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Compensation for the Fear of Contracting Asbestos-Related Diseases – Critical Reflections on an Important US Supreme Court Decision and its Relevance for Europe

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Keywords: Asbestos-related diseases; Damage to psyche; Fear of disease

Abstract: As exposure to asbestos has been recognised as an important health problem, many potential victims of asbestos-related diseases have commenced law suits. This article concentrates on the question of compensation for any alleged mental distress, i.e., damage to the psyche. The question of whether to compensate for this type of damage has long been controversial in the law; claims for the fear of contracting asbestos-related diseases are no exception. The article discusses the patterns which emerge from cases from courts in many countries, in particular a fairly recent (July 1997) decision from the Supreme Court of the United States, which handles the issue in an overly harsh manner. The article concludes that *European* courts can handle the legal problems which will arise under traditional concepts of tort law. For the Netherlands there is some evidence that such a claim will be considered favourably. *Despite the apparent novelty of these claims, there is no need for courts to develop artificial rules of liability to handle them.*

Résumé: Depuis que l'exposition à l'amiante a été reconnue comme un problème de santé majeur, de nombreuses victimes potentielles de maladies liées à l'amiante ont engagé des actions en justice. Cet article s'intéresse plus particulièrement à la question de l'indemnisation de l'état de détresse psychologique de ces victimes, c'est-à-dire de dommages affectant le psychisme. La question de la réparation de ce type de dommage s'est rapidement posée, les demandes visant la crainte de contracter des maladies liées à l'amiante n'étant pas rares, mais elle a fait l'objet de controverses. Le présent article examine les tendances qui se dégagent de la jurisprudence de plusieurs pays, en particulier une décision récente (juillet 1997) de la Cour Suprême des Etats-Unis. Il conclut que les juridictions européennes peuvent parfaitement résoudre les problèmes juridiques qui se poseront à partir des règles de la responsabilité civile. Aux Pays-Bas, il est d'ailleurs très vraisemblable que de telles demandes seront favorablement accueillies. En tout état de cause, en dépit de leur apparente nouveauté, il n'est nullement nécessaire pour les juges d'élaborer des règles artificielles de responsabilité pour en traiter.

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Schlüsselbegriffe Krankheiten im Zusammenhang mit Asbest, psychischer Schaden, Angst vor Krankheit

Zusammenfassung Als der Kontakt mit Asbest als ein wichtiges Gesundheitsproblem erkannt worden ist, haben viele potentielle Opfer von Krankheiten im Zusammenhang mit Asbest Gerichtsverfahren angestrengt. Dieser Beitrag konzentriert sich auf die Problematik des Schadensersatzes für behauptete geistige Störungen, d.h. für psychischen Schaden. Das Problem des Schadensersatzes in solchen Fällen ist unter Juristen lange kontrovers diskutiert worden, Klagen im Hinblick auf die Angst vor der Ansteckung mit Krankheiten im Zusammenhang mit Asbest sind keine Ausnahme. Dieser Aufsatz diskutiert die Modelle, die sich aus Gerichtsentscheidungen in vielen Ländern ergeben, insbesondere eine ziemlich aktuelle Entscheidung des Supreme Court der Vereinigten Staaten. Nach Auffassung des Autors können Gerichte in Europa die aufkommenden rechtlichen Probleme mit den traditionellen Konzepten des Rechts der unerlaubten Handlungen lösen. Trotz der augenscheinlichen Neuartigkeit dieser Klagen besteht für die Gerichte keine Notwendigkeit, künstliche Haftungsnormen zu entwickeln, um über die Klagen entscheiden zu können.

