

A scandal over the toxic chemical substance chromium VI at the Dutch Defence Ministry. The national Belgian railway company also found guilty of exposing workers to chromium VI. What role did the law play in these cases? Can the two countries learn from each other, despite their different legal systems? How can trade unions use the law to best effect? And what improvements can be made? Two lawyers offer their experiences and insights.

A Dutch and a Belgian lawyer on chromium VI and the role of the law

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Wout van Veen is a lawyer and an expert on occupational diseases. Since 2014, he has been part of the interdisciplinary sounding board group set up by the National Institute for Public Health and the Environment (RIVM) to review the inquiry into exposure to and the effects of chromium VI. That inquiry was prompted by the chromium VI cases involving the Dutch Defence Ministry and a back-to-work project for the unemployed in the southern Dutch city of Tilburg. Following publication of the RIVM report, he has also been involved in a number of lawsuits brought by Defence Ministry employees who are seeking compensation via the courts for health problems caused by exposure to chromium VI.

Jan Buelens is a member of the Progress Lawyers Network in Belgium and a professor of collective employment law and comparative social law at the University of Antwerp. He was contacted in 2018 by employees of Belgian Railways (SNCB/NMBS) who had worked at a site in Gentbrugge on the reconditioning of old rolling stock between early 2014 and early 2016. He represented those workers in what was to become a criminal case against the railway company. The facts suggest a strikingly large number of similarities with the Dutch cases, in terms of both exposure to chromium VI and of the employer's failure to do anything about it, even though it was aware of the hazards that the substance represented. The approach followed in the two countries was, however, different.

↳ Sanding, grinding and welding work can lead to the release of chromium VI, a toxic metal that has long been used for its anti-corrosion properties.
Photo: ©Belga

➔ What was the problem at Belgian Railways?

Jan Buelens — The workers at Gentbrugge took care of dismantling and breaking up rolling stock and metalworking operations (grinding and welding). This work generated large quantities of dust and fumes which remained suspended in the air of a large shed. The interior of the train carriages was treated with an anti-rust paint primer which contained chromium VI. Metalworking operations caused the release of highly toxic and carcinogenic chromium VI. Although the external occupational safety and health department had explicitly warned of the dangers of chromium VI as early as 2008 and had made recommendations, Belgian Railways had failed to act. The mandatory risk analysis did not even mention chromium VI, let alone any adequate measures, and this created enormous risks.

The workplace was not hermetically sealed, so the dust dispersed throughout the shed, where dozens of workers were present. There was no adequate ventilation or extraction of the toxic substances at source. There was not enough protective clothing or face masks. Occupational hygiene was substandard: workers ate their lunch wearing their dusty clothing – and chromium VI is taken into the body not just through the lungs, but also through the skin and orally. The workers were not even told about the dangers, and so were unable to protect themselves properly. In September 2015, the work rate was increased, and thus the level of exposure to dust and fumes too. This caused more health problems for the workers.



➔ When was something done?

JB — After continued complaints, the external occupational safety and health department finally conducted exposure measurements on 15 December 2015. Five workers were sampled anonymously, using a personal air sampling pump fixed to their work clothing, close to their mouth. Four of the five samples were higher than the permitted limit values, even 13 times higher. At the workers' request, the unions forced Belgian Railways to halt the work until further protective measures were taken. This development marked the start of everything that came next. The Labour Inspectorate was informed, and it identified infringements of

the rules. The labour prosecutor ultimately brought a criminal prosecution.

It was clear to us right from the start that this was an important case and that we'd be up against a powerful opponent, who would spare no effort in hiring expensive lawyers to throw every sophisticated legal technicality possible at us. But we had a number of advantages.

Firstly, it was a big plus point that the case had been referred straight to the courts at the initiative of the public prosecutor. That meant that there was no protracted process of preliminary investigations, with the burden of proof primarily on us – after all, the public prosecutor was basing himself on infringements which the

Labour Inspectorate¹ had identified – and, as a result, judgment was given relatively quickly (final judgment on 30 June 2020).

A second advantage was that the workers were closely and energetically involved in this case. All the workers at the Ghent site chose to be “civil parties” in the criminal case. That is exceptional. Often not a single worker is prepared to do this, because he or she fears losing his or her job, and, in the case of workers no longer with the company, they may have signed an agreement with the employer not to bring any legal proceedings against him. The number of workers involved and their determination to get a result certainly had a positive influence on the case. During the pleadings, counsel for the railway company tried to argue that the case had primarily been instigated by the trade unions, but this cut little ice. Workers and unions were totally singing from the same hymn sheet, and that was good to see.

A third and final advantage was that we had access to the findings of the scientific inquiry conducted by the RIVM into the Dutch chromium VI cases involving the Defence Ministry and the back-to-work project in the city of Tilburg.² I had already been in touch early on in the case against Belgian Railways with the Dutch lawyers Wout van Veen and Daphne van Doorn, who were closely involved in the chromium VI cases in the Netherlands. I laid the RIVM’s findings before the court in Belgium, which took the matter very seriously and appointed a group of expert witnesses.

