. *Obiter dicta* seem relatively rare in Dutch judgments. A search on *rechtspraak.nl* on 15 October 2016 yields 183 instances of *obiter*, about 0.38 per cent of the 48,713 Supreme Court cases in the database at that time. From this, it should not be concluded that English judgments are more philosophical than Dutch ones, as an *obiter dictum* may be included in the text without explicitly being named so (see, for example, the case of the *Meppelse ree* (ECLI:NL:HR:1983: AG4688), in which *obiter* was said that "hoezeer zijn reactie op de plotselinge kritieke situatie menselijkerwijs ook begrijpelijk moge zijn", the driver who tried to avoid a collision with a deer by swerving to the left side of the road, with fatal consequences, could nevertheless be blamed). Dissenting opinions in English Supreme Court judgments are also *obiter dicta*. Though not binding, they are considered very important for the development of law, as yesterday's dissenting opinions might well be tomorrow's leading opinions (Zwalve 80).

1.6: Onrechtmatige daad and Tort

> "[T]his is an area of the law in which, as Lord Nicholls said, imprecision is inevitable. To search for certainty and precision … is to undertake a quest for a chimaera" (Lord Dyson in *Mohamud* v *WM Morrison Supermarkets*).

The research part of my thesis consists of an analysis of a corpus of civil law cases brought before the Dutch Supreme Court, the *Hoge Raad der Nederlanden,* and the Supreme Court of the United Kingdom (and its predecessor, the House of Lords). The Dutch cases all deal with the *onrechtmatige daad* (law of tort), defined in Book 6, article 162, paragraph 1 of the Dutch Civil Code: "Hij die jegens een ander een onrechtmatige daad pleegt welke aan hem kan worden toegerekend, is verplicht de schade die de ander dientengevolge lijdt, te vergoeden" (A person who commits an unlawful act against another person that can be imputed to him, must repair the damage that this other person has suffered as a result of this act). In Dutch law, *onrechtmatige daad* is defined by five elements:

1. There has to be an *unlawful act,* defined in Book 6, article 162, paragraph 2 of the DCC as "a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour" (www.dutchcivillaw.com). The Dutch text of this paragraph, "een doen of nalaten in strijd met … hetgeen volgens ongeschreven recht in het maatschappelijk verkeer betaamt" is often interpreted as a breach of a "standard of care" (*schending van een zorgvuldigheidsnorm,* Loonstra 130) and may in this respect have some connection with the *duty of care* which is the focal point in the English tort of negligence.
2. There has to be *damage.* This can be damage to property, harm to persons (resulting in suffering, injury or even death), or pure economic loss.
3. There has to be *causation*: a "relationship between the act and the consequences it produces" (*Oxford Dictionary of Law,* s.v. "causation"). In other words, the act must be the *condicio* [sic] *sine qua non* for the damage (Nieuwenhuis 41). In English law, this is also known as the "but-for test": "but for the tortfeasor's action the damage would never have occurred" (Foster, lecture February 2016). The important questions here are *if* and *to what extent* the tortfeasor's behaviour has contributed to the damage. The "if" question is asked to establish liability. The

answer to the second question, to what extent someone is liable, determines the amount of damages.

4. The act can be imputed to its author "if it results from his fault or from a cause for which he is answerable according to law or the generally accepted view" (Foster 17, translation of Book 6, article 162, paragraph 3 of the DCC), this is called *imputability.*

These four elements all have to be present to bring an action for *onrechtmatige daad.* Of course, one element may carry more weight than another, but they all have to be there in some degree.

5. The *protective norm criterion* (Foster 19) which is set out in Book 6, article 163 of the DCC states that "There is no obligation to repair the damage on the ground of a tortious act if the violated standard of behaviour does not intend to offer protection against damage as suffered by the injured person" (www.dutchcivillaw.com).

This fifth requirement has to be met in order to qualify for damages.

*Onrechtmatige daad* is usually translated into English with "unlawful act" (Van den End, Foster). "Tort", which is often thought to be the most likely English counterpart, has different connotations, as the Dutch and the English legal systems are different too. In the Netherlands, *onrechtmatige daad* is a single concept for all kinds of unlawful acts. Any translation of Dutch law in this area would therefore have to be in the singular form: the law of *tort.* English tort law may be singular or plural: there are two different schools of thought. The oldest view is that there is a law of *torts*, "only specific torts and unless the damage suffered can be brought under a known or recognised head of liability, there should be no remedy" (Keenan 431). In this view, it would be impossible to establish new torts (as Keenan claims). Some writers (Weir, Zwalve) argue that recent developments (e.g. the development of the tort of negligence) indicate that there is a law of *tort*, "that *all* harm should be actionable in the absence of a just cause or excuse" and that "under the flexibility of case law new torts have come into being" (ibid., italics added). The structure of English tort law may be compared to criminal law, rather than (Dutch) civil law: "Tort is more like criminal law, for just as there are different crimes…so there are different torts… so to get to know the law of tort one must get to know the different requirements of the various torts, and there are quite a lot of them" (Weir 11; see also Zwalve 418).

Whatever the tort may be, the focal points are always the same and are to a large extent similar to the Dutch requirements. English tort cases are always about:

1. what the alleged tortfeasor did (the *unlawful act*, the cause),
2. what the claimant suffered in consequence (*damage*, the effect),
3. and the relation between these two facts (*causation*).

*Imputability* is not a general criterion for tort in English law, though Weir considers an "assumption of responsibility" that can be *imputed* to a defendant a key feature in cases of negligence resulting in economic loss (35). Neither is the *protective norm criterion*. There is, however, a connection between Dutch and English law here: the Dutch protective norm (or *Schutznorm*, see Nieuwenhuis 18) theory is a defence that can also be invoked in the English tort of breach of statutory duty. In *Gorris* v *Scott* (1874), the claimant could not recover under breach of statutory duty, because the statutory provisions he relied on had the purpose of preventing the spread of disease on a ship carrying sheep, and not of preventing sheep from falling overboard (Keenan 817). Nieuwenhuis claims that this English tort case "inspired" Book 6, article 163 of the DCC (18-19).

English torts must be specifically known (hence the term "nominate" torts), and each tort has its own rules and remedies. Some of the oldest nominate torts are trespass (to land, to goods or to the person), nuisance (public or private), and conversion ("what the defendant in a typical conversion case has done is to sell or buy a thing belonging to the claimant" (Weir 154)). Other important torts are defamation, discrimination and economic torts (a.o. malicious falsehood, intimidation and conspiracy). Negligence, as early as 1856 defined as "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do" (Baron Alderson in *Blyth* v *Birmingham Waterworks*), has become the most important tort. First only regarded as a component of other, more specific, torts, negligence developed into a separate tort in the nineteenth century. According to Weir, the tort of negligence differs from other torts in that it is not about *liability*, but about a legal *duty of care* (29, italics added). Consequently, there must be a breach of this duty of care, damage and causation. In order for a duty of care to arise in negligence, three criteria must be met:

1. harm must be reasonably *foreseeable* as a result of the alleged tortfeasor's conduct;
2. the parties must be in a relationship of *proximity*;

3. it must be *fair, just and reasonable* to impose a duty.

English tort law proceeds the way of all common law: it is developed by judges on a case-by-case basis. However, sometimes the legislature intervenes. For example, the torts of trespass to goods, detinue (wrongful detention of goods) and conversion overlapped and were considered complex and archaic. The Torts (Interference with Goods) Act 1977 abolished the tort of detinue and simplified the law and the procedure (Barker 214). Though the courts are bound by statute, this is not considered an obstacle to an ongoing development of the common law. "The common law is constantly developing … It is quite possible that a later development in the common law will take away the case for a reform which has been enacted on the basis of what the law was previously thought to be … But that will not deter the courts from developing the law unless it is clearly inconsistent with what Parliament has enacted" (Lady Hale in *Douglas* v *Hello!* Ltd., 315). If Keenan is right in claiming that, so far, the courts have not managed to create *new* torts (invasion of privacy, mentioned by Weir as an example of an "emergent" tort, can also be considered in the light of article 8 of the Human Rights Act 1998), they have certainly extended the old ones (432). Especially the scope of liability in the tort of negligence has ever been expanded and refined, a development already foreseen in 1932, when Lord MacMillan said in *Donoghue* v *Stevenson* that "the categories of negligence are never closed".

# 2. Methods, Materials and Limitations

## 2.1: Methodology

> "You know my methods. Apply them." (Sir Arthur Conan Doyle).

The Dutch and English Supreme Court judgments that make up the corpus for analysis were all taken from electronic databases: Legal Intelligence or *Rechtspraak* for the Netherlands, Bailii for the UK. The criteria for selection and the focal points of each case can be found in 2.2. I copied each judgment to a separate MS Word document, as this type of document is suitable for electronic processing. Word counts and searches could thus be quickly done. To avoid extreme differences in length, only the leading speeches of English judgments were selected for analysis (the rest was deleted from the document). The preliminary proceedings and the advisory opinion that used to be an integral part of older Dutch Supreme Court judgments were not included in the material for analysis either.

In an analysis of the corpus I tried to establish any presence of the six criteria for literariness defined by Carter and Nash (see 1.3). First, I closely read the definition proposed by Carter and Nash and then asked myself how this was likely to manifest in Supreme Court judgments. I soon found that these definitions, though valuable, are hardly applicable to texts that are first and foremost *legal* texts, when interpretation is limited to the narrow sense that they have been given in *Seeing Through Language*. I therefore decided to give some of them a broader interpretation. Thus the central question for establishing medium dependence became: "is there anything (else) from outside the text that a non-professional reader would need for a full comprehension of this text?" Carter and Nash explicitly name visual media and codes or keys to abbreviations (38), but I tried to make the definition as broad as possible by considering other possibilities (e.g. legal dictionaries) as well. In addition, I included in the discussion of re-registration two "games" that are characteristic of fiction: the realism game and the keynote game (Carter and Nash 99-106), and linked the criterion of displaced interaction, with its focus on the interaction between writer and reader, to speech act theory. I closely observed the wordings in each judgment and marked with a comment each word, phrase or sentence that I felt to be exemplary. By using the search function I was able to count the number of instances of a specific criterion in each text and to highlight striking examples. Finally, I also looked at *obiter dicta* as potential examples of a more philosophical (or even literary) approach of the case. I first looked for parts of the judgments that could be identified

as *obiter* and then searched for evidence of literariness, applying the same method as described above.

