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From the Recognition of ‘Psychiatric Disorder Caused by Asbestos Exposure’ to the Mobilisation of Dignity in Labour Law: A Comparison of France and Sweden

PETER ANDERSSON* AND LOÏC LEROUGE**

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ABSTRACT

In two rulings on 8 February 2023, the French Court of Cassation invoked the notion of ‘dignity’ in labour law to support claims for ‘damage due to anxiety’ (‘préjudice d’anxiété’). The concept of ‘damage due to anxiety’, which might in English be translated more functionally as ‘psychiatric disorder caused by asbestos exposure’, is based on loss arising from the fear of developing a future disease due to occupational exposure to a toxic and hazardous substance, such as asbestos. Based on a reading of these two cases, the aim of this article is to analyse the approach developed in the French legal system, and to discuss it from the standpoint of Swedish law. The concept of ‘psychiatric disorder caused by asbestos exposure’ is not currently recognised in Swedish law. However, the idea that physical work environment factors can cause psychological injury is not entirely unfamiliar. It touches upon the ideas of a holistic approach to the work environment and a broad and inclusive concept of health and illness, which are important foundations for Swedish work environment law. By studying this specific occupational health and safety issue it is possible to illuminate not only how this topical and important issue is regulated in France and Sweden, but also on a broader level how these two legal systems—the French one based on the individual responsibility of the employer and the Swedish one on collective bargaining—are functioning when it comes to systems of prevention of and compensation for ill health.

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1. INTRODUCTION

On 8 February 2023 the French ‘Court of Cassation’,¹ in two rulings, highlighted the French legal concept of ‘prejudice d’anxiété’, which concerns the fear of developing a future disease due to occupational exposure to a toxic and hazardous substance, and linked it to the concept of dignity in labour law. On the basis of a reading of these two important cases, this article aims to analyse the approach developed in the French legal system and to discuss it from the standpoint of Swedish law.

The French term ‘préjudice d’anxiété’ would be translated as ‘orosskada’ in Swedish. It is not a legal concept in Swedish law, but it is relatively easy to translate and understand. A literal translation into English would be ‘damage due to anxiety’. To better capture the meaning of the concept, we use the more functional term ‘psychiatric disorder caused by asbestos exposure’ or, at times, caused by exposure to one or other highly toxic and dangerous substances, as the recent developments in French law invite us to do. ‘Prejudice d’anxiété’ is a form of ‘moral’ harm in French law. It is related to the psychological suffering of a person who knows he or she has a high risk of developing a disease such as cancer as a result of work-related exposure to a toxic and hazardous substance. In other words, the employee suffers from a psychological condition because of the fear of developing a serious illness in the future. In this article, we are going to use the term ‘psychiatric disorder caused by asbestos exposure’ to denote this kind of loss. According to the ruling n. 20-23.312 of the Court of Cassation, ‘an employee exposed to asbestos can claim compensation for his or her damage due to anxiety from the company in which he or she was subcontracted to work, even though this company was not his or her employer’. Along with this decision, the ruling n. 21-14.451 states, ‘an employer who unlawfully uses a toxic substance violates the dignity of employees who have been exposed to it. These employees will be able to obtain compensation separate from that which compensates for their damage due to anxiety’.

‘Préjudice de l’anxiété’ as a legal concept stems from cases of asbestos exposure. A considerable number of employees have been exposed to this highly toxic substance and so have to live with the risk of developing painful and almost invariably fatal forms of cancer. The concept can be considered

¹The Court of Cassation (Cour de cassation) has some of the functions of the UK Supreme Court, in the sense that it controls the application of the law by the courts of first instance in the area of private law.

an innovation made by French law to tackle this situation. The principle must be explained and understood in order to delimit its remedial importance. Indeed, ‘damage due to anxiety’ is not automatic and its recognition remains difficult. The employee must find a way to demonstrate that there is a high risk of developing a serious illness from the exposure, which is not an easy task. Many questions remain and will perhaps be answered in due course in the development of litigation related to this head of loss. For example, at what point is a risk considered high and a illness serious? Does the illness have to be fatal? The aim of this article is not to objectivise an illness but to demonstrate the existence of psychological disorders linked to the possibility of developing the illness due to exposure to toxic products.²

The subject-matter of this paper has also been in focus in English law and has attracted a lot of attention. Indeed, the case *Rothwell v. Chemical & Insulating Co. Ltd* from 2008 concerned employer liability in negligence for employee psychiatric disorder arising from a fear of contracting cancer after being exposed to asbestos, once a pre-cancerous condition known as ‘pleural plaques’ was identified. The claim was rejected as ‘pleural plaques’ are not considered to be damage or injury of a physical nature, which is normally required for a claim in psychiatric disorder caused by negligence, according to English law. This has been subject for much discussion regarding the issue of employer’s duty of care when it comes to preventing psychiatric disorder and also regarding more general issues in English tort law such as the definition of damage in personal injury cases, the analysis of causality between fault and damage and the apportionment of liability between joint tortfeasors.³ Although English law is not the main focus of this paper, the *Rothwell* decision is indicative of the importance of the question in the United Kingdom too.

France and Sweden have distinctly different systems when it comes to preventing and compensating for work injuries. Although occupational safety and health regulations have the same goal, to prevent illnesses and accidents, the rules are applied differently. The French system relies on the liability of employers to compensate employees for injuries and harm related to work. By contrast, the Swedish employer normally does not legal

²Morane Keim-Bagot, ‘Préjudice d’anxiété: quand le droit rime enfin avec justice’ (2019) 1875 SSL 9–12; Dominique Asquinazi-Bailleux, ‘L’impossible preuve d’un préjudice d’anxiété pour les salariés exposés à des substances toxiques’ (2021) JCPS S 35–38.

³See Simon Deakin and Zoe Adams, *Markesinis and Deakin’s Tort Law* (Oxford: Oxford University Press, 2019) 52. Important English cases in this subject, in addition to *Rothwell v. Chemical & Insulating Co. Ltd* [2008] 1 AC 281 are *Fairchild v. Glenhaven Funeral Services Ltd* [2003] 1 AC 32, *Barker v. Corus UK Ltd* [2006] 2 AC 572 and *Trigger-BAI Run Off Ltd (In Scheme of Arrangement) v. Durham* [2012] UKSC 14.

liabilities of this kind Compensation is provided to an injured worker from public social security and from insurance based on collective agreements. Under Swedish law, fear of becoming ill from work is covered by these forms of compensation, in principle, but the rules are not enforced in the same way as in France. By studying this particular and highly specific occupational health and safety issue—the fear of becoming ill from working with certain very toxic substances—it is possible to illuminate not only how this issue is regulated in France and Sweden, but also on a broader level, how the two legal systems function to deal with the issue of workplace risks and harms.

Although asbestos was classified as a carcinogen in 1977 by the International Agency for Research on Cancer (IARC), it was not completely banned in the French construction sector until the year 1997. Thus, for almost 20 years, asbestos was used even though the risks were known, which is what gave rise to what is known in France as the ‘asbestos scandal’.⁴ According to the French Agency for Food, Environmental and Occupational Health Safety (ANSES), asbestos exposure occurs mostly at work.⁵ Cancers occur up to 30 or 40 years after exposure. The French asbestos scandal followed the public revelation and scientific proof that asbestos is harmful to health. Inhaling asbestos fibres can lead to pulmonary fibrosis and bronchopulmonary cancer between a person’s 70s and 90s. The French government continued to authorise the use of asbestos, and it was widely deployed in the construction sector even after there was awareness of its danger.⁶ According to the ANSES, asbestos causes between 150 and 170 cancers of the larynx and ovary each year in France. Asbestos also causes stomach, bronchopulmonary and colorectal cancers.⁷ According to Santé Publique France,⁸ asbestos is now considered a carcinogen responsible for an estimated 2,600–6,500 deaths each year since its use ended. More than 1,100 new cases of mesothelioma are detected each year.⁹ In Sweden, the most

⁴See for instance, François Malye, ‘Le scandale d’un siècle: l’amiante’ in Roger Faligot (ed), *Histoire secrète de la Ve République* (Paris: La Découverte, 2007) 671–80; Cécile Thibert, ‘L’amiante: récit d’un scandale sanitaire’, *Le Figaro*, 29 May 2015.

⁵See ANSES, <<https://www.anses.fr/en/content/asbestos-still-very-topical-problem>> accessed 4 September 2023.

⁶See Franceinfo <<https://www.francetvinfo.fr/sante/affaires/scandale-de-l-amiante/>> accessed 11 October 2023.

⁷ANSES, ‘Cancers de l’ovaire et du larynx en lien avec l’exposition à l’amiante’, *Avis de l’Anses, Rapport d’expertise collective*, Jan 2022.

⁸‘Santé Publique France’ is the national public health agency.

