

Particle Accelerator in Law?

**Research into potential accelerating factors in judicial subproceedings
for personal injury and loss of dependency claims as regards out-of-
court negotiations**

SUMMARY

Rationale and problem definition

It has long been known that settlement of injury and loss of dependency (personal injury) claims after an accident can be difficult and can take a long time. The Subproceedings in Personal Injury and Loss of Dependency claims Act entered into effect on 1 July 2010 after initiatives aimed at facilitating settlements, such as self-regulation and specific mediation, turned out not to be sufficiently effective.¹

This Act introduced a new judicial procedure in order to facilitate out-of-court negotiations hereafter referred to as 'Subproceedings'. This is an application procedure which can be initiated both unilaterally and jointly and which has the following specific features. The costs of these proceedings are deemed to be out-of-court costs in the meaning of Section 6:96 of the Dutch Civil Code (CC), as a result of which the costs are in principle for the expense of the person who caused the damage or the person who is held liable for this (Section 1019aa, sub 2 of the Dutch Code of Civil Procedure (CCP)). What is more, the judge in the subproceedings has the job of both deciding on the application in subproceedings and binding the parties in such a way that they are able to reach an amicable settlement of the entire dispute (Section 1019w CCP) themselves. Furthermore, there is no direct remedy against a decision in subproceedings (Section 1019bb DCCP). An appeal is only possible via an application procedure if grounds for breaching this rule arise in the case law or in proceedings instituted by a writ of summons (1019cc, sub 3, DCCP). In such proceedings instituted by a writ of summons, the judge is bound by decisions in subproceedings concerning the material legal relationship just as he is by a binding final decision in an interim judgment. The judge is not bound by decisions in subproceedings that include an order.

The Minister of Justice has announced in Section V of the Subproceedings Act that within four years after this Act takes effect, he will send a report to the States General on the effectiveness and the effects of this Act in practice. For that reason, in 2014 the Research and Documentation Centre (WODC) issued instructions at the request of the Central Legal Department for a study to be conducted, stating the problem as follows:

- Is the Subproceedings Act effective, meaning does the Act speed up the settlement of personal injury and loss of dependency claims? If this is not or not sufficiently the case, what is the reason for this?
- What are the positive and the negative consequences of the Subproceedings Act? Are there also side effects?
- In what areas could the Subproceedings Act also be opened up and on the basis of which arguments?

Because of the short timeframe in which this study was carried out, it only investigated the question whether subproceedings speed up out-of-court negotiations.

Research method

No quantitative measurement has been performed which compares the duration of negotiations on personal injury claims before and after the introduction of subproceedings. Such data are not recorded and tracing these turned out to be unfeasible within the given

¹ Act of 17 December 2009 amending the Code of Civil Procedure, setting up subproceedings to promote the out-of-court settlement of personal injury and loss of dependency claims (Bulletin of Acts and Decrees 2010, 221).

timeframe, if this were even possible at all.

This report is based on qualitative, exploratory research performed for the purpose of a dissertation that is still to appear on the effects of subproceedings on the actors involved in an actual negotiation situation regarding personal injury claims.²¹⁵⁶ We have used various research methods to study how subproceedings work in practice, in order to create a reasonable picture of the variety of effects on the behaviour of the various actors, and in particular the various potential negotiation relationships. A distinction has been drawn in this regard between the various accelerating factors in the phase before and the phases during and after subproceedings. It ensues from this qualitative, exploratory research that it can do no more than make a plausible case that subproceedings contribute to more rapid settlement of personal injury claims and to define which factors could influence this. This is also the case because subproceedings form part of a multiplicity of initiatives intended to improve the claims settlement process, which means it is not possible to isolate the consequences of subproceedings from this.

In addition to literature, jurisprudence and observational research, this report is mainly based on interviews with actors who were involved in an actual negotiation situation: victims, claims handlers at liability insurers and the various potential representatives (injury claims adjusters, legal expenses insurers and lawyers). We also conducted a group interview with judges involved in subproceedings. What is more, three case studies were carried out with the purpose of gaining greater insight into the interaction between parties and the claims settlement process as a whole. We studied the settlement of a claim following a traffic accident in a case which could be finalised immediately after subproceedings (model case), a case that was fully escalated after subproceedings and a case that is situated between a 'model case' and an escalated case. We interviewed the six lawyers in these cases and studied their files. The findings have been anonymised and incorporated into this report.

Findings

Who commences subproceedings?

In practice it turns out that subproceedings are almost always instituted unilaterally by the victim. Liability insurers hardly ever make use of such procedures because of the expense they entail, the risk of creating a negative precedent and the barriers to taking legal action against a victim. The number of subproceedings that have been instituted is:

Source: Council for the Judiciary

Court	July - December 2010	2011	2012	2013	January-July 2014
Canton	8	35	79	67	unknown
Civil	34	210	248	250	unknown

The mediation office of the Personal Injury Board will play a limited, informative role at the request of the parties when instituting subproceedings.

