# A DUTCH DES CASE: PHARMACEUTICAL PRODUCERS JOINTLY AND SEVERALLY LIABLE

**PROFESSOR EWOUD HONDIUS** Utrecht University

From 1953–1967 a drug called "diethylstilbestrol," better known as "DES," was prescribed as a sedative in the Netherlands, as it was in other countries. DES was supposed to prevent miscarriages, but instead happened to cause grave side effects. Daughters of the women who used the drug developed a special form of cancer in the uro-genital system. Not only did the victims suffer a medical plight, their legal plight has also come to the fore. Can the manufacturers of the drug be held liable? This question raises a number of issues: did the manufacturers commit a tort? Are the victims time-barred from instituting proceedings? How to sue a manufacturer when one cannot prove who brought the drug into circulation? It is especially the latter issue which has come to be associated with DES cases. DES being a generic drug, it was marketed by a large number of manufacturers. Twenty-five years later it is all but impossible to prove which manufacturer produced the particular drug which was used by the mother of any victim. Does this mean that victims cannot be compensated? Not necessarily.

In order to find an equitable solution, American courts have introduced the notion of market share liability. In the landmark case *Sindell v. Abbott Laboratories* 607 P 2d 924, the California Supreme Court, since followed by a number of courts in other states, held that in cases where the manufacturer cannot be traced, all manufacturers are liable for their share in the market. This "market share liability" has attracted much attention in Europe, but so far as I know has not been applied by European courts. Would it be adopted by the Dutch courts which were called upon to decide a DES case?

On April 28, 1986, six DES daughters sued 10 pharmaceutical companies before the Amsterdam (District) Court. The case was dismissed, as it was on appeal, basically on the ground that none of the victims could prove which of the defendant manufacturers had brought the particular drug into circulation. In cassation, however, the Advocate-General Hartkamp asked the *Hoge Raad* to annul the decision on the ground that it did not follow the market share liability theory. Would the *Hoge Raad* follow the revolutionary torch raised by its Advocate-General?

The answer is: No. The court went one step further. The court first dismissed the Appellate Court's rejection of article 99 Book 6 of the Dutch Civil Code as an obstacle to the daughters' case. "When constructing this article," said the court, "the text, the purpose and the parliamentary history of the law should be taken into consideration" (section 3.7.1 of the decision, as numbered by the Court). The text of article 6:99 reads:

> "Where the damage may have resulted from two or more events for each of which a different person is liable, and where it has been determined that the damage has arisen from at least one of these events, the obligation to repair the damage rests upon each of these persons, unless he proves that the damage is not the result of the event for which he himself is liable" (translation Haanappel, Deventer, 1990).

According to the *Hoge Raad*:

> "the situation occurring in the present case is covered by this text: it must be assumed by way of supposition that the companies which marketed DES in the relevant period are each liable therefore on account of fault on their part, that the entire damage of each injured party may have resulted from each of these 'events'—the marketing—and that at any rate the damage was the result of one of these 'events.' If the Court of Appeal (. . .) imposes the requirement that the alleged facts must include a 'specific act,' it makes a requirement which does not find support in the text of article 99" (3.7.1).

As to the purpose, the *Hoge Raad* continues:

> "The application of the article in a situation like the one involved in the present case is also in keeping with its purpose. The article aims at removing the unreasonableness that the injured party would have to bear the damage himself because he is unable to prove whose act was the cause of his damage. This is the difficulty of providing evidence with which the injured parties are confronted in the present case" (3.7.1).

Then comes the most difficult element: how to explain away the absence of any reference to this kind of case in the Parliamentary proceedings. It should be mentioned that unlike the United Kingdom, where only since the end of 1992 has consultation of *Hansard*, when construing legislation, been allowed (*Pepper v. Hart* [1993] 1 All E.R. 42), on the continent

this construction method has a long standing tradition. This is how the *Hoge Raad* countered this argument:

> "It is true that in the 'Toelichting Meijers' and in the parliamentary documents there is no mention of a situation like the one occurring in the present case in connection with the DES product, but it is likely that at the time this type lay beyond the range of conceivable situations. Therefore it may not be concluded from the fact that this situation was not discussed, that the article does not apply in such situation" (3.7.1.).

Another important point, says the *Hoge Raad*:

> "is that the system accepted by the Court of Appeal leads to an unacceptable result. Even though in the present case it must be assumed by way of supposition that each of the Pharmaceutical Companies was at fault by marketing DES and that the DES-daughters sustained serious injuries as a result of the use of DES by their mothers, in this system the DES-daughters will nevertheless be denied any claim for damages merely because they are unable to state from which producer the DES tablets taken by their mothers originated" (3.7.2).

But why did the *Hoge Raad* not accept the American market share liability, as advocated by its Advocate-General? This is the *Hoge Raad's* answer:

> "(...) it is unsatisfactory that this system lays the risk of insolvency of one of the producers and also the risk that a producer has ceased to exist or can no longer be traced, with the victims and not with the producers. It is also burdensome that the victims will have to bring claims against as many producers as possible and that the market share of each of the producers will have to be established in the litigation between the victims and the producers. From the standpoint of victim protection, moreover, there is no need for market share liability in a situation like the one occurring in the present case, since each of the producers is in principle liable for the entire damage, as has been ruled above" (3.8).