⁹Santé Publique France, *Données de surveillances du Programme national de surveillance du mésothéliome pleural (PNSM): vingt années de surveillance (1998–2017) des cas de mésothéliome, de leurs expositions et des processus d’indemnisation*, June 2019.

dangerous form of asbestos—blue asbestos (crocidolite)—was banned in 1976 and a total ban on all kinds of asbestos came into force in 1982. But still today it is calculated that as many as 1,100 people die from asbestos each year in Sweden.¹⁰ Worldwide, it is estimated that exposure to asbestos at work causes close to 300,000 deaths each year.¹¹

Referring to the UN resolution of 23 September 2019 on the Protection of the Rights of Workers Exposed to Hazardous Substances and Wastes¹² makes sense in this context. The resolution emphasises the need to develop a culture of prevention as does the ILO Convention 161 on a Promotional Framework for Occupational Safety and Health.¹³ Recalling notably the Charter of the United Nations, the Universal Declaration of Human Rights and the 2030 Agenda for sustainable Development and the Resolution ‘urge the strengthening of the global regime for chemicals management to prevent and minimize unsafe exposure to hazardous substances, to promote the right of everyone, including workers, to the enjoyment of the highest attainable standard of physical and mental health and to just and favourable conditions of work’. This approach is connected with the amendment in 2022 of the ILO Declaration on Fundamental Principles and Rights at Work which recognises as a fundamental right a safe and healthy working environment. The UN resolution also recalls the Declaration on the Right to Development and the conventions of the International Labour Organization. According to the newly adopted UN Global Framework on Chemicals,¹⁴ the sound management of chemicals and waste in the world of work is essential for protecting workers. A safe and healthy working environment is a fundamental principle and right at work and all workers should be protected from hazardous chemicals and waste along the entire supply chain. Workplace measures and policies, including the ratification and

¹⁰Jonna Söderqvist, ‘1 100 människor dör av asbest i Sverige varje år’ *Arbetarskydd* <<https://www.arbetarskydd.se/asbest/1-100-manniskor-dor-av-asbest-i-sverige-varje-ar/1561769>> accessed 25 May 2023.

¹¹Jukka Takala, Päivi Hämäläinen Riitta Sauni, Clas-Håkan Nygård, Diana Gagliardi and Subas Neupane, ‘Global-, regional- and country-level estimates of the work-related burden of diseases and accidents in 2019’ (2023) *Scandinavian Journal of Work, Environment & Health*, 73, <<https://doi.org/10.5271/sjweh.4132>> accessed 27 March 2024.

¹²United Nations, Human Rights Council, Resolution on the Protection of the Rights of Workers Exposed to Hazardous Substances and Wastes, 23 September 2019, HRC/42/L.27.

¹³ILO <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C187> accessed 5 September 2023.

¹⁴UN Global Framework on Chemicals. For a Planet Free of Harm from Chemicals and Waste, <<https://www.chemicalsframework.org/>> accessed 4 October 2023.

implementation of relevant International Labour Organization standards, should be integrated in chemicals and waste management efforts.¹⁵

By comparing France and Sweden through the lens of this issue common to them both, which concerns regulation of the effects of exposure to a toxic and hazardous substance at work, it is possible to analyse two different ways of and approaches to tackling ‘psychiatric disorder caused by asbestos’. The aim of this article is to obtain and convey knowledge by comparing two legal systems: the French one, which relies more on individual employer liability combining prevention of and compensation for workers’ ill health; and the Swedish, which relies more heavily on collective bargaining and has separate legal mechanisms for prevention and compensation in work environment law and social security. Regarding the French asbestos scandal and the extent of illnesses caused by asbestos in Sweden since the asbestos ban, it also refers to the concept of dignity at work and explores its implications for work-related harms.

2. TACKLING ‘PSYCHIATRIC DISORDER CAUSED BY ASBESTOS EXPOSURE’

A. French Background and Swedish Approach

(i) France: The Evolution of the Case Law on Liability for *Préjudice d’anxiété*

Juridically conceptualised by French courts in the context of the asbestos scandal, compensation for *préjudice d’anxiété* was initially reserved for employees exposed to dust arising from asbestos or materials containing asbestos. They would have to have worked in enterprises listed by Article 41 of the law of 23 December 1998 on the financing of the French Social Security system for 1999,¹⁶ which introduced provisions for the payment of an early retirement allowance for employees and former employees of establishments manufacturing materials containing asbestos (ACAATA). However, the ruling of the Plenary Assembly of the Court of Cassation,¹⁷ issued on 5 April 2019, extended compensation for ‘psychiatric disorder caused by asbestos exposure’ beyond these workers.¹⁸

¹⁵UN Global Framework on Chemicals. For a Planet Free of Harm from Chemicals and Waste., Section 46.

¹⁶Loi 98-1194 de financement de la sécurité sociale pour 1999. Loi n° 98-1194 du 23 décembre 1998, JORF 27 Déc. 1998.

¹⁷This is the highest panel of the Court of Cassation.

¹⁸Cass. AP 5 Apr. 2019, n° 18-17442.

It has therefore become possible for employees exposed to toxic products other than asbestos to apply for compensation of this type of loss. In the wake of the Plenary Assembly's decision, the Social Chamber of the Court of Cassation applied this principle in a number of decisions issued on 11 September 2019 concerning seafarers employed by the Société nationale maritime Corse Méditerranée (SNCM),¹⁹ employees of the Pont-de-Claix chemical platform²⁰, railway workers in Marseille²¹ and coal miners in Lorraine.²²

According to a ruling issued on 12 November 2020,²³ the limitation period for bringing an action for this head of damage lapses after two years from the day when the person bringing the action knew or should have known the facts enabling him to exercise his right. On 15 December 2021,²⁴ it was held that 'psychiatric disorder caused by asbestos exposure' does not result solely from exposure to the risk created by a noxious and toxic substance, but also arises when the employee suffers a psychological disorder caused by the knowledge of the high risk of developing a serious illness. It is up to the employee to provide this evidence (e.g., in the form of a medical opinion). The Court of Cassation also affirmed the importance of testimony from relatives of the workers concerned, for example reporting regular anxiety attacks, fear of undergoing medical examinations, insomnia and anxiety caused by depression. Compensation for this loss is only available if the employee has not actually suffered a physical illness resulting from the exposure. In the case of an employee suffering from a cancer-related occupational disease, recovery for the specific harm of 'psychiatric disorder caused by asbestos exposure' is available only for the period before the physical illness became known.

Despite the recognition of *prejudice d'anxiété* as a specific psychological harm, it is subject to some restrictions. The concept has been criticised for being too abstract and difficult to evaluate, as it is difficult to put a measure on the employee's loss. In English law, damages for workplace injury would be calculated by reference to lost wages and medical expenses. The need to show a recognised physical injury in English law may make the process of calculating loss more straightforward. French law relies on a mode of

¹⁹ Cass. soc. 11 Sept. 2019, n. 17-26.879, n. 17-26.883, n. 18-26.885, n. 17-28.895 and n. 18-10.100.

²⁰ Cass. soc. 11 Sept. 2019, n. 18-50.030.

²¹ Cass. soc. 11 Sept. 2019, n. from 17-18.311 to 17-18.349.

²² Cass. soc. 11 Sept. 2019, n. from 17-24.979 to 17-25.623.

²³ Cass. soc. 12 Nov., n. 19-18.490.

²⁴ Cass. soc. 15 Dec. 2021, n. 20-11.046.

calculation used in the early retirement scheme for asbestos workers created in 1998,²⁵ and assumes a link between working in an establishment covered by this scheme and the presence of the psychological condition claimed by the employee.

In a decision of 25 September 2013, the Court of Cassation decided that an employee had necessarily been exposed to a proven and serious risk to his or her health by the mere fact that he or she had worked in an establishment appearing on a list drawn up by ministerial decree and entitling the employee to the early retirement allowance for asbestos workers (ACAATA). In this case, it held, the employee is in a situation of permanent worry, due to the risk that an asbestos-related disease may appear at any time. The compensation automatically granted for ‘psychiatric disorder caused by asbestos exposure’ therefore covers for the effects of ‘all psychological disorders’, including those linked to the disruption of everyday life.²⁶

The ‘Conseil d’État’²⁷ has held that the right to protection under ACAATA is sufficient proof of the ‘psychiatric disorder caused by asbestos exposure’, as this decision in itself constitutes recognition, for the worker concerned, of a link between exposure to asbestos dust and a reduction in life expectancy. According to Conseil d’État, these circumstance is sufficient to make the claimant aware of the ‘high risk of developing a serious illness and, by the same token, of a reduced life expectancy’, and this is a compensable loss.²⁸

The rulings issued on 11 September 2019 concerning the claims of miners from Lorraine are important also for the agriculture sector. The miners were exposed not only to asbestos but also to numerous other toxic and dangerous products. Their case therefore brings the notion of poly-exposure into the scope of préjudice d’anxiété. In agriculture, poly-exposure to plant protection products is a common risk; poly-exposure involves a range of health effects which are more serious than those arising from exposure to a single active substance (this is sometimes referred to as the ‘chemical cocktail’).²⁹

²⁵ Art. 1 of the law n° 98-1194 of 23 Dec. 1998.

²⁶ Cass. soc., 25 Sept. 2013, D. 2013. 2658, obs. M. Bacache, RTD civ. 2013. 844, obs. P. Jourdain.

²⁷ The ‘Conseil d’État’ assumes a role akin to the constitutional court in other countries. It can be called on to settle disputes between citizens, companies and associations and the authorities, and also advises the executive and legislature on improvements in proposed laws to the before they come into force.

²⁸ CE, 3 March 2017, n. 401395; CE, 9 Nov. 2016, AJDA, 2017, 426.

