De belangenbehartiger bij letselschade

Over het bevorderen van kwaliteit en het tegengaan van zorgelijke praktijken op de markt voor belangenbehartigingsdienstverlening bij letselschade

In opdracht van het Wetenschappelijk Onderzoek- en Datacentrum

Uitgevoerd door

Onderzoeksconsortium Radboud Universiteit Nijmegen, Erasmus Universiteit Rotterdam, Universiteit Utrecht, Vrije Universiteit Amsterdam

Juni 2024

Onderzoekers

Willem van Boom (RU; projectleider)
Rianka Rijnhout (UU)
Han Gulyás (UU)
Jolette Derksen (RU)
Rosalba van Tilburg (UU)
Emanuel van Dongen (UU)
Michael Faure (EUR)
Arno Akkermans (VU)

WODC Project nr. 3396

Summary

The claims management professional in personal injury cases
On promoting quality and countering troubling practices in the personal injury claims management and litigation services market

1. Problem outline and objective
This study deals with the quality of services provided to victims of personal injury in the Dutch market for personal injury claims management and litigation services. The injured party who suffers damage due to injury and wishes to obtain compensation from the liable party or his liability insurer through liability law, often turns to a service provider – a lawyer or other service provider – to achieve this. Thus, by claims management and litigation services we mean the assistance provided to the injured party based on a services contract. Where such contracts are concluded, we can speak of a market with supply and demand, with service providers forming the supply side.
The objective of this study is to gain an understanding of the composition of the management and litigation services market, to gain an understanding of the quality of such services and the factors that promote and hinder that quality, and to gain an understanding of possible improvements in that quality. Among the reasons for the study were recent reports about malpractices in the personal injury sector and a parliamentary motion calling on the government to investigate alleged malpractices by rogue service providers who are not affiliated with the *Dutch Personal Injury Quality Mark* (NKL).
Provision of management services is not a protected profession. Service providers do not have to hold law degrees, let alone attorneys admitted to the bar, nor do they have to be affiliated with a specialization association, acquire some license, hallmark, or other guarantee of quality. There are all kinds of groups of service providers working in this market. At one end of the supply-side spectrum, there are specialized lawyers who are subject to professional and entry requirements, disciplinary law, and substantive requirements of their specialty associations, and at the very opposite end there is the completely unaligned, unorganized, and unregulated group of service providers. In between, there are many shades; for example, non-specialized lawyers who are not affiliated with a professional association or freestanding, self-proclaimed service providers who do not have a particular professional qualification.
It is to be expected that given the heterogeneity of the field of management and litigation services, there are also differences in quality. But what is quality in this context? In the abstract, everyone will subscribe to the importance of good quality personal injury treatment. It becomes more difficult if we ask follow-up questions, such as: what exactly does good quality mean, what should it cost, is it justified that there are differences in quality, can a 'lower limit' be identified? Which practices promote quality, and which hinder quality? And are interventions in this market necessary, given what we know about the quality of supply?

2. Research questions, method, and demarcation
Against this background, we conducted research using the following research questions:

1. What does the market for advocacy services look like and what rules apply in that market (see below under 3 and 4)?

2. What do the most concerned parties think about quality of advocacy services? (see below under 5 and 6)
3. What goals should be pursued by the system of interest representation in personal injury settlement? (see below under 6)
4. What can be said about quality promoting and quality impeding factors from the stakeholder perspective and the law economy perspective? (see below under 6)
5. In this light, which interventions can be considered without question and which issues would deserve further investigation, also in view of the government's perspective on quality (see below under 7)?

The research involved a combination of legal-empirical and legal-economic methods. We conducted structured desk research and semi-structured interviews. We then confronted the findings with three theoretically grounded perspectives on quality to identify several relevant factors promoting and impeding quality. Then, partly following an expert meeting we held, we were able to make several policy recommendations. The main delineation we applied to our research is that we limited ourselves to the usual civil law settlement of personal injury claims, with an emphasis on situations where a liability insurer is involved in the settlement. We excluded the criminal procedure compensation route entirely, in part because the criminal law route is different in many respects from the civil route and the role of liability insurers in the criminal route is significantly smaller. There are also several limitations to our study. For example, our study should be seen primarily as exploratory. The facts and figures we have collected are indicative and far from exhaustive. Indeed, in many respects, the figures are incomplete. A sharp picture of the scale of certain phenomena has not emerged. We also ran into several limitations in the implementation phase. For example, despite several attempts, it proved hardly possible to find freestanding, self-proclaimed service providers willing to talk to us.

