

A Case Study of Mesothelioma Cases in the Netherlands: Room for Improvement?

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Are we doing right by mesothelioma victims in the Netherlands? In just 47% of the cases compensation was paid under the Covenant. 53% of those cases received just EUR 19,417 under the TAS/TNS Scheme. Statutes of limitations, evidentiary issues and the voluntary participation by liable parties in the mediation by IAS are to blame. This article discusses the alternative approach taken in New South Wales, where some 95% of the victims receive full compensation within just a few weeks. The authors conclude with some major recommendations for changing the Dutch system.

1. Introduction

Born on 6 February 1938, Piet worked hard all his life. He held various jobs in different corners of the world. Three pop out.

In 1957 he worked as an insulation engineer for Hertel in the Netherlands. Here he was exposed to asbestos. In 1958 Piet went to Australia, where he spent seven months as a production assistant with James Hardie & Coy Pty Ltd.³ For eighteen months in the period from 1959 to 1961 he was a production assistant with Bell's Asbestos & Engineering Ltd.⁴ In both jobs he was exposed to asbestos. After returning to the Netherlands Piet again worked as an insulation engineer for Hertel from December 1963 to March 1964. This was the last time he was exposed to asbestos: 51 years ago.

In October 2014 Piet started having lung problems. One month later the lung specialist diagnosed him with mesothelioma. A disease that proved fatal five months later.

Piet went to see Joanne Wade, asking her how he should recover his loss: enforce a claim in Australia, or rather in the Netherlands. Please read on for the answer.

2. Dutch Approach to Mesothelioma Victims

In the Netherlands Piet had two options to seek compensation:

1. He could file a claim with the Institute for Asbestos Victims (IAS)⁵;
2. He could sue his former employers.

2.1. IAS

Under the Covenant Asbestos Victims⁶ made in 1998 the IAS was founded in 2000, with the involvement of employers' organisations, insurers, the government and employees' organisations to shorten and preferably avoid the so-called double suffering of mesothelioma victims.

This suffering was painfully apparent in Bram Cijssouw's case. Bram was diagnosed with mesothelioma in August 1988.

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³ A manufacturer of asbestos in New South Wales (NSW).

⁴ Also in NSW.

⁵ www.asbestslachtoffers.nl

⁶ Covenant Asbestos Victims, by which the IAS was founded and compensation determined 1998.

In November 1988 summons were issued against his employer, de Schelde shipbuilders. Bram died in February 1989. His widow, Lies Cijssouw, continued the suit that would last eleven years and would require proceedings before the Supreme Court twice. The IAS was founded to prevent such tragic course of justice.

The IAS has reached its 15th anniversary. In the IAS' most recent annual report⁷ the Dutch Minister of Social Affairs and Employment, Lodewijk Asscher, wrote:

"If your work is making you sick it's dreadful and unjust. No job should cause health problems, let alone invalidity or premature death. Diseases like asbestosis and mesothelioma, however, can. Victims of those illnesses have to bear the curse of the job they have done for the rest of their lives. And that is an unacceptable injustice."

The Minister advocated the monitoring of how the files are handled:

"We also watch closely how the files are handled, as lessons for the future. And in doing so we raise critical questions. Is the communication sufficiently clear? Are protocols too strict or too generous? What do physicians and victims say? And most of all: what are the points for improvement?"

This article gives an answer to the last question. We will use Piet's case to set out how the Dutch situation compares to Australia (New South Wales: hereinafter: 'NSW'). And make recommendations on how to improve the Dutch situation.

Investigation

Piet could simply file a claim with the IAS by filling out the form that can be downloaded from the IAS website. Once a case has been filed the IAS investigates employment, exposure facts and liability. The diagnosis is assessed by a team of specialized physicians, the Dutch Mesothelioma Physicians Panel ('NMP').

Mediation

Although we call the services of the IAS 'mediation' this is factually not right. The IAS formulates its view of the facts and the liability and presents that view to the employer as a non-binding recommendation.

Employers can simply disregard the recommendation, which in fact makes the IAS' services non-committed mediation.

If the employer is no longer in business, or if the statute of limitations has run out, no mediation comes about. If the employer is still in business but simply does not admit to liability, the mediation stops.

The TAS Scheme

The TAS Scheme has been in effect since 2000. Pending the investigation and mediation by the IAS Piet could already qualify under the scheme for an advance of EUR 19,417⁸ on possible damages. The advance is usually paid by SVB within two to three months. If the employer does not admit to liability, the victim may keep the advance. In that sense the TAS Scheme is a safety net for victims who have nowhere (else) to turn. The advance is deducted from any damages paid later. Should Piet receive any compensation for mesothelioma equal to or more than the TAS compensation from someone else (in the Netherlands or in another jurisdiction), he must repay SVB the advance⁹. If Piet would not notify his claim to the IAS but opts for legal proceedings, he would not be entitled to payment under the TAS Scheme.