I. Introduction

Exposure to asbestos fibers is now known to be very dangerous to human health.¹ By one reliable estimate, over 20 million people were exposed to asbestos fibers while working between 1940 and 1980 in the United States, and that up to 10,000 people per year will die from that exposure over the next twenty years.² Other countries expect to have comparable mortality rates.³ Over 100,000 asbestos-related claims have been filed in US courts alone.⁴ More claims are expected from victims such as school children and teachers, and others who spent long periods of

¹E.g., Ira PILCHEN, 'Asbestos, The 'Magic Mineral' Creates Toxic Tort 'Avalanche,' 75 *Judicature* 320 (1992), Brooke T. MOSSMAN & Bernard L. GEE, *Medical Progress, Asbestos-Related Diseases*, 320 *New England J Medicine* 1721 (1989). Some of the dangers have been known for a very long time. See Barry I. CASTLEMAN, *Asbestos: Medical and Legal Aspects* (Boston: Aspen Publishers, Inc., 4th ed. 1996), 1-2 (showing that slaves of the Romans used protective devices when weaving asbestos).

²William J. NICHOLSON ET AL., 'Occupational Exposure to Asbestos: Population at Risk and Projected Mortality, 1980-2030', 3 *Am J Indust Med* 259 (1982). See also D.E. LILIENTHAL ET AL., 'Projection of Asbestos Related Diseases in the United States, 1985-2009', 45 *Br J Industrial Med* 283 (1988) (projecting 131,000 asbestos related deaths in the US). See also CASTLEMAN, *Asbestos*, at 784 (citing studies with higher and lower mortality estimates).

³E.g., Petra VAN KAMPEN & Hans NIJBOER, 'Daubert in the Lowlands,' 30 *UC Davis L Rev* (1997), at 951 ff. sec. 5 cite estimates of up to 40,000 deaths from asbestos-related diseases in The Netherlands over the next 20 years. British epidemiologists make comparable predictions. J. PFTO ET AL., 'Continuing Increase in Mesothelioma Mortality in Britain', 345 *Lancet* 535 (1995) (mesothelioma death rates may peak at 3000 annually). Other EU countries have experienced significant mortality rates as well. CASTLEMAN, *Asbestos* at 813 (at least 400 cases of death from mesothelioma annually in France and Italy in the 1980's). For the Dutch situation see A. BURDORF, J. BARFENDRGT, P. SWUSTE & D. HFEDERIK, *Schatting van asbestgerelateerde ziekten in de periode 1996-2030 door beroepsmatige blootstelling aan asbest*, VUGA, Den Haag 1997.

⁴Asbestos Litigation Crisis in Federal and State Courts. Hearings Before the Subcommittee on Intellectual Property and Judicial Administration of the House Committee on the Judiciary, 102d Cong., 1st and 2d Sess. 8 (1991-92). Peter H. SCHUCK, 'The Worst Should Go First: Deferral Registries in Asbestos Litigation', 75 *Judicature* 318, 319 (1992).

time in the thousands of buildings containing asbestos.⁵ A typical example of such claims has come up recently in The Netherlands, when it was learned that the buildings of a former NATO base, *The Cannerberg*, contained asbestos, until the early 1990's, it seems that no adequate protection was provided for people working there.⁶

Asbestos-related claims are difficult to prove. The latency period is very long, it can take over 30 years after exposure for certain effects to become manifest in a victim.⁷ After such a long period of time, it can be very difficult to prove that a particular defendant was responsible for the victim's exposure. It can also be difficult to demonstrate that a particular illness resulted from exposure to asbestos rather than from some other cause, such as smoking.⁸

Because of these problems of proof and the long delay in the onset of any symptoms, many plaintiffs have filed suit as potential victims of asbestos. They typically bring two types of claims: (1) they sue for the emotional distress caused by the knowledge that they might have their lives cut short in the future by the exposure to the defendant's product, and (2) they seek compensation for medical monitoring in the coming years, as they wait to see if the exposure to asbestos will cause injury or disease.⁹ From the point of view of the plaintiff, these claims have the advantage of putting some compensation in the pockets of potential victims earlier rather than years later, and, if a particular defendant can be identified, it

⁵Brian DiMASI, 'The Threshold Level of Proof of Asbestos Causation: The 'Frequency, Regularity and Proximity Test' and a Modified Summers v Tice Theory of Burden Shifting', 24 *Cap U L Rev* 735, 739 (1995)

⁶See a report, *Een berg met problemen. Onderzoek besluitvorming asbestproblematiek, Cannerberg*, by a parliamentary commission, Tweede Kamer 1997-1998, 25-323, nrs. 10-11, also separately published by Sdu uitgevers 1998.

