KLUWER LAW INTERNATIONAL

EUROPEAN REVIEW OF PRIVATE LAW

Wolters Kluwer
Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

Published by *Kluwer Law International*
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Sold and distributed in North, Central and South America by *Aspen Publishers, Inc.*
7201 McKinney Circle
Frederick, MD 21704
United States of America

Sold and distributed in all other countries by *Turpin Distribution*
Pegasus Drive
Stratton Business Park, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

ISSN 0928-9801
© 2009, Kluwer Law International

This journal should be cited as (2009) 17 *ERPL* 2

The *European review of Private Law* is published six times per year.
Subscription prices for 2009 [Volume 17, Numbers 1 through 6] including postage and handling:
EUR568/USD758/GBP418 (print)

This journal is also available online at www.kluwerlawonline.com.
Sample copies and other information are available at www.kluwerlaw.com.
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The *European review of Private Law* is indexed/abstracted in the *European Legal Journals Index.*

Printed on acid-free paper

EUROPEAN REVIEW OF PRIVATE LAW
REVUE EUROPÉENNE DE DROIT PRIVÉ
EUROPÄISCHE ZEITSCHRIFT FÜR PRIVATRECHT

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Founded in 1992 by Ewoud Hondius and Marcel Storme

ISSN 0928-9801

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Typeface ITC Bodoni Twelve
Design Dingoj | Peter Oosterhout, Diemen-Amsterdam
Printed in the Netherlands

Dutch case note

FARO SOBCZAK,[*] DAVID TOWNEND[**] AND GERRIT VAN MAANEN[***]

1. Introduction

In Dutch law, the question whether asbestos victims suffered any damages will not be problematic because lung cancer is an actual 'damage'. The main problem in cases like this lies in the causal uncertainty between the exposure to asbestos and the development of lung cancer. The problem of uncertain causality in asbestos cases involves a multidisciplinary interaction between judges and experts and is well established in the literature. However, the case of *Johnston v. NEI International Combustion Limited*[1] differs from other asbestos cases, in that whereas the three claimants showed clear evidence of exposure to asbestos, they had not developed lung cancer yet.

In *Johnston* and in similar cases, the evidence of exposure to asbestos comes from X-ray examination of the lungs. The visceral pleura and sometimes the parietal pleura show pleural plaques, that is, localized areas of pleural thickening with well-demarcated edges. Clinical experience shows that, when pleural plaques are radiological detectable, there is nearly always a history of significant occupational exposure to asbestos. There is no consensus, however, whether finding pleural plaques indicates a minimum level of exposure. Furthermore, and perhaps most importantly for Tort law, current medical consensus seems to indicate that the presence of pleural plaques gives no indication of whether the individual will or will not develop lung cancer because of the exposure that they have had to asbestos: the general view is that the presence of pleural plaques is not an indication of an increased risk of developing an asbestos-related lung cancer of itself but it 'only' confirms an exposure to asbestos. According to the dominant view, pleural plaques do not cause any symptoms, they only mark the presence in the lungs and pleura of asbestos fibers, which may independently cause life-threatening or fatal diseases, such as asbestosis or mesothelioma.

The problem for tort law posed in this case is whether employees who have been negligently exposed to asbestos dust and subsequently have developed pleural plaques – but not lung cancer – should be compensated or not. As seen throughout this collection, this is not easy to resolve. In Dutch law, the presence of pleural plaques themselves will not give rise to compensatory damages beyond the costs of

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[1] *Johnston v. NEI International Combustion Limited* (2007) UKHL 39.

regular monitoring of the condition of the employee following the finding that he or she has been exposed to asbestos. This is not because the damage is not actionable (compensatable), but simply because there is (in most cases) no damage to claim (beyond the increased monitoring costs). So this position is different from the English law, since in Dutch law, the damage is seen as potentially actionable. This gives rise to another interesting question about how the law should deal with the reaction of an individual who is given the information that they have pleural plaques and, therefore, a confirmation that they have had an exposure to asbestos. In Dutch law, a clinical depression as a consequence of the development of pleural plaques might be actionable, compensatable damage. However, when giving the individual the information causes mere anxiety is rather different, as mere anxiety is not a recognized psychiatric illness. Should this reaction to the negligent exposure of the employee to asbestos be compensated? Furthermore, the same question can be asked for the simple risk of future illness.

