

SUMMARY

Background and aim of the research

This report contains the account of descriptive research into the practice of compensation for damages for legitimate and illegitimate punishable action. The research should give further insight into the current practice of compensation for damages for punishable action. This is done in connection with the implementation of the bill, Claims for Damages, for punishable government action. Indeed, for a considerable time, a new and more coherent rule has been pressed for from various sides.

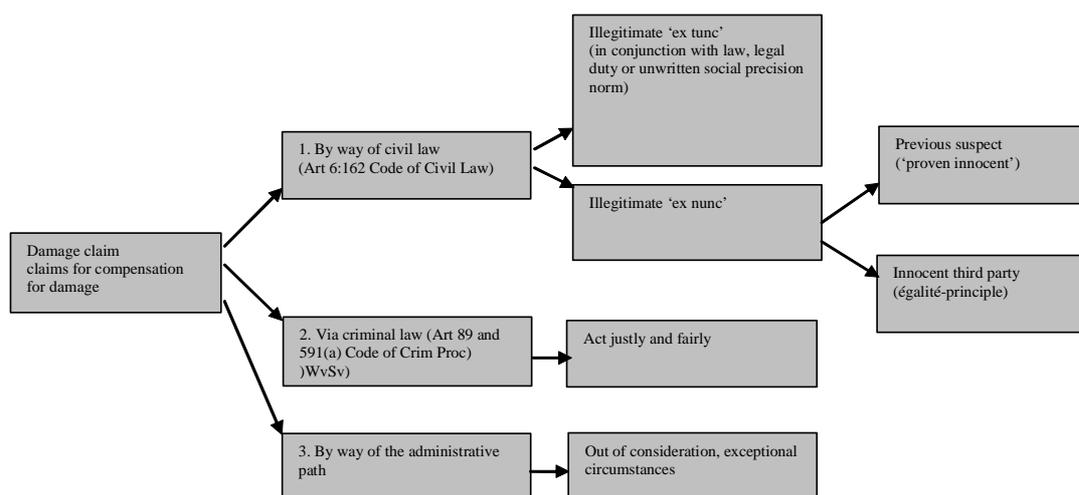
Implementation of the research

The research was conducted by B&A in conjunction with the Verwey-Jonker Institute and IVA Policy Research and Advice and commissioned by the WODC from the Ministry of Justice. In the first place, quantitative data was collected about the processing of claims for compensation for damages. This concerns data from the CBS (Central Statistics Netherlands) about the processing of claims for compensation for damages on the basis of Article 89 and 591 (a) Code of Criminal Procedure and data about the processing of claims for compensation for damages by the Public Prosecutor and the insurance company to which police constabularies are connected. Subsequently, 419 cases of damage claims were studied from the law courts of Arnhem, Den Bosch and The Hague and the Court of Appeal in The Hague and Amsterdam. Finally, eleven interviews were conducted with field experts who were closely involved with the processing of claims for compensation for damages.

The current provisions for damage claims

In practice, to be taken into consideration for compensation for punishable action there are various possibilities. Roughly speaking, victims can try to obtain damages via the criminal law, civil law and the administrative path.

In the first case, one can make a claim according to Article 89 and further and 591 (a) Code of Criminal Procedure in the case that damage occurs as a result of being taken into custody or provisional imprisonment and the case is ended without the imposing of a sentence or measure (or after imposing, but for a fact for which no provisional imprisonment is allowed). In the second case, one can try to obtain damages from the State of the Netherlands in a procedure with the civil judge on the grounds of illegitimate action (Article 6: 162 Code of Civil Law). Finally, one can appeal to a Public Prosecutor's Office at a District Court, the Public Prosecutor and the (insurer of the) police constabularies. These organisations process claims for compensation for damages for damage claims according to their own insight on the basis of civil law jurisprudence, or out of consideration and, as such, acting in practice as 'first stage' with regard to the civil judge. The possibilities are sketched in the diagram below.



In practice: claims for damages by way of criminal law

The number of claims for compensation for damages for damage claims on the basis of Article 89 and 591 (a) Code of Criminal Procedure in connection to provisional imprisonment and the costs of legal aid has increased by about 50 percent in the period researched: from 4,254 in 2002 to 6,665 in 2006. Further the number of granted claims has increased by more than 50 percent: from 3,705 in 2002 to 5,951 in 2006. Through the years, this increase has developed in a steady relationship to the number of submitted claims: 85 – 90 percent of the claims for compensation for damages are always approved. Always 10 – 15 percent of the submitted claims for compensation for damages are rejected. The number of rejected claims for compensation for damages has increased less strongly than the granted claims for compensation for damages. The total amount awarded in compensation for damages has not increased. This amount fluctuated between € 12 and 17 million in the period researched.

The claims for compensation for damages that are processed by the courts researched appear to be just about exclusively based on Article 89 and 591 (a) Code of Criminal Procedure, in mutual connection. The claims for compensation for damages are submitted by previous suspects and are related to damage as a result of being taken into custody / provisional imprisonment, trial costs and legal aid costs. The majority (about 80 %) of the claims are not complicated, are processed out of court and granted as requested. The courts assess the claims for compensation for damages regarding the size of the claims for compensation for damage, the facts, the course of the detention, and the costs of legal aid marginally from the records and a specification of the costs.

