

Summary

This report encompasses the results of the second part of the study ‘Victims and liability’ which was commissioned by the Dutch Ministry of Justice and carried out by the Interdisciplinary Centre for Law and Health (IGER) of VU University Amsterdam in cooperation with the Research and Documentation Centre of the Dutch Ministry of Justice. The first part of this study, the ‘Exploration of the field’ (*Terreinverkenning*), was of a more general nature and was published in 2007. The aim of this second part is to formulate answers to a number of questions in relation to a legislative proposal on ‘affectionate damage’ (*wetsvoorstel affectieschade*), momentarily under discussion in the First Chamber of Dutch Parliament. In this proposal, a right to compensation for non-pecuniary loss is awarded to a narrowly drafted circle of secondary victims in the case a loved one is severely injured or has died as a result of an event for which a third party is liable. Secondary victims are relatives who stand in a close family, or comparable, relationship to the primary victim. This compensation for ‘affectionate damage’ must be paid by the liable person, although in practice payment will often be made by a private liability insurance company. The amount of damages will be laid down in an administrative order. The present intention is to set down a fixed sum of € 10.000. The primary goal of the proposal is to offer acknowledgement and satisfaction to relatives. Compensation is only a secondary objective.

The intention to introduce compensation for affectionate damage is broadly supported. However, in both Chambers of Parliament and in legal literature, critical remarks have been made about certain elements of the proposal, including the intended fixed sum of € 10.000. This critique was one of the reasons to initiate this study. When it debated the proposal on 12 September 2006, the First Chamber decided to await the results of this study, which at that moment was half way into its first phase. As a result of the debate in the First Chamber the pre-question, whether close relatives actually have a need for compensation of affectionate damage, was included in the examination.

The aim of this study is to provide the information needed to proceed with the legislative process. To this purpose the following research questions were formulated:

1. To what extent relatives of severely injured persons and relatives of persons who have died, have a need for the right to claim compensation of affectionate damage?
2. Will compensation of affectionate damage contribute to the fulfillment of immaterial needs of relatives?
3. Which elements in the proposal will positively affect the fulfillment of immaterial needs of relatives, and which elements will not (fixed sum, amount)?
4. Which aspects of the mode of offering of the compensation are important with respect to the fulfillment of immaterial needs (manner and timing of offering)?
5. To what degree do the most important outcomes relate to:
 - personal characteristics (demographic variables such as financial position);
 - characteristics of the relationship with the victim;
 - characteristics of the event (e.g. blameworthiness of the wrongdoer);
 - the time interval since the event?

This study involved questionnaire research among secondary victims in The Netherlands, and interviews with fourteen secondary victims in Belgium who had received compensation for types of damages comparable with affectionate damage. A total of 462 persons (falling within the range of persons entitled to compensation of affectionate damage under the proposal) filled out the questionnaire. This group consisted of 391 relatives of injured persons and 72 relatives of persons who died (surviving relatives).

With regard to the first research question the results of the study showed that the majority of relatives felt a clear need for compensation of affectionate damage. No significant differences were found between relatives of injured persons and surviving relatives in this respect.

With regard to the second research question (does compensation of affectionate damage contribute to the fulfillment of immaterial needs), the results of the study showed that the vast majority of respondents did expect a beneficial effect of the compensation of affectionate damage on the fulfillment of their emotional needs. Relatives of injured persons and surviving relatives did not differ significantly in this respect. Respondents regarded it even more important for their recovery that the pecuniary damage is settled smooth and swiftly, that pecuniary damage is indeed compensated, and that the responsible party acknowledges its fault (including apologies/empathy). Outcomes further indicated that the compensation for affectionate damage will contribute to fulfillment of several needs that were rated (even) higher (e.g. that the responsible party acknowledges its fault) than the need for compensation of affectionate damage as such. In this respect, compensation of affectionate damage is viewed more as a means to an end than as an end in itself. This fits well with the goal of the proposal, which primary aim is to offer acknowledgement and satisfaction.

With regard to the third research question (to what extent the elements in the proposal, such as the fixed sum and the intended amount of € 10.000, may contribute to the fulfillment of the immaterial needs of relatives), the results showed the following. Most respondents preferred their individual circumstances to be taken into account in the determination of the amount of compensation for affectionate damage, and favor variable or standardized amounts rather than a fixed sum. This in spite of their understanding that this may involve painful discussions and lengthier settlement procedures. Relatives of injured persons and surviving relatives did not differ significantly in this respect. It appears that the legislator's intention to apply a fixed sum for all cases does not fit well with the preferences of most relatives. However, at the same time respondents valued a smooth and swift settlement of the pecuniary damage above all other things. They also expressed that painful discussions about the adequate amount would hinder their process of coming to terms with what has happened. The latter findings conflict with the earlier one because variation of amounts can lead to painful discussions and a lengthier settlement procedure.