In this case note, we will consider causation problems in Dutch law, causal uncertainty in asbestos cases, and the proportional liability theory, the *Johnston* case, compensation for pleural plaques themselves, pleural plaques, and the risk of future illness or anxiety, and the same position in relation to clinical depression.

2. Causation Problems in Dutch Law

As in most legal systems, in Dutch law, it is up to the claimant to prove the liability of the tortfeasor, unless fairness demands another arrangement of the burden of proof.[2] In asbestos cases, wherein the claimant has developed lung cancer or other illness through the exposure to asbestos, the claimant and his or her relatives will already be suffering pain and stress. It is arguable that, in these specific circumstances, fairness could require an exception to the normal burden-of-proof rule. Dutch law, again as in most legal systems, does not demand a 100% certainty but a 'reasonable degree of certainty' to assume a causal connection. Two aspects of causation can be distinguished: the first is establishing causation (factual causation) and the second is determining the total amount of damage (legal causation). The principle of 'conditio sine qua non' is applied in the Netherlands to establish factual causation, also known as the 'but-for' test in Anglo-American legal systems. The *conditio sine qua non* test implies an all-or-nothing approach. Liability will arise and compensation will be paid if the *conditio sine qua non* test and the other requirements for liability are met.[3] All-or-nothing recovery can lead to overcompensation or undercompensation.[4] Applying the all-or-nothing approach will, in some cases,

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[2] Article 150 of the Code of Civil Procedure (Rv).

[3] This means that if the claimant cannot prove *conditio sine qua non*, he will, in general, be left empty handed.

[4] J.S. Kortmann, Karamus/Nefalit: 'Proportionele aansprakelijkheid?', *NJB* (2007): 1404-12.

lead to undesirable consequences. The application of this principle has its drawbacks. This is the reason why Dutch scholars, like Akkermans,[5] Frenk,[6] and Faure,[7] have proposed to reduce the negative side effects of the traditional all-or-nothing approach. Their solution is the 'proportional liability theory'. Applying this theory, the judge does not simply award or reject the total amount of damages, rather he awards damages in proportion to the probability of causality.

3. Causal Uncertainty in Asbestos Cases and the Proportional Liability Theory

The *conditio sine qua non* test does not work in situations where there are a number of possible conditions present that could have caused the damage (i.e., the problem of 'multiple causality'). If judges apply the *conditio sine qua non* test in such situations of multiple causality, it is very difficult to establish liability with the required 'reasonable degree of certainty' that one of the possible and likely conditions has caused the damage. And so, the claim for compensation will most likely be dismissed. This would be contrary to common sense; tort law should be about compensating those who are wrongfully injured.[8] In cases of asbestos-related injuries, a distinction should be made between, on the one hand, situations in which uncertainty exists about the specific tortfeasor and, on the other, situations in which uncertainty exist as to the cause of the damage.[9]

To give an example of the first situation, one might think of mesothelioma cases. Exposure to asbestos is the only known cause of contracting a mesothelioma.[10] In such cases, the uncertainty can only arise as to the identity of the specific tortfeasor. For example, the employee, who contracted a mesothelioma, could have worked for several employers all exposing him to inhale asbestos dust in the course of the separate employments. Medical science cannot tell us the exact moment the employee inhaled the 'fatal asbestos fibres', and therefore, such a mesothelomia victim cannot prove which employer caused his illness.

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[5] A.J. Akkermans, *Proportionele aansprakelijkheid bij onzeker causaal verband: een rechtsvergelijkend onderzoek naar de wenselijkheid, grondslagen en afgrenzingen van aansprakelijkheid naar rato van veroorzakingswaarschijnlijkheid* (Deventer: W.E.J. Tjeenk Willink, 1997).