For each criterion, I visualised, if possible, the results in a table (or more than one table if necessary for reasons of readability). Each table is divided into a Dutch and an English part; the Dutch judgments are on the left side, with odd case numbers, and the English judgments are on the right, with even case numbers. Within each half, the judgments are also ranked in chronological order (from 1965 to 2016). This makes it easy to see if a specific phenomenon occurs more often in Dutch or English judgements, and more often in older or in more recent judgments.

## 2.2: Materials and Limitations: the corpus for analysis

> "There would be much to be said for our adopting the practice of other supreme courts in having a single majority opinion to which all have contributed and all can subscribe without further qualification or explanation. There would be less grist to the advocates' and academics' mills, but future litigants might thank us for that" (Lady Hale in *Douglas* v *Hello! Ltd*).

I selected the materials for analysis from the extensive online collections of Dutch and English Supreme Court (or House of Lords) judgments, according to the following criteria:

- With one exception, the corpus is made up of *pairs*: one Dutch and one English judgment, both focusing on the same aspect of *onrechtmatige daad* or tort (though there are, of course, more criteria than one involved in all these cases). Overall, the corpus covers the three focal points that Dutch and English tort law have in common (unlawful act, damage and causation), and the three requirements for a duty of care in the tort of negligence (foreseeability, proximity, and that it must be fair, just and reasonable to impose a duty of care, see also 1.6).
- Ideally, both judgments of a pair date from (about) the same time and are of fairly equal length (in practice, English judgments are often, but not always, longer). On average, the judgments in the corpus have about 3,750 words.
- The judgments cover a period of about fifty years: the oldest English judgment dates from 1965, the most recent one was delivered in 2016. Approximately half of them date from the twentieth century, the other half from the twenty-first. The same goes for the Dutch judgments (also dating from 1965 to 2016). Older well-known cases

were easy to find. Unfortunately this does not apply to other, less well-known cases from before 1990: so far, only few have been digitised. The major part of the corpus therefore consists of cases from (roughly) the last two decades of the twentieth and the first decades of the twenty-first century.

- Only one English judgment was delivered by the UK Supreme Court, the other eight cases were dealt with by its predecessor, the House of Lords. It was difficult to find suitable material from the Supreme Court, as the number of tort cases dating from 2010 or later is restricted. Moreover, there is a problem with the word count. It is true that the UK Supreme Court tends to deliver judgments that are shorter, as judges may now agree with the leading opinion without having to make a speech of their own (see also 1.5), but this is the *overall* length: as a result of the new procedure, the leading opinion has to include (almost) everything that is relevant to the case and thus becomes longer.
- The authorship of Dutch Supreme Court judgments is never clear (see 1.5). It is therefore impossible to know who actually wrote what, and it is possible that more than one judgment has been written by the same justice. On the other hand, I made sure that the leading speeches of House of Lords judgments have all been written by different justices, as having two or more speeches by the same author would severely upset the balance in the corpus. These speeches are from *Lord* Justices only. Lady Justices are few in number: so far, Lady Hale is the only woman to have been appointed to the English Supreme Court. Besides, I selected the cases on the basis of their characteristics, not on the basis of the sex of the justice.

The corpus for analysis is made up of the following judgments:

*Kelderluik* (1965) has become the standard for Dutch cases pertaining to the duty of care. Four criteria which have to be taken into account when creating a dangerous situation (*gevaarzetting*) were first defined in this case. These criteria have often been referred to in later cases. *Jetblast* (2004, not included in this corpus) and *Nijmeegse Markt* (2016) show how important the *Kelderluik* criteria still are. Because of its recent date, *Nijmeegse Markt* has been included into the corpus. *Haley* v *London Electricity Board* (1965) is in many ways comparable to *Kelderluik*. All three cases focus on the *foreseeability* of the harm, though the outcome differs.

For a duty of care to arise in negligence, there must be a relationship of *proximity* between the parties. The limits of proximity are especially explored in nervous shock cases.

England has a long tradition in this area, from *Dulieu* v *White & Sons* (1901) to *White* v *the Chief Constable of the South Yorkshire Police* (1999, both not included in this corpus). The claimant in *McLoughlin* v *O'Brian* (1983) is a woman who did not witness the accident in which one of her children was killed, but came on the scene in its immediate aftermath. The same goes for the Dutch *Taxibus* (2002). The focus in the next pair, *Taxusstruik* (1994) and *Page* v *Smith* (1995), is on the question if the harm was *foreseeable* as a result of the (alleged) tortfeasor's conduct and on the question how *fair, just and reasonable* it is to impose a duty of care in these cases.

Another important aspect of tort is *causation*. There has to be a direct relationship between the (unlawful) act and the damage, even if this damage is related to a physical or psychological predisposition that is typical of the victim. The principle that "the tortfeasor takes his victim as he finds him" does not only apply to the so-called "thin skull" or *eierschedel* cases, but also to *Renteneurose* (1985) and *Simmons* v *British Steel* (2004). If an act (or an omission) can be *imputed* to a doctor, the major question is one of *damages*: which damages can be considered "fair, just and reasonable"? In so-called "wrongful birth" cases, such as the Dutch *Wrongful Birth* (1997) and *McFarlane* v *Tayside Health Board* (1999), both statute law (contract law) and common law (tort law) may play a part.

Employers are liable for wrongful acts committed by their employees, but where does this liability end? The limits of *vicarious liability,* together with the question if it is *fair, just and reasonable* to hold an employer liable for the wrongful acts of his employees, are explored in *Kievitsdal* (2007) and, very recently, in *Mohamud* v *WM Morrison Supermarkets Plc* (2016).

Although the tort of negligence sometimes seems to be "dominant and pervasive" (Weir 29), there are other tort categories in this corpus too. They range from the tort of (private) nuisance and the question if an *unlawful act* has been committed in *Burengeschil* (2005) and *Hunter* v *Canary Wharf Ltd* (1997), to the tort of defamation and the question of *damages* in *Sanoma* v *Boerhaave* (2006) and *Grobbelaar* v *News Group Newspapers* (2002). The corpus has been completed with two cases concerning invasion of privacy, regarded by Weir as an "emerging" tort (169): both *Cruijff* v *Tirion Uitgevers* (2013) and *Douglas* v *Hello! Ltd* (2007) particularly discuss the kind of *damage* that has been done.

The final selection is thus as follows:

1a. *Kelderluik* (1966): negligence/duty of care/foreseeability
1b. *Nijmeegse markt* (2016): negligence/duty of care/foreseeability
2. *Haley* v *London Electricity Board* (1965, leading speech by Lord Reid): negligence/duty of care/foreseeability
3. *Taxibus* (2002): negligence/nervous shock/proximity
4. *McLoughlin* v *O'Brian* (1983, leading speech by Lord Wilberforce): negligence/nervous shock/proximity
5. *Taxusstruik* (1994): negligence/foreseeability/fair, just and reasonable
6. *Page* v *Smith* (1995, leading speech by Lord Keith): negligence/foreseeability/fair, just and reasonable
7. *Renteneurose* (1985): negligence/causation/the tortfeasor takes his victim as he finds him
8. *Simmons* v *British Steel* (2004, leading speech by Lord Hope): negligence/causation/the tortfeasor takes his victim as he finds him
9. *Wrongful Birth* (1997): negligence/imputation/damages
10. *McFarlane* v *Tayside Health Board* (1999, leading speech by Lord Slynn): negligence/imputation/damages
11. *Kievitsdal* (2007): negligence/vicarious liability employer/fair, just and reasonable
12. *Mohamud* v *WM Morrison Supermarkets Plc.* (2016, leading speech by Lord Toulson): negligence/vicarious liability employer/fair, just and reasonable
13. *Burengeschil* (2005): private nuisance/unlawful act
14. *Hunter* v *Canary Wharf Ltd* (1997, leading speech by Lord Goff): private nuisance/unlawful act
15. *Sanoma* v *Boerhaave* (2006): defamation/unlawful act/damages
16. *Grobbelaar* v *News Group Newspapers Ltd.* (2002, leading speech by Lord Bingham): defamation/unlawful act/damages
17. *Cruijff* v *Tirion Uitgevers* (2013): invasion of privacy/damage
18. *Douglas* v *Hello! Ltd* (2007, leading speech Lord Hoffmann): invasion of privacy/damage

(see Appendix A for a list of these cases and their sources in chronological order).

# 3. Results

## 3.1: Medium Dependence

The first of the six criteria for literariness defined by Carter and Nash is medium dependence*:* the impossibility to read a specific text without the support of images or other sorts of texts or specific vocabulary. The question that should be asked here is whether there is anything from outside the text that a non-legal reader would need for a full comprehension of this text. I looked for the presence of visual support, legal abbreviations, legal Latin, and legal terminology. If possible, I processed the results in a table. The cases in this table are divided into a Dutch (odd case numbers) and an English part (even case numbers); both parts are ranked in chronological order.

a. *Visual support.* For the sake of clarity, the place where the wrongful act was committed is often minutely described. Sometimes this description indeed helps to clarify the situation. However, in the only instance of visual support that I found, it creates confusion: in *Kelderluik,* descriptions of the actual situation are mixed with descriptions of how this situation would have been if adequate precautions had been taken. The reader does not have the benefit of inspecting the site (which was done by the court) or of the photographs made for use in the proceedings.
b. *Legal abbreviations.* As can be seen from table 1, Dutch judgments make an extensive use of legal abbreviations, for referring to parties to the proceedings (*pp., adv., dagv.*), legal grounds (*rechtsoverwegingen: r.o.* and *rov.*), and legislation (particularly the Dutch Civil Code, *BW,* and the Code of Civil Procedure, *Rv.*).

