Insurers' Institute
on Personal Injury
Claims

Annual Report 2013

"Governing requires foresight; reaction in anticipation..."

Preamble – Governing requires foresight, reaction is anticipation

From 2013 to 2014
It seems to be a turn of the year like any other: from 31st December 2013 to 1st January 2014. But also in the world of personal injury settlement it consisted of more than simply 'hanging a new calendar on the wall'. 2014 could very well be a very important year for our industry, with certain developments having been given real impetus in 2013. I refer to the upcoming evaluation of the Partial dispute courts, to the experiment that allows solicitors to work on a no cure no pay principle, and also to developments in the field of medical negligence.
The scope of provisions for permanently impaired victims will change considerably: part of the Exceptional Medical Expenses Act will be transferred to local authorities and to the medical health insurers under the Social Support Act (*Wet maatschappelijke ondersteuning – Wmo*).

Many events that occurred in 2013 will have significance for 2014 and years beyond. In all of the expected developments, the PIV is a reliable and innovative knowledge centre, both on behalf of liability insurers and for the industry as a whole. Moreover, the PIV stands in the middle of the playing field, not at the sidelines.

Theo Kremer,
Managing Director PIV

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01. Threat or opportunity? – No cure no pay in injury cases

Personal injury lawyers are permitted to take on personal injury cases on the basis of the no cure no pay principle as from 1st January 2014. The trial period runs for five years and is an exception to the general applicable rule that prohibits lawyers from making their remuneration dependant on the outcome of the case. Some specific conditions apply, such as the proviso that there is a realistic expectation of a discussion on the question of liability. There is also a cap on the fee that can ultimately be charged.

Expectation
We anticipate that the first condition alone will preclude us from seeing too many no cure no pay agreements in traffic injury cases. The question of liability is generally not the main issue: in many cases liability is admitted fairly quickly. This is different in (alleged) medical negligence cases and occupational disease claims. It therefore stands to reason that we will encounter ~~the~~ most no cure no pay-remuneration agreements in these areas. The no cure no pay-principle has a somewhat negative connotation in our country (and, in fact, on the whole of mainland Europe). The (mal)practices in the United States have certainly played an important role in creating this dubious reputation, because lawyers there sometimes demand very high percentages of the compensation sums (sometimes as much as 40%). The compensation amounts are generally a lot higher than in the Netherlands. The question that therefore arises is whether or not this negative image is justified. Perception certainly plays a role here.

Balancing act for lawyers
It cannot be prognoticised if the no cure no pay remuneration constitutes a threat or an opportunity for solicitors. The opportunities obviously lie in taking on more cases, but a repercussion is that lawyers cannot assume too many cases with an uncertain outcome. In consideration of this, the lawyer must

carefully weigh up the chances of success and he must not too readily offer a no cure no pay deal in cases where this might possibly be financially unfavourable for the victim. An example would be a case in which little discussion about liability is expected. Once liability is admitted, the victim can, after all, claim the costs of legal assistance as legal expenses (BGK) and consequently receive full reimbursement if these costs comply with the double reasonableness criteria.
That said, the solicitor must not decline a request for a no cure no pay remuneration deal too easily, as this would conflict with the ideal of easier access to justice, which the *Orde van Advocaten* (The Netherlands Bar Association) envisaged.
It will therefore require a careful balancing act by the lawyer. A wrong approach will easily lead to a tarnished image, both for the solicitor in question, as well as for the profession as a whole.

Blessing
An advantage of this remuneration method for solicitors is that a level playing field is achieved compared to other legal representatives who, for a long time already, were allowed to work on a no cure no pay basis (in particular the claims settlement firms). It is anticipated that, as a consequence, dubious constructions with a number of intermediaries will be a thing of the past. That must be beneficial for the whole industry!!

Victims: 'Look before you leap'
As long as there is a level-headed approach by solicitors when offering no cure no pay remuneration deals, its inherent principle definitively presents opportunities for victims to gain easy access to justice. This applies to out of court settlements, but especially to litigated cases. Even when a victim obtains a favourable judgement, he must bear a substantial part of the litigation costs himself. In cases where the judgement goes against him, he is even liable for the full litigation costs, plus part of the defendant's costs.

