ADR in Compensation Systems: trying to make the adversarial tort system itself more user friendly
The Netherlands

- Pop. 16,5 mil.
- Land 33,883 km2
- 487 inh. per km2 – one of the most densely populated countries in Europe
- Roads 135,470 km
- Accidents/year
  - Road: ± 260,000
  - Workplace: ± 160,000
  - Adverse medical events: ± 38,000
  - Fatal: ± 750 (Road), ± 80 (Workplace), ± 1960 (Adverse medical events)
Hybrid system Dutch style

- Statutory system of compensation of loss of income in case of disability to work
- Cause of disability irrelevant
- Benefits limited to income support
- Many other restrictions in eligibility, duration and level of protection (max 75%)
- ILO are investigating compliance with ILO conventions
Hybrid system Dutch style

- Tort system, with its principle of full compensation:
  - Always amounts to a very substantive addition of compensation
  - Often constitutes the only source of compensation
    (e.g. non-employees, other loss than loss of income)

- Tort system is the focus of the present efforts for reform

- With some minor exceptions, ACCL’s involvement and research is limited to the tort system
1. **Private regulation** (e.g. Codes of Conduct, professional standards, protocols)
   => CoC Handling PI claims: developing / promoting tools to implement change (online dossier, claim resolution plan, various tools med. assessment phase)
   => CoC medical injuries: operational strategies for open disclosure and early ADR

2. **Legislation**
   => introduction (2010) of *ad hoc* limited judicial intervention in out of court settlement of PI claims
   => bill introducing Commission for the out of court settlement of medical injury claims (present stage: expert meetings on desirable specifications)

3. **Improvement of out of court settlement process**
   => promoting personal contact – developing tools & training loss adjusters
   => promoting emotional recovery – pilots on promotion of apologies & other means of addressing moral and emotional harm
   => identifying & promoting legal obligations and remedies obliging liable party/insurers to respect non-pecuniary needs

4. **Victim empowerment: making the ‘market’ work**
   => web based decision support system for PI victims in regard of choice whether to engage a legal services provider and if so, which one
   => instigating / supporting improvement of services (legal and other) provided to PI victims
   => piloting best practices in cooperation with service providers and insurers
Promoting emotional recovery

- Empirical research: suffering a wrong disrupts moral and emotional balance between wrongdoer (WD) and victim (V)

- V experiences moral and emotional injustice

- Need for ‘emotional recovery’ as well as financial recovery

- V needs WD (and his agents – e.g. insurer) to take responsibility for accident and its consequences
Promoting emotional recovery

Properties of PI claims settlement process:

- V has to make claim, take initiative, suffer the burden of proof
- Insurer appears to be able to allow himself a passive attitude
  => carries across implicit message that not wrongdoer/insurer but V is
  responsible for solving problem of damage caused
- WD doesn’t pay compensation himself, generally no direct communication
  between WD and V, WD often not even aware of consequences for V
  => V experiences that WD does not take responsibility
- Out of court settlement – no decision by judge
  => no formal establishment of moral responsibility of WD for accident
- Also no symbolic acknowledgement of moral responsibility of WD by insurer
- ‘Taboo trade-off’: PI cannot really be compensated by money
‘Acknowledgement’ not only in words but also in practice

• Insurer/agent/hospital must take and keep initiative in resolution process
• Behaviour of insurer/agent/hospital should carry across implicit message that insurer/agent/hospital and not victim/patient is the ‘owner’ of the problem that mistake was made and damage was caused, which now has to be managed, assessed and compensated
• Resolution process should favour determinants of Procedural Justice:
  – Information
  – Involvement
  – Voice
  – Consultation
  – Respect
• Open disclosure and apologies