Table 1

Legal abbreviations

| case nr. | 1a | 7 | 5 | 9 | 3 | 13 | 15 | 11 | 17 | 1b | 2 | 4 | 6 | 14 | 10 | 16 | 8 | 18 | 12 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| year | 66 | 85 | 94 | 97 | 02 | 05 | 06 | 07 | 13 | 16 | 65 | 83 | 96 | 97 | 99 | 02 | 04 | 07 | 16 |
| pp. | 1 | 2 | | | | | | | | | | | | | | | | | |
| adv. | 2 | | | | | | | | | | | | | | | | | | |
| O. | 2 | | | | | | | | | | | | | | | | | | |
| dagv. | 9 | | | | | | | | | | | | | | | | | | |
| Rb. | 4 | | | | | | | | | | | | | | | | | | |
| rov. | | 4 | | 3 | | | | | | | | | | | | | | | |
| r.o. | | | | | 18 | 4 | 6 | | 7 | 12 | | | | | | | | | |
| art(t). | 2 | | | | | | | | | | | | | | | | | | |
| Gw | 1 | | | | | | | | | | | | | | | | | | |
| RO | 1 | | | | | | | | | 1 | | | | | | | | | |

| case nr. | 1a | 7 | 5 | 9 | 3 | 13 | 15 | 11 | 17 | 1b | 2 | 4 | 6 | 14 | 10 | 16 | 8 | 18 | 12 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| BW | 1 | | 4 | 3 | 6 | 2 | 2 | 6 | 4 | 13 | | | | | | | | | |
| Rv. | 3 | | | 1 | 1 | | | | | | | | | | | | | | |
| WRO | | | | | | 4 | | | | | | | | | | | | | |
| Aw. | | | | | | | | | 1 | | | | | | | | | | |
| L.J. | | | | | | | | | | | 1 | 10 | 3 | 2 | | | | | |
| J. | | | | | | | | | | | | 6 | 5 | 2 | | | | | |
| QC | | | | | | | | | | | | | | | | 2 | 2 | 2 | 1 |
| CPR | | | | | | | | | | | | | | | | 1 | | | |

*Kelderluik* (nr. 1a) seems to rely more on knowledge of legal abbreviations than more recent Dutch judgments. English judgments have fewer abbreviations: legislation is written out in full, nearly all abbreviations refer to titles of judges and justices (*L.J., J., QC;* the only exception is *CPR, Civil Procedure Rules*); in addition, abbreviations are mainly found in older judgments.

c. *Legal Latin*. Legal Latin is very rare in Dutch judgments. More than half of the eight instances are found in *Kelderluik.* It is not found in recent judgments, as the Dutch Supreme Court has abolished the practice of using Latin terms in its judgments (Feteris 3247). However, legal Latin is very frequently used in English judgments, to this very day. The reason for this is the fact that Latin managed to keep its privileged position as the language of English law for a long time. Moreover, judges may adopt the wordings of the *ratio* of previous cases. There is one word that occurs in both languages: *dictum,* the "operative part of the judgment" (Van den End, s.v. "dictum"). I also found one instance of legal French: *descente* (in case nr. 13: *Burengeschil*).

Table 2

Legal Latin

| case nr. | 1a | 7 | 5 | 9 | 3 | 13 | 15 | 11 | 17 | 1b | 2 | 4 | 6 | 14 | 10 | 16 | 8 | 18 | 12 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| year | 66 | 85 | 94 | 97 | 02 | 05 | 06 | 07 | 13 | 16 | 65 | 83 | 96 | 97 | 99 | 02 | 04 | 07 | 16 |
| posita | 1 | | | | | | | | | | | | | | | | | | |
| probandum | 4 | | | | | | | | | | | | | | | | | | |
| de facto | | 1 | | | | | | | | | | | | | | | | | |
| pro se | | | | | | | | 2 | | | | | | | | | | | |
| dictum | | | | | | | 1 | | | | | | | | | | | | |
| ratio | | | | | | | | | | | 1 | | | | | | | | |
| ex tempore | | | | | | | | | | | 1 | | | | | | | | |
| prima facie | | | | | | | | | | | | 1 | | | | | | | |
| genus | | | | | | | | | | | | | 1 | | | | | | |
| ex post facto | | | | | | | | | | | | | 2 | | | | | | |

| case nr. | 1a | 1b | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| solatium | | | | | | | | | | | | | | | 1 | | 1 | | |
| dictum | | | | | | | | | | | | | | | | | 3 | | |
| nexus | | | | | | | | | | | | | | | | | 1 | | |
| de minimis non curat lex | | | | | | | | | | | | | | | | | 1 | | |
| injuria | | | | | | | | | | | | | | | 2 | | | | |
| damnum | | | | | | | | | | | | | | | 3 | | | | |
| qui facit per alium facit per se | | | | | | | | | | | | | | | | | | | 1 |
| respondeat superior | | | | | | | | | | | | | | | | | | | 1 |
| gravamen | | | | | | | | | | | | | | 1 | | | | | |
| ex parte | | | | | | | | | | | | | | | | | | 1 | |
| novus actus interveniens | | | | | | | | | | | | | | | 2 | | | | |
| quantum | | | | | | | | | | | | | | | | 1 | | | |

d. *Legal terminology.* Dutch judgments rely to some extent on legal terminology. There even seems to be a trend towards using more legal terms in the first decade of the twenty-first century (see Table 3). On the other hand, English legal terminology is rare. Apart from the usual terms as *appellant* (also *plaintiff*, *pursuer* or *claimant*) and *respondent*, there is but one example: *exemplary damages*, which are awarded not as a compensation, but "to punish the defendant, and to deter him and other from similar behaviour in the future" (Keenan 460).

Table 3

Legal terminology

| case nr. | 1a | 7 | 5 | 9 | 3 | 13 | 15 | 11 | 17 | 1b | 2 | 4 | 6 | 14 | 10 | 16 | 8 | 18 | 12 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| year | 65 | 85 | 94 | 97 | 02 | 05 | 06 | 07 | 13 | 16 | 65 | 83 | 96 | 97 | 99 | 02 | 04 | 07 | 16 |
| exploit | | | 1 | | | | | | | | | | | | | | | | |
| exploot | | | | | 1 | 1 | | | | | | | | | | | | | |
| uitvoerbaar bij voorraad | | | | | 1 | 1 | 2 | | | | | | | | | | | | |
| ten titel van | | | | | 1 | | | | | | | | | | | | | | |
| interlocutoir vonnis | | | | | | | | | | | | | | | | | | | |
| comparitie | | | 1 | | | 1 | | 2 | | | | | | | | | | | |
| geintimeerde | | | | | | | | | | | | | | | | | | | |
| onder algemene titel | | | | 1 | | | | | | | | | | | | | | | |
| in vrijwaring | | | | | | | | 5 | | | | | | | | | | | |
| gevoegd | | | | | | | | 2 | | | | | | | | | | | |
| nemen van een conclusie | | | | | | | | 1 | | | | | | | | | | | |
| betekening | | | | | | 3 | 2 | | | | | | | | | | | | |
| bodemprocedure | | | | | | | 1 | | 1 | | | | | | | | | | |
| verbeurte van een dwangsom | | | | | | | | | | | | | | | | | | | |
| exemplary damages | | | | | | | | | | | | | | | | 1 | | | |

3.2: Re-registration and fictitiousness

In the light of what was discussed in 1.3, re-registration may be defined here in a more general way, i.e. as the process of admitting elements from other registers (or genres) to a text that is itself marked as belonging to a specific genre. In this case, I will be looking for the presence of non-legal language in a legal text. According to the nature of the case, medical (e.g. *scapulae*, *pneumoconiosis*) or technical (e.g. *burner*, *stanchion*) terminology may be found, though in English cases only (nrs. 4, 6, 8 and 10). Unlike medium dependence, which can be established by "filtering out" single words, re-registration is mainly about phrases, sentences or even longer elements of the texts. Some of my findings can be accounted for by the differences between English and Dutch Supreme Court judgments: the former consist of personal opinions, whereas the latter are the result of a co-production. As a consequence, the first person singular may be used (apart from the last line, in which the justice has to indicate if he will allow or dismiss the appeal and then always speaks in the first person):

- "I find myself to be in agreement…" (14.)

The justice may address the other Lords in his speech (if it is delivered in public):

- "My Lords, I regard this contention as misconceived" (16.),

but also the audience in court. He may take his audience by the hand:

- "we must then consider…" (4.),
- "let me just expand a little further…" (16.),

or even directly appeal to the audience, inviting them to think along his lines:

- "Can it make any difference that…?" (4.),
- "Is there any conceptual problem about the fact that…?" (18.),

or he may voice a personal opinion or interpretation (which occurred in all English judgments):

- "I think what they did was quite insufficient" (2.),
- "And it surely cannot be right that…" (8.),
- "There would be something wrong with the law if…" (12.).

So far, these features are exclusively found in English judgments. However, other forms of re-registration are shared by English and Dutch justices alike. Both may use striking words or expressions that belong to another (more informal or colloquial) register:

- "met zijn gezondheid heeft *gesukkeld*…" (7.),

- "the *wear and tear* on the mother" (10.),
- "*juinden* elkaar *op*…" (11.),

and they share a preference for statements expressing common knowledge:

- "Ieder kind wordt van jongs af aan gewaarschuwd om bijvoorbeeld geen besjes van planten en struiken te eten, omdat deze giftig kunnen zijn, met alle kwalijke gevolgen van dien" (5.),
- "Het is immers bekend … dat paarden grazers zijn en zich dus voeden met onder andere planten, takken en blaadjes" (5.),
- "As everyone knows, the personality and demeanour of witnesses … plays a large part in an assessment of their reliability" (8.),
- "It is a matter of universally-shared emotion and sentiment that the intangible but all-important, incalculable but invaluable 'benefits' of parenthood far outweigh any of the mere monetary burdens involved" (10.).

Sometimes, a quotation from a literary work is smuggled in. I found one example of a non-legal quotation, from a recent (2016) English judgment: "As Immanuel Kant wrote, 'Out of the crooked timber of humanity, no straight thing was ever made'".