3. What does the market look like and what rules apply?

As indicated, the supply of personal injury claims management services constitutes a free profession and so is litigation representation for claims up to € 25,000. There is great heterogeneity in the supply of these services. There are specialized attorneys (members of LSA and ASP), non-specialized attorneys, lawyers, non-lawyers who are affiliated with a professional association (NIS, NLE), register (NIVRE) or quality mark (NKL), and non-lawyers who are not affiliated with anything (the "unattached" advocates) operating in this market.[1] The training, admission and quality requirements differ between these groups, and it can therefore be assumed that the cost price of services also differs.
What rules apply in the market? This varies by group: attorneys admitted to the bar are subject to specific rules regarding access to the market, quality of service, and supervision and review of compliance. Those rules do not apply to freestanding management service providers. But there are basic rules that apply to all groups alike. The contract between injured party and service provider is governed by general consumer law protection rules. From those basic rules several requirements can be derived that the services provided must comply with. For

[1] LSA stands for Vereniging van Letsel Schade Advocaten (Association of Personal Injury Attorneys), ASP stands for Vereniging van Advocaten voor Slachtoffers van Personenschade, (Association of Attorneys for Victims of Personal Injury) NIS stands for Nederlands Instituut van Schaderegelaars (Netherlands Institute of Claims Settlers), NLE stands for Nederlandse Letselschade Experts (Dutch Personal Injury Experts), NIVRE stands for Nederlands Instituut van Register Experts (Netherlands Institute of Chartered Experts), NKL stands for Nederlands Keurmerk Letselschade (Dutch Personal Injury Hallmark).

example, there are the rules on general terms and conditions, and numerous consumer law rules apply to the client acquisition process, which impose requirements on advertising and on information to be given prior to the conclusion of contracts. Also relevant is the context of liability law and statutory damages law, as the service is provided takes place "in the shadow of liability law", and there are certain standards and practices in personal injury practice that flesh out the quality that can be expected. All in all, this leads to the conclusion that all service providers, including the unaffiliated service providers are already required to meet the standard of the "average competent and careful service provider" in terms of legal, medical and tax knowledge and understanding of the relevant customs and practices in personal injury settlement.

A numerical picture of the services market is not easy to provide. It is estimated that insurers pay out €1.5 billion in compensation annually to over 70,000 injured parties. Of the amounts paid out, probably about 20% is to pay for claims management and litigation services. In more than half of the cases a claims management service provider is involved in the settlement on the side of the injured party. We estimate the number of active service providers to be at least 1,350 persons, of which about 70% appear to be affiliated with LSA, NKL, NIVRE et cetera. Of the more than 600 attorneys who, according to the NOvA jurisdictional register, act as service providers, some 20% do not appear to be affiliated. Of the non-attorneys, the majority are affiliated with NIVRE and/or NKL. The number of service providers who are completely freestanding and unaffiliated is, in our estimation, a minority. Exactly how large that group is, how stable its composition is, and whether there are one or more common characteristics among this group, we have not been able to determine. Moreover, the figures we do have do not tell us how volumes are distributed in the market; as a result, we do not know, for example, whether only the most difficult or bulky injury cases end up with the most specialized lawyers (who we suspect also have the highest cost).

We have also tried to map how an injured person "ends up" with the service provider. Again, there is relatively little public information about this, nor about what steps an injured party takes when choosing from the range of services available. It turned out that there are numerous "routes" to the service provider, from word of mouth from former clients to active recruitment with *Google Ads*. Some routes involve intermediaries making money from "the file" of the injured party ("paying for leads") and others do not.

