MAARTEN TROMP ADVOCATEN

RECENT DEVELOPMENTS IN THE NETHERLANDS

JUNE 2011

A short report about recent developments in the Netherlands.

1. **Political attention for personal injury cases**

   Last year I reported about a certain pressure from the government towards the insurance companies to pay more attention to the old cases (id est cases where the date of the accident was more than 10 years ago). This is still the case. In daily practice these old cases can still be settled more easier than before.

2. **Events**

   As every year, a lot of conferences have been organised by different organisations. Some of the topics were:

   - The lawyer, the doctor and the death (WAA: an organisation of lawyers and doctors)
   - Personal injury in a wider perspective (LSA: the Dutch personal injury organisation)
   - New players in the personal injury practice (PIV: organisation of insurers)
   - The future of whiplash cases
   - The evaluation of a new approach of whiplash cases

3. **New code of conduct in medical liability**

   Last year I reported that a new code of conduct was launched and that I hoped to be able to tell you more about the first experiences with these new guidelines this year. I am sorry, I cannot. Therefore I asked some input from John Beer. And this is what he would like to remark:

   > *"In June 2010 a Code of Conduct regarding Medical Negligence Claims (Dutch abbreviation GOMA) was presented. This Code of Conduct was produced by a task force which included academics, lawyers, insurance companies and representatives of patients and doctors. The reason for this Code of Conduct was that medical negligence claims are dealt with in a poor manner, partly because a lot of doctors refuse to be open and honest towards their patients.*

Some major recommendations or principles in this Code of Conduct are as follows:

1. *Patients and/or their families should be informed as soon as possible whenever something goes wrong during a medical treatment.*

2. *Doctors and hospitals should provide full medical and factual information to victims or their family in case of a possible medical negligence claim.*

3. *Doctors should say 'sorry' to their patients if they have good reason to do so.*

4. *Both patients, and their lawyers, and hospital insurance companies will provide each other with well reasoned written statements on liability issues.*

5. *Both parties will bear the costs, 50% each, of a joined out-of-Court medical expert if they do not reach a compromise on liability beforehand.*

The Code of Conduct has no legal basis but is generally recognized as a principle of good practice in the market.

The first experiences with this Code of Conduct are hopeful. Of course discussions on liability issues remain, but insurance companies will cooperate in mutually funded out-of-Court medical expert reports.
It will probably take us into the next century before all doctors say sorry to their patients as soon as they find out that they have made a mistake."

4. New law: part dispute

As from 1st July 2010 a new law is applicable, according to which you can start legal proceedings for only a part of the dispute. The advantage of this new law is that the legal costs are still regarded as out of court expenses. That means that the costs can still be claimed. After a decision on this part dispute, parties can continue the out of court negotiations.

This works out pretty well. Until 1 April 2011 we had circa 40 decisions, which have a lot of attention of the writing press and the organisations in the field. These proceedings do not take much time. 75% of all the cases are dealt with within six months. From the other 25% it is still unknown how much time they took. However, what we do know, is that the most decisions are given within 60 to 120 days after the day the request was filed.

This new law has been evaluated at several congresses. This new law was also subject to an inquiry, organised by our member August Van. Therefore, I also asked input from him. In that respect he sent me a draft article, which he is writing for a magazine. His preliminary conclusion is:

"The part dispute has proved to be an important instrument in the personal injury practice. Dragged negotiations can be smoothened with these kind of proceedings, within short time. The costs of these proceedings have to be borne by the insurance companies. This new legal possibility provides an equality of arms. In words of one of the respondents: "Part dispute is a blessing for the personal injury practice"."

5. New case law: two cases

1. The hammock case

The facts in this case were as follows: A young woman was lying in a hammock, which was attached between two brick pillars in the garden of her house. One of the pillars broke and fell on her. She sustained severe spinal injuries and became paraplegic. She holds her husband liable for 50% of the damages, because of the fact that they were both co-owners of the building for 50%.

The legal question in this case was whether or not the liability for defective buildings could be extended to co-owners. The court accepted this liability towards a co-owner. The award was (indeed) restricted to 50%.

The decisive argument was found in a comparison to a situation of an injured third party against a 100 co-owners. An injured third party could claim a 100% of his damages from each individual co-owner. Now imagine, that the injured person is one of the 100 co-owners. Would that mean that he would get nothing? Our highest court ruled in this case that the co-owner/victim should get compensation, except for the percentage of her ownership.

2. Deduction of insurance benefits?

If a victim receives other insurance benefits, the liable insurer often argues that these benefits should reduce the damage awards. Our highest court has given six useful guidelines for this frequent argument:

A. Deduction of the benefit seems reasonable, only if that benefit has the intention to indemnify the insured for exactly the same head of damages which he claims from the liable party.

B. Deduction will be even more reasonable if this payment (see guideline A) was made by a damage insurer (instead of a life insurer), because a damage insurer will be subrogated for the amount they have paid out.

C. Deduction is not appropriate if the insurance benefit was received under a so called sum insurance, for which the premium was paid by the victim himself (or any other party outside the scope of the liable party).

D. Deduction from a benefit received under a so called sum insurance policy can be reasonable if the premium for that policy was paid by the liable party. This can, for example, be the case if there was no obligation to take out this kind of insurance.

E. Deduction of benefits under a so called sum insurance is – in general – not reasonable.

F. Deduction is regarded more reasonable in case of strict liability compared to fault liability. Furthermore the judge may consider the degree of culpability. The more the liable party is culpable, the less reason for deduction.

6. Work load judges

Still very high.

7. Lawyers' fees

Lawyers' fees (or at least the out of court legal expenses) are – as damage for the victim – recoverable from the liable insurer. The insurance companies however, are objecting in almost every single case. That causes a lot of problems and daily annoyances.

A special task group has been formed with the request to investigate whether this annoying problem can be solved in such a way that all the parties involved can live with. However, until yet no such solution has been reached. I hope to be able to report a solution next year.

8. Personal remarks

As you might know, I give lectures and contribute to publications on a regularly basis. My latest lecture was about the adolescent brain. In that lecture I gave a summary of the most important conclusions in the medical (neuro) science of the last ten years. Neuroscientists have found out that the brains of adolescent people do function different from the brains of adults. The parts of the brain responsible for hormones and emotions are far more active in the adolescence, than the parts of the brain responsible for the regulating functions. That combination can explain the typical adolescent behaviour, such as poor planning and poor adaptability. It also explains why adolescents are not the best decision makers and why the kick (read: the emotion) often wins from reason.

It is arguable that these new scientific views should have judicial consequences. In the near future it could lead to a specific adolescent criminal law. It could also lead to the extension of the liability of adults for unlawful behaviour of their children. And last but not least: it could lead to the prevention of cutting back the damage awards in traffic cases, on the basis of "own fault ", which own fault until now has been justified with the hazardous behaviour in traffic.

I concluded my lecture with the statement that the adolescent brain could be the newest lawyers' paradise!

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Finally, with modest honesty, I can tell you that I became a honorary judge at a district court in the North of our country. The intention is to also be appointed in the other two Northern district courts, as they will merge in the near future. This will be a part-time job. I will keep my personal injury practice in Rotterdam. But after so many years working as a lawyer, I am looking forward to something new (read: extra) in my career.

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Maarten Tromp
(Peopil General Board Member
for The Netherlands)