

Summary

This report encompasses the results of a preliminary study “Victims and liability” which was carried out on the authority of the Dutch Ministry of Justice by the Interdisciplinary Centre for Law and Health (IGER) of the Vrije Universiteit Amsterdam. This research aimed to gain insight into the needs, expectations, and experiences of victims, their relatives, and bereaved with respect to liability law.

On the one hand, this study focuses on the relatively tangible questions raised by bill on affectionate damages (*affectieschade*). In the light of this discussion the question is posed whether it would be desirable to provide bereaved and relatives of victims of serious injury with a fixed compensation for damages. On the other hand, this study sheds light on what it is that litigants wish to achieve with personal injury claims and which considerations are made in this respect. Numerous assumptions regarding the needs, expectations, and experiences of litigants have been expressed, but empirical data is sadly lacking. In this research, material and immaterial needs of litigants are studied, such as the need for financial compensation and recognition. Furthermore, experiences of litigants under tort law are investigated, as is the extent to which the legal process meets the needs of litigants.

This exploratory research report encompasses the results of a literature study, two expert meetings, and 61 interviews with personal injury victims, their relatives, and bereaved. The primary goal of this exploratory research was to achieve a greater understanding, as opposed to coming to representative findings. To come to representative findings, a large-scaled investigation is called for, which is the essence of the research that will be carried out at a later stage. Naturally, insights gathered during this first stage will be of great importance for the way in which the second stage is set-up. Therefore, the final chapter of this report not only includes a synthesis of results of previous chapters, but also touches upon implications for the second stage of this research.

The scope and composition of several groups of victims in the Netherlands are described in *chapter 2* of this report. In the Netherlands, each year around 1.2 million people become a victim of traffic accidents, medical mishaps, and violent assaults. Of these people, an estimated 10-15% undertake legal action. Furthermore, on a yearly basis around 2800 people would have a right to an award of affectionate damages.

In the current research six groups of victims and relatives are distinguished. Within the group of primary victims are distinguished: victims of traffic incidents, victims of work-related accidents and victims of medical mishaps. Further, within the category of traffic victims, victims with whiplash are set apart from those without. As far as secondary victims go, relatives of victims with serious and permanent injury are set apart from bereaved.

In *chapter 3* a literature study serves to formulate assumptions with respect to needs and expectations of litigants under liability law, based on national and international legal, psychological and other literature.

The chapter starts with an overview of the arguments and assumptions in the legal debate on affectionate damages and the resulting call for empirical support. In outline, the bill that was

submitted in the Lower House on February 6 2003 holds that by changing sections of the law 6:107 and 6:108 BW, a well-defined party of bereaved and relatives of victims of serious and permanent personal injury would receive an award of solatium. The height of the compensation would be set by administrative order (*Algemene Maatregel van Bestuur*), where the Minister is considering an amount of €10,000. The idea of adhering to a fixed compensation is motivated out of the aims of the bill. An award should primarily provide bereaved and relatives of victims with recognition and solace for what they go through. In this sense, financial compensation is a secondary motive at best, since relieving the suffering of bereaved and relatives can hardly be achieved by means of finance. Moreover, the Minister of Justice feels that, especially in these cases it is in the best interest of all involved to be clear in order to avoid conflict. According to the Minister, a system by which bereaved and relatives would have to exhaustively confront the other party and possibly go to court would not serve its purpose, since an award of damages should bring about recognition for bereaved and relatives while minimizing the legal discourse and paperwork to get there.

Relatively little is known about the underlying motives when litigants sue in tort. What is known, though, is that litigants seek to be compensated in both material and immaterial ways. Paradoxically, the personal injury regulation is mostly aimed at the former, while litigants also seek acknowledgement and recognition on a more immaterial level. Experiences of litigants can be interpreted from several psychological approaches, such as secondary victimization, litigation neurosis, and procedural justice. Secondary victimization can be understood as renewed victimization as a result of the legal process. Apart from the injury and grief a victim is prone to as a result of the harm-inflicting incident, the legal process itself can be damaging. In particular, the treatment by the opposing party can cause the litigant to become secondarily victimized. Litigation neurosis, by contrast, refers to the largely unconscious tendency of victims to exaggerate their symptoms when confronted with financial or non-financial gain. In this case, liability law has anti-therapeutic effects since being involved in a damages claim interferes with recovery. Incidentally, the harmful effects of the claim procedure on the well-being of litigants has not been established in all studies on the subject. A third relevant psychological approach is that of procedural justice. Studies in this area show that what people feel is just as strongly affected by characteristics of the legal proceedings and the way a decision come about, than by the outcome of the procedure. Litigants appreciate being offered the opportunity to participate in the decision process, being treated with respect, and having a neutral party decide on the outcome.

In *chapter 4* results of two expert meetings are discussed. Both groups included lawyers specialized in personal injury, personal injury practitioners, specialized psychologists and psychiatrists, experienced social workers, and representatives for Slachtofferhulp Nederland (victim assistance). The multidisciplinary character of the meetings allowed for more specific insights into the needs of claimants with respect to the claim settlement procedure. As such, chapters 3 and 4 served a preparatory function for the qualitative interviews with bereaved and relatives in chapter 5. Furthermore, the meetings yielded valuable information by which findings from other chapters could be consolidated.

