



SUMMARY OF CASE LAW ON WASTE PRODUCER LIABILITY IN EUROPE

NETHERLANDS

Name of case: State v. Shell Netherlands Refinery BV

Country and court: Supreme Court of the Netherlands

Date of holding: September 30, 1994

Summary of facts: This is a classic case of the company producing insecticides (Endrin) in the 1950s using a landfill for the waste. In 1959, a large fish kill occurred nearby. By the 1980s, the authorities found widely contaminated soil for the disposal of approximately 15,000 kg of Endrin waste (mixed with a variety of other landfilled materials both municipal and industrial). At the time of the court decision, about 1 million Dutch Guilders had been expended, but the cleanup of the soil, including removal of houses built in the area beginning only three years after the last disposal activity, was estimated to be over 60 million Guilders (27 million Euro). The Court noted that “Shell knew their waste, including drins, was deposited on a regular dump.”

The defense raised by Shell was that its actions were consistent with norms of the 1950s: *“In the fifties, there was no standard of care in society that required making announcements or alerting the concerned transport to protect the general interest of the public health or the environment.”* The Soil Protection Law used by the Dutch Government asserting the claim protects an *“interest ...[that] did not exist in the fifties. In this law is a new interest, namely the retention of the natural state of the soil, is created.”* Shell further argued that it abided by the standard of care that existed in the 1950s: at the time, the company had done what *“could reasonably be expected of them, namely the issue of the waste to an experienced carrier for deposit into a government controlled landfill. They had the carrier wearing prescribed gloves to avoid contact with drins. In the fifties it is generally assumed that drins were quickly broken down in the soil. Accumulation in the food chain was still unknown.”*

Shell argument boiled down to the contention that *“[t]he behavior of the defendants must be judged on the basis of the science of that time.”* They also argued that they could have anticipated the fact that houses would be built on the area. Shell also contended that the landfill was inadequately monitored by the state.

The Government contested each of these points and argued that Shell knew of Endrin hazards and should have known that landfilling was inappropriate disposal.

Legal basis for holding waste generator or producer not liable: The Court created a rule of “relativity” that acknowledged that the duty of care and the foreseeability of damages was a subjective measure that required an examination of the specific facts and historical circumstances. The Court also noted:

“The permits under the [law at the time], relating to this deposit, determined among other things that the dumping of ‘liquids like oil and harmful solids and chemicals’ were forbidden. Such provisions are often included as conditions in permits. They were in the time in which the present deposits were made more or less common.” [this apparently implies that the common place practice must negate the inference that the actions were harmful].

The Court ruled that “*whether the present soil contamination was caused by careless conduct of Shell, of course, ... must be judged by the standards of 1954-1959.*” It further noted that the local government should have appreciated the dangers of building housing at the location, particularly after the 1959 fish kills. The fact that the Government did not take action on the landfill after the 1959 incident was cited by the court as evidence of the fact that awareness of these issues only arose much later in time. The Court also relied upon various technical journals showing an absence of concern for soil contamination at landfills in this period. It found:

“Based on the above considerations, the court considers that there is no evidence in this case of facts or conditions that should have been obvious to Shell in the years 1953 to 1959 that .. pollution of the landfill by harmful waste would require remediation ... so the requirement of relativity is not met.”

The Court require that the damages be foreseeable framing “*the question of whether the prospect of serious soil contamination was sufficiently clear to Shell or should they have been aware that their conduct would cause a financial loss in the form of incurred cleanup costs for the government....*” The court held that this hurdle had not been met.

Scope of damages or relief ordered: Defendant was ruled not liable for a 27 million Euro cleanup.

Commentary: This case was roundly criticized in the Netherlands. See Dunné, “A low point in the development of environmental liability: 1994 Shell Case,” COST RECOVERY REMEDIATION. DEALING WITH THE PAST, INVEST IN THE FUTURE?” (The Hague: SDU Publishers, 2008) pp.83-118. The Netherlands Supreme Court moved ultimately to a cut-off year of 1975 as a date that waste producers should have been aware of the risk of improper disposal. The law today in the Netherlands still using a duty of care. Article 10.1 of the Environmental Protection Act provides:

“1. Any person effecting transactions relating to waste or fails and who knows or reasonably should have known that thereby harm to the environment has arisen or may arise, is obligated to take any action or omit that can reasonably be expected of him in order to minimize that impact or limit.

“2. Anyone who produces wastes is prohibited from carrying out acts in respect of such waste or to leave wastes, where he knows or reasonably should have known that harm the environment has arisen or may arise.

“3. It is an offense for any business or to an extent or in a manner ... to perform actions relating to waste, if so, for he knows or ought to be aware of it, harming the environment arisen or may arise.”

While still incorporating a degree of foreseeability, the standard of care is obviously more onerous for contemporary waste management activities. The objective standard of “should have known” is also a lower standard of proof than the subjective standard employed by the Court in the Shell case. As a result, the situation today is much different: *“After a number of major environmental accidents and scandals in the eighties, the laws changed drastically and regulations relating to the environment incorporated ‘the polluter pays’ creed. Almost entrepreneurs are confronted daily with the high cost of cleaning up soil contamination.”* Milieu Magazine, September 2005.

Note: Nothing in the waste law transposed into national law supersedes, replaces or negates potential liability under the Environmental Liability Directive or the Industrial Emissions Directive (IPPC). Both of which have been applied to waste producers.

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