²⁹ For example, see Karolinska institutet, ‘Cocktail effect makes chemicals more toxic’ <<https://ki.se/en/research/cocktail-effect-makes-chemicals-more-toxic>> accessed 25 May 2023.

(ii) Sweden: A Holistic View of the Work Environment

In Sweden, there is no immediate equivalent to the French concept of *préjudice d'anxiété*. Some of the French cases which developed this concept were highlighted in Swedish labour law journals and in trade union-run publications, which pointed out that the concept was considered foreign to Swedish law, and that changes to Swedish law would be required for similar claims to succeed there.³⁰

However, the thinking behind the French concept is in fact present in Swedish law. It is a key idea underpinning Swedish work environment law that the physical work environment can cause psychological damage, and that this problem must be addressed by the employer. This principle is understood as *the holistic view regarding the work environment*, and is an important part of the concept of the 'work environment'. The purpose of the work environment concept is to shift focus from specific or individual risks arising from particular processes or modes of operation to the risks caused by the overall or general environment in which the employee works. The foundational rules of Swedish work environment law is that the employer must take all necessary measures to prevent the employee from being exposed to illness or accidents.³¹ According to Chapter 2 Section 1 Paragraph 4 the Swedish Work Environment Act, technologies, the organisation of work and the content of work must all be designed in such a way that the employee is not subjected to physical strain or mental stress that may lead to illness or accidents.

When the Swedish Work Environment Act came into force in 1978, the preparatory works emphasised that psychological responses to the work environment could take the form of experiences of security or insecurity, of satisfaction or dissatisfaction. These experiences could in some cases give rise to mental harms as well as purely physical effects.³² Making an overall assessment according to the holistic view of the work environment does not mean that the different factors are simply accumulated. The method is holistic, in the sense that an overall assessment of risks and harms and how

³⁰Ann Trenning-Himmelsbach, 'Gruvarbetare kräver skadestånd för "orosskada"' (17 September 2019), *Lag & Avtal* <<https://www.lag-avtal.se/halsa-nyhetsarkiv/gruvarbetare-kraver-skadestand-for-orosskada/1512857>> accessed 25 May 2023 and Salomon Rogberg, 'Ingen ersättning för arbete med asbest' (17 April 2019) *SEKO tidningen* <<https://sekotidningen.se/nyhet/ingen-ersattning-for-arbete-med-asbest/>> accessed 25 May 2023.

³¹Chapter 3 Section 2 of the Swedish Work Environment Act.

³²Prop. 1976/77:149 om arbetsmiljölagen m.m., 223.

they interact, is needed. Thus, it is not a question of simply combining the effects for different chemical substances and physical factors such as noise or radiation. According to the Act, the assessment should also consider the interaction of the different risk factors with the aspects of the work environment that affect the psychological and social content of work. Examples of relevant questions are: to what extent does noise affect the opportunities to keep in touch with colleagues and management; and how far are machine design and set-up suitable not only from the point of view of preventing injury but for providing opportunities for personal responsibility and a certain freedom in work.³³ The preparatory works of the changes to the Act made in the early 1990s also emphasise this holistic view of the work environment.³⁴

The holistic approach act is closely related to the development of the concept of health. The World Health Organisation's (WHO) constitution defines health as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'.³⁵ Swedish work environment law uses this broad understanding of what should be defined as health and ill health.³⁶ Thus it is clear that fear or anxiety of becoming ill in the future is in principle within the general scope of the law governing the employer's responsibility to prevent ill health.

The Work Environment Act is a framework law, meaning that the rules in the Act lay down general obligations and principles, leaving it to the Swedish Work Environment Authority to make more specific provisions. These regulations, the so-called AFS provisions, contain detailed rules concerning occupational health and safety. They are enforced through the supervision powers of the Swedish Work Environment Authority and are also important for deciding the employers' criminal responsibility for work environment breaches.

The provisions of AFS 2006:1³⁷ regulate work with material that contains asbestos. According to paragraph 11, asbestos and asbestos-containing material that has already been installed may be handled during processing and treatment only with the permission of the Swedish Work Environment

³³SOU 1976:1 Arbetsmiljölöslag slutbetänkande, 96.

³⁴Prop. 1990/91:140 Arbetsmiljö och rehabilitering, 35, 36, 39, 44, 49 and 61.

³⁵WHO Constitution, <<https://www.who.int/about/governance/constitution>> accessed 25 May 2023.

³⁶Peter Andersson, *Vidta alla åtgärder som behövs* (Stockholm: Jure, 2013) 125 f.

³⁷AFS 2006:1 Asbest. The rules in his Provision, along with all other AFS Provisions, will be rearranged in 2025 but their material content will stay the same.

Authority. Materials containing more than 1% by weight of asbestos may be handled at the point of the demolition of a building only with permission from the Work Environment Authority.³⁸ The person who manages and the person who performs work with asbestos or containing asbestos material must have undergone training on asbestos that at least includes learning about asbestos properties, health effects, occurrence, protective measures, emergency measures, handling of personal protective equipment, work methods, control measures, waste management and cleaning measures and regulations on medical check, according to paragraph 19. Work in activities covered by these regulations must be preceded by an assessment of the risk of exposure to asbestos-containing dust, paragraph 21. Anxiety as psychological suffering of an employee who knows he or she has a high risk of developing disease such as cancer due to work-related exposure to asbestos is not mentioned in these provisions, which are strictly preventive in their focus. In a similar manner, the Swedish provisions of chemical risks in the work environment, AFS 2011:19,³⁹ also set out many obligations for the employer, but do not address the question of anxiety caused by fear of future illness. Nor does the regulation on risks of infection, AFS 2018:4.⁴⁰

Since 2016, there are AFS provisions concerning psychosocial risks, by virtue of AFS 2015:4⁴¹ containing rules concerning the balance between demands and resources, Paragraphs 9–11, working hours, Paragraph 12 and victimisation (bullying), Paragraphs 13–14. Although anxiety due to exposure to asbestos or another highly toxic substance, according to the Swedish view of classifying work environment factors, arguably can be regarded as a psychosocial factor, it is not specifically mentioned in AFS 2015:4, which focuses on the organisational and psychological work environment and not psychological effects of physical work environment factors. The focus of these provisions is mainly on workload and preventing stress.

The only AFS provision in Swedish work environment law that expressly addresses anxiety—or worrying, ‘oro’, as the term in Swedish could be translated—is the provisions regarding violence and threats in the work environment, AFS 1993:2.⁴² According to Paragraph 11, employees who are exposed to violence or threats of violence must quickly receive help and support to prevent or alleviate both physical and psychological harm. The employer

³⁸Section 12 AFS 2006:1 Asbest.

³⁹AFS 2011:19 Kemiska arbetsmiljörisker.

⁴⁰AFS 2018:4 Smittrisker.

⁴¹AFS 2015:4 Organisatorisk och social arbetsmiljö.

⁴²AFS 1993:2 Våld och hot i arbetsmiljön.

must have special procedures for this. In the advice linked to this paragraph, the Swedish Work Environment Authority states that it is necessary that the employee receives help immediately in the event of a severe shock and is provided with both medical and psychological care. Workers who have been subjected to violence or serious threats must not be left alone in the first hours after the incident. When there has been a serious case of violence or threats, the other employees must be informed of what happened. To prevent worrying and rumours, the employer should inform them as soon as possible. The Work Environment Authority's website, while not in itself a legal text, states that the 'worry of being exposed to threats and violence at work is a psychological burden that also affects the work environment negatively. The employer must also be aware of this and prevent it as much as possible'.⁴³

The conclusion of this overview of the general Swedish work environment rules, including the regulations made by the Work Environment Authority, is that anxiety of developing ill health as a result of exposure of toxic substances is in principle covered by the law governing the employer's responsibilities under the Swedish Work Environment Act, but that there are no detailed or specific rules on this health and safety problem.

B. A Social Security Law or a Labour Law Issue?

(i) Clues to Understanding French and Swedish Occupational Injuries Law

The compensation system in France came into being with the law adopted on 9 April 1898 on occupational accidents. The law was based on the premise that workers were being exposed to new and greater risks with the development of machinery in industry. Accidents multiplied while, at the same time, the mechanisms of civil liability based on the employer's fault only rarely allowed victims to be compensated for their losses. They were confronted with the difficulty of proving the materiality of the occupational accident, the extent of their injury and the employer's fault in causing the accident. The near impossibility of initiating a civil claim in practice also added to these difficulties.⁴⁴ There was, therefore, a need to implement a

⁴³ Arbetsmiljöverket, *Hot och våld* <<https://www.av.se/halsa-och-sakerhet/psykisk-ohalsa-stress-hot-och-vald/hot-och-vald>> accessed 25 May 2023.