The downturn
But there are also disadvantages. By availing of the no cure no pay construction, the victim knows in advance that he will have to forsake part of his compensation to the lawyer. In cases where the lawyer must instruct experts, this might easily run to a quarter (inclusive of VAT) of his indemnification payment. Although the victim can compensate for this with his entitlement to legal costs, this will be (wholly) inadequate if his claim is litigated.

Honest advice
The PIV is of the opinion that victims must be fully aware what they enter into. Sound and honest advice by the solicitor is a prerequisite for this. In addition, we certainly recommend that a second opinion is sought. If the '*Resultaatsafhankelijke Uren Beloning* (RUB – Outcome-related Hourly Remuneration) is applied, we have, in fact, a hybrid system. The remuneration for solicitors still depends on the number of hours spent on the case; but the lawyer is permitted to increase the total amount with a maximum of 150%. It is not the intention that a solicitor can collect 25% of the damages with a minimal amount of effort.

Insurers holding back
On the insurers' side there is often a certain degree of wariness against the no cure no pay principle. They fear a massive influx of claims, perhaps under the pretext of "nothing ventured, nothing gained". An increase in the number of claims is expected, but if they are essentially just claims, which would not have been submitted under the system of hourly fee billing, then this is not a bad thing for the legal security.

Point of discussion
We can expect discussion about the amount of legal costs that is payable if a solicitor works on the basis of the no cure no pay principle. There are going to be lawyers who will argue that the legal costs can be as high as the amount he can charge his client. This argument is misconceived, however, because one must differentiate between the legal relationship between the victim and his lawyer and the legal relationship between the victim and the liable party. The key here is the double reasonableness principle. It does not appear reasonable to simply bring the higher hourly fee that can be charged on a no cure no pay agreement, to the account of the liable party, and certainly not for all activities.

Court of Appeal Amsterdam

The Court of Appeal of Amsterdam also is of this opinion, as per its decision of 28th May 2013. The court ruled that while it may have been an inherently reasonable choice on the victim's side to enter into a no cure no pay agreement, the ensuing legal charges do not automatically constitute reasonable legal costs in the sense of article 6:96 of the Dutch civil code. The Dutch Supreme Court might possibly have to speak the final word here. The second reasonableness test will always hold a casuistic element, in which the insurers' stance also plays a role.

Deserves a chance
The PIV is of the opinion that the introduction of the no cure no pay system creates more opportunities than threats -especially for victims-. It is a condition, however, that solicitors apply the no cure no pay principle in a responsible manner, both towards victims as well as towards insurers.
In our opinion, this experiment deserves a chance. It remains to be seen if we are going to encounter many no cure no pay agreements. There may be hesitation because of the 'ifs and buts' that have been (justly) incorporated into the scheme, as well as concerns about the impact it might have on the business model of firms of solicitors. Only time will tell.

02. Quo vadis? – Settlement of medical negligence cases

In 2013 a lot of attention was paid by various parties to the settlement of unintended consequences of medical intervention:
- The dissertation `Liability For Care-related Harm' (Rolinka Wijne);
- Preliminary opinion for the Annual Conference of the *Vereniging voor Gezondheidsrecht* (Dutch Association for Medical Law);
- A voluminous report by the *Vrije Universiteit* commissioned by the NPCF (The Federation of Patients and Consumer Organisations in the Netherlands) and Victim Support Netherlands.

These developments have in part led to organizing a meeting of experts on 23rd April 2013, in collaboration with the Dutch Association of Insurers, CentraMed and MediRisk. Many parties who are directly involved attended the meeting.
The participants unanimously agreed that the present practices of care and the claim settlement of these unintended complications can be organized differently and more effectively. But there is no consensus on the way this should be done and opinions differ greatly.

Possible changes
There is discussion about possible adaptations in three different areas:
- Improving communicative aspects:
  There is currently discussion underway about possible legal changes, for example about the liability system, the (onus) of proof and procedural law;
- Logistical `aspects':
  Should a fund be created, to which the victim can apply? The question also arises as to whether or not the majority of disputes should be brought before a disputes tribunal instead of a court of law.

