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Case Report

DES Daughters vs. several Pharmaceutical Companies. Supreme Court of The Netherlands, First Chamber (Hoge Raad der Nederlanden, Eerste Kamer), Nr. 14,667, October 9th 1992.

In October 1992, the Supreme Court of The Netherlands passed judgement in the latest phase of the prolonged litigation brought by a group of women congenitally injured by the drug DES (diethylstilbestrol) against a number of pharmaceutical companies which at the time in question were producing or selling the product. The well-established link between the use of DES in pregnancy and the occurrence of late injury, including genital tumours, in the second generation, has been discussed on various occasions in this *Journal*, as has the resultant litigation. The two countries in which the latter has become most prominent are the United States and the Netherlands, where for a long period the drug enjoyed widespread use because of its supposed ability to counter habitual abortion. In both countries, the legal problems have centred particularly around the issue of proof of drug use after a long period has elapsed, and particularly the fact that as a rule it has been impossible which of the many trade versions of DES had been prescribed in any particular case, and hence which manufacturer was involved.

The present protracted case in The Netherlands was initiated in Amsterdam on April 28th 1986 by a group of "DES Daughters" who had developed tumours and who brought an action for damages against ten pharmaceutical companies, including the Netherlands daughter companies of a German and a Belgian firm. Each of the individual plaintiffs requested the court to sentence each of the ten companies in principle to payment of the total sum in damages, the distribution of the actual payment between the companies to be determined by law. In the court of first instance the claim in this form was rejected on May 25th 1988. The plaintiffs appealed to a higher court in Amsterdam, but the appeal was dismissed on November 22nd 1990. Thereafter the DES Daughters appealed to the Supreme Court.

The Supreme Court accepted as its starting point the facts of the case as established in the lower courts, namely: (i) all the DES Daughters are suffering or have suffered from carcinoma of the urogenital system; (ii) this affliction is a consequence of the fact that the mothers of plaintiffs had at various times during the period 1953–1967 in the course of their pregnancies taken DES tablets; (iii) the defendant companies had during this period marketed DES tablets, an act which in principle could be considered as a tort committed against the DES daughters; (iv) the DES Daughters do not known from which source the tablets

used by any individual woman were derived; not are they in a position to establish and document an exhaustive list of all companies which at any time marketed DES.

In considering the appeal, the Supreme Court devoted much attention to arguments used in the lower courts to reject the DES Daughters' claims. It was clear that the manufacturers had not acted as a group, which could have exposed them to an action for group liability. Nor were the DES Daughters now acting as a group, a procedure not provided for in Dutch law; each of them was bringing her own personal claim against the entire group of defendants. Application of the principle of "market share liability" had been proposed by the Solicitor General at an earlier stage of the proceedings, i.e. an approach by which each manufacturer might have been successfully sued for the proportion of the total damages corresponding to his share of the DES market at the time in question. That approach, as developed in some US courts, could have inequitable consequences where certain of the defendants could no longer be traced or were no longer capable of paying damages; it would also lay an impossible burden on the plaintiffs, i.e. that of proving which market share had been held by a particular firm at a particular time. The approach was also unnecessary; in principle each of the firms could be held responsible for the entire injury.

The view advanced by defendants that plaintiffs must provide and document a complete list of all firms marketing DES at the times in question would, if accepted, lay an unreasonable burden on the plaintiffs.

The Court considered (but set aside) the possibility that the provision 6:99 of Netherlands law an alternative causation might be in conflict with the European Community's Directive on Product Liability; the present case related to products marketed prior to 1985, which are not covered by the Directive.

The article of Netherlands Law on which the appellants based much of their case (Article 6:999 of the Civil Code, dealing with alternative causation) had, however, been passed into law many years ago for the very purpose of providing relief to an injured party who, because of circumstances, was not in a position to provide which of a series of tortfeasors had caused his or her individual injury. The Supreme Court drew an analogy with the situation which arises if a group of persons throw stones or shoot bullets in a particular direction; to demand that any persons injured in consequence would have to prove list and document all the persons involved would result in his failure to obtain compensation, and it is precisely this inequity which Article 6:99 was designed to eliminate. At the time when it was put into law, the exact circumstances of this case had not been foreseen by the legislators, and it was thus not provided for exactly in the Article in question, but it fell well within the spirit of the Article which could be distilled from its history and the works of legal commentators.

In view of these considerations, the Supreme Court set aside the judgement of the Amsterdam Court of Appeal; it referred the case to the Court of Appeal at the Hague for further trial. The Pharmaceutical Companies were ordered to pay their own and the DES Daughters' costs of the appeal to the Supreme Court.