⁴⁴ See Yves Saint-Jours, 'De l'autonomie de la volonté à l'obligation légale en matière de sociale (1850–1930)', in Peter A. Kölher and Hans F. Zacher (eds), en coll. avec P.-J. Hesse, *Un siècle de sécurité sociale 1881–1981* (Brussels: PUB, 1982) Centre de Recherche en Histoire Economique et Sociale de l'Université de Nantes et le Max-Planck-Institut, 145–206.

special legal regime for those ‘disabled because of work’, separate from the general law relating to civil liability. The result was the Law of 9 April 1898 concerning liability for occupational accidents. The law covered injuries but excluded occupational diseases,⁴⁵ the legal recognition of which would be the result of a long and chaotic process, marked by twenty years of confrontation between unions and employers.⁴⁶

It was not until the end of World War II in 1945, and the vote on the law of 30 October 1946, which repealed the law of 1898, that occupational diseases came under the remit of the Social Security system. They were then attached to the law governing accidents at work as far as compensation was concerned, and this provided the institutional basis for their prevention. Today, occupational diseases are legally defined by Article L. 461-1 of the Social Security Code: ‘Any disease designated in an occupational disease table and contracted under the conditions mentioned in this table is presumed to be of occupational origin.’ The tables of occupational diseases include only diseases with a direct and certain link to work can be included, but since the law of 27 January 1993,⁴⁷ they are not a closed set; it is possible for conditions not listed in the tables to be recognised as relevant occupational diseases, under certain conditions.

According to Article L. 461-1 of the Social Security Code, ‘if one or more conditions relating to the time limit for compensation, duration of exposure or restrictive list of work are not met, the disease as designated in an occupational disease table may be recognised as being of occupational origin when it is established that it is directly caused by the victim’s usual work.’ The Social Security fund recognises the occupational origin of a disease not designated in an occupational disease table when it is established that it is essentially and directly caused by the victim’s usual work and that it leads to the victim’s death or a permanent disability, in the latter case according to a benchmarks which refers to a certain percentage level of disability. More specifically, ‘the Social Security fund recognises the occupational origin of the disease after a reasoned opinion from a regional committee for

⁴⁵The law of 25 October 1919 allowed for the first time in France the recognition of diseases as occupational diseases.

⁴⁶See Stéphane Buzzi, Jean-Claude Devinck, Paul-André Rosental, *La santé au travail 1880–2006* (Paris: La Découverte, Coll. Repères, 2006), 13; Philippe-Jean Hesse, ‘Le nouveau tarif des corps laborieux: la loi du 8 avril 1898 concernant les responsabilités des accidents dont les ouvriers sont victimes dans leur travail’, in Jean-Pierre Le Crom (ed), *Deux siècles de droit du travail. L’histoire par les lois* (Paris: Les éditions de l’atelier, 1998) 89–103.

⁴⁷Law n. 93-121, 27 Jan. 1993 portant diverses mesures d’ordre social, JORF 30 Jan. 1993.

the recognition of occupational diseases [CRRMP]: Following a decree of 7 June 2016—the latest legal development, ‘psychological illnesses can be recognised as diseases of occupational origin’.⁴⁸

Daily allowances for permanent disability for victims of occupational diseases only partially compensate for lost wages. Even if they are paid without a waiting period, their rate is only 60% of the gross salary for the first 28 days and 80% thereafter.⁴⁹ For permanent functional impairment, compensation takes the form of a capital sum or an annuity depending on whether or not the degree of disability is less than 10%. In all cases, the parameters for calculating the annuity are not very favourable to the victim. The amount of the annuity results from the application of a corrected rate of disability to the so-called ‘useful minimum wage’, which is determined on the basis of the victim’s actual wage, and is capped. As a result, social security benefits do not fully compensate for the loss of salary during either temporary or permanent incapacities to work. Moreover, the victim’s other losses are not considered.

The coverage of health care costs caused by occupational disease is also limited. Although it is more favourable than for an ordinary illness, since the victim is entitled to exemption from the advance payment of expenses and 100% reimbursement, the reference point is the Social Security reimbursement base. Excess fees charged by health professionals and care services not covered by Social Security are therefore not eligible for compensation, depriving the victim of the possibility of cost-free care.

Dependants also receive basic compensation in the event of the victim’s death. In addition to the payment of funeral and transport costs, they may receive a ‘survivor’s pension’. Certain relatives of the deceased insured person can benefit from this at the same time, the list having been extended in 2001 to include cohabitants and civil partners.⁵⁰ The funeral expenses benefit is capped and the pension rates are low (40% for the un-remarried spouse, 25–20% per child, 10% for mean parents and equivalents), with the combined rates of these pensions not exceeding 85%. If this cap is exceeded, the amount of each annuity is reduced proportionally.

Additional compensation is available to the victim of an occupational disease only in limited cases: intentional fault, inexcusable fault or fault of

⁴⁸ Decree n. 2016-756, 7 June 2016 relatif à l’amélioration de la reconnaissance des pathologies psychiques comme maladies professionnelles et du fonctionnement des comités régionaux de reconnaissance des maladies professionnelles (CRRMP), JORF 9 June 2016.

⁴⁹ Article L. 431-1 of the Social Security Code.

⁵⁰ Article L. 434-8. of the Social Security Code.

a third party. Intentional fault can be ruled out from the outset because, in the case of occupational diseases, it is a purely hypothetical possibility. On the other hand, inexcusable fault and fault of a third party can be used to obtain additional compensation. Since 1919, important developments have taken place in respect of these legal categories, unquestionably improving the situation of victims.

‘Inexcusable fault’, which is not defined in the legal standards but by case law, is certainly the most effective way to improve compensation for victims today. It is moreover during the litigation of occupational diseases and the actions for compensation brought by the victims of asbestos that its redefinition began. It was then that the categories of reparable damage were reviewed with a view to extending and diversifying them.

The current definition of the employer’s inexcusable fault originates from the *Eternit*⁵¹ rulings issued on 28 February 2002.⁵² It was later clarified to apply to accidents at work. The French courts have made it much easier to prove inexcusable fault, as the victim only has to establish that the employer was aware of the danger and had not taken the necessary measures to protect him or her. The recognition of inexcusable fault is facilitated and is doubly favourable to victims. It allows for a more frequent increase in the basic compensation, with the rate of the annuity for permanent functional deficit being raised to the maximum (100%), and it contributes to opening up access to supplementary compensation more widely. However, the pension is capped and the degree of fault does not affect the daily allowances payable to the claimant.

Significant progress has also been made in this area to improve the situation of victims and their beneficiaries. The restrictive nature of the list of compensable damages set-up by Article L. 452-2 of the Social Security Code, which been of long standing, was overturned following a ‘Priority question of constitutionality’ (QPC)⁵³ submitted to the Conseil d’État. Since this 2010 decision,⁵⁴ all heads of damage not specifically compensated for by the Social Security system must be compensated, even if they are not covered by Article L. 452-2 of the Social Security Code. As a result, head

⁵¹Name of a company manufacturing panels in asbestos.

⁵²Cass. soc., 28 Feb. 2002, JCP E 2002, II, 10053, concl. Premier Av. gén. Benmakhlof, D. 2002. 2696, note X. Prétot.

⁵³During a trial, if one of the parties believes that a legal standard is contrary to the rights and freedoms guaranteed by the Constitution, he or she can submit a QPC before the case is tried.

⁵⁴Cons. constit., 18 June 2010, n. 2010-8 QPC, S. Porchy-Simon, D. 2010. 459, M. Badel, Dr. ouv. 2010. 639.

of loss such as ‘temporary functional disability’, the costs of adapting the home and the vehicle, the loss of quality of life and sexual injury have been compensated.⁵⁵

In Sweden, work injuries are mainly compensated through social security according to the Social Insurance Code and collective agreement-based insurance. According to Chapter 39 Section 3 of the Social Insurance Code, occupational injury is defined as an injury resulting from an accident or other harmful impact at work. Swedish law has a general concept of occupational injury. This means that all types of injuries that occur due to work can be classified as work injuries, not only those in a list.⁵⁶ A distinction is made between two types of occupational injury: those caused by accidents and those caused by other harmful impacts. The term ‘other harmful impact’ denotes all occupational injuries that are not accidents, a category which includes repetitive strain injuries, stress-related injuries and equivalent occupational diseases.⁵⁷

A basic condition for an injury to be considered a work injury is a concrete connection between the work-related risk factor and the damage suffered. The legislative history of this law states that the concept of occupational injury should include all injuries derived from work or working conditions, regardless of the nature of the work and that occupational injury protection covers all employed persons.⁵⁸

Also according to Chapter 39 Section 3 of the Social Insurance Code, an injury shall be considered to have occurred as a result of an accident or other harmful impact at work according to the causal test of the balance of probabilities, meaning that it must have been more likely than not to have occurred by virtue of that accident or impact.⁵⁹ This low standard of proof is undoubtedly one of the reasons why there are several cases where stress-related ill health has been deemed to have a compensable causal connection with work, while cases of this kind are completely absent when it comes to, for example, criminal liability for work environment violations, where the standard of proof is higher.⁶⁰

⁵⁵ Cass. civ. 2e, 4 av. 2012, note S. Hocquet-Berg, Dr. soc. 2012. 39.

⁵⁶ An exception from this rule is injuries due to infection, which have to be on a list to be considered work injuries.

⁵⁷ Prop. 1975/76:197 med förslag till lag om arbetsskadeförsäkring, 71 and prop. 1992/93:30 om ändring av begreppet arbetsskada, 36.

⁵⁸ Prop. 1975/76:197 med förslag till lag om arbetsskadeförsäkring, 51, 60 and 90 and also prop. 1992/93:30 om ändring av begreppet arbetsskada, 10.

⁵⁹ Prop. 2001/02:81 Vissa arbetsskadefrågor m.m.