Re. communication
It was unanimously concluded that considerable inroads can be made here. This concerns improving the communication between the physician and his patient following an incident, between the insurer and the legal representative and improvements in how hospitals deal with complaints by the patient and his or her family.
In the communication between the insurer and the legal representative, there is room for better collaboration, for example in the medical trajectory as part of the claim settlement. Fortunately, in 2010, the Personal Injury Board (De Letselschade Raad) introduced the GOMA [*Gedragscode medische incidenten; betere afwikkeling Medische Aansprakelijkheid* or Code of Conduct Transparency of Medical Incidents, better management of Medical Liability]. The GOMA has already brought great advancement, but it could be tightened even further. It is not without reason that the two leading insurers MediRisk and CentraMed are at the forefront with regard to the communication with their insureds.

Gain!
The PIV believes that in the short term, most is to be gained on the communication front. We are thus pleased that the Personal Injury Board has taken the initiative to draw up a second, more extensive

version of the GOMA [*Gedragscode Openheid Medische incidenten; betere afwikkeling* or Code of Conduct Transparency of Medical Incidents; better settlement]. The PIV willingly contributes to this!

The Personal Injury Board has certainly set steps in the right direction to make hospitals work GOMA-proof by the Register it has introduced.

Re. Possible legal changes
The PIV acknowledges that the legal position of victims of unintended consequences of medical interventions is a difficult one. Not only does the patient have to proof that the physician acted negligently, but also that there is a direct causality between that action (or omission) and his damage. The recognition that the factual details that are required for a successful liability claim are generally in the physician's file, constitutes a further complication for the victim.
We regularly hear voices advocating for a so-called no fault system (as is in existence in Sweden), in which the question of blame is discarded.
It is the PIV's view that it is not the obvious choice to adopt this scheme in our country. It would place victims of medical malpractice in a more favourable position than victims of, for example, traffic injuries or occupational diseases. The question then arises: is this fair? Even under a no-fault system, the onus of proof regarding causality still rests with the victim.

Reducing the burden of proof
Alleviating the victim's burden of proof would be a more logical solution, especially as we already have some examples of this in other areas of our legal system, for instance with employers' liability.
There is the danger, of course, that there will be a substantial influx of new claims, which can, in its turn, have consequences for the claims handling costs (even though most of these extra claims will ultimately not lead to compensation payments.

Access to justice
Our procedural law -or better the 'access to justice' is not always easy for victims either. In many cases there is the risk that liability cannot be established, consequently leaving the victim with a substantial bill of costs. Often these costs will have had to be financed in advance.
The possibility to enter into a no cure no pay agreement with a solicitor (see chapter 1), does facilitate the access to justice.

Re. Logistical 'aspects'
The logistical aspect refers first and foremost to the possibility of introducing an easily accessible fund the victim can appeal to. Additionally, certain elements regarding the burden of proof mentioned in the previous paragraph, could be incorporated. The idea, basically, is that the fund seeks regress on the responsible health care provider after it has made an indemnification payment. There are examples of this settlement method in existence in Belgium and France. In Belgium, the scheme only applies to the more serious cases, one of the requirements being, for instance, a permanent impairment of at least 25%.
If a fund is opted for, additional rules must be drawn up as to whether or not the fund replaces conventional litigation or if it is additional to this. A further possibility would be that standardised amounts are awarded, as is for example presently the case with the Asbestos Fund.

Finance
There are questions, however, about financing the funds, both with regard to the handling costs and the compensation payments. In Belgium it is fed by general resources and that would appear - if it were to come to a fund - the most correct model for the Netherlands, particularly in view of the regress option.

Arbitration commission
Another logistical question is whether or not most disputes must be brought before an arbitration commission instead of before a court of law.
The *Wet kwaliteit, klachten en geschillen zorg* (Wkkgz) -Law Quality, Complaints and Disputes Medical Care- stipulates that the health care provider must affiliate to a dispute commission, which can award compensation payments of up to € 25,000.
Daily practice shows that through this scheme, 90% of the present claims can be dealt with in this accessible manner. Reference is often made here to the current disputes commission, which pays out compensation in small claims.

The question remains if this arbitration commission is adequately equipped to deal with the influx of cases not exceeding € 25,000. Both in logistical and qualitative terms. It is not prudent that the arbitration commission envisaged by the Wkkgz, deals with both complaints and claims. That would appear to be a mismatch.
In the years to come, the (organisations of) health care providers, insurers and representatives from the legal practice will have to give further substance to this.