The TNS Scheme

2007 saw the introduction of the TNS Scheme, which provides for a similar advance on damages as the TAS Scheme for mesothelioma victims who have contracted the disease outside a working environment. This advance may not be kept either if no mediation comes about or if mediation is unsuccessful. We will confine ourselves here to just mentioning this scheme as in this article we will focus on Piet's case and thus on the position of the employee.

Compensation under the Covenant

The IAS investigates all the facts and mediates. If his former employer admits to liability, Piet will qualify for 'Covenant Compensation' for immaterial loss: EUR 56,464¹⁰. In addition Piet is entitled to a lump sum for his material loss¹¹ in the amount

⁷ 2014.

⁸ Asbestos Victims Compensation Scheme (TAS); the advance is indexed every year and in 2015 amounts to EUR 19,417.

⁹ Articles 3, 5 and 18 TAS Scheme.

¹⁰ Under the Asbestos Victims Scheme. This compensation is indexed annually.

of EUR 3,142. The same applies to his family. They are entitled to compensation for the material loss in the form of reimbursement for funeral costs and compensatory damages based on their loss of living support¹². Any other material loss should be demonstrated. This is called loss 'in excess of the prescribed level' or 'complex loss in excess of the prescribed level'. The latter is the subject of a separate procedure that does not start until the standard procedure has been completed.

In 2014 the IAS settled 13 cases of complex loss in excess of the prescribed level, totalling EUR 56,702. Examples are funeral costs. The average payout per case was EUR 4,362. Computing compensatory damages based on the families' loss is complicated and calls for solid expertise¹³. In 2014 the IAS handled 25 cases of complex loss in excess of the prescribed level, totalling EUR 1,555,508 in payouts, with an average of EUR 62,220 per case.

Grounds for Dismissal

The main grounds for employers for dismissing liability are lack of evidence, absence of liable employers/insurers and the statute of limitations.

Evidence

Evidence of mesothelioma is adduced by submitting medical data to the NMP. The IAS collects that evidence.

Victims must present evidence of their employment, of the diagnosis mesothelioma and of their exposure to the disease. If they do not succeed in presenting this evidence using the means available to them (employment contracts, witness statements), their claims will fail.

The mesothelioma cases handled in the Netherlands to date should have produced an extensive and still growing collection of data on the exposure of individuals.

Still, there is no National Database yet in the Netherlands containing all such data.

Statute of limitations

A main ground for dismissal that opposes success is the statute of limitations. Following the introduction of the new Civil Code in 1992, personal injury cases in the Netherlands were subject to two statutes of limitations until 2004:

- The absolute statute of limitations of Section 3:310 in conjunction with Section 6:175 BW: 30 years after first exposure.
- The relative statute of limitations of Section 3:310 BW: 5 years after the victim has become aware of the loss and the liable party.

In 2000 the absolute statute of limitations was overridden in *Van Hese v. De Schelde*.¹⁴ The Supreme Court drew up a list of seven points to be considered in assessing such override based on the standards of reasonableness and fairness. One of those points (c) concerns the culpability of the employer's actions and thus the recognisability of the risk to this specific employer. In practice the current state of case law is that in cases before 1964 the limitation period is at any rate deemed completed.¹⁵ In cases between 1964 and 1978 victims usually have to litigate to obtain an opinion on the statute of limitations.¹⁶ In cases after 1978¹⁷ the statute of limitations is usually no longer at issue.

Abolition of Absolute Statute of limitations

In 2004 the 30-year statute of limitations was abolished in personal injury cases, and thus for mesothelioma victims, for *exposure cases after that year*.¹⁸ Anyone exposed before 2004, after all, is still subject to the old regimen. In their case employers frequently rely on the limitation period, and with success. By way of exception the statute of limitations is overridden, although this usually requires legal proceedings. If claims are affected by the statute of limitations, the compensation for victims remains stuck at the TAS Scheme.

¹¹ Section 6:107 BW.

¹² Section 6:108 BW.

¹³ www.deletelscha.eraad.nl, press release of 19 November 2014 on the new system for computing damages resulting from death. This issue exceeds the scope of this article. For the purpose of this article it is enough to observe that such computation is not possible without the help of an expert.

¹⁴ Supreme Court 28 April 2000, ECLI:NL:HR:2000:AA5635, NJ 2000/430.

¹⁵ In this context reference is made to the lecture by Dr. Richard Lemen to the EAF, the first European Asbestos Forum on 27 May 2015. Dr. M.S.P.H. Lemen USPHS (ret) Ph.D., former vice Surgeon General of the United States and former Deputy Director of the National Institute for Occupational Safety and Health (NIOSH). He explained once again that and why the harmful effects of asbestos were well known internationally before 1964.