In general, the courts keep strictly to the agreed amounts as are determined by the LOVS. Furthermore, the remaining costs for legal aid come into consideration for compensation. If the damage is also (partly) to blame on the one claiming damages, it will be used against him. Only in exceptions (for example in harrowing cases or in cases of great publicity) are larger amounts granted for material and immaterial damage, provided they are well supported (by which is meant the showing of a causal relationship between the action of the government and the damage).

Thus the concept 'act justly and fairly' from Article 90 Code of Criminal Procedure is applied in a standardised manner. Apart from the orientation points of the LOVS, there are no internal guidelines for the judging of claims for compensation for damages for damage compensation. The courts do not direct an active information policy about the procedure for claims for damages.

In practice: claims for damages by way of civil law or the administrative path

The number of claims for compensation for damages for damage compensation on the basis of illegitimate action (Article 6: 162 Code of Civil Law) submitted to the Public Prosecutor has decreased from 461 to 277 in the period 2002 – 2004, only to rise again from 326 to 355 in the period 2005 – 2006. The most claims for compensation for damages concern confiscation and detention. The number of claims for compensation for damages granted increased by more than 50 percent in the researched period. About half of the claims for compensation for damages were rejected¹. The total compensation for damages awarded has increased from € 179,471 to € 222,135 over the course of years, only to decrease again to € 204,590 in 2006.

The number of compensation claims for damages on the basis of illegitimate action that are processed by the police insurer has increased from 367 to 478 in the period 2003 – 2005. In this period the number of claims granted rose from 182 to 248 and the number of claims rejected from 185 to 230. Moreover, it is emphatically indicated that, in 2005, there are still 105 claims being processed and, in 2006, still 414 (already processed in 2006: 194). The most claims are submitted in connection with arrest, entry, searching of premises and confiscation. The relation between granted and rejected claims has remained more or less level in the period 2003 – 2005. The total amount awarded in compensation for damage claims has risen slightly from € 277,652 to € 290,495 in the period 2003 – 2005.

This type of claim for compensation for damage shows much more variation and is much more laborious. They are mainly submitted by previous suspects and, for a smaller part, by a third party. The claims are judged in the light of civil law jurisprudence of the Supreme Court about government liability. In a small portion (about 30 %) of the claims that are granted by the Public Prosecutor one can speak of illegitimate 'ex tunc', for example, because one can speak of an identity exchange. In the other cases (about 70 %) one can speak of illegitimate 'ex nunc', this concerning cases where it was decided not to prosecute because it appeared that the person in question was wrongly regarded as a suspect from the evidence from the police and the Public Prosecutor.

Claimants have to prove their innocence based on their criminal dossier on the grounds of the above-mentioned jurisprudence. Most of the time, this offers few starting points. Claimants only appear to be actually able to show their innocence by way of an alibi. If the claimant has himself contributed to the origin or the maintenance of the suspicion, this would be used against him in the sense of own guilt (about 10 %). Furthermore, it is (marginally) checked if there is a possibility of a causal relation between the damage and the out of court government action.

In judging the claims for compensation for damage in connection to removal of freedom the Public Prosecutor uses the amounts that are agreed by the LOVS. The Public Prosecutor is reticent concerning claims for compensation for damages as a result of entry and searching by a third party who lets premises commercially. This damage is considered as falling under the normal company risks. However, in harrowing cases, the Public Prosecutor acts out of consideration and the claim is (partly) granted (about 10 %). The police insurer is critical about the content processing of the claims for compensation for damages, in particular at the size of the claimed damages. Thus, practically always, a (injury) damage expert is consulted to estimate the damage. Through this, the processing period of the claimant is longer.

The Prosecutor General works with model letters and building blocks for processing the claims for compensation for damage. For the rest there are no internal regulations or policy. Apart from the monetary compensation manual from the ANWB, the police insurer employs no internal guidelines or policy. The Public Prosecutor, the police and the police insurer operate no active information policy about the procedure for claims for compensation for damage.

¹ See comments about data Public Prosecutor in paragraph 4.1.2.

Functioning in practice

The largest portion of the claims for compensation for damage (more than 90 %) is based on Article 89 and 591 (a) Code of Criminal Procedure. Also the (total and average) amount granted for compensation for damage is the greatest for this category of cases.

The researched organisations indicate they manage well with the current regulations in general. Nevertheless they indicate a number of juridical technical bottlenecks in the current regulations. For example, the narrow interpretation by the Supreme Court of the concept case in Article 89 Code of Criminal Procedure and the lack of a foundation for compensation for damage if the detention has lasted longer than the provisional imprisonment.

The entirety of the ways in which a claim for compensation for damages for punishable action can be submitted is poorly organised. There is a way via criminal law, via civil law and an administrative way (the latter is meaning the possibility to be eligible for compensation for damages on the basis of the Public Prosecutor or the police insurer acting out of consideration).

Although the researched organisations do not make a problem of the current situation in itself, it is also felt, content wise, the actual practice of compensation for damage for punishable action is many sided and complex. This concerns in particular the civil law jurisprudence managed as a judgement framework: there is mention of illegitimate 'ex tunc' and 'ex nunc' and in cases of claims by a third party the égalité principle is applied. The application of this jurisprudence in concrete cases appears to be made-to-measure per claim. The researched organisations do not operate any internal guidelines or policy in which the jurisprudence has been detailed for the processing of claims for compensation for damage, apart from the model letters and building blocks of the Public Prosecutor. In the case of claims for compensation for damage being processed on the basis of consideration, the previously mentioned jurisprudence is actually taken into account but, in fact, a recognisable and clear (in policy form) judging framework is missing.