⁶⁰ Peter Andersson, *Arbetsmiljörätt* (Stockholm: Lars Åhnberg, 2023) 100 and Mia Carlsson, *Arbetsskada* (Stockholm: Jure, 2008) 212 f.

Of particular importance concerning psychosocially conditioned injuries is the exception from the general concept of occupational injury concerning certain psychological and psychosomatic injuries in Chapter 39 Section 5 of the Social Security Code. This states that damage of a psychological or psychosomatic nature that is a consequence of a company closure, lack of appreciation of the insured's work efforts, dissatisfaction with work tasks or co-workers, or comparable conditions, shall not be considered a work injury. In the preparatory works, it is been asserted that mental disorders as a result of such factors do not by their nature fall within workers' compensation insurance schemes. In other terms, certain circumstances related to work or working conditions which can undoubtedly give rise to psychological problems for employees are not of such a nature that the harmful impact they can cause should fall under the regulations.⁶¹ According to case law, harm that is caused by direct misconduct regarding the employer's care of the staff is not necessarily covered by the exception.⁶² The implication is that if the employer has acted wrongly, from a work environment law point of view, this suggests that the exception in Chapter 39 Section 5 of the Social Insurance Code is *not* applicable, so that the employee may be eligible for compensation for work injury of psychosocial nature.

Compensation from the Social Security Authority is provided at different levels and at different times during the period of illness in the form of sickness benefits and annuities. The benefits provided by the Social Security Code do not always fully compensate for loss of income in the event of a work injury.

Collective agreement-based insurance in many cases covers 'remaining damage'⁶³ as well as costs and non-pecuniary damage in the event of a work injury. Greatest coverage in the labour market is the *safety insurance in case of work injury* (*Trygghetsförsäkring vid arbetsskada* in Swedish), often referred to by its Swedish abbreviation 'TFA'.⁶⁴ In the event of an accident at work, this insurance covers up to one hundred percent of the loss of income as well as costs and non-pecuniary losses during acute illness. In the event

⁶¹Prop. 1975/76:197 med förslag till lag om arbetsskadeförsäkring, 91.

⁶²Examples of judgments from the highest administrative courts in question are Försäkringsöverdomstolen (FÖD) 1982:12, FÖD 1982:31, FÖD 1985:3, FÖD 1987:40 and RÅ 1995 not. 408. Also, see Sara Stendahl Arbetsoförmåga i rättstillämpningen (Göteborg: Göteborgs universitet, 2009).

⁶³It means to consider any compensations already ordered or implemented on another basis when determining damages.

⁶⁴'TFA' is short for Swedish 'Trygghetsförsäkring vid arbetsskada'.

of an occupational disease, that is, an occupational injury not caused by an accident but by another harmful effect, compensation is paid at the same levels if the insured employee can prove that the employer caused the occupational illness. An inquiry is then carried out by a special board, in which the employee must demonstrate fault (but not as in France inexcusable fault) on the part of the employer.

However, no liability arises on the part of the employer since the employee is compensated through insurance. According to section 35 of the TFA, which also has equivalents in other similar insurance schemes, an employee may not bring an action for damages due to personal injury that constitutes a work injury against a legal entity that has signed an insurance contract with the TFA. This means that the compensation system in Sweden for occupational injuries is separate from the legal system aimed at preventing occupational injuries. Compensation comes about through social insurance and collective agreement-based insurance; prevention is achieved via the Work Environment Act. Preventing occupational injuries is the employer's responsibility; compensating work-related injuries is not. By contrast, compensation for injuries outside the work relationship has been recently recognised in the context of environment responsibility. This came about when the Swedish Supreme Court, in a much-discussed case, decided that high levels of per-and polyfluoroalkyl substances (PFAS) in the blood should be considered a physical defect or condition that, in terms of tort law, constitutes a personal injury, even though the ill health has not yet manifested itself.⁶⁵

To be able to receive compensation for a work injury through social security in Sweden, the individual must, to at least a partial extent, be unable to have an income from work, Chapter 24 Section 2 and Chapter 41 Section 2 of the Social Security Code. Also, when it comes to compensation

⁶⁵Swedish Supreme Court Case T 486-23 'PFAS'. Earlier in this case, the district court ruled that the water supplier was responsible for compensating the plaintiffs for personal injury, in the form of elevated PFAS levels leading to increased health risks and physical changes and deteriorations of their bodies. The court dismissed the claim regarding psychological personal injury in the form of justified concerns about health and a worsened health and life prognosis—a claim similar to the 'psychiatric disorder due to asbestos exposure'. Since only the defendant has appealed the judgment, the issue of psychological personal injury has not been subject to the appellate court's or the Supreme Court's review. For further reading in Swedish, see Mårtn Schultz and Mattias Öberg, 'Risk och personskada: skadeståndsrättsliga frågeställningar i miljömedicinsk belysning', *Juridisk Tidskrift* no 1 3023/2024. As pointed out, the TFA practically prohibits cases like this when it comes to injuries caused by work.

from the insurance based on collective agreements, incapacity for work is a prerequisite.⁶⁶

(ii) Still Able to Work: Prevention According to Labour Law

The presumption of occupational origin in Art. L. 461-1 of the French Code on Social Security is extremely important in practice, as it avoids or short circuits the complex debate over causality which has occurred in the English case law on mesothelioma, from *Fairchild* onwards.⁶⁷ In French law, however, there are still some complexities in the application of social security law. If '*préjudice d'anxiété*' is understood as the worry of future harm due to an occupational exposure, at first one might think this issue falls within the scope of Social Security law. This would seem to be loss which could be compensated for mental suffering for victims of occupational risks in cases of inexcusable fault on the part of the employer based on Article L. 452-3 of the French Social Security Code.

However, the specific case of 'psychiatric disorder caused by asbestos exposure' only concerns people whose illness has not yet manifested itself. As such, it falls outside the scope of social security law. As far the employer's fault is concerned, this stems from the breach of the obligation to maintain a safe workplace. Those employees who are not yet physically ill, and in respect of whom no occupational disease has yet been recognised, cannot invoke the concept of inexcusable fault. As a result, it is labour law, and the violation of the obligation to ensure health and safety and the general principles of prevention by the employer, that must be applied.

According to the case law on '*prejudice d'anxiété*', an employee who can prove exposure to asbestos or another toxic or dangerous substance, generating a high risk of developing a serious pathology in the future, can bring an action against his or her employer for failure to fulfil the obligation of health and safety, under Article L. 4121-1 of the Labour Code. The courts have combined this Article with Article L. 4121-2 relating to the general principles of prevention, specifically principle 2, which states the obligation to avoid occupational risks, and principle 6 which states the obligation to replace what is dangerous with what is not dangerous or with what is less dangerous.

⁶⁶Section 14 TFA.

⁶⁷See *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22.

The employee must prove that he or she has personally suffered *prejudice d'anxiété*, resulting from such a risk. The loss does not result solely from the exposure but requires evidence in addition of the psychological loss. (e.g. regular anxiety attacks, medical examinations, insomnia and a state of depression). From the viewpoint of the French system's, then, this is not a social security issue. This is why litigation on this point in 2010 was heard in the Labour Court and not the Social Security Court. The judges then noted the existence of a specific damage in the form of anxiety that is a form of damage distinct from other heads of compensation. They considered that the claimants 'found themselves, because of their employer, in a situation of permanent anxiety about the risk of declaring an asbestos-related disease at any time and had to undergo regular checks and examinations likely to reactivate their state of anxiety'.⁶⁸

The Swedish system's standpoint is not far from the French one on this matter. 'Damage due to anxiety' appears without any physical injury that leads to an inability to work. Thus the social security system in Sweden cannot compensate the employee in such a case. In practice, a combination of penal law and administrative law must be used. But since the main parties are employers and employees, it makes sense to consider these rules to be part of the legal field of labour law in Sweden as well as in France, as we shall now see in more detail.

3. POTENTIAL ROUTES TO EMPLOYER LIABILITY FOR 'PSYCHIATRIC DISORDER CAUSED BY ASBESTOS EXPOSURE': ADVANCING SWEDISH LABOUR LAW

A. Safety Representatives' Right to Stop Work

According to Chapter 6 Section 7 of the Swedish Work Environment Act, safety representatives, who are normally appointed by the union, can stop work if a particular task involves immediate and serious danger to the life or health of an employee, and no immediate remedy can be obtained by applying to the employer. The safety representative's suspension of work lasts until there is a decision by the Swedish Work Environment Authority to either allow work to continue or to stop more permanently. The right to stop work is the most far-reaching power of the safety representatives.

⁶⁸Cass. soc. 11 May 2010, JCP S 2010. 1261, note G. Vachet, Dr. soc. 2010. 839, opinion of J. Duplat.

It overrides the employer's right to manage work and affects the employees' duty to work.⁶⁹ The right to stop work gives weight to the safety representative's actions in hazardous situations and emphasises the importance of companies having an effective safety organisation with the ability to promptly make decisions on safety issues.⁷⁰

The most crucial legal precondition for stopping work is that there is an *immediate* danger to employees' lives and health. This emphasis on immediacy often illustrated with the example of exposure of asbestos. Even though a cancer typically takes many years to appear after such exposure, the requirement of immediacy will be fulfilled, since asbestos exposure during merely a brief period of time can cause serious health problems and death later on in life. It is the exposure of the risk factor that must be immediately dangerous. The consequences—illness or death—do not have to appear immediately.⁷¹

To our knowledge, there are no Swedish cases illustrating the safety representative's right to stop work with respect to asbestos on the grounds of a lack of proper protection, education and equipment, but this may be because this type of situation is not in dispute; it is clear that exposure to asbestos or other highly toxic or dangerous substances can give a safety representative a right to stop work with immediate effect.

