

Summary

DETERMINATION OF NON-ECONOMIC DAMAGES

The object of the study. The object of this study concerns the determination of non-economic damages. This has been inspired by several judicial and extrajudicial problems concerning the determination of non-economic damages. These are (on the assumption always that there is liability and that there is an entitlement to non-economic damages) situations that come within the scope of Article 6:106.1, and under b. of the Dutch Civil Code.¹ This concerns, in brief, injuries (including both mental and bodily injuries) and other forms of violations of persons (such as defamation of character, breach of privacy or breach of (another) fundamental right such as the right to self-determination). A more pragmatic reason is the multitude of proposals in the Netherlands and other countries to coordinate the determination of non-economic damages in personal injury cases. The author understands coordination to mean any activity geared towards harmonising the judicial and/or extrajudicial determination of non-economic damages.

Reason for Study. The determination of non-economic damages faces problems of a judicial as well as extrajudicial nature. First, damage other than financial loss cannot be expressed in money directly. Non-economic damages cannot be computed in any way whatsoever. The law meanwhile demands rulings on non-economic damages to be consistent although no two cases are (entirely) the same. In other words, the requirement of unity of law and more in particular the requirement of unity of case law, implies that a court decision about the size of non-economic damages should always be in line with the existing set of rulings on non-economic damages. In Dutch legal practice, too, the problems set out above are solved by tying in with more or less similar cases.

1 Article 6:106.1 of the Dutch Civil Code stipulates: 1. For damage that does not consist of financial loss, the injured party is entitled to damages to be determined equitably: a. If the liable party had the intention to cause such damage; b. If the injured party has sustained physical injuries, has sustained defamation of character or has been violated otherwise; c. If the damage lies in defamation of the memory of a deceased and has been caused to a spouse from whom the deceased has not been legally separated, the registered partner or a blood relation twice removed of the deceased, provided that such defamation occurred in a manner that would have entitled the deceased, had s/he still lived, to damages on account of defamation of character.

That is, if they are available, for otherwise the court will have to steer its own course. What's more, the court *must* consider the amounts awarded by Dutch courts in similar cases, so the Supreme Court held.² In practice the court will usually base its decision on the three-yearly special on non-economic damages (with an annual update) of the *Tijdschrift voor Verkeersrecht* (the *Smartengeldgids*). However, with the current directions on the determination of non-economic damages it does not appear simple to decide what similar cases are. In other words: the court's leeway in determining non-economic damages carries with it the risk of arbitrariness. It is furthermore assumed that the existing methods of coordinating the case law on non-economic damages are inadequate to ensure the unity of that case law. Although coordinated case law can be coerced by means of appeal or cassation, in the sense that a 'wrong' ruling can be set aside, the system of remedies is limited where it comes to the coordination of the determination of non-economic damages. The Supreme Court, for instance, considers the determination of non-economic damages to be mostly factual, and is hardly directive in how to determine non-economic damages. To this date the Courts of Appeal have had little to say either about desirable non-economic damages in different categories of cases, or about the desirable method of determination. The *Smartengeldgids* has met with criticism as well. The assumption seems justified that the current safeguards for the unity of case law on non-economic damages cannot always prevent inexplicable differences. Moreover, there are signs of stagnation in the evolution of non-economic damages. Not only may the sums awarded differ from those awarded in similar cases, the judiciary appears to award low damages in the light of older case law, and also – but this is a (slightly) different issue), the damages awarded by Dutch courts are quite small compared to other European countries. Moreover, at times legal uncertainty appears to mar the extrajudicial practice. This legal uncertainty, although seemingly not considered a pressing problem in practice, also justifies attention to the determination of non-economic damages, all the more so as victims set great store by receiving (the proper amount in) non-economic damages.

Four Research Questions. Four questions have been researched, namely: (i) what is the damage that does not consist of financial loss, (ii) what is the court's leeway in determining non-economic damages, (iii) which factors decide the size of non-economic damages, or should be decisive, and lastly, assuming that a more radical coordination of non-economic damages is desirable and necessary, (iv) which methods of coordinating the determination of non-economic damages is to be preferred? It should be noted that the question whether an entitlement to non-economic damages in a general sense has a right of existence and the question in what cases an entitlement to non-economic

2 Supreme Court, 17 November 2000, NJ 2001, 215 (Druijff/Bouw).

damages should be assumed have not been fully researched. Below the main findings will be discussed in brief.