Participants of the expert meetings underlined the importance of the current empirical study and could relate to the suggested classification of litigants in six groups. Concerning the proposed legislation on affectionate damages, the general notion was that a need for compensating affectionate damages exists. Despite the fact that a fixed amount of remuneration might not be fair to the personal situation of the litigant (by neither recognizing nor satisfying the suffering), some form of standardization may be advisable.

The experts agreed that the primary goal of litigants is to regain control over their lives. In order to do so, it is crucial for litigants to secure their financial position. The extent to which immaterial needs exist will be dependent on contextual factors such as the extent to which guilt is attributable to the other party or the way in which the other party treats and informs the victim. Additionally, a number of personal characteristics were listed that could affect 1) the propensity to undertake legal action and 2) litigants' expectancies of the proceedings and their experiences along the way, such as one's general attitude to life, perceived social support, pre-existing vulnerability and financial position. The characteristics of the victim role might provide further clues of determinants of secondary victimization. The quality of the contact with the other party will influence experiences with the legal procedure and careful communication between litigant and lawyer can prevent problems.

The qualitative interviews with litigants described on *chapter 5* were based on the findings of the literature survey and the expert meetings. Sixty-one litigants were approached via their representatives and social workers. During interviews of an hour and a half, these litigants were asked about their needs with respect to liability law and their experiences with the legal procedure. In the interviews with bereaved and relatives the bill on affectionate damages was also a topic of discussion. Results indicated that needs could be both material and immaterial of nature. Litigants wanted to be financially compensated for what had happened to them and sought recognition. The need for recognition could take different forms, such as recognition of guilt by the opposing party, which was considered a condition for being taken seriously by the social environment; having the other party admit to having made a mistake and realizing for themselves what had happened; the need for sympathy and apologies from the other party. But financial compensation was also considered a means of recognition for what had happened and the suffering of immaterial damages. Another immaterial need was the ambition to prevent what had happened from happening to others, which was especially pronounced for victims of medical mishaps and traffic accidents. Participants did not believe their needs had changed throughout the juridical procedure. They did however indicate that the significance of needs could have shifted.

Participants found the personal injury procedure taxing. On a few occasions it was even described as interfering with recovery. The other party frustrating the case, the long duration of the proceedings, and the large amounts of administrative work affected experiences negatively. Good contact between lawyer and client was considered a positive contribution. The results of the interviews further indicated that besides these external determinants of experience, individual characteristics can also play a role, such as the amount of experience with legal proceedings, personality traits and religious faith.

As far as the bill on emotional damages goes, opinions of bereaved and relatives differed. While some indicated a need for compensation, others did not share this need at all. Some participants assumed the need for compensation would be income-related. The participants found it difficult to indicate which amount would suffice in their situation. Some of the people interviewed found that a fixed compensation would not do justice to their individual situation. A standardized remuneration amount could work. Some bereaved and relatives would have been satisfied with the proposed amount of €10,000, whereas others found this sum insufficient.

In *chapter 6* the findings from the previous chapters are related to each other. From the various components of this exploratory research it becomes apparent that litigants' needs with

respect to liability law are both of material and immaterial nature. A core determinant of the need for financial compensation is the extent to which the consequences of the accident challenge one's financial situation. With respect to immaterial needs, the need for recognition is prominent. Recognition could take several forms, such as establishing fault on behalf of the opposing party; recognition of what happened by the other party and the social environment; acknowledgement by the other party to have made a mistake and to feel its consequences for the victim; together with the need for sympathy and apologies from the other party. Additional immaterial needs included the desire to find out how it was possible that what happened occurred, and to prevent what had happened from happening to others.

Possibly the most notable finding of this exploratory research is the extent to which not only compensation for material and immaterial damages is of importance to recovery, but also the way in which this compensation is achieved. In this respect, two matters can be distinguished: 1) litigant's needs are not exclusively financial; 2) for recovery in the broadest sense of the word not only the outcome of the procedure contributes to recovery but also the way in which the outcome is reached, even if the primary motive for taking legal action was to be compensated financially. The liability law seems potentially capable of meeting the immaterial needs of litigants. Immaterial needs often concern those aspects of the proceedings which would also contribute to a litigant judging it as procedurally fair. As such, characteristics of liability law have a lot to offer: for example by allowing the litigant to relate one's story. At the same time, it seems that this positive potential is not (fully) realized in many cases. Instead, the personal injury procedure can interfere with litigants' psychological and physical well-being, for example when secondary victimization or litigation neurosis come to play. Aspects contributing to secondary victimization can be considered as those aspects of the proceedings which are opposite to the aspects that would contribute to it being judged procedurally fair. This might be due to the core emphasis on material compensation and neglect of immaterial needs. It can be concluded that there is a remarkable discrepancy between the primary focus on financial compensation on the one hand, and litigants' need for immaterial compensation on the other. Based on the findings, it is concluded that neglecting immaterial needs interferes with well-being and that fulfillment of these needs stimulates recovery of victims, bereaved and relatives in a psychological, social and medical sense. This notion should be subject to further study.

The diversity in opinions of bereaved and relatives with respect to the bill on emotional damages and a suitable amount of compensation emphasize the need for future research to come to representative findings. Furthermore, it is apparent from this exploratory study that the way in which remuneration is presented can influence the extent to which the compensation is appreciated and thereby achieving its goal of providing bereaved and relatives of victims with recognition for what they go through.