⁷CASTLEMAN, *Asbestos* at 122.

⁸MOSSMAN & GEL, *Medical Progress* at 1724. DiMASI, *The Threshold*, fully discusses the problems of proving legal and medical causation in an asbestos claim under US law. VAN KAMPEN & NIJBOER, *Daubert* provide comparable analysis under Dutch law. See for an impressive and comprehensive overview of Dutch tort law A. T. BOLT and J. SPIER, *De uitdijende reikwijdte van de aansprakelijkheid uit onrechtmatige daad*, preadvies Nederlandse Juristen Vereniging, Zwolle 1996. See for more research on asbestos J. M. VAN DUNNE (red.), *Asbest en aansprakelijkheid*, Arnhem 1994 (in Dutch). Recently in The Netherlands, a report containing recommendations on how to handle the claims in the future was issued on victims of asbestosis by the Dutch prof. de Ruiter, who was a former minister of justice. The report does not mention phobia claims. See for a comment on this report P. H. J. J. SWUSTE, A. BURDORF, K. FESTEN, HOFF & N. J. H. HULS, 'Naar een instituut van barmhartigheid voor asbestslachtoffers', *Nederlands Juristenblad* 1997, p. 1157ff.

⁹Asbestos victims who can prove that it is more probable than not that they will develop an asbestos-related disease such as mesothelioma in the future can also bring a claim for increased risk of disease. E.g. *Jackson v Johns Manville Sales Corp.*, 781 F.2d 394, 413 (5th Cir.), cert. denied, 478 US 1022 (1986) (following law of Mississippi), *Gideon v Johns Manville Sales Corp.*, 761 F.2d 1129, 1137 (5th Cir. 1985). However, since it is very difficult to demonstrate proof at this level of certainty before any disease has manifested itself, this cause of action has not been particularly successful. See, e.g., *Steinling v Velsicol Chemical Corp.*, 855 F.2d 1188 (6th Cir. 1988) (rejecting enhanced risk claim, but accepting fear of contracting cancer claim). See also Deirdre A. McDONNELL, 'Increased Risk of Disease Damages: Proportional Recovery as an Alternative to the All or Nothing System Exemplified by Asbestos Cases', 24 *B C Env't Affairs L Rev* 623, 637 (1997) (only two reported cases where plaintiff has recovered damages for increased risk of disease due to exposure to asbestos).

eliminates some of the problems of proof that might arise should the victim have to prove later that a particular disease was legally caused by the defendant's conduct. For defendants, these types of claims have the very same qualities but from the opposite perspective; in addition, there are vastly more people who could potentially file such claims than would ever ultimately file claims for asbestos-related diseases.

This article assumes that a known defendant has breached its duty of care to the plaintiff. It concentrates on the question of compensation for any alleged mental distress, i.e., damage to the psyche.¹⁰ Such damage usually will consist of non-pecuniary damages, although it may also include pecuniary damages, such as loss of income and fees to health care providers to treat the distress. The question of whether to compensate for this type of damage has long been controversial in the law; the fear of asbestosis cases are no exception. We will also discuss the companion claim for medical monitoring, which has been comparatively less controversial.

We will consider the concerns which courts around the world have expressed over time about mental distress claims. We will also review the patterns which emerge from the cases, in particular a fairly recent decision from the Supreme Court of the United States, which addresses the issue in an overly harsh manner. This article, which builds upon the authors' earlier research on aids-phobia claims¹¹, concludes that *European* courts can handle the legal problems which will arise under traditional concepts of tort law. Despite the apparent novelty of these claims, there is no need to develop artificial rules of liability to handle them.

