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Taxonomy of Asbestos Litigation in the Netherlands: Duelling with Causal Uncertainty

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1. Introduction

Nearly nine decades after the first medical accounts of the harmful properties of asbestos, this once considered miracle substance remains the primary carcinogenic toxin affecting European workers today. The use of asbestos in human culture has been traced back to some 4500 years, as records have attributed its earliest use to Finland where it was utilized for pottery making. Indeed, the term asbestos itself dates back to the Ancient Greeks who identified the substance with the term asbestos in order to signify its *unquenchable* or *indestructible* properties.[1] It was not until the Industrial Revolution, however, that the use of asbestos became widespread and global. The railroad industry was among the first to make extensive use of asbestos. The modern revival of the use of asbestos can largely be linked to Ludwig 'Hatschek's invention of the process of combining asbestos fibres with cement in order to produce asbestos cement. This new material was set to revolutionize construction around the globe and provided the largest boost to the asbestos industry.[2] Asbestos was thus 'booming business' and asbestos manufacturing plants began to sprout as the industry continued to thrive in the mid-1970s. Things changed after that, however, as sales in the developed world rapidly declined due to rising health concerns. The mounting public awareness of the adverse effects of asbestos brought a flood of liability claims by chiefly factory workers who suffered from the dreadful health impacts associated with asbestos exposure. Liability claims were also instigated by the family members of such employees and, later, by those exposed to asbestos in their living environment (the so-called domestic and environmental exposure cases). Consequently, a vast body of case law emerged in countries where such legal battles were being waged.[3] It should come as no surprise, then, that asbestos

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1 H. SCHREIER, *Asbestos in the Natural Environment*, Elsevier, 1989, p. 6.

2 See R.L. VIRTA, *Asbestos: Geology, Mineralogy, Mining, and Uses*, U.S. Geological Survey Open-File Report, available online at <http://purl.access.gpo.gov/GPO/LPS39552>.

3 For example, according to *Asbestos Litigation Costs and Compensation: Interim Report*, published in 2002 by the Rand Institute for Civil Justice, asbestos litigation is the longest-running mass tort

exposure-related liability has come to play a major role in some significant legal developments in civil law and liability law, in particular. The two cases under review exemplify such a development in UK law, and, as will be illustrated hereinafter, the same can be said to have taken place in the Netherlands.

Let us briefly bring the facts to mind: in *Sienkiewicz* v. *Greif (UK) Ltd* (hereinafter '*Sienkiewicz* v. *Greif*'), a claim for damage compensation was brought by Karen Sienkiewicz on behalf of the estate of her mother, Enid Costello, for her death caused by mesothelioma. Enid Costello had formerly worked in an office at a steel drum factory. Exposure at the factory was 'very light' but continued for a prolonged period of time. Moreover, Enid Costello had been subject to general low-level atmospheric asbestos exposure. In *Willmore* v. *Metropolitan Borough Council* (hereinafter '*Willmore* v. *The Council*'), the husband of the late Mrs Willmore claimed compensation for the death of his spouse due to complications from mesothelioma. Mrs Willmore had been exposed to low levels of asbestos at her secondary school, run by the defendant, but had also been subject to low-level, non-tortious atmospheric exposure. Notwithstanding the severe personal repercussions associated with mesothelioma, both cases share the central question as to whether a dedicated asbestos-related rule on the burden of proof, meant for easing the requirement of proof for the establishment of causation in cases where victims suffering from mesothelioma can attribute their harm to multiple sources (the so-called *Fairchild* exception), could be extended to also cover cases of single exposure (meaning instances in which exposure can be attributed to a sole tortfeasor, excluding the possibility of environmental exposure).[4] Not surprisingly, both cases were subject to a joint appeal and were later brought before the UK Supreme Court. In a unanimous decision by the seven-judge bench, the Supreme Court upheld the judgment of the Court of Appeal, in which it was decided that the *Fairchild* exception to the conventional rule on causation in the United Kingdom does hold in cases of single exposure. A precedent was thus created whereby, in accordance with the previously established *Fairchild* exception, a claimant in the case of single exposure is no longer forced to prove that their risk of developing mesothelioma would not have occurred *but for* the 'defendant's negligence. Instead, the claimant is only required to prove a

litigation in the United States, in D. ALAN RUDLIN, *Toxic Tort Litigation*, American Bar Association, 2007, p. 354. See also S.J. CARROLL *et al.*, *Asbestos Litigation*, Rand Institute, 2005, available online at <http://www.rand.org/pubs/monographs/2005/RAND_MG162.pdf> and AMERICAN ACADEMY OF ACTUARIES, *Overview of Asbestos Issues and Trends*, December 2001, available online at <www.actuary.org/pdf/casualty/mono_dec01asbestos.pdf and Asbestos>.

4 *Sienkiewicz* v. *Greif (UK) Ltd*; *Knowsley MBC* v. *Willmore* [2011] UKSC 10.

material increase in the risk of contracting mesothelioma due to negligence on the part of the defendant.[5]

This judgment, in conjunction with the previous precedents that established and further refined the *Fairchild/Barker* exception, is a testament to how litigation arising from the dreadful aftermath of asbestos exposure-related harm has, to a real extent, been the instigating force behind the development of significant legal precedents in the United Kingdom.[6] As will be presented in the following, a similar development can be said to have taken place in Dutch tort law, wherein asbestos exposure-related liability litigation has over the past decade proved to be a fertile source of legal development.[7]

The objective of this article is thus twofold: Before delving into the particulars of the judgment under review and providing the Dutch perspective, we aim to present the reader with an understanding of the intricacies that govern Dutch tort law with regard to asbestos-related liability through an overview of the developments that have come to provide victims of asbestos exposure with a refined liability framework. We first begin with an overview of the health hazards linked to asbestos exposure (sec. 2). We then examine the legal framework of Dutch liability law by addressing the question as to whether, and how, harm suffered due to asbestos exposure is covered under our liability law. First, a general overview of the legal provisions of asbestos liability is provided in order to set the stage (sec. 3). Next, the requirement of a causal link according to Dutch law is examined (sec. 4). In light of the varying nature of exposure in each of the two cases under review, we then discuss asbestos liability based on the provision on the 'employer's liability (sec. 5) and the general provision of tort (sec. 6). We also devote some due attention to the relation of asbestos liability and the statute of limitations (sec. 7). Finally, the focus will once again be on the judgment under review, as we provide the Dutch answer to the question of liability in these cases (sec. 8).

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5 See Y.R.K. WATERMAN, 'De Fairchild-zaak: perikelen van het Engelse asbestslachtoffer', 6. *TMA (Tijdschrift voor Milieuschade en Aansprakelijkheidsrecht)* 2003, pp. 151-159; F. SOBCZAK, 'Proportionality in Tort Law: A Comparison between Dutch and English Laws with Regard to the Problem of Multiple Causation in Asbestos-Related Cases', 6. *ERPL (European Review of Private Law)* 2010, pp. 1155-1179.

6 *Fairchild* v. *Glenhaven Funeral Services Ltd* [2002] UKHL 22 and *Sylvia Barker* v. *Corus UK Plc* [2006] 2 AC 572.

7 See F. SOBCZAK, 'Proportionele aansprakelijkheid voor mesothelioom? Een beschouwing aan de hand van het Engelse recht', 2. *L&S (Letsel & Schade)* 2011, pp. 32-41.

2. Asbestos Exposure-Related Harm

There is no doubt that an extensive quantity of literature has been devoted to asbestos in the medical and legal literature,[8] and rightfully so, considering the widespread use and highly detrimental nature of the substance.[9] For the purpose of this article, it is useful to briefly look at the various medical conditions associated with asbestos exposure, as the particular properties of these illnesses can play a role in liability litigation.

Asbestos is a naturally occurring mineral that has been subject to widespread industrial application due to its highly favourable properties in construction, as well as its low manufacturing costs. The term asbestos is a generic name used for a group of fibrous silicate minerals. The mutual structure of these minerals consists of thin fibrous crystals that are extremely small and light enough to be carried in the air. When inhaled, small quantities of these fibres can remain in the lungs and, over time, cause serious tissue damage. Two forms of asbestos are generally distinguished: serpentine asbestos (also known as chrysotile or white asbestos) and amphibole asbestos (which includes crocidolite, or blue asbestos, and amosite, or brown asbestos).[10] White asbestos accounts for more than 90 per cent of asbestos applications and it has commonly been utilized to produce asbestos cement roof sheets, typically used for construction. Brown and blue asbestos are the most hazardous of the asbestos minerals because of their long persistence in the lungs of those persons who have been exposed to them. It is also important to bear in mind that throughout the 1960s and 1970s, the asbestos industry stressed the dangers of blue asbestos in order to ease concerns relating to white asbestos, based on the reasoning that blue asbestos fibres tend to be smaller and therefore they penetrate more easily deep into the lungs. Although

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8 See, e.g., I. SELIKOFF & D. LEE, *Asbestos and Disease*, Academic Press, New York 1978; B. CASTLEMAN, *Asbestos, Medical and Legal Aspects*, Law & Business, Inc. 1986, p. 692; P.W.J. BARTRIP, 'History of Asbestos Related Disease', 80. *Postgrad. Med. (Postgraduate Medicine)* 2004, pp. 72–76; G. TWEEDALE & P. HANSEN, 'Protecting the Workers: The Medical and the Asbestos Industry, 1930-1960s', 42. *Medical History* 1998, pp. 439–457; J. PETO, A. DECARLI, C. LA VECCHIA, F. LEVI & E. NEGRI, 'The European Mesothelioma Epidemic', *British Journal of Cancer* 1999, pp. 666–672; J.C. WAGNER, 'Epidemiology of Diffuse Mesothelial Tumors: Evidence of an Association from Studies in South-Africa and the United Kingdom', 66. *Ann. N.Y. Acad. Sci. (Annals of the New York Academy of Sciences)* 1965, pp. 575–88; J. WEBB, 'Tragic Asbestos Error Will Kill Thousands', *New Scientist* 1995, p. 145; G. TWEEDALE, *Magic Mineral to Killer Dust: Turner & Newall and the Asbestos Hazard*, Oxford University Press, Oxford 2000.