The aforementioned adaptations in the communicative and logistical fields can be realised much easier and quicker than changes in our (material) legal system.
The PIV is satisfied that many changes are already underway in the communicative field, while the Wkkgz offers a handle for an accessible settlement of the majority of cases. It is imperative that a solution is found for the settlement of the serious cases. Combinations of the various options mentioned in this chapter cannot be excluded.

03. Evaluation – Four years of Partial Dispute court

In 2014 the Ministry of Security and Justice evaluates the Partial dispute proceedings, to find out if this legislation is effective, what its effects are, and if the Partial dispute courts can be utilised in other fields. Since 1st July 2010, a party is entitled to submit a partial dispute in a personal injury or fatality claim to a court of law. Overall, the PIV is positive about its experiences with the Partial dispute proceedings over the past four years. In daily practice, the scheme foresees in a need, certainly for the victims. In many cases, a ruling brings parties closer to a solution, whatever the outcome of the proceedings.

In this annual report, the PIV gives a first evaluation of four years of Partial dispute proceedings.

Striking elements

- There are frequent publications of rulings by the Partial dispute courts: in excess of three hundred as per the middle of March 2014. Remarkably, most cases were brought by the victim (or his legal representative). Although insurers are entitled to address themselves to the Partial disputes courts, this has rarely happened thus far. Costs might possibly play a role here. Or concerns that the case might escalate even further. It would be (most) in keeping with the spirit of the Code of Conduct if parties were to jointly submit a dispute. The law explicitly allows for this possibility. Unfortunately, such a joint request has only been submitted in a handful of cases.
- The logistical and legal-technical introduction of these proceedings went very smoothly:
  – The courts can cope well with the not inconsiderable influx of partial dispute cases;
  – It has not led to long backlogs;
  – The time lapse between the hearing and the courts' ruling is deemed in most cases as more than reasonable;
  – Most rulings are well motivated.
- With some trepidation we awaited how the courts were going to interpret the term 'partial dispute'. Particularly in the early stages, the primary defence of the liable party (or his insurer), was that it did not concern a partial dispute. This defence was set aside in the majority of cases, however. Too strict an interpretation of the term 'partial dispute' easily negates the intended advantages.
- A wide scope of partial dispute cases were submitted to the courts in the last number of years, varying from liability issues and discussions about legal costs to loss of earning capacity. The issues were often unique and therefore nothing much came of the envisaged ripple effect of partial dispute rulings to other cases. Maybe this endeavour was a bit too optimistic.
- It is remarkable that the question of liability was in many cases considered to constitute a partial dispute, although it was not always decided in favour of the prejudiced party.

Criticisms

- Legal representatives have often stated that the mere threat of Partial dispute proceedings suffices to "get insurers moving". The question arises whether or not this is an undesirable side effect. Legal representatives should be more reticent with this pre-emptive measure. But in view of the expected costs of Partial dispute proceedings, both parties naturally act in a calculating manner.

- Because the cost of legal assistance -assuming that liability has been submitted- are in principle to be borne by the insurer as legal costs, partial dispute proceedings are sometimes misused under the motto “nothing ventured, nothing gained”.
- It’s the PIV’s opinion that judges to whom partial dispute cases are submitted, could be more critical when setting the legal costs that must be reimbursed, especially in cases where the ruling was not in the claimant’s favour.
- The courts should also give a broader interpretation to the criterion of “completely unnecessarily and unjustly” bringing a partial dispute case. The PIV will certainly raise this point during the evaluation.
- Another issue is the discussion about determining the payable legal costs, which is rife in many cases. Points of contention are the hourly rate that is charged by the lawyer and the number of billed hours. There are also signals from the judiciary that standardisation would be welcomed here. Solicitor’s rates currently lie between € 200 and € 300. One conclusion is warranted and that is that the courts seldom follow the (very high) hourly tariff suggested by the ASP (Advocaten voor *Slachtoffers van Letselschade* – Lawyers for victims of Personal Injuries).
- In collaboration with the LSA (*Vereniging van Letselschade Advocaten* -Association of Personal Injury Lawyers) and ASP, the PIV will in 2014 explore possibilities to arrive at standardisation agreements

Added value
The PIV questions if, in the long term, the possibility for a separate Partial dispute court will remain. The justice department, after all, has ambitious plans with its *Programma Kwaliteit en Innovatie* [KEI] (Program Quality and Innovation) to make access to the courts easier.
The PIV expresses the hope that, in view of its added value, the separate Partial dispute proceedings remain in existence. Both from the victim’s perspective and with regard to the essence of the Code of Conduct.