II. Damage to the Psyche

The courts in the United States and in other countries¹² have often expressed a certain reserve in granting an award for damage to the psyche. The arguments in favour of this caution are familiar. They usually fall into the following categories:

- (i) mental disturbance often will be of a temporary and slight nature;

¹⁰In this article, we use the terms 'damage to the psyche' or 'psychiatric damage' interchangeably to refer to 'some recognizable psychiatric injury or illness resulting from the infliction of traumatic shock' Nicholas J MULLANY & Peter R HANDFORD, *Tort Liability for Psychiatric Damage*, The Law Book Company Limited 1993, at 15 See also The Law Commission Consultation Paper No 137, *Liability for Psychiatric Illness*, HMSO 1995, par 1 2 which advocates the use of the term 'psychiatric illness' rather than the older British formulation of nervous shock

¹¹C J J M STOLKER & D I LEVINE, 'Aids Phobia – Schadevergoeding voor angst', *Nederlands Juristenblad* 1996, at 882ff

¹²MULLANY & HANDFORD, *Tort Liability* (reviewing case law in countries following the common law). For a careful, if somewhat older, discussion, see *The International Encyclopedia of Comparative Law*, Volume IX Torts part 1, at 7-182ff See also the Consultation Paper's extensive Appendix, *Liability for Psychiatric Illness*, which covers the law of several countries, including France and Germany

- (ii) psychiatric damage can be simulated,¹³
- (iii) determining the nature and duration of the damage is often difficult,
- (iv) the plaintiff may have an ‘eggshell personality’¹⁴; ie, he or she may be especially vulnerable to psychiatric damage;
- (v) the emotional distress harm may become manifest at a time and place that is too remote from the alleged cause of the injury,
- (vi) there will be a vast number of emotional distress claims filed in court¹⁵

Nevertheless, in the United States, and other countries such as Australia and England,¹⁶ all these difficulties have not resulted in a general rule rejecting claims for compensation in cases of psychiatric damage. The well-known adage, ‘the tortfeasor takes the victim as he finds him’, is usually applied as a point of departure.¹⁷ The case law, however, does show constant ferment on the question of

¹³*Prosser and Keeton on the Law of Torts*, West Publishing Co., St. Paul, Minnesota, 1984, at 361, assert ‘Mental disturbance is easily simulated, and courts which are plagued with fraudulent personal injury claims may be unwilling to open the door to an even more dubious field’. On the other hand, MULLANY AND HANDFORD, *Tort Liability*, take a more optimistic view, see *infra*. The Consultation Paper (1995), *Liability for Psychiatric Illness*, discusses this problem at par 4 7-4 9 ‘although many psychiatric illnesses cannot be substantiated by ‘physical’ tests (such as blood tests), a number of psychological tests now exist which can help to ascertain whether the plaintiff has faked or exaggerated psychological symptoms and whether he or she is a credible informant. These tests also distinguish long standing character problems and dysfunctions from illness or injury or sudden onset. The tests are objective and are often given and scored by computer’ (at 55). Rosalind English believes that ‘[m]ore open acknowledgment of the realities of [psychiatric] diagnosis’ could prevent ‘judicial equivocation’ and ‘hair-splitting’, in ‘Nervous Shock: Before the Aftermath’, [1993] *Cambridge L J* at 204-06.

¹⁴*Page v Smith* [1995] 2 All ER 736, 753-54 (quoting Lord Browne-Wilkinson)

¹⁵Perhaps in a future article, we can examine the phenomenon of ‘claims phobia’ in judges. See Sir Thomas Bingham MR in his foreword to MULLANY & HANDFORD, *Tort Liability* (at vii) ‘Underlying the cases has been the judges’ concern that unless the limits of liability are tightly drawn the courts will be inundated with a flood of claims by plaintiffs ever more distant from the scene of the original mishap. So fine distinctions have been drawn and strict lines of demarcation established’. See also his comments in dissent in the Australian case *M v Newham LBC* [1994] 2 WLR 554, 573. The Consultation Paper, *Liability for Psychiatric Illness*, discusses his comments in some detail in par 2 6 and 2 7. There is further discussion of the floodgates argument in par 4 2 4 6. Part of that discussion, which is relevant to consideration of recognizing a claim for fear of asbestosis, is the concern that a large number of claims will result from one event. E.g., *Alcock v Chief Constable of South Yorkshire Police*, [1992] 1 AC 310, [1991] 4 All ER 907, HL (claims arising from football match in England where many fans were crushed to death and their friends and families witnessed the deaths in the stadium or on television).

