De deelgeschilprocedure. Kan procederen onderhandelen stimuleren?
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Summary

The Subproceedings for Personal Injury and Loss of Dependency Claims
Can Judicial Proceedings Improve Negotiations?

Rationale and problem definition

The settlement of personal injury and loss of dependency claims following an accident can be a long and arduous process. This has inspired a wide variety of initiatives in the personal injury branch to improve the process. However, as these failed to achieve substantial improvement, media and political pressure for a more binding solution increased. The Subproceedings in Personal Injury and Loss of Dependency Claims Act entered into effect in 2010.[1] This Act introduced a new judicial procedure hereafter referred to as 'subproceedings', which gives the parties the opportunity to submit an aspect of their dispute to the courts during their out-of-court negotiations. After the procedure, they are expected to resume the negotiations and reach an amicable solution. In short, subproceedings are a judicial procedure that serves to facilitate out-of-court negotiations. They thus differ from other civil proceedings that generally aim to resolve the entire dispute. In order to establish whether subproceedings really do improve the settlement of personal injury claims, a study was undertaken of how the procedure works and its effect on the out-of-court negotiations.

Research method

Exploratory research was conducted in order to establish the effect of subproceedings. Various research methods were used, varying from literature research to jurisprudence research and empirical research in the sense of case studies, interviews and observational research. The relevant legal literature was used to determine the

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

characteristics of the proceedings and how they relate to other methods of dispute settlement. This also involved ascertaining which rules affect the parties in the negotiations and the kinds of disputes that can arise. This was followed by an analysis of the decisions issued in subproceedings that were published on rechtspraak.nl on 1 July 2015, in order to determine whether the parties did institute subproceedings for such disputes and how the judges applied the procedure.

However, negotiations are impeded not only by judicial disputes but also by what takes place between the parties outside the legal circuit. An analysis was therefore performed of a number of standard works on negotiation supplemented with relevant literature acquired using the snowball method in order to determine what negotiation is and under which general conditions parties are able to negotiate. This was followed by an examination of whether the negotiation process for the settlement of personal injury meets these conditions. For this purpose, observational research was performed at two liability insurers, an injury claims adjuster and a law firm. In addition, three case studies were carried out to gain a better understanding of the settlement process as a whole as well as of the interaction between negotiators. The cases studied included one case that could be finalised immediately after subproceedings (model case), one case that fully escalated after the proceedings and one case that was somewhere between a 'model case' and one that escalated. The six lawyers involved in these three cases were interviewed separately and their files were scrutinised. Finally, interviews were conducted in order to gain the most reliable possible impression of the effects of the subproceedings on the various actors involved in the negotiations. A distinction was made between the phases before, during and after subproceedings. For each of the five categories of actor that can be involved in an actual negotiation situation (victim, claims handler at liability insurer, injury claims adjuster, legal expenses insurer and lawyer), five people were interviewed. A group interview was also conducted with judges from various courts, and several subproceedings were attended.

Characteristics of Subproceedings

Subproceedings are an application procedure to which the legislator has assigned specific characteristics in order to facilitate negotiations. They are provided for in Book 3 of the Dutch Code of Civil Procedure (hereafter CCP) under title 17 'Judicial procedure in subproceedings in personal injury and loss of dependency claims' in sections 1019w up to and including 1019cc.

Subproceedings can be instituted either unilaterally or jointly (Section 1019w CCP). An application is possible pertaining to or in relation to a part of the matter between the parties to which the legislation applies and the resolution of which can aid the establishment of a settlement concerning the entire claim. The costs of the proceedings are deemed to be out-of-court costs (Section 1019aa, sub. two, CCP) in the sense of section 96, sub. two, of Book Six of the Civil Code (hereafter CC). As pecuniary loss,

the costs therefore qualify in principle for full reimbursement by the liable party. Furthermore, the court has the task of both reaching a decision on the application and binding the parties in such a way that they are able to resume the negotiations (Section 1019w, sub. one, CCP).