9 For a historical account of the use of asbestos in the United Kingdom, see G. TWEEDALE, *Magic Mineral to Killer Dust: Turner & Newell and the Asbestos Hazard*, Oxford University Press, Oxford 2000; for a historical account of the use of asbestos in the Netherlands, see P. SWUSTE, A. BURDOF & J. KLAVER, *Asbest. Het inzicht in de schadelijke gevolgen in de periode 1930–1969 in Nederland*, Delftse Universitaire Pers, Delft 1988.

10 H.I. PASS & M. CARBONE, *Malignant Mesothelioma: Advances in Pathogenesis, Diagnosis, and Translational Therapies*, Springer, 2005, p. 21.

this itself is true, there is no evidence to suggest that exposure to white asbestos is, in any way, safe.[11] Unlike the United States and Canada, the use of asbestos is now banned in the European Union.[12]

The most common illnesses associated with asbestos exposure are primary cancer of the lungs, secondary cancer of the pleura and peritoneum (known as mesothelioma), and asbestosis.[13] All three types of diseases can be fatal for the victim while the latency period of these diseases is very long. In the case of mesothelioma, symptoms may only surface after 15, sometimes even 30 or 60 years, after exposure.[14] Hence, environmental and occupational exposure to asbestos in the past continues to cause mortality today. The illness is fatal within one to two years after diagnosis. With regard to mesothelioma, it is also relevant to note that, other than is the case with lung cancer, mesothelioma is the only type of cancer for which asbestos is known to be the sole cause. For 80 per cent of the patients' diagnosed with mesothelioma, a direct connection with past exposure to asbestos can be found, while for the remaining cases, a cause cannot be established with sufficient plausibility.[15] There is insufficient medical evidence to indicate a necessary threshold level of exposure to asbestos. Even a single, low-level exposure to asbestos can lead to mesothelioma.[16] In contrast, primary lung cancer may also occur due to a number of different reasons, chief among which is smoking. As for asbestosis, exposure to asbestos needs to have been substantial. The occurrence of asbestosis and the severity of the condition are thus largely dependent on the amount and duration of exposure.[17]

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11 See the *Report of the International Agency on Cancer (IARC): IARC Monographs on the Evaluation of the Carcinogenic Risk of Chemicals to Man. Asbestos*, vol. 14, IARC, Lyon, France 1977, and more recently, K. STRAIF, L. BENBRAHIM-TALLAS, R. BAAN *et al.*, 'A Review of Human Carcinogens – Part C: Metals, Arsenic, Dusts and Fibres', *Lancet Oncol. (The Lancet Oncology)* 2009, pp. 453–454. R.A. LEMEN, 'Chrysotile Asbestos as a Cause of Mesothelioma: Application of the Hill Causation Model', *Int. J. Occup. Environ. Health (International Journal of Occupational and Environmental Health)* 2004, pp. 233–239; P.J. LANDRIGAN, W.J. NICHOLSON, Y. SUZUKI & J. LADOU, 'The Hazards of Chrysotile Asbestos: A Critical Review', *Ind. Health.* 1999, pp. 271–280.

12 The Commission Directive 1999/77/EC of 26 Jul. 1999 set the deadline for the prohibition of chrysotile use, with one minor derogation, as 1 Jan. 2005.

13 Asbestosis is a scarring of lung tissue through inhalation of airborne asbestos fibres. Mesothelioma is a rare type of cancer, most commonly occurring in the lining of the lung. Lung cancer is a malignant tumour of the lung. In addition, benign symptoms may occur such as pleural thickening of the lungs. This is a thickening of the lining of the lungs, which, in some cases, may progress to breathlessness; pleural plaques are areas of pleural thickening. Although usually without symptoms, they may cause lung impairment.

14 A. TANNAPFEL, *Malignant Mesothelioma*, Springer, 2011, p. 56.

15 HEALTH COUNCIL OF THE NETHERLANDS, *Asbestos: Risks of Environmental and Occupational Exposure*, The Hague, Publication No. 2010/10, p. 19.

16 *Ibid.*, p. 20.

17 *Ibid.*, p. 23.

From a liability perspective, it is important to bear in mind that the single source attributed to mesothelioma contraction means that the proof of causation for mesothelioma is more easily established, since no other form of exposure, such as smoking or otherwise, can be attributed to have caused the harm (more in sec. 4).

3. Overview of the Legal Grounds of Liability for Asbestos Exposure-Related Harm

Dutch civil law offers a number of grounds for liability when faced with civil claims due to asbestos exposure-related harm.[18] The legal basis for liability largely depends on the nature of the exposure in a given case. In this context, a general division can be made between occupational exposure and other exposure. The statuary provision of the contractual 'employer's liability as laid down in Article 7:658 of the Dutch Civil Code (hereinafter the 'Civil Code') is the common ground for determining occupational liability. This provision places employers in a strong position in litigation, because they can make use of the favourable burden of proof rules offered by Dutch labour law. The second important ground of liability applied in asbestos exposure cases according to Dutch law is the general provision regarding tort embodied in Article 6:162 Civil Code. It should be noted that asbestos liability according to Dutch law can, under certain circumstances, also be based on the grounds of product liability (Article 6:185 Civil Code),[19] liability for dangerous constructions (Article 6:174 Civil Code), and liability for dangerous substances (Article 6:175 Civil Code). However, these provisions are of little practical use for asbestos victims, since they were introduced in the 1990s, which was generally after exposure had occurred, and are thereby not applicable. For the majority of victims in instances of non-occupational asbestos exposure, this means that they are left with the general tort clause of Article 6:162 Civil Code. A comprehensive discussion of the general provision on tort – providing a basic rule intended to cover the whole of tort law –

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18 It should be noted that, as is the case in the United Kingdom, the majority of the Dutch asbestos victims find compensation through social security regimes. The Institute for Asbestos Victims, established in 1998, is specifically aimed at mesothelioma victims that have suffered occupational asbestos exposure. It provides mediation services between employer and (former) employee for the purpose of settling compensation. Since 2000, this group of victims may also be entailed to a governmental social security composition (the so-called *TAS-regeling*), should they no longer be able to file for compensation from the employer, due to, for example, bankruptcy or the termination of the business of their former employer. A similar regime of social security composition has come in place since December 2007 for victims of non-occupational exposure, such as victims of domestic and environmental exposure (the so-called *TNS-regeling*). Lung cancer victims, however, still remain outside the scope of such social security regiments and are therefore left with civil liability.

19 See Hof Arnhem 9 Aug. 2011, LJN BR5350, JA 2011, 175.

falls outside the scope of this commentary. Therefore, we will focus on a select set of cases that are of particular interest for the purpose of this article, namely exposure outside the workplace and, more in particular, environmental exposure in school buildings.

With regard to the judgment under review, the provision of contractual employer's liability forms the obvious legal basis for liability, should the case of *Sienkiewicz* v. *Greif* be brought before a Dutch Court, given the formal working relationship between the victim and defendant. As for *Willmore* v. *The Council*, the general tort clause is the most evident legal basis.

4. The Central Concern of Causal (Un)certainty in Asbestos Cases

In instances where widespread harm is suffered, liability law is usually found lurking just around the corner. This is no different where the harm suffered is due to asbestos exposure. Personal injury, such as cancer, falls squarely within the Dutch definition of damage. Little doubt exists as to whether persons suffering from the dreadful aftermath of asbestos exposure *can* claim compensation for their damage.[20] A more critical hurdle, however, concerns the requirement of causal causation and issues of causal uncertainty that may arise in asbestos liability. Indeed, one of the fundamental requirements for liability on the whole is the requirement of the causal link: A claimant needs to prove that a causal link exists between the wrongful conduct of the tortfeasor and the damaged suffered by the claimant. This is determined by considering whether the damage would have occurred if the tortfeasor had not violated the relevant norm in question, such as, for instance, the 'employer's duty of care. If, continuing with the example of the 'employer's liability, the damage would have occurred despite the 'employer's negligence, then the causal connection does not exist. The test is commonly referred to as the principle of *conditio sine qua non* (in Dutch doctrine or the *but for* test in English law). Traditionally, if the existence of a *conditio sine qua non* between the liability-creating event and the harm cannot be established, the causal uncertainty will, as a rule, have the effect that the claim will be dismissed. Only when the court is convinced to the extent of a reasonable degree of certainty that a *conditio sine qua non* is present will the judgment be in favour of the plaintiff. As to the degree of evidence required to meet the standard of

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20 This follows on the grounds of Art. 6:95 in conjunction with Art. 6:106 of the Dutch Civil Code. Art. 6:95 Civil Code provides that *damage that has to be compensated by virtue of a statutory obligation, consists of material loss and other disadvantages, the latter insofar as the law confers a right to compensation thereof*. Art. 6:106 para. 1 under b then provides, in clear terms, that *the aggrieved person has a right to compensation for damage that does not consist of material loss, assessed in conformity with the standards of reasonableness and fairness: (…) b. if the injured person has sustained physical injuries, if his honour or reputation is injured or if he is otherwise harmed in person*.

proof according to Dutch law, the measure to be attained has been set higher than the balance of probabilities (according to which standard the plaintiff has to establish that it is more likely than not that the defendant caused the harm). The relevant standard of proof in the Netherlands is 'a reasonable degree of certainty'. Before delving into the frameworks that govern the legal grounds at hand, it is therefore necessary to first consider the issue of the requirement of a causal link, given its central role in establishing liability in asbestos exposure-related cases, regardless of the legal basis.