¹⁶ All the more poignant as the import of asbestos was at its peak in 1975.

¹⁷ The introduction of the first ban on asbestos in the Netherlands.

¹⁸ Section 3:310.5 BW.

Turnaround Time

The IAS endeavours to complete mediation within six months of receiving notification of a case. The review of 10 years of IAS in 2008¹⁹ revealed many points for improvement. The 2014 annual report of IAS showed that by 2014 the six-month term was attained, bar some exceptions, with mediation succeeding or terminated as unsuccessful.

Costs

The IAS has a team of specialised staff²⁰, who handle cases expeditiously. For the investigation these staff members rely on the individual data supplied in each case. As mentioned earlier they do not have a database containing individual exposure data that could be used as a basis for liability.²¹ The IAS receives a fixed fee for each case. Victims do not have to pay for IAS' services.

Results of the IAS between 2000 - 2014

Over the past fifteen years a total of 6934 cases were notified to the IAS. 6541 of these were settled. The major part of the victims are males who have been exposed to asbestos at work.

The majority of the cases receive the allowance under the TAS/TNS Schemes. One of the grounds for dismissal under the TAS/TNS is that the NMP could not diagnose mesothelioma. Another ground is that there are no surviving family members. 1333 of the finalised cases (20.3%) did not produce any financial results for the victims, contrary to 5601 cases (80.7%).

The Sociale Verzekeringsbank awarded advances under the TAS/TNS schemes in 4713 cases in total over the past fifteen years.

In 2235 of the cases (47.4% of the rightful claimants to TAS/TNS allowances) mediation was successful, and the compensation under the Covenant was paid. In all other cases (2478 cases: 53%) compensation for victims gets stuck in the (safety net) compensation under the TAS/TNS schemes despite that IAS holds that liability exists. Compared to a 2008 review the results of the IAS have improved.²²

2.2. Legal Proceedings

Victims who take the legal route bypassing the IAS do not have access to the TAS/TNS schemes.

Keep in mind that after being diagnosed with mesothelioma victims have just a few months or years to live, nine months on average. The turnaround time for legal proceedings in occupational disease cases is usually²³ long as they require a great deal of expertise on the part of lawyers and judges. This is no different in mesothelioma cases despite the monocausal nature of the injuries. Even in this millennium,²⁴ asbestos cases are the subject of long-winding litigation about evidence and the grounds for overriding the 30-year statute of limitations. In this respect we have not learned much from history.

Remarkable is the unwanted social development that the Covenant has generated. In asbestos cases that require litigation to obtain compensation, that is cases in which victims or their families are definitely not spared any 'legal suffering' courts consequently latch onto the so-called 'Dutch polder standard' (i.e. the acclaimed Dutch version of consensus-driven economic and social policy-making) of the Asbestos Victims Covenant when deciding on damages. For the sake of brevity reference is made to well-known rulings included in *Smartengeldbundel* nos. 523 et seq. They may come as a surprise, to say the least.

On a final note: the amount set by the Covenant by way of damages applies to all victims regardless of their personal circumstances. Case law does not consider the loss of life expectancy a significant factor.²⁵ Give the exposure of our children to asbestos in schools²⁶ and other buildings victims' ages

¹⁹ L.E.M. Charlier: *Voldoet de Nederlandse aanpak voor asbestslachtoffers? Een terugblik op tien jaar Convenant Asbestslachtoffers*, NJB 2008 page 1857 et seq.

²⁰ The execution of the investigation and mediation is done by BSA: <http://www.bsabv.nl/home/bsa/onze-klanten/>

²¹ There is, however, the general asbestos map: www.asbestkaart.nl; but this map is not allowed as individual evidence.

²² L.E.M. Charlier: *Voldoet de Nederlandse aanpak voor asbestslachtoffers? Een terugblik op tien jaar Convenant Asbestslachtoffers*, NJB 2008 page 1857 et seq.

²³ In the year 2014 turnaround times of six to seventeen years (!) are no exception.

²⁴ In spite of the statute of limitations ruling in *Van Hese v. De Schelde*, in which the Supreme Court drew up seven points for assessing the overriding of the 30-year statute of limitations.

²⁵ ANWB *Verkeersrecht Smartengeld* 2015 Summarised: no. 523 et seq.

will increasingly fall. Neither the Covenant nor the Dutch courts take account of young ages.²⁷

Summary

Back to Piet. In the Netherlands he has a choice. He could either notify his claim to the IAS. In the worst case scenario he would receive within two to three months the advance payable by SVB²⁸ under the TAS Scheme.²⁹ If he were to receive any other compensation for mesothelioma equal to or higher than that amount, be it in the Netherlands or any other country, he would have to repay this amount in full.³⁰

In the best-case scenario Piet can produce enough evidence, and his employer is still in business or Piet can rely on his employer's liability insurance. If the employer relies on the statute of limitations (which in this case would be the obvious route because of the early exposure, most recently in 1964; by the current state of case law that reliance would succeed) Piet's compensation will be stuck at the TAS Scheme.

