
SUMMARY

The legislator is considering extending the ‘Disasters and Serious Accidents (Compensation) Act’ (*Wet tegemoetkoming schade bij rampen*, hereafter Wts) to uninsurable risks concerning personal injury or death. The Wts is a ‘last resort’ mechanism for the compensation of property damage that results from disasters: it offers limited compensation for citizens and organizations that suffer damage as a result of disasters, provided that their damage is of a nature for which insurance was not available prior to the event and for which there are no alternative resources available elsewhere. Personal damage (injury and/or death) caused by disasters will first and foremost be covered by other mechanisms outside the scope of the Wts. But for part of this damage the deprived persons will not have any insurance coverage or alternative means for compensation. This concerns immaterial (non-pecuniary) damage, (part of) the loss of profit and income in case of incapacity to work, the loss of independence and self-reliance and specific types of costs (such as study costs), damage consequential to providing informal medical care to the primary victim, the loss of maintenance and funeral costs in cases of death. That seems to be, by and large, the part of the disaster losses that must be considered for a possible extension of the Wts to uninsurable personal damage.

This study aims to find a future ruling that is the most appropriate to decide who will be entitled to a financial award based on the Wts and for which part(s) of their personal damage and how the damage must be translated into a monetary award. The answer to these questions was found within the normative framework of four interests, *viz.* a future ruling must provide for: legal certainty, limited burdens in implementing the new ruling, a made-to-measure award and flexibility in order to deal with unforeseen affected persons or harm. Based on a normative analysis this study shows how a balance between these four interests can be found, with legal certainty as the predominant interest: before the disaster one needs to be able to assess who and for what part of their damage awards may be due and how the damage will be calculated. The interest of limited burdens means that the costs and time involved in the application of a future ruling, and the administrative procedure of claim assessment, will be limited. The interest of a made-to-measure capacity entails that a possible future ruling for the Wts offers the possibility to differentiate between entitlements to awards based on the individual circumstances of the deprived persons in question. The interest of flexibility calls for the capacity of a possible future ruling for the Wts to offer awards to individuals and for kinds of damage that were unforeseen at the time of its enactment.

This balancing of the four interests, with legal certainty being predominant, can be found with a ruling that consists of a limited list of the heads of damage that may call for an award, combined with standard amounts of the awards to be offered and concrete caps and limitations that indicate the exact bandwidth of the awards to be paid. Given the fact that victims of a catastrophe may suffer various kinds of personal damage, independent of their exact capacity and their involvement in the disaster, there will be a certain amount of legal uncertainty if the law is not clear, prior to a catastrophic event, to whom and for which part(s) of the damage it will grant awards for personal damage. Legal certainty will be promoted if the Wts were to offer such an enumerated list of the heads of personal damage that may call for awards to be paid, instead of, for example, leaving this up to the State to decide after the event that has taken place. The remaining legal uncertainty in relation to the exact amount of individual awards and the total amount of awards to be paid can be diminished by the introduction of standard amounts of awards to be paid for each head of damage as well as thresholds and caps that determine an exact

bandwidth of the awards to be paid. This will also provide for predictable outcomes and enhance efficiency, which may benefit the victim as well since he or she will not be unpleasantly surprised by the outcome and the administrative procedure will not be too demanding. The standard amounts, thresholds and caps may vary depending on the kind of harm involved.

A possible future ruling for the Wts can, as does the Wts in its current form, leave open which categories of victims are entitled to awards. It is not necessary and, indeed, it is undesirable that such a ruling would also provide for a limited list in this respect. Such a list would not promote legal certainty in cases of personal damage. There are many possible victims involved in personal injuries caused by disasters; these can hardly be bundled into or summarized in a list. This is different for the kinds of damage involved; that can more easily be limited by the law. If the heads of damage are listed in the Wts, then that will also limit the categories of victims who may receive awards: only those that have the kinds of damage that are mentioned in the law will be protected. Also, legal certainty can be furthered by other, generic conditions in the law, for example the condition that the damage, with the exception of the part caused by informal care that the victim offers to primary victims and maintenance costs and funeral costs, has been caused directly at the time and place of the event.

A scheme of standard amounts for the separate heads of personal damage will make a possible extension of the Wts to uninsurable risks of injury and death relatively easy to execute. Also, from the victim's perspective, the absence of standard amounts for awards to be paid may take its toll given the complexity of certain components of the personal damage involved and the factors that may play a role here. The standard awards to be paid must not, from the perspective of legal certainty, be determined after specific disasters, but before and independent of the specific event.

By creating diverse standards, for example dependent on the seriousness of the harm, and by period adjustments, this new ruling can to a certain extent be made to measure. Offering awards for immaterial (non-pecuniary) damage also provides for the opportunity to ensure that different categories of victims and different forms of pain or grief will relatively easily – based on different (categories of) fixed awards – be treated accordingly. Lastly, a hardship clause can contribute to more individualized (made-to-measure) outcomes and a measure to offer solutions in unexpected and unforeseen cases that may arise after the catastrophe. Given the fact that the Wts has a broad field of application such a clause must be limited to certain specific elements of the new ruling. An example would be a clause that would only allow an exception to the extent that awards could be made outside the bandwidth that the new ruling would determine, provided that certain conditions were met. With these three tools (differentiation and a periodic adjustment of the standards to be used, different awards for immaterial damage and a specific hardship clause) the interests of being made to measure and flexibility are given shape in a way that is compatible with the legal certainty and efficiency offered by the new ruling as envisaged.