Evaluatie Wet vergoeding affectieschade

In opdracht van het Wetenschappelijk Onderzoek- en Datacentrum

Uitgevoerd door

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Summary

This report contains the Evaluation of the Act on Bereavement Damages ('Wet vergoeding affectieschade') commissioned by the Research and Data Centre (WODC), carried out by the Vrije Universiteit Amsterdam and Utrecht University. This study was commissioned in light of a commitment to Parliament to evaluate the Act on Bereavement Damages five years after its enactment, which was 1 January 2019.

Purpose and structure of the Act

With the Act on Bereavement Damages, the legislator intended to meet the aspiration to provide a form of recognition and satisfaction of the suffering experienced by close relatives as a result of the death or serious and permanent injury of a loved one due to accidents, crimes, and other events for which a third party is liable. The law defines a restricted circle of persons entitled to compensation for affection damage. Briefly, this statutory circle of entitled persons consists of spouses, cohabitants, parents, children, and those who were permanently cared for by the primary victim or who had permanent care of the primary victim. Furthermore, the law works with fixed compensation amounts, laid down in the Decree on Bereavement Damages (ranging from € 12,500 to € 20,000). The design of a statutory scheme with a fixed circle of entitled persons and fixed amounts was a conscious choice. The aim was to avoid painful discussions about the claim and its amount as much as possible. A hardship clause does offer the possibility, in exceptional situations, to also grant compensation to persons outside the fixed circle of entitled persons. With this hardship clause, a balance was sought between the aspiration for a regulation that is easy to implement and to make it possible to compensate for emotional damage in typical cases.

Research aim and questions

The purpose of this study is to examine to what extent the law achieved its intended objective, i.e. whether next of kin experience the compensation as recognition of suffering and as a form of satisfaction. In addition, the study should provide insight into the advantages and disadvantages of adjusting the amount of compensation and the circle of entitled persons. It should be mentioned that in the past five years since the Act came into force, the position of siblings has been the subject of debate in literature and in parliament (in particular). Siblings are not included in the circle of entitled persons and therefore have, in principle, no legal entitlement to bereavement damages. In order to receive such compensation, their only recourse is to invoke the hardship clause. So far, the results of such appeals in most cases have not been successful. This restrictiveness towards siblings has been the subject of criticism.

The central research question is:

To what extent are the objectives of the Act on Bereavement Damages, namely recognition of the suffering of close relatives and providing a form of satisfaction, being achieved?

The objectives of the Act (recognition and satisfaction) cannot be seen separately from the secondary objective of the Act ('avoidance of dispute'), which was decisive for its design (the main elements being the fixed circle of entitled persons and the standardised amounts). For the purpose of this evaluative study, this central question has been divided into a large number of sub-questions. These sub-questions relate to the achievement of the law's objectives, the circle of entitled persons, the standardised amounts and the practice of awarding and processing.

Several research methods were used: study of legislative history, laws and regulations, literature review, case law analysis (Supreme court n=3, criminal courts n=414, civil courts n=5), questionnaire research among relatives and survivors (n=130) and professionals (n=125), interviews with relatives and survivors (n=18), exploratory comparative law research and focus groups (n=2; 1 with professionals and 1 with MH17 survivors). This mixed-method design was chosen in order to get a complete picture of the modus operandi of questions and discussion points about the Act. A limitation of the questionnaire survey and interviews is that - despite intensive efforts - the proportion of claimants and professionals from the criminal law were limited. Occupational accidents and medical errors were also under-represented.

Below is a summary of the main findings of this evaluation of the Act. Successively, these findings concern: the experiences of close relatives and next of kin with the Act, the delineation of the fixed circle of entitled persons, working with standard amounts and indexation, the application of the criterion of serious and permanent injury, causality questions and the way the benefit is offered to the entitled persons in practice.

Experiences with the Act by close relatives and next of kin are positive

The results imply that, in general, the Act fulfils its objective. It indeed provides recognition to close relatives and next of kin, and without too much dispute, at least for those belonging to the fixed circle of entitled persons. The set-up with a fixed circle and fixed amounts works as intended and is widely accepted. Beneficiaries rate receiving affection compensation positively (average score 7.9/10). Considering how difficult it is to translate the loss of a loved one into money and to mold the sensitive matter of this Act into fixed rules, this is an exceptional score. Little hassle is experienced over whether one is entitled to this benefit. The processing time also seems to be perceived as good. Information about the settlement is generally good, and the settlement is perceived as fair. People are reasonably satisfied with the amount received. Various discussion points that were raised at the time the Act was introduced appear not to have occurred, or only to a minor extent, in legal practice.