If mediation were successful (which is not likely in this particular case), Piet would probably receive within six months the full Covenant compensation from the employer: an amount of EUR 56,464 in damages and a lump sum of EUR 3,142 for his material loss. His family members would be entitled to a lump sum of EUR 3,142 for funeral costs and compensatory damages for loss of living support. This brings the total to EUR 62,748. Higher (material) losses should be demonstrated.

If Piet chooses not to apply to the IAS, he could go the litigation route.

3. -The Australian Approach (New South Wales) to Mesothelioma Victims

Different countries take different approaches to mesothelioma victims.^{31/32} Here we will take a closer look at NSW (Australia), the appropriate jurisdiction for Piet's Australian claim. The approach and damages in NSW and those in the Netherlands are like night and day.

Victims

In most cases, sound investigation will reveal where the exposure to asbestos has occurred. For this purpose there is an extensive database of asbestos specifics. The groups of rightful claimants³³ and liable parties³⁴ are about the same size as in the Netherlands. Perhaps with the exception of the asbestos mines, which the Netherlands did not have.

Studies show that the number of victims has not yet reached its peak in Australia. Because asbestos was used until the mid-eighties, the peak is likely to occur between 2020 and 2021. Again, comparable to the Netherlands.

Recent data of the Australian Mesothelioma Registry (AMR)³⁵ show that in 2013³⁶ 575 victims were diagnosed with mesothelioma in all of Australia, of which 158 in NSW.

The AMR furthermore shows that 61% of the victims were asbestos workers. 33.1% of the victims were exposed outside the workplace³⁷, while a mere 6% has no memory of being exposed to asbestos. 19% of the victims were females.

²⁶ The Minister did not make an asbestos inventory for schools compulsory until 2012.

²⁷ On 27 January 1999 the Court of Almelo handled a case concerning a 32-year old victim. VR 2000,24. In determining the damages the Court takes into account the nature of the liability, the intensity of the pain, the distress, also over the shorter life expectancy. The victim's young age was reason to demand immaterial damages of EUR 109,833 indexed. The short life expectancy, however, made the Court wonder out loud what the point would be if the victim were to receive a large sum of money that he could not fully enjoy. A large portion would go to his heirs. The Court therefore held that an amount of EUR 51,564 indexed would be fair and reasonable.

²⁸ Sociale Verzekerings Bank.

²⁹ EU 19,417

³⁰ Articles 3, 5 and 18 TAS Scheme plus explanatory notes

³¹ Also see F. Sobczak, Liability for asbestos related injuries, Maastricht 2013, ISBN 978 94 6159 1937 p.125

³² For a description of the obligations in the light of the ILO Convention, the compensation system in Belgium, the United Kingdom and Australia (New South Wales) I refer to the article: "De treurige (rechts-) positie van het Nederlandse slachtoffer van een beroepsziekte" by Y.R.K. Waterman, in: F.T. Oidehuis and H. Vorrseman (ed.), *Werkgevers-aansprakelijkheid: een grensverleggend debat*, BJU, Den Haag 2013, p. 97-111.

³³ Asbestos workers, spouses, children, etcetera, exposed at work, at home, and through environmental exposure

³⁴ Employers, manufacturers, lessees of business accommodation, insurers, mines.

³⁵ A government institute gathering and publishing data on the diagnosis mesothelioma.

³⁶ <http://www.mesothelioma-australia.com/media/11828/amr-3rd-data-report-final.pdf>

³⁷ Home renovation, washer women and other non-occupational exposures.

No fewer than 95% of the people who had been diagnosed with mesothelioma were found to have been exposed to asbestos, which meant they could file claims for compensation with the Dust Diseases Tribunal.

Dust Diseases Tribunal

In NSW a specialist asbestos court set up in 1989 judges mesothelioma cases: the Dust Diseases Tribunal (DDT).³⁸ The Tribunal's procedures have been described earlier by dr. Y.R.K. Waterman beschreven.³⁹

Since 2005 they have been working on the principle that all claimants are required to first go through a brief (mediation) procedure (CRP)⁴⁰ before they have access to the court. Where necessary, exceptions are allowed, depending on the specifics of the individual case. Under circumstances the DDT can reach a decision within weeks or even days. The DDT is in session 24/7 and sees the world as its work area. The rules of evidence are flexible, to fit the individual demands of a case.