4. Cost recovery and reward structures

In outlining the market, we found that claim management service provider remuneration is in fact a *hybrid* phenomenon. First, there is the cost recovery system (Art. 6:96(2)(b) and (c) of the Civil Code), which gives the injured party the possibility, in many cases, of being reimbursed by the liable party for, among other things, the reasonable costs of extrajudicial legal assistance if liability is either undisputed or positively established. Since it is estimated that more than 90% of all personal injury cases are settled out of court, it can be assumed that Art. 6:96(2) BW is the decisive framework for cost recovery in as many cases. In the rare cases where the court must rule on the reasonableness of the costs charged, it seems that in a small number of cases this test results in the amount claimed not being awarded in full. However, there are indications that judges have become more critical over time with respect to the review of the reasonableness of the hourly rate. In practice, insurers try to efficiently settle the bulk of personal injury cases with a standardized fee (the so-called *BKB tier*), but the use of that BKB tier is not accepted by attorneys and there are also drawbacks to its use.

Secondly, the contract between the injured party and the service provider typically includes a remuneration structure agreed upon. This involves the contractual agreement between injured party and service provider on the fee the injured party will owe to the contractor. The heterogeneity in supply that we identified among the different groups of service providers appeared to deepen at this point. Attorneys are subject to specific rules when it comes to remuneration. The hourly rate is left to the market, but any form of remuneration other than per hour worked is less common and, in some cases, even prohibited. Unaffiliated non-lawyers are bound only by the basic rules of contract law, and those rules leave room for any method of calculating remuneration. The result, for example, is that unaffiliated service providers are in principle allowed to make *no cure no pay agreements* (NCNP; result-dependent remuneration) and *quota pars litis agreements* (an NCNP agreement in the form of a percentage of the financial result) with injured parties who give their informed consent, while this is not simply allowed for lawyers and NKL-affiliated advocates.
The conclusion is that the topics of cost recovery and reward structures are strongly related: in personal injury practice, a large part of reward is placed with (the insurer of) the liable party through the rules of cost recovery. This gives the reward a hybrid character. What we see is that this creates a dynamic between injured party, advocate and liability insurer that is specific to the personal injury industry. These dynamics give rise to a special responsibility for the judiciary, which must review the reasonableness of the recovery of costs when required. As mentioned above, most cases do not go to court, and when a case does go to court it sometimes leads to the reasonableness of the hourly rate and/or the number of hours incurred being called into question; however, we cannot say that the court is an active supervisor of the cost recovery system of Art. 6:96(2) BW.

5. What are the concerns about practices?

What are the concerns about certain practices that occur according to personal injury professionals and other experts? First, we inventoried what practices are so observed by and among the different groups of service providers and in what sense they are labelled as worrisome in the debate about them. This debate is largely conducted by the different groups and their spokespersons. We also inventoried what solutions are mentioned in that debate. The practices about which concerns are raised vary enormously: from misleading advertising, the use of lures and other unfair recruiting practices, the delivery of substandard quality, to the whipping up of damages suffered and practices that lean toward fraud and embezzlement. We also came across concerns about the practice of “double claiming”, whereby the service provider claims against the insurer for the recovery of costs under Art. 6:96(2) of the Civil Code and at the same time negotiates a result-dependent remuneration against the injured party, often without the insurer and injured party knowing from each other that they are each paying the service provider. A practice that also stood out concerns paying for files (also called paying for “leads”), while the injured party is unaware of it.
The review of practices about which concerns are raised led us to the following insights. First, we know relatively little about the extent to which these practices occur. Of some practices, it is plausible that they occur more among freestanding service providers than under affiliated service providers, but we found no hard evidence in this respect. Second, the legal differences between the practices mentioned are great. Some of these practices are outright criminal acts, and others are probably in violation of consumer law rules. There are also practices that are not banned outright but only for some service providers. So, in a sense, these lead to an “uneven playing field”. Third, our survey shows that affiliated service providers are concerned

about the quality of unaffiliated service providers and the impact that competition by this group has on their own livelihoods and market share. In this regard, it is notable that many complaints are about revenue models and how they may or may not be unethical and unacceptable, but little attention is paid to what victims themselves consider important. Thus, in essence, our research did not provide any insight into the scale of the practices observed, leaving aside the question of what can be considered a malpractice.

