

Workshop Presentation

8.1 THE DEVELOPMENT OF PERSONAL-INJURY LAW AND COMPENSATION FOR ASBESTOS-RELATED DISEASES IN THE NETHERLANDS

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Since 1908 the Dutch Civil Code (CC) provides that within the framework of the employment contract the employer has the duty to provide safe working conditions. However, following the Accidents Law 1921 the employee was no longer allowed to claim compensation from the employer for an occupational disease or an occupational accident on the basis of the Civil Code. Instead, the employee could claim compensation within the framework of the Accidents Law.

It wasn't until 1967, when the Accidents Law disappeared, that employees could again claim compensation from their employer. Since then, we have seen important developments of Supreme Court case law on the basis of the provisions of the employment contract, which has resulted in a much stronger position for employees.

Article 7:658 Dutch Civil Code holds the employer to a duty of care regarding the health protection of the employee. If the employer fails to take adequate safety measures and the employee suffers damage because of this failure, the employer is therefore liable.

As the case law developments actually started in 1967, asbestos personal-injury litigation is a relatively new feature in the Netherlands. It was not until the 1990 verdict of the Dutch Supreme Court in the case *Janssen v. Nefabas* that the legal position of employees exposed to asbestos was largely improved. The employee, Janssen, who was exposed to asbestos at work and stricken with asbestosis, sued his employer, Nefabas, a subsidiary of Eternit Holland, for damages incurred due to the employer's failure to take safety measures. First the cantonal judge and the district court rejected the claim, but the Supreme Court reversed this decision.

The litigation turned on the issue of the scope of the burden of persuasion (the burden of proof). According to the district court, the employee had insufficiently stated which standards were applicable at the time in question for companies working with asbestos, and which specific safety measures could have been expected from the employer according to the state of science and technology.

The Supreme Court noted that the employee in theory is required to allege and to prove that the employer has taken inadequate safety measures, but that the employer, in the context of his own rebuttal, should in general be obligated to outline the circumstances which lie more within his control than that of the employee. In addition the Supreme Court outlined certain standards that also arise out of the employer's heavy duty to investigate and his duty of care.

This decision of the Supreme Court tightened the standards for the duty of care of the employer. The employer has to do research as to the dangers which threaten the employee and as to measures which have to be taken by the employer, taking into account that measures have to be timely, that experts may have to be consulted and that experience with asbestos in other countries is relevant.

The Supreme Court also set standards for the allegations of the parties. In general the employee has to state, in broad terms only, what safety measures had to be taken by his employer, while the employer has to state the circumstances which are more within his sphere than within the sphere of the employee. The effect of this decision was a partial reversal of the burden of proof of negligence.

Another effect of the decision was that the defence of the employer, who said that the usual safety standards had been followed, was not enough. The employer has to prove that the safety measures taken were in conformity with the state of the art regarding asbestos.

It's obvious that this decision of the Supreme Court in 1990 was a clear improvement of the legal position of asbestos victims.

Three years later, the Supreme Court gave another important decision in the case of Cijssouw v. De Schelde. Cijssouw had been exposed to asbestos between 1949 and 1967 and stricken with mesothelioma. He sued his employer, a shipyard, for damages incurred due to the employer's failure to take adequate safety measures.

The most important part in the Supreme Court's verdict was that the court decided that if an employer has failed to take such safety measures as required of him, considering his knowledge of the dangers connected with exposure to asbestos dust, and if such failure has substantially increased the risk of his employees contracting mesothelioma, he is liable, even if his negligence has resulted in the realization of a risk he was not aware of at that time.

A few years later in another asbestos case, the Supreme Court decided, regarding the question of when the employer should have had knowledge about the dangers connected with exposure to asbestos, that the employers could and should have known about this risk back in 1949.

This means that the employee's legal position in claiming compensation because of an asbestos-related disease has become much stronger. It also means that an overwhelming majority of the claims nowadays can be settled within a relatively short period of time. And that's, of course, a very important circumstance especially for mesothelioma victims, as they have a rather short life expectancy from the moment the disease is diagnosed.

Nevertheless, this favourable development in legal precedents doesn't mean that no more legal problems exist for mesothelioma victims. Currently, we are confronted with the problem of the latency period for mesothelioma and statutory provisions of the limitation term.

For mesothelioma, latency periods are known ranging from about 10 years to more than 60 years. However, mostly the latency period lies between 20 and 40 years and often exceeds 30 years. By latency period, we mean the period lying between the moment of exposure and the moment of diagnosing mesothelioma. Under Dutch law the statutory limitation term is 30 years. On the basis of this legal provision employers can easily run away from their liability. Of course this result is hard and unacceptable for employees stricken by mesothelioma, as they can't help becoming ill more than 30 years after exposure to asbestos.

We're fighting this injustice on two fronts. From the government we demand a change of the law and in the courts we're fighting against the limitation term up to the Supreme Court, because this limitation term is contrary to the fundamental principles of the legal system.

Currently, the Dutch parliament is handling a legislative proposal to change the statutory provision of the limitation term. However, this proposal isn't really adequate. Apart from that, the Supreme Court made an important exception to the limitation term rule a few months ago, by which, under certain circumstances, the employer's appeal to the limitation term is no longer accepted.

It's obvious we're not satisfied with this outcome yet. Therefore, we'll continue our struggle on both fronts until we obtain a fair and decent administration of justice for all asbestos victims.