In asbestos liability, the proof of causation is often problematic since more than one possible cause can be found to have caused the harm. From a medical point of view, it is inherently impossible to attribute a definite cause to an individual case of lung cancer. Likewise, even when the cause can be attributed to a single possible cause, such as is the case with mesothelioma, there still remains the issue of there being multiple sources of exposure, such as, for example, environmental or domestic exposure to asbestos outside the workplace. The issue of causal uncertainty forms a serious obstacle in occupational liability exposure as well as liability on the basis of the general provision on tort, as both provisions contain the requirement of causality.

Now, when a claimant is unable to establish causation, due to the circumstance of there being multiple possible sources of exposure or a large degree of uncertainty as to the link between his/her harm and the exposure, he/she is then left with nothing. In other words, the stationary provision of Article 7:658 Civil Code, as well as the general tort clause of Article 6:162 Civil Code, traditionally adhere to an *all-or-nothing* rule. A situation may, for example, occur – as was the case in *Sienkiewicz* v. *Greif* – in which an 'employee's possibility of contracting mesothelioma can be proven to have increased by only a rather small degree, due to attributable negligence on the part of the employer, while other environmental exposure to low levels of asbestos in the atmosphere account for the remaining probability of causing the harm. According to the all-or-nothing rule, the employee cannot be awarded any compensation, as a *conditio sine qua non* is not established to a reasonable degree of certainty. Hence, the risk of uncertainty regarding the degree to which the 'employer's negligence contributed to the damage is completely shifted to the employee. A contradictory situation is equally conceivable – as is shown by the UK cases under review – in which an employer is held liable for the whole of an 'employee's damage on the basis of the all-or-nothing rule, in spite of a great likelihood that circumstances not attributable to the 'employer's conduct, such as non-occupational environmental exposure, caused the damage.

Both situations promptly conjure a sense of injustice, and moreover, such outcomes appear to be at odds with the principles of reasonableness and fairness. In light of these, arguably, unjust outcomes, Dutch law has sought alternatives to the traditional all-or-nothing rule. In this regard, asbestos-related litigation can be

said to have provided a fertile ground for some significant developments in civil law. A more in-depth account follows in sections 5 and 6.

Next to the requirement of factual causation through the *conditio sine qua non* doctrine, Dutch law still contains a second aspect of causation, namely the imputation test or the requirement of legal causation. The rule, as laid down in Article 6:98 Civil Code, reads that compensation can only be claimed insofar as the damage is related to the event giving rise to liability in such a way that the damage, also taking into account its nature and that of the liability, can be imputed to the debtor as a result of this event. The rule deals with the causal chain of events that give rise to the harm suffered by the victim. The *conditio sine qua non* is considered a necessary but not a sufficient condition for causality; hence, a second, normative test is needed to reduce the magnitude of possible consequences.[21] This concerns the question as to which of the wide-ranging possible consequences that may have passed the *sine qua non* of the threshold can, in light of the standards of reasonableness and fairness, be attributed to the defendant. Where personal injury is concerned, it suffices to take note that when the *conditio sine qua non* has been established, the second stage of causation will rarely form a point of concern.

5. 'Employer's Liability

5.1. Overview

The Industrial Revolution of the 19th century brought workers into factories en masse. Long working hours and dire working conditions meant that injury among workers was a common occurrence on the work floor. However, at the time, only a handful of Dutch employers offered compensation for work-related injuries through private funds. For the majority of the workforce, there was little in the way of damage compensation for injury suffered at work. With the introduction of the new provision on the 'employer's contract in the Old Civil Code in 1907, things were set to change. Article 1638x, the predecessor of Article 7:658 (New) Civil Code, placed a clear obligation on the employer to offer protection to his employees against harm at the workplace.[22] Nonetheless, during the following decades, little use was made of the 'employer's liability provision because workers were already covered by social security in case of accidents at the workplace, through a special social security regime: The Accidents Insurance Act of 1901,

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21 See for a more detailed examination of Art. 6:98 Civil Code among others: C.J.H. BRUNNER, 'Causaliteit en toerekening van schade', *VR (Verkeers Recht)* 1981, pp. 210-217 and 233-236; J.H. NIEUWENHUIS, 'Eurocausaliteit: Agenda voor het Europese debat over toerekening van schade', 4. *TVP (Tijdschrift voor Privaatrecht)* 2002, pp. 1-38.

22 A.R. BLOEMBERGEN, J. SPIER & W.A.M. VAN SCHENDEL, *Schadevergoeding: een eeuw later: bundel opstellen aangeboden aan mr A.R. Bloembergen*, Kluwer, 2002, p. 161.

and the later amendment of 1921, provided insurance to all employees for damage suffered during work while, more remarkably, at the same time relieving employers from civil liability.[23] The 1967 reorganization and convergence of the various social security systems reversed this practice and allowed for civil liability against employers. Actions based on Article (7A:)1638x, and later Article 7:658, Civil Code became more common by the 1980s. This was primarily the result of an increase in litigation for damage compensation, due to long-term diseases such as lung cancer and mesothelioma, while at the same time the amount of social security compensation decreased steadily.[24] Occupational asbestos liability, in particular, has over the years been a major contributing source for developments with regard to the provision of the 'employer's liability.[25]

5.2. Establishing Liability under Article 7:658 Civil Code

The principal idea behind Article 7:658 Civil Code is that the employee is generally thought to be placed in a comparatively weaker position to that of the employer and should therefore be protected.[26] Under Article 7:658 paragraph 1, *the employer must arrange and maintain the spaces, rooms, machines and tools in which or with which work is performed under his responsibility and give instructions and take safety measures as is reasonably necessary to prevent that the employee suffers damage during the performance of his work*. Paragraph 2 provides: *the employer is liable towards the employee for damage which the employee has suffered from activities performed in the course of his work, unless he shows that he has complied with the obligations mentioned in paragraph 1 or that the damage to a substantial degree results from an intentional act or omission or from willful recklessness on the part of the employee*.

Should the employer contest a claim for damage compensation by the employee, the burden of proof thus lies primarily with the claimant: The employee is obliged to prove that his or her damage is connected to his or her earlier employment (the so-called requirement of *functional connection*). Case law concerning asbestos liability has further elaborated on the rule.

In the first instance, it is relevant to point out that employees claiming compensation for asbestos exposure-related harm need to prove that they, at some point during their employment, were *actually* exposed to asbestos. This was

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23 B. BARENTSEN, *Arbeidsongeschiktheid:aansprakelijkheid, bescherming en compensatie*, Kluwer, 2003, p. 58.

24 A.T.J.M. JACOBS, *Labour Law in the Netherlands*, Kluwer Law International, 2004, p. 82.

25 See T. HARTLIEF, 'Asbest en aansprakelijkheid: de reikwijdte van de rechtspraak omtrent werkgeversaansprakelijkheid', 9. *AV&S (Aansprakelijkheid, Verzekering & Schade)* 2005, pp. 41–49.

26 See, for example, HR 11 Mar. 2005, *JAR (Jurisprudentie Arbeidsrecht)* 2005, 84 (*ABN AMRO* v. *Nieuwenhuys*).

decided by the Dutch Supreme Court (hereinafter the 'Supreme Court') in the case of *Weststrate* v. *De Schelde*.[27] The crucial circumstance of that case was that the employee (Weststrate) had only proven that he could possibly have been exposed to asbestos during his employment by De Schelde and, as a result, had contracted mesothelioma. The Supreme Court ruled that such a mere possibility is insufficient and that an employee has to prove actual exposure. The Court saw no reason to expand the scope of Article 7:658 Civil Code to also cover instances of possible exposure.

Second, with regard to the proof of causation between exposure and illness, the principal idea behind the provision, namely the protection of the weaker party, is reflected in the case law. The proof for the requirement of functional connection can be said to have been eased in favour of the employee, in that when an employee has been exposed to hazardous substances during his work, the 'employee's burden of proof in establishing causation has to be *assumed* to have been fulfilled if the employer has failed to take the adequate measures that are reasonability necessary in order to avoid harm to the employee.[28] This rule on the onus of proof was later confirmed and further elaborated upon by the Supreme Court in the case of *Havermans* v. *Luyckx*.[29] The Court provided that for the application of the said rule, the employee is required to prove that his/her exposure to asbestos could be the *likely* cause of his/her illness or rather that it is insufficient for the employee to merely establish exposure alone. The nature of the illness is important in this respect, since the causal link between the behaviour of the employer and the illnesses of the employee cannot always be demonstrated. This will rarely form an obstacle for employees suffering from mesothelioma, as any amount of exposure has been found to increase the risk of contracting mesothelioma. However, in the case of asbestosis, for example, the bar is set higher and the employee is required to prove a *substantial* exposure.

In short, an employee claiming damages due to occupational asbestos exposure needs to establish causation. In this regard, employees are only required to prove that they, at some point during their work, had been exposed to asbestos and that this exposure could be the cause of their illness.

This brings us to the second stage of liability under Article 7:658 Civil Code that deals with the extent of the 'employer's duty of care and places the ball firmly in the 'defendant's court: The employer can avoid liability by proving that he has taken the safety measures that, at that time, could reasonably have been expected, in order to avoid possible harm to the employee. The case law on the 'employers' duty of care is far-reaching and, by and large, places the employee in

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27 HR 2 Jan. 2001, *NJ (Nederlandse Jurisprudentie)*, 2001, 597 (*Weststrate* v. *De Schelde*).

