

## Liability for Loss of Housekeeping Capacity in The Netherlands

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### I. General Part

#### A. Compensable Harm and the Right to Sue

*(1) Can a person (V = victim) with housekeeping responsibilities obtain compensation from a tortfeasor (D = defendant) if s/he is prevented from performing household tasks or able to perform them only to a limited extent as a result of the injury and s/he thus incurs the expense of a replacement or sustains other financial harm?*

Persons who sustain damage as a result of their lost capacity to do or contribute to housekeeping can claim damages from the person liable under the general rules for compensation. Typically, the victim will claim compensation for the costs incurred by employing someone to perform the housekeeping tasks and for other financial consequences such as the costs of (additional) professional childcare, the costs of special equipment and the costs of customising the home in order to enable the victim to perform certain household tasks, etc. **1**

For the purpose of this chapter we will try to clarify the terms 'housekeeping capacity' or 'housekeeping costs', which is easier said than done since there are no concrete definitions for these terms. The loss of the capacity to perform household tasks or housekeeping costs as similar heads of damage must be distinguished from the loss of 'self-activity' (*zelfwerkzaamheid*) or, synonymously, the loss of 'self-management' (*zelfredzaamheid*). All of these terms serve as umbrellas for different losses or kinds of damage, but their exact meaning and scope and the demarcation line between them is quite unclear. 'Housekeeping capacity' or 'performing household tasks' refers to the daily care for persons who share a household with the caregiver, including the caregiver him/herself, including cooking, cleaning, buying groceries and other systematic chores required to run the household on a daily basis. The term 'household care' is used for **2**

this professional or non-professional help provided by persons other than the first caregiver (eg by the victim's partner, relatives, neighbours or professional help). The terms 'self-activity' and 'self-management' are used for the victim's loss of his/her ability to do specific repairs in and around the house for which craftsmanship is usually needed (painting, repairs, etc).<sup>1</sup> In practice the loss of housekeeping ability and the loss of self-activity are often used cumulatively to obtain compensation. Clearly victims will need to specify the exact kinds of damage that have resulted from their impairment in order to avoid any overlap.

- 3 Under the general rules of liability law, the basic test for injury claims (not only claims for the costs of housekeeping but also claims for medical expenses, reintegration costs, etc) is whether the costs incurred were *necessary and reasonable*. The reasonableness will be assessed based on the choice of the measure taken (eg was it reasonable to hire a professional help) and the amount of money spent on the particular measure at hand, the so-called 'double reasonableness test'.<sup>2</sup> This test can be applied quite easily with regard to monetary costs which have been incurred for specific devices or adjustments to the house (such as the costs of hiring a builder to lower the sink so as to be able to do the dishes). Within these boundaries such 'material' costs are recoverable in as far as these are not borne by social or private insurance carriers.
- 4 Most difficulties lie with situations in which *no* monetary costs were incurred, typically because the partner of the victim or relatives take over household tasks. For those cases more specific and in some ways more stringent tests apply, which will be central to our discussion here. See no 12 ff below.

(2) *Is D liable to compensate for losses incurred by a member of V's family (R = relative) as a result of the injury, for example, the cost of a replacement housekeeper or – if R personally takes over housekeeping responsibilities – R's loss of earnings? Who is entitled to claim, V or R? What claims arise if V is killed?*

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1 As a separate head of damage in addition to future loss of earning capacity; see eg Rechtbank (Rb) Arnhem 4 July 2007, Landelijk Jurisprudentie Nummer (LJN) BB1687, no 2.5 and Rb Middelburg 28 January 2009, LJN BJ3536, no 2.2.5. The 'Recommendation for Household Care' of the *Letselschaderraad* (Personal Injury Board, see no 51 below) and the 'Recommendation Self-Activity' (*Aanbeveling Zelfwerkzaamheid*) give comparable interpretations.

2 This test was designed for costs that are incurred to mitigate further damage but it is also applied to other heads of damage; AS *Hartkamp/CH Sieburgh*, Asser serie 6-II\*, *Verbintennisrecht – De verbintenis in het algemeen, tweede gedeelte* (13th edn 2009) no 28 ff; *GM van Wassenaer*, *Schadevergoeding: personenschade* (3rd edn 2008) no 33b.

In the last few years questions as to compensation for the loss of household capacity have led to several Dutch Supreme Court decisions most of which deal with the impact of partners or relatives taking over household tasks after the injury and/or death of a loved one.<sup>3</sup> Within certain boundaries these and other third parties (friends, professionals) are entitled to compensation for the monetary costs they incur due to the fact that the primary victim's capacity to do the housekeeping has reduced. But these rights of persons other than the primary victim are generally limited to certain kinds of damage. For example the relatives' loss of earnings is not recoverable as such. To clarify this we must distinguish between the loss of the primary victim's household capacity in case of injury and the loss of his/her household capacity consequential to his/her death.<sup>4</sup>

*Injury.* Art 107 of Book 6 of the Dutch Civil Code (hereafter: art 6:107 CC) provides that if the person liable has caused physical or mental injury, s/he must not only compensate for the damage of the primary victim but must also compensate costs that third parties (*derden*) have incurred on behalf of the primary victim which are not reimbursed through insurance. The term 'third parties' is broad; it includes, in principle, any person, for example the victim's partner, relatives, friends, neighbours and even strangers (eg bystanders who pay for transport to the hospital). The third party is only entitled to compensation for his/her monetary expenses if these are incurred by virtue of the damage to the primary victim (the injured party). Typical examples in the sphere of housekeeping are the husband, partner or family member who has paid for the costs of hiring a professional housekeeper to do the work that the primary victim would have done if s/he had not been injured.

Article 6:107 CC is based on the so-called transferred loss doctrine (*verplaatste schade theorie*): the third party's right to compensation cannot exceed the amount of compensation to which the primary victim would have been entitled him/herself if these costs would otherwise have been borne by him/her directly.<sup>5</sup> It is irrelevant on what (legal) basis the

3 Hoge Raad (HR) 16 December 2005, Nederlandse Jurisprudentie (NJ) 2008, 186, with cmt by JBMV, *Pruiskens/Organice*; HR 11 July 2008, NJ 2009, 385, with cmt by JBMV, *Bakkum/Achmea*; HR 10 April 2009, NJ 2009, 386, with cmt by JBMV, *Philip Morris/Bolink*; HR 5 December 2008, NJ 2009, 387, with cmt by JBMV, *Rijnstate/Reuvers* and HR 12 June 2009, Rechtspraak van de Week (RvdW) 2009, 740, LjN BH6533, *plaintiff/respondent*.

4 EFD Engelhard, Third Party Losses in Dutch Law, in: CC van Dam/EFD Engelhard/I Giesen, Third Party Losses in a Comparative Perspective: Three Short Lectures in Honour of WHV Rogers, Utrecht Law Review (ULR) 2007, 82 ff, at 84.

5 Both in essence and in rationale (ie the claim will shift from the primary victim onto the third party to whom the damage was transferred, to the effect that the defendant will not go free). This resembles the German *Drittschadensliquidation* and the reasoning in English

primary victim's losses have been transferred to the third party with the exception of legal or contractual insurance: insurers are excluded from the right to compensation based on art 6:107 CC.<sup>6</sup> The Dutch Supreme Court takes the view that the obligation to provide the primary victim with the care s/he needs is an obligation 'that is primarily the defendant's'.<sup>7</sup> For example, if the spouse of someone who has been injured in an accident (the primary victim) hires a professional housekeeper to do the tasks that the primary victim can no longer do because of the injury then, following this approach, the spouse fulfils the monetary responsibility that rests on the person liable. It is, in the court's view, primarily for the person liable to provide the means that are reasonably necessary for the primary victim's recovery. Since the spouse must not relieve the person liable of this responsibility, the spouse is entitled to compensation for the monetary expenses incurred. Based on art 6:107 sec 2 CC, the person liable may invoke all the defences that s/he would otherwise have had vis-à-vis the primary victim.

- 8 If the monetary expenses the spouse (or any other third party with the exception of insurers) incurred were made in order to replace the lost household tasks by hiring a professional housekeeper or a paid home help to do particular chores, then these will generally be recoverable under art 6:107 CC, provided that the choice of hiring professional help was necessary in order to restore the family situation and that the extent to which costs were incurred was also reasonable. The criterion for compensation in cases where no actual costs were incurred is that in the given circumstances it was 'normal and customary' for the third party (or the primary victim) to receive professional help for the given chores. Whether this last criterion also applies under the aforementioned reasonableness test in cases where actual costs have been incurred by the relative to hire professional care is as yet unclear.<sup>8</sup> If third parties (eg the victim's partner or parents) have incurred income losses because they have taken over the housekeeping activities themselves, then the law currently (but see no 35) seems reluctant to award the actual, concrete income losses, lost profits or

cases such as 'The Aliakmon' (*Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd* [1986] Appeal Cases (AC) 785).

6 EFD Engelhard, Regres (2003) 32.

7 HR 28 May 1999, NJ 1999, 564, with cmt by ARB, *Gemeente Losser/De Vries*, no 3.3.2.

8 See also Engelhard, ULR 2007, 84. The criterion that it was 'normal and customary' comes from the Supreme Court's decision in *Gemeente Losser/De Vries*, but was in that case intended for the care and nursing (not housekeeping as such) of relatives in the situation in which no monetary costs awards were made. See no 16 ff.

similar losses.<sup>9</sup> The reason for this is that the court must still be able to regard the third party's income losses as the 'transferred losses' of the primary victim in terms of art 6:107 sec 1 CC. Beyond the scope of that provision there is no right to compensation for third parties. Parents will, in principle, not be entitled to compensation for the exact income losses or lost profits of their own as such but, as will be seen below, they (or the primary victim him/herself) *may* claim the estimated costs of *professional* care. It goes without saying that such costs may be much less than the real lost income or lost profits.<sup>10</sup>

*Death.* Art 6:108 sec 1 CC holds that if the primary victim dies, the person who is liable for his/her death must compensate for the loss of living support (*gederfd levensonderhoud*) of specified categories of relatives. This entitles the non-separated spouse and the minor legitimate or illegitimate children of the deceased to their actual loss of living support and at least to the sum of life support that the deceased would have been obliged to pay to them by law. Other relatives by blood or marriage of the deceased are entitled to the actual life support that the deceased was paying before his/her death or to the amount of life support that s/he was obliged to pay by court order. Persons who lived with the deceased as his/her family and who were wholly or partially supported by the deceased may also claim compensation to the amount that it is likely that the deceased would have continued this and where the dependents cannot financially support themselves.