04. Project – Apologies to victims of road traffic accidents

A follow-up pilot scheme for the project ‘Apologies to victims of road traffic accidents’ was started in 2013. The PIV implements this pilot in collaboration with the Vrije Universiteit Amsterdam, a number of insurers and a legal representative.

Reason for pilot
It transpired from the first pilot of the project that it is absolutely worthwhile for insurers to take initiatives to encourage their insureds to contact the other party/parties. It is sometimes difficult for an insured to approach the victim he collided with. But experience has taught that, for the most part, victims very much appreciate a token of interest. Contact between parties is (almost) always beneficial to the emotional aftermath on both sides and can bring about actual health improvements. For the effectiveness of an apology, it is imperative that the contact takes place shortly after the accident and that the perpetrator is the apparent initiator of the contact. Furthermore, there are indications that a successful contact eases the claims settlement process.

Result
We will analyse the outcome of the follow-up study in 2014. Based on these findings we will draw up recommendations. The objective of the project group is to provide insurers with new tools, enabling them to stimulate their insureds to show compassion for the impact the accident had on the other party. These tools might comprise brochures and texts for internet sites, but it is imperative that they are easy to use. Only then is it appealing for insurers to deploy these means. In the interest of all parties involved!!

Which three studies did we carry out in 2013?
- Research topic 1 – How often does spontaneous contact between perpetrators and road traffic victims presently take place?
- Research topic 2 – How can contact between perpetrators and road traffic victims be encouraged?
- The third research topic studied the effect of sending a ‘contact letter’ to insureds. Does such a letter stimulate the insured to contact the victim?

05. Study – Swift reporting of claims

In case a person sustains bodily injuries as a result of an accident, it is important that the insurer of the liable party contacts the victim as quickly as possible. This enables the insurer to lend assistance to the victim in the earliest possible stage, to make advance payments or – if necessary – swiftly gather more information with regard to the question of liability. The sooner the contact between the insurer and the prejudiced party takes place, the better. The PIV, wherever possible, wants to lend its support to speeding up the reporting of accidents. As a first step, in 2013, we studied the current process on the basis of 750 personal injury files divided over five companies, in order to determine the delaying factors.

Outcome
We established that, at the end of 2013, a liability insurer can, on average, start dealing with a new personal injury claim 19 calendar days after the accident. The PIV is of the opinion that this should be quicker.
Other findings showed that especially the time lapse between the accident date and the first notification to the insurer, the intermediary or the underwriting broker, is, at times, too long. After a claim has been (first) reported, the route to the personal injury department is relatively short.
Furthermore, it transpires that there is a clear difference in handling times if the claim is first reported by the insured – to his own insurance company – or by the claimant to the perpetrator's insurance company.
A noteworthy conclusion is that 53% of the claims are first reported by the aggrieved party and 33% by the insured.

Possible causes for this late reporting are:
- The claim notification, for the most part, involves paperwork;
- The claims notification process is unclear;
- The person reporting the claim has no previous experience with ~~in~~ reporting an accident;
- The claim form is complicated and requires many details;
- In case the accident is reported by the claimant: the victim is not able to report the accident because of the nature of the injuries, the injuries manifest themselves later or ignorance;
- In case the accident is reported by the insured: he has no interest in reporting the accident, it is to his advantage not to report the accident (no claims bonus), he/she does not consider him-/herself responsible for the accident, or plain ignorance.

Possible solutions for swifter notification:
- Simplifying the process of how claims are reported to the own insurer – for example via an app, a digital reporting kit and/or an explanation on the accident report form;
- Developing and stimulating digital claims reporting;
- Separating the claim notification from the accident report form (the third party liability insurer contacts the prejudiced party on the basis of a brief claim report)
- Highlighting the need for swift reporting to all parties;
- Agreements for swift reporting – for example with legal assistance insurers.