28 HR 17 Nov. 2000, *NJ* 2001, 596 (*Unilever* v. *Dikmans*).

29 HR 2 Jun. 2006, *NJ* 2006, 354 (*Havermans* v. *Luyckx*).

a more favourable position. First, this concerns the employer''s role in determining the possible occupational health hazards. In the case of *Janssen* v. *Nefabas*, the employee, Janssen, had in the period of 1945–1972 occupied various fabrication positions while being employed by Nefabas.[30] He was exposed to extensive amounts of asbestos during his employment. In the proceedings that followed, Nefabas argued that it had fulfilled its duties of care, since, at the time, the use of asbestos was common practice and no regulation yet existed in the Netherlands on the use and manufacturing of the substance. Consequently, he could not have known about the health hazards involved. The central question concerned the issue as to which specific safety measures could have been expected from the employer, based on the *then known state of science*. The Supreme Court rejected 'Nefabas' argument and held that the duty of care extends to the active participation of the employer in obtaining information on the possible health hazards linked to the use of asbestos: It is up to the employer to take an active role in determining what possible health hazards are involved in the duties of its employees, in order to be able to prove that it has fulfilled its duty of care.

The Supreme Court in its judgment in *Cijsouw* v. *De Schelde (I)* provided, among other things, some needed clarity as to when an employer is required to be aware of the dangers associated with asbestos.[31] The claimant, Cijsouw, was an employee at a shipping yard owned by De Schelde. During his employment between 1949 and 1967, he was directly exposed to asbestos. He later contracted mesothelioma and died as a result thereof. 'Cijsouw's estate sued for damages incurred due to De 'Schelde's failure to take adequate safety measures. De Schelde argued that during the period prior to 1960, it may have been aware of the risks of asbestos and lung cancer but could not have reasonably been able to know about the link between asbestos exposure and mesothelioma, since the disease was not yet recognized. It was therefore unable to take the appropriate safety measures in order to prevent the harm suffered by its employee. The Supreme Court rejected the 'employer's arguments and provided that if the employer knows or should know that a substance, such as asbestos, is dangerous and it has not taken adequate safety measures in view of the known dangers involved (asbestos or lung cancer), then, in principle, it is liable, even if the possibility of health damage is significantly increased due to a risk that is unknown to the employer (in this case, mesothelioma). As long as medical science has not established that a substance is hazardous, the employer, as a rule, is not liable for the damages of the employee caused by exposure to the substance. The employer is required to take adequate safety precautions from the moment after such a hazardous situation has been found, depending on the circumstances, such

30 HR 6 Apr. 1990, *NJ* 1990, 573.

31 HR 25 Jun. 1993, *NJ* 1993, 686.

as the degree of causation and the scope of the hazard involved. Moreover, the judgment provides that if it remains uncertain whether the cause of the 'employee's illness arose during the period of employment, in which the employer should have taken the necessary safety measures, the employer is liable, unless it can prove that the cause of the 'employee's harm occurred during a period in which the employer could not have been required to take safety precautions to prevent the harm. In other words, the risk of uncertainty regarding the moment of exposure and the requirement to take due care is, in principle, placed on the 'employer's shoulders. This judgment further established that an employee could be considered to know about the harmful health hazards of asbestos from 1949 onwards. This was later confirmed in the follow-up judgment of *Cijsouw* v. *De Schelde II*.[32] With regard to the specific risks involved in contracting mesothelioma, an employer is deemed to be aware of the risk from 1969 onwards.[33]

The established precedents on the 'employer's duty of care are not exclusively in accordance with the 'employee's position; however, there are instances in which the extent of the 'employer's duty of care has been restricted. The case of *Heesbeen* v. *Van Buuren* is especially relevant in the context of this article, in that it provides guidance as to where the boundaries of the 'employer's negligence rest.[34] In that case, a distinction was made based on the nature and intensity of the asbestos exposure. The claimant, Heesbeen, was an employee of a central heating installation firm owned by Van Buuren, where he was employed during a period of two years in 1965–1967. His duties included the removal and installation of central heating equipment that brought him into contact with asbestos. He later contracted mesothelioma and sued his employer. Based on the previously established rule in *Cijsouw* v. *De Schelde I*, the functional connection could easily be established: Heesbeen had been exposed and there was a link between his illness and his activities during his employment. However, Van Buuren argued that he could not be blamed for this harm, based on the fact that the exposure had occurred during a relatively short time span, whereby the risks

32 Hof 's-Gravenhage 25 Feb. 1997, *JAR* 1997, 53 (*Cijsouw* v. *De Schelde II*).

33 See, however, the difference that is sometimes made between 'chrysotile asbestos' (the so-called white asbestos) and 'amphibole asbestos'(the so-called blue and brown asbestos) as well as the distinction of exposure in the primary asbestos industry (e.g., asbestos cement factories) in contrast to exposure in the secondary (e.g., shipbuilding industry) and tertiary asbestos industries (e.g., construction industry). See HR 4 Jun. 2004, *JAR* 2004, 287 (*Broug* v. *Gemex*) and comments by J.W.M.K. MEIJER & S.D. LINDENBERGH, 'Asbestschade buiten de werkomgeving', 8. *NJB (Nederlands Juristenblad)* 2008, pp. 436–443. It should also be noted that the district courts still remain somewhat restrictive in accepting the employer's knowledge of the dangers of chrysotile asbestos before the late 1970s while also showing restraint when it comes to exposure in the secondary and tertiary industries.

34 HR 17 Feb. 2006, *NJ* 2007, 285 (*Van Buuren* v. *Heesbeen*).

of contracting any of the then known asbestos-related illnesses were negligible. He also raised the fact that his firm did not actually manufacture or make use of asbestos. The Supreme Court accepted these arguments and found that Van Buuren had sufficiently proven his lack of fault.[35]

Finally, in the third stage of occupational liability, the employer can stave off liability by pleading that the harm suffered by the employee was caused by wilful intent or conscious recklessness on the part of the employee – a defence that is exceptionally difficult to prove – or, in short, the result of exposure outside the workplace. The latter essentially boils down to disproving the *conditio sine qua non* connection, by demonstrating that the damage would have occurred despite the employer taking adequate safety measures. Thus, should the employer raise the fact that other causes may be responsible for the harm, it will be given the opportunity to provide proof of the matter. If the defence is successful, the employer will not be held liable; otherwise, causation remains in place and the employee is compensated for the damages suffered. In the following section, we will deal with the situation in which the employer can only manage to prove that other causes, next to its own negligence, may have (additionally) lay at the source of the 'employee's harm.

5.3. Proportional Liability for Occupational Asbestos Liability and Beyond

The case law on occupational asbestos liability shows that the Courts are rarely inclined to leave the employee empty-handed. The link between occupational exposure and the 'employee's harm has been interpreted to require proof of a reasonable degree of likelihood rather than an absolute or a reasonable degree of certainty. Causality is presumed to exist when there is a reasonable degree of likelihood that the damage suffered by the employee was caused due to a breach of the 'employer's duty of care, unless the employer can prove otherwise. If causality is at issue, a judge will generally appoint an expert to advise him/her on this likelihood. If the likelihood is found to be either very small or very high, a judge will, based on the all-or-nothing rule, either reject or allow the claim. However, with regard to the grey area that exists between *a very small* and a *very high* likelihood, the matter is more complicated. This is most common in instances of multiple possible sources of exposure. However here, too, the case law provides answers, in what has been one of the most ground-breaking precedents in Dutch civil law, with far-reaching consequences: *Nefalit* v. *Karamus*.[36]

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35 J.W.M.K. MEIJER & S.D. LINDENBERGH, 'Asbestschade buiten de Werkomgeving', *NJB* 2008, pp. 436–443.

36 HR 31 Mar. 2006, *RvdW* 2006, 328 (*Karamus* v. *Nefalit*). See also C.H. VAN DIJK, 'De Hoge Raad stemt in met het leerstuk van proportionele aansprakelijkheid', *NTBR (Nederlands Tijdschrift voor Burgerlijk Recht)* 2006, pp. 294–306; I. GIESEN, 'Proportioneel vermogensrecht:

The case concerned a smoker (Karamus) and his former employer (Nefalit). During the course of his employment by Nefalit, Karamus had been exposed to asbestos. Karamus later contracted lung cancer. He claimed damages from his employer, based on the 'employer's liability provision under Article 7:658 Civil Code. Scientifically, it was not possible to establish which of the various possible causes – such as exposure to asbestos, smoking, a natural physical condition, or background risks – had led to the harm suffered by Karamus. Nonetheless, a certain degree of probability that exposure to asbestos was indeed the cause of his illness remained plausible within the particular circumstances of the case. An expert estimated the probability that 'Karamus' illness was caused by exposure to asbestos to be 55 per cent. Nefalit did not contest the exposure to asbestos in itself but rather argued that there was a considerable possibility that 'Karamus' condition was the result of his smoking habits over a long period of time. Here, the issue of causal certainty came to the surface.