² This dissertation is expected to appear in 2015. Promoters: Professor E. Bauw (Professor of liability law and the administration of justice at the Faculty of Law, Economics, Administration and Organisation at the University of Utrecht and Professor of administration of justice at the Faculty of Law at the University of Amsterdam) and Professor E. Niemeijer (Endowed Professor of Empirical Sociology of Law at the Faculty of Law at the Vrije Universiteit Amsterdam).

What is more, rule of conduct 13 of the rules of conduct of the legal profession, which states that settlement negotiations between lawyers cannot be disclosed without the permission of the other party, does not prevent the institution of such proceedings. There are virtually no negotiations between two lawyers and if this does occur and there is conflict between the rule of conduct and the law, then the law takes precedence.

Accelerating factors prior to potential subproceedings

Subproceedings speed up the out-of-court negotiations before such proceedings could potentially be commenced, because they contribute to rectifying the unequal balance of power between the inexperienced victim on the one hand and the experienced liability insurer on the other. Thanks to these proceedings the victim gains access to knowledge, information and an independent legal assessment, which he does not have to forego because of a lack of cooperation with the other party or for financial reasons. An improved balance of power means that the parties can negotiate better with each other.

What is more, subproceedings have a shadowing effect on the negotiators. Merely threatening such proceedings is sometimes enough to bring the negotiations back up to speed again. Liability insurers adjust their policies preventively and are more communicative and cooperative in order to avoid subproceedings. Subproceedings therefore reinforce the trend towards placing the victim at the centre of things and to strive towards an amicable solution, a trend that already started up with the Code of Conduct for Handling Personal Injury Claims and other recommendations.

Accelerating factors during and after subproceedings

The accelerating effect during and after subproceedings is in particular to be found in the fact that the parties discuss part of the dispute in an informal manner under the guidance of a judge in subproceedings as well as, if so required, in the decision given by the judge in the subproceedings. Singling out one 'salient' point without putting together full proceedings, prevents all kinds of other points that could also be a problem from actually becoming one. The (legal) decision-making function offers the possibility of gaining clarity within the open legal framework in which the parties negotiate, as a result of which they can take the next step. It is also possible to benefit from this mode of lawmaking in other cases, provided that the lawmaking is clear.

The average completion time for subproceedings until now has been 3.7 months in the civil sector and 4 months in the cantonal sector. This is relatively fast compared to the duration of other legal proceedings, in so far as it is possible to make a comparison, due to the very specific features of subproceedings. However, negotiations usually remain at a standstill during that period. It also depends on the outcome of the proceedings whether the negotiations can continue without further delay. In any event the decisions generally appear to be clear and to be given without reservation.

After an amicable settlement between parties or a decision where an application is granted or denied on substantive grounds, the parties generally seem able to continue the negotiations. They generally interpret the decision in a businesslike manner and not personally. Continuing negotiations also appears possible following rejection on the basis of the proportionality criterion, provided that judges offer the parties some help in this regard; the latter is however not yet a standard practice. Continuing negotiations after a judgment of inadmissibility appears to be less simple, because a subproceedings application creates bitterness and the parties do not benefit from the decisive and binding function of the subproceedings judge. If the person who submitted the subproceedings application that has

been declared inadmissible does not then moderate his position, relations will deteriorate and the delay will increase.

It is not possible to state with certainty whether fewer proceedings on the merits are commenced because of subproceedings or whether these last a shorter time if such proceedings are commenced, because no specific data are recorded about this. It is true that the number of proceedings on the merits before the civil commercial chamber dropped in various categories according to the literature during 2011 and 2012. Also the 0.2% of judgments on appeal before appeal courts that were published on 1 July 2014 at www.rechtspraak.nl offers an indication that few proceedings on the merits are initiated. However, it cannot be ruled out that the drop in proceedings on the merits is (partly) caused by other factors.

Positive side-effect

The positive side-effect for the judiciary appears to be that subproceedings are an efficient instrument. They save time because they require less preparation time than proceedings on the merits, where a decision has to be taken on all aspects. But this only succeeds if proceedings on the merits would otherwise be instituted in those cases and judges would not be confronted by a flood of cases as a result of subproceedings.

Expectations of the legislators which have not yet been realised

No evidence has been found to support earlier use of subproceedings and any associated acceleration. After all, making threats unnecessarily or too quickly makes negotiations more acrimonious, and all the representatives anyway seek an amicable settlement, only initiating proceedings if there is really no alternative. Nor has the expectation been realised that both parties would make use of this procedure. Liability insurers make virtually no use of this. Moreover, this reluctance increases if they negotiate with someone from the same insurance sector or a closely related sector, which is the case in the majority of negotiating relationships.