Evidence

The judge may do away with rules of evidence that cause unnecessary delay. Furthermore any evidence ever admitted by a court in a case is contained in an extensive DDT database of asbestos-related facts, of a factual, historical, and medical nature. The judge can call on this database at any time in other cases. Where necessary the judge supplements the facts submitted drawing on this database. Using his or her specialist knowledge the judge has the right to assess the causality to decide whether exposure was sufficient to cause mesothelioma. The involvement of medical or other experts and the attendant fees are thus kept to a minimum.⁴¹

Statute of Limitation

Initially NSW applied the Limitations Act 1969 (NSW). This act provided for a three-year statute of limitations, with

the possibility of a one-year extension if the victim was not aware of his disease, its cause or the consequences. Extension had to be requested from the Court. In 1998 NSW abolished the statute of limitations for asbestos-related cases. Since then Section 12A of the Dust Tribunal Act reads as follows:

12A No limitation period

- (1) The purpose of this section is to enable proceedings to be brought before the Tribunal in relation to dust-related conditions at any time.
- (2) Nothing in the Limitation Act 1969 or any other statute of limitations operates to prevent the bringing or maintenance of proceedings before the Tribunal in relation to dust-related conditions.

31 Without limiting subsection f2f:

- (a) sections 14, 18A, 60C and 60G of, Division 6 of Part 2 of, and Schedule 5 to, the Limitation Act 1969 do not prevent the bringing or maintenance of any such proceedings before the Tribunal, and
- (b) any such proceedings may be brought or maintained before the Tribunal even though a limitation period has already expired under that Act, and
- (c) any such proceedings may be brought or maintained before the Tribunal as if Division 1 of Part 4 of that Act had never been in force.

For the sake of brevity we refer to the relevant Second Reading Speech^{42,43} for the considerations when this amendment came about.

Several other Australian states chose to abolish the statute of limitation regime, such as Queensland.⁴⁴

Other states have not reached this point yet. To this date South Australia (SA) applies a three-year statute of limitation from the diagnosis⁴⁵, with the possibility of a twelve-month extension to allow for further investigation into the facts. Victoria, too, provides for a three-year statute of limitation⁴⁶ from the moment the victim becomes aware of his disease and the liable party. The same goes for Western Australia (WA)⁴⁷: three years from the diagnosis.

³⁸ Dust Diseases Tribunal Act 1989 (NSW), s. 6; Dust Diseases Tribunal Amendment (Claims Resolution Process) Regulation 2005, verbeterd in 2008; Dust Diseases Tribunal Regulation 2007; Dust Diseases Tribunal Regulation 2013; www.legislation.nsw.gov.au.

³⁹ Source: Waterman o.c.

⁴⁰ Claims Resolution Process.

⁴¹ Acknowledgment to dr. Y.R.K. Waterman.

⁴² In which members of parliament discuss the amendments.

⁴³ <http://www.parliament.nsw.gov.au/Prod/parlment/hansart.nsf/V3 Key/LC19981117052>

⁴⁴ Section SII(2) of the Limitation of Actions Act (Qld).

⁴⁵ Common law in SA.

⁴⁶ Limitations of Actions Act 1958 (Vic).

⁴⁷ Limitations of Action Act 2005 (WA).

Loss

Victims of Australian asbestos companies in NSW may file claims for any past and future financial loss and for immaterial loss. The financial loss of their families is also eligible for compensation.

The immaterial loss (general damages, non-pecuniary damages) is made up of several elements: pain and suffering, loss of enjoyment of life, loss of life expectancy

Current Damages in NSW

In NSW damages are significantly higher than in the Netherlands and in the period between 2009 and 2013 ranged between \$250,000 and \$ 500,000⁴⁸ (EUR 175,138 - EUR 350,270).⁴⁹ In NSW victims are entitled to compensation *tailored to the individual case* for the loss of life expectancy of \$ 1000 for each year 'lost',⁵⁰ which also vindicates the (young) age of young victims. When it comes to the size of the damages, the Australian context is not unique.⁵¹

Costs

In NSW all other aspects of the handling of cases by the Dust Diseases Tribunal are governed by regular civil law and

the code of civil procedure. This means that the victims' costs of the proceedings are recoverable if their claims succeed.

Safety Net

NSW does not have a safety net in place that is comparable to the TAS/TNS Schemes. However, asbestos workers with mesothelioma who have worked in NSW are entitled to payments from the NSW Dust Diseases Board.

Other victims who have been exposed to asbestos outside a work context but have no memory of where exposure may have occurred or cannot adduce evidence of exposure do not qualify for compensation. The figures, however, show that this rarely happens (5% approx.).

4. Back to Piet.

Piet contacted Joanne Wade on 9 January 2015. That same day, after consulting Beer Advocaten about the options in the Netherlands, she filed Piet's claims with the Dust Diseases Tribunal (DDT) of NSW.