Faced with the unfortunate choice between placing the risk of causal uncertainty on either one of the parties, which follows from the all-or-nothing approach, the Supreme Court set a sweeping new course and opted for the proportional approach instead. Based on considerations of reasonableness and fairness and principles that underlie Articles 6:99 and 6:101 Civil Code, the Court held *'that when an employee suffers damage which can be caused by both attributable negligence on the part of the employer in his duty to exercise reasonable care, as well as through a circumstance which can be attributed to the employee himself or, through a combination of these, where it cannot be established with sufficient certainty to which extent the damage suffered by the employee has been caused by all of these circumstances or one of them, the judge can order the employer to compensate the entire damage of the employee, while reducing the 'employer's duty to compensate proportionally, based on a well reasoned estimate, to the extent in which circumstances which can be attributed to the employee have also contributed to his damage*.[37]

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deining aan de Haagse kust', 6680. *WPNR (Weekblad voor privaatrecht notariaat en registratie)* 2006, pp. 645–646; S.D. LINDENBERGH, 'Hoge Raad aanvaardt proportionele aansprakelijkheid bij onzeker causaal verband', *MvV (Maandblad voor vermogensrecht)* 2006, pp. 104–108; A.L.M. KEIRSE, 'Proportionele aansprakelijkheid bij blootstelling aan asbestvezels en tabaksrook', 3. *TVP* 2006, pp. 66–75; A. OORTHUYS, 'Proportionele aansprakelijkheid', 7. *JutD (Juridisch up to Date)* 2006, pp. 15–16; E.J.P. SCHOTHORST-GRANSIER, 'Proportionele aansprakelijkheid bij asbest gerelateerde longkanker', *Bb (Bedrijfsjuridische berichten)* 2006, pp. 95–98; T.F.E. TJONG TJIN TAI, 'Proportionele aansprakelijkheid in het algemene aansprakelijkheidsrecht', *Bb* 2006, pp. 98–100; M.S.A. VEGTER, 'Proportionele aansprakelijkheid bij longkanker', *Sociaal Recht* 2006, pp. 196–198.

37 Article 6:99 deals with uncertainty in situations concerning multiple wrongdoers; the article reads: *Where the damage is caused by two or more events, for each of which another person is liable, and it is ascertained that the damage originates from at least one of the events, then each of*

Hence, in the given case, on the basis of the 'expert's estimate, the employer was found liable and ordered to compensate 55 per cent of the damage, due to his part in contributing to 'Karamus' damage. With the judgment in the case of *Karamus* v. *Nefalit*, the Supreme Court once and for all opened the gates for the application of proportional liability in Dutch tort law. The Supreme Court stated that the principal idea behind Articles 6:99 and 6:101 of the Civil Code provides sufficient leeway to extend the scope of proportional liability to cases where the said articles are not themselves applicable.[38]

By a later judgment, *Fortis* v. *Bourgonje*, the Supreme Court further stated that the proportional solution of *Karamus* v. *Nefalit* can be applicable beyond the facts of that particular case.[39] The case of *Fortis* v. *Bourgonje* involved a 'bank's breach of its special cautionary duty in asset management. The circumstances of the case are of little relevance in the context of asbestos liability, as they fall outside the reach of personal injury altogether, but the deliberations of the Supreme Court on the application of proportional liability in general do provide for some much needed guidance on its scope of applicability. The Court first stated that proportional liability, as had previously been accepted in *Nefalit* v. *Karamus*, has a wider applicability but should be applied with caution. A justification for the application of proportional liability can, according to the Supreme Court, especially be present if a breach of a duty of care has, in fact, been established (be it the 'bank's duty of care in asset management or the 'employer's obligation to provide adequate safety measures for its employees) and if there is more than a very small possibility that a *conditio sine qua non* between the infringed norm and the damage of the victim exists, while also taking into account the purpose of the violated norm and the nature of the norm violation. Proportional liability was, in the end, not accepted in the case of *Fortis* v. *Bourgonje*, where the purpose of the violated norm, a duty to warn, only related to purely economic loss; a breach of safety measures and personal injury, on the

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the persons is jointly and severally liable for the damage, unless he proves that the damage is not caused by the event for which he is liable. Art. 6:101 Civil Code provides a rule for contributory negligence. The article states that: *When the damage is also caused by circumstances which are attributable to the injured person himself, the obligation to compensate the damage is reduced by apportioning the damage between the injured person and the liable person in proportion to the degree to which the circumstances which have caused the damage can be attributed to them individually, with the proviso that another apportionment shall be made, or the obligation to compensate the damage shall be extinguished totally or maintained in full, if this is required by fairness in view of the significance of the various faults or other circumstances in the underlying situation*.

38 See also A.L.M. KEIRSE, 'Proportionele aansprakelijkheid bij blootstelling aan asbestvezels en tabaksrook', 3. TVP 2006, pp. 66–75.

39 HR 24 Dec. 2010, *NJ* 2001, 251 (*Fortis* v. *Bourgonje*); *NJB* 2011, p. 110. See also I. GIESEN & A.L.M. KEIRSE, 'The Netherlands', in H. Koziol, B. Steininger (eds), *European Tort Law 2010*, Vienna 2011.

other hand, can be considered to carry more weight in this regard, as is illustrated by the case of *Karamus* v. *Nefalit*.[40]

Here, it serves to better qualify the proportional approach in *Karamus* v. *Nefalit*, as one can question whether the chosen proportionate approach by the Supreme Court can indeed be considered as 'proportional liability' in the strict sense.[41] Proportional liability in the strict sense can be defined as civil liability imposed on a tortfeasor for harm suffered by a victim, in proportion to the causal probability that the 'tortfeasor's conduct may have caused the 'victim's harm. However, in *Karmaus* v. *Nefalit*, the Supreme Court holds the employer liable for 'the entire damage of the employee' while 'reducing the 'employer's duty to compensate proportionally, based on a well reasoned estimate, to the extent in which circumstances which can be attributed to the employee (such as the background risk, genetic constitution or ageing and smoking) have also contributed to his damage'.' Liability for the entirety of the damage minus the causal share of the victim is not the same as liability in proportion to the causal share of the liable person.[42] This seemly minor difference gives rise to a cascade of consequences, particularly in the event that more than one person is held liable. Consider, for example, the situation where an employee is wrongfully exposed to asbestos by two different employers, while, to make matters simple, assuming that both exposures for all intent and purposes occurred and consequently caused damage to an even degree. Based on *Karamus* v. *Nefalit*, one would assume that each employer would be held jointly and severally liable for the total damages minus the contribution on the part of the injured party. In contrast, the application of proportional liability in the strict sense would lead to an equal divide of each employer's' obligation to pay compensation. This would mean that the victim, should he wish to claim compensation to the fullest possible extent, will need to claim from all potentially responsible parties (all employers). Are we to read the ruling of the Supreme correctly, in the Dutch approach, the injured party can suffice by claiming full compensation from just one of the possible wrongdoers (notwithstanding a deduction in proportion to the probability that the harm would have occurred regardless due to the background risk or due to claimant's own conduct).

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40 Compare A.L.M. KEIRSE, *Schadebeperkingplicht: over eigen schuld aan de omvang van de schade*, Kluwer, 2003, p. 221.

41 It should also be noted that, on the same day, the Supreme Court rendered another similar decision regarding employer's liability for occupational diseases, the difference being that the second case dealt with an employee who was not a smoker. The same proportional approach was also accepted in that case. HR 31 Mar. 2006, *JAR*, 2006, 101 (*Hollink* v. *Eternit*).

42 See J.S. KORTMANN, 'Karamus/Nefalit: Proportionele aansprakelijkheid?', 26. *NJB* 2006, p. 1409; A.L.M. KEIRSE, 'Proportionele aansprakelijkheid bij blootstelling aan asbestvezels en tabaksrook', 3. *TVP* 2006, p. 71.

Furthermore, it should be noted that the first actual introduction of proportional liability in asbestos liability took place several years before the judgment of *Nefalit* v. *Karamus*: in *Schaier* v. *De Schelde*, the subdistrict court of Middelburg was the first to introduce the proportional approach.[43] The case involved a former employee (Schaier) of the shipbuilding company De Schelde who had contracted lung cancer due to occupational asbestos exposure. Here too, the employee was found to be a heavy smoker during a prolonged period of his life. An epidemiological 'expert's report estimated an average of 26 per cent probability that asbestos exposure had caused 'Schaier's lung cancer (the report concluded that the risk could lie anywhere between 13 per cent and 36 per cent). The subdistrict court judge took into account the lack of medical certainty regarding the exact cause of the damage and therefore reasoned that both exposure to asbestos and smoking should be deemed to have been the possible causes of the lung cancer. Hence, based on the average estimate, De Schelde was held liable for 26 per cent of the damages.

5.4. 'Employer's Liability: Recapitulation

The above is a selection of the most noteworthy case law on the subject of occupational liability in asbestos exposure cases. It is apparent that the 'employee's legal position in claiming compensation due to asbestos exposure-related harm has, over the years, become much stronger.[44] Litigation can thus be settled outside the courts. This is an especially welcome state of affairs considering the short life expectancy that most mesothelioma victims face.

In instances of multiple causation, and more relevant for the judgment under review, cases in which the causation can be attributed to multiple possible sources (such as, for example, occupational exposure and general environmental exposure), establishing a functional connection is more complicated, especially when the different sources of exposure can all be considered as likely causes of the harm. According to the traditional all-or-nothing rule, a judge will either grant or deny liability. However, here, too, we see that the case law has stepped in by adopting proportional liability: Employers can be held liable, proportional to the degree to which their negligence contributed to the 'employee's harm.

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43 Ktr. MIDDELBURG, 1 Feb. 1999, *TMA (Tijdschrift voor Milieuschade en Aansprakelijkheidsrecht)*, No. 6 (1999) (*Schaier* v. *De Schelde*); see also G. VAN MAANEN, 'Proportionele schadevergoeding bij asbestclaims. De zaak Schaier/De Schelde', in A.J. Akkermans, M. Faure, T. Hartlief (eds), *Proportionele Aansprakelijkheid*, 2000, pp. 43–57.

44 Although recent judgments seem to indicate a slight restrictive stance by the Supreme Court, in that Art. 7:658 Civil Code does not provide the employee with an absolute guarantee of compensation. See, for example, the opinion of Advocate General J. Spier in the case of HR 9 Jul. 2004, *NJ* 2005, 260 (*Oost* v. *Brands)*, under Consideration 4.1.

