

2 year collision time limit set aside

In 2 recent judgments Dutch courts have rejected the 2 year collision time bar defense in favour of claimants who lodged claims well after the 2 year collision time limit had lapsed.

*By Richard van 't Zelfde
Caland Advocaten*

Under Dutch law, the 'general' civil law time limit for claims for payment of damages amounts to 5 years (art. 3:310 para 1 DCC).

In deviation from the above, our 'specific' civil transport law contains shorter time limits, such as the 9 month time limit for claims on a freight forwarder (8:1740 DCC), the 1 year time limit for (cargo) claims against the carrier (art. 8:1711 DCC) and the 2 year time limit for collision claims (art. 8:1790 and 1793 DCC), etc.

This means that the unlucky soul who is run over by a car on the streets has a claim on the liable party that is subject to the general 5 year time limit, whilst the unlucky person who is run over by a ship in waters has a claim which is subject to the specific 2 year collision time limit.

Of course, the Dutch courts have seen cases brought before them by parties with a time barred collision claim who sought to bypass the 2 year time limit by basing their claim (not on the collision rules but) on the general Dutch tort rules (art. 6:162 DCC) stating that the 5 year

time limit applied to their claims (and that these were therefore not yet time barred).

This concerns the doctrine of 'concurrence' of claims (in Dutch: *samenloop*), of 'alternativity' (in Dutch: *alternativiteit*) and of 'exclusivity' (in Dutch: *exclusiviteit*).

The Dutch rule on concurrence is (shortly put) that if a claim can be based on two different legal grounds (for instance on the specific collision rules and also on the general tort rules) that both sets of rules in principle apply ('concurrence').

Where the legal consequences of one set of rules cannot apply at the same time as the consequences of the other set of rules, the claimant is entitled to chose what set of rules apply ('alternativity').

The above is otherwise if statute law prescribes (or inevitably brings with it) that the application of one set of rules excludes the application of the other set of rules ('exclusivity').

In Dutch case law it has been held that if a claim can be based on the specific collision rules and also on the general tort rules ('concurrence') that then the claimant may chose on which set of rules he bases his claims ('alternativity') but that such does not bring with it that the 2 year collision time limit is bypassed by the 5 year

general tort time limit. In such case the 2 year time limit applies exclusively ('exclusivity').¹

This means (simply put) that in collision cases shipowners / ship's interests can in principle validly raise the 2 year time bar defense against claims lodged after the 2 year limitation period has expired.

However, there are now 2 recent judgments in which Dutch courts have set aside the 2 year collision time limit.

Judgment Court The Hague 18.12.2020²

On 18.12.2020, the District Court of The Hague handed down a striking judgment with regard to the 2 year collision time limit.

It concerned a criminal case following a regrettable collision on 28.06.2018 between a fast motorboat and a RHIB as a result of which one passenger of the RHIB died and several of its passengers suffered serious physical injuries.

The court sentenced the suspect (the skipper of the fast motorboat) to 100 hours of community service (in the alternative 50 days imprisonment).

As is possible under Dutch law, in the criminal proceedings the passengers of the RHIB presented themselves as 'injured parties' and brought claims

against the skipper ranging from EUR 788.72 to EUR 330,546.64.

Inter alia, the skipper raised the defense that the claims had already become time barred (invoking the specific 2 year collision time bar).

The criminal court rejected the time bar defense invoking art. 3:310 para 4 DCC of the general Dutch law, which (freely) translates as:

'If the event causing the damage constitutes a criminal offence to which Dutch criminal law applies, the action for compensation for damages against the person who committed the offence shall not become time barred as long as the right to criminal prosecution has not lapsed as a result of time bar or the death of the person liable.'

The criminal court considered:

'On behalf of the suspect, it was argued that the claims of the injured parties are time-barred because a limitation period of two years applies (articles 8:1790 and 1793 DCC) and that this period has now expired.

This defense is also rejected. Although the limitation periods of Book 8 DCC apply exclusively to the detriment of the general time bar period of

¹ See f.i. HR 15.06.2007 NJ 2007, 621 (FERNHOUT / ESSENT a.k.a. ZWARTEMEER).

² ECLI:NL:RBDHA:2020:13009.

art. 3:310 para 1 DCC, the claims in this case are not time-barred.

Article 3:310 para 4 DCC provides that if the event causing the damage constitutes a criminal offence to which Dutch criminal law applies, the action for compensation for damage against the person who committed the offence does not lapse as long as the right to criminal prosecution has not lapsed by time bar or by the death of the liable person. The Dutch legislator considers it undesirable that in these cases the civil law time bar can be completed, while this is not yet the case with regard to criminal law authority resulting from these offences. This provision is intended to prevent that a victim of a crime can no longer claim compensation while the person guilty of the crime is still involved as a suspect in criminal proceedings.'

Whilst the above judgment is one the maritime practice needs to take into account, a similar judgment was rendered recently on 25.05.2022.