However, the right to stop work because of risk of being exposed to asbestos treats the risk of harm as a purely physical one. Fear of future illness is probably not covered. In a case decided by an Administrative Court of Appeal in 2018, certain issues regarding psychological harms were addressed. A safety representative had stopped work for an employee working alone during the transportation of valuable goods. The Swedish Work Environment Authority subsequently decided not to issue a prohibition or order against the company. The safety representative appealed the decision and argued, among other things, that the affected employees had indicated that they experienced strong fear and anxiety when performing the task. The Swedish Work Environment Authority did not seem to have obtained the views and experiences of these employees regarding working alone. Thus, the safety representative argued that the workers' psychosocial work environment had not been taken into account. The Swedish Work

⁶⁹Maria Steinberg, *Skyddsombud i allas intresse* (Stockholm: Norstedts Juridik, 2004) 32.

⁷⁰Prop. 1973:130 Kungliga Maj:ts proposition angående ändringar i arbetarskyddslagstiftningen och andra åtgärder för bättre arbetsmiljö, 158.

⁷¹Maria Steinberg, *Skyddsombuds rätt* (Stockholm: Norstedts Juridik, 2018) 264.

Environment Authority agreed that the employees' experience of fear and anxiety has not been further investigated within the framework of this case, concerning whether there was a basis for an immediate prohibition to proceed the work. However, the Authority at the same time emphasised that the employer was obliged to investigate and assess the risks of ill health in the psychosocial work environment and to take the measures required to counter ill health due to such risks. The Administrative Court of Appeal agreed with the Swedish Work Environment Authority's assessment that the risks associated with the work in question were not such that there was a reason for the authority to immediately prohibit working alone.⁷² The case illustrates the point that fear and anxiety about getting injured or ill at work in Sweden, unlike in France, is considered a psychosocial risk. It also shows that this kind of anxiety itself is usually not considered as a risk that is immediate in a way that gives the safety representative a right to stop the work.

B. State Supervision with Injunctions and Prohibitions

The Swedish Work Environment Authority supervises compliance with the Work Environment Act.⁷³ The rules concerning state supervision through injunctions and prohibitions are perhaps the most important legal enforcement mechanism in Swedish work environment law. The supervision of the work environment aims to get employers to fulfil their obligations towards employees. Work environment law, and thus also work environment inspection, is directed toward proactive and preventive measures.⁷⁴

There are many cases regarding asbestos, in which the employer had to pay an administrative fine for not following the rules regarding informing the Work Environment Authority about work with asbestos or other breaches regarding the rules in Work Environment Authority's provisions on asbestos (AFS 2006:1).⁷⁵ As mentioned earlier, the Swedish work environment rules regarding asbestos are clear and strictly enforced.

Fear and worrying ('oro' in Swedish) is in itself recognised as a legitimate work environment issue that the Swedish Work Environment Authority on many occasions has addressed in its decisions about injunctions and

⁷²Kammarrätten i Göteborg, judgement 2018-10-12 in case 3531-17.

⁷³Chapter 7 Section 1 of the Swedish Work Environment Act.

⁷⁴Chapter 7 Section 1 and Chapter 1 Section 1 of the Swedish Work Environment Act. For a discussion (in Swedish) see Peter Andersson, *Lagom krav på arbetsmiljön* (Stockholm, Jure, 2019) 19.

⁷⁵For example, Kammarrätten i Sundsvall, judgement 2016-02-23 in case 1565-1566-15.

prohibitions against employers. Most often, these cases concern threats and violence. One example is a case from 2011 when an Administrative Court of Appeal adjudicated on an injunction from the Swedish Work Environment Authority against a petrol station that was open 24 hours a day. The company was banned from organising work alone at the station between 10pm and 6am unless a night hatch was used to prevent robbery. The court considered that the ban was reasonable even though the petrol station was located in a quiet part of the municipality. The petrol station had been subjected to three robberies in the course of several years. The use of the night hatch for solitary work could reduce not only the risk of physical and psychological injuries in case of a robbery taking place but also reduce the worker's fear and worry that a violent situation might occur.⁷⁶ Here, fear or anxiety of being injured was the basis of the intervention of the Work Environment Authority.

Another example related to threats and violence concerns an injunction from the Swedish Work Environment Authority in 2017. Night staff at two municipal dementia homes experienced anxiety about working alone. The municipality was ordered to investigate and assess the night staff's anxiety about working alone, as well as the psychological strain and stress that the employees experienced.⁷⁷ This involved an order for risk assessment specifically related to the employees' anxiety.

In one instance in 2008, the Work Environment Authority inspected mass media companies. As part of this work, a visit was paid to a radio station. During the visit, several shortcomings were noted, regarding among other things the handling of the staff's concerns about ill health due to electromagnetic fields in the building housing the radio station. The employer had to take measurements of the magnetic field and then take appropriate steps to mitigate risks.⁷⁸ This is perhaps the closest case of a Work Environment Authority intervention to the situation of 'psychiatric disorder caused by asbestos exposure' since it was an intervention regarding fear of ill health caused by a physical factor. It was however a non-binding inspection notice (not a binding injunction) and not very recent.

We can conclude that there are clear occupational health and safety regulations that prohibit dangerous work involving asbestos and similar

⁷⁶Kammarrätten i Jönköping, judgement 2011-02-01 in case 437-10.

⁷⁷Arbetsmiljöverket, Enheten för inspektionsjuridik, beslut 2017-01-26, case 2016/028151.

⁷⁸Arbetsmiljöverket, distriktet i Umeå, inspektionsmeddelande 2008-11-08, AIUM 2008/29748.

substances. There is also, in principle, legal grounds for the Swedish Work Environment Authority to issue injunctions regarding anxiety—in itself—for exposure to such substances. As far as we can see however, there are no examples of such demands from the Swedish Work Environment Authority. This is perhaps understandable since preventive requirements are instead aimed at the primary physical risks themselves: asbestos and other highly toxic substances. The compensatory aspect of the French concept of *prejudice d'anxiété* is not included in these preventive supervisory rules.

C. Criminal Responsibility: When Prevention Has Failed

The rules on work environment offences in the Swedish Criminal Code constitute the ultimate responsibility mechanism in Swedish work environment law. These rules become applicable when someone dies, is injured, or becomes ill at work, as well as in case of certain serious incidents. According to Sections 7–10 Chapter 3 of the Criminal Code, anyone who is guilty of causing someone's death or bodily injury or illness, by neglecting what has been required of him or her under the Work Environment Act to prevent ill health or accidents, commits a *work environment offence*.

Illness caused by exposure to asbestos has however never led to any prosecution in Sweden. This may be due to the long gap between the exposure and the harm manifesting itself.

Practically all criminal convictions in work environment cases have concerned workplace accidents, that is, injuries that have occurred suddenly through an accident. The only case, of which we know, when an employer has been convicted of a work environment offense for causing work-related *illness*—not injury due to an accident—is from 2002, when a production manager in a tunnel construction project was convicted for the use of a certain sealing agent that caused several employees to suffer damage to their peripheral nervous system. The production manager had failed to ensure that the necessary protective equipment was used and should have acted earlier after employees' complaints.⁷⁹ This case is somewhat related to the topic of 'psychiatric disorder caused by asbestos exposure' as it concerns damage from exposure to a toxic substance, but the resulting injuries were physical and did not involve psychological harms.

There are no cases in Sweden where an employer has been convicted of a work environment offence for an injury that occurred in a psychosocial

⁷⁹Helsingborgs tingsrätt, judgement 2001-01-18 in case 3971-01.

context. This issue has however been tried in two cases. The first one, from 2000, concerned two telephone switchboard operators who suffered from post-traumatic stress disorder and high blood pressure shortly after a police authority installed a new central switchboard. The District Court found that it was not established that the police leadership's failure to take necessary measures regarding cooperation and education was the cause of the workers' illness, so the prosecution for the work environment offence was dismissed.⁸⁰ In the second case, from 2015, an employee at a social services department took his own life after a prolonged period of illness related to problems collaborating with a new supervisor. The Court of Appeal considered the employee's two managers to have been negligent for failing to investigate the possibilities of adapting the employee's working conditions and possibilities of reassignment, for not assessing the employee's rehabilitation needs and for conducting a bullying investigation in a less than acceptable manner. However, the court found that the negligence was not punishable, considering the employee's attitude and the difficulties in achieving satisfactory solutions in practice, and since there were no clear regulations on how bullying investigations should have been conducted.⁸¹

In summary, according to Swedish law, it is possible in - principle - to hold an employer accountable and prosecute for work environment offence of causing illness in the form of severe anxiety, but this has never happened, and given how rarely the criminal law has been applied concerning anything other than accidents with clear, delimited causality, it is unlikely to happen. To prove that an employer caused psychiatric disorder by exposing an employee to asbestos or another hazardous substance in the past is very difficult according to the high evidentiary standards of criminal law.⁸²

The offence of *human exploitation* was introduced into the Swedish Criminal Code in 2018. It applies to anyone who exploits a person in forced labour, work under obviously unreasonable conditions or begging through illegal coercion, deception or taking advantage of someone's dependent position, helplessness or difficult situation.⁸³ The purpose of this law is mainly to strengthen criminal protection against the exploitation of people in work or begging.⁸⁴ According to the law's preparatory works, human exploitation 'is

⁸⁰Linköpings tingsrätt, judgement 2000-03-08 in case B 450-99.