6. Non-occupational Asbestos Liability

6.1. Asbestos in School Buildings

So far, we have dealt with asbestos liability in instances where the parties qualify as having an employer-employee relationship. However, when no such association exists, the provision on the 'employer's liability will obviously offer little solace. Such are the conditions in the second case under review, *Willmore* v. *The Council*, where the victim (Mrs Willmore) alleged that she had been exposed to asbestos while a pupil at her primary school, run by the Council. Her estate claimed compensation from the Council for their loss. Remarkably, Mrs Willmore had made a number of different allegations as to her possible exposure to asbestos: Initially, she alleged that she had been exposed to asbestos dust in the course of her employment with the Army & Navy stores; she also alleged to have been exposed to asbestos when some prefabricated houses near her childhood home were demolished. Where the claim against her primary school is concerned, however, Mrs Willmore, under Dutch law, would have had to base her claim on the general provision on tort as embodied in Article 6:162 Civil Code. As has previously been mentioned, it is relevant to bear in mind that asbestos liability due to exposure outside the workplace can be based on a number of special provisions. With regard to school buildings, special reference should be made to the provision on the dangerous constructions in Article 6:174 Civil Code.[45] However, an ex-student who has been subject to exposure prior to 1992 will not be able to apply this provision as it only came into effect from that period onwards.[46]

Asbestos exposure in school buildings is a familiar concern in the Netherlands. Only recently, the Dutch Parliament voiced its concern on the subject by calling an urgent debate, after a television programme by a Dutch public broadcasting company released some worrying results on the extent and the relative lack of knowledge about the existence of asbestos in school buildings.[47] Consequently, the State Secretary for Infrastructure and the Environment pledged for an asbestos inventarization of all school buildings built

45 The Supreme Court has accepted asbestos liability on the basis of Art. 6:175 Civil Code, although a construction is only deemed dangerous and thereby in violation of the safety norms that can be required of a construction insofar as the asbestos-containing construction material is damaged in itself or when friable asbestos (asbestos that easily crumbles when dry) has been detected in the structure; see also L.M. DUFOUR, 'Asbest in schoolgebouwen', 5. *PIV-Bulletin* 2011.

46 B.M. PAIJMANS, 'Asbest, scholen en aansprakelijkheid ten opzichte van leerlingen', 3. *PIV-Bulletin* 2008.

47 Urgent debate 'Asbest op scholen', 16 Feb. 2011, Dutch Parliament 2010–2011, No. 53-6.

prior to 1994, to be concluded by 1 June 2012.[48] Dutch case law has also dealt with the subject of asbestos exposure in school buildings, albeit in just one instance.[49]

6.2. Establishing Liability under Article 6:162 Civil Code

Article 6:162 Civil Code is a negligence-based liability ground, meaning that for liability to arise there must be an unlawful act that causes damage to a person, which can be attributed to the wrongdoer who committed the act. Conduct is considered unlawful if it infringes 'someone's right, is in violation of the wrongdoer statuary duty of care, or if it violates an unwritten rule of duty of care. The latter contains the broadest scope of application and provides the likely ground for the establishment of a failure to take due care in asbestos liability. As to whether the duty of care has been violated, a reasonability test is applied, whereby the judge will determine if the tortfeasor acted in such a way that could have been expected of a hypothetical *reasonable person* in similar circumstances. Dutch doctrine provides a firmly established set of guidelines in determining this breach of the duty of care, through the so-called *Kelderluik* criteria.[50] These include the nature and seriousness of the danger in a given case, the expected damage, the magnitude of the chance of the damage occurring, the foreseeability of the damage, the availability of alternative courses of action, and the costs of taking the necessary measures to prevent the damage.

In contrast to litigation based on the provision of the 'employer's liability, victims of domestic or environmental asbestos exposure who claim damage compensation on the basis of Article 6:162 Civil Code find themselves in a considerably less favourable legal position. First of all, the burden of proof of Article 6:162 Civil Code with regard to fault lies with the claimant.[51] It is up to the claimant to prove that the defendant could have been aware of the hazard involved in the manner in which exposure occurred and it should be made plausible that the defendant should have prevented it from happening. However, commentaries have pointed out that the duty of the employer under Article 7:658 of the Code Civil and the general duty of care as embodied in Article 6:162 of the Civil Code (the so-called *zorgvuldigheidsnorm* according to Dutch doctrine) have been interpreted to a somewhat comparable extent by the Supreme Court and show certain parallels, as, in both instances, the duty of care entails an obligation

48 Letter of 5 Apr. 2011 to the Dutch Parliament regarding an asbestos inventarisation of school buildings, Reference No. RB 2001042740. See also Gezondheidsraad advies 'Asbest: Risico's van milieu- en beroepsmatige blootstelling', 3 Jun. 2010, p. 35.

49 District Court of Utrecht 26 Mar. 2009, LJN BC7697.

50 HR 5 Nov. 1965, *NJ* 1966, 136 (*Kelderluik*).

51 This follows from the basic rule for allocating the burden of proof as laid down in Art. 150 of the Civil Procedure Act.

to take due measures, which could reasonably be required, based on the generally accepted principles or views that are current in society (the so-called *verkeersopvatting*).[52]

Second, the burden of proof with regard to causality also lies with the claimant. However, here, too, developments in the case law have somewhat settled the balance in favour of claimants in non-occupational asbestos liability cases. This concerns the rule on the reversal of the burden of proof or the so-called *omkeringsregel*. First introduced in the mid-1970s in cases of traffic accidents and accidents at workplaces, the *omkeringsregel* gained momentum in the 1990s when its scope of application was widened.[53] The rule contains a rebuttable presumption in that, when a norm that aims to prevent a specific danger has been breached, and the risk of this danger occurring is significantly enlarged by the violation of that norm, the causal link between the breach and the damage suffered is assumed. Based on considerations of reasonableness and fairness, the *omkeringsregel* basically provides that whenever a wrongful act creates or increases a certain risk of damage and that specific risk actually materializes, the causal link is considered given, unless the wrongdoer can make plausible that even if he had not acted wrongfully, the damage would nevertheless have occurred.[54] With regard to asbestos liability in particular, the rule was applied in the case of *Hertel* v. *Van Der Lugt*.[55] The claimant, Van der Lugt, was a boiler maker from 1936 to 1978, during which time he worked at NDSM shipyard. He worked in the boiler rooms and engine rooms of ships under construction. NDSM subcontracted some of the work to third parties (including Hertel). 'Hertel's duties included the insulation of various constructions with asbestos. The staff of Hertel and Van der Lugt often shared the same working environment. As a result, Van der Lugt contracted mesothelioma in 1996 and soon after claimed damages from Hertel. Since no actual employer-employee relationship could be established between the parties, Van der Lugt was left with the general tort clause. In the following proceedings, the *omkeringsregel* was successfully applied, whereby the *conditio sin qua non* was assumed. 'Hertel's counterarguments were interesting on the point where Hertel argued that since the dangers of mesothelioma were not known at the time of exposure, a specific norm, as is required by the *omkeringsregel*, could not have been violated. Here, the Court of Appeal overturned the argument and, in short, provided that, at the

52 See J.W.M.K. MEIJER & S.D. LINDENBERGH, 'Asbestschade buiten de werkomgeving', *NJB* 2008, pp. 436-443.

53 HR 26 1996, *NJ* 1996, 607 (*Dicky Trading II*). See, for an overview, I. GIESEN, 'De aantrekkingskracht van Loreley. Over de opkomst en ondergang (?) van de omkeringsregel', in T. Hartlief, S.D. Lindenbergh (eds), *Tien pennenstreken over personenschade*, LSA lustrum bundel, 2009, pp. 69-86.

54 HR 23 Nov. 2002, *NJ* 2004, 304 (*TFS* v. *NS*); HR 23 November, *NJ* 2004, 305.

55 HR 17 Dec. 2004, *NJ* 2006.

time, Hertel was or could have been aware of the dangers of asbestos in general (asbestosis/lung cancer); hence, a specific norm did indeed exist and had thus been violated. The Supreme Court upheld the establishment of causation, and consequently, Hertel was held liable.

It should be noted here that the *omkeringsregel* is just a way of dealing with the burden of proof in the all-or-nothing framework; it does not provide much in the way of dealing with causal uncertainty in itself but instead shifts the risk of uncertainty. However, a proportional approach can be in order, based on the previously discussed adaptation of proportional liability and the expansion of its scope beyond the 'employer's liability, whereby tortfeasors can, in principle, be held liable, proportional to the causal probability that their negligence may have caused the victim's' harm.

6.3. A Claim by a Former Pupil

So far, the subject of 'pupils' asbestos exposure in school buildings has, in one instance, been brought before the Court.[56] The case dealt with the claim of a former pupil suffering from mesothelioma aimed against his former elementary school. The former pupil claimed compensation for asbestos exposure that he had allegedly undergone during his years at the school. The school building was constructed with steel beams and columns, covered with asbestos-containing material. The former pupil consequently alleged that the school had acted unlawfully by exposing him to the carcinogenic substance. The school contested the claim and argued, among things, that the asbestos in the building was completely sealed off and was not damaged; hence, the former pupil could not have contracted his illness through any exposure during his education at the school. The Court considered that actual exposure had not been established; the defendant stated that the asbestos used in the school construction was sufficiently sealed off to pose no danger to the pupils, whereas the pupil did not substantiate his claim with evidence of any sort. Given the 'school's defence in calling the exposure into question, it would have been more prudent for the ex-pupil to have further delineated his stance on the alleged exposure. The court held that the causal link between the presence of asbestos in the school and the damage suffered by the former pupil was consequently not established. The judge dismissed the claim on that ground and therefore did not come to a judgment on the unlawfulness of the 'school's conduct.[57]

Had the former pupil succeeded in establishing actual exposure, the outcome might well have been different. In that case, the question regarding tortious conduct arises where it should be assessed at what time a school should

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56 District Court of Utrecht 26 Mar. 2009, LJN BC7697.