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1. Kirkpatrick v Babcock Australia Pty Limited [2009] NSWDDT 4; Judge Curtis awarded \$280,000 for general damages. In Euros: € 196,211.02;
2. Mooney v Amaca Pty Limited [2009] NSWDDT 23 Judge Curtis awarded \$290,000 for general damages. In Euros: EUR 203,218.56;
3. Roberts v Amaca Pty Limited [2009] NSWDDT 28 Judge Curtis awarded \$275,000 for general damages. In Euros: EUR 192,651.91. Total damages 2,000,000 (EUR 1,376,000), inclusive of loss of income;
4. John William Booth v Amaca Pty Ltd and Amaba Pty Ltd [2010] NSWDDT 8 Judge Curtis awarded Mr Booth \$250,000 in general damages. In Euros: EUR 175,138.10;
5. Phillips v Amaca Pty Ltd [2010] NSWDDT 11 President O'Meally awarded Mrs Phillips \$250,000 for general damages. In Euros: EUR 175,138.10;
6. McGrath v Allianz Australia Ltd [2011] NSW DDT 1; President O'Meally awarded Mr McGrath \$215,000 for general damages. Also by way of injunctive relief \$91,000 for asbestos-related pleural disease In Euros: EUR 150,617.18 and EUR 63,749.60;
7. Perez v State of NSW [2013] NSW DDT 1; Judge Curtis awarded Mr Perez \$290,000 for general damages. In euros: EUR 203,218.56;
8. In Raymond John Dean v Tower Insurance Limited (for Rogers Meat Co Pty Ltd) [2013] NSWDDT 9 Judge Finnanne awarded Mr Dean \$ 290,000 for general damages. Mr Dean was 61 years of age and underwent a lung biopsy and 12 cycles of chemotherapy. In Euro: EUR 203,218.56;
9. Colin McMaster Rodgers v Amaca Pty Limited [2014] Judge Finnanne awarded Mr Rodgers \$350,000 for general damages (EUR 245,189.04);
10. Kevin John Phillips v Amaca Pty Limited [2014] NSWDDT 2; Judge Kearns awarded Mr Phillips \$300,000 for general damages (EUR 210,162.03);
11. Dunning v BHP Billiton Limited [2014] NSWDDT 3; Judge Kearns awarded Mr Dunning \$500,000 for general damages. The victim was 50 years old (EUR 350,270.06);
12. Pamela Wells as Executrix of the Estate of the Late Walter Wells v New South Wales Land and Housing Corporation [2014] NSWDDT 363; Judge Finnanne assessed general damages at \$250,000 (EUR 175,138.10).

⁴⁹ Exchange rate of May 2015.

⁵⁰ In the United Kingdom, too, age is a consideration: cf. F. Sobczak, Liability for asbestos related injuries, Maastricht 2013, ISBN 978 94 6159 193 7, pag. 197.

⁵¹ An English-context example is the recent case of a 70-year old English teacher to whom a total compensation of GBP 210,000 (EUR 290,850) was awarded for mesothelioma after being exposed to an asbestos-contaminated classroom for eleven years. Dutch victims will not receive damages in such amounts. <http://schoolsweek.co.uk/retired-teacher-who-was-exposed-to-a-sbestos-paid-out-210000-after-meso-the-lion-diagnosis/>

Because Piet's health was deteriorating quickly, his claim was taken off the DDT's standard route (CRP) and submitted for settlement by the Tribunal. An application to that effect was filed on 6 February 2015. On 10 February 2015 the Tribunal considered and granted the application.

This procedure required a statement by Piet in the form of a deposition. The problem was that Piet could not make the trip to Australia. Where necessary the Australian judge comes to the victim – a case of the mountain coming to Mohammed.

However, an international network of lawyers can help to find faster solutions⁵². In this particular case Beer advocaten⁵³ was asked to take depositions on 27 January and 25 February 2015. A public law notary took sworn statements from Piet, who was extremely sick by then, at his home on 28 January and 25 February. The Tribunal had the statements in its possession on 28 January and 26 February 2015, eliminating the need for the Tribunal to travel to the Netherlands, which no doubt would have led to longer terms and higher costs.

On 13 February the Informal Settlement Conference was held, and on 16 February a settlement was reached within the framework of the effective NSW case law. The settlement was presented to the Tribunal for approval on 17 February. When the last statement has arrived on 26 February the Tribunal gave its approval and damages for Pieter were paid on 27 February 2015.

Within a total of seven weeks Piet's case, featuring full legal proceedings with complicated foreign aspects, had been settled and Piet could receive the damages to which he was entitled in accordance with the DDT's case law in his lifetime. Piet died on 18 March 2015, in the knowledge that he had left his loved ones well-cared for.

