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Het rampenfonds

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Summary

DISASTER RELIEF FUND

Disasters and incidents inevitably occur from time to time, on both a major and minor scale. Take the fireworks disaster in Enschede, the flight that was downed over the Ukraine, or the monster truck crashing into the crowd in Haaksbergen. In principle, victims of these kinds of disasters may claim restitution for damage from the party at fault through the system of liability law. In the case of disasters, however, liability law proves insufficient to the task. As a result, the victim is unable to recoup his or her loss at all, or potentially only after great delay, or only in part. For this reason, the government has regularly seen fit to establish a disaster relief fund.

This study will centre on the question of which role these government-funded disaster relief funds should have in the Netherlands in the settlement of damage as a result of disasters, with regard to liability law. To that end, the following four disasters have been examined, each of which resulted in the establishment of a disaster relief fund. Subjects of study include:

- the legionellosis outbreak in Bovenkarspel;
- the fireworks disaster in Enschede;
- the dike breach in Wilnis;
- victims of asbestos exposure.

An assessment framework has been developed and subsequently applied in the study of these disasters. That the victims have not, or have only partially, been compensated for their losses is related to a number of issues. Insolvency and the long duration of legal proceedings are major problems. The nature of damage caused by disasters is partly to blame for these obstacles: large numbers result in high stakes and slow the pace of legal proceedings, while at the same time increasing the likelihood that the culprit will be insolvent. The average length of proceedings as a result of a disaster, when pursued to the highest authority, is ten years. Insolvency of the guilty party is primarily an issue when the case involves what is known as a 'small culprit': a private citizen or small-business owner.

Other problems lie with the strict conditions applicable within liability law. Victims must prove a causal relationship, for example, which can be quite difficult. The statutory time limit on claims may also expire before the damage has manifested itself. Various verdicts rendered by the Supreme Court of the

Netherlands have already made the system more amenable to the victims. Which brings us to the question: can a disaster relief fund provide solutions to these problems?

Because the government is the financial supporter of the disaster relief fund, insolvency is no longer an issue. The disaster relief funds all call for brief proceedings, varying from six weeks to five months in length. The problem of long duration of proceedings could therefore be solved by a disaster relief fund using a clearly established, streamlined procedure. If a disaster relief fund were to apply the same conditions as the system of liability law with regard to burden of evidence, damage, causal relationship and statute of limitations, the problems associated with these aspects will inevitably recur. By making a well-considered change to the manner in which damage is assessed – aided by the establishment of damage standards, or by reducing the burden of evidence or clarifying its definition – a disaster relief fund will be able to sidestep these pitfalls. Because the damage compensated by a disaster relief fund is often homogeneous in nature, the damage may be standardised by offering either a fixed sum or standardised damages to the victims. The benefit of standardisation is that it effectively saves time while reducing costs. A potential disadvantage is that victims will not be compensated quite as precisely for their loss or damage as they would be under liability law. The downside of the aforementioned reduction in the burden of evidence required is that victims might be too readily compensated for their loss or damage.

The system of liability law has been assigned a number of vital functions. The most important function is the enforcement of rights. Sub-functions are additionally present. The victim seeks not only material compensation for his or her damage or loss, but also from the culprit. Liability law offers recognition for the victimisation that has occurred as well. There might even be a preventive function. The liability law procedure occupies a central role in seeing that procedural justice is done. This begs the question: might a disaster relief fund assume one or more of these functions?

In principle, a disaster relief fund can assume all functions performed by liability law. A disaster relief fund is imminently able to reimburse damage or loss, and therefore to realise compensation and recognition on behalf of the victims. In order for a disaster relief fund to assume the functions of satisfaction and prevention, the fund will need to seek financial recourse from the culprit. In the case of disasters, this would prove difficult due to the culprit's previously established insolvency.

The ends of procedural justice can be served by including a number of guaranteed rights for victims when establishing a disaster relief fund: the opportunity for the victim to be heard (preferably in the presence of the culprit); the provision of sufficient information concerning the proceedings; to be treated with dignity; and a guarantee of speedy proceedings. In addition, if all other functions are being served, the overarching function of the enforce-

ment of rights could be realised through a disaster relief fund as well. Depending on the stated objectives of a disaster relief fund, it might be possible to establish the fund in such a way as to meet one or more functions.

