

Characterisation (and mischaracterisation) of occupational injuries in portuguese jurisprudence. An analysis from 2011 to 2021

Caracterización (y descaracterización) de los accidentes de trabajo en la jurisprudencia portuguesa. Un análisis de 2011 a 2021

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Abstract

Based on Portuguese case law, this study examined the characterisation and mischaracterisation of occupational injuries in the Portuguese court system. A content analysis was carried out, namely on how the Portuguese courts understand the characterisation and mischaracterisation (requirements) of occupational injury sentences. Case law was collected and analysed from listed decisions by the higher courts (Supreme Court of Justice and the Portuguese Courts of Appeal), between 2011 and 2021. A total of 330 judicial decisions were identified and analysed; groups of descriptors were categorised and sub-themes were identified. The sub-theme 'concept and scope of the injury' was identified in 80 decisions and 'mischaracterisation of injuries' in 46 decisions. This analysis reflects the Portuguese courts' understanding of the extent to which occupational injuries are characterised, which will be important to safeguard the system of compensation for occupational injuries in Portugal.

Keywords: Occupational injuries; Health and safety at work; Portuguese jurisprudence; characterisation of occupational injuries.

Resumen

Basándose en la jurisprudencia portuguesa, el objetivo de esta investigación fue identificar la cuestión de la caracterización y la caracterización errónea de los accidentes de trabajo en los tribunales portugueses. Se llevó a cabo un análisis de contenido, concretamente sobre cómo entienden los tribunales portugueses la caracterización y la caracterización errónea (requisitos) de las sentencias de accidentes de trabajo. La jurisprudencia fue recogida y analizada a partir de sentencias de los tribunales superiores (Tribunal Supremo de Justicia y Tribunales de Apelación portugueses), entre 2011 y 2021. Se categorizaron los grupos de descriptores y se identificaron subtemas. El subtema «concepto y alcance del accidente» se identificó en 80 sentencias y la «caracterización errónea de los accidentes» en 46 sentencias. Este análisis revela la forma en que los tribunales portugueses entienden la caracterización de los accidentes de trabajo, lo que será importante para salvaguardar el sistema de indemnización por accidentes de trabajo en Portugal.

Palabras clave: Accidentes de trabajo; salud y seguridad en el trabajo; jurisprudencia portuguesa; caracterización de los accidentes de trabajo.

Introduction

Currently, one of the biggest labour problems in workplaces across Europe and in the world is occupational injuries⁽¹⁻¹⁰⁾. Occupational safety and health issues have not only been at the centre of European social policies but also of the European project since its inception with the creation of the European Coal and Steel Community. The main milestone for occupational safety and health in Europe was the publication of the Framework Directive (89/391/EEC) in 1989, which established common principles and placed risk assessment at the centre of OSH legislation. More recently, it should also be noted that at European level, at the end of 2020, the public consultation period was opened on the European Union's (EU) future strategic framework for health and safety at work for the period 2021-2027.

In this regard, regulation of the prevention of occupational injuries falls primarily to the legislative powers of the various countries⁽⁹⁻¹¹⁾. In Portugal, according to the Ministry of Labour, occupational injuries are strongly regulated by law, and are dealt with abundantly in the courts. However, the percentage of Portuguese companies that carry out some of the occupational health and safety management activities provided for by law is low, as the vast majority are micro-enterprises⁽¹⁴⁾.

The article 59 of the Portuguese Constitution requires the employer to organise work in decent conditions (paragraph b) and in hygiene, safety and health conditions (paragraph c), while also recognising the worker's right to receive "assistance and fair compensation when they are victims of an occupational injury or occupational disease" (paragraph f). Article 64 also recognises that everyone has the right to health protection and the duty to defend and promote it (paragraph 1) and that the right to health protection is realized "by the systematic improvement of living and working conditions" (paragraph 2(b)).