Furthermore, the theory that subproceedings emphasise mutual dependency as a result of which the focus of the parties in the subproceedings does not result in winning without compromising and the parties take a more constructive attitude in such proceedings than in other legal proceedings, is not correct. Just as in other civil law proceedings, polarisation and juridification take place in subproceedings.

Increasing facilitative effect

A number of factors have been found that can slow down negotiations. This concerns the processing time for subproceedings, declaring a claim inadmissible, dismissal on the grounds of the proportionality criterion, not exercising the binding function sufficiently, a lack of uniformity in the jurisprudence, and insufficient or biased transfer of the case following subproceedings. A lack of uniformity as regards the application of subproceedings, for example, increases the risk of careless and improper use of such proceedings, which will prolong the duration.

It is also important for the facilitating function of judges in subproceedings that they continue to devote attention to the processing times, which have been relatively rapid until now. The subproceedings fail in their objective if rapid settlement is no longer possible. In addition, judges in subproceedings can increase their facilitating effect by striving for uniformity both substantively and as regards the application of subproceedings. They can also discuss rejection of the subproceedings application on the grounds of the

proportionality criterion with the parties and provide help with continuing the negotiations. They can also pay more attention to the binding function by discussing the course of the negotiation process and the consequences of the subproceedings. Making use of mediation-type techniques at the right time, in the right way, or appearing in court or referring the parties to mediation requires experience and training in specific skills. Lastly, the judges can encourage parties to pay attention to the transfer of the case after subproceedings and to reach agreements on this.

Representatives and liability insurers can increase the facilitating function of subproceedings by agreeing to standardise out-of-court costs. Imposing standardisation by means of regulations is, for the moment, not a solution, as this undermines the core of the subproceedings system (compensating the real costs on the part of the victim and no fixed amounts) and therefore the success of the proceedings (restoring the balance of power). These actors can also ensure that the transfer of a case after subproceedings does not result in unnecessary delay, by transferring the information impartially and in full, and clearly communicating who will continue the negotiations and who will be in control.

Expanding the area of application

The fact that there is a need for subproceedings is apparent from the private member's bill proposed by the parliamentarian Van der Steur concerning the promotion of mediation in civil law (Parliamentary Records 2012/13, 33 723, no. 1) and the preliminary draft bill in order to make it possible to settle large-scale claims in a collective action which entered the internet consultation phase in July 2014. Both of these proposals already use parts of subproceedings, namely the decision function regarding subproceedings and discussing a 'salient' point in an informal manner under the guidance of a subproceedings judge at the hearing, where the judge can exercise his binding function. The specific costs tariff has been omitted here.

It follows from this research that if consideration were to be given to opening up (parts of) subproceedings in areas other than personal injury cases in order to speed up negotiations, it is important first to consider which negotiation relationships and factors hindering negotiations arise in the area in question. An analysis of the negotiation relationships is important because this research shows that the manner in which subproceedings speed up negotiations depends on the negotiation relationship in question. An analysis of the factors that hinder negotiations is important in order to be able to determine whether there is a need to apply the entire procedure or only some specific parts of this. Thus the specific costs tariff in the personal injury field works so well because it helps to correct the skewed balance of power in this area. This tariff is also possible in this area because the costs are virtually always borne by the liability insurer, which also has the necessary financial means to be able to bear these costs. This could be different in other areas.

It is also possible to consider expanding the application area of the subproceedings as regards personal injury with 'first-party' insurers who offer cover for this type of damage, such as (private) incapacity for work insurance or insurance for injury arising from participation in medical scientific research ('trial subjects insurance') because debates occur in these areas that are comparable to those in the current area of application.

Suggestions

It is necessary to reflect on the way that subproceedings are financed. The comprehensive control function of the subproceedings judge is not always in proportion to the financial

payment that a court receives per subproceedings application. This is particularly important because of the number of subproceedings that are initiated, the seriousness of the cases in those proceedings and the expectation that these proceedings will continue to be used, certainly if the area of application is expanded.

Further research is needed into whether the lack of a direct remedy against a subproceedings decision fosters or does not foster the willingness of the parties to negotiate. Such research needs to take account of the feasibility and the effect on the negotiations of the distinction in proceedings on the merits between subproceedings decisions concerning the material legal relationship and subproceedings decisions that concern orders, and also the effect that the costs of subproceedings are always remunerated in their totality in proceedings on the merits. If the above-mentioned private member's bills reach the statute book, it will also be necessary to carry out research into the effect on the negotiations on the new elements included in those bills in relation to the current subproceedings: electronic proceedings and the possibility that the court will itself decide on an agreement if the parties cannot reach one themselves.