The code also contains a number of provisions to encourage the parties to resume the negotiations after the subproceedings rather than continue litigation. For instance, there is no direct remedy against a decision in subproceedings (Section 1019bb CCP), and an appeal can only be lodged if, following the proceedings, a summons procedure takes place in which an appeal can also be made against the partial dispute proceedings (Section 1019cc, sub 3, CCP). The Supreme Court of the Netherlands has since confirmed that it is also possible to appeal to the court of cassation.[2]

Furthermore, 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 (Section 1019 cc, sub. 1). The court of first instance in proceedings on the merit is thus bound by these decisions, unless further information demonstrates that the judicial or factual basis of this decision was incorrect. However, the binding nature does not extend to decisions that state that a certain action must be performed, such as making a payment or providing certain data (Section 1019cc, sub. 2, CCP). These decisions form as it were provisional rulings, such as a decision in interlocutory relief proceedings. The costs of the subproceedings continue to qualify for full remuneration, even if proceedings on the merits are required after the subproceedings.

To conclude, the Supreme Court has confirmed that an independent appeal is possible by means of an application procedure, if one or more of the grounds for allowing an appeal arising from the case law of the Supreme Court is present.[3]

Findings: legal section

Relationship to other methods of dispute settlement

Subproceedings supplement existing out-of-court and judicial dispute settlement methods; their specific characteristics have the effect of increasing the available options. On the one hand they are an alternative to binding decisions, arbitration and the proceedings at the district court (Section 96 CCP). As it is possible to institute

2. Supreme Court 19 June 2015, ECLI:NL:HR:2015:1689.
3. Supreme Court 18 April 2014, ECLI:NL:HR:2014:943. The grounds for breaching this are: the judge has incorrectly ventured beyond the range of application of the regulation in question, the judge has failed to apply the regulation or the judge has neglected a principle of law that is so fundamental that it prevents the fair and impartial consideration of the case.

subproceedings without the agreement of the other party, this ensures that access to proceedings is not blocked as it would be if joint applications were mandatory. Furthermore, the victim does not have to refrain from instituting proceedings on financial grounds since the liable party is, in principle, responsible for the costs. On the other hand, subproceedings are a supplement to mediation, interlocutory relief proceedings and proceedings on the merits. Subproceedings make it possible for parties who are in mediation to receive a legal opinion. Furthermore, in contrast to interlocutory relief proceedings, a declaratory decision can be received in subproceedings. Finally, subproceedings can be instituted at an earlier stage than proceedings on the merits, although they are also possible during proceedings on the merits. The fact that aspects of subproceedings are already included in a legislative proposal and a private members'bill indicates that there is a need for them.

Which parties institute subproceedings and why?

Although the field of personal injury is a field of negotiation, subproceedings appear to be instituted for all sorts of liabilities and for both personal injury and loss of dependency. In addition, all disputes that can arise in the settlement of personal injury appear in the proceedings.

However, applications for subproceedings are almost always filed by the victim. Although claims handlers for liability insurers appear to believe that the proceedings advance the negotiations, they rarely make use of them themselves, because of the expenses they entail, the risk of setting a negative precedent and the barriers to taking legal action against a victim.

In addition, the subproceedings are almost always instituted by a single party. The preference for an individual application appears to be rooted in unfamiliarity with the possibility of a joint application, negative experiences of the proceedings at the district courts (Section 96 CCP), insufficient familiarity with the opposing party or strategic considerations.

How do courts apply subproceedings?

Judges very rarely declare applications inadmissible, but may dismiss them on the basis of the proportionality criterion. They sometimes help the parties avoid a declaration of inadmissibility or rejection on the basis of the proportionality criterion; in this case, with the agreement of both parties, they change the application at the hearing orally into a valid summons. If they do reject the application on the basis of the proportionality criterion or grant or deny it on substantive grounds, they sometimes also make suggestions to the parties, possibly in obiter dicta, which will benefit them when they resume negotiations. In the application of the proportionality criterion, many judges also take a facilitative approach with regard to whether sufficient negotiations have taken place prior to subproceedings. The same applies to whether further negotiations are required after subproceedings. Judges also strictly

demarcate the proceedings from the provisional taking of evidence. However, the costs are not applied in a uniform fashion. Finally, the duration of the proceedings is relatively fast with a median of four months at both the sub-district and district courts.

Findings: empirical section

Do the negotiations on personal injury meet the conditions for negotiation?

Negotiation is a process of give and take, in which parties try to reach a result that is acceptable to both. Parties in negotiation need to be relatively dependent on each other, have a level playing field, pursue both their own and their joint interests and communicate properly with each other. In the settlement of personal injury these conditions are hardly ever met.