57 See B.M. PAIJMANS, 'Asbest, scholen en aansprakelijkheid ten opzichte van leerlingen', 17. *PIV-Bulletin* 2008.

have known that asbestos exposure formed a danger for the pupils and what safety measures could reasonably have been expected from the school. The generally accepted principles or views in 'society's social attitudes at the time of the wrongful conduct or negligence are decisive in determining the 'school's general duty of care. A comprehensive answer to how the 'school's exact duty of care relating to asbestos exposure should be interpreted is difficult to give, given the lack of case law on the subject. However, a school can, in general, be thought to hold a special position where its duty of care is concerned, given its general role as the party that is responsible for the pupils under its control. In other words, a school may be considered to have a special duty of care in providing its pupils with a safe learning environment. Whether this special duty also covers the actual construction of the school building is the subject of debate. Any breach of the 'school's duty of care should, in any case, be determined through the previously cited *Kelderluik* criteria, whereby the nature and seriousness of the danger and the foreseeability of the damage would form the major decisive factors. Next, the favourable assumption through the *omkeringsregel* can be applied regarding the causal link between the breach of the 'school's duty of care and the damage suffered by the former pupil.

7. The Statute of Limitations

The road to asbestos liability in Dutch law does not quite end with the legal grounds for liability. One final hurdle remains. In light of the long latency period associated with asbestos-related illnesses, claimants in asbestos liability cases will inevitably face the barrier of the statute of limitations. At least, this holds true if the defendant pleads the statute of limitations as the provision does not apply automatically.

In view of the principles of legal certainty, it is understandable that a claim cannot be initiated indefinitely. Article 3:310 Civil Code forms the central provision on the statute of limitations in Dutch liability law. The provision works alongside two limitation periods: a relative, short time limit that is determined through a subjective test and an absolute, long time limit based on an objective test. The relative period is five years and begins to run from the date from which the victim becomes aware of his damage and also has knowledge of his tortfeasor. One has to bear in mind however, that in addition, on the basis of established case law, the victim will have to actually be able to file a claim; otherwise, the starting point will be postponed.[58] The absolute period of limitation is 20 years, or 30 years specifically with regard to damage suffered due to exposure to harmful substances, after the moment of the liability-creating events. An action for damages thus expires with the lapsing of five years from the moment that a victim

58 J.L. SMEEHUIJSEN, *De bevrijdende verjaring*, Kluwer, 2008, p. 244.

becomes aware of his damage and also has knowledge of his tortfeasor or, in any event, after 20 years or – in cases of dangerous substances – 30 years after the liability-creating event occurred. Since asbestos can be regarded as a dangerous substance, the absolute limitation period in asbestos exposure-related liability cases is prolonged to 30 years.[59]

The Supreme Court confirmed the application of the 30-year limitation period in asbestos exposure cases in the case of *De Schelde* v. *Wijkhuisen.*[60] There it was held that an exposure to asbestos does indeed fall under the extended limitation period concerning harmful substances and that the claim is barred after 30 years after the liability-creating event last occurred. With regard to the liability-creating *event*, it is important to note that in this respect a threefold distinction is made between a suddenly occurring fact, a continuously occurring fact, or a consecution of facts arising from the same cause. If the event forms a continuously occurring fact, then the period of 30 years begins after this fact has ceased to occur. If the event forms a consecution of facts arising from the same cause, then this period starts to run after the last fact in line has occurred. For asbestos liability, this means that the relevant period for the absolute period of limitation begins from the date of the 'claimant's last exposure.

We should point out, however, that a recent addition to Article 3:310 of the Civil Code has done away with the absolute limitation period with regard to claims based on personal injury. A different regime has come into place after 2004, whereby such claims only expire according to the aforementioned paradigmatic, five-year rule.[61] This law amendment is more favourable to victims of asbestos-related illnesses such as mesothelioma, given the long latency period of often over 30 years, as the relative limitation period adheres to a subjective test and only starts from the moment that the victim has knowledge of his harm as well as his tortfeasor. Nonetheless, the new regime only covers liability-creating events that occur after 2004 and will therefore not be relevant for some time to come. Until then, the regime of the absolute and relative limitation periods remain in place with regard to personal injury claims.[62]

This having been said, a balanced approach is needed here. For mesothelioma victims, the current situation is not all bleak, as the strict nature of the absolute limitation period has been subject to some flexibility through developments in the case law. In 2000, the Supreme Court delivered a judgment through which the application of the absolute limitation period can be waived in

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59 The 30-year limitation period in case of harmful substances came into effect as an exception to the 20-year rule in para. 2 of Art. 3:310 of the Civil Code; Law of 24 Dec. 1992, *Stb*, 691.

60 HR 2 Oct. 1998, *NJ* 1999, 682.

61 Law of 9 Dec. 2003, *Stb*, 495.

62 The amendment came into force in February 2004 and does have retroactive effect; it will therefore only be applicable from February 2034 onwards.

certain exceptional circumstances.[63] When uncertainty exists as to whether a damage-creating event can indeed cause injury and this uncertainty has remained for a long time, while damage could only be identified after (or shortly before) the limitation period has expired, the standards of reasonableness and fairness may justify setting the limitation period aside.[64] Whether that is the case depends on all the relevant circumstances of the case. The Supreme Court declares the following points of considerations in order to provide judges with a framework through which the reasonableness and fairness of the application of the statute limitation should be assessed in a given case: (a) whether it concerns compensation for purely financial loss or non-pecuniary damages and – in connection thereto – whether the benefits are claimed by the victim himself, his relatives, or a third party; (b) the extent to which the victim or his estate can claim benefits on grounds other than liability; (c) the extent to which the event can be attributed to the defendant; (d) the extent to which the defendant, before the expiry of the limitation period, has to contend with the possibility that he will be held liable for damages; (e) whether the defendant is, in all fairness, still able to raise a defence against the claim; (f) whether liability is (still) covered by insurance; (g) whether the claim for compensation is set within a reasonable period after the damage came to light. Based on this case law, in the past the courts have waived the statute of limitations more than once for asbestos victims whose claims would otherwise have been barred.[65] Unfortunately, these points of considerations offer little in the way of a consensus, as no single factor is determinative on its own, if only because their correlated importance is unclear. A need for more guidance has been voiced in the literature and by the lower courts.[66] The Supreme Court could foresee in this need by, for example, providing a ranking among the various points of considerations.

8. Going Dutch in the Given Case

In the previous sections, we laid down the Dutch legal framework in asbestos liability, with special focus on liability arising on the work floor through the application of Article 7:658 of the Civil Code, and liability outside the workplace, in particular regarding former pupils and their school on the basis of Article

63 HR 28 Apr. 2000, *NJ* 2000, 430 (*Van Hese* v. *De Schelde*).

64 The Supreme Court chose to base its reasoning on the standards of reasonableness and fairness, while at the same time, some discussion exited on whether Art. 6 ECHR could perhaps also form a legal basis for diverging from a strict application of the limitation period. This, however, was rejected by the Supreme Court. See also the judgment in ECHR 7 Jul. 2009, No. 1062/07, *NJB* 2009, 1607 (*Stagno* v. *Belgium*).

65 See, for an overview, J.L. SMEEHUIZEN, *De bevrijdende verjaring*, Kluwer, 2006.

66 Among others: T. HARTLIEF, 'Gezichtspunten, vingerwijzingen en vuistregels. Kan dat anders?', No. 4. *NTBR*, 2011, p. 24; Hof Amsterdam 15 Dec. 2009, LJN BL3708.

6:162 of the Civil Code. The two cases under review, *Sienkiewicz* v. *Greif* and *Willmore* v. *The Council*, have been touched upon.

The central feature of both cases is that the proceedings were directed against only one defendant, while causal uncertainty remained regarding the sources of exposure, as both victims were also found to have been exposed to asbestos in the general atmosphere in the areas where they lived. In addition, the exposure was, in both cases, regarded as slight. In *Sienkiewicz* v. *Greif*, the breach of the 'employer's duty of care was found to have merely increased the (on itself very small) risk of 'Sienkiewicz's mother developing mesothelioma by 18 per cent. In *Willmore* v. *The Council*, Mrs Willmore was found to have been exposed in three separate ways during her years as a pupil at her former school under the supervision of the Council. First, exposure occurred as a result of work involving the removal, handling, and disturbance of ceiling tiles in a corridor along which the pupils, including Mrs Willmore, passed. Second, it occurred as a result of the 'pupils' misbehaviour that caused ceiling tiles containing asbestos to be damaged or broken. The third exposure was the result of asbestos ceiling tiles, including broken tiles, being stored in a 'girls' toilet that had been used by Mrs Willmore on many occasions. In each instance, the exposure to asbestos was found to have materially increased the risk of Mrs Willmore contracting mesothelioma.

The question of causal uncertainty due to multiple sources of exposure thus lie at the heart of both cases under review. In a joint judgment by the UK Supreme Court, it was held that the special rule governing the attribution of causation to those responsible for exposing victims to asbestos (the so-called *Fairchild* exception) does apply in cases where only one defendant was proved to have exposed the victim of mesothelioma to asbestos. There was no requirement for a claimant to prove that the 'defendant's breach of duty doubled the risk of developing the disease, and thus, it was established that liability for mesothelioma fell on anyone who had materially increased the risk of the victim contracting the disease. Both victims were awarded full compensation.