However, art 6:108 CC covers not only *financial* living support (the part of the deceased person's income that was spent on the claimant) but also the deceased's physical contribution to the upkeep of the household. A typical example is that of the husband (primary victim) who, next to being the breadwinner for his wife and daughter, also took care of his daughter one day a week. He picked her up from school and they would spend the afternoon together, helping her with her homework and cooking for her, which also enabled his wife to work on that day. In doing so he provided both his wife and his daughter with living support – not just financially but also physically – by taking care of his daughter. Subsection d of

[1986]

<sup>9</sup> This was illustrated by HR 8 September 2000, NJ 2000, 734, with cmt by ARB, *Baby Joost*, where a father was denied recovery of the income loss he had suffered because of the significant care his minor son needed after a medical error. See on this case I Giesen, *Baby Joost*, in: JBM Vranken/I Giesen (eds), *De Hoge Raad binnenstebuiten* (2003) 18–22.

<sup>10</sup> *Vranken* points to the comparison with 'wrongful birth' cases, where the mother *can* recover her income losses (in his case note published under HR 10 April 2009, NJ 2009, 386, with cmt by JBMV, *Philip Morris/Bolink*).

art 6:108 CC<sup>11</sup> explicitly gives the relatives the right to compensation for this type of loss namely the care which is lost as a result of the victim's death. This right to compensation based on art 6:108 CC is generally restricted by the requirement that the relatives' means must be too limited to enable them to partially or fully provide for their own living support. This is the so-called 'limited means test' (*behoefstigheidsvereiste*):<sup>12</sup> in order to receive compensation it must be proven that the relative is, in the given situation, unable to continue the lifestyle that s/he and the deceased would have maintained in the hypothetical situation in which the latter had not died. It is *not* necessary however, that prior to death the deceased did the majority of the household activities; any degree of loss may give relatives a claim for damages.<sup>13</sup>

- 11 In many such cases the relatives will not actually have spent money on professional help because in the first period after the partner's death the relatives will often receive voluntary help from family and friends.<sup>14</sup> But if they *do* hire a professional to do the housekeeping which, without their partner's death, would have been done by the latter, then such costs will be compensated to the extent that the relatives (claimants) have too limited means or resources themselves to continue their lifestyle. For this 'limited means test' it is not necessary for the relatives *generally* to have limited resources (in other words to live on the minimum wage). The question is, to what degree their particular lifestyle, as it would have been had the primary victim not died, can be continued given his/her actual income and taking account of any insurance payments and other (possible) changes, both negative and positive, in his/her income and expenses.<sup>15</sup> The limited means test can thus also be satisfied by relatives who have an income that is (much) higher than the average income.

*(3) Is V entitled to damages for the impairment of his/her ability to perform household tasks even if s/he does not incur monetary expense, for example, if s/he makes up for the impairment by working for longer rather than by hiring a replacement?*

11 Art 6:108 subsec d CC rules that 'the person liable is obliged to compensate damage caused by the lack of maintenance to persons to whose living the deceased contributed by doing the same household, in as far as those persons, due to his/her death, have to find other ways to maintain the household'.

12 HR 4 February 2000, NJ 2000, 600, with cmt by MMM, *Kwidama/Raphael-Richardson*, annotated by EFD Engelhard, *Behoeftigheid bij overlijden*, Nederlands Tijdschrift voor Burgerlijk Recht (NTBR) 2000, 254 ff.

13 HR 16 December 2005, NJ 2008, 186, with cmt by JBMV, *Pruiskens/Organice*.

14 See no 25 ff below.

15 HR 16 December 2005, NJ 2008, 186, with cmt by JBMV, *Pruiskens/Organice*, with reference to art 1:392 sec 1 CC (family law obligation to provide for living, albeit this provision mentions only parents, step-parents and parents-in-law and their children).

It is important to note that, both in cases of injury and death, the actual loss of the victim's capacity to perform housekeeping, by itself, does not entitle him/her or the relatives to compensation; if no actual costs were incurred, then the main criterion is whether the victim can still do the household chores or not. This means that the injured party (we will discuss the relatives' position hereafter) is not yet entitled to damages for this loss *as such*, if no actual monetary costs were incurred by him/her and if s/he has no assistance from relatives or friends. If s/he can still perform household tasks, be it that these tasks are slightly more time-consuming and may require more effort, then this will, in principle, not entitle him/her to compensation (cf no 45 below). At the most it could be that this increases the amount of compensation for his/her non-pecuniary damage. The same is true if the injured party has not suffered any concrete losses because s/he has received (or is entitled to receive) financial assistance or material facilities and services from the public municipality (*gemeente*). In that case the injured party does not suffer monetary damage and s/he is therefore not entitled to damages, nor does the public municipality have a reimbursement right vis-à-vis the person liable (private insurance companies and social insurance carriers on the other hand have reimbursement rights for the actual losses of the injured party which are compensated by them).

In general the law seems reluctant to award a claim for the loss of extra spare time as an economic loss but it must be said that the current state of the law is not entirely clear. We would argue that compensation must be possible in certain serious cases where the injured party needs to spend a substantial amount of extra time performing his/her housekeeping tasks. This could be the case if the injured party would otherwise need to hire professional help and if that would be more costly than performing the household tasks him/herself. In our view the injured party's choice to do this at the expense of his/her own spare time might be considered to be fair given his/her duty to mitigate the damage. But grounds other than saving costs of professional help may also support that choice. Suppose, for example, that professional help would be considered less expensive for the injured party than actually performing the household tasks in his/her own time. In that case the fairness of this choice might still be founded in arguments such as that professional help has appeared to be impossible to find in the concrete circumstances of the case (eg because the victim lives in a rural area and has experienced difficulty finding professional help). In our view performing the household tasks him/herself might in some cases even be considered to be fair on the ground that this will help the injured party to keep his/her independence and/or that it may contribute to his/her recovery.

- 14 But even if a damages award for the injured party's loss of spare time is found to be appropriate at all when s/he chooses to do the chores him/herself, it will be difficult to determine the value of this particular loss, especially if it is seen as an economic loss which is still somewhat unusual. Examples of this can be seen in other parts of civil liability law (such as, most typically, with delays for passengers of air traffic) but also for the loss of time suffered by relatives who take over the injured party's contribution to the household, (see no 15 ff below). Clearly the injured party's lost spare time may be measured by the average hourly rate of professional help. Perhaps the law will even go so far (this is yet unclear) as to value the injured party's loss of time by the standard of his/her net income if, with good reasons, this exceeds the costs of professional care. This does not seem likely under Dutch law since that would put the injured party in a better legal position than his/her relatives: as was seen above (no 8), their lost time is also not compensated on the basis of their actual income but is limited to the costs of professional help saved. In *Rijnstate/Reuvers* (2008) the Supreme Court ruled that if the injured party can no longer do household chores him/herself, s/he is entitled to damages in as far as it would have been 'normal and customary' to hire professional help. The fact that the victim's husband took care of the particular chores did not limit her claim. This will be further explained in no 19 below.

(4) *Is D liable if R takes over the housekeeping and neither incurs monetary expense nor suffers any loss of earnings? Who is entitled to claim, V or R? What claims arise if V is killed?*

- 15 As to the position of the relatives or other third parties (the victim's partner, friends, neighbours, etc) who have physically taken over the particular housekeeping tasks without charge, a few Dutch Supreme Court decisions need to be noted. It is appropriate to distinguish again between claims of relatives in case of injury and relatives' claims in case of death.
- 16 *Injury*. Several court decisions concern injury claims from partners and relatives who have taken on *nursing and caring tasks* (and not housekeeping tasks as such) without incurring monetary expenses.<sup>16</sup> The 'classic' case of *Gemeente Losser/De Vries* deals with the loss of time of parents whose minor child had been seriously injured after an accident at school. The claim was made in the child's name (by the parents as her legal representatives). She

16 Which doctrinally, as we mentioned above, is treated as housekeeping too. HR 28 May 1999, NJ 1999, 564, with cmt by ARB, *Gemeente Losser/De Vries*. This case was decided under the old Civil Code to which art 6:107 CC did not yet apply.

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was entitled to compensation for the time that her parents spent on intensively nursing and caring for her. The Supreme Court ruled that in such a case the judge may ignore the fact that the nursing and care were done by her parents and, therefore, free of charge which meant that no monetary expenses were incurred. Secondly, the court decided that the judge of fact may ignore the fact that the parents did not experience direct income loss as a result of the amount of time spent on nursing and care.<sup>17</sup> Thirdly, it is crucial to note that the Supreme Court also decided that in such a case the judge may not award a higher amount of compensation than the estimated amount of the costs which otherwise would have been spent on professional help ('abstract damages').<sup>18</sup> In respect of this third element it may be possible that if the parents, as opposed to what was claimed in this case, had claimed to have suffered actual income loss themselves, which is a (true) relatives' claim, their claim would in fact have been awarded in full. But with the decision as was given by the Supreme Court and subsequent decisions it now seems highly unlikely that the victim's parents, partner or other third parties will be able to succeed in a claim that goes beyond the cost of professional help. Only to this last extent (the estimated costs of professional help) can their loss still be presented as a loss which has befallen the primary victim but which was 'transferred' to the third party (cf no 8 above). In practice, standardised calculations can be used to determine the amount of compensation, based on the guidelines of the Personal Injury Board (*Letselschaderraad*). We will discuss these further in no 51 ff below.

The case of *Gemeente Losser/De Vries* seems to imply that the right to 17 compensation for the intensive *nursing* and *care* of third parties where *no* monetary expenses were incurred is limited to firstly, nursing and care for which professional assistance could reasonably have been employed and secondly, to the maximum costs which would have been incurred if a professional had been employed. Lindenbergh and Van der Zalm call this a *two-staged touchstone* for recovery in respect of such activities in the absence of monetary costs or losses.<sup>19</sup> However, in the later case of *Krüter-Van de Pol/Wilton-Feijenoord* (2003), the first stage has been more closely defined as *excluding* all nursing and care in respect of which it is *not* 'normal and customary' (*normaal en gebruikelijk*) to hire professionals.<sup>20</sup> The care

17 HR 28 May 1999, NJ 1999, 564, with cmt by ARB, *Gemeente Losser/De Vries*.

18 HR 28 May 1999, NJ 1999, 564, with cmt by ARB, *Gemeente Losser/De Vries*, no 3.3.2.

19 *SD Lindenbergh/I van der Zalm*, Vergoeding ter zake van verzorging en huishoudelijke hulp bij letsel en overlijden, *Maandblad voor vermogensschade (MvV)* 2009, 146 ff.