[6] N. Frenk, 'Toerekening naar kansbepaling', *NJB* (1995): 482-91.

[7] M. Faure, *(G)een schijn van kans*, Oratie (Inaugural adres) UM, Intersentia, Antwerpen, 1993.

[8] *Fairchild v. Glenhaven Funeral Services Ltd.* (2002) UKHL 22, 11.

[9] The problem of uncertain causality does not only arise in asbestos cases, but it is present in all areas of liability law, for example, in medical malpractice cases. See Hof Amsterdam 4 Jan. 1996, NJ 1997, 213 (Baby Ruth).

[10] H.E.J. Sinnighe Damsté, S. Siesling, & A. Burdorf, 'Milieublootstelling aan asbest in de regio Goor vastgesteld als oorzaak van maligne pleuramesothelioom bij vrouwen', *Nederlands Tijdschrift Geneeskunde* 151, no. 44 (3 Nov. 2007): 2453-9.

There are also asbestos cases in which no uncertainty exists about the specific tortfeasor but where uncertainty exists about the cause of the damage.[11] For example, the employee may have worked for only one employer and have been exposed to asbestos during that employment, but the lung cancer that he or she contracted could also have been caused by heavy smoking, genetic predisposition, or aging. Of course, the most complex situation is the situation in which there is uncertainty about the specific tortfeasor and uncertainty about the cause of the damage as well.[12]

The proportional liability theory was applied by the Dutch Supreme Court[13] for the first time in an asbestos case in 2006.[14] The employee contracted a form of a lung cancer that can have multiple causes: heavy smoking, genetic predisposition, and exposure to asbestos dust. In this case, a number of possible causes, which could have caused the damage, are present. The employer denied liability on the ground that there was a considerable chance that the lung cancer was not caused by the admitted exposure to asbestos but by the employee's twenty-eight years of heavy smoking. Medical science had, at that time and indeed still today, not been able to determine whether the lung cancer was caused by the exposure to asbestos or by the other factors that could be imputed to the employee. However, the epidemiological expert report assessed the chance that the lung cancer was caused by the exposure to asbestos dust at 55%. On that basis, the Court of Appeal awarded 55% of the damages claimed. The Dutch Supreme Court affirmed the judgment of the Court of Appeal and ruled (on the basis of Article 6:99 Dutch Civil Code[15]) that the employer was liable for this 55%, but that this obligation to repair was diminished by the degree to which the employee was held personally responsible for contributing to the damage (Article 6:101 Dutch Civil Code[16]). Great weight is

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11 For example, the *Karamus/Nefalit-case* (HR 31 maart 2006, *RvdW* 2006, 328).

12 For example, in cases wherein the employee worked for two or more employers and all of them exposed him to asbestos, the employee did not contract a mesothelioma but another form of lung cancer, which can have multiple causes. In this situation, there is uncertainty about the specific tortfeasor and the cause of the damage (lung cancer).

13 The Supreme Court followed a line of cases from the lower courts and other legal opinion favouring proportional liability theory. See Ktr. Middelburg 1 Feb. 1999, *TMA* 1996/6 (Schaier/De Schelde), Gerechtshof Amsterdam 18 maart 2004, JAR 2004/96 (Winkelaar/Hertel), Gerechtshof 's-Gravenhage 1 Oct. 2004, *VR* 2005, 109 (Rietveld/Wilton Fijenoord).

14 HR 31 maart 2006, *RvdW* 2006, 328.

15 'Where the damage has resulted from two or more events for each of which a different person is liable, and where it has been determined that the damage has arisen from at least one of these events, the obligation to repair the damage rest upon each of these persons, unless he proves that the damage is not the result of the event for which he himself is liable'.

16 'Where the circumstances which can be imputed to the victim have contributed to the damage, the obligation to repair is diminished by apportioning the damage between victim and the person who has the obligation to repair, in proportion to the degree in which the circumstance can be imputed to each of them, have contributed to the damage. The apportionment may vary or the obligation to

therefore placed upon expert(s) opinion estimating the chance and extent to which the lung cancer was caused by the exposure to asbestos dust in relation to a number of possible causes.