A Judge-Made Regulation for Personal Injury Cases. A judge-made regulation for personal injury cases is being advocated. Such regulation could avert the risk of incoherence between court rulings and inefficiency. A risk that lies both in the inherent arbitrariness attached to the translation of non-material damage into financial compensation for such damage, and in the related risk of arbitrariness that is imminent as the legislator, the Supreme Court and the Courts of Appeal give few directions about the desirable size and method of determination of non-economic damages by the lower courts. A judge-made regulation on non-economic damages is furthermore legally desirable because it fits in best with the concept of 'damage other than financial loss', which must always be interpreted objectively and functionally, the central standard for every instance of determination of non-economic damages (see below).

What is Damage that Does not Consist of Financial Loss (chapter 2)? It should be noted that non-economic damages do not have the presumption to mend the emotional loss of injured parties in any way whatsoever. The term 'damages' does not imply either that the loss is undone by the compensation. To ask what it does imply, is to ask what the function(s) is of damages. The answer to the question what 'damage is other than financial loss', depends in the author's view also on the answer to the question which purposes damages can serve. This is so closely connected that the answer to the one question helps to decide the answer to the other question. In this light it should be noted that especially in personal injury cases non-economic damages serve to compensate decreases in wellbeing, such as pain, sorrow or loss of enjoyment of life. Non-economic damages can serve also as a redress for the injured party for the actual event, in particular to satisfy his or her shocked sense of justice. Examples are cases of sexual abuse, in which no physical and/or mental injury was caused. Non-economic damages further serve as an acknowledgment of the sorrow of people who have lost a loved one, and to maintain fundamental rights such as the right of self-determination (including the right to have an abortion). The search for the meaning of the concept 'damage other than financial loss' therefore did not embrace an exploration of the deepest caverns of the human soul. This exploration would only yield more uncertainty about the right of existence of the concept of non-economic damages as such (key question: money is/isn't everything). The author advocates a functional and objective interpretation of the legal concept 'damage that does not consist of financial loss'. This means: abstracted from the injured party's concrete perception or experience, and in the light of the functions of non-economic damages in the specific case. That thus defined 'damage other than financial loss' could be called normative, should meet with little opposition in the author's view, all the more so because this qualification means little. The question, after all, is not so much *whether*

the concept of 'loss' could be enriched normatively but rather on what grounds and to what extent. The author believes that an objective interpretation of the concept of damage that does not consist of financial loss is in line with the most desirable practice of determining non-economic damages, i.e. determination further to a judge-made regulation.

The Court's (Leeway in the) Determination of Non-Economic Damages (chapter 3). The first part of chapter 3 looks at several more procedural subjects that concern the determination of non-economic damages by the court. These subjects are the obligation to furnish facts and evidence, the discretionary power of determination of the court deciding questions of fact and the check in cassation of rulings on non-economic damages. The first part of the study also considers the level of non-economic damages as such, and discusses an important mechanism of coordination: the *smartengeldgids*. Following a study of the more procedural framework the second part of chapter 3 discusses the circumstances and/or factors could be decisive in the determination of non-economic damages in several categories of cases, i.e.: injury, defamation of character, violations of fundamental rights, intention, defamation of memory and emotional loss. This chapter also considers the question what direction the determination by the court of non-economic damages should take. To answer this question an inventory has been made first of the present practice, focusing on the court's leeway in this determination. The conclusion is that the court's leeway is of course not unrestricted. And although it is not possible to exactly delineate the limits crossing those limits in a specific case could come to light and be corrected. The court's leeway as such cannot be qualified as undesirable, so the author submits. In the author's view the answer to the above question, what direction to take, does not result in a disqualification of the present system but in a suggestion to perfect the present system. For although the court in this specific case may not find it difficult to pass a fair judgment, it is difficult to foresee what that decision will be. In addition, it is remarkable that a great deal of solutions has been suggested to regulate the determination of non-economic damages differently. Although standardisation is not free from criticism, it appeals to the author. It testifies to realism to recognise that the determination of non-economic damages comes down to the monetary valuation of the loss of a leg or arm with just a minor correction for circumstances that concern the specific injured party. Therefore the author would prefer a more insightful appreciation of the nature and seriousness of the injury.