20 HR 6 June 2003, NJ 2003, 504, with cmt by JBMV, *Krüter-Van de Pol/Wilton-Feijenoord Holding BV*; see also *Engelhard*, *NTBR* 2004, 47 ff.

given by a wife to her husband who suffered from mesothelioma in the last six weeks of his life was, in that case, regarded as not the type of care for which it is normal and customary to hire professionals. Lower courts have since refused compensation quite often for what was taken to be 'more regular, daily care', which partners or relatives provide for one another.<sup>21</sup>

- 18 In line with this reasoning that it must be 'normal and customary' to hire professional help in respect of the housekeeping activities, the Dutch Supreme Court has refused compensation for the lost leave days parents used for *visiting* their child when she was still in the hospital because it was not likely that paid professional help could (and would) be hired for these visits (which is necessary for the transferred losses doctrine of art 6:107 CC, see no 7 above).<sup>22</sup>
- 19 This double touchstone also seems to apply to actual cases of *household* activities where no children are involved. The case of *Rijnstate/Reuvers* (2008) concerns a claim from the primary victim who suffered from incapacity to do housekeeping tasks due to medical negligence (some of her lymph glands had unnecessarily been removed based on a misdiagnosis). The Supreme Court decided that she was entitled to compensation for the loss of her capacity to do housekeeping tasks even though her partner had taken over the particular household tasks (and she had consequently not incurred any monetary expenses). The Appellate Court had, in that case, determined that only the housekeeping chores performed by her partner for which it would have been 'normal' to hire professional help were recoverable; compensation for the remaining chores (for example, doing the dishes, grocery shopping, preparing meals and the like) was *not* awarded. In respect of the chores which *were* recoverable, the court again ignored the fact that professional help was, in reality, not hired. This was based on the fact that professional care was not provided as the primary victim was not eligible for *social* home care and because a professional housekeeper was difficult to find in the area where she lived.<sup>23</sup>
- 20 This judgment was upheld by the Dutch Supreme Court. The Supreme Court first emphasised that the main rule is that compensation must be based on actual, concrete costs incurred but that on both practical and

21 Inter alia Rb Zwolle-Lelystad 29 March 2006, Letsel & Schade (L&S) 2006, 28–34; Rb Dordrecht 18 October 2006, LJN AZ1074; Rb Zwolle 24 March 2004, LJN AO9003.

22 HR 28 May 1999, NJ 1999, 564, with cmt by ARB, *Gemeente Losser/De Vries*.

23 HR 5 December 2008, NJ 2009, 387, with cmt by JBMV, *Rijnstate/Reuvers*. The Advocate-General *Spier* mentions several lower case law decisions where the criterion had also already been applied (see his conclusion for this decision in NJ 2009, 387 at no 3.10).

equitable grounds the exception made in earlier cases for intensive nursing and care also applies to household activities *stricto sensu*. In other words: spouses may claim compensation for the loss of the victim's physical contribution to the household, even if they take care of the tasks themselves or receive help from friends or family members with the particular household tasks. Their right to compensation is not limited by the fact that no concrete expenses were incurred (eg hiring professional help), provided that it would have been 'normal and customary' to hire a professional to undertake the particular activities.<sup>24</sup> The Supreme Court added that this rule also applied if the primary victim's injury was not particularly grave but nevertheless made the primary victim unable to do the chores herself.

In the literature the application of this criterion ('normal and customary' 21 to hire professional help) has been strongly criticised.<sup>25</sup> Generally, it is thought to be too restrictive as a criterion. Although there is consensus about the fact that the criterion must not be interpreted so as to require that there be a necessity for *social* home care (which would be too restrictive) it is thought that the criterion will still be difficult to satisfy if it is applied to private professional household help. Although any regular cleaning and cooking will be less problematic, it may not always be easy to argue that for other housekeeping and care tasks professional help is 'customary'.<sup>26</sup> Lindenbergh and Van der Zalm argue that it would have been more desirable to focus on the victim's degree of invalidity rather than on it being 'normal and customary' to hire a professional. They prefer to treat these cases in the same way as claims for income loss.<sup>27</sup> We would like to point out the fact that the aforementioned cases were intended to deal with situations where no actual costs have been incurred and so an abstract form of compensation is made available. The judge may ignore the fact that in reality *no* professional was hired. In cases of income loss where no actual loss were suffered, abstract forms of compensation would, generally, be quite rare.

Another point of debate is that in *Rijnstate/Reuvers* the Supreme Court has 22 left somewhat unclear whether the amount of compensation for loss of capacity to do housekeeping tasks is, in the same way as nursing costs, also

24 HR 5 December 2008, NJ 2009, 387, with cmt by JBMV, *Rijnstate/Reuvers*, nos 3.3–3.5.1.

25 *Engelhard*, NTBR 2004, 48; *Lindenbergh/Van der Zalm*, MvV 2009, 148 and *R Rijnhout*, *Vergoeding voor huishoudelijke hulp door naasten: een overkoepelende analyse, Aansprakelijkheid, Verzekering en Schade (AV&S)* 2009, 179 ff.

26 See *Engelhard*, NTBR 2004, 49 and *Vranken's* discussion to HR 11 July 2008, NJ 2009, 385, with cmt by JBMV, *Bakkum/Achmea*.

27 *Lindenbergh/Van der Zalm*, MvV 2009, 149.

limited in its *extent* (capped) at the level of the costs that would have had to be incurred if a professional housekeeper had been hired to do the chores. The court's decision in this respect was rather unclear.<sup>28</sup> This is a matter of calculation and will be dealt with more extensively below (see no 48 ff below).

- 23 As was already touched upon, the relatives themselves may also pursue a claim for compensation for the loss of housekeeping where no monetary expenses were incurred. Each party (the primary victim or his/her relatives) can claim; there is no priority of one party's claim over the other with the obvious restriction that, if the defendant compensates certain household costs either by paying an award to the primary victim or to the relatives, then to that extent the defendant is no longer liable to either one of them.<sup>29</sup> If relatives pursue the claim, the defendant has the same defences as he would have had against the primary victim.<sup>30</sup> The precise rules as to the assessment of such claims, either pursued by the victim or by the relatives themselves, will be explained below; but let us first amplify further under which conditions the relatives may have such a claim for damages *without having incurred any concrete material expenses*. For injury cases we have already discussed the main cases above; we will therefore only briefly summarise these in no 24. More attention must be paid to cases in which relatives take over housekeeping as a result of the primary victim's death.
- 24 In the case where the primary victim suffers from an incapacity to do housekeeping chores and these tasks are taken over by a third party then, as was seen above, both the relatives and the victim can pursue a claim save that the defendant only needs to compensate for the same losses once. In the aforementioned case of *Rijnstate/Reuvers* (2008) it was the primary victim who pursued the claim but compensation was sought by her for the fact that her partner had invested his time in taking over some of her housekeeping tasks. The double touchstone mentioned already (which awards compensation only in cases where it is 'normal and customary' to hire professional help and limits it to the estimated costs that the primary victim would then have incurred) applies equally to third parties who have themselves provided housekeeping services for the benefit of the primary victim,<sup>31</sup> (see more extensive details about this, no 15 ff above).

28 *Lindenbergh/Van der Zalm*, MvV 2009, 148; *Rijnhout*, AV&S 2009, 179 ff.

29 HR 5 December 2008, NJ 2009, 387, with cmt by JBMV, *Rijnstate/Reuvers*.

30 Art 6:107 sec 2 CC and art 6:108 sec 2 CC.

31 HR 5 December 2008, NJ 2009, 387, with cmt by JBMV, *Rijnstate/Reuvers*. Although, as stated, the exact manner in which these costs are calculated is not entirely clear.

*Death.* Similar to injury cases, the starting-point for the determination and calculation of the need for the replacement of the housekeeping tasks and/or the children's care in case of death is basically *concrete* (taking account of all the personal circumstances). In 2005 the Dutch Supreme Court ruled nevertheless, that also in cases of wrongful death the fact that no concrete monetary costs were incurred by relatives (partners, children, parents, etc) does not prevent their recovering for the loss of living support under art 6:108 CC. The Court further noted that it is not necessary that the deceased, prior to his death, took care of the *majority* or even all of the housekeeping activities.<sup>32</sup> 25

Monetary expenses are not necessary to obtain compensation, but what is required in case of death, however, is that there be a *concrete need* to replace the lost part that the deceased played in the housekeeping tasks. Whether and to what degree the claimant/relative (partner, children, parent, etc) can show his/her concrete need for help depends on the actual circumstances. In terms of providing proof of such a need, the Supreme Court has referred to the 'rule of common knowledge', that a single person household (namely the household of the surviving spouse) requires *more than* half of what a two-person household requires in terms of housekeeping tasks.<sup>33</sup> Account will be taken, inter alia, of the exact age(s) of the child(ren), the family structure, the nature of the household and caring tasks involved and the financial position of the child(ren).<sup>34</sup> 26

In case of death the court *may ignore at least two facts* which prevent the relatives from actually suffering concrete, monetary losses. Firstly, similar to injury cases, the court may ignore the fact that no expenses whatsoever were incurred by the relatives. In other words, if the required replacement of the housekeeping tasks has been undertaken by the family, friends or any other unpaid party this does not stand in the way of recovery at all. So, although there must be a concrete need for help, no monetary expenses need to have been incurred.<sup>35</sup> Secondly, in the specific situation in which the surviving spouse has started a new household with (or has even remarried) a new partner, the fact that the new partner takes over (or will in the future) certain (or most) tasks in respect of raising and taking care of the household for the children does not, by itself, remove the children's 27

32 HR 16 December 2005, NJ 2008, 186, with cmt by JBMV, *Pruiskens/Organice*.

33 HR 11 July 2008, NJ 2009, 385, with cmt by JBMV, *Bakkum/Achmea*, no 3.3.2, in fine. Likewise: the standardised amounts of the Recommendation for Household Care of the 'Letselschaderraad' for single households are 75 % of the amounts for double households.