In cases where there are more than one possible tortfeasor, the Dutch asbestos victim does not have to trace all the possible tortfeasors because each tortfeasor in a group of possible tortfeasors is jointly liable on the basis of Article 6:99 Dutch Civil Code (BW). The Dutch claimant, unlike the English asbestos victim,[17] does not have to fear insolvency of one of the tortfeasors and the burden-of-proof is firmly with the tortfeasor rather than the victim.[18]

4. The Case *Johnston v. NEI International Combustion Limited*[19]

Johnston actually differs from most common asbestos cases wherein an employee contracted lung cancer after he has been negligently exposed to asbestos. In the common types of asbestos cases, the lung cancer is established by medical doctors and asbestos is seen as 'the' cause or at least as one of the possible causes. Thereby, the asbestos victim suffered compensatable damage. The 'damage question' is, thus, compared with *Johnston*, not problematic in the most common asbestos cases.

In *Johnston*, the question was whether someone who had been negligently exposed to asbestos could sue his employer on the mere fact that he has developed pleural plaques. As said, these are areas of fibrous thickening of the pleural membrane, which surrounds the lungs. These pleural plaques cause no symptoms. They only signal the presence in the lungs and pleura of asbestos fibers, which may independently cause life-threatening or fatal diseases, such as asbestosis or mesothelioma. In essence, they are only indicators that do no more than evidence exposure to asbestos.[20]

The diagnosis of pleural plaques may, however, cause the patient to contemplate his future with anxiety or even cause a recognized psychiatric illness, for example, clinical depression.[21] In the Dutch legal system, proof of damage, as in most legal systems,[22] is also a standard element in an extra-contractual liability procedure.

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repair can either be completely extinguished or not apportioned at all, if equity so requires due to the different degree of gravity of the faults committed or any other circumstance in the case'.

17 In England, the employers are not jointly liable for asbestos exposure except for mesothelioma cases (which is dealt with specifically by the Compensation Act 2006).

18 Article 6:99 BW: 'Where the damage has resulted from two or more events for each of which a different person is liable, and where it has been determined that the damage has arisen from at least one of these events, the obligation to repair the damage rest upon each of these persons, *unless he proves that the damage is not the result of the event for which he himself is liable*' [emphasis added].

19 *Johnston v. NEI International Combustion Limited* (2007).

20 Ibid., 38.

21 Ibid., 1.

22 In England, a claim in tort based on negligence is incomplete without proof of damage.

Applying this in the factual situation under consideration here, the first question to be answered is whether pleural plaques *on their own* will give rise to compensatable damage. The second question is whether the development of pleural plaques and the additional association, with the risk of future illness or anxiety about the possibility of that risk materializing or even clinical depression, will amount to compensatable damage. (These two questions are, therefore, isolated from the question of the compensation where the presence of pleural plaques is found with a full-blown lung disease with or without further questions of anxiety-related complications.)

Dutch law does not give a sharp definition of the concept of damage. Damage is most commonly described as diminution (*vermindering*) or detriment (*nadeel*) of an object. In Dutch law, this includes economic loss or other forms of loss.[23] Articles 6:95 and 6:96 of the Dutch Civil Code (BW) describe the forms of damages that are eligible for compensation. Article 6:95 BW distinguishes property damage and other detriment as compensatable damages. Article 6:95 BW distinguishes material from immaterial damages. Immaterial damages, like pain and suffering, can be compensated in the Netherlands according to the rules set out in Article 6:106 BW.

The first possibility for an award of immaterial damages is where the tortfeasor *intended* to cause immaterial damage to the victim.[24] Any type of immaterial damage is compensatable in such a case. The second ground for an award of immaterial damages is where the victim suffered *physical* injury. Immaterial damages can also be awarded in situations of libel or slander or in situations where the victim suffered some *other type* of personal injury.[25] The third possibility is damage to the reputation of a deceased person.[26]

In *Johnston*, had the case been heard under Dutch law, in order to get compensation, the victims thus would have had to prove that they suffered physical injury or another kind of 'personal injury'.