When confronted with a fixed sum, 45 % of the respondents took a neutral standpoint towards the amount of € 10.000. 28% valued this amount too low, and 8,5% too high. Over 13% of respondents chose not to answer this question. On this point significant differences between relatives of injured persons and surviving relatives were identified: surviving relatives more often than relatives of injured persons valued the amount of € 10.000 as too low. This finding was supported by the results to the open question what they considered an appropriate amount in their own personal situation. Relatives of injured persons on average indicated an amount between € 10.000 and € 25.000. Surviving relatives on average indicated an amount between € 50.000 and € 100.000. Together these results can support the conclusion that, in view of the fact that it remains quite troublesome to value the emotional loss suffered in money terms, the intended amount of € 10.000 will not be perceived as inappropriate by the majority of relatives, although their own preferences are, on average, somewhat higher. This at least where relatives of injured persons are concerned. For surviving relatives the situation seems to be somewhat different.

When in the course of further deliberation on the modalities of the compensation of affection damage, it would be considered to award a higher sum to surviving relatives than to relatives of injured persons, this suggestion would be supported by the outcomes of this research. No

support was found for distinguishing between different categories of affectionate relationships (e.g. parents and children, partners in between each other, brothers and sisters). No significant differences were found between these categories, at least not among relatives of injured persons. It is quite possible these differences are relevant to surviving relatives, but this could not be tested statistically as their number was too small. In regard of variation according to the age of the primary victim, the research outcomes do not provide a definite outcome. No support was found for distinguishing according to the level of impact of the injuries on the victim's daily functioning (e.g. whether or not constant care is needed), nor for distinguishing according to the amount of blame attributed to the wrongdoer. Both a higher level of impact of the injuries and a larger amount of blame related to a higher need for compensation of affectionate damage and a higher expected contribution to recovery. Yet these factors did not involve significant differences in the appreciation of the fixed sum of € 10.000, nor significant differences in the answers to the open question as to what respondents considered to be an appropriate amount.

Regarding the fourth research question (which aspects of the mode of offering of the compensation are important with regard to fulfillment of immaterial needs), the conclusion is that compensation for affectionate damage will fail to meet its goal if not offered in a well-thought-out way. The interviews in Belgium revealed how painful a purely matter-of-fact approach can be to relatives. A personal and compassionate mode of offering is required, which acknowledges that the loss suffered is of a human nature and quite different from something like damage to the bodywork of a car. With regard to the mode of offering, the outcomes of this study allow the following recommendations:

- To ensure that the compensation of affectionate damage meets its goals, its offering should take place in a context of careful communication with the recipients.
- Keywords in this context are a personal and compassionate mode of offering, the expression of regret that a fault has been made/an offence has been committed, and the acknowledgement that a type of damage is concerned of a special nature.
- Also it should be expressed that the compensation is of no more than a symbolic nature, as it cannot truly compensate the non-pecuniary loss suffered.
- Generally, written communication seems to be sufficient for these purposes. Yet depending on the circumstances, a house call can also be appropriate.
- A letter from the person who caused the damage is generally valued positively, a house call, however, is not. Yet relatives of victims of crime do not appreciate a letter from the offender either.
- The compensation should be offered within a specifically defined time interval from the day of the accident.
- The offering of the compensation should be organized separately from any settlement of pecuniary damages.

With regard to the fifth research question the influence of a large number of variables was examined, including demographic characteristics (age, gender, education, financial position), categories of relationships (victim was child, partner, parent of the respondent), categories of accidents (traffic, industrial, medical, violence), the amount of blame attributed to the wrongdoer and the time passed since the damaging event.

No significant effects were found of income and gender on the need for compensation of affectionate damage, on the expected contribution of such compensation to the fulfillment of immaterial needs, or on the answers concerning the amount of compensation. A lower level of education was related to a moderate increase in the need for compensation of affectionate damage and the expected contribution of such compensation to recovery. Also some indication

was found that as respondents were older, the expected contribution was higher and an amount of € 10.000 was more often valued too low.

Within the group of relatives of injured persons no significant differences were found between categories of relationships, nor between categories of accidents in relation to the most important outcome measures. This could not be examined for surviving victims because the group was too small to test these distinctions. For both relatives of injured persons and surviving relatives the outcomes show that a higher amount of blame attributed to the wrongdoer correlates with an increased need for compensation of affectionate damage and a higher expected contribution of such compensation to recovery. Furthermore, for relatives of injured persons a higher level of impact of the injuries on victim's daily functioning showed a correlation with an increased need for compensation of affectionate damage and a higher expected contribution to recovery. For the other explaining variables (time interval since the accident, number of hours of care spend by the relative of the injured, total amount of pecuniary damage, affectionate quality of the relation at the time of the accident) no significant effects were found.