EQUITY IN DUTCH LIABILITY AND INSURANCE LAW

by Frank Stadermann - Trenité Van Doorne

The Netherlands Civil Code, that is, the part dealing with damages, includes a provision which on the face of it is quite straightforward. It is in fact one of the most complicated sections one is likely to encounter in the Dutch Civil Code. Section 101 from Book 6 - the provision in question - provides that the loss should be apportioned between the tort-feasor and the injured party if the latter also has contributed to the loss. Quite apart from that, however, Equity may require that liability is adjusted or limited. But when is something equitable and when is it not? That is a question which time and again has proved very difficult to answer.

Let me give an example to illustrate that it is not so simple answering the question whether in any specific event, weighing the causal contributions to a loss leads to an equitable result.

A baby elephant weighing 999 kilograms and an overdeveloped mouse weighing 2 kilograms cross a bridge together. The bridge has a bearing power of only a 1,000 kilograms. It does not take a mathematical genius to predict what happens next.

Nor should, it would seem, the matter of determining the causal contributions of the two animals to the bridge's collapsing pose much of a problem. The mouse and the elephant contributed in a ratio of 2:999. Suppose the mouse owned the bridge; in that case the elephant's liability would amount to 999/1001 part of the damage to the bridge.

If, on the contrary, the elephant were the owner, he would have to settle for a compensation equal to 2/1001 part of the loss, given his own causal contribution.

But does that constitute an equitable result? Not necessarily. Applying the equity test may result in an adjustment of liability, if (for example) one considers the extent to which each animal is at fault.

It is quite possible that the fault of the mouse is just as serious as the elephant's, that accordingly one is as much to blame as the other and that it would therefore be equitable to divide the loss between the mouse and the elephant fifty-fifty.

And so it is up to the Court to determine what is "equitable" in each case. But what would be equitable in the eyes of one judge need not be considered equitable by another.

A Real-Life Case

A prime example of the application of the equity test can be found in the decision of the Netherlands Supreme Court of 31 March 1995 (RvdW 1995, no. 83). I find the result rather surprising. I discussed this ruling in an article in the IBA Insurance Newsletter of August 1995 already but since the chances are that no one has read that article anyway, I rehearse the case here.

A Luncheon that got out of hand

Two medical doctors met for lunch in a distinguished restaurant. They had, however, not quite left their college years behind and tried the restaurant owner's patience to breaking level. First they ordered a bottle of Chablis only to send it back. The entrées were not up to their expectation and hence were finished only partly. The doctors were also less than satisfied with the wine list. They ordered three half bottles of a white Burgundy, opening the first one. Having consumed more than half its contents, they sent this bottle back as well. The two remaining bottles are replaced by a bottle of Chateau Meursault 1978. About two thirds finished, this bottle was sent back as well. When the restaurant owner presented the bill, the guests objected, unwilling to pay for the Meursault and the opened half bottle of white Burgundy. Having a hard time keeping his composure, the restaurant owner then went out into the garden to cool off.

At some moment the gentlemen made ready to leave. The restaurant owner was convinced that they would leave without paying. It is a fact that the money had been put on the table; it is unclear, though, whether the money had been put on the dish with the bill, or underneath it, hidden.

The restaurant owner grabbed one of the medical doctors by the jacket in an attempt to prevent them from leaving without paying. The latter turned around and in doing so swung his arm in such a way that the restaurant owner's face was scratched. The owner promptly hit the doctor, who then fell against the door of

the restaurant. As a result, he lost the hearing in one ear, for which he claimed the restaurant owner should be held liable.

The Court of Appeal held that the restaurant owner may have committed a wrongful act in hitting the doctor, but that his conduct was provoked by that same doctor. The Court of Appeal held that equity therefore required that the restaurant owner's liability towards the victim be extinguished in its entirety. The Netherlands Supreme Court, judging on the subsequent further appeal, concurred and upheld the decision.

What we see here is that the equity test resulted in the complete extinction of liability although such liability did in principle exist. This is quite exceptional. Rather less exceptional in Dutch jurisprudence are rulings ordering that liability be enhanced on the basis of the equity test.

Only partial cover due to equity

Application of the equity test has not remained restricted to liability law. It has also seeped through to insurance law. I say "seep" because so far I know of only one case (Supreme Court decision of 15 February 1991, NJ 1991, no. 493). The following was the case.

A man and his girl-friend applied for life insurance. A year earlier the girl-friend had been diagnosed as suffering from leukaemia. They informed the insurance agent of her disease. Wanting to sell the insurance, the agent, however, decided not to disclose this information to the insurer. He filled out a so-called "gezondheidsverklaring" (mandatory questionnaire about applicant's health, to be filed along with proposal form) for the man and the woman. One of the questions was:

"Are you currently suffering from any ailment, illness or disease?"

On the girl-friend's form, the agent ticked the answer "no". The insurer subsequently accepted the risk. Less than two years later the girl-friend died and the man brought a claim on the cover.

The insurer refused to cover the loss, pleading non-disclosure. When accepting the insurance, the insurer had not been informed of the disease and that, the insurer claimed, avoided the agreement.

The insurer also raised a defence that when the insurance agreement was concluded, the man knew or at any rate should have understood that the agent would not disclose to the insurer that the man's girl-friend was suffering from leukaemia. The man could not reasonably plead that his oral statement as to his girl-friend's disease would constitute notice to the insurer, argued the insurer.

The Netherlands Supreme Court rejected the defence of non-disclosure. It held that since the insurer's agent was aware of the disease, the failure by the agent to disclose such information should be for the insurer's account.

However, the Court of Appeal had also ruled that according to the standards of reasonableness and equity, it would be unacceptable that the man could claim the full insured amount. The Court of Appeal considered payment of half that amount equitable.

The Netherlands Supreme Court concurred with that consideration, taking the ground that "the principle of reasonableness and equity may entail that an insurer need only discharge part of an obligation such as the one in question - that is, to make payment under a life insurance agreement".

So, in a nutshell: in principle, the man was entitled to payment because the insurer's defence of non-disclosure failed. On the other hand, the Supreme Court considered it inequitable if the man were to receive the entire insured amount. That is why the Supreme Court adjusted the coverage to 50 per cent of the insured sum.

The Moral

Dutch Courts have proved not to be reluctant to apply the equity test. As a result, it is very difficult to predict the outcome of liability and insurance cover actions. After all, what one person may consider equitable need not necessarily be equitable in the eyes of another. This unpredictability is what makes it so hard for lawyers to give their clients straight forward advice. And so the Netherlands, too, threaten to become a lawyers' paradise.

My Own Approach

I have come up with my own solution to the problem of preparing difficult advices. You don't have to be a lawyer to know if something is equitable or not.

In fact, lay people often have a better sense for equity than have - professionally deformed - lawyers. That is why these days I discuss complicated liability cases over dinner with my family. Their views display an amazing insight and simplicity; something is either "fair" or "reasonable" or it is not. The opinions of my family members therefore often influence the contents of the advices I give to my clients. And those are often the very advices on which my clients compliment me.

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