The appellate court had not applied article 6:99, because the DES-daughters had not stated who belonged to the circle of persons who had marketed DES. The appellate court had not required that all such persons be summoned in the procedure, correctly so, according to the *Hoge Raad*, since it sufficed for an injured party to summon one of the persons liable. The Court continues:

> "Likewise, it is not a requirement that the injured party allege—and prove—which persons belong to the circle of persons liable. Even in the traditional situation falling within the scope of article 6:99, where several persons fire a rifle or throw stones in the same direction, such a requirement would already lead to an unreasonable result: if it is impossible to identify all riflemen or stone throwers, the injured party would have to bear his damage himself. In a situation like the one under review a requirement like the one just referred to would all the more lead to an unreasonable result: the injured party would have to bear her own damage if she is unable to identify all the producers which marketed DES in the relevant period, even though in fact such identification of producers will be virtually impossible" (3.7.4).

As to the burden of proof, the court stated:

> "Each of the DES-daughters will have alleged sufficient facts by alleging with respect to each of the Pharmaceutical Companies, as in fact each of them did in the present proceedings:
> (i) that the Pharmaceutical Company in question marketed DES in the relevant period and is liable therefor on account of a fault committed by such company;
> (ii) that there are also one or more other producers—whether or not joined as defendants—who also marketed DES in the relevant period and who is/are also liable therefor on account of fault; and;
> (iii) that she has suffered damage and that the damage is the result of the use of DES, but that it is no longer possible to establish from which producer the DES that was taken originated.
> In principle the burden of proof of the above rests with the DES-daughter in question.
> The concluding words of article 6:99 entail that as a rebuttal of his liability each of the Pharmaceutical Companies may allege and if necessary prove towards each of the DES-daughters that the damage of the DES-daughter in question is not the result of the use of any DES marketed by him" (3.7.5)

What about the defence that DES was also marketed by producers who are not liable? This is what the court has to say on this point:

> "it is conceivable that it will be established that in the relevant period DES was also marketed by one or more producers who are not liable therefor because there is no question of fault and that the damage of the DES-daughter in question may also have been caused by such DES. This will not release the other producers from their liability for the entire damage unless, in the given circumstances which include the degree of risk that the damage of the DES-daughter in question was caused by DES originating from a producer who is not liable, such liability would be unacceptable according to criteria of reasonableness and equity" (3.7.6)

As for recourse between the various manufacturers, the court is curt. It says

> "that the producers, who are jointly and severally liable to the injured parties for the entire damage, have mutual recourse, so that in principle they will not have to bear more damages, eventually, than their share in the total damage. Anyway, since recourse is not a point of discussion in the present proceedings, it need not be decided here in which proportion each of the producers will have to contribute to the damages" (3.7.3).

And a little further: "It need not be decided here whether the market share of each of the producers may be a relevant factor in the determination of the proportional contribution to be made by each of the producers" (3.8).

This case was not decided on the basis of the E.C. Directive on Product Liability and its implementation in the Dutch Civil Code. As the *Hoge Raad* states, "this is a case about liability for products which were marketed before 1985 while article 17 in conjunction with article 19 shows that the directive does not apply to these in any case" (3.5).

The DES decision has met with a positive reception in the Netherlands. A majority of writers are happy with the result. See Jac Hijma (1993) *Ars Aequi* 123; P. Ingelse (1992) *Nederlands Juristenblad* 1403; J. Knottenbelt (1993) 5 *Nemesis* 23; G.J. Rijken and J.G.J. Rinkes (1992) *Tijdschrift voor Consumentenrecht* 325 and A.J.O. van Wassenaer van Catwijck (1993) *Verkeersrecht* 19, and myself (1993) *Tijdschrift voor Gezondheidsrecht* 382. The decision has met with criticism by L. Dommering-van Rongen, *Weekblad voor Privaatrecht en Notariaat* 6089; A.S. Hartkamp in *Kabaal in Holland/Asscher-bundel* (Arnhem 1993), pp. 76–78; C.J.M. Klaassen, A.A. van Rossum, (1994) *RM Themis* 4–22 and J. Spier (1992) *Nederlands Tijdschrift voor Burgerlijk Recht* 193.

The importance of the DES case may be summarised in three points:

(i) First, it is a major boost for the many victims of DES, although the liability of the manufacturers is yet to be assessed. It may also serve as an argument in other European countries to compensate the victims.

(ii) The practical consequences of the decision should not be overestimated. Environmentalists have, incorrectly in my opinion, assumed that the case could immediately be applied to environmental claims. This cannot be read in the court's decision. Even, liability under the E.C. Product Liability Directive, being constructed as a strict liability, may not be affected by the DES-decision, being based on fault liability.

(iii) On the other hand, the importance of this case for the Dutch law-finding process should not be underestimated. Indeed, few Dutch lawyers would have predicted the outcome of this procedure, their type of argument still being based on Civil Code-related arguments. Since the present Civil Code is of such recent origin (it entered into force on January 1, 1992), it was generally presumed that the court would stick to these arguments. Instead, the *Hoge Raad* uses policy arguments, just as an American court would. Since such arguments must always play some role, it is better to bring them out into the open, in order that a decision can be judged on its real arguments. This is the major gain which DES brings the Dutch.