06. PIV-Events in 2013 – The PIV as Knowledge Centre

13th PIV Annual Conference
The thirteenth PIV annual conference took place on Friday 22th March 2013 in *Hotel Theater Figi* in Zeist. The theme of the conference was "From Battle axe to Peace Pipe". In excess of five hundred participants attended. The objective of the conference was to improve the personal injury settlement, thus rendering 'battle axes' obsolete in the long term. The chairman for the day was Tom van 't Hek. The PIV Blues Band, which consists of colleagues from our profession, both from insurers and legal representatives, performed some swinging intermezzos.

Morning session
Dineke de Groot – Judge at the Dutch Supreme Court and Extraordinary Professor *Rechtspraak and conflictoplossing* at the *Vrije Universiteit* Amsterdam –sketched the possibilities for problem solution. She argued that conflict analysis is necessary in case of a difference of opinion. With the aid of the 7-i

model (issues, individuals, interdependence, interaction, implications, institutions and interventions), a conflict can be identified and an effective form of problem resolution can be embarked upon.
Thereafter, Diederik Wachter, a judge at the Court of Utrecht, recounted his experiences with the Partial dispute proceedings. He mentioned as positive aspects of these proceedings that the points of contention were generally manageable and that it often concerned ‘young’ cases that can be resolved at an early stage.
Josée van de Laar, lawyer and mediator at Beer Advocaten, spoke from her vast experience about mediation in personal injury cases.
Maurits Barendrecht – Professor of Private Law at Tilburg University; Johan Legemaate – Professor of *Gezondheidsrecht* (Medical Law) at the University of Amsterdam; and Erik-Jan Wervelman – Lawyer at Verschoof Wagenaar Wervelman Advocaten – spoke about their involvement in the inception of the GBL (Code of Conduct) and GOMA (Code of Conduct Transparency of Medical Incidents, better management of Medical Liability). One of the main differences between the old and new GBL is the phraseology. The old GBL spoke of ‘principles’, but these also referred to procedural rules or merits. Legemaate recognised that various follow-up steps must be taken with regard to the GOMA.

Afternoon session
The afternoon session comprised of workshops which the attendees had previously signed up for. The topics were:
- communicating with different cultures;
- privacy;
- how to deal with a patient;
- whiplash;
- careful decision making in the personal injury settlement;
- a psycho-physiological approach to non-objectifiable complaints;
- speed mediation;
- deliberate opinion forming

Finally, Marc Lammers –who coached the Dutch ladies hockey team to Olympic silver and gold in 2008 and 2012- told us how we can be successful.
His clear advice was to: “Never give up” and “Change an 8 into a 10, instead of a 4 into a 6”.

The PIV Giraffe, which is annually awarded to a person or organisation who through new initiatives ‘sticks out his or her neck’ to improve the personal injury claim settlement, was awarded this year to Josée van de Laar for her positive contribution to mediation in personal injury claims.

PIV Current Developments Lecture; a record number of attendees in 2013
The PIV Current Developments Lecture, which was held on 1st and 3rd October 2013, had a record number of attendees of no less than 167 participants.
The Current Developments Lecture is primarily intended for past students of the modules Knowledge and/or Aptitude of the former PIV Personal Injury Course, the Moderate Injuries Course (MzI) by *OSR Juridische Opleidingen* and the Severe Injuries Course (ZwL) by NIBE-SVV, but is also open to employees of insurers participating in the PIV and firms of claims adjusters instructed by them.
On 1st and 3rd October, these ‘students’ were guided by dr. Chris van Dijk – Kennedy Van der Laan Advocaten – through the jurisprudence from October 2012 to the end of September 2013. He conversed in his characteristic, anecdotal manner.
Dr. Jørgen Simons – Leijnse Artz Advocaten – is chairman of the PIV’s Study Group Implementation Medical Chapter (WIMP) and is best placed to inform the audience and to answer questions about:
- medical liability, with an emphasis on the GOMA;
- relevant stipulations of the GBL 2012 and the appurtenant Medical Chapter.

Afterwards, the inspired participants mulled over an interesting afternoon as they enjoyed the boeuf bourguignon and coq au vin of the French buffet!

PIV-Bulletin in 2013
Six editions of the PIV-Bulletin were published since the 1st January 2013, instead of the usual seven or eight editions. As a result of this lower frequency, two editions were replete with topical items and comprised no less than 24, respectively 28 pages. The circulation has been reduced from 2,750 to 2,500 as a number of companies opted for digital distribution.