While the compensation system for occupational injuries and occupational diseases is laid down in Law 98/2009 of September 4, it is also worth considering Decree-Law 352/2007 of October 23, which approved the National Table of Disabilities, and Law 102/2009 of September 10, which regulates the legal system for the promotion of safety and health at work. In addition, the Portuguese Labour Code contains relevant provisions relating to employer and employee's duties to prevent occupational injuries and occupational diseases. Employers can also develop safety rules in addition to legal diplomas, such as internal company regulations or service orders⁽¹⁶⁾. Following Portuguese doctrine^(16,17,21,22) mischaracterisation brings together a set of requirements that exonerate the employer from compensating for the damage resulting from the occupational injuries. In the Portuguese legal system, the issue of the mischaracterisation of occupational injuries has received increasing attention in case law and, as some authors warn, if it is not properly interpreted, it jeopardises the system of compensation for occupational injuries⁽¹⁷⁾. Gomes pointed out that although occupational injuries are often the result of negligence or carelessness on the part of the worker, this is due to the fact that the worker is often subjected to intense work pace, and lack of adequate preparation for the job, and that unlike other legal systems, in Portugal the mischaracterisation of the accident is broader⁽¹⁷⁾.

Despite the fact that we are also experiencing new challenges in the field of occupational safety and health in the so-called digital age⁽¹⁸⁾, occupational injuries remain as a central issue in Portugal. With this problem in mind, a theoretical framework on occupational injuries was drawn up and Portuguese case law was collected and analysed at the request of a Portuguese trade union centre with the aims to identify the issue of characterisation and mischaracterisation of occupational injuries in Portuguese courts⁽¹⁹⁾.

Methods

A qualitative study of the case law of the Portuguese higher courts was carried out. Content analysis was applied to these judicial decisions, which revealed the spirit of the law enforcer and made it possible to highlight the main problems facing the courts in Portugal in this area. This analysis technique included a manual categorisation of the case law descriptors most frequently referenced in the summaries of these decisions.

The theoretical-conceptual framework was first drawn up based on two issues: RQ1-What is the scope of a occupational injuries in Portugal?, and RQ2-How is the mischaracterisation of an occupational injuries understood?. Then, information was collected on Portuguese case law, the results obtained on line were analysed, and the descriptors were categorised for the purposes of the analysis.

Information collection was targeted according to the topic, based on the literature on occupational injuries, and policies for regulating safety and health at work. The information on this case law was obtained online. The descriptors indicated in the decisions were categorised according to the themes analysed in these court

decisions, and sub-themes were identified. This task involved slower manual categorization but, on the other hand, provided access to an important interpretation of the findings. The main descriptors were analysed in an attempt to systematise the relevant information to complete the research into the case law of the Courts. Despite the fact that the research was limited to characterisation (and mischaracterisation) of occupational injuries, the identification of the most referenced descriptors also made it possible to identify the topics to be developed in future research on this subject. The source of information for content analysis included any verbal or non-verbal communication, such as court rulings. Content analysis of these judicial decisions started with "a series of assumptions and can focus on different perspectives"⁽²⁰⁾ and the information is processed in order to facilitate the work of understanding, interpretation and inference.

Results

A total of 330 decisions of the Courts of Appeal and the Portuguese Supreme Court of Justice, between 2011 and 2021, were identified and analysed. Ten groups of descriptors were considered: on the one hand, the concept and scope of occupational injuries; non-observance of health and safety rules; disability due to occupational injuries; enforcement of rights (Table 1). On the other hand, proof, liability, reparation and benefits; guarantee of compliance; participation in occupational injuries; fund for occupational injuries; prescription and forfeiture (data not shown).

Table 1. Categorisation of descriptors and sub-themes on occupational injuries identified in 330 decisions of the Courts of Appeal and the Portuguese Supreme Court of Justice. Portugal, period 2011-2021.

DESCRIPTORS GROUP	n	Sub-themes	n
1. Concept and scope of occupational injuries	200	Concept and scope of occupational injuries (place and time of work)	80
		Mischaracterization of occupational injuries	46
		Causation link	38
		Travel accident/ <i>in itinere</i>	19
		Occupational injuries and temporary employment contract	4
		General principles, good faith and prevention of professional risks	3
		Occupational injuries and economic dependence (extension)	3
		Illness and accident at work	2
		Occupational injuries and part-time employment contract	2
		Socially relevant interests	1
		Occupational injuries and suicide	1
		Occupational injuries and suspension of employment contract	1

DESCRIPTORS GROUP	n	Sub-themes	n
2. Non-observance of health and safety rules	79	Failure to comply with the rules and the employer's fault	44
		Failure to follow the rules and gross negligence	19
		Fall from height	8
		Exclusive fault of the victim	6
		Civil Construction	2
3. Disability due to occupational injuries	65	Permanent (absolute and partial) incapacity for work	31
		Disability review	20
		Temporary disability	6
		Disability table	5
		Pathological predisposition and disability	1
		Challenge of incapacity	1
		Permanent disability benefit	1
4. Enforcement of rights (conciliatory phase and litigation phase)	44	Competence	13
		Conciliation	9
		Litigation phase and jurisdiction	7
		Principles (of access to law and the courts; of the adversary system; of trust; of equality of arms)	6
		Nullity of the sentence	4
		Third party intervention	1
		Passive legitimacy	1
		Factual basis	1
		Acquittal of the request	1
		Transaction	1

n = number of decisions where each descriptor and sub-theme were identified.