Table 4

Re-registration

| case nr. | 1a | 7 | 5 | 9 | 3 | 13 | 15 | 11 | 17 | 1b | 2 | 4 | 6 | 14 | 10 | 16 | 8 | 18 | 12 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| year | 65 | 85 | 94 | 97 | 02 | 05 | 06 | 07 | 13 | 16 | 65 | 83 | 96 | 97 | 99 | 02 | 04 | 07 | 16 |
| the text is clearly meant to be spoken: use of the first person singular, address to an audience | | | | | | | | | | | 1 | 1 | | 1 | | 2 | | 3 | 1 |
| inviting the audience to think along the speaker's line | | | | | | | | | | | 2 | 3 | | | 1 | | | 3 | |
| giving a personal (but not a legal) opinion or interpretation | | | | | | | | | | | 1 | 5 | 1 | 1 | 1 | 2 | 1 | 2 | 1 |
| using striking words or expressions | | 1 | | | | | 2 | 1 | | 1 | | 2 | | 1 | 1 | 1 | | | |
| referring to common knowledge or opinion | | | 2 | | | | | | | | 2 | 1 | | 2 | 1 | 1 | 1 | 1 | |
| non-legal quotation | | | | | | | | | | | | | | | | | | | 1 |
| creating suspense | | | | | | | | | | | 1 | | | | | 4 | | | |
| lively description of a situation | | | | | | | | | | | | | | | | 1 | | | 1 |

One of the resources of language that may also be used in the process of re-registration is the language of popular fiction. Carter and Nash distinguish two types of "games" that authors of fiction play to draw their audiences in. The "realism game" (99) has a preference for names, epithets, periphrases and statistics. The "keynote game" (104) makes use of verbs, adjectives, participle clauses and figurative language that all suggest intense emotion and action. Although this seems at first sight incompatible with legal judgments, it might be argued that the facts of a case are some kind of a story, and that there may indeed be elements in it that belong to either of these games. However, the purposes of both games should also be considered. A judgment has to present readers with "the facts as ascertained by law" (*de in rechte vastgestelde feiten,* Zwalve 79), and not with "the material credentials of fantasy" (Carter and Nash 104), which is the intention of the realism game. Therefore, these "stories" are *real* instead of *realistic* and the realism game does not apply. The keynote game, which aims at "express[ing] or stimulat[ing] appropriate states of feeling" (ibid.), seems more promising. I found some examples in the corpus, in English judgments only. A justice may create suspense:

- "what the men did was…" (2.),
- "his difficulties do not end even there…" (16.),

or give a lively description of an event:

- "Mr Khan again punched him in the head, knocked him to the floor and subjected him to a serious attack, involving punches and kicks, while the claimant lay curled up on the petrol station forecourt, trying to protect his head from the blows" (12).

This description indeed suggests violent action, created by verbs (*punched, knocked, curled up*), an adjective (*serious*) and participle clauses (*involving, trying*), and there is even a touch of "realism" in the exact location: the *forecourt* of the petrol station. It is the best example of what may be called "fictitiousness" in an English judgment (though the word "claimant" may dispel any illusion of fiction). Another example only *seems* to be fictitious:

> She was taken down a corridor and through a window she saw Kathleen, crying, with *her face cut and begrimed with dirt and oil.* She could hear George *shouting and screaming*. She was taken to her husband who was sitting *with his head in his hands*. His shirt was *hanging off* him and he was *covered in mud and oil*. He saw the appellant and started *sobbing* (4, italics added).

At first sight, the keynote game is at work here. No detail has been spared to install in the reader an overwhelming sense of horror and compassion. However, these sentences serve

quite another purpose. At the end of his speech, Lord Wilberforce refers back to this description to argue that the case falls within the boundaries of proximity: "Can it make any difference that she comes upon them … in a nearby hospital, when, as the evidence shows, they were *in the same condition, covered with oil and mud*, and distraught with pain?" Obviously, the first description serves as evidence and can therefore only be read as fact, not as fiction.

3.3: Interaction of levels: semantic density

According to Carter and Nash, "semantic density which … results from an interactive patterning at the levels of syntax, lexis, phonology and discourse" is "one of the most important of defining criterial categories" (39). These patterns are often made up of contrasting words of Anglo-Saxon or Latin derivation, monosyllabic or polysyllabic, formal or informal words, simple versus complex syntax, semantic oppositions and contrasting sound patterns. Other elements of these patterns may be forms of repetition, e.g. lexical repetition, alliteration, and parallelism. However, for a text to possess some degree of literariness there should always be some form of *interaction* between elements within a given pattern.

A search for separate elements may yield some results, but in this context it is only the first step and the results are limited. There are no substantial syntactic contrasts in the judgments that make up the corpus, at least, not at sentence or paragraph level. Facts and events are usually described in short sentences, both in English and in Dutch judgments. The legal grounds are often phrased in (very) long, complex sentences with a lot of formulas, especially in Dutch judgments. Some paragraphs only *seem* to have syntactical contrast:

> There she saw Michael, who told her that Gillian was dead. She was taken down a corridor and through a window she saw Kathleen, crying, with her face cut and begrimed with dirt and oil. She could hear George shouting and screaming.
> She was taken to her husband who was sitting with his head in his hands. His shirt was hanging off him and he was covered in mud and oil. He saw the appellant and started sobbing. The appellant was then taken to see George. The whole of his left face and left side was covered. He appeared to recognise the appellant and then lapsed into unconsciousness. Finally, the appellant was taken to Kathleen who by now had been cleaned up. The child was too upset to speak and simply clung to her mother. *There can be no doubt that these circumstances, witnessed by the appellant, were*

> *distressing in the extreme and were capable of producing an effect going well beyond that of grief and sorrow* (4, italics added).

There are eleven short sentences, mostly with coordinating conjunctions and only two instances of subordination ("who…"). The twelfth and final sentence, the focal point or conclusion, is longer, but not syntactically more complicated.

In the area of lexis, there are several instances of contrast between words of Latin and Germanic derivation with the same meaning, e.g. *fysiek – lichamelijk, deponeren – neerleggen, trust – confidence, negligence – inadvertence* (Anglo-Norman vs. Latin). Other contrasts are more complex:

- "*ex tempore* after *inadequate* argument or given after *full* argument and *mature consideration*" (2.).

Not only is there a contrast between words of Latin and French derivation, but there is also a semantic opposition: an *ex tempore* decision is delivered immediately after hearing and therefore does not involve extensive (or mature) consideration, and *inadequate* argument is certainly less than *full* argument. In addition, there is a rhetorical touch: the elements in the first phrase are reversed in the second, so that the two phrases form a chiasmus.

Little can be said about patterns involving informal and formal words: they are few and far between. Informal language seems to occur in only one Dutch judgment: *opjuinen – aanzetten* (case nr. 11), and this is probably not (part of) a pattern, but a sort of "register clash," merely incidental. More interesting because of its potential for patterning are semantic oppositions which seem to be the exclusive province of English judgments:

- "a *public* interest in *disclosure* greater than the *private* interest in *secrecy*" (18.),
- "keener to *conceal his own identity* than *discover theirs*" (16.),

but these double contrasts are not part of a pattern extending beyond the phrase. However, these lines from Lord Slynn's speech on the joys of parenthood are:

> To reduce the costs by anything resembling a realistic or reliable figure for the benefit to the parents is well nigh impossible unless it is assumed that the benefit of a child must always outweigh the cost which, like many judges in the cases I have referred to, I am not prepared to assume. Of course there should be joy at the birth of a healthy child, at *the baby's smile* and *the teenager's enthusiasms* but how can these [be] put in money terms and trimmed to allow for *sleepless nights* and *teenage disobedience*? If the valuation is made early how can it be known whether the baby will grow up *strong or weak, clever or stupid, successful or a failure* both personally and careerwise,

> *honest or a crook*? It is not impossible to make a stab at finding a figure for the benefits to reduce the costs of rearing a child but the difficulties of finding a reliable figure are sufficient to discourage the acceptance of this approach. (10.)

The first series of words in italics, referring to advantages and disadvantages of having children, consist of implicit oppositions; the second series are explicit oppositions. But these are set in a framework of lexical repetition (*assumed - assume*), parallelism (*how can…how can*), metaphor (*to make a stab at*) and alliteration (*resembling* a *realistic* or *reliable* figure, *finding* a *figure, reduce* the costs of *rearing* a child, the *acceptance* of this *approach*). The final clause: "but the difficulties of finding a reliable figure…" combines elements of an earlier f-alliteration with a new element, *reliable*, which is part of the r-alliteration in the first sentence ("resembling a realistic or reliable figure"). The result is not only that *reliable* receives special emphasis, but also that the argumentation has come full circle.

Table 5

Contrast

| case nr. | 1a | 7 | 5 | 9 | 3 | 13 | 15 | 11 | 17 | 1b | 2 | 4 | 6 | 14 | 10 | 16 | 8 | 18 | 12 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| year | 65 | 85 | 94 | 97 | 02 | 05 | 06 | 07 | 13 | 16 | 65 | 83 | 96 | 97 | 99 | 02 | 04 | 07 | 16 |
| *contrasts between:* | | | | | | | | | | | | | | | | | | | |
| simple and complex syntax | | | | | | | | | | | | | | | | | | | |
| words of Germanic and Latin derivation | | 1 | 1 | | 3 | | | | 1 | | 2 | | | | | 1 | | | |
| formal and informal words | | | | | | | | 1 | | | | | | | | | | | |
| semantic oppositions | | | | | | | | | | | 2 | 3 | | | 6 | 5 | | 3 | |

Repetition is part and parcel of legal language. It comes in many shapes in judgments, for example in the elaborate formulas that are used in the summary of (older) judgments by the House of Lords:

- "It is *Ordered and Adjudged*, by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen…"

or in the grounds for cassation in (again, older) judgments by the *Hoge Raad*:

- "te overwegen en *te beslissen als daarin is beslist*…"

This sort of repetition is far removed from anything to do with literary language, and for this reason not included in the table. "Lexical repetition" only concerns repetitions that may be said to possess some sort of literary quality. Examples of these are mainly found in Dutch

judgments: *gruwelijke en schokkende, oplettendheid en voorzichtigheid.* Parallellism may also occur as a result from a legal requirement, e.g. the *O.* (*Overwegende…*) in *Kelderluik* (case nr. 1a). In fact, this judgment is one long sentence made up of parallel constructions, every clause starting with *dat* and ending with a semicolon. Other, non-legal, parallel constructions can be found in both Dutch and English judgments: *ook hier… ook hier…, voorzover... voorzover…, he was angry… he was angry…, certainly… certainly…,* or with some variation, building up a climax:

- "*Some* of the conversation recorded is personal. *Some* relates to the parties' business ventures. *But much* is devoted to discussing and working out the terms of the corrupt bargain…" (16.),

or in combination with semantic oppositions:

- "*to exclude* the *uninvited, to include* only the *invited, to preclude unauthorized* photography, *to control* the *authorized* photography" (18.).