¹⁶For recent examples, see *Page v Smith*, [1995] 2 All ER 736 (plaintiff was physically unhurt in a car collision, but the accident caused him to suffer the onset of myalgic encephalomyelitis (ME) from which he had suffered for about 20 years but which was in remission until after the accident), *Walker v Northumberland County Council* [1995] 1 All ER 737 (plaintiff brought action against his employer claiming emotional distress damages for breach of his duty of care to take reasonable steps to avoid exposing him to a health endangering workload). See further MULLANY & HANDFORD, *Tort Liability* at 10 (England and Australia have been less reluctant than US courts to ‘open up the gates of liability’). For analysis of the reluctance of the courts to grant emotional distress damages from a feminist point of view, see Martha CHAMALIAS & Linda K. KERBER, ‘Women, Mothers, and the Law of Fright: A History’, 88 *Mich L Rev* 814 (1990), Elizabeth Handsley, ‘Mental Injury Occasioned by Harm to Another: A Feminist Critique’, 14 *Law & Inequality* 391 (1996).

¹⁷See *Page v Smith*, [1995] 2 All ER 736, [1995] 2 WLR 644. For an argument that tort law should not ‘equate thin skins and thin skulls’ see Tony WEIR, Book Review, [1993] *Cambridge L J* 520 at 521.

whether plaintiffs with emotional distress claims must meet special conditions in addition to meeting the traditional requirements for tort liability¹⁸

For example, in some cases, courts have required a showing of 'physical injury' as a test of genuineness of the plaintiff's claim for emotional distress. Thus, under the physical injury rule, the claims of a mother who had been given the wrong baby at the hospital, and a person who developed psychiatric damage due to having broken glass in his mouth without actually cutting himself, were both rejected.¹⁹ In reaction to what were perceived to be unfair results, some courts modified the physical injury rule into a 'physical impact test', so that even when there had been no infliction of traumatic injury, but just a slight 'touch', the judge could award damages for the psychiatric damage that occurred.²⁰ Other jurisdictions have required proof that the psychiatric damage has led to a manifestation of physical injury.²¹

In many courts, instead of requiring an injury or impact, the more flexible 'zone of danger' test has been applied.²² The claim is permitted in these jurisdictions without proof of physical injury or impact as long as there was a 'reasonable fear of injury to oneself'. A variation on this test is the 'bystander test'.²³ The classic example is a mother who sees her child injured or killed by an automobile, but is not herself in any physical danger.²⁴ And, finally, a few courts,

¹⁸Glen DONATH, 'Comment, Curing Cancerphobia Phobia Reasonableness Redefined', 62 *U Chi L Rev* 1113-1117 32 (1995) (reviewing varying standards US courts employ in cancerphobia cases). See also Terry MOREHEAD DWORKIN, 'Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box?', 53 *Fordham L Rev* 527 (1984).

¹⁹For a collection of additional US cases see *Prosser and Keeton on Torts*, at 361.

²⁰*Prosser and Keeton on Torts*, at 362-64. Only five US states still follow either the physical injury or physical impact tests. See *Consolidated Rail Corp v Gottshall*, 512 US 532 n 7 (1994) (citing cases). The Supreme Court of the United States has recently adopted the physical injury test for certain fear of asbestosis claims, however. See discussion *infra* of *Metro North Commuter R.R. Co v Buckley*, 117 S Ct 2113 (1997).

²¹*Prosser and Keeton on Torts*, at 364 credit the origins of this test to an Irish case, *Bell v Great Northern Railway* [1890] L R 26 Ir Rep 428. The first US case applying this test was *Hill v Kimball*, 76 Tex 210, 13 S W 59 (Texas 1890). US courts do not have a clear rule as to what will qualify as a sufficient physical consequence from the damage to the psyche. See *Payton v Abbott Labs*, 386 Mass 540, 437 N E 2d 171 (1982) (surveying different standards).