5. Pleural Plaques without Psychiatric Illness or Anxiety

When pleural plaques only are found, are such pleural plaques in that situation compensatable damage or not, under the Dutch legal system? The problem is that, according to the current prevailing medical opinion, pleural plaques themselves do not give rise to actual damage. Beyond the thickening of the visceral pleura and sometimes the parietal pleura, the plaques themselves do not cause any symptoms and *by themselves* do not increase the susceptibility of the claimants to other

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[23] J. Spier, T. Hartlief, G.E. Van Maanen, R.D. Vriesendorp, *Verbintenissen uit de wet en Schadevergoeding*, (Deventer: Kluwer, 2006), no. 200.

[24] Article 6:106 s. 1 sub a *Dutch Civil Code* (BW).

[25] Article 6:106 s. 1 sub b *Dutch Civil Code* (BW). This does not include the grief one suffers because a relative is injured or killed.

[26] Article 6:106 s. 1 sub c *Dutch Civil Code* (BW).

diseases or shorten their expectation of life. They do not, in general, have any effect on the victim's health at all.[27]

So what would the position of an individual presenting with only pleural plaques be in Dutch liability law? When there is no actual damage at all, there is nothing to claim.[28] And crucially, damages are given for injuries that cause harm, not for injuries that are harmless.[29] Unlike the English Tort of Negligence, 'damage' is not a necessary element in the formal sense for extra-contractual liability under Article 6:162 BW. In the pleural plaques case, however, there *is* some kind of bodily injury (lesion to the body). Unlike the visible scar in the face, the scars on the pleural membrane, which surrounds the lungs, are not visible for other people. The question for Dutch law is whether the plaques are, or are not, 'harmless' injuries. And it is not simply a question for Dutch law, as the person having been told of the presence of pleural plaques and, therefore, of an exposure to asbestos could well want to have regular check-ups in order to monitor his condition. This can result in actual (material) costs. Would this move the injury from the category of harmless to harmful? Indeed, why should such a person *not* be entitled to compensation? Dutch scholars, like Spier, argue that there should be no hesitation to allow compensation for damages in the case of necessary substance-related monitoring.[30] However, if there is no psychiatric illness or anxiety and if we accept as a point of departure that pleural plaques themselves do not increase the chance of getting lung cancer or any other illness, then we must conclude that there is no other claim for damages than the one relating to the costs of monitoring, although the pleural plaques indicate an exposure to asbestos, which could have resulted from the negligence of an employer. Such an individual must wait and see if the exposure causes serious illness as the presence of the plaques will not give rise to punitive damages. However, the Dutch asbestos victims who developed pleural plaques, which did not lead to serious anxiety or even a clinical depression, will be better off than English asbestos victims, since under the Dutch law, the costs of monitoring are eligible for compensation. In the English legal system, pleural plaques, by themselves, will not give rise to 'damage', which is a necessary element for a claim in tort based on negligence. This also means that the costs of monitoring will not be compensated under the English legal system. In the next sections, we will see that the 'damage question' can be answered differently when there is the risk of future illness, (serious) anxiety, or even clinical depression.

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[27] *Johnston v. NEI International Combustion Limited* (2007), 11.

[28] *De minimis non curat lex;* there is no cause of action if the damage suffered was negligible.

[29] *Johnston v. NEI International Combustion Limited* (2007), 47.

[30] J. Spier, *Schade en loss occurrence-verzekeringen* (Deventer: Kluwer, 1998), 12.

6. Pleural Plaques with the Risk of Future Illness or Anxiety

The second question to be answered is whether pleural plaques will give rise to compensatable damages if these plaques are taken in association with the risk of future illness or anxiety about the possibility of that risk materializing? One has to distinguish two situations in *Johnston*: In the first situation, the victims claimed immaterial damages for the risk of future illness and anxiety about the possibility of that risk materializing. In the second situation, one victim (Mr Grieves) claimed damages because knowing the risk of future illness in his case lead to a recognized psychiatric illness.