Our main doubts were whether there was enough evidence of contamination by chromium VI. The fact that all traces of it disappear quickly from the human body makes it hard to prove. Ultimately, only a few samples had been taken, and not in the best possible manner. This was, of course, immediately seized on by the defence. Happily, and rightly, the court did not fall for it and went with our arguments and those of the group of experts.

➔ Was this a Pyrrhic victory for the workers?

JB — Belgian Railways were found 100% guilty and fined 210 000 euros. Our prime interest in this case was to secure a conviction against the company, and, in that respect, we scored a resounding victory.

Unfortunately, the applications to join the proceedings as a “civil party” were declared inadmissible by the court. This has to do with the Belgian system of compensation for occupational accidents and illnesses. Early in the 20th century, Parliament voted in a law which provided that, in exchange for a swift admission of culpability for occupational accidents and illnesses and lump-sum recompense by insurers or the government, the employer would be granted civil immunity, that is to say they can no longer be held liable to pay full compensation, with one or two exceptions. This immunity was extended to cases of occupational diseases in 1927.

We remain of the opinion that immunity in this case was wrongly invoked. No workers have yet become ill (so no compensation has been paid), but they have to live with the fear that they may do so in a few years’ time or even decades later. Consequently, we demanded a reservation of rights in respect of this damage, along with provisional compensation for the distress which the workers are having to endure in the meantime. We shall take the same position in any similar cases that may follow.

Given the robust conviction we secured against Belgian Railways and the modest financial claim of the civil parties, we decided, all things considered, that we would not appeal. Workers who become ill can, of course, still claim compensation under the rules on occupational illness.³

1. Under Belgian (criminal) employment law, individuals can join criminal proceedings as a “civil party”. This enables them, for example, to bring a claim for damages.
2. See article by Pien Heuts in this issue.
3. On the obstacle course that the path of recognition of an occupational disease can be in Belgium, see the article by Pierre Bérastégui in this issue, page 44.

“Goodwill settlements” and the law on liability

The chromium VI cases in the Netherlands were addressed primarily not by the courts but by committees appointed by the employers concerned (the Defence Ministry and the municipality of Tilburg) to find a solution. Those committees assisted the RIVM scientific inquiry, but they also sought financial compensation arrangements for the victims.

➔ The Defence Ministry was quite quick to agree a goodwill settlement and – based on the findings of the inquiry – a definitive financial settlement. In Tilburg too, the victims received compensation promptly. Why do you think these employers agreed to this?

Wout van Veen — This was really unprecedented for the Netherlands, but my explanation for the speedy conclusion of these compensation settlements is that the Occupational Diseases Office of the Dutch Trade Union Confederation (the FNV, the country’s biggest labour organisation) has, since it was founded in 2000, significantly raised the profile of occupational illnesses, through countless lawsuits and settlements. This has created a climate in which health and safety, and the prevention principle, are taken more seriously: exposure to hazardous substances is simply no longer considered acceptable by public opinion. The Defence Ministry and the municipality of Tilburg have seen the light. That, I think, is why the Defence Ministry did not argue for claims to be time-barred, even if they concerned the period 1984–2004.

→ **Are you a fan of this kind of settlement?**

WvW — It is good that victims are compensated promptly. That makes them feel that their suffering is both seen and heard. It was certainly the case with those formerly engaged on the job-creation project in Tilburg, where work conditions were quite dreadful. Even if they had no health problems, the Tilburg victims received compensation. People are living with a great deal of anxiety, because of the long latency period of chromium VI, which means that you can still get cancer 20 years later.

However, I have trouble with the limited list of illnesses which are scientifically proven to be linked to chromium VI. Some scientific studies were taken note of, but others were deemed not good enough. As a result, people with health problems that are not on the recognised list lose out.

→ **The case against Belgian Railways was won, in the sense that the employer was punished, but those affected received no compensation or other settlement. Why is this case important for the victims?**

JB — It is more than just the outcome of this case that is important. For a long time, occupational safety and health was treated as something of a poor relation in Belgium, but we hope this case will help to change that. I would be very happy if this case led to greater awareness of the dangers of hazardous substances. There are still plenty of them around at the workplace.

First and foremost, trade unionists and lawyers can learn from this case. It has shown that tackling a specific case, especially if public opinion is engaged, can generate a lot of attention. If you take on a case of this kind, it is very important to cooperate. You need solid agreements between victims, unions, any other organisations involved, and lawyers. It is also important that you pay attention to the specific legal procedures required. Collection of evidence is essential: employer testimony, but also photos and in-house reports. You can start gathering these well before a case gets under way. Lastly, it is important

that unions and the lawyers assisting them share their experience across borders. In our case, cooperation with the FNV and Dutch lawyers helped us to secure a positive outcome. How invaluable it would be to pool this experience across the whole of the European Union!