Given the categorisation of the descriptor groups, sub-themes were identified by their frequency within each descriptor group. In the first group of descriptors (concept and scope of occupational injuries), ten sub-themes were identified, namely, the sub-theme 'concept of occupational injuries' (in 80 decisions) and 'mischaracterisation of occupational injuries' (in 46 decisions) (Table 1).

Discussion

In Portugal, the obligation to prevent risks to health and safety at work is enshrined in the Constitution, and is based on protecting the right to human dignity and guaranteeing decent working conditions. It translates not only into the obligation to prevent occupational injuries, but also to provide material assistance and fair compensation to victims.

One of the positive aspects of this methodological experiment was that it made it possible to identify the main issues linked to the subject of occupational injuries that have been discussed in Portuguese courts recently. However, this study has

some limitations, since the objective search for categorisation by descriptors indicated in the summaries of court decisions involves some subjectivity. This stems from the fact that the identification of the descriptors themselves in each decision is in itself a process of categorising the matter dealt with in each specific case and does not always fully summarise the discussion in question. Thus, the set of precepts indicated in the summaries of a given decision were considered to be the central themes addressed therein, although they may not exhaust them.

Nevertheless this data collection made it possible to identify, describe and interpret the content of these texts, making it possible to understand their meanings at a level that goes beyond ordinary reading. The analysed case law took the view that the employer must plan the work in such a way as to identify and prevent the risks, as well as ensuring the essential and appropriate safety measures to prevent the risks, by means of collective or individual protection. This view is emphasised by the dominant doctrine in Portugal: preventing occupational injuries is considered not only as a duty for the employer, but also as an advantage for the company and the community as a whole⁽¹⁶⁾. The employer must also involve the worker in this prevention through training and information⁽²¹⁾.

Case law has held that the verification of accident at work requires a spatial element (as a rule, the workplace) and a temporal element (which as a rule can be traced back to working time) that express together an adequate connection with the work performed.

Following Portuguese doctrine^(16,17,21,22), according to case law, mischaracterisation of occupational injuries exonerates the employer from compensating damages resulting from the accident (Oporto Court of Appeal, 24-09-2020, 4015/15.6T8MTS.P1, Jerónimo Freitas). This is the case when the following requirements are met: (a) the existence of safety conditions established by the employer or by law; (b) the violation, by action or omission, of these conditions by the injured party; (c) that the injured party's action is voluntary and without justifiable cause; (d) that there is an adequate causal link, in its positive formulation, between this violation and the accident, a causal link which does not refer to the fact and the damage in isolation, but to the factual process which, in concrete terms, led to the accident (Supreme Court, 26-06-2019, 763/16.1T8AVR.P1.S1, Chambel Mourisco). Furthermore, the employer, who is responsible for compensating occupational injuries, bears the burden of proving the facts that lead to the occupational injuries not being characterized as such (Supreme Court, 28-11-2012, 181/07.2TUFIG.C1, Pinto Hespanhol; Supreme Court, 03-03-2016, 568/10.3TTSTR.L1.S1, Gonçalves Rocha). The occupational injuries mischaracterisation constitutes a fact that prevents from the right that the plaintiff claims and, as such, its proof is the responsibility of the defendant in the action, i.e. the employer or its insurer. In addition, the violation of safety rules alone is not enough to disqualify, but serious behaviour on the part of the injured party must be required, and the violation of safety rules may have other justifying causes than the injured party's difficulties in knowing or understanding the legal rule or the rule established by the employer (Oporto Court of Appeal, 24-09-2020, 4015/15.6T8MTS.P1, Jerónimo Freitas).

As a recommendation, it is important to periodically analyse the evolution of case law in this area, particularly with regard to the characterisation (and mischaracterisation) of occupational injuries, a central theme in labour jurisprudence in Portugal.

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Conflict of Interest

None of the authors have a conflict of interest to disclose.

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