In the first situation, if we accept that pleural plaques is some kind of bodily *injury*, which is not the same as *damage*, an argument could be made that a claim for pain and suffering is valid. *Serious* anxiety could then give rise to a claim for immaterial damages, which would be within the scope of Article 6:106 lid 1 sub b BW. We have found two Dutch decisions of two separate courts of first instance[31] (trial court), which dealt with the same situation as *Johnston*. Only the first decision will be discussed. Here, the employee was exposed to asbestos dust for thirty-seven years, which lead to pleural plaques. However, the court considered that an expert opinion was needed to establish whether the complaints of anxiety were to be seen as serious and real. The general opinion in Dutch Law is that anxiety claims as such are admissible and will give rise to compensation.[32] *Serious* anxiety, as a result of the contraction of pleural plaques, thus does not have to lead to a recognized psychiatric illness in order to be compensated.

Equally, whether or not the risk of future illness can be compensated completely depends on the findings of experts. If experts are able to establish that there *is* a minimal but serious risk of future illness, there could also be a claim in law based on the calculation of the chance for getting the asbestos-related disease. The mere fact of the risk of future illness can be seen as an actual damage. However, this risk must then be substantial. A risk of just 2% or 3% will not be enough to be seen as actual damage, which is eligible for compensation under the Dutch legal system. The risk of future illness could also be seen as uncertain future damages, which can be regarded as threatening (*dreigende*) irrevocable (*definitieve*) damage. Both approaches put the 'damage concept' in another perspective: 'future damage' is the irrevocable damage and 'actual damage' is the damage relating to the chance for getting the asbestos-related disease.[33]

It goes without saying that if the point is reached that an employee contracts an asbestos-related disease like mesothelioma or asbestosis – and thus, the risk

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[31] Rb. Middelburg 30 mei 2001, *JAR* 2001, 232, Rb. Zwolle-Lelystad 30 mei 2007, zaaknr. 249185.

[32] M. Vegter, *Vergoeding van psychisch letsel door de werkgever* (Den Haag: SDU, 2005), 400-1; See also Stolker & Levine, 'Compensation for the Fear of Contracting Asbestos-Related Diseases – Critical Reflections on an Important Supreme Court Decision and Its Relevance for Europe', *European Journal of Private Law* (1999): 1–19.

[33] J. Spier (1998), 21; A.J. Akkermans (1997), 220.

under which he is living actually materializes – his employer will be liable to him in damages.[34]

7. Pleural Plaques with Clinical Depression

In *Johnston*, Mr Grieves, once learning of the risk of future illness, developed a recognized psychiatric illness. He underwent an X-ray examination in 2000 and, after being told that his pleural plaques indicated a significant exposure to asbestos and a risk of future disease, he developed clinical depression. Clinical depression is seen as a recognized psychiatric illness under the Dutch legal system and, therefore, this could also be seen as an *injury to his person* in the sense of Article 6:106 lid 1 sub b BW. Is such a compensatable injury one which the negligent employer who exposed the victim to the asbestos could be held liable? A second requirement, which needs to be met in order to hold the employer liable, is that there has to be a causal connection between the wrongful conduct of the employer and the damage which the victim encountered (i.e., between the exposure to the asbestos and the clinical depression). Proving the wrongful conduct of the employer will not be problematic because, in the *Johnston* scenario, the employer acknowledged that he negligently exposed his employee to inhale asbestos dust in the course of the employment. Also, proving the causal connection between the wrongful conduct of the employer and the contracting of pleural plaques will, in general, not be problematic. However, the question remains whether there *is* a causal connection between the wrongful conduct of the employer and the clinical depression. To answer this question, according to the Dutch law, we must first establish whether there is a factual causation. The question to be asked is whether the clinical depression (damage) would also have occurred if the employer had not acted in the way he did? The answer to this question is relatively simple: if the employer did not expose Mr Grieves to inhale asbestos dust, Mr Grieves would probably not have developed clinical depression. This means that the first stage of causation – the stage of *conditio sine qua non* – will be met in the situation where the claimant only worked for one employer who exposed him to inhale asbestos dust in the course of the employment. But if, in fact, the employee worked for two (like Mr Grieves) or even more employers and all of them exposed him to asbestos in the course of that employment, then the question whether there is factual causation will be more problematic to answer. The Dutch legislator has tried to solve this problem of 'alternative causality' by Article 6:99 BW. Dutch asbestos victims will not have to sue all employers. All employers who wrongfully exposed Mr Grieves to asbestos are jointly liable, as discussed above.