²²Probably the first case announcing this test was *Dulieu v White & Sons* [1901] 2 KB 669. The American Law Institute adopted the zone of danger rule in Restatement (Second) of Torts §§ 313, 436 (1965). See also *Clohesy v Bachelor*, 675 A 2d 852, 858 n 9 (Connecticut Supreme Court 1996) (citing cases from 13 US states adopting the zone of danger rule), *Consolidated Rail Corp v Gottshall*, 512 US 532 (1994) (adopting zone of danger rule for cases arising under Federal Employers' Liability Act).

²³Perhaps the best known example of a US court adopting this test is the California Supreme Court in *Dillon v Legg*, 441 P 2d 912, 69 Cal Rptr 72 (1968). See also *Clohesy v Bachelor*, 675 A 2d 852, 862 n 11 (Connecticut Supreme Court 1996) (Connecticut becomes 25th US state to follow Dillon).

²⁴English case law has wrestled with these cases frequently. For a very important ruling, see *Alcock v Chief Constable of South Yorkshire Police*, [1992] 1 AC 310, [1991] 4 All ER 907, HL. See the Law Commission's entire report, *op cit*, and K J NASIR 'Nervous Shock and Alcock: The Judicial Buck Stops Here', [1992] *The Modern Law Review* 705-713. For criticism of the lower court ruling in the Alcock case, on the grounds that the court failed to provide either 'Justice' or 'Certainty', see Steve HEDLEY, 'Nervous Shock B: The Common Law Moves in a Mysterious Way (Again)', [1991] *Cambridge L J* 229-31.

including the House of Lords²⁵ and the Hawaii Supreme Court,²⁶ have rejected such additional conditions and require only that the psychiatric damage must have been 'reasonably foreseeable'.

In German law, the principal rule is '...dass der Ersatzberechtigte so hingenommen werden müsse, wie er ist...' ('the tortfeasor must take the victim as he finds him'). This refers to both physical as well as psychiatric predispositions. However, the German judge demands 'ein Minimum an physischer oder psychischer Widerstandskraft' ('a minimum of physical or psychiatric resistance'). If this is missing, the claim will be rejected.²⁷

Under Dutch law, both physical as well as psychiatric injuries are compensable.²⁸ The principal rule is that damage to the psyche will be imputed to the liable person, even when the psychiatric damage can also be blamed on the personal predisposition of the victim. Special personal circumstances regarding the victim do not break the chain of causation. It is, however, established case law in The Netherlands that any predisposition of the victim has to be taken into account when estimating damages and awarding compensation, because some forms of physical or mental disorder can increase the possibility of certain injuries.

Will psychiatric damage also be compensated if the violation of the standard of care has not been accompanied by physical injury or 'impact'? In Dutch case law, mostly 'physical norm violations' have been involved.²⁹ There are exceptions, like the *Nuts/Hofman* case³⁰ where an employee sustained damage to the psyche caused in part by the treatment of his employer. In this case, it was not required that the psychiatric damage was the result of a physical violation. With the gradual recognition that psychiatric damage was an equally serious form of injury as physical injury, the Dutch courts have seen no reason to treat these cases differently. For example, in two cases decided by lower courts in The Netherlands, AIDS-phobia claims have been upheld and compensation has been awarded.³¹ Similarly,

²⁵*Page v Smith*, [1995] 2 All ER 736, [1995] 2 WLR 644 (plaintiff was a 'primary victim' of the defendant's negligence)

²⁶*Rodrigues v State*, 52 Hawaii 156, 472 P 2d 509 (1970) Similarly, a court in Ontario, Canada, awarded damages to a widow who was informed that her husband was a suicide when he had actually drowned in his bath due to negligent supervision in a mental hospital *Jinks v Cardwell*, [1987] 39 CCLT 168

²⁷For further German case law, see Hermann LANGE, *Schadensersatz*, J C B Mohr (Paul Siebeck) Tübingen 1990, at 132 and 141ff