5. A Closer Look at Damages in the Netherlands

The first thing that strikes the eye is that damages in the Netherlands overall compare unfavourably to its neighbouring countries. In a national as well as international⁵⁴ context damages in the Netherlands are low to very low, not just for mesothelioma victims. As early as 2008 Prof. S.D. Lindenberg observed that Dutch damages lag sorely behind other European countries and inflation⁵⁵. In 1992 damages for a 54-year old HIV-victim⁵⁶ amounted to EUR 136,000 maximum (indexed to 2015: EUR 227,960). In Germany and the United Kingdom damages are much higher than in the Netherlands, and even show an upward trend. The following table illustrates the discrepancies until 2013:

Highest Damages Paid:

	1999	2005	2013
The Netherlands	EUR 136,000	EUR 136,000	EUR 150,000
England	EUR 230,000	EUR 320,000	EUR 380,000
Germany	EUR 250,000	EUR 500,000	EUR 650,000

In this context reference is made to an interesting publication by Prof. T. Hartlief.^{57,58} About the size of damages Prof. Hartlief concluded that the emancipation of damages should definitely be placed on the agenda.

Damages for mesothelioma victims in the Netherlands are a factor 4 lower than the regular damages, which are low already. Could this honestly justify the route of the Asbestos Victims Covenant? We don't think so.⁵⁹

The Supreme Court is still conservative in determining the size of the damages.

The Supreme Court is extremely conservative in determining damages, sticking to a few maxims, namely:

⁵² APE,, AAJ, PEOPIL.

⁵³ Member of the aforesaid international organisations.

⁵⁴ For an international comparison of claims by the end of last century, reference is made to N.J. Wikely 1993: Compensation for Industrial disease, isbn 1 85521 264 1, Dartmouth publishing company Ltd.

⁵⁵ Cf. for instance the HIV infection decision of the Supreme Court of 8 July 1992, NJ 1992/714 also HR 28 January 2005, ECLI:NL:HR:2005:AR6458, NJ 154; to a HIV-infected victim NLG 300,000 (EUR 136,000) was awarded. Also see: Prof. S.D. Lindenberg, smarte ngeld, 10 jaar later, ISBN 978-90-13-05921-2, published by Kluwer, Deventer.

⁵⁶ Who survived for three years after the diagnosis.

⁵⁷ Professor of private law at Maastricht University.

⁵⁸ <https://www.s-martenge.nl/pagina/s-martenge-ld-ne-derland-an-no-2012-tijd-voor-een-s-teen-stilstaand-wa-ter-0>

⁵⁹ Especially not in cases in which litigation is necessary anyway.

- (1) Similar cases
- (2) Highest damages paid: the ceiling
- (3) Foreign cases can be used as reference but are not decisive⁶⁰.

In assessing damages lower courts take account of all circumstances of the case, including the nature of the liability of the one part and the nature and severity of the injuries, the duration and intensity of the distress and the loss of enjoyment of life of the other. The question is whether the turnaround time of the suffering should be a factor of significance. The Court of Overijssel recently held it should not.⁶¹ In assessing the damages courts also consider the severity of the infringement of the prejudiced party's sense of justice, the nature of the actions attributed to the liable party (degree of culpability) and the economic situation of both parties. Also taken into account are the amounts awarded by Dutch courts in similar cases, including the maximum amounts, subject to inflation since the decisions in question. On a final note, courts factor in (changes in) society's views of compensation for suffering⁶².

It is not clear where the justification lies in the (extremely) low damages awarded in the Netherlands to mesothelioma victims. Compared to the situation in NSW the solution presented by the Asbestos Victims Covenant certainly does not bring any such justification.

6. Summary

In an international context damages in the Netherlands are overall low.

A special solution has been found for mesothelioma victims, with even lower damages. The question arises how such lower damages could be justified.

In the Dutch solution the following components stand out:

1. Speed: within two to three months TAS Scheme; within six months mediation by IAS completed;

2. Victims do not pay for the IAS' services;
3. The expertise and quality of the IAS are good;
4. But: because only individual-related evidence is accepted, evidentiary possibilities are limited;
5. There is no National Database from which evidence can be taken;
6. The outdated statute of limitations regime presents a major hurdle;
7. Just as major a hurdle is the fact that the IAS' decision in fact has the status of a non-binding recommendation. We call it 'mediation' but there is no commitment on the employer's part. Employers cannot be compelled to take part in the mediation;
8. If mediation fails, there is the safety net of the TAS/TNS Scheme for victims who do not find liable parties;
9. 19.2% of the cases notified to the IAS do not receive compensation. Of the remaining cases in which the LAS holds there is a liable party, just 47% receive the limited allowance under the Covenant; 53% of the cases, however, have to rely on the safety net;
10. The Netherlands awards exceptionally low amounts in damages, even in the event of liability: EUR 56,46⁶³; Compared to similar losses attributable to other causes compensation does not exceed 25%;
11. In the Netherlands no separate, individual (age-related) damages are awarded for loss of life expectancy; for the amount of damages it does not make a difference whether the victim is 28 or 82 years old;
12. No higher damages can be expected from legal proceedings: case law has adapted to the Covenant allowances..