In 13 of the 14 possible negotiation relationships that were considered here, the victim has a professional opponent who is a repeat player: a claims handler for a liability insurer or an injury claims adjuster who has been hired by him. In these negotiation relationships, the playing field is not level and the parties are not relatively strongly dependent on each other. They represent opposing financial interests, so a competitive negotiation style dominates. The claims handler for the liability insurer can monopolise these negotiations. Although the Code of Conduct for Handling Personal Injury Claims (GBL) states that the claims handler should place the victim at the centre of the negotiations and reach an amicable settlement based on collaboration, the effect of such self-regulation should not be overestimated. The pursuit of financial interests is after all a legitimate goal, and transgressions of openly formulated codes of conduct are often difficult to prove.

In 11 of the 14 negotiation relationships considered here, the victim does have representation, but this can help him narrow but not close the gap. This is also because representatives act in their own interests too, and these can diverge from those of the client. Codes of ethics and conduct can reduce this to a certain degree, but not all representatives are equally bound to these – if such codes exist at all.

The tendency of representatives to pursue their own interests may even increase in a negotiation relationship. The pressure to reach an amicable settlement increases if both negotiators come from the insurance branch or the related injury claim branch. Both these negotiators have a financial interest in an amicable settlement. For the legal expenses insurers and claims handlers for liability insurers, this is also a consequence of the codes of conduct to which they must adhere. As these negotiators have a shared background, there will, furthermore, be a better atmosphere of negotiation, which makes proceedings much less likely.

Likewise, if a lawyer acting on behalf of the victim negotiates with a claims handler for a liability insurer or an injury claims adjuster who has been hired by him, the prime aim is to reach an amicable settlement: for the claims handler for the liability

insurer this is due to financial reasons and the GBL; for the lawyer this is due to Rule 3 from the Code of Conduct 1992. As they come from different branches, however, the relationship is more likely to be distant, which also makes it more likely that proceedings will be threatened. Lawyers are trained and have the authority to institute proceedings in all courts, so they can revert to this relatively easily. This can also be financially advantageous to them, because they often receive a higher fee for court proceedings than for out-of-court negotiations. However, whether they do revert to this will also depend on the client's financial situation, because he risks being ruled liable for the court costs.

Unlike Wetering's conclusion from 2004[4], in more complex cases in which the victim is supported by a representative the competitive manner of negotiation will not dominate, but rather there will be attempts to reach an amicable settlement.

Finally, a lack of communication often also hampers negotiations on the settlement of personal injury. Many diverse actors are generally involved who, what is more, may change during the course of the negotiations. There is thus a high chance of misunderstandings and differences of opinion, also because representatives must first consult their clients before they can negotiate with the opposing party. Furthermore, the parties generally possess divergent information, which means that they will be selective in choosing and interpreting evidence. In addition, it is often more difficult for the victim, who needs to recover physically and mentally and is suffering from all the associated emotions, to keep track of the case, to reason logically and to take considered decisions than it is for professional representatives and claims handlers for liability insurers.

What effects do subproceedings have on the out-of-court negotiations that precede them?

Help level the playing field

Help level the playing field subproceedings foreshadow all the negotiations that precede them. They provide the victim with access to knowledge, skill and an independent judicial opinion, access which he would not otherwise have due to lack of collaboration with the opposing party or financial reasons. This enables the victim as an inexperienced 'one shotter' to counterbalance the power of the claims handler for the liability insurer, who is a repeat player. He is better able to represent both his material and immaterial needs. Subproceedings thus help increase the mutual dependence and level the playing field, which facilitates the negotiations. Merely threatening such proceedings is sometimes enough to get the negotiations moving again. This is particularly the case if attempts to reach an amicable settlement have ground to a halt, if the application is realistic, if the applicant is actually prepared to institute proceedings and if the opposing party is also convinced of this. If proceedings are threatened at too early a stage or if they are unnecessary, this only serves to aggravate the relationship, which can lead to escalation and delay.