34 HR 11 July 2008, NJ 2009, 385, with cmt by JBMV, *Bakkum/Achmea*.

35 HR 11 July 2008, NJ 2009, 385, with cmt by JBMV, *Bakkum/Achmea*.

right to recover. This was already decided by the Supreme Court many years ago,<sup>36</sup> but has been re-affirmed.<sup>37</sup> The reason for this, as given originally by the court, is (and remains) that it would not be fair to, in effect, place the 'burdens' caused by the person liable on the new spouse. Any contribution by the new spouse may be set aside; what is decisive is the children's remaining need.

- 28 However, for the calculation of what the children need in respect of house-keeping and care account *will* be taken of any extra efforts that may 'reasonably' be expected of the surviving spouse (or possibly older siblings).<sup>38</sup> In other words, the children's right to recovery may still be limited to the degree that the surviving spouse (the children's father or mother) can be expected to replace the primary victim. This implies a concrete approach again in case of death, taking into account that the remaining parent can (and must) take over extra care responsibilities for the children.<sup>39</sup> In order to determine if this may be 'reasonably' required of the remaining spouse, account must be taken of his/her number of work hours, type of work (travelling or not?), the age of the children (can they be asked to assist too, for example by looking after siblings?) etc. There has been criticism with regard to this difference: *de facto*, the remaining spouse is expected to do as much as can be reasonably expected whilst the fact that the new wife/husband (stepmother/father) takes over the care of the children will *not* in any way limit the children's claim. Some authors argue that account should *not* be taken of what the surviving spouse can do (a more abstract approach) whilst others claim account *should* be taken of the contribution the new partner makes to the childcare and housekeeping (a more concrete approach). Vranken argues that the difference is fair given that the surviving spouse has a different relationship with and different responsibilities to the children than the partner s/he remarries.<sup>40</sup>

(5) *Is loss of housekeeping capacity compensable regardless of the sex of the victim?*

- 29 The aforementioned rules and criteria do not distinguish between male or female victims. Hence the loss of housekeeping capacity is compensable regardless of the sex of the victim.

36 HR 28 February 1986, NJ 1987, 100, *Huiskes en Niks/Snippe-Meulenbroek*; cf earlier HR 5 June 1981, NJ 1982, 221, with cmt by CJHB, *Tijsterman/Hony*.

37 HR 11 July 2008, NJ 2009, 385, with cmt by JBMV, *Bakkum/Achmea*.

38 HR 11 July 2008, NJ 2009, 385, with cmt by JBMV, *Bakkum/Achmea*.

39 *T Hartlief*, Vergoeding van overlijdensschade: abstract of concreet? *Ars Aequi* (AA) 2008, 896 ff; *Lindenbergh/Van der Zalm*, *MvV* 2009, 146 ff.

40 See, with references, *Vranken* in his commentary to HR 11 July 2008, NJ 2009, 385, with cmt by JBMV, *Bakkum/Achmea*.

(6) *Do the above principles (Questions 1–5) also apply in the case of a one-person household?*

As a matter of principle the law also does not distinguish between a one-person household and a household of more than one person (albeit with the Supreme Court's reference to the 'rule of common knowledge' that single households will generally demand proportionally more work than households with two or more persons, as was mentioned in no 26). 30

(7) *Are persons (eg children) who do not currently have housekeeping responsibilities, but may be expected to have them in the future, also entitled to damages for loss of housekeeping capacity?*

The right to compensation in the various situations described above also extends to *future* losses on the basis of the general rule in art 6:105 CC. This means, for example, that the estimated costs of professional care and other future household costs for which it is 'normal and customary' to hire professional help may be recovered in the form of either periodic payments or a capitalised lump sum. In principle this also includes children or young adults who are incapacitated as a result of the accident but who do not yet have their own household and/or household responsibilities. However, courts seem reluctant to calculate future losses more so than income losses for primary victims who live in the parental home and whose 'creature comforts' are still taken care of by the parents. The fact that they, due to their injury, cannot properly contribute to the family household and the fact that, as a result of the accident, there will generally be a greater burden on the victim's mother in respect of the daily preparation of meals, cleaning and the like are, in so many words, said to form an insufficient basis for the assessment of the damage.<sup>41</sup> The fact that the victim in that case might also experience limitations later on if s/he decides to live on his/her own was not sufficient.<sup>42</sup> But in that specific case the medical condition was not entirely clear and we suspect that the decision may be very different in cases where the medical condition is more definite and it can be proven that the victim was actually considering moving out or will definitely do so to start his/her own household. 31

(8) *Is the right to compensation in respect of household tasks performed for another person (V) limited to cases where there is a relationship recognised in family law or does it also extend to, for example, non-married partners (including same-sex partners) or casual flat shares?*

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41 See inter alia Rb Middelburg 24 September 2008, LJN BG5483.

42 Rb Middelburg 24 September 2008, LJN BG5483.

- 32 As was mentioned above (no 6) in the case of an injury (or illness) the claim for loss of housekeeping capacity may be brought by any third party except insurance companies and may not exceed the damage that the primary victim would have suffered without the third party's intervention. This includes, for example, non-married partners and same-sex partners and even neighbours. In the case of death only the aforementioned categories of persons are entitled to compensation. This concerns the non-separated spouse and the minor legitimate or illegitimate children of the deceased, other relatives by blood or marriage of the deceased and the persons who lived with the deceased as his/her family and who were wholly or partially supported by the deceased, (see more extensively nos 7 and 9 above).

### B. Doctrinal Justifications

(9) *What are the doctrinal foundations for the award of damages for loss of housekeeping capacity? Is compensation for such loss consistent with general tort law principles or does it involve deviation from those principles?*

- 33 The departure point for civil liability law is the principle of full compensation. It follows from this principle that the injured party with housekeeping responsibilities can obtain compensation for the damage that results from his/her lost capacity to perform household tasks, just as s/he can obtain compensation for other heads of damage. The starting-point in cases of injury or death is that there is a concrete assessment of the damage. In this regard it is remarkable that the Supreme Court has, nevertheless, allowed relatives to obtain compensation to provide for household care even in cases where no monetary expenses are incurred. This is even more special given the fact that the relative's right to damages itself is already considered to be an exception to the main rule that in case of personal injuries only the injured person is entitled to claim damages.<sup>43</sup> Arts 6:107 and 108 CC *extend* the defendant's liability to relatives and are therefore usually interpreted quite restrictively.<sup>44</sup> Both provisions only allow the expressly mentioned categories of third parties to have a claim for a specific type of loss.<sup>45</sup>

43 See Engelhard, ULR 2007, 379; HR 16 June 1972, NJ 1972, 375, *Van Wettem/Courtois*; HR 8 April 1983, NJ 1984, 717, *Van der Heijden/Holland*; HR 28 May 1999, NJ 1999, 564, with cmt by ARB, *Gemeente Losser/De Vries*; HR 20 February 2002, NJ 2002, 240, with cmt by JBMV, *Kindertaxi* and HR 9 October 2009, NJ 2010, 387, *Vilt*.

44 *Ibid* 144 ff.

45 *Ibid* 143.

Beyond the scope of these articles (and reimbursement clauses for private and social insurance carriers and employers) third parties cannot claim damage which results from the victim's injury. The only exceptions are nervous shock cases as defined by the Dutch Supreme Court<sup>46</sup> and cases where the victim's injury was caused with the intention of causing non-pecuniary damage to the third party.<sup>47</sup> This system has been referred to as being 'limited' (no one else but the primary victim, the parties mentioned in arts 6:107 and 108 CC and their subrogated first-party insurers may claim) and 'exclusive'.<sup>48</sup> The 'exclusiveness' of the system means that, even if third parties could have a substantive claim based on tort or contract law, they cannot pursue that claim beyond the scope of arts 6:107 and 108 CC for any damage that is a consequence of the primary victim's injury or death.<sup>49</sup> This was determined by the Supreme Court in a longstanding line of case law.<sup>50</sup> This special character of arts 6:107 and 108 CC, being exceptions to the general excluding rule for third parties in cases of personal injury and death, may also explain why the recovery of third parties is limited in such a strict way: the third parties' claim for costs that result from the primary victim's injury are (based on art 6:107 CC) restricted to the victim's losses which were transferred to them (see no 7) and the claims of relatives in case of death are (based on art 6:108 CC) limited to the class of persons and kinds of damage mentioned in the latter provision (see nos 9 and 10).

*(10) Is loss of housekeeping capacity considered to be pecuniary or non-pecuniary loss? To what extent is the right to compensation independent of actual pecuniary loss, for example, loss of earnings or the cost of a replacement?*

The loss of housekeeping capacity as such is considered to be pecuniary damage. Generally it refers to the economic value of housework. In principle primary victims will only be entitled to damages in as far as their incapacity to perform household tasks actually causes damage. But if the victim's partner, relatives, friends and/or neighbours (etc) are taking care of the household free of charge, the primary victim will still be entitled to recovery on the basis of the saved costs of professional help, provided that it would have been 'normal and customary' to hire profes-

46 HR 20 February 2002, NJ 2002, 240, with cmt by JBMV, *Kindertaxi*; HR 9 October 2009, NJ 2010, 387, with cmt by JBMV, *Vilt*.

47 Art 6:106 sec 1, sub a CC.

48 Engelhard, ULR 2007, 379.

49 See extensively *ibid*, 145 and 378 ff ('super beperkende uitleg') and similarly *Rijnhout*, AV&S 2009, 179 ff.

50 HR 12 December 1986, NJ 1987, 958, with cmt by CJHB, *Rockwool/Poly*; HR 8 September 2000, NJ 2000, 734, with cmt by ARB, *Baby Joost*.

sional help. As was discussed above (no 23), the victim's partner, relative or similar may also claim the saved costs of professional help him/herself (instead of the primary victim's claim). The primary victim's income losses or lost profits (for example, if s/he owns a company) are recoverable if caused by the impairment and not solely by other, economic factors (growing competition, etc). This can be illustrated by *Rijnstate/Reuvers* (2008), which was discussed in no 19. In this case the primary victim was entitled to recover for her *housekeeping* costs, even though she had not incurred any actual costs because her partner had taken care of the housekeeping. But she was *not* allowed compensation for the *lost profits* of her company because those could, in that case, not be causally connected to her incapacity. Lastly, non-pecuniary losses of the primary victim will also be compensated but these are commonly related to his/her impairment as such and not necessarily to the incapacity to perform housekeeping tasks in particular. However, in severe cases the latter may affect the award of damages for non-pecuniary loss in respect of the injury. The reason for this may be that the victim has become dependent on others (loss of independence).