→ **Mr Wout van Veen, you say that chromium VI victims in the Netherlands can always use the law on civil liability if, for example, they are not covered by the compensation arrangements or think they are entitled to more generous compensation. That sounds ideal compared to Belgium, where no such possibility exists. Yet you do not find the Dutch system ideal. Why not?**

WvW — With an occupational illness or accident, you have to prove that health problems were exposure-related and that the employer failed in his duty of care. Only then can there be any question of recompense. The law on civil liability needs to be expanded in such a way that, even where there is doubt about causality, workers must be compensated. The enormously high level of proof currently required of victims must be lowered. If you are manifestly exposed and sick, compensation must follow.

↳ **The SNCB site in Gentbrugge, where several metal workers were exposed to chromium VI.**
Photo: ©Belga



4. In 1967, the Netherlands abolished all specific social security compensations for occupational accidents and illnesses. Only the ordinary regime for work incapacity, whatever the cause, was maintained.

Collective or individual compensation arrangements?

The issues are similar in both countries: workers are unlawfully exposed to a carcinogenic substance for years or even decades, and some of them develop one or more illnesses linked to that substance.

The significant conclusion is that, however the legal systems in the two countries may differ, both offer starting points for tackling the situation. Both lawyers, using the opportunities afforded by their country's system of laws, acted creatively to serve the victims' interests as effectively as possible.

In so doing, they not only did the victims a service; they have also helped to improve the regulation of judicial procedures relating to occupational illnesses. Jan Buelens hopes that "his" case will help to raise awareness of the dangers of hazardous substances in Belgium and that more workers will have the courage to stand up for their rights. Wout van Veen reports that the fact that cases have systematically been handled by the FNV's Occupational Disease Office since 2000 has led to a climate in which occupational safety and health is taken more seriously – and that climate made it possible to reach collective financial settlements for persons affected relatively quickly.

Humanely and judicially, employment law has to be on the side of the weakest. With the FNV's Occupational Diseases Office, we are currently waiting for a judgment from the Supreme Court (the Hoge Raad, the highest judicial body in the Netherlands) on the minimum criteria that must be met as regards the burden of proof.

You have to remember that, because social security was pared down in the Netherlands at the end of the last century⁴, workers with an occupational illness are victimised twice over. They are sick as a result of their work, and they suffer financially too. Often they have to go to court to get some form of financial compensation. If you are a trade union member, you can do this through the Occupational Diseases Office, which advances all your costs and claims them back only if you win your case, and often only in part. But if you don't belong to a trade union, you can't realistically afford to sue.

We can also see that there are many points of substantive agreement in the legal cases (regarding the gathering of evidence, legal arguments, and proof of causality) and that the two lawyers were able to help each other. Large parts of the inquiry by the Dutch RIVM, which formed an important evidential basis in the Netherlands, could also be used in the Belgian case.

Neither of the two legal systems can be deemed "ideal"; both have their advantages and disadvantages. Belgium has a collective compensation arrangement for occupational accidents and illnesses (an accelerated procedure), but individual victims cannot sue for compensation outside this arrangement or in addition to it. In the Netherlands, there are specific collective compensation schemes, but only for particularly extreme situations, such as the chromium VI cases. In principle, each individual case must be pursued through the courts. This is a long and unwieldy procedure but, on the other hand, the individual approach has the advantage that (again, in principle) anyone can bring a case.

And finally: cooperation pays. Cooperation between trade unions and lawyers from different Member States, but at the European level too. Thanks to years of effort by the unions at the European level, the European Carcinogens and Mutagens Directive set a limit value for chromium VI – an important victory, but the pressure will have to be maintained to achieve a limit value that will ensure a more effective protection.

➔ **Collective settlements and/or compensation arrangements on the basis of the law on liability are often only an imperfect solution. People can't get their lost health back. Do you think enough attention is given to occupational safety and health and strict permitted limit values for toxic substances?**

WvW – I am all for the prevention principle, meaning that substances are not used unless you are sure they are safe. The system of permitted limit values for hazardous substances takes no heed at all of the individual and his or her suffering. It is ironic to be exposed at work but unable to get compensation for illness because your level of exposure was within the permitted range. Employers exploit this.

The scientific basis for these permitted limit values is flimsy, I think. It is a hindrance in civil liability law. And I am convinced that a combination of multiple exposures, even at very low levels, has a cumulative effect. Dutch Defence Ministry workers employed at NATO sites, for example, were exposed not only to chromium VI but also to depleted uranium, benzene and PX10. They were working on military equipment used in the Gulf Wars. Many of them have a wide range of health problems, such as broken teeth and nails – they are physical wrecks. But these problems are not scientifically recognised as being caused by chromium VI, the victims do not qualify for compensation.

We should look at the person as a whole. And at total exposure, not individual substances and permitted limit values. ●



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