NSW offers mesothelioma victims a different route to compensatory damages. Damages awarded are furthermore of a different order of magnitude.

The NSW solution comprises the following elements:

1. Enforceable legal proceedings;
2. Speed is very high, tailored to the individual's need;
3. The liable party pays for the costs of the legal proceedings;

⁶⁰ Supreme Court, 7 July 1992, NJ 1992/714 (AMC/O.) and Supreme Court, 17 November 2000, ECLI:NL:HR:2000:AA8358, NJ 2001/215 comments by ARB (Dr uijff v. Bouw).

⁶¹ Subproceedings of 23 February 2015 ECLI:NL:RBO VE:2015:944.

⁶² Based on publications about too low damages in the Netherlands.

⁶³ Under the Asbestos Victims Covenant. This allowance is indexed every year.

4. The quality of the court's services and assessment is high
5. Compensation: full;
6. Damages: full, ranging between \$ 250,000- \$500,000 (EUR 175,138- EUR 350,270);
7. Separate, individual-related compensation for loss of life expectancy, which acknowledges the (young) age of the victim;
8. No statute of limitations;
9. Enforceable outcome;
10. Approx. 95% of the cases receive damages in line with case law;
11. No safety net comparable to TAS Scheme;
12. However, it is possible to file a WorkCover claim⁶⁴
13. Only in a slight number of cases (5% approx..) no compensation is paid after a sound investigation.
14. This percentage is so slight that a safety net like the TAS Scheme would seem superfluous.

7. Conclusion

Minister Asscher is right: No job should cause disease or death.

In the post-war reconstruction period asbestos was a much-used and cheap material. Despite the international knowledge about the harmful effects of this product the Dutch authorities did not ban this product until 1993.⁶⁵ Victims exposed to asbestos should receive adequate compensation. To this date they are the ones who pay with their lives for the rebuilding of the Netherlands.

In 2000 the Asbestos Victims Covenant and mediation by the IAS were the promising start of a solution that a civilised country like the Netherlands should offer its victims. However, fifteen years on that same solution for mesothelioma victims stands out in stark contrast to the Australian (NSW) approach to similar cases in terms of procedural and evidentiary issues and in terms of statute of limitations and the compensation offered. In 2015 we are wrong to regard the Dutch compensatory system and the mediation by IAS in its current form as a 'quiet possession'. Fifteen years after the IAS' foundation this system deserves a mature follow-up.

By the principles applied by NSW the extremely low damages awarded to mesothelioma victims in the Netherlands cannot be justified just by the speedy, simple and free IAS procedure. The procedure in NSW beats the Dutch IAS route by far on all fronts.

To some of the contractual partners, the insurers, the Asbestos Victims Covenant no doubt presents a convenient tool to obtain as much certainty as possible on the cost of possible claims. Claims that reportedly did not match premiums. However, victims should be able to understand the law. It is impossible to explain to Piet the difference between the Netherlands and NSW as set out in this article.

Also impossible to explain to Piet is that with the IAS the Netherlands has opted for a system of non-committed mediation, in other words a system by which employers can and are held liable, and stating the grounds for liability, but then allows employers to disregard the – solid – recommendation of the IAS without further explanations.

Overall damages in the Netherlands could do with a thorough review. This applies even more for mesothelioma victims.

In mesothelioma cases the Netherlands should seek to create a National Database containing specifics on asbestos for evidentiary purposes, to reform the evidentiary regimen in these particular cases given the extremely long latency of the disease and to entirely abolish the statute of limitation of the old regimen.

On us foists itself the choice in favour of a court specialized in asbestos, with ample possibilities for gathering and assessing evidence, and latitude for speedy proceedings. The objective should be optimising the opportunities for adequate compensation for this group with decisions that are enforceable in the short term.

It is possible. Of this NSW is living proof. With the procedure followed and their approach to compensation to victims NSW sets a shining example for the Netherlands

⁶⁴ Statutory payout for job-related loss.

⁶⁵ The first, restricted, ban on asbestos in the Netherlands dates to 1978.

Minister Asscher is right.

We have to watch closely how files are handled. And not just watch. Also listen. And not just listen, but pay attention. We should learn from Piet's case. We live in a world of globalisation. Last time we looked the Netherlands was part of that world.

If the Netherlands were to choose not to follow the Australian example, that choice should be justifiable to the victims. It should be explained to them that this choice is not inspired by legal grounds, but rather by economics. That the interests of insurers prevail.

In that case courts should not consider economics in determining damages for mesothelioma victims, but look to their foreign counterparts instead.

Where do victims and their families stand? It's time for a wakeup call.