Truly literary forms of repetition are alliteration and end rhyme. Alliteration is prolific in English judgments, though there are also some Dutch examples: *op suggestieve en sensationele wijze, bekendheid en belangstelling, een zekere zeggenschap.* A few of the many English examples are *at some stage, strongly supportive, commercial confidentiality of coverage, a paradigm private occasion, proof of proximity presents no problem, replete with references.* English justices seem to have a preference for plosives: more than half of the alliterations I found were p- or k-alliterations. Some word pairs are (near) synonyms: *close and careful scrutiny,* others antonyms: *on or off the pitch.* End rhyme is, of course, the most poetic variety of repetition, which can be expressed in everyday language:

- "the *wear* and *tear* on the mother..." (10.),

or in an inspired utterance:

- "the dazzling *glare,* too bright for the human eye to *bear*…" (14.).

Taken out of its context, this could well have been a line from a love poem. The third instance of end rhyme:

- "The ambush of the appellant at the airport may have been seen as oppressive, the weight of the newspaper's journalistic onslaught as excessive and the newspaper's attempt to involve the appellant's children as offensive" (16.),

provides an example of three *interacting* forms of repetition: alliteration ("The *ambush* of the *appellant* at the *airport*"), parallelism (*as… as… as…*), and end rhyme (*oppressive, excessive,*

*offensive*). The pattern is also reinforced by "register borrowing" from military language such as *ambush* and *onslaught.* It is in examples like this that a glimpse of literariness is shining through.

Table 6

Repetition

| case nr. | 1a | 7 | 5 | 9 | 3 | 13 | 15 | 11 | 17 | 1b | 2 | 4 | 6 | 14 | 10 | 16 | 8 | 18 | 12 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| year | 65 | 85 | 94 | 97 | 02 | 05 | 06 | 07 | 13 | 16 | 65 | 83 | 96 | 97 | 99 | 02 | 04 | 07 | 16 |
| lexical repetition | 4 | | | 1 | 1 | | 1 | | | | | | 1 | | 1 | 2 | | | |
| parallellism | | | 1 | | 1 | 1 | | | | 3 | | 1 | | 1 | | 2 | 3 | | 1 |
| alliteration | | | | | | | | 3 | 2 | | 2 | 10 | 6 | 1 | 3 | 8 | 4 | 5 | 6 |
| end rhyme | | | | | | | | | | | | | | 1 | 1 | 1 | | | |

3.4: Polysemy: metaphor

As said in 1.3, polysemy is the capacity of words to have more than one meaning. A polysemic (this is the adjective used by Carter and Nash, which is, according to the *OED*, the linguistic term; Peter Newmark uses *polysemous*) text can therefore be read in more ways than one. Consequently, polysemy seems incompatible with legal texts that aim (among other things) at conveying unambiguous information. However, there is one type of polysemy that may be admissible to legal language: metaphor. Metaphor allows words with specific meanings to take on new, related meanings. Thus denotations may be turned into connotations, words may be read figuratively rather than literally, and new meanings may point to something that is outside the text. There is a clear link between polysemy and metaphor in Newmark's claim that "all polysemous words… are potentially metaphorical" (104). And there may even be a similar aesthetic purpose: Carter and Nash point out that polysemic words have the capacity to "provide a verbal pleasure" (41); according to Newmark, the pragmatic purpose of metaphor is "to appeal, to delight, to surprise" (104).

Newmark distinguishes six types of metaphor, in increasing order of originality: dead, cliché, stock, adapted, recent, and original metaphors.

1. *Dead metaphors* have become so common that they "pass unnoticed". As their metaphorical qualities are simply overlooked, they have "ceased to be metaphorical" (Gray 175). As such, they have also given up any claim to literariness. Dead metaphors abound in the Dutch texts: *in het midden laten, een (belangrijke) rol spelen,*

*aan het maatschappelijk verkeer deelnemen, voor rekening komen van*, but also occur in the English ones: *attach weight to (an argument), to take account of (the facts).* I found one example that is found in both the Dutch and the English judgments: *in the light of.* Supreme Court justices seem to have a preference for this expression, because it occurs in seven of the nineteen judgments (even three times in case nr. 8).

2. *Cliché metaphors* are "used as a substitute for clear thought" (Newmark 105), as an excuse for not having think about the facts of the matter. These metaphors often appear in appellative texts, such as political and commercial texts, but are not very likely to be found in legal texts, which should (preferably) be the result of clear thinking, phrased in clear wordings. There are no examples in the corpus.
3. *Stock (or standard) metaphors* are established metaphors, well-used but "not deadened by overuse" (Newmark 108). This is the type of metaphor that is found in almost every text in the corpus (with the exception of one Dutch and one English case). It tends to occur more in Dutch than in English texts. In numbers, there are more English stock metaphors, but this is due to an overabundance of metaphor in two texts (nrs. 12 and 18). Many Dutch examples are concerned with life, death, and health: *in het leven roepen van (een gevaarlijke situatie), met zijn gezondheid sukkelen, mank gaan aan, aan de dood ontsnappen* but there are also others: *door de beugel kunnen* (in a quotation), *de vraag rijst, populariteit verzilveren.* Examples of English stock metaphors are: *to come to light, to make a stab at,* and *to throw his weight around.*
4. *Adapted metaphors* are stock metaphors with one or more elements adapted to the rhetorical situation. An example is found in case nr. 10: "they must look to their perspective and *impalpable gains* on the roundabouts to balance what they *actually lose* on the swings." This is a well-known playground metaphor, with a semantic opposition, *impalpable* vs. *actually*, added (note that there is also a *syntactic* opposition between the first clause and the embedded second clause).
   In this category I would include *legal metaphors*: fixed expressions in legal language that make use of metaphor. Again, these are found in both languages. Some Dutch examples are on the verge of becoming dead metaphors: *afwegen van belangen, afbakenen van de gevallen,* others are almost exclusively found in legal language: *dit klemt temeer, (naar de eis der wet) met redenen omkleed, zich keren tegen (verwerping van het betoog).* English examples of the latter type are: *to sound in damages, findings of fact.*

5. *Recent metaphors* are neologisms of recent coinage, which have been adopted in the *general* language. They could not be traced in these, first and foremost *legal*, texts.
6. *Original (or novel) metaphors* are artistic products, most likely to be found in expressive texts. The problem with this type of metaphor is that "original" is a subjective notion, depending on the reader's opinion and experience. Examples should therefore be given with some caution, but there might well be one in case nr. 18: "[this] case does not *get off the ground*".

Metaphors may consist of one word or more. In the latter case they are often called "extended" metaphors, though there is no agreement on the minimum number of words or sentences that make up an extended metaphor. A given metaphor may also be repeated or developed within a paragraph or a text. This kind of extended metaphor comes close to the notion of literariness, as it allows patterns to come into being. I found examples in English judgments only. In case nr. 4, Lord Wilberforce plays with the images of unwanted things that all appear in large numbers: "a *proliferation* of claims" (*proliferation* often being associated with nuclear weapons), "the establishment of an *industry* of lawyers and psychiatrists", and "a *flood* of litigation". He also uses metaphor to develop an image of borders: "the law is to draw *an arbitrary line*". This line is at first not precisely defined: "he has crossed *some critical line* behind which he ought to stop", but develops into "the *barrier* of commercial sense and practical convenience". Finally, now that the line is known, "the law should *retreat behind the lines*" (like an army). Lord Hoffmann (case nr. 18) criticises the attitude of a magazine that bought and published photographs which had surreptitiously been taken: "these defendants *firmly kept their eyes shut* lest they might *see*…" and informs his audience that they had better keep their (metaphorical) eyes open instead: "The point of which one should *never lose sight* is…" that it was all about money: "if one *keeps one's eye firmly on the money*…" (the repetition of *firmly* reinforces the pattern).

There is a striking amount of military metaphor in the English cases in the corpus. Examples are case nr. 4 (*proliferation* and *retreat behind the lines*, as discussed above), nr. 18 ("Thorpe *infiltrated* the wedding and took photographs"), and especially case nr. 16. Not only does Lord Justice Palmer of the Court of Appeal report the events in war-like terms ("*bombarded* him with questions"), this language has been adopted by Lord Bingham of the House of Lords as well, in a story that sometimes almost reads like a detective: "The newspaper *armed* Mr Vincent with equipment…" In "a *posse* of journalists" there is a clear reference to "The population of local able-bodied men whom a sheriff may summon to …

pursue felons" (*OED*, s.v. "posse"). These "able-bodied men" participate in an "*ambush* of the appellant at the airport" and a "journalistic *onslaught*" (see also 3.3). But the appellant is not only the victim of all kinds of military operations, he himself, a former goalkeeper, is accused of having acted in a way that could "*undermine* the integrity of a game which earns the loyalty and support of millions".

Metaphor is the most frequent form of polysemy, but it is not the only one. Metonymy, synecdoche, irony, hyperbole and understatement are also examples of figures of speech that could be read in more ways than one. However, they do not appear in these texts, even though some (e.g. puns or understatement) may be said to be typical of the English – and, by extension, of English discourse.