6. What is quality?

Next, we asked the question of what exactly quality in claims management and litigation services is. If we define quality as assessing the process and its outcomes considering the stated goals of the process versus requirements and expectations that involved parties and society as a whole may have in that process, we run into an obstacle. Each party involved may have its own goals in mind, while society's expectations may be different. Do we use the notion of quality as the government had in mind when formulating liability and compensation law and when developing policy in this area (the *government perspective*)? Or do we let the notions of quality that focus on the most affected parties such as injured parties, their advocates, the liable parties, their insurers, and the judiciary prevail (and if so, which of these affected parties have the heaviest voice; the *stakeholder perspective*)? Or should the notion of quality for society prevail (the *societal perspective*), so that aspects such as cost-effectiveness, acceptable outcomes, and optimization of settlement behaviour, for example, can play a role?

To make the question of quality concrete, we chose to examine three perspectives on quality in relation to each other: (i) the government perspective, (ii) the stakeholder perspective, and (iii) the law and economics perspective.

Viewed from the government perspective, it can be concluded that the legislator, on the one hand, recognizes that society has an interest in a good quality of personal injury claims management and litigation services, but on the other hand, broadly places the responsibility for determining that quality and safeguarding it with the social field, more specifically insurers and affiliated service providers, and the courts. There would be no reason for specific legislation in addition to the general legal frameworks, no matter how important all initiatives from the social field are considered.

When looking at the stakeholder perspective, it is noteworthy that in recent decades a development has taken place in which, in addition to professionalization of the services industry, more attention has been paid to the immaterial needs of injured parties, given the nature, severity and duration of the injury. An injured party's perspective, in other words. Quality of service providers can thus be concretized through several themes, such as expertise, transparency and communication, empathy and respect, efficiency and timeliness, legal integrity, and customer satisfaction. If we contrast the existing knowledge about the injured party's perspective on quality with the various quality instruments that exist in personal injury practice (think of the Code of Conduct for the Treatment of Personal Injury and the principles of the NKL), i.e., with the perspective of certain service provider groups, we can see that there is still some light between the injured party's perspective on quality and the perspective that these instruments choose.

From a law and economics perspective, quality aspects are the building blocks for a functioning market. If injured parties, when choosing a service provider, know what their preferences are and how they rank them, if they are also aware of the legal framework, and if they can properly assess the quality of the offerings of the various service providers as well as

their costs, then a well-functioning market for services would exist: the injured party would have sufficient information to weigh quality and price of the offerings in light of their own preferences. For numerous reasons, the existing market for services deviates from this theoretical premise. Among other things, there is an inherent information asymmetry between the injured party as a “one shot player” and the service provider as a “repeat player”. With that, while some intervention is needed in this market, what that should be is not evident. Introducing a licensing system (the “protected profession” model) imposes costs on society in many ways, while it may stand in the way of innovation and does not in itself resolve the differences between the perspective of injured parties and service providers on quality. Many quality gains have already been made in recent years through self regulation, and we therefore believe that the scale of malpractice must be significant to determine whether the likely benefits of a statutory licensing scheme outweigh the costs. Our research, as noted above, did not provide insight into the scale, leaving aside the question of what qualifies as a malpractice. At the same time, less drastic interventions are also conceivable - and may already be possible today under existing law - to counter evident abuse of vulnerability and/or information asymmetry and to further improve the functioning of the claims management and litigation services market.

7. Promoting and hindering quality: factors and schools of thought

Against the background of the three perspectives on quality, we arrived at an analysis of quality-inhibiting practices and discussed possible interventions to take quality a step further. A quality-enhancing effect will first be able to come from further improving the information generally available about what can be expected from a personal injury case and improving the specific provision of information before and during the services-rendering process.

A better alignment of services with the material and immaterial needs of the injured party is the second quality improvement aspect that deserves attention. If the service provider wants to put the injured party at the center, the "know your client" principle must apply and be fleshed out. This connection to the material and immaterial needs of the injured party makes freestanding services as such a legitimate professional practice.