This means that Mr Grieves' claim probably could be awarded under Dutch law, because Mr Grieves suffered damage in the form of clinical depression, which could

[34] For example, HR 31 maart 2006, *RvdW* 2006, 328, CRvB 21 juni 2007, nr. 04/4724 AW, LJN BA8436.

be seen as compensatable (actual) damage according to Article 6:106 lid 1 sub b BW. The fact that the expert stated that pleural plaques would only, in very exceptional cases, lead to clinical depression does not exclude the liability of the employers. The mere fact that this damage is not a 'normal' reaction will be a risk for the tortfeasor to bear; he has to take his victim as he finds him.[35] The argument that Mr Grieves' damage (his clinical depression) was not foreseeable, thus, does not exclude the employers from liability.

8. Conclusions

Johnston v. NEI International Combustion Limited shows that employees who have developed pleural plaques are better off in the Netherlands than in England. In the Dutch legal systems, the proof of damage is not a necessary element in the formal sense for extra-contractual liability under Article 6:162 BW. The actual (material) costs of monitoring the condition of the asbestos victim can be eligible for compensation. The approach taken by the Dutch legislator differs from the one taken by judges in the English House of Lords who seized the opportunity to discuss the concept of actionable damage.

The House of Lords confirmed the general rule in English law: a claim in tort based on negligence is incomplete without proof of damage. Awarding damages for pleural plaques themselves is out of the question, because there is just no actionable damage to claim. The same line of thought holds true in English law for awarding damages for the risk of future illness or anxiety because a cause of action only accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible.[36] This approach even counts when the risk of future illness has resulted in a clinical depression. The employees have *not yet* sustained an injury for which the law can give them a remedy in damages.[37]

In Dutch law, the position of the claimant is made better by the position of the proof of damage in the system. Damage does not have to be actionable, but there must be 'actual' damage in order to get compensation. Thus, the claimant can be compensated for the additional costs of regular monitoring. Serious anxiety can also give rise, under the Dutch law, to a claim for pain and suffering (immaterial damage) based on Article 6:162 BW, which would be within the ambit of Article 6:106 lid 1 sub b BW. Serious anxiety, as a result of the contraction of pleural plaques, does not have to lead to a psychiatric illness in order to be eligible for compensation. A recognized psychiatric illness is not a necessary condition for awarding immaterial damages based on anxiety. Even the risk of future illness

[35] The employer also has to answer for the consequences of the claimant's vulnerabilities and predispositions.

[36] *Johnston v. NEI International Combustion Limited* (2007), 83.

[37] Ibid., 59.

might be – depending on the findings of experts – eligible for compensation under the Dutch legal system.

Under the Dutch law, clinical depression is seen as a recognized psychiatric illness, which means that this could be seen as an *injury* to his person within the scope of Article 6:106 lid 1 sub b BW. The damage question will then not be problematic to answer. In light of the maxim, 'the tortfeasor has to take his victim as he finds him'; we conclude that both the costs of treatment (material) and costs for mental suffering (immaterial) are, in this situation, eligible for compensation.

EUROPEAN REVIEW OF PRIVATE LAW
REVUE EUROPÉENNE DE DROIT PRIVÉ
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