Often, when a disaster has occurred, the government assumes the role of night watchman: it monitors, issues permits and ensures regulations are in place to prevent threats to public safety. With regard to that capacity of the government, the European Convention on Human Rights applies: the government may in those instances be held liable through an arguable claim. ECHR article 2, which protects the right to life, will then also create a positive obligation on national law to offer a remedy, not only in theory but in practice as well. Victims of a disaster might potentially hold the government liable in the absence of such a remedy, namely the failure to remedy the shortcomings of liability law with regard to the culprit's insolvency. Furthermore, the victim has the right to a fair trial within a reasonable period of time, based on article 6 of the Convention. The lengthy duration of the proceedings following disasters is also in violation of this article. The question arises: does the government relieve itself of liability on the basis of the Convention by establishing a disaster relief fund for the victims?

Through the establishment of a disaster relief fund, the government does indeed escape liability on the grounds of ECHR article 2, because it has – in setting up the fund – provided the victim with effective legal protection. In that event, damages must necessarily be paid in full by the fund. An actual, legal remedy, as described in ECHR article 13, must exist parallel to decisions of the fund as well. An administrative court proceeding will surely be sufficient to satisfy that requirement.

When the disaster relief fund offers a streamlined procedure, this will equally be sufficient to relieve the government of liability incurred due to its having exceeded a reasonable period of time as defined by liability law (article 6 of the ECHR). Potential administrative disputes arising in the course of settlement through the disaster relief fund must also be heard within a reasonable amount of time. In the event that compensation from a fund is remitted as an advance on damages yet to be determined through liability law proceedings, the reasonable term for civil proceedings may be extended to some degree. This is because the stakes of the case will be lower as a result of the advance.

These findings from the study have shed light on the role that government-funded disaster relief funds may have in settlement of damage as a result of disasters, with regard to liability law. The government might consider the establishment of a structural disaster relief fund going forward. This fund could have two possible manifestations. The first possibility is that of an advance fund, in combination with a streamlined version of the civil procedure conducted by the government on behalf of the victims. This fund would remit a fixed sum or standardised amount in damages. This form is the least drastic, would be less expensive, allows the functions of liability law to remain intact,

solves problems encountered in liability law and discharges the obligations established in ECHR article 6. Implementing this form will necessitate that the government resolve the insolvency problem of the culprit, for example by requiring that he or she carry sufficient liability insurance. ECHR article 2 will then not be an issue.

The second potential form is a general disaster relief fund, in case the government fails to resolve the insolvency problem of the culprit. The fund would offer victims compensation in full, on the basis of standardised amounts, so that the government would be discharged of liability on the grounds of ECHR article 2. The streamlined procedure will ensure that the reasonable period of time established in ECHR article 6 is not exceeded.

The organisation of the disaster relief fund, in whichever form that may take, should be entrusted to a team of experts consisting of delegates from the Ministry of the Interior, personal injury lawyers, the Dutch Association of Insurers, the Dutch Safety Board (OVV), damage experts, scientists and judges, and potentially supplemented by additional experts. This coalition will design an arrangement for tailoring the compensation to fit the specific situation, allowing the proceedings to run as smoothly as possible. The basic structure of the disaster relief fund will be established in a framework law, which will provide a rough outline including both the guiding principles and application criteria for the law. This means: a case must entail grave infringement on the right to life or the right to bodily integrity, and/or the right to property; it must affect a large number of individuals; it must be an event for which a third party may be held liable; it must require a coordinated effort on the part of emergency services and intervention must be a matter of necessity. In the event the culprit acknowledges liability for the disaster and is prepared to remit the advances, it will not be necessary for the fund to intervene further. The team of experts will make this determination, after which a specific agreement will be designed for the disaster in question, in order to compensate the victims for their damage or loss. This agreement will take the form of a ministerial decree.

The government-funded disaster relief fund can play a significant role in settlement of damage as a result of disasters, with regard to liability law. To that end the legislator should accomplish legislation for a disaster relief fund.