The third aspect concerns fraud. Fraud is obviously an obstacle to quality and combating it is a collective good to which insurers already have several instruments. Those instruments are not a panacea, for example because detection of some forms of fraud is not easy. In addition, there are obvious unfair business practices; one of our recommendations is to activate the Dutch Authority for Consumers & Markets (ACM) to conduct targeted investigations and to proceed to enforcement. This is related to the fourth aspect: deception, obfuscation, and opaque financial arrangements. We have gone into this relatively deeply because, in our estimation, these practices affect the quality of service provided by service providers. They include misleading advertising, obfuscation of how costs are recovered and how that recovery relates to fee agreements, the practice of paying for leads and “double billing”. We believe that these practices are, or can be, quality inhibiting and that consideration should be given to limiting them.

The last aspect relates to the central function that liability insurers have. Through the mechanism of cost recovery of Art. 6:96(2) BW, they can fulfil a role of *facilitator* as well as *gatekeeper*. They are facilitators because cost recovery makes it possible to give injured parties the assistance they deserve, while they can be gatekeepers because application and clarification of the rules of cost recovery may well prove to be the key to tackling some of the harmful practices. Insurers seem to have more opportunities to set clearer limits on certain

practices and to apply differentiation on an objective basis in the context of cost recovery. Our impression is that this will not happen by itself, and so the central government must take the lead and flesh out this gatekeeper function. In this regard, we recommend that a delegation basis be introduced in Section 6.1.10 of the Civil Code so that this government direction can take further shape.
Considering the foregoing, we come to the following recommendations, which are addressed to various parties:

1. Central government is to assume responsibility for implementing the following recommendations in a cohesive and coordinated manner
2. Continue efforts to detect insurance fraud, both from service providers alone and fraud in cooperation with injured parties
3. Provide a focused enforcement investigation into violation by service providers of consumer protection provisions under the Consumer Protection Enforcement Act
4. Continue to improve the connection between the needs of disadvantaged people and what claims management service providers offer in terms of services
5. Provide reliable public information on different groups of service providers (and their educational requirements, audit requirements, disciplinary and complaint systems), the personal injury process and prevailing remuneration structures (objective information platform)
6. Expressly allow the liable party and its insurer to also correspond directly with the injured party under conditions so that standardized information about the rights of injured parties also becomes known to the injured party
7. Allow the liable party and its insurer to ask the injured party directly about the content of the contract with the service providers and to verify whether payment should really be made to the representative
8. As a service provider, be fully transparent to the injured party - both before and during the conclusion of contract and upon its termination - regarding the recovery of costs from the insurer
9. Insurers should be able to differentiate in their work processes between 'trusted' advocates and other service providers
10. Consider amending the Dutch Civil Code rules on damages in such a way that a basis for delegation is created for further rules by lower legislation on the standardization of cost recovery, for example after advice by a standing committee on personal injury
11. Prohibit “double billing” without clear informed consent of the injured party whenever Art. 6:96 paragraph 2 of the Civil Code already applies to the file.
12. Require service providers who pay for a lead to obtain the contract with the injured party to be fully transparent about this with the injured party, preferably based on uniform transparency principles.
13. Consider the introduction of an ADR committee for disputes about Art. 6:96(2) of the Civil Code.

In addition, we recommend:

14. Further investigate whether it should be forbidden for a service provider to stipulate in a contract that any non-reimbursable part of the fees can still be recovered from the injured party.
15. Investigate whether it is desirable (and whether it is permitted under competition law), in addition to the use of the BKB tier, to standardize the compensation pursuant to Art. 6:96 (2) of the Dutch Civil Code according to the added value of the representation of interests, whereby the reasonable hourly rate is attuned to objective criteria such as years of experience and degree of specialization.
16. Examine the positioning of the Dutch Personal Injury Board (De Letselschaderaad).
17. Evaluate the operation of the BKB tier.

We appreciate that our recommendations require significant efforts from various parties. Some recommendations are easier to implement than others, and some offer more of a first step than a ready-made solution. The recommendations have one thing in common: they assume that the central government will take *more* direction than in the past and work *harder* than ever to coordinate the various efforts. We feel, however, that this is hardly too much to ask since the quality of personal injury settlement is to some extent a collective good.