SUMMARY

INTRODUCTION

This book is about the medical assessment procedure in personal injury cases and includes a scientific final report of the research into possibilities to improve this medical assessment procedure. This research, which I carried out as project leader on the instructions of De Letselschade Raad and under the supervision of my PhD thesis supervisors Prof. mr. A.J. Akkermans and Prof. mr. J. Legemaate, resulted in the Medical Section (Medische Paragraaf) of the Code of Conduct for Handling Personal Injury Claims (Gedragscode Behandeling Letselschade (GBL)), a code of conduct for personal injury professionals with good practices for following the medical assessment procedure in personal injury cases.

The problem on which the research is based, was the problematic process of the medical assessment procedure in personal injury cases. Rendering this problem into a legal-scientific problem statement results in the following main questions and sub questions that are at the centre in this book:

‘How can (the process of) the medical assessment procedure in personal injury cases be improved?’

1. What are the bottlenecks within the medical assessment procedure?
2. What are the causes of the bottlenecks within the medical assessment procedure?
3. What solutions to improve the medical assessment procedure are conceivable (and feasible)?
4. Is legal action research a suitable method for the development of private regulation such as the Medical Section?

LEGAL ACTION RESEARCH AND PRIVATE REGULATION

The research has been carried out by means of an empirical legal research method bearing a close resemblance to the method of ‘action research’ or ‘(participatory) action research’ originating from the social sciences. Chapter 2 of this book describes
this method of ‘legal action research’ by means of the main shared characteristics of action research and the research into possibilities to improve the medical assessment procedure; the research is problem-oriented, developing concrete knowledge products to solve the so-called ‘action problem’ in close cooperation with the directly involved parties, in different research stages and with the help of several research methods.

The key question in chapter 9 – and closely related to chapter 2 – is whether this method of legal action research could be a suitable method for the development of private regulation, such as the Medical Section. After briefly addressing the term ‘private regulation’ and its most significant characteristics, some determinants are identified from which private regulation can derive its legitimacy and binding force and which are very suitable for being applied and elaborated in the formation process of private regulation. These determinants are (i) the organisation of consultation and participation of interested parties, (ii) the representativeness of the interested parties involved and dealing with conflicts of interest, (iii) the substantive and legal expertise involved, (iv) openness and transparency in the formation process, and (v) evaluation and improvement of the end product. These quality determinants coincide with major characteristics of (legal) action research, on the basis of which it is concluded that this method might contribute significantly to further theory building about private regulation and its formation process.

IN-DEPTH LEGAL RESEARCH

During the research an in-depth legal research has also been carried out into a number of specific bottlenecks within the medical assessment procedure in personal injury cases. This in-depth research was related to (i) the Dutch Personal Data Protection Act (Wet bescherming persoonsgegevens (PDPA)) being underemphasized as an important source of regulation in the medical assessment procedure, (ii) the underdevelopment of the professional standard of medical advisers in personal injury cases and (iii) the unclear scope of the right to refuse access to one’s medical data both in and outside personal injury cases.

Significance of the Dutch Personal Data Protection Act in personal injury cases

The theme of the chapters 3-5 of this book is the (underemphasized) significance for the medical assessment procedure in personal injury cases of the PDPA as well as of the Code of Conduct for the Processing of Personal Data by Financial Institutions (Gedragscode Verwerking Persoonsgegevens Financiële Instellingen) (“Code of Conduct”) based on that Act. These regulations include rules for dealing with medical information and therefore provide an important framework for more detailed regulation of the medical assessment procedure.
In chapters 3 and 4 it is explained that the application of these regulations in personal injury cases, however, results in much uncertainty. The circle of persons entitled on the part of the insurer with access to medical information of the personal injury victim, for example, has not yet been identified and it is not clear what the scope of the right of access is the personal injury victim is entitled to on the basis of article 35 PDPA. With respect to a large number of provisions in the Code of Conduct it is not clear how they should be applied in personal injury cases, as this code of conduct was mainly written with a view to first party insurances as opposed to third party insurances (like the liability insurance). An adjustment of the Code of Conduct is required to be able to remove these uncertainties.

Chapter 5 describes the emergence of the PDPA in the case law on personal injuries and the (contradictory) case law since late 2009 in respect of the scope of the right of access of the personal injury victims, and in particular regarding the question whether the personal injury victim can claim on the basis of article 35 PDPA to be given access to the advice of the insurer’s medical adviser.

**The professional standard of medical advisers in personal injury cases**

The medical adviser in personal injury cases usually acts on the instruction of one of the parties (the personal injury victim or the liability insurer) and is at the same time presumed to be objective and independent on the basis of the general rules of conduct of physicians. He therefore is in the awkward and somewhat paradoxical position of ‘independent party-appointed expert’ and a clear professional standard is therefore of major importance. For a long time the professional standard of medical advisers and their independence, however, has been insufficiently worked out and secured.