Main bottleneck: delimitation of the fixed circle of entitled persons

The main bottleneck appears to be the delimitation of the fixed circle of entitled persons, in particular the exclusion of siblings, especially when they were/are living with the victim in a family context. The Dutch Parliament has called on the minister to extend the circle of entitled persons to include siblings. In various ways, the survey results are consistent with the view that this should be seen as the main bottleneck in the functioning of the Act. Siblings are the largest group to invoke the hardship clause, relatives and professionals believe that the distinction with other family members is hard to explain and should be removed.

If the legislator would want to act on these outcomes - and the Parliament’s motion - it can be expected that any enlargement of the circle of entitled persons raises difficult questions. This necessitates rethinking the possible justifications for granting an entitlement to some but not others. After all, the Act does not aim to compensate for every loss of a close relative, but only that which, because of the existence of a special emotional bond, can be said to lead to have a major impact on the close relative’s or survivor's own life. A too wide fixed circle of entitled persons would jeopardise the manageability of the scheme and could devalue the recognition for the loss that is expressed by granting a benefit.

A further question is how to adequately design any extension. Among other things, the following questions will have to be considered: 1) does one want to include all brothers and sisters, or does one want to limit this to brothers and sisters who are living together in a family context only; 2) does one want, as in the case of spouses/registered partners (a) and parents and children (c) and (d), to let the sole legal family tie be decisive, or does one want to fit in with modern social reality, which increasingly has composite family forms (with half- and step brothers/sisters).

With regard to the first question (restriction to siblings living together in a family context?), it can be noted that the call for the inclusion of siblings that emerged from the questionnaire survey and interviews primarily refers to siblings living together in a family context. The infraction to the family unit seems to be the supporting idea in that context. However, in the focus group with professionals. the general feeling was that, in the event of a possible extension, adult and 'flown-out' siblings should nevertheless be brought within the fixed circle of entitled persons (while imagining that different amounts would be used). Otherwise, a distinction that in practice would often be debatable would emerge with awkward 'frayed edges'. It is not the infraction to the family unit here that seems to be the underlying idea but avoiding painful disputes.

Regarding the second question ('does one want to let the sole legal family tie be decisive or does one want to align with the social reality of increasing composite family forms'), the first relevant question is whether aligning with the legal family tie would be tenable under Article 8 ECHR and whether the Act should not align with actual family relationships. These are, however, very diverse. Common, for example, is a composite family where one or both parents have children from a previous relationship. Those children may or may not, or to varying degrees, live or have lived together under the same roof. Possibly, a distinction could be made between resident stepbrothers and step-sisters, where the question whether they have been living together permanently under one roof is decisive, and out-dwelling stepbrothers and step-sisters, who are excluded from the extension of the fixed circle (and thus remain dependent on an appeal to the hardship clause). This matter is not easy to put into legal regulation. Workable, defensible and explainable distinctions will have to be sought.

A widening of possibilities for siblings - and other close relatives - to claim bereavement damages could also be achieved by a relaxation of the hardship clause. A disadvantage of the hardship clause is that it gives rise to uncertainty and unpleasant and emotional disputes. The questionnaire survey showed that professionals would prefer to get rid of the hardship clause. The professionals in the focus group, as in the questionnaire, working on both the 'claiming' and 'paying' sides of the field, were unanimous and outspoken on this point. They saw nothing in 'stretching' the hardship clause, as this results in ambiguity and debate in sensitive cases. The explicit preference was for expanding the fixed circle of entitled persons.

Decree on Bereavement Damages and indexation

Both the case law survey and the questionnaire survey show that the amounts in the Decree on Bereavement Damages are adhered to legal practice. Close relatives and professionals also generally appreciate working with fixed amounts. Obviously, some relatives indicate that they find the amount being too low, and that it cannot make up for their loss, but they do understand that it is a symbolic amount, and they see the importance of avoiding disputes. When suggesting possible changes, professionals regularly mentioned the desirability of indexation. In the focus group with professionals, there was consensus on the need for periodic indexation. This was

mainly to prevent the recognition inherent in receiving the amount from being eroded over time. In this context, it is worth noting that other amounts of damages for pain and suffering are indexed also. From that perspective a 'backlog' of approximately 22% already exists as of the Act's enactment date. Noting the symbolic nature of the amounts, it is preferable to work with well-rounded amounts, to be adjusted every couple of years.