- 36 For the victim's partner, relatives or other third parties (neighbours) any substantive losses of their own, for example the partner's loss of earnings, lost career chances, lost profits, non-pecuniary damage, etc, are currently not recoverable. Only 'transferred losses' (including the saved costs of professional help) are recoverable, (see no 7). There is a chance that the law might change as far as this last point is concerned. It has often been criticised that the victim's loved ones are not entitled to any compensation for their losses beyond the scope of arts 6:107 and 108 CC. Initially the idea was at least to make it possible for a narrowly drafted circle of secondary victims to claim non-pecuniary damages in cases where a loved one was severely injured or had died in a fatal accident. But the (former) legislative proposal to make this so-called 'affectionate damage' (*affectieschade*) recoverable has been rejected by Parliament.<sup>51</sup> However, when the above proposal was still pending the approval of Parliament, informal sources<sup>52</sup> revealed that there was also an initiative to revise the law in

51 Parliamentary Reports, First Chamber of Parliament (EK) 28 781. This legislative proposal, which *had* already been accepted by the *Second* Chamber of Parliament, entitled an enumerated list of categories of loved ones to compensation vis-à-vis the person liable for their pain and grief in cases of serious injury or death of the primary victim.

52 A response to the informal draft proposal was published on the internet, at <www.rechtspraak.nl>. See EFD Engelhard, Naar een nieuw criterium voor de vergoeding van derden: het voorontwerp Inkomensschade en het wetsvoorstel Re-integratiekosten, *Verkeersrecht* (VR) 2008, 1, at 4 ff.

respect of purely pecuniary income losses of relatives in case of injury beyond the scope of mere 'transferred losses'.<sup>53</sup> According to this (currently still) informal draft proposal, the lost income (including future income losses) of relatives who take over the housekeeping tasks and/or care of the primary victim must be compensated even if the loss exceeds the amount of damage that the primary victim would have suffered in the absence of such care. It is still highly uncertain whether the legislator will proceed with this alleged draft proposal; in any case the proposal for affectionate (non-pecuniary) damages has been rejected.

Loss of *time* may be slightly more difficult to categorise in this respect. In the aforementioned case of *Gemeente Losser/De Vries* (see no 16) compensation was awarded for the leave days that parents had reasonably spent on the intensive, long-lasting nursing and care which their injured child needed after she was released from hospital.<sup>54</sup> This was seen as *monetary* damage since, as was explained above, the Supreme Court construed the compensation for lost time as a transferred loss of the child itself and it allowed no more recovery than the costs which would have been charged if professional help had been hired. 37

To conclude, both in cases of injury and death the Supreme Court's approach is concrete but with the important abstraction that it is not necessary that actual expenses are incurred in replacing the loss or decrease in the victim's contribution to the household or to replace him/her by hiring professional care. This is not a fully fledged, concrete calculation given this abstraction (and other abstractions which we have mentioned above) but it is not an objective approach either. 38

### C. Assessment of Damages

(11) *How is loss of housekeeping capacity to be assessed? Please give an overview.*

The judge of fact has discretion with regard to the assessment of the damage related to the loss of housekeeping capacity and the amount of compensation<sup>55</sup> although in practice standardised rates, percentages and amounts are used (as will be seen below, no 51 ff). 39

<sup>53</sup> Cf no 7 above.

<sup>54</sup> HR 28 May 1999, NJ 1999, 564, with cmt by ARB, *Gemeente Losser/De Vries*.

<sup>55</sup> Art 6:97 CC and inter alia HR 28 May 1999, NJ 1999, 564, with cmt by ARB, *Gemeente Losser/De Vries*.

(12) *By what criteria (medical, economic or other), in which way and by whom is loss of housekeeping capacity established and measured? Are the same criteria employed as in establishing and measuring loss of working capacity generally? Is it possible for the degree of impairment in housekeeping capacity to differ from the degree of impairment in general working capacity in an individual case?*

- 40 The starting-point for the assessment of the loss of housekeeping capacity is concrete: both in cases of injury and death there must be damage which, in the cases at hand, comes down to an actual need for help. In order to determine whether that is the case, all the relevant circumstances must be taken into account. For future damage this also involves weighing all the relevant positive and negative risks and chances (art 6:105 CC). In this respect it strongly resembles the calculation of income loss. There are no strict requirements in respect of future chances and hypothetical income<sup>56</sup> in terms of the degree of proof needed for the assessment of the income losses in cases of permanent disability.
- 41 In cases of physical or mental injury possible losses of earnings and the loss of housekeeping capacity of the *primary victim* are both recoverable under the principle of full reparation. But, as was mentioned in nos 8 and 35, if the *third party* (spouse, parent) has incurred income losses as a consequence of having taken over the housekeeping activities, the law does not allow recovery because only 'transferred losses' are recoverable based on art 6:107 CC.
- 42 In cases of death, the general rule is that the deceased's loss of income or earning capacity as such is not recoverable; only his/her contribution to the financial dependants and funeral costs are recoverable as enumerated in art 6:108 CC (see nos 9 and 10). However, the case of *Philip Morris/Bolink* (2009) illustrates how the relatives' own, substantive, income losses may sometimes easily overlap with their loss of the deceased's household contribution.<sup>57</sup> The Court was asked to determine whether art 6:108 CC allows a widow's claim for the loss of the deceased's physical support in respect of the children if it partially includes the widow's own income loss for the extra time she is now needed at home. It was undisputed that if her husband had lived, he would have stayed home with their daughter so as to enable her to extend her own career and working hours. The defendant refused to pay for this income loss since art 6:108 sec 1 CC only allows claims for loss of support and not for the remaining spouse's loss of income and because staying home with the child was a personal choice by

56 See eg Rb Breda 27 February 2008, LJN BC5872, no 3.21.

57 HR 10 April 2009, NJ 2009, 386, *Philip Morris/Bolink*.

which the woman had increased her own financial dependency herself. The Supreme Court, however, decided that, in principle, her whole income loss must be awarded.<sup>58</sup>

The claim in this particular case was made *for the concrete, actual income loss* 43 which, strictly speaking, falls outside the scope of art 6:108 CC. Lindenbergh and Van der Zalm explain this case by reference to the rule that victims (also the widow in this case) are under an obligation to mitigate their losses. According to them, the wife recovered the costs she incurred (her own lost income) trying to mitigate the loss of her husband's physical support in the household.<sup>59</sup> All in all, we welcome this approach of the Supreme Court as it provides for appropriate solutions given today's social reality but we do think that the complexity of case law rules for personal injury cases which has resulted from these developments calls for a comprehensive and integral review of its inner coherence, legitimacy and practical workability.<sup>60</sup>

(13) *Which tasks are deemed to be household tasks in considering housekeeping capacity? Is there a right to damages for, for example, impairment of a person's ability to care for his/her children, do the gardening or organise family life and social relationships?*

Comparisons between the approaches followed in injury and death cases 44 will be more accurate if regard is had to the various household tasks which fall under the term 'loss of housekeeping capacity'. But as was said above (at no 2) it is not certain which specific tasks or care are recoverable under this heading. In principle, all sorts of household tasks seem to fit but in particular personal care or other chores may fall outside the scope of compensation in at least three ways. We will briefly discuss these below.

Firstly, the factual assessment of incapacity in case of injury often seems to 45 indicate that this does not extend to the daily tasks such as, for example, preparing meals and taking care of children.<sup>61</sup> Generally, the help of the victim's parents or the surviving partner with these simple tasks is also *not* considered to be recoverable but taken to be part of the normal household routine even if it creates an extra burden. There may be incapacity for more intensive tasks such as vacuum cleaning, changing the beds, clean-

58 HR 10 April 2009, NJ 2009, 386, *Philip Morris/Bolink*.

59 *Lindenbergh/Van der Zalm*, MvV 2009, 150.

60 One of our researchers, Ms Rianka Rijnhout, LL.M, is conducting a PhD study with this purpose. See her article *Rijnhout*, AV&S 2009, 179 ff, in which differences in the current approach of the Supreme Court with regard to injury versus fatal cases are critically analysed.

61 Rb Middelburg 24 September 2008, LjN BG5483.

ing the windows and the like but even then the expert may find that these *may* (still) be done if the victim *spreads* them throughout the week. The court may then, with reference to the statement(s) of the expert(s), find that there is no substantial loss of housekeeping capacity.<sup>62</sup> This is, of course, basically a matter of factual evaluation and proof.

- 46 Secondly, as we have discussed in more detail above, the criteria used to limit the right to compensation, particularly the criterion in *injury* cases that professional help must be 'normal and customary' are also likely to have the effect that the loss of the aforementioned basic daily tasks such as preparing meals will not be compensated, (see nos 17 and 21). Rijnhout has pointed to a possible anomaly which may come from the fact that the criterion of 'normal and customary' has not yet been referred to in fatal cases by the Dutch Supreme Court. This indicates that different criteria are used for tasks which are factually the same which may especially complicate claims in cases where the injury turns out to be fatal.<sup>63</sup> The same claim will be governed for the injury part of the damage (housekeeping tasks done by the spouse prior to the primary victim's death) by different criteria than for the death related part of the damage (housekeeping tasks done by the surviving spouse after the primary victim's death).
- 47 A third ground for limitations as to the kind of tasks which may lead to recoverable losses and those which may not, may come from the requirement of legal causality under art 6:98 CC (the so-called 'attribution test'). As far as causality is concerned, Dutch law works with two cumulative criteria. First, once it has been established that the losses *are* in fact recoverable under the Dutch system (arts 6:107 and 108 CC), it must be determined whether there is factual causality between these losses and the incident for which the defendant is held liable. This means, both in cases of injury and in cases of death, that it must be established whether the loss of household capacity is necessarily related to the incident in a factual way, in the sense that if the latter is thought to have been absent, the loss would not have existed (the *conditio sine qua non* criterion). It is quite controversial that the (professional) medical expert of the liability insurer will often be entitled to be given access to the claimant's medical file in cases where it is indicated that there are medical records prior to the incident.<sup>64</sup> Secondly, the damage must be legally attributable to the defendant on the basis of

62 As was the case in Rb Middelburg 24 September 2008, LJN BG5483.

63 *Rijnhout*, AV&S 2009, 179 and 184.