According to Dutch law, each case requires a different approach in light of the varying underlying legal relationship between the victim and the tortfeasor. In *Sienkiewicz* v. *Greif*, the claim for damage compensation is determined through the application of the provision on occupational liability. In the first stage of establishing liability under Article 7:658 Civil Code, Sienkiewicz, representing the estate of her late mother, Enid Costello, will need to prove a functional connection. Given the circumstances, we believe that this may well succeed. To begin with, Enid Costello was *actually* exposed to asbestos during her employment by Greif, albeit only slightly as her duties did not directly put her in the factory environment where asbestos was being manufactured but instead occurred due to small amounts of fibres that penetrated the office areas where she worked. Furthermore, given the fact that her illness was identified as mesothelioma (and mesothelioma is monocausal), Sienkiewicz will be able to prove that the exposure *could* have been the cause of her 'mother's fatal illness. It

is then, in the second stage, up to Greif to attest that it had taken the necessary safety measures that could reasonably be expected of it at the time. Considering the relevant employment period was between 1966 and 1984, 'Greif's duty of care will be quite high: Medical science by that time had fully recognized the large risks of contracting mesothelioma due to asbestos exposure, no matter how slight; moreover, the exposure occurred during a prolonged period. The causal connection between 'Sienkiewicz's harm and 'Greif's negligence will thereby be assumed to exist, based on the favourable burden of proof in Article 7:658 Civil Code, that is, unless Greif can provide sufficient evidence that the 'employee's damage would also have occurred if the necessary safety measures had been taken. The expert report is a determining factor in this final stage of establishing liability. Based on the facts of the UK judgment, Greif holds a better hand and may well be successful in disproving the *conditio sine qua non*, given the rather small possibility that 'Greif's negligence contributed to the harm suffered by the victim; the trial judge found that 'Greif's exposure of Enid Costello to asbestos over her working life at their premises increased her background risk (of contracting mesothelioma) from 24 cases per million to 28.39 cases per million – an increase of risk of 18 per cent.

However, there is more. Given the scope of the protected interest – the prevention of health risks for employees – as well as the nature of the norm violated by the employer – Article 7:658 of the Code Civil – and the harm suffered – mesothelioma – the application of proportional liability may be in order. Based on considerations of reasonableness and fairness and in line with *Karamus* v. *Nefalit*, one could think that it would be unacceptable that the risk of uncertainty regarding causality would be completely shifted to either the employee or the employer. Although ambiguity remains as to when an increase in the possibility should be considered too small to apply proportional liability, we are inclined to think that the Court should consider the increased risk of 18 per cent to fall within the grey area between a very small and a very high likelihood where proportional liability is an option, although the risk of developing mesothelioma in a case such as this one remains very small. In *Sienkiewicz* v. *Greif*, it was estimated that the breach of the 'employer's duty of care, in neglecting to prevent environmental exposure in the factory space, had merely increased the risk of 'Sienkiewicz's mother developing mesothelioma from 24 cases per million to 28.39 cases per million: an increase of 18 per cent. In absolute terms, this meant that Enid 'Costello's chance of developing mesothelioma was 0.000028 per cent. However, in proportional liability, the determining factor is regarded to be the relative probability that a liability-creating event increases the chance of a victim's harm, that is, relative to other possible causes. Thus, the question that needs to be addressed in *Sienkiewicz* v. *Greif* regarding the scale of proportional liability does not concern the absolute probability of Enid 'Costello's chance of contracting mesothelioma, but rather it lies in establishing the probability that 'Greif's conduct actually contributed to Enid 'Costello's harm. Given the fact that

the victim in this case did actually develop mesothelioma and bearing in mind the medically backed assumption that her illness could have been caused by either general environmental exposure to asbestos or occupational exposure, we can deduce that it is 5.46 times more likely that her illness was caused due to asbestos exposure other than the exposure attributable to Greif. In other words, the facts of the case show that even if Enid Costello was not exposed to asbestos during her working life at Greif's' factory, there would still exist an 85 per cent chance that she would have contracted mesothelioma regardless. Hence, the chance that the occupational exposure caused Enid 'Costello's mesothelioma can be estimated at 15 per cent. Consequently, the employer should, in our view, be held liable for only 15 per cent of the damages. In any event, full compensation, as was awarded in the UK case, would be improbable according to Dutch law.

In *Willmore* v. *The Council*, the claimant alleged to have been exposed to asbestos at the secondary school that she had attended between 1972 and 1979, as a result of which she contracted mesothelioma. The only available legal ground for liability is the general provision on tort, as the provision on dangerous constructions of Article 6:174 Civil Code only has effect from 1992 onwards. First, Willmore will be able to prove actual exposure based on the different exposed asbestos-containing building material found in various open areas of the school. Once exposure is established, Willmore would need to determine the tortious conduct of the Council, by proving that a duty of care that could reasonably been required of the school was breached. The nature and seriousness of the danger in the case are severe, given the fatal consequences of mesothelioma, and in view of the time period during the early to the late 1970s, the judge will likely consider that the school could have foreseen the serious health hazard that may arise due to asbestos exposure. This burden of proof will, in principle, lie with Willmore. However, the application of the reversal rule (*omkeringsregel*) is indeed likely. The norm in question aims to prevent a specific danger, while the specific risk that should have been prevented actually materialized. Thereby, the judge will assume that a *conditio sine qua non* exists, unless the school can provide proof to the contrary. The odds that the school will be successful in rebutting the causal connection are favourable, considering the fact that *Willmore* initially pointed the finger at various other causes. Additionally, it must be noted that the toolbox of the Dutch judge in such a case will also contain the possibility of proportional liability, given the expansion of its scope of applicability beyond Article 7:658 Civil Code.

Finally, we must assess whether the statute of limitations in liability can provide the defendants with an additional instrument for avoiding liability, by means of the previously mentioned framework of the statute of limitations. This will not hold in the case of *Sienkiewicz* v. *Greif*. Mrs Costello died of mesothelioma in January 2006 and her estate first claimed damages in December of 2008. It can therefore be inferred that the claimant became aware of her damage and her possible tortfeasor within the five-year time limit. The relevant

statute of limitations thereby raises no problems. This is also the case with regard to the absolute time limit. The beginning of the absolute limitation period should be measured from 1984, the last date of exposure, which in turn only amounts to about 25 years up until the date of the first claim. Both limitation will also provide the Council with no means of avoiding liability, given the fact that Mrs Willmore, directly upon becoming aware of the possible exposure at her former school, began proceedings for damage compensation. As for the absolute limitation limit, the final moment of exposure relates to her final school year at her secondary school, namely 1979, while her claim was instigated in 2008, thereby the 30 limitation period will not have been reached.

In summary, we can conclude that, in both cases, full compensation would be out of the question according to Dutch law, as, on the bases of the all-or-nothing approach, both claims by Sienkiewicz and Willmore would fall too short where the requirement of causality is concerned. However, as has been illustrated, Dutch law may allow for the application of proportional liability. Both English and Dutch laws thus provide the victims in question with means for compensation, albeit in significantly varying degrees. The position of mesothelioma victims in liability is stronger under English law, yet, in order to provide this high level of protection, the rules of causation have had to be stretched to a large extent. The *Fairchild* exception is a special rule and deals only with a rather particular set of circumstance regarding causal uncertainty in asbestos liability and, thereby, can be said to undermine the but for test.[67] On the other hand, the exception may likely provide victims with full compensation, even when causal uncertainty is extraordinary. In contrast, the similar underlying principle of protection under Dutch law, although less extensive, is brought into effect by means of a general rule that applies to tort law on the whole, that is, provided that the listed criteria are met, at the same time as full compensation is not the default outcome of a positive verdict for the victim.

9. Final Remarks: A Plea for Proportional Liability

In this article, we have aimed to provide the reader with the Dutch perspective on the cases under review. In doing so, we also demonstrated the various instances in which case law arising from asbestos liability has helped to build a mature framework through which asbestos exposure victims can justly bring their claims before the courts or, better yet, settle outside court. Moreover, we have seen that these precedents have come to shape and determine the course of Dutch liability law in some remarkable ways, for which the adoption of proportional liability can without a doubt be said to have been the crowning achievement. With the

67 See also Lord Brown, in *Sienkiewicz* v. *Greif (UK) Ltd*; *Knowsley MBC* v. *Willmore* [2011] UKSC 10, 72.

recognition that the legal responsibilities of tortfeasors and victims can overlap, the application of the traditional all-or-nothing approach can no longer be regarded as the most logical nor the desired solution. After all, placing the burden of (compensation for) damage on either party is, in our view, at odds with the ultimate goal of justice, if both parties can be proven to have contributed to the materializing of the damage. It is therefore more reasonable to spread the damages onto parties in proportion to the degree of co-responsibility, by means of a thorough and reasoned estimate. Proportional liability can thus do justice to the actual circumstances of the case and the interests of the various parties to the dispute. It must be admitted that the traditional all-or-nothing approach is effective in its simplicity, particular in view of the principle of legal certainty. However, should one be hesitant due to the fear of complications that may arise from such a relativistic way of legal reasoning, then it is important to bear in mind that it is not the practice of *l'art pour l'art* that is promoted; rather, the law itself inherently necessitates such a relativization, even if it is only based on the principle of equality. The all-or-nothing approach will inevitably foster a tipping point between all and nothing. This tipping point is then difficult to find: how likely must the probability be for the risk of the entire damage compensation to be placed with the tortfeasor, or how unlikely should this probability be for the compensation of the damages suffered by the victim to be dismissed altogether? To be forthright, the proportional approach that the Dutch Supreme Court has so far handed down merits our support.[68] Such a solution is also in line with the Principles of European Tort Law.

68 See A.L.M. KEIRSE, 'Proportionele aansprakelijkheid bij blootstelling aan asbestvezels en tabaksrook', 3. *TVP* 2006, pp. 66–75.