⁸¹Hovrätten för Nedre Norrland, judgement 2015-03-03 in case B 399-14.

⁸²Peter Andersson, *Vidta alla åtgärder som behövs* (Stockholm: Jure, 2013) 273 ff.

⁸³Section 1 b Chapter 4 of the Swedish Criminal Code.

⁸⁴Prop. 2017/18:123 Det straffrättsliga skyddet mot människohandel och människoexploatering, 1.

a phenomenon that seriously violates the individual's freedom, peace, and human dignity'.⁸⁵ Additionally, an example of 'clearly unreasonable conditions' according to the legislative history is when the employee is subject to 'unacceptable safety risks at work'. What that could entail is not explained, but working with asbestos without proper safety measures may be an example of it.⁸⁶ The offence targets acts that are serious enough to be considered a violation of the victim's freedom and peace. It may apply to certain situations where, for example, undocumented immigrants are performing asbestos removal, but the crime generally does not address the specific case of asbestos.

D. New Pathways to Liability: An Implied Clause in Collective Agreements?

When it comes to management decisions, a fundamental principle in Swedish labour law is that the employer can make such decisions at his discretion, unless it is otherwise stipulated by collective agreement or law. However, another principle is that the employer's right to manage work must be exercised by reference to law and good practices in the labour market. Collective agreements are based on the assumption that the employer, in actions towards the employee, observes the law and good practices in the labour market. In the ruling AD 1985 No. 65, the Swedish Labour Court stated that this does not necessarily mean that unfair conduct by the employer towards an employee constitutes a breach of the collective agreement that may result in liability for damages. To draw that conclusion, it is normally required that the collective agreement contains explicit provisions that support this result. In the ruling AD 1985 No. 112, the Labour Court stated that it cannot be ruled out that a collective agreement can be considered to include an implied term according to which the parties must refrain from certain acts that may be considered contrary to good practice in the labour market, such as discriminatory conduct.

A key concept here is 'good practices'. The preparatory works indicate that good practices in the labour market 'can be said to correspond to a certain standard—generally practiced behaviour that represents a certain professional ethical or general moral level'.⁸⁷ It has been argued that in the area

⁸⁵ Prop. 2017/18:123 Det straffrättsliga skyddet mot människohandel och människoexploatering, 34.

⁸⁶ Erik Sjödin, 'Människoexploatering—en analys av ett straffbuds förhållande till regleringen av arbetsmarknaden' *Juridisk Tidskrift*, 2019-20 no 3, 708.

⁸⁷ SOU 2009:44 Integritetsskydd i arbetslivet, 79.

of work environment law, ‘good practices’ has a counterpart in ‘good working environment’.⁸⁸ Demands for a good work environment set limits to the employer’s right to manage work.⁸⁹ Possibly, this could constitute a way to hold employers accountable in cases of bullying, where affected employees in practice lack legal opportunities for compensation and redress.⁹⁰ In one such case, AD 1983 No. 4, the Labour Court adjudicated a case concerning the question of whether a county council had exercised its right to manage work in violation of law and good practices when it presented an employee, a healthcare assistant, with the choice of being relocated or taking unpaid leave. The healthcare assistant lost the case regarding general damages, but probably because she was not a union member, not because it was a not matter of management in violation of the law and good practices. She did however receive compensation for lost income.

It must be emphasised that the argument that a poor work environment amounts to be breach of an implied clause in a collective agreement has not yet successfully been brought to the Labour Court. Because the Swedish Working Environment Act is mainly enforced through administrative supervision and criminal liability there is limited scope to invoke damages for breaches of law and good practices as an implicit clause in the collective agreement.⁹¹ Breach of the Provisions from the Work Environment Authority regarding asbestos (AFS 2006:1) can lead to administrative fines, which is an argument against employer liability in such a case. However employees who have been exposed to asbestos but have not yet become ill in practice lack legal opportunities for compensation or redress. Neither labour law nor social security law offers such opportunities for the employee. This means that the argument from the implied term of the collective agreement, despite its difficulties, may be the best option available.

Thus, the closest one can come to the French cases of *prejudice d’anxiété* in Swedish labour law is probably to pursue the issue as a breach of good practices as an implied clause in the collective agreements and can entitle the affected employee to general moral damages.

⁸⁸Henric Ask and Bo Ericson, ‘Kränkande särbehandling i arbetslivet—hur hanteringen sker och kan ske inom det rättsliga systemet’ *Ny Juridik* 3:17, 2017, 66.

⁸⁹Mats Glavå and Mikael Hansson, *Arbetsrätt* (Lund: Studentlitteratur, 2023) 508.

⁹⁰Henric Ask and Bo Ericson, ‘Kränkande särbehandling i arbetslivet—hur hanteringen sker och kan ske inom det rättsliga systemet’ *Ny Juridik* 3:17, 2017, 71 ff.

⁹¹Jonas Malmberg, *Anställningsavtalet* (Uppsala: Iustus, 1997) 252 f.

4. HOW THIS ALLOWS US TO SPEAK OF DIGNITY IN LABOUR LAW

As members of the EU, France and Sweden both fall under the scope of the Charter of Fundamental Rights of the European Union of 7 December 2000. The Charter specifies in Article 3 a 'Right to the integrity of the person' which in paragraph 1 states that 'Everyone has the right to respect for his or her physical and mental integrity'. To be understood globally, this therefore includes those at work. Thus, EU law expressly recognises a mental dimension to the integrity of the person as an element of human dignity. The inalienable nature of the right to dignity implies the need to protect mental integrity in the workplace in the same way as physical integrity. This provision is intrinsically linked to the first paragraph of Article 31, which states that 'every worker has the right to working conditions which respect his or her health, safety and dignity'.⁹²

'Dignity' is not mentioned as such in the French Constitution nor in the Declaration of the Rights of Man and of the Citizen of 26 August 1789. In addition, if the concept of dignity is one of the ethical aims of labour law, the French Labour Code very rarely makes explicit reference to it, except for workplace bullying and harassment⁹³ or sexist behaviour.⁹⁴ The case law does not refer to it except twice (the 'dwarf-tossing' case⁹⁵ and unkind words that the employer had said to an employee⁹⁶). In Sweden, the concept of 'dignity' is not widely used in labour law either. The most prominent example of its explicit use is found in the Discrimination Act, where harassment is defined as conduct that violates someone's dignity and is related to one of the grounds for discrimination: sex, gender identity or expression, ethnicity, religion or other belief, disability, sexual orientation, age and sexual harassment as conduct of a sexual nature that violates someone's dignity, under Chapter 1 Section 4 Paragraph 4 and 5 the Discrimination Act.

However, the right of dignity was invoked in France in a ruling of the Social Chamber of the Court of Cassation of 8 February 2023,⁹⁷ in dispute related to asbestos. It was held that for the employer to continue to use asbestos illegally after it was banned, constituted an infringement of the

⁹² Charter of Fundamental Rights of the European Union of 7 December 2000, *OJEC*, 18 Dec. 2000.

⁹³ Article L. 1152-1 of the Labour Code.

⁹⁴ Article L. 1142-2-1 of the Labour Code.

⁹⁵ Cons. const., 27 July 1994, n. 94-343/344-DC.

⁹⁶ Cass. Soc. 7 Feb. 2012, n. 10-18.686.

⁹⁷ Cass. Soc. 8 Feb. 2023 n. 20-23.312.

dignity of the employee; and this infringement on dignity characterised a breach of the employer's obligation to perform the employment contract in good faith, according to Article L. 1222-1 of the Labour Code. Can this decision extend to the case of *prejudice d'anxiété*? Not only is the obligation breached here (that of good faith) not the same as the breach of the health and safety obligation, but the nature of the harm here is fundamentally different. 'Damage due to anxiety' or 'psychiatric disorder caused by asbestos exposure' is simply the fear, reasonable and well-founded, of a future painful and fatal disease. It is a disorder of worry, of a loss of tranquillity, which disrupts the days and nights of those who suffer from it. Anxiety in this sense is not, however, harmful to the worker's mental health: he or she is not ill as such, and the anxiety is not pathological. And although a medical remedy will often be prescribed to relieve this type of condition, it is a disorder of his or her living conditions.

From the Swedish perspective, the preparatory works of the law on human exploitation refers to crime that seriously violates the individual's freedom, peace and human dignity.⁹⁸ It can be argued also that the right to 'dignity'—in a sense similar to that in French case law, particularly regarding the ruling issued on 8 February 2023—is an implied term in collective agreements. When the Swedish Labour Court assesses the concept of dignity, it primarily does so in the context of harassment, which is the area where the court has come closest to accepting breaches of good practices as a basis for general damages. In the French case, the employer's use of asbestos that the employee was made to work with was considered a breach of applying the employment contract in good faith. 'Good faith' and 'good practice' have close points of contact.