Serious and permanent injury

The Bereavement Damages Act not only covers cases of death, but also applies to situations where a close relative suffered 'serious and permanent injury'. The legislator indicated that the latter should be cases in which the injury also - because of the close personal relationship between the injured person and close relative - represents a 'turning point in life' for that relative. As a guideline it was suggested that this is the case when there is a permanent loss of function of 70% or more. Decisive, however, is the impact of the injury on the victim and his close relative(s). As a result, lower percentages can constitute 'serious' injury within the meaning of the Act as well.
On the basis of the study, it can be concluded that, as envisaged prior to the introduction of the Act, it is not self-evident to delineate the 'serious and permanent' injury category in a unambiguous manner. . Precisely because the severity of the injury varies from case to case, as well as its impact on the life of the injured person and the next of kin, it does not seem feasible (or desirable) to further delineate this criterion in advance (legally) in terms of content. After all, further substantive demarcation could also lead to undesirable results, because some cases that can now be brought under this open norm could/would fall outside its scope. What we - as researchers - reiterate here is that the guidance provided by the legislator in the legislative history can be discerned in published case law, including that of the Dutch Supreme Court. This case law shows that the question of whether the injury is "serious" is about the impact of the injury on the life of the injured person and that of the next of kin. There must be a "turnaround" (also) in the life of the next of kin as a result of the injury of his loved one, the burden of proof of which is on the next of kin. If there is a 70% permanent functional impairment or more (the burden of proof of which lies with the next of kin), this "turnaround in life" is assumed. But that does not mean that there is no room to conclude (and substantiate) that serious and permanent injuries not meeting this level of disability nevertheless results in such a "turnaround in life" for the next of kin. Therefore, too much weight should not be attached to the 70% impairment level. It should be treated merely as an aid for the next of kin to demonstrate that there is serious and permanent injury eligible for bereavement damages. If the level of 70% permanent disability is not met, then there must simply still be debate between the parties about the existence of bereavement damage (in accordance with the rules of evidence of art. 150 Dutch Code of Civil Proceedings), just as in many other personal injury cases there is debate between the parties about the existence of heads of damage.

Another research finding is the issue of medical end state. In some rulings, the attainment of the medical end state seems to be seen as a provision to establish the permanent nature of the serious injury. This confusion can perhaps be explained by the debate on this issue in the legislative history. This interpretation of the law does not seem to be the correct one. It must be shown that the injury is serious en permanent. That determination can be made even without a medical end state, as this may be sufficiently clear from the prognosis and prospects of (partial) recovery, this may be sufficiently clear.

Finally, several research findings show that in criminal proceedings the position of close relatives in cases of sexual abuse of children is perceived as complicated. In the legislative

history, Members of Parliament already called attention to this. It would be helpful if the minister would again comment on the position and right of claim of these close relatives in the criminal process. Various possibilities for this have been mentioned in the literature, into which the State Secretary could commission research.

Bereavement damages and medical liability

In the focus group with professionals, it was raised that in medical cases, by their very nature, causality questions arise more often than in other domains. This was also revealed by the questionnaire survey of professionals. Pre-existing conditions or vulnerability in general can lead to difficult discussions about whether and to what extent the healthcare provider's negligence caused the death or injury to the health of the loved one. Claims for bereavement damages increase these issues, as there are quite a number of medical cases in which this is the main or sole component of damages. This increased the claims burden with the introduction of the Act. It can be observed that the Bereavement Damages Act numerically affected the medical sector more than other sectors and gave rise to more discussion on liability and causation. However, no apparent solutions seem available to solve this problem: disputes about liability and causality cannot be avoided and it is questionable whether an exception for medical liability or applying an age differentiation would be desirable.

The manner in which the compensation is offered could be improved

Both the questionnaire survey and the interview study show that the factual handling of the Act is going well. People are content with the straightforwardness of the scheme that gives little cause for discussion. What the interviews do show is that there are also disadvantages to this businesslike manner of handling, namely that it can come across as distant and (too) formal. Some respondents indicated that they would have appreciated more information. In this respect, the manner in which the compensation was offered is not perceived as positive by everyone, although nevertheless there is recognition, and the compensation provides a positive experience. Earlier research already showed that in order to secure the non-pecuniary objectives of the Act, the compensation should be offered in a context of careful communication with the entitled parties. Practice appears to vary on this point, but it can be concluded that a mode of presentation tailored to the Act's objectives is not always achieved. Better information and a more empathetic interaction which allows for the emotional impact of the damage-causing event therefore seem to be issues for improvement.