In chapter 6 of this book some important aspects of the professional standard of medical advisers in personal injury cases is mapped by means of relevant disciplinary proceedings. In succession attention is given to (i) objectivity and independence, (ii) the requirements for the medical advice, (iii) openness and testability and (iv) the area of expertise of the medical adviser. The steps that have been taken to date to improve and to make the professional standard of medical advisers in personal injury cases clear in these respects is also discussed. The publication of the Professional Code for Medical Advisers in Private Insurance Matters (*Beroepscode GAV 2011*) and the Medical Section in 2012 played a key role in this process.

**The maze of the right to refuse access to one’s medical data**

The theme of chapter 7 of this book is the right to refuse access to one’s medical data as laid down in article 7:464 paragraph 2 of the Dutch Civil Code. This right means that a person undergoing a medical evaluation on the instructions of someone else, must be given the opportunity to decide whether the (medical) data that are generated for the purpose of this evaluation can be provided to the person instructing the evaluation or
that he wishes, for privacy purposes, to avoid this by refusing such access to the person instructing the evaluation.

The scope of this right to refuse access to one’s medical data, however, is unclear and in practice therefore numerous problems and uncertainties occur, both in and outside the medical assessment procedure in personal injury cases. In personal injury cases it is in particular unclear whether the right to refuse access to one’s medical data is applicable to (independent) expert’s reports in medical liability matters and whether the right to refuse access to one’s medical data also applies to the advice of the liability insurer’s medical adviser. Also in social security and working conditions matters, matters related to the law of persons and family law, criminal matters and as part of medical check-ups for driving licence renewals, the application of the right to refuse access to one’s medical data raises certain questions and uncertainties.

In many of these areas it is not possible to give a conclusive answer to the question when the right to refuse access to one’s medical data is and when it is not applicable. This leads to legal uncertainty for the person being evaluated and to fear for disciplinary complaints among medical professionals. It is therefore high time for a better statutory regulation of the right to refuse access to one’s medical data. The initially planned introduction of a new Patients’ Rights (Care Sector) Act (Wet cliëntenrechten zorg) seemed to be a unique opportunity for the legislator to clarify a large number of uncertainties around the right to refuse access to one’s medical data. To date the legislator has not made use of this opportunity, however, or it has not succeeded as yet in clarifying the regulation of the right to refuse access to one’s medical data at any rate. At the end of chapter 7 an alternative legislative proposal has therefore been made.

The Medical Section

The theme of chapter 8 of this book is the Medical Section which was developed as resultant of this research. This Medical Section is made up of five parts, each of which includes a number of good practices, a rather comprehensive explanation thereof and one or several working documents, with which an attempt has been made to translate the good practices into concrete working procedures.

In Part 1 of the Medical Section the general starting points are mentioned briefly, the most significant of which are proportionality, transparency and objectivity and independence of the medical adviser. Part 2 is about asking for medical advice and the most important message of this part is that the client must ask his medical adviser concrete questions and provide him with sufficient factual background information to enable him to give sound and specific advice. Part 3 is the most comprehensive and complex part of the Medical Section and is about the collection and the handling of medical information. Part 4 is about the medical advice and includes good practices with respect to the work and the position of the medical adviser and good practices with respect to the medical advice as such. Part 5 discusses the medical expertise and
its major starting point is that costly and time-consuming medical expertises – often also aggravating for the victim – should be reduced to a minimum. The application of the Medical Section in practice has already led to some relevant suggestions and initiatives for improvement and as part of the evaluation of the Medical Section it will also undoubtedly be possible in the future to make improvements in both the Medical Section and the working documents.

CONCLUSION

In the concluding chapter 10 the most important bottlenecks and their causes have been mapped. It is established that almost all these bottlenecks are connected to two core problems in the medical assessment procedure, i.e. the problems around the access to and the exchange of medical information and the complicated position of the medical adviser as ‘independent party-appointed expert’. Apart from the substantive (financial) conflict of interest between the parties in personal injury settlements – which is obviously unsolvable as such within the scope of this research – these problems are mainly caused by unclear regulations with respect to the access to and the exchange of medical information and the ‘underdevelopment’ of the professional standard of medical advisers in personal injury cases. The good practices of the Medical Section (and the corresponding working documents) which have been developed for the purpose of this research, clarify matters and provide avenues for solutions with which the main part of the bottlenecks in the medical assessment procedure is addressed. Additionally, as a result of this research the development of law has been set in motion with respect to a number of relatively unexplored topics within the medical assessment procedure. In spite of the fact that there are definitely still bottlenecks which need to be addressed in the future and that the question whether the Medical Section ‘works’ cannot be answered on the basis of this research, in my view the research has definitely improved the medical assessment procedure in personal injury cases.