Table 7

Metaphor

| case nr. | 1a | 7 | 5 | 9 | 3 | 13 | 15 | 11 | 17 | 1b | 2 | 4 | 6 | 14 | 10 | 16 | 8 | 18 | 12 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| year | 65 | 85 | 94 | 97 | 02 | 05 | 06 | 07 | 13 | 16 | 65 | 83 | 96 | 97 | 99 | 02 | 04 | 07 | 16 |
| dead metaphor | 3 | 2 | 1 | | | 1 | | | 1 | | | | 1 | | | 1 | 1 | | |
| stock metaphor | 1 | 2 | 3 | 5 | 1 | 2 | 4 | 2 | 1 | | 4 | 2 | | 3 | 7 | 8 | 1 | 15 | 10 |
| legal metaphor | 1 | 1 | 2 | 1 | | | | | 1 | | | | | | | | 2 | | |
| extended metaphor | | | | | | | | | | | | 2 | | | | 1 | 1 | 2 | 1 |

## 3.5: Displaced Interaction and Speech Acts

Displaced interaction, which is related not only to literature but also to fiction, enables the reader to enter into what Coleridge called "a willing suspension of disbelief": a temporary state of mind in which a reader is willing to assume that what he or she reads is plausible, and does not critically judge the narrative by its truthfulness. This means that the reader will not be asked to perform any particular action, except "that of a kind of mental accompaniment to the text in the course of which he or she interprets or negotiates what the message means" (Carter and Nash 42). Interpretation is different for every reader and may for one specific reader even vary with every next reading of the text. This is inconsistent with the nature of a judgment in cassation, which should be clear and unambiguous, and indeed the Dutch Supreme Court judgments in the corpus do not leave the reader any room for interpretation or negotiation. This applies not only to *Kelderluik* (see the example in 1.4), but also to more recent judgments. The facts in *Nijmeegse Markt* (2016) are drily summed up:

> Op 3 januari 2009 is [eiseres] op de stoep van de Burchtstraat in Nijmegen ten val gekomen doordat zij is gestruikeld over een of meer stroomkabels. Deze kabels, eigendom van marktkraamhouders, liepen van een elektriciteitskast, eigendom van de Gemeente, aan de gevelzijde van de stoep van de Burchtstraat naar de marktkramen aan de andere zijde van die stoep. Als gevolg van de val heeft [eiseres] letsel opgelopen aan haar knieën. (1b.)

In terms of speech act theory, this little "story" can be interpreted in only one way, for all readers and for all times. It is a meaningful utterance, because the reader knows what the words mean (locution). The nature of the utterance is a description of a specific event (illocution). The aim of the utterance is to inform the reader of this event (perlocution). There is no interaction between author and reader: the court sums up the facts and the reader can only follow. In addition, the numerous references to legislation in other parts of this judgment state clearly that this is an authoritative text, written by legal experts.

English Supreme Court justices are, of course, legal experts too. But they are also authors of a *personal* opinion, and some of these authors seem to allow their readers some room for interpretation (e.g. Lord Atkin in 1.4). It should also be taken into account that, contrary to Dutch Supreme Court judgments that are nowadays nearly always only published in writing, UK Supreme Court judgments are not only published, but also pronounced orally. This difference in rhetorical situation may partly determine the interaction between the author and the audience. For example, in case nr. 2, Lord Reid directly addresses his colleagues in court ("My Lords"), but draws his audience in as well, not only trying to persuade, but also constantly inviting them to negotiate what the message means. When he says "there can be no question of padding lamp posts," he performs a speech act with a number of illocutionary and perlocutionary possibilities. The nature of the utterance (illocution) may be a warning, an explanation or even a command. As a result, the effect on the hearer (perlocution) will also differ. Some, and indeed most, will simply agree or disagree, with or without asking themselves why they feel this way. Lawyers will ask themselves how far the law should go to protect infirm pedestrians. Non-professionals may wonder what this statement means for the safety of the blind, and there may even be some who start imagining a world where lamp posts and other dangerous objects have been neutralised – or manipulated, so that they have become a threat to everyone who ventures on the streets. The point is that there is room for reader (or hearer) interpretation, and that interpretation may vary.

3.6: Discourse Patterning

Patterns at the level of discourse, made up of lexical or syntactical repetition, may be an indication of a degree of literariness in a text, provided that these patterns are not a result of the *formal* requirements of this text. For a pattern to be truly 'literary', repetition should represent and reinforce *content*, so that the reader is engaged in a process of organical growth, or, as Carter and Nash phrase it, an "unfolding 'plot'" (45). Although *Kelderluik* is syntactically highly patterned, with four sentences starting with *O.* (*Overwegende*), and a subdivision of these sentences in clauses starting with *dat*, this is only part of the typical layout of a Dutch Supreme Court judgment of the 1960s. However, there is another form of repetition in this judgment, i.e. repetition of word pairs with related meanings, occurring throughout the text: *onoplettendheid en zorgeloosheid*, *roekeloos en onvoorzichtig*, and *oplettendheid en voorzichtigheid.* These are complementary elements in a semantic pattern, which forms an A-B-A structure in the text. Starting with the first two (negative) pairs in the first part of the text, the middle section explores what happens if the requirements of *oplettendheid en voorzichtigheid* (positive) are or are not met, growing into the conclusion that there has indeed been a certain amount of *onoplettendheid* (negative) on the part of the victim of the accident. That there is only one focal noun in this final sentence results from a reinforcement of meaning: the reader has been led to a definite conclusion that need not be expressed in more than one word.

Most suprasentential patterns consist of lexical items that belong to the same category, e.g. the adjectives *gruwelijk, schokkend, traumatiserend, afschuwelijk* in *Taxibus*. Groups of lexical items are also found in *Renteneurose,* where a pattern of triplets with related meanings can be traced, from the health problems (*hoofdpijnen, geheugenstoornis en algehele achteruitgang van zijn intellectuele capaciteiten*) to the diagnosis (*renteneurose, aggravatie en querulerende gedragingen*), or the *lichamelijke, geestelijke of psychische* constitution of the appellant, which may be due either to *opzettelijk, doelbewust resp. verwijtbaar* behaviour or to *geaardheid, aanleg of instelling*.

Other patterns, involving repetition of *identical* lexical items, can be discerned in case nr. 16:

- "In thus seeking to explain away his apparently incriminating statements, the appellant faced certain *formidable* difficulties. Most *formidable* of all is the content of the tapes themselves…"

In this pattern, *formidable* provides the link in what indeed can be called an unfolding 'plot,' including an element of suspense and an antithesis between a rather undetermined *certain* and a very definite *most.* This pattern is repeated in the course of the text: "his *difficulties do not end* … his *difficulties do not even end* there," and "But for *one feature* of the jury's decision … *That feature* is…"

A higher degree of literariness can be awarded to a text in which two or more patterns interact. This is what happens in case nr. 4, with its play on two ideas: that of a road that is being travelled, and that of places where the traveller cannot go. The reader is taken on a metaphorical journey "from case to case, upon a basis of logical necessity," and with every new case the reader is invited to ponder: "if a mother… if a father… if a wife and mother…" The "process of logical progression" (note the alliteration) seems to go on endlessly, for good reasons: "To argue from one factual situation to another and to decide by analogy is a natural tendency of the human and the legal mind", but here it stops short. Where at first there only had been "an arbitrary line", in drawing too much on analogy "some critical line" has been crossed. In the next section that line is defined: it is "the barrier of commercial sense and practical convenience". Both images interact, and both are worded in metaphorical language (see also the discussion of this case in 3.4), so that a higher degree of semantic density is achieved and reading at more than one level is possible. This may be called characteristic of texts higher up on the cline of literariness: there is *interaction* not only between patterns, but also between two or more of the criteria defined by Carter and Nash.

Table 8

Discourse Patterning

| case nr. | 1a | 7 | 5 | 9 | 3 | 13 | 15 | 11 | 17 | 1b | 2 | 4 | 6 | 14 | 10 | 16 | 8 | 18 | 12 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| year | 65 | 85 | 94 | 97 | 02 | 05 | 06 | 07 | 13 | 16 | 65 | 83 | 96 | 97 | 99 | 02 | 04 | 07 | 16 |
| lexical patterns | | | | | | | | | | | | | | | | 1 | | | |
| semantic patterns | 1 | 1 | | | 1 | | | | | | | 2 | | | | | | | |

3.7: Obiter dicta

Finally, I looked for *obiter dicta* in this corpus. These are defined as remarks that refer to possible future events, to "what might be". As they are made "along the way" (see also 1.5), they are not binding on lower courts. *Obiter dicta* occur both in English personal opinions and in Dutch joint productions: I found three instances on either side. The fact that they are not

part of the *ratio decidendi* should allow them to be expressed in a less formal, and maybe even more philosophical, language. However, this is not the case for the six examples in this corpus: there is no substantial difference in style or register between the part that could be characterised as being *obiter* and the other parts of the judgment.

The Dutch Supreme Court uses *obiter dicta* to deal with questions that are not directly involved in the case at hand:

- "Met betrekking tot deze in dit geding door partijen niet in hun debat betrokken vraag volstaat de Hoge Raad daarom vooralsnog met het volgende…" (9.),

or with considerations that are outside the scope of the judiciary, but nevertheless merit some contemplation. I found two examples of the latter in *Taxibus*:

- "Andere vormen van compensatie en erkenning van leed dan toekenning van een bedrag aan smartengeld zijn denkbaar…" (3.).

However, this is not for the judge to decide, as he is not allowed to deviate from the statutory system. The same goes for the second *obiter*:

- "Niet uitgesloten is dat het wettelijk stelsel onvoldoende tegemoet komt aan de maatschappelijk gevoelde behoefte om aan degenen die in hun leven de ernstige gevolgen moeten ondervinden van het overlijden van een persoon tot wie zij … in een affectieve relatie hebben gestaan, enige vorm van genoegdoening te verschaffen" (3.).

The reader seems to have some room for interpretation here, but there is no other evidence for literariness in these two *obiter dicta.* The language is similar to that of the rest of the judgment and shares some typical features with that of other Dutch Supreme Court judgments (e.g. double negation: *niet uitgesloten*, see 1.5).