As a consequence, speaking of 'damage due to anxiety' or 'psychiatric disorder caused by asbestos exposure' and the conditions that led to the justification of these lawsuits, rightly reminds us that work contributes to the dignity of the individual, but that it can also greatly degrade it. The right to health is part of the dignity that is the essence of humanity just as 'freedom is the essence of human rights'.⁹⁹ This approach allows us to refocus at the human being at work in economic life.

⁹⁸Prop. 2017/18:123 Det straffrättsliga skyddet mot människohandel och människoexploatering, 34.

⁹⁹Bernard Edelman, 'La dignité de la personne humaine, un concept nouveau', *Dalloz*, 1997, chr., 185.

5. DISCUSSION FROM A COMPARATIVE STANDPOINT

Compared to the French system, Swedish work environment law is limited when it comes to employer liability for work injuries. In practice, there are no tort cases, but these injuries are compensated through social security law. In Sweden, as well as in France, ‘psychiatric disorder caused by asbestos exposure’ is not compensated through social security law, since the employee is still able to work. Just as in France, Swedish employees would have to look to labour law for any possible compensation.

If in the United Kingdom, the claimant would have to show a condition such as PTSD or depression like in *Rothwell v. Chemical Cleaning Co*, the position is different in France according to five rulings of the Court of cassation issued on 13 October 2021.¹⁰⁰ Mere exposure to the risk created by a noxious or toxic substance is not sufficient to constitute recognition of ‘psychiatric disorder caused by asbestos exposure’. However, it may be recognised when the employee demonstrates that the employer did not respect his health and safety obligations. In this situation, the employee may claim compensation for the psychiatric disorder suffered if the employee is at risk of ‘declaration at any time of a disease linked to asbestos [or another toxic substance] with the risk of a serious pathology that could be the cause of the employee’s death’. However, in situations where the employee’s state of health leads to the recognition of an occupational disease, the psychiatric disorder caused by asbestos exposure cannot be recognised because the occupational disease regime will be apply. The Court of Cassation added that ‘the anxiety resulting from the issue of an exposure certificate and the implementation of post-professional medical monitoring resulting from this exposure’ is not sufficient to characterise the ‘psychiatric disorder caused by asbestos exposure’. In this respect, the French judges specified the ‘permanent anxiety generated by the risk of a declaration of an asbestos-related disease at any time, with the risk of a particularly serious pathology that could cause the employee’s death is sufficient to justify the claim’. The burden of proof is exclusively on the employee, and it is related to the disorder that he or she ‘suffered personally’. On 15 December 2021, the Court of Cassation added that attestations from relatives reporting regular anxiety attacks, fear of undergoing medical examinations, insomnia and anxiety-depression or, where applicable, the fact that colleagues exposed to the same substance

¹⁰⁰Cass. Soc. 13 Oct. 2021 n. 20-16.617, 20-16.585, 20-16.584, 20-16.593, and 20-16.583.

have contracted a serious illness are enough for the judge to decide whether or not there has been ‘psychiatric disorder caused by asbestos exposure’.¹⁰¹ Medical certificates are not mandatory. In other terms, for the judges it is a long term, permanent and high degree of distress which leads to a medically confirmed psychiatric disorder.

Although the concept of ‘psychiatric disorder caused by asbestos exposure’ is not recognised as such in Swedish law, the Swedish legal system could in principle address this issue. It is a relatively abstract question, but one not unfamiliar to Swedish work environment law. It concerns a type of harm that consists of ill health in a broad sense even if there is no physical work disability. It involves a psychological disorder caused by physical work environment factors. Both of these aspects were extensively discussed in the preparatory works of the Swedish Work Environment Act in the late 1970s. As we have seen, the related ideas of a holistic approach to the work environment and a broad and inclusive concept of health and illness are important foundations for the Work Environment Act and for Swedish work environment law as a whole. Swedish work environment law is focused on prevention of ill health. Both medically recognised psychiatric injury and mere distress are forms of ill health that must be prevented.

Nevertheless, in practice, a different picture emerges, namely that these ideas are not applied in legal practice. This is a strong indication that the principles in question—the idea of a holistic approach to the work environment and a broad concept of health and illness—are not given much weight in practical work environment management. By highlighting the French cases on *prejudice d’anxiété* in a Swedish context, we can shed light on this problem. The recognition of the class of harm consisting of ‘psychiatric disorder caused by asbestos exposure’ can therefore play a central role in advancing the issue of a holistic approach to the work environment and a broad concept of health and illness. It also makes it clear that the Swedish system, with its collective approach and prohibitions against individual employer liability, lacks flexibility when it comes to new and emerging health risks at work.

English law on compensation for work injuries through tort law shares more similarities with French law than Swedish in this regard, as it allows employer’s liability to play a role in prevention. In *Rothwell v. Chemical Cleaning Co* the claim for compensation in a situation that to a large extent was similar to *prejudice d’anxiété* was rejected on the grounds that no

¹⁰¹ Cass. Soc. 15 Dec. 2021 n. 20-11.046.

physical injury had occurred. Although the legal outcome was not the same as in the relevant French cases, the issue of this type of psychological harm was at least raised.¹⁰² This has not been the case in Sweden, where cases concerning claims of compensation are absent.

In terms of collective labour relations, Swedish work environment law offers only limited opportunities for trade unions to pursue work environment issues against employers in court. The same problem applies for individual employees. The system is based on active government supervision by the Swedish Work Environment Authority and criminal liability in cases brought by prosecutors. The way that possibly could be used to pursue cases of liability and compensation for ‘psychiatric disorder caused by asbestos exposure’ is to see it as a breach of implied clauses in collective agreements, which stipulate that employers must not organise work in a manner that violates the law and good practices in the labour market. Although there are precedents, our argument is that the issues surrounding ‘psychiatric disorder caused by asbestos exposure’ could very well be addressed through such a process, as it involves very serious cases where there are no alternative legal liability mechanisms. Discussing employers’ actions in such cases as violating good practices and good faith and harming the dignity of the employee does not seem far-fetched considering the carelessness and negligence committed when exposing workers to banned toxic and dangerous products.

6. CONCLUSIONS

The study of ‘psychiatric disorder caused by asbestos exposure’ through a comparison between the French and Swedish systems leads to a re-examination of the place of the idea of dignity in industrial law. In addition, it demonstrates that the fundamental principles of a holistic approach to the work environment and a broad concept of ill health, which are emphasised as essential to Swedish occupational health and safety law, have not been

¹⁰²It can also be added that some authorities do not think that the outcome in *Rothwell* is correct. Adams and Deakin argue that *Rothwell* could be understood as either (1) falling under the principle of employer’s liability for psychological harm independent of underlying physical harm, which has been recognised in cases on workplace stress following *Walker v. Northumberland* [1995] 1 All ER 737 or (2) as falling under the principle of *Page v. Smith* [1996] AC 155, under which a claim could be brought for psychological harm caused by fear of a collision which is avoided at the last second, see Simon Deakin and Zoe Adams, *Markesinis and Deakin’s Tort Law* (Oxford: Oxford University Press, 2019) 109 f. and 123 f.

fully implemented in practice. The comparison also highlights the point that there may be ways to pursue certain types of occupational health and safety issues in civil court through the Labour Court, as breaches of good faith and thus violations of implied clauses in collective agreements, which may entitle individuals to general damages.

Recognising ‘psychiatric disorder caused by asbestos exposure’ is a way to not forget all the workers who were exposed to toxic substances which their employers knew were highly dangerous for their health, yet did nothing to mitigate the risk. Here lies the idea of dignity, and also that of ethics when it comes to employees exposing employees to working conditions. It is no longer a question of thinking of employees as people who create accidents, but of thinking that the production process itself harms occupational health, public health and the environment.¹⁰³ On the use of Chemicals, the UN resolution of 23 September 2019¹⁰⁴ thus serves as a reminder to respect fundamental standards. A culture of prevention in the field of physical and mental health should be developed at the crossroads of occupational health, public health and environmental health. It is necessary to reduce the adverse effect on the physical and mental health of exposure to hazardous substances in the workplace and to focus on primary preventive strategies. Occupational health and safety aspect is highlighted in UN Global Framework on Chemicals.¹⁰⁵

Recognition of a culture of prevention combined with respect for human dignity at work should make it possible to make work more sustainable. This is also a challenge that comes with the ILO recognition in 2022 that a safe and healthy working environment for all workers is a fundamental principle.

¹⁰³Suggestion deduced from M.P. Lee, H. Hudson, R. Richards, C.C. Chang, L.C. Chosewood and A.L. Schill, *Fundamentals of total worker health approaches: essential elements for advancing worker safety, health, and well-being*, on behalf of the NIOSH Office for Total Worker Health. Cincinnati, OH: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health, DHHS (NIOSH) Publication n. 2017-112.

¹⁰⁴United Nations, Human Rights Council, Resolution on the Protection of the Rights of Workers Exposed to Hazardous Substances and Wastes, 23 September 2019, HRC/42/L.27.

¹⁰⁵UN Global Framework on Chemicals. For a Planet Free of Harm from Chemicals and Waste, Section 46 <www.chemicalsframework.org> accessed 26 September 2023.