[Judgment North-Netherlands Court 25.05.2022³](#)

Also this concerns a case following a regrettable collision: on 02 August 2014 a vessel collided with another vessel on board of which 2 passengers died with damage to the vessel.

By writ of summons dated 14 December 2021 (therefore more than seven years following the collision) the underwriters of the other vessel brought civil law claims against the skipper of the colliding vessel.

Prior to the civil law proceedings, criminal proceedings had been conducted against the skipper leading to his conviction by the criminal court of first instance (on 29.03.2016) of (*inter alia*) manslaughter and causing a vessel to become unusable endangering the lives of others. The skipper was convicted (*inter alia*) to 4 years imprisonment.

By subsequent decision on appeal of 11.12.2017 the Amsterdam Court of Appeal considered the same criminal facts proven and imposed a higher punishment: it increased the conviction to (*inter alia*) 5 years imprisonment.

By subsequent decision, the Dutch Supreme Court rejected the cassation appeal by judgment of 28.05.2019 on which date therefore the decision on appeal of 11.12.2017 became irrevocable.

In the subsequent civil law proceedings by the (subrogated) underwriters against the (convicted) skipper, the skipper raised as defense that the civil law claims had already become time barred (under the specific Dutch collision law time limit).

³ ECLI:NL:RBNHO:2022:4980.

The North-Netherlands Court considered and held as follows.

'The Skipper's most far-reaching defense is that the underwriters' claims are time-barred, because the time bar of art. 8:1793 DCC applies. The two-year period referred to therein has expired.

The underwriters on the other hand take the position that the limitation provision of Book 3 DCC applies as laid down in art. 3:310 para 4 DCC. The court will first assess both of these positions. (...)

The court will first have to determine which provision applies in this case. In this case, it concerns a concurrence of the collision rules (on which the skipper relies) and the rules on liability in tort (on which the underwriters rely). In the event of a concurrence of different sets of rules, in principle both sets apply (cumulation). If the legal effects of one set cannot occur at the same time as those of the other set, the claimant has the choice between the two sets (alternativity).

This is different if the law prescribes or inevitably entails that the applicability of one set excludes the applicability of the other set (exclusivity).

The law does not indicate that the collision rules in the event of concurrence has exclusive effect in relation to the general tort rules. The question is therefore whether the law inevitably entails this exclusivity.

Whilst the North-Netherlands Court first considered *inter alia* the above case law by the Dutch Supreme Court (choosing for exclusivity in favour of the 2 year collision time limit) the North-Netherlands Court went on to consider this also in relation to art. 3:310 para 4 DCC and the Parliamentary History to said article, after which the court considered and held:

It follows from the foregoing that, in the event of a collision, the claimant is afforded less extensive protection than is achieved under the general rules. But, the explanation cited above for the introduction of art. 3:310 para 4 DCC shows the opposite. On the contrary this is intended to provide the claimant with more extensive protection than under the general rules.

In the judgment cited above, the Supreme Court ruled that the specific time bar rules in the event of a collision take precedence over the general time bar rules. However, the present case between the underwriters and the skipper concerns the special time bar rules in the event of a criminal offence. For such the legislator has taken into account the fact that these special rules can infringe the interests of a liable person in an action for damages being brought as soon as possible. However, in the opinion of the legislator, the interests of the victim weigh more heavily.

Unlike the case decided by the Supreme Court in 2007, in the opinion of the court there is therefore

no unacceptable interference with the shorter time bar from transport law. The time bar of art. 3:310 para 4 DCC therefore applies to this case.

Considerations

In Dutch case law (and literature) the 2 year collision time limit has (long) been held to be exclusive (to the detriment of the 5 year time limit of general law).

But, in the above two recent judgments the time limit provision of art. 3:310 para 4 DCC is considered to be a specific provision (in cases where criminal law offences are involved) and it is held that the specific time bar provision contained in art. 3:310 para 4 DCC takes precedence over the collision law time limits.

Such is the case where *‘the event causing the damage constitutes a criminal offence to which Dutch criminal law applies and where the action for compensation for damages against the person who committed the offence is not time barred because the right to criminal prosecution has not yet lapsed (as a result of time bar or the death of the person liable).’*

Due to the above, it needs to be taken into account that, in collision cases where the 2 year collision claim time bar has lapsed, a claimant might take the step to request the Dutch public prosecutor to commence criminal law proceedings against the Master / skipper / helmsman of the involved vessel, after which the claiming party will either file an appearance as ‘injured party’ in the criminal proceedings or will commence separate civil

law proceedings, in both cases stating that this can still be done by invoking art. 3:310 para 4 DCC.

At Caland Advocaten we have lawyers specialised *inter alia* in transport law and administrative law.



Richard van 't Zelfde

Partner

Caland Advocaten

Willemskade 18 A

3016DL Rotterdam

Tel. +31 10 21 777 21

Tel. + 31 6 52 606 922

www.caland.nl