Coordination of Determination of Non-Economic Damages (chapter 4). The double objective of every coordination, including the coordination of case law, whether or not in the form of judicial cooperation, is to enhance the unity of law and efficiency. The prevailing opinion in the literature is that the determination of non-economic damages can qualify for coordination and moreover that

coordination is desirable, even necessary. The actual need for coordination is illustrated also by the many concrete proposals made in the Netherlands and other countries. The phenomenon of coordination as such evokes several questions, which are considered in chapter 4. In the approach chosen several questions related to any form of coordination of the determination of non-economic damages have been distilled from comparative law data and several detailed proposals for standardisation in the literature. The chapter then examines how these questions and the questions arising therefrom could be answered for the Dutch situation. Forms of coordination introduced in Belgium, Germany, England and France are discussed. It has become apparent that the different legal systems always face the same problems with regard to the contents and realisation of any form of coordination of the determination of non-economic damages and furthermore that several of those problems are handled lightly. In particular problems are discussed that have been the subject of much debate in the Dutch literature even before any actual coordination has been realised. Besides the contents of the different proposals, the nature and the extent of cohesion are the key issues. The author concludes that despite the safeguards for legal unity judicial cooperation is a form of coordinated case law that could prove useful for the determination of non-economic damages. Not in the last place because for several years the non-economic damages awarded have been at a rather constant level. This appears to apply not only to the highest amounts but also to other, less serious cases. It is safe to say that the current method of comparing cases seems to encourage rigidity. The court is too frugal. A possible explanation could be that the court focuses primarily on the damages awarded previously in similar cases and makes insufficient allowance for, for instance, developments in other countries or social trends in the valuation of injuries in general. And although it should, the court appears not always to take account of inflation. A product of judicial cooperation could process such developments much more easily, as such product could simply be revised integrally. The seemingly paralysing effect of the current method of comparing constitutes another argument to take other methods of determining non-economic damages under consideration. The harmonisation of the determination of non-economic damages by means of (a product of) judicial cooperation seems a useful option to increase the coherence of non-economic damages judicially and extrajudicially. The product of such cooperation is expected to increase the manageability and transparency of case law. The systemisation of case law is furthermore expected to simplify and the product of systemisation – whether or not in the form of electronic lists of rulings – is likely to become more accessible and instructive.

What Would a Concrete Judge-Made Regulation Look Like? The study has concentrated on finding a legal, practicable, foundation on which the answer to the above question can rest. The central standard in determining non-economic damages is the objective and normative concept 'damage not consisting of

financial loss'. The author would prefer a court faced with the issue of the extent of the actual damage to focus on the amounts in non-economic damages laid down in a judge-made regulation on non-economic damages. The extrajudicial practice, too, could use these amounts. As an independent third party the court could act as a moderator in the debate between parties seeking settlement extrajudicially, more so and more explicitly so than in the collective case law, as it is always tailored to a specific case and therefore can be applied to a limited extent only. All the more so as empirical studies have shown that victims set great store by an independent judgment. The author advocates an approach engrafted on the English system (the Guidelines for the Assessment of General Damages in Personal Injury Cases of the Judicial Studies Board). On a final note, as this study was finalised, the first judgment recognising entitlement to non-economic damages for physical injury was some 65 years old.³ Since then non-economic damages have gained foothold in liability and compensation law. The concept of non-economic damages is not ready for retirement. Yet it remains 'widely perceived as one of the tort beast's uglier heads.'⁴ A judge-made regulation would put a more attractive face to this head.

3 Supreme Court, 21 May 1943, *NJ* 1943, 455 (Van Kreuningen/Bessem).

4 Croley & Hanson, 108 *Harvard Law Review* 1785, 1789.