64 *EFD Engelhard*, *Kroniek Schadevergoedingsrecht*, AV&S 2007, 15 ff (with case law references).

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art 6:98 CC for which account will be had of, inter alia, the nature of the harm and the type of liability (fault based, strict liability).

(14) *Is the degree of impairment of housekeeping capacity assessed on the basis of the actual circumstances of the individual case or by reference to abstract considerations (eg statistical averages)?*

The manner in which the loss of housekeeping capacity is assessed in cases of injury and/or death must be determined was already discussed above. Here and in the following sections we will, given the complexity of the issue, briefly sum up the main points. Firstly, as indicated, both in cases of injury and death there must be damage, for example the – concrete – need to hire a professional which will be assessed by taking all the relevant circumstances into account (including future chances). Receipts are not necessary but the victim will have to submit evidence of time spent by third parties to help him/her or other negative consequences.<sup>65</sup> What this *does* require is not entirely clear, may of course vary slightly from case to case and will generally be determined on the basis of the court's evaluation of a medical expert's assessment of the degree of incapacity. This assessment of the concrete need is equally (or even more) critical in cases of death where the relative claims compensation for the loss of the deceased's contribution to their mutual household: if the surviving spouse does not specify the exact, concrete housekeeping tasks and activities in his claim, then to that extent the claim cannot be awarded.<sup>66</sup> 48

If there is such a *concrete need* for help, the primary victim or relative may even claim compensation if no monetary expenses have been incurred. In injury cases this seems to be the case only to the extent that the victim is unable to perform the household tasks and it was 'normal and customary' to hire professionals for nursing, care and/or household chores. In case of death, however, this criterion, as such, is *not* used. In those cases it is necessary for the relative to have too limited resources to enable him/her to continue the lifestyle that s/he would have shared with the deceased if the accident had not occurred. 49

As to the calculation of damages, the law is not yet entirely clear: if in the cases that meet the criteria mentioned above the relatives have invested extra time in doing the household tasks or to provide care beyond the extra efforts that may reasonably be expected of them, the professional rate for such housekeeping or care may function as the touchstone. It is as yet unclear whether this means that the professional rate is the actual basis 50

65 Hof Leeuwarden 3 February 2009, LJN BH4480, no 29.

66 Which was found to be the case in Rb Rotterdam 6 August 2008, LJN BF1952, no 5.3.

used for the calculation of the amount of compensation or rather that (and this seems to be preferred by most authors) the professional rate (for the victim's need) is the maximum level of compensation.<sup>67</sup> The latter interpretation implies that the amount of compensation will, *in principle*, be less than the cost of professional help and that the hourly rate of a professional is only used as a touchstone for the amount of compensation in cases where it is proven that a professional will actually be hired. Based on his study of the case law, Laseur argues that the lower courts calculate the damage on the basis of their estimate of the hourly rate of professional help, albeit on the basis of the concrete number of hours for which the victim would need to have hired such help (if s/he had hired professionals instead of relying on his/her relatives).<sup>68</sup>

- 51 Different rates are also used, varying from € 8.5 per hour to a more occasional € 10 and € 8.<sup>69</sup> There are standardised guidelines for these rates based on the so-called *Richtlijn Huishoudelijke Hulp* (Recommendation for Household Care). The parties are free in their (mutual) choice to apply these guidelines. These guidelines are not law, but indicative and are published by the *Letselschaderraad* (Personal Injury Board). The Personal Injury Board is a non-profit organisation that aims to facilitate care for personal injury victims and the settlement of damages. It is financed at 30 % by organisations and representatives of those personally injured (Victim Service, insurers, medical advisors, etc) and at 70 % by the Ministry of Justice. Its Recommendation for Household Care offers important, self-regulated, objective guidelines for the calculation of housekeeping costs as a head of damage which may be agreed upon by the parties in order to promote a more efficient settlement of the claim in respect of the first three months of housekeeping costs.<sup>70</sup> After that period the calculation reverts to the concrete situation again but the parties may agree to retain the standardised amounts of the Recommendation. The guidelines of this Recommendation cover household tasks provided by third parties such as grocery shopping, preparing meals and (regular) cleaning with the exception of the every-day tasks (bathing, getting dressed, etc). In addition to the household chores we mentioned, these amounts are also said to cover the personal care of one or more children. But any costs of caring and nursing are *not* covered by these amounts (*verzorgende en verplegende taken*)

67 See *Rijnhout*, AV&S 2009, 183 (with references).

68 *I Laseur*, *Mantelzorg in het civiele aansprakelijkheidsrecht: wel of geen vergoeding?* L&S 2008, 5 ff, at 9.

69 *Laseur*, L&S 2008, 10.

70 These have most recently been revised per 1 January 2011, and are available at <<http://www.deletselschaderraad.nl/>>.

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nor are the costs of professional day-care services for children; these costs may additionally be claimed as a separate head of damage.

Without specifications the Recommendation for Household Care gives standardised sums for the costs of the household tasks per week (ie seven days). These standardised sums per week are categorised in the range of currently € 60 (in case of minor to average incapacity) to € 120 (in case of severe incapacity) for single households. The amounts are higher where the primary victim shares a household with his/her partner: € 80 for minor to average incapacity and € 160 for severe incapacity. These amounts are even higher where children under five are concerned: € 150 for minor to average incapacity and € 300 for severe incapacity. The amounts for households with children over (*sic!*) the age of five years old are a bit lower (which seems to accidentally ignore households with children of five years of age, EE/IG): € 130 for minor to average incapacity and € 260 for severe incapacity. After the first three months a fixed hourly rate is used of currently € 8.5. The standardised sums or hourly rate must be multiplied by the victim's contribution prior to the accident. This contribution is standardised in the form of a fixed percentage: the victim's contribution to the household can be 25, 50, 75 or 100 %. In order to determine the correct percentage, account must be taken of the 'light' daily contribution that may be expected of other members of the household (the victim's partner and children). **52**

The Recommendation for Household Care is not binding for anyone; it only serves to facilitate the process of settling damages. It may enable the parties to reach agreement, but it may also inspire and guide courts. The Recommendation is not intended to limit any party's rights: damages may still be calculated on a concrete basis and the Recommendation leaves open the possibility for the defendant to raise the defence that the compensation must be limited because the victim has not reasonably mitigated his/her own losses, for example, by organising the household more efficiently. **53**

From a procedural point of view the parties are also encouraged to settle their case by the *Wet Deelgeschilprocedure* (Procedure for Particular Disputed Aspects Act). This Act, which was adopted in 2009,<sup>71</sup> enables parties to receive an expedited judgment on one or more specific aspects of the claim in cases of personal injury and/or wrongful death. Typically, in personal injury claims, specific matters that deal, for example, with the assessment of specific heads of damage such as income losses or household costs may **54**

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71 First Chamber of Parliament, 15 December 2009 (EK 2009-2010, 31 518).

divide the parties and, therefore, prevent them from reaching an out-of-court settlement. The Act seeks to promote extra-judicial settlement and to prevent unnecessary delays which are due to the fact that the parties are in dispute over particular parts of the claim. Those disputed issues may now be individually brought to court without having to submit the claim in full to the court. Examples given by the legislature are disputes over how a person's remaining years of earning potential need to be calculated and how many hours of professional household care are needed.<sup>72</sup> As a result, based on this Act, the parties can, after having received the court's decision on the specific disputed matter, return to their attempts to reach an out-of-court settlement. If, despite the clarification of the court on the specific matter, no settlement can be reached, then the parties may, of course, still submit the claim in full to the court.

*(15) Is the level of damages affected if professional or other paid help is engaged to perform household tasks in place of a person who has been injured or killed?*

- 55** If professional or other paid help is engaged to perform household tasks in place of the person who has been injured or killed (and if the concrete costs of this help increase the standard amounts that were mentioned in no 52), the damages may be calculated on a concrete basis. As indicated above, the Recommendation of Household Care only offers an optional instrument to calculate the amount of compensation. If the actual losses of the primary victim, his/her partner, relatives or other third parties incurred in hiring a professional are higher, the claimant may obtain damages for this higher amount. In all likelihood courts will then assess whether hiring professional help was 'normal and customary' (in cases of personal injury) or whether there was a concrete need (*behoefte*) for household care (in cases of wrongful death). The actual costs will be measured within the boundaries of the double reasonableness test, (see our discussion at nos 3 and 5 ff above).

*(16) Is the standard cost of such help relevant to the assessment of damages for loss of housekeeping capacity? If so, is the assessment based on the pay that would be received by a skilled, semi-skilled or unskilled worker? Which activities are considered for the purposes of comparison? Is the level of compensation based on the pay that such a worker would receive or the amount that an employer would charge for the help (gross or net pay)?*

- 56** In the Recommendation for Household Care the standard hourly rate for professional (or other paid) help is currently € 8.5. The parties may agree to a higher hourly rate which will probably be around € 9, € 9.5 or € 10.

<sup>72</sup> Parliamentary Reports, Second Chamber of Parliament, 2007–2008, 31 518, no 3, 16.

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Generally the assessment is based on the pay that would be received by a skilled worker. As we have pointed out above, this assessment does not cover help with minor everyday activities such as bathing, but it does cover cooking, cleaning, buying groceries and similar (see no 45). The level of compensation will generally be based on the fee that an agency would charge a customer for care services, which means gross pay if taxes are included. It is for the recipient, the person who supplies the care, to fulfill his/her tax obligations and to subsequently pay taxes.<sup>73</sup>

*(17) Is the level of damages affected if a relative or a third party (eg a neighbour) gratuitously takes over household duties from a person who has been injured or killed? How are the damages, if any, calculated in such a case?*

However, the latter is different in respect of gratuitous assistance. As we have explained above, both in cases of injury and death the estimated costs of a professional help can, in principle, be claimed if no professional was hired because the victim's partner, relatives or a neighbour took care of the particular housekeeping tasks or care. We assume that in that case the compensation will be based on the (average) net pay of professional help (since gross pay (no 55) is only relevant when professional help is actually hired). But as we have mentioned above, persons who live with the victim such as their surviving partner and possibly older siblings are expected to provide extra help and assistance (see no 19). In particular, in cases where no concrete costs were incurred, the aforementioned standardised amounts can be used for the calculation of this abstract kind of damage (with the possibility of claiming more if not all kinds of damage are covered).