4. Weterings 2004, p. 75.

Improve communication and cooperation
Although claims handlers for liability insurers appear to believe that subproceedings improve the negotiations, they hardly ever institute them themselves. However, they do appear to change their policy to some degree in order to avoid subproceedings and adopt a more communicative and cooperative approach. In short, subproceedings strengthen other initiatives, such as the GBL, which have already been taken to improve the settlement of personal injury. Subproceedings appear to exert such pressure that without them the liability insurers would not have introduced these policy changes, at least not to the same extent.

Undesirable side effect:
Encourage representatives to pursue their own interests
However, the specific costs tariff also makes it possible for representatives to allow their own interests to prevail over those of their client.

In negotiation relationships in which both negotiators come from the insurance branch or the related injury claims adjustment branch, subproceedings only serve to increase existing pressure to reach an amicable settlement. This is a positive effect, unless an amicable settlement is reached that is in the interests of representatives rather than the victim.

In negotiation relationships in which a lawyer acting on behalf of the victim negotiates with a claims handler for a liability insurer, the likelihood of subproceedings increases, because there is no procedural risk for the victim. What is more, the lawyer can generate his own income. Instituting subproceedings is a positive move if they serve to achieve a better result for the victim, but not if they serve only to increase the earnings of the lawyer.

This unwanted side-effect undermines the aim of subproceedings, which is to improve the position of the victim. However, subproceedings do not make it possible to counteract this effect.

What effects do the subproceedings have on the out-of-court negotiations while these negotiations are underway?

No indications for earlier use
No indications were found that the parties make use of subproceedings at an earlier stage in the negotiations than they did of other proceedings in the past. This finding is in line with the main aim of all representatives, which is to reach an amicable settlement and that they will only go to court if that proves necessary.

Polarisation and juridification
Subproceedings are almost always instituted by one party, which can heighten tensions in the relationship. In addition, the negotiations are generally suspended during subproceedings. Furthermore, like in other civil procedures, the parties try to substantiate and outline their own arguments, while at the same time undermining those of the opposing party. This means there is polarisation and juridification.

Importance of the decision-making and binding function of the judge
All the parties value the decision-making function of the judge together with the informal and pragmatic approach that is taken. A few claims handlers for liability insurers and the lawyers who represent them did emphasise that this approach entails the risk that the judge's sympathy is mainly directed at the victim, which means that insufficient attention is paid to their side of the case.

The number of applications withdrawn after the court hearing demonstrates that the judge succeeds in exercising his binding function. However, the interviews show that representatives and claims handlers for liability insurers do not always perceive the binding function as such, when they do need this.

What effects do subproceedings have on the out-of-court negotiations once they have ended?

The interviewed victims as well as the claims handlers for liability insurers and representatives unanimously appear to perceive subproceedings as beneficial to the negotiations. However, whether they resume the negotiations after subproceedings depends on the result as well as on the manner and extent of communication between the parties.

After an amicable settlement, the parties generally appear able to resume the negotiations without delay. This is only otherwise if one of them has felt a certain degree of pressure from the judge or a representative to accept the decision.

If the application has been granted or rejected in part or in full on substantial grounds, it is usually equally possible to resume negotiations, because this means the dispute has been settled. The decision is generally formulated clearly and without reservations, and the parties usually also appear to interpret the settlement in a professional way. Only if one party takes the decision personally and starts to thwart it does the resumption of negotiations become more difficult and or even impossible.

If an application has been declared inadmissible or rejected on the grounds of the proportionality criterion, it is often less simple to resume negotiations. The result has not solved the present dispute, but the relationship has generally become tenser. The result can either defuse or escalate the negotiations. If the application has been declared inadmissible, this can lead to the complete severance of contact. Such delay or escalation may not be seen if the applicant moderates his position or if the judge provides the parties with suggestions that will benefit them when they resume negotiations. The latter is not standard practice, however.

Furthermore, communication is crucial in the resumption of negotiations. All parties who were or will be involved in the negotiations do not necessarily attend the hearing. In addition, the proceedings create a new negotiation situation, to which the parties must once again become accustomed. The negotiations are often as easy or difficult as they were in the phase before the proceedings, presumably because the same negotiators are generally involved.

What is the effect of postponing and limiting the possibility of appeal?