The same can be said of the three English examples. Yet these are remarkable, albeit not for linguistic reasons. In 1965, Judge Buckley raised "the possibility that ability to receive television signals free from interference might one day be recognised as 'so important a part of an ordinary householder's enjoyment of his property that such interference should be regarded as a legal nuisance'". Exactly this question was dealt with twelve years later (case nr. 14). Because of their philosophic nature, *obiter dicta* may be prolific in areas of law that are still developing. I found two examples in the Dutch nervous shock case (*Taxibus,* see above), and two in its English counterpart (*McLoughlin* v *O'Brian*). Lord Wilberforce acknowledges

- "that it should follow that other cases involving less close relationships must be very carefully scrutinised. I cannot say that they should never be admitted" (4.),

and even prophesies that the current scope (the shock "must come through sight or hearing of the event or of its immediate aftermath") may be extended in the future:

- "Whether some equivalent of sight or hearing, e.g. through simultaneous television, would suffice may have to be considered" (4.).

It was considered eight years later, in *Alcock v Chief Constable of the South Yorkshire Police*, where it was held that parents and spouses who had seen the disaster at Hillsborough football stadium by viewing a live television broadcast could not recover damages for nervous shock.

Table 9

*Obiter dicta*

| case nr. | 1a | 7 | 5 | 9 | 3 | 13 | 15 | 11 | 17 | 1b | 2 | 4 | 6 | 14 | 10 | 16 | 8 | 18 | 12 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| year | 65 | 85 | 94 | 97 | 02 | 05 | 06 | 07 | 13 | 16 | 65 | 83 | 96 | 97 | 99 | 02 | 04 | 07 | 16 |
| *Obiter dicta* | | | | 1 | 2 | | | | | | | 2 | | 1 | | | | | |

3.8: Overall results

Within the restrictions of this research I can present only a limited number of findings. Nevertheless, some clear results emerge from the analysis of the corpus of Dutch and English Supreme Court judgments. Both are, to a certain extent, medium dependent. Dutch judgments rely on legal terminology and abbreviations, whereas English judgments require a knowledge of Latin. There is a clear tendency towards less abbreviations: *Kelderluik* has an exceptionally high number of different abbreviations (ten), later judgments seldom use more than two. On the other hand, legal Latin is present in every one of the nine English judgments.

Re-registration is mainly found in the English judgments, though some words or expressions from a more colloquial register appear in Dutch judgments.

With regard to interaction of levels, there is no evidence of syntactic contrast, though facts are usually described in short and simple sentences and the grounds of the judgments are often worded in long complex sentences. Contrast is therefore only found in lexis, with an

apparent preference for semantic oppositions in the English judgments. Patterns of repetition are also more frequent in English judgments, and they interact with other patterns more often.

Metaphor is found in all judgments but one (the most recent Dutch judgment). Dutch authors frequently use dead or legal metaphors, while English authors seem to prefer stock metaphors. Extended metaphor only occurs in English judgments, the majority (five out of seven) dating from the twenty-first century.

Displaced interaction has not been expressed in a table because of the large differences between the Dutch and the English Supreme Court. Owing to requirements of form that are typical of judgments in cassation and to the fact that they are authoritative texts, lacking any form of interaction between author and reader, Dutch judgments can make no claim to literariness whatsoever in this area. English judgments are more open to interpretation, because they are written by individual justices (as opposed to the Dutch co-production), who pronounce them in public (which nowadays hardly ever occurs in the Netherlands).

Discourse patterning should represent content, not form. Syntactical patterns found in this corpus are always the result of formal requirements. Lexical or semantic patterns do occur, but they are relatively rare and only found in judgments from the twentieth century.

Finally, the language in *obiter dicta* is in line with the rest of the judgments, and not significantly more philosophical or literary.

Medium dependence may be called a "negative" criterion: a text that is more medium dependent is less likely to be literary. "Positive" criteria (re-registration, interaction of levels, polysemy and discourse patterning) have a linear relationship with literariness: the higher the number of occurrences in a text, the more the text moves up the cline of literariness. The overall scores (including totals) for these criteria are shown in table 10.

Table 10
Scores on the four “positive” criteria (including totals)

| case nr. | 1a | 7 | 5 | 9 | 3 | 13 | 15 | 11 | 17 | 1b | 2 | 4 | 6 | 14 | 10 | 16 | 8 | 18 | 12 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| year | 65 | 85 | 94 | 97 | 02 | 05 | 06 | 07 | 13 | 16 | 65 | 83 | 96 | 97 | 99 | 02 | 04 | 07 | 16 |
| the text is clearly meant to be spoken: use of the first person singular, address to an audience | | | | | | | | | | | 1 | 1 | | 1 | | 2 | | 3 | 1 |
| inviting the audience to think along the speaker's line | | | | | | | | | | | 2 | 3 | | | 1 | | | 3 | |
| giving a personal (but not a legal) opinion or interpretation | | | | | | | | | | | 1 | 5 | 1 | 1 | 1 | 2 | 1 | 2 | 1 |
| using striking words or expressions | | 1 | | | | | 2 | 1 | | 1 | | 2 | | 1 | 1 | 1 | | | |
| referring to common knowledge or opinion | | | 2 | | | | | | | | 2 | 1 | | 2 | 1 | 1 | 1 | 1 | |
| non-legal quotation | | | | | | | | | | | | | | | | | | | 1 |
| create suspense | | | | | | | | | | | 1 | | | | | 4 | | | |
| lively description of a situation | | | | | | | | | | | 1 | | | | | 1 | | | 1 |
| *contrasts between:* | | | | | | | | | | | | | | | | | | | |
| words of Germanic and Latin derivation | | 1 | 1 | | 3 | | | | 1 | | 2 | | | | | 1 | | | |
| formal and informal words | | | | | | | | 1 | | | | | | | | | | | |
| semantic oppositions | | | | | | | | | | | 2 | 3 | | | 6 | 5 | | 3 | |
| *repetition:* | | | | | | | | | | | | | | | | | | | |
| lexical repetition | 4 | | | 1 | 1 | | 1 | | | | | | 1 | | 1 | 2 | | | |
| parallellism | | | 1 | | 1 | 1 | | | | 3 | | 1 | | 1 | | 2 | 3 | | 1 |
| alliteration | | | | | | | | 3 | 2 | | 2 | 10 | 5 | 1 | 3 | 8 | 4 | 5 | 6 |
| end rhyme | | | | | | | | | | | | | | 1 | 1 | 1 | | | |
| dead metaphor | 3 | 2 | 1 | | | 1 | | | 1 | | | | 1 | | | 1 | 1 | | |
| stock metaphor | 1 | 2 | 3 | 5 | 1 | 2 | 4 | 2 | 1 | | 4 | 2 | | 3 | 7 | 8 | 1 | 15 | 10 |
| legal metaphor | 1 | 1 | 2 | 1 | | | | | 1 | | | | | | | | 2 | | |
| extended metaphor | | | | | | | | | | | | 2 | | | | 1 | 1 | 2 | 1 |
| lexical discourse patterning | | | | | | | | | | | | | | | | 1 | | | |
| semantic discourse patterning | 1 | 1 | | | 1 | | | | | | | 2 | | | | | | | |
| TOTAL | 10 | 8 | 10 | 7 | 7 | 4 | 7 | 7 | 6 | 4 | 18 | 32 | 8 | 11 | 22 | 41 | 14 | 34 | 22 |

Two points need emphasising here. In the first place, some parts of a text fit into more than one category (as shown in the analysis). It may seem unfair to score them in all applicable categories. However, literariness is about *interacting* patterns or criteria. Patterns that place a text further up the cline of literariness should, in my opinion, for that very reason be entitled to a higher score. In the second place, I feel that there is some justification for drawing conclusions from these scores. Though it has rightfully been said that "whether a text is considered to be literary is unlikely to derive simply from the presence of more or fewer literary features" (Yau-hau Tse 240), the result may at least tell us something about the *likelihood* of a text being more or less literary. As will be seen in the conclusion, it is no coincidence that the texts that merited special mention in the previous sections because of their literary qualities are also the ones with the highest scores, and that the English cases have significantly higher scores than their Dutch counterparts.

## 4. Conclusion

My analysis of a corpus of ten Dutch and nine English Supreme Court judgments yielded some very fine examples of literary language in legal decisions. However, I had to dig deep to locate these, and adapt my working method in the process. Having found that, when interpreted in a narrow sense, some of the criteria for literariness proposed by Carter and Nash are hardly applicable to legal texts, I decided to give these criteria a broader interpretation. Thus the central question for establishing medium dependence became: "What would a non-legal reader need to gain knowledge of this legal text?" I found that each medium served one group of readers only: a list of legal abbreviations and a legal dictionary were indispensable to Dutch non-professionals, while the English could not do without a Latin dictionary. The addition of two "fiction games" to the criterion of re-registration did not yield many results: in almost all cases in which the facts seemed to tell a story, this story could not be regarded as fiction. The only exception was the most recent English case (nr. 12), in which the use of verbs, adjectives and participle clauses hinted at something that may (with some analogy) be called "fictitiousness". The criterion of displaced interaction seemed hardly applicable, even if linked to the speech act theory. Owing to the nature of cassation, Dutch Supreme Court judgments can be interpreted in only one way, which excludes any form of interaction between writer and reader. English judgments leave more room for interpretation, though not ample. Because of this, I left displaced interaction out in my final assessment.

Semantic density as defined by Carter and Nash is hard to pinpoint in legal texts. As it is primarily about contrast and repetition, I narrowed my analysis down to these two features. Contrast is rare in Dutch judgments, and even rarer in the more recent ones; repetition occurs more often, though not as often as in the English judgments with their large numbers of alliterations, distributed throughout all cases. Here I also found the *interaction* between forms of repetition that makes a text more literary. However, true literariness shows when the criteria *themselves* are interacting. I found links between the two criteria which are concerned with patterns, each at their own level: semantic density and discourse patterning. In two older Dutch cases (1a and 7), a semantic pattern of *similar* lexical items was part of a pattern on discourse level. In one English case (nr. 16), repetition of *identical* lexical items was made an integral part of the text. Other English cases (4, 10 and 16 again), combined semantic and discourse patterning with metaphor (polysemy), which placed them even higher up the cline of literariness.