In cases of wrongful death, the housekeeping activities and care for the children which may be provided by the new partner of the surviving parent is also not taken into consideration in the assessment of the damage. Here too, the surviving partner and any older siblings of the children of the primary victim are expected to provide extra care for the children and to that extent their need for compensation will be limited.

*(18) What is the relationship between damages for loss of earnings from paid work and damages for loss of housekeeping capacity? Is it possible to accumulate the two claims? If so, how is this effected?*

Aside from the few aforementioned abstractions when no actual monetary costs were incurred in finding a replacement and/or when, in case of

<sup>73</sup> Cf for the – different – case of the calculation of lost income, HR 24 November 2000, NJ 2001, 195, M/G.

death, the partner of the surviving partner steps in, the assessment of the amount of damages is still concrete. In that sense, the calculation of the loss of housekeeping capacity resembles the calculation of income losses, as was mentioned in no 40 above. For the primary victim both heads of damage are recoverable separately (and cumulatively) and are in principle calculated on the basis of all the relevant and concrete circumstances. Future losses may be estimated and capitalised.

*(19) To what extent, if at all, does a loss of housekeeping capacity affect the award of damages for non-pecuniary loss in respect of personal injury or death?*

- 60** A loss of housekeeping capacity may, in severe cases, most particularly cases of full invalidity, affect the award of damages for non-pecuniary loss in respect of injury. The reason for this may be that the victim has become dependent on others (loss of independence). As was mentioned in no 35 only the primary victim (and not relatives) is, in cases of severe impairment, entitled to obtain compensation for his/her non-pecuniary loss in this respect.

*(20) Is compensation for loss of housekeeping capacity to be paid as an annuity or as a lump sum? If both are possible, does the victim have the option to decide between the two methods of compensation?*

- 61** The claimant may obtain damages for past and future losses although, theoretically, the judge has the discretion to postpone the estimation of the part of the losses which is yet to come for example, because the future circumstances to support them are still too uncertain (art 6:105 sec 1 CC). The estimated costs of professional care and other future household costs for which it is 'normal' to hire professional help may be recovered in the form of either periodic payments or a capitalised lump sum. In principle the victim may choose which form s/he prefers but the court will determine this with particular regard to the interests of the claimant. The judge may also decide the case subject to certain conditions, for example in order to index periodic payments, and the person liable may be ordered to provide the claimant with security for periodic payments (art 6:105 sec 1 CC). The court may also rule that each party may request to have the amount of compensation to be paid periodically to be adjusted if and when, after the court's decision, certain circumstances arise that were not taken into consideration in the initial estimation of the periodic amounts (art 6:105 sec 2 CC).

**D. Relationship to Social Welfare Law**

*(21) What social welfare provision, if any, is made in respect of the loss of house-keeping capacity? Are welfare benefits received set off against the damages payable? What recourse actions, if any, are available to an agency making such provision?*

To the extent that the victim or his/her relatives receive social security benefits, they are generally not entitled to damages based on civil liability grounds. With regard to the loss of housekeeping capacity, the most relevant provision is the so-called Social Care Act (*Wet Maatschappelijke Ondersteuning*, WMO). According to this Act, which came into force in 2007, the municipalities (*gemeenten*) are legally obliged to provide care services for the disabled (and for the elderly) such as transport, wheel-chairs and special facilities in houses. Persons who are incapacitated from doing housekeeping tasks can apply to a special municipal agency for care services or for an allowance with which to purchase the care themselves. The WMO also makes municipalities responsible for providing support for carers and volunteers. The municipality is given a wide margin of discretion in the decisions on social support taken by the council itself and/or the municipal board. There is an obligation on the persons who are entitled to WMO support to contribute themselves, to a certain extent, to the particular care facilities; each municipality may, below a certain maximum amount, decide for itself how high the amount of the contribution must be. 62

In cases of death the National Survivor Benefits Act (*Algemene Nabestaandenwet*, ANW) may offer a social benefit for the surviving partner and/or children. These benefits are meant to cover basic needs if the surviving partner suffers from a loss of living support but they are subject to several restrictions (being of limited means, etc). 63

Claims for damages by the victim and his/her relatives will generally not extend to the damage that is covered by the WMO and, in case of death, the ANW. There is no right to recourse for the payments and facilities that the municipality offers under the WMO which means that to that extent, the person liable is relieved of liability. The ANW does have the right to recourse for the payments paid by the social benefits carrier (the so-called *Sociale Verzekeringsbank*) under the ANW. The recourse claims under the ANW are, however, collectively paid on the basis of agreed annual sums based on agreements with liability insurers.<sup>74</sup> 64

74 See Engelhard, ULR 2007, 111 and 338.

## II. Concrete Assessment Examples

*Case 1: married woman, aged 45, with three children (5, 10 and 15 years old); does not work outside the home; fracture of both wrists with residual effects; impairment in the performance of household tasks: on average 33%; detached house in the countryside.*

- 65 The case, as presented, is limited to the primary victim's 33 % loss of household capacity and leaves open whether or not professional help was hired. Aside from the possibility that the primary victim would be entitled to social (WMO) benefits she or her husband may have an injury claim based on art 6:107 CC. It is not entirely clear from the facts as presented whether the victim's husband and the two eldest children are helping out by performing extra household tasks that would normally (without the injury) have been performed by the victim. It is also left unclear whether extra expenses have been incurred for the upkeep of the household now that the victim is partly incapacitated. If *no* costs were incurred (but probably even when costs *have* in fact been incurred) in obtaining extra help or assistance, the criterion seems to be that it must be 'normal and customary' to hire professional help. This criterion was used by the Supreme Court in the case of *Krüter-Van de Pol/Wilton-Feijenoord* (2003) in respect of the time spent by a wife to care for her terminally ill husband and has been repeated in *Rijnstate/Reuvers* (2008) in respect of the time spent by a partner in taking over the running of the household. In the latter case the Supreme Court not only applied this criterion to the loss of housekeeping capacity in the true sense of the word (for tasks such as cleaning) but also added that it is not necessary for the injury to be particularly grave. However, in particular the victim's husband, oldest child and perhaps also the middle one, will to some degree be expected to help. That will limit her right to compensation, although, as we mentioned above, this is quite controversial as several authors argue that full compensation is in order for *every* extra task that falls to the spouse and/or the older children (see no 21).
- 66 Dependent on the further concrete facts, which are not given here, this might lead to the result that, for example, two full days a week professional help with cleaning and even care for the children could be hired. But again such a decision can only be made if more facts are available, such as the husband's work situation, their housing situation, etc. No compensation is payable to the extent that the victim is entitled to social security assistance or payments. However, she can then still claim damage exceeding the social security level of protection, based on the aforementioned WMO (no 62 above). This (the remaining damage left uncompensated by

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social security) is quite likely in this case; social security entitlements are based on 'the cheapest forms of adequate protection' and will not exist to the same extent that the victim's husband and her two eldest children will be expected to help. For the calculation of this remaining damage (ie the costs of their help), to the extent that it goes further than the plain personal care mentioned in no 45, standardised amounts of compensation are set out in the so-called *Richtlijn Huishoudelijke Hulp* (Recommendation for Household Care), which we have discussed in no 51 ff above.

The Recommendation for Household Care allows a concrete calculation of the damage, but following its normative approach the damage may be capitalised accordingly. The woman in our case is impaired by 33 % on average, which qualifies for the category 'light to average impairment'. The standard amount of compensation for the (remaining) loss of housekeeping capacity is € 130 per week (which is the amount for the aforementioned category in a situation with children at home over the age of five). However, this is based on a situation with two children whilst the case describes a household with three children. We suspect that this could raise the standard amount to € 150 a week. Then, according to the Recommendation, the victim's contribution prior to the accident needs to be determined, which may be done on the bases of a fixed percentage of 25, 50, 75 or 100 %. For this assessment of the victim's contribution to the household prior to the accident, account will be taken of the fact that the eldest child is fifteen years old, so quite independent. This child will probably be expected to perform some extra household tasks and a certain extra contribution can probably also be expected of the victim's husband and, to a much smaller degree, of her middle child of ten years old. On this ground the primary victim's contribution to the household prior to the accident will probably be 75 % (or perhaps 50 %). Compensation will then be, say, 75 % of € 150 multiplied by the number of weeks of the victim's disability. This leads us to believe the victim will be entitled to € 112.50 per week (corrected by inflation, lost interest, etc), or approximately € 500 per month. However, there are a few important caveats.

- Firstly, the amounts of the Recommendation for Household Care are, also in out-of-court settlements, not conclusive. In this case, for example, a higher amount for housekeeping services may be in order than the weekly rate of € 130. As said, the latter is only given for a household with two children above the age of five years old (and was raised by us to € 150 for the fact that the victim has three instead of just two children at home). The youngest child in this case is only five years old. For a household which involves at least one child below the age of five the Recommendation gives a weekly rate of € 150 (which we could then

raise to € 170 for the fact that the victim has three instead of just two children at home). Also, the fact that their living conditions include living in the countryside and, potentially, the nature of the facilities in the house may result in a higher amount of compensation (which may well be awarded if the parties go to court).