In order to encourage the parties to resume the out-of-court negotiations rather than continuing through the courts, there is no direct remedy against a subproceedings decision. In addition, certain aspects of the decision are assigned a specific status in proceedings on the merits and the costs of subproceedings also qualify for full remuneration in proceedings on the merits. The question is whether this encourages the parties to resume negotiations. Although this cannot be established with certainty from the available information, there are indications that it is the case. The number of proceedings on the merits appears to drop, but this could be due to other causes, such as higher court fees. The analysis of the negotiation relationships shows that a large increase in proceedings on the merits is equally unlikely. As was previously shown, subproceedings are less likely if the victim himself negotiates with the claims handler for the liability insurer or if both negotiators come from the insurance branch or the related injury claims adjustment branch. If a lawyer acts on behalf of the victim in the negotiations with the claims handler for the liability insurer this may differ. Proceedings on the merits are not, however, as likely to be instituted due to the associated risk to the victim of a court. The costs of the subproceedings qualify for full remuneration in proceedings on the merits, but the costs of proceedings on the merits themselves fall under regular procedural law.

Recommendations to increase the facilitative effect

It can be concluded from the above that the proceedings improve the negotiations, but there is still room for further improvement.

Recommendations for the legislator

Before expanding the range of application, it would be recommended first to analyse the playing field in question. After all, the effect of subproceedings appears to depend on the actors involved, the possible negotiation relationships and the interests that are being represented. Economic interests play a particularly important role in this. It is only worth expanding the range of application if this removes the impediments to negotiation and ensures the differentiation of proceedings rather than an unnecessary accumulation of them.

Recommendations to the Minister of Security and Justice

In order to ensure the facilitative effect for the future, a structural increase of the financial tariff for subproceedings is necessary. The comprehensive control that the judge exercises and the gravity of the cases does not bear relation to the financial tariff that a court receives per application. Furthermore, additional research is necessary into the

manner in which the judge can best encourage the parties to resume the negotiations after subproceedings.

Recommendations for the judicial system

From the perspective of transparency and unambiguity, it is important that judges develop uniform criteria concerning practical matters before and during a hearing.

Furthermore, judges can increase their effect on the negotiations in several ways. If they consider this possible and desirable, they can, with the agreement of both parties, change a non-admissible or non-proportional application at the hearing orally into a valid summons. If they reject an application on the grounds of the proportionality criterion, they can discuss this and review other possible solutions with the parties. In addition, it is important that whenever possible, possibly in obiter dicta, they include suggestions in the decision that will benefit both parties upon resumption of negotiations. Although such suggestions are not binding, it is recommended that a judge who has presided over subproceedings and made suggestions concerning the material legal relationship of the parties does not preside over proceedings on the merit. This is in order to avoid any semblance of bias. It is also important that judges apply the same criteria when awarding costs.

If the binding function is to be applied in an optimal fashion, it makes sense that those persons who have held and will resume the negotiations also attend the hearing. It is also recommended that the judge summons the parties to do so. Furthermore, in the exercise of the binding function, the judge should focus on the interests of the parties and their representatives as well as their manner of communication and behaviour. In addition, it is important that the judge considers who will initiate and resume negotiations after subproceedings, in order to prevent unnecessary delay.

Finally it is recommended that lead times are monitored in a structural fashion, because subproceedings have not achieved their goal if a fast settlement is no longer possible.

Recommendations for representatives and liability insurers

The specific cost structure in the proceedings provides the parties with the opportunity to act in their own interests. However, this undermines the aim of the proceedings to strengthen the position of the victim. Furthermore it undermines faith not only in the proceedings but also in the profession. Although such behaviour is already prohibited for some representatives in codes of conduct and ethics, it is recommended that branch associations explicitly notify their members that such behaviour is undesirable and that professional conduct is expected of them. This means that they ensure that subproceedings are not instituted too lightly, for instance as a covert form of taking of evidence. It also means that representatives communicate in such a way to prevent negotiations from grinding to a halt and that they thus do not benefit from the

proceedings. It is important, moreover, that a summons to attend a hearing is obeyed, so that the judge can make optimal use of his binding function.

In addition it is recommended that branch organisations continue their attempts to standardise the applicable hourly fee. Although such guidelines can never completely prevent discussions about costs, they can lead to more transparency and predictability.

To conclude, it is important that representatives incorporate sufficient specific information in summons to ensure that any resulting proceedings are as efficient as possible.