Metaphor, the most common manifestation of polysemy, was found in almost all judgments. Overall, the number of metaphor in Dutch cases tends to decline over the years, whereas there is an increase of metaphor in English cases in the twenty-first century. Stock metaphors abound in both languages, dead and legal metaphors are rare in English judgments. Besides, there are no Dutch examples of extended metaphor. This type of metaphor, which allows patterns to come into being and is therefore of a higher degree of literariness, is mostly found in recent English judgments. One of the most striking findings in my analysis of metaphor was the presence of military metaphor in several English judgments (4, 16 and 18).

The *obiter dicta* in the corpus were not what I expected them to be. Not only were they few in number, but I also found that they were not more philosophical or literary than the other parts of the judgments. Their significance is therefore mainly legal or historical: some raised interesting issues for future legal debate, others made a prediction with an uncanny accuracy.

The most problematic factor in the discussion of literariness was (and is) the difference in the legal systems of England and the Netherlands. This difference accounts for some of the results, but not for everything. It is clear that a Dutch Supreme Court judgment is much more restricted in the use of other registers, not only because it expresses a shared opinion, but also because it is a written statement. Addresses to an audience and invitations to think along with the author may be related to the circumstance that English judgments are also spoken out in public, and personal opinions are, of course, more likely to be expressed by an individual author than by a collective authorship. But even a group of authors could tell a story or give a lively description of a situation or an event, and there certainly is no ban on including a well-chosen metaphor or citing an appropriate (non-legal) quotation. As the instrument of cassation is only concerned with the rule of law, the *Hoge Raad* is not supposed to judge on facts (history, what was), and one would therefore expect their judgments to be on a more philosophical level. However, the Dutch Supreme Court seems to be moving in the opposite direction: the analysis shows that there is a tendency towards *factual* reporting in their judgments, and that consequently their language is becoming more and more restricted.

Overall, my conclusion is that English Supreme Court judgments are indeed more "literary" than their Dutch counterparts. Not only did I find more instances of the Carter and Nash criteria in English judgments, but they were also more often of a higher literary nature (e.g. end rhyme and extended metaphor), and interacted more often and to a greater extent with other elements, within a given criterion or in a pattern with one or more other criteria. There is also a clear difference between the judgments from the twentieth century and the

more recent ones, with opposite results. On the one hand, the Dutch judgments tend to become less medium dependent, but also more factual and less literary. The language of the most recent judgment (*Nijmeegse Markt* 2016) is sparse and almost without a hint of literary features: the observation that this is the only judgment in the corpus without metaphor was indeed telling. On the other hand, the more recent English judgments seem to be gaining in literary qualities. Poetical forms of repetition and metaphor have become regular features from the turn of the century, and justices seem more willing to allow other genres to be part of their speeches. Here too, the most recent judgment (*Mohamud* v *WM Morrison Supermarkets Plc.* 2016) serves as an example, with its action-packed and emotionally appealing description of events.

Limited as this research may be, I feel that it has opened up many areas for further investigation. The question whether the language of dissenting opinions of English justices, a large category of *obiter dicta* which was not included in this corpus, differs from that of the leading speech might be an interesting one. Another question might be if there is any difference in literariness between judgments written by male justices and those written by their female colleagues. Research should then be done at the lower courts, as Lady Hale (who contributed two quotations to this thesis, and whose opinions are certainly worth reading) is, so far, the only woman to have ever been appointed to the highest level of the judiciary. And there are, of course, numerous possibilities for further excursions into the world of metaphor in legal language, even if research were to be restricted to a specific type or topic. For example, the presence of military metaphor, mentioned above as one of the most salient results of my research, could be further investigated. One may ask if military metaphor is characteristic of English judgments only, of older or more recent judgments, or, linking the question to gender, if this is a typical feature of male speech, and if so, if there are more of these features, and so on and so forth. The possibilities are endless – and exciting.

My final recommendation is not for scholars, but for lawyers, especially for those who acknowledge the value of literature for legal professionals and aspire to be a judge (or even a justice) one day. Many legal professionals feel that judges should only be concerned with the law, but this does not mean that the language in which the law is expressed needs to be devoid of any personal, literary touch. Literary language may be an invaluable help in reaching out beyond the wall of legal language and connecting with those on the outside. East and west may be far apart, but once a move has been made, there will be, somewhere in between, a place to meet.

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The author thankfully refers to three lectures given by Tony Foster:

"Where linguistics and literature meet: What does stylistics do?" December 2013, Leiden University.

"Welcome to Legal Translation I: Introductions, legal language & translation." September 2015, Leiden University.

"You done me wrong: Tort for translators." February 2016, Leiden University.

Appendix A: List of judgments

Kelderluik, HR 05-11-1965, ECLI:NL:HR:1965:AB7079
Meppelse Ree, HR 11-11-1983, ECLI:NL:HR:1983:AG4688 *
Renteneurose, HR 08-02-1985, ECLI:NL:HR:1985:AG4961
Taxusstruik, HR 22-04-1994, ECLI:NL:HR:1994:ZC1347
Wrongful Birth, HR 21-02-1997, ECLI:NL:HR:1997:ZC2286
Taxibus, HR 22-02-2002, ECLI:NL:HR:2002:AD5356
Burengeschil, HR 21-10-2005, ECLI:NL:HR:2005:AT8823
Sanoma v Boerhaave, HR 12-05-2006, ECLI:NL:HR:2006:AV3385
Kievitsdal, HR 09-11-2007, ECLI:NL:HR:2007:BA7557
Cruijff v Tirion Uitgevers, HR 14-06-2013, ECLI:NL:HR:2013:CA2788
Nijmeegse Markt, HR 07-10-2016, ECLI:NL:HR:2016:2283

Gorris v Scott [1874] LR 9 Exch 125 *
Donoghue v Stevenson [1932] AC 562 *
Haley v London Electricity Board [1965] AC 778
McLoughlin v O'Brian [1983] AC 410
Alcock v Chief Constable of the South Yorkshire Police [1992] AC 310 *
Page v Smith [1996] 1 AC 155
Hunter v Canary Wharf Ltd. [1997] AC 655
McFarlane v Tayside Health Board [1999] UKHL 50
Grobbelaar v News Group Newspapers Ltd. [2002] UKHL 40
Simons v British Steel [2004] UKHL 20
Douglas v Hello! Ltd. [2007] UKHL 21
Mohamud v WM Morrison Supermarkets plc. [2016] UKSC 11

(*)Not included in the corpus for analysis.

Appendix B: Sources of quotations

"… and never the twain shall meet." Rudyard Kipling. "The Ballad of East and West." 1892. In *Oxford Dictionary of Quotations.* 7th ed., Oxford: Oxford University Press, 2009, p. 465.

1.1 "Read the literature of human nature. The lawyers can gain many points by reading." From an address by Frank J. Loesch, President of the Chicago Bar Association, at Northwestern University Law School, 1905. Quoted in Wigmore, John H. "A List of One Hundred Legal Novels." *Illinois Law Review* vol. 17, 1922-1923, p. 32.

1.2 "I cannot conceive how any ordinary person can be expected to understand it." Lord Denning, commenting on *Davy* v *Leeds Corporation*, 1964. Quoted in Crystal, David. *The Cambridge Encyclopedia of the English Language*. 2nd ed., Cambridge: Cambridge University Press, 2003, p. 376.

1.3 "It is the impossibility of defining it in any simple way that is its most defining feature." Katie Wales. *A Dictionary of Stylistics.* 3rd ed., Harlow: Longman, 1994, p. 280.

1.4 "It is quite difficult to measure which text is more literary unless the two texts are of identical genre." Andrew Yau-hau Tse. "Which One is More Literary – A Speech or a Visitor's Guide?" *International Journal of Humanities and Social Science* vol. 1, no. 5, May 2011, p. 237.

1.5 "Cassatie is een Franse uitvinding … Het idee had exportwaarde en werd gecopieerd in Spanje, Griekenland, Portugal, Italië, België, Nederland – en Vietnam." Marc Loth and Marijke Kooijman. In Graaff, Ruben de, et al., editors. *Rechtsvorming door de Hoge Raad.* Nijmegen: Ars Aequi Libri, 2016, p. 258.

1.6 "[T]his is an area of the law in which, as Lord Nicholls said, imprecision is inevitable. To search for certainty and precision … is to undertake a quest for a chimaera." Lord Dyson in *Mohamud* v *WM Morrison Supermarkets*, [2016] UKSC 11, 54.

2.1 "You know my methods. Apply them." Sir Arthur Conan Doyle. *The Sign of Four*. 1890. In *Oxford Dictionary of Quotations.* 7th ed., Oxford: Oxford University Press, 2009, p. 292.

2.2 “There would be much to be said for our adopting the practice of other supreme courts in having a single majority opinion to which all have contributed and all can subscribe without further qualification or explanation. There would be less grist to the advocates' and academics' mills, but future litigants might thank us for that.” Lady Hale in *Douglas* v *Hello! Ltd*., [2007] UKHL 21, 303.

3.2 “Out of the crooked timber of humanity, no straight thing [can] ever [be] made.” Immanuel Kant. *Idee zu einer allgemeinen Geschichte in weltbürgerlichten Absicht.* 1784. In *Oxford Dictionary of Quotations.* 7th ed., Oxford: Oxford University Press, 2009, p. 453. (See also Nieuwenhuis, Hans. *Orestes in Veghel: Recht, literatuur, civilisatie.* Amsterdam: Balans, 2004, p.7: “Recht en literatuur schaven ‘het kromme hout waaruit de mens gemaakt is.’”)

3.5 “[a] willing suspension of disbelief.” Samuel Taylor Coleridge. *Biographia Literaria*. 1817. In *Oxford Dictionary of Quotations.* 7th ed., Oxford: Oxford University Press, 2009, p. 241. (Also quoted in Nieuwenhuis, Hans. *Kant & Co: Literatuur als spiegel van het recht*. Amsterdam: Balans, 2011, p. 156.)