- Further, the Recommendation only covers the 'light' household tasks: cooking, grocery shopping, cleaning, etc. It does not deal with the loss of the victim's ability to do repairs in and around the house and to maintain the garden (etc), which, especially given that the family owns their own house in the countryside, may be relatively high. For the latter loss the Personal Injury Board has a separate Recommendation, the *Aanbeveling Zelfwerkzaamheid* (Recommendation on Self-Activity), which points to a standardised amount of € 1,080 annually which should here be multiplied by a standard factor 1.3 since the victim lives in a detached house. The amount of compensation based on this latter Recommendation also depends on the percentage of inability in respect of these tasks (house repairs, garden) which again are standardised at 25, 50, 75 or 100 %, (see further, the Recommendation on Self-Activity below, no 75). Also, the Recommendation for Household Care does not cover the costs of professional day-care for the youngest child if this is needed (to the extent that these costs are not covered by social insurance), nor does it cover the costs of personal care for the victim (eg if she needs help with, for example, bandages, getting dressed, bathing, etc). Some of these kinds of damage might, in addition to non-pecuniary damages, be added to the claim in as far as they are a consequence of the victim's impairment.<sup>75</sup>
- Thirdly, it must be noted that the Recommendation (which came down to about € 112.50 per week for 'light' housekeeping) is basically only intended to be used for the first three months of impairment. For this period of incapacity an hourly rate of about € 8.5 is often used, which in our case means about 13 hours of professional help for the 'light' household tasks (cooking, grocery shopping, cleaning, etc). Given that the victim does not have paid employment, she probably can (and in that case, will) be expected to spread the heavier chores more effectively throughout the week. In total about 15 hours per week for all household tasks (which consists of about 13 hours for 'light' tasks and another 2 hours for gardening, repairs, etc) will be granted.

<sup>75</sup> Cf Rb Arnhem 17 June 2009, BJ1757.

- In cases where the impairment lasts for a longer period of time, an employment expert may be asked to make an exact estimation of the situation to see whether the victim's capacity has improved and if, and to what extent, the amount may then be set lower (and/or if there is still damage at all). The standard rate for any remaining damage in this period (after the first three months of impairment) is € 8.5 per hour, but we could see courts agreeing to a somewhat higher hourly rate, perhaps of € 9 or even € 9.5.

*Case 2: single woman, aged 30; in paid employment; living on her own; comminuted fracture of the heel bone with residual effects, three-room flat:*

*(a) can no longer perform any household tasks;*

In this case (single woman, supposedly in full-time employment) it also seems likely that the costs of professional help with cleaning and the more burdensome household tasks will be awarded. The fact that the victim works may make it more difficult for her to manage on her own by spreading some of these tasks more gradually (doing them in small parts) over the week. If she were able to do tasks more slowly, then to that extent her claim for damages would have been limited, but given that she cannot do anything, her incapacity rate seems to be 100 %.

As for the amount of compensation, the Recommendation for Household Care uses two standardised sums for victims in a one-person household: € 60 per week in case of light to average impairments and € 120 per week for heavy impairments for the first three months of impairment. More concretely this means that, assuming the victim's contribution to her own household would continue to be 100 %, she would fall into the latter category for this period of time, provided the degree of impairment can be said not to change within these three months. This would come down to about 2 hours per day (based on the standard rate of € 8.5). In principle, after the first three months a more concrete calculation of the remaining loss of household capacity will be made based on the Recommendation for Household Care which departs from a standard rate of € 8.5 per hour. But if both parties agree, the aforementioned standard week amount (of € 120) can also be used for the period after the first three months. Courts might also, for both periods, agree to a higher hourly rate of about € 9 or even € 9.5 (which, on the basis of the Recommendation, would perhaps even entitle the victim to an average award of € 126 to 133 per week for the total period of full impairment). Here too, the four comments mentioned in no 67 must be made.

*(b) is slowed down in the performance of household tasks (needs twice as much time as before the accident) but capacity to continue in paid employment remains unaffected;*

- 70** The fact that the claimant is able to do the housekeeping tasks but is slowed down when she does them (it takes her twice as much time) is generally not considered to amount to a concrete need for professional care and may even give rise to a claim for nothing other than non-pecuniary damages.<sup>76</sup> In order to assess the victim's ability to perform the household tasks, account may be taken of her hours of employment, her type of work and how flexible that is, the percentage of her incapacity to do housekeeping tasks and of being self-sufficient, the chores that she can no longer do herself (such as preparing meals, cleaning, but also washing the car, extra professional repairs, gardening), her type of home (flat, not a house), the availability of kitchen equipment, etc.

*(c) is slowed down in the performance of household tasks (needs twice as much time as before the accident) and is no longer able to engage in paid employment;*

- 71** Compensation for the loss of household capacity is, in principle, as explained above with the one difference that having more time to spread household tasks over the week may enable the victim even further to get them done more easily. Again, as far as this can reasonably be expected of her (because of her duty to mitigate her losses) this may thus reduce damages. However, the defendant may also be held liable for the income losses (and non-pecuniary damage) insofar as these are caused by the event for which he is liable.
- 72** The victim's entitlement to compensation for her income losses does not extend to the part for which she is entitled to salary continuation and social security benefits. For that part, the paying parties have the right to reimbursement. Employers are, in principle, required to continue salary payments for at least 70 % of the salary during the first two years of work disability after which disabled employees who have a work disability of 35 % or more will be entitled to social security pensions. In this case, where there seems to be full disability (which is 80 % or more), with only very small chances of recovery, it is likely the victim may receive a pension based on the *Inkomensvoorziening Volledig Duurzaam Arbeidsongeschikten* (IVA). There is the possibility of benefits based on the *Werkhervatting Gedeeltelijk Arbeidsongeschikten* (WGA) for those who are only partially incapacitated. The part of the salary that is not covered by these social benefits or by

<sup>76</sup> See eg Rb Middelburg 28 January 2009, LJN BJ3536.

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private insurance may, in respect of current and future losses, be claimed by the victim herself under civil liability law; for future losses positive and negative risks will be included in the assessment under art 6:105 CC.

*(d) it is planned that she start a family.*

This is a factor which may increase the victim's concrete need for household care and may possibly be taken into consideration for the assessment of the claimant's non-pecuniary damages (and might, on the other hand, affect the assessment of her lost income). 73

*Case 3: married carpenter, aged 40, with two children of 4 and 6; complex fracture of the right upper arm and the right shoulder with paralysis of the entire upper extremities; living in a four-room flat; no longer able to contribute to household tasks (shopping, simple repairs, maintenance of the garden).*

With regard to the carpenter's own contribution to the household of, say, 25 % prior to the accident we note that his partner will probably be expected to give extra help as part of everyday life and, therefore, this is not recoverable (no 45). This depends on the exact family circumstances as was recently illustrated in a case where the claimant had lost the full capacity to use his hand as a result of medical negligence: the hospital had negligently performed the wrong surgery on him. His statements that he could no longer do household tasks such as vacuum cleaning and preparing meals and that his wife, as a result of this lost contribution to the household, was suffering from a nervous breakdown, were contested by the hospital. In the absence of further proof, this could not be compensated for.<sup>77</sup> However, depending on the weighing of the concrete circumstances of our case, recovery can still be possible to the degree that it would be 'normal and customary' that professionals are hired and/or that extra expenses are incurred for the repairs in and around the house within the boundaries of the double reasonableness test (see no 3). 74

Although the case does not mention losses other than the loss of the capacity to contribute to light or simple 'household tasks' the Personal Injury Board's *Aanbeveling Zelfwerkzaamheid* (Recommendation on Self-Activity) still comes into mind, which was briefly touched upon above (no 67). According to this Recommendation, which covers special repairs in and around the house, painting the house and gardening, the standardised amounts vary from € 135 per year (category rented house without garden with 'small' maintenance; 'small' is not further defined) to € 1,080 per year (category private house with garden and full maintenance). These 75

77 Rb Utrecht 14 October 2009, LJN BK3305, no 4.6.

amounts are based on a semi-detached house and can be slightly altered in the case of a detached house (factor 1.3), terraced house (factor 0.8) or flat/apartment (factor 0.7). Similarly to the Recommendation for Household Care, the Recommendation on Self-Activity may be used up to the age of seventy (in case of a permanent impairment to the victim's capacity) and can similarly be set aside if the victim's concrete costs exceed the standardised amounts. Thirdly, material costs may be claimed such as the costs of adjustments to the house or moving costs. Obviously, an indication by the municipality that the victim had to move to another place because, as a result of the incident, he was not capable of cleaning his single-family dwelling and of walking up the stairs may help to convince the court that extra moving costs must be compensated.<sup>78</sup>

*Case 4: 20-year-old student, living alone; very severe brain damage with serious residual effects; resident in a therapeutic living community; requires care by others; is not able to perform any household tasks.*

- 76 The student may be entitled to compensation for his/her future income losses (for which an assessment of possible career paths needs to be made), in principle, until the average pension age in the particular profession for which the student was preparing him/herself (generally the age of sixty-five). Additionally, there will probably be compensation due for his/her (future) loss of self-management. The material aspects of this loss (costs of professional help, alterations to the new house) may already be covered by the costs of his/her living facility or new housing as a separate head of damage in which case, of course, the court must be careful not to compensate the same loss twice. So if he lives in a special facility and is cared for, there will probably not be any specific compensation for the loss of housekeeping activities, since those costs will generally be included. Of course it may be different, and extra compensation will be possible, if additional damage is actually suffered (for example, to keep and maintain the victim's own household), which does not appear to be the case from the facts of the case. The non-pecuniary aspects of this loss may also give rise to compensation (art 6:106 CC); non-pecuniary damages may further be awarded for other non-pecuniary damage components such as pain and grief.

*Case 5: 70-year-old woman; married; severe injury of the leg; impairment of the performance of household tasks: 50 %; three-room flat; two-person household.*

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78 Rb Amsterdam 29 August 2007, LJN BB4557 (estimated at a mere € 1,500).

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Here the claimant may be entitled to obtain compensation for her need for help as a result of her injury. The court will be likely to assess how long the claimant would still have lived independently with her husband. Again we note the possibility for the court and/or the parties to base the actual calculation of losses on the amounts set out in the Recommendation for Household Care of the *Letseischaderraad* (Personal Injury Board). Leaving aside any social security entitlements, for a two-person household the Recommendation mentions a standardised amount for household costs (such as cleaning, groceries, cooking, etc) of € 160 per week. Given what we have said above, the amount of compensation the victim may be entitled to on the basis of these standards depends on her share of the household tasks prior to the accident. We assume her contribution to the household was 75 %, which would entitle her in principle to (at least) € 120 per week for the first three months of her recovery. After that period her costs are calculated on the basis of a standard rate of € 8.5 per hour. But if the victim's concrete costs of hiring professional help are in fact higher, then she may be able to receive compensation for her actual costs (if the court agrees that the higher hourly rate, of say € 9 or even € 10 is still a reasonable hourly rate). However, no compensation will be paid to the extent that she can receive (a budget for) care on a social security basis. The Recommendation is not conclusive and further, does not cover personal care the victim might need, (see no 51 above).