²⁸See article 6:106 Civil Code 'The victim has the right to an equitably determined reparation of harm other than patrimonial [ie, pecuniary] damage if the victim has suffered physical injury, injury to honour or reputation or if his person has been otherwise afflicted' *New Netherlands Civil Code, Patrimonial Law*, Translated by P P C HAANAPPEL & Ejan MACKAAY, Kluwer Law and Taxation Publishers, Deventer/Boston 1990

²⁹For an overview see T HARTLIEF in *Byzonder letsel, Aansprakelijkheid voor psychisch letsel en psycho-somatische gevolgen van letsel*, Vermande 1995, at 37ff

³⁰Hoge Raad der Nederlanden, July 1, 1993, NJ 1993, 667

³¹Pres Rb Amsterdam July 11, 1991 KG 1991, 242(plaintiff was raped by defendant and asked the court for mandatory testing of the defendant and for compensation for her fear) The second case Rb Leeuwarden, January 21, 1993, TvG 1996, 26 (defendant, knowing he was HIV-positive, had unsafe sex with plaintiff several times, without telling her, compensation for fear awarded)

in the case of the former NATO base, the responsible undersecretary of defense has declared that in case the Dutch government should be held liable for damages suffered by personnel the Government would not invoke the applicable statute of limitations. According to a Dutch newspaper, the official also said that phobia - claims would not be excluded out-of-hand.³²

The House of Lords has taken a similar position. In *Page v Smith*,³³ the Law Lords allowed a claim from a plaintiff who suffered psychiatric damage, but no personal physical injury, from an automobile accident. For a primary victim of an accident, ie, a person well within the range of foreseeable injury, the Lords held that the test to be applied was whether the defendant could reasonably foresee that his conduct would expose the plaintiff to a risk of personal injury of any type. The plaintiff did not have to prove either that it was reasonably foreseeable that injury by nervous shock would result from defendant's negligent conduct or that the plaintiff had an 'eggshell personality'. The Lords' ruling is consistent with an earlier observation of the English author Munkman:

Where a neurosis claim arises out of an accident, there has usually been some physical injury or at least shock which would be actionable in any case, and neurosis supervenes afterwards; or else the accident aggravates an existing neurotic state. But there seems no reason why an action should not lie for causing neurosis alone in the absence of injury or shock (if such a thing is possible). A recognisable illness is something more than the unhappy or painful thoughts which, as already indicated, are not in themselves a subject of compensation.³⁴

The issue of whether a breach of the duty of care has been accompanied by physical violation of the plaintiff can play a role in establishing the gravity and seriousness of the alleged psychiatric damage, but, at least in the case of a primary victim of a defendant's negligence, it should not be a pre-requisite to recovery. As the Australian authors Mullany and Handford have stated, '[d]ifferences in the strengths of various types of claims can be reflected in the quantum of damages awarded rather than leading to the automatic exclusion of some actions ...'.³⁵

In cases where the damage to the psyche consists of the plaintiff's fears that he or she might become ill as a result of the defendant's conduct, it is understandable if the traditional reservations against compensation for damage to the psyche will

³²*Algemeen Dagblad* April 16, 1998.

³³[1995] 2 All ER 736, [1995] 2 WLR 644.

³⁴John MUNKMAN, *Damages for Personal Injuries and Death*, Butterworths 1993, at 128. The Law Commission (Consultation Paper (1995), *Liability for Psychiatric Illness* at par 2.4), too, makes clear that the plaintiff must suffer a recognised psychiatric illness that, at least where the plaintiff is a secondary victim, must be shock-induced; and not just transitory fear and anxiety. See also Lord Browne-Wilkinson in *Page v Smith*, [1995] 2 All ER 736, at 752ff., referring to the Consultation Paper.

³⁵Mullany & Handford, *Tort Liability*, at 312. But see Tony WEIR, Book Review, [1993] *Cambridge L J* 520 at 522. Most of Weir's criticisms of Mullany and Handford's book seem more directed to their treatment of claims by persons 'merely affected' by an accident rather than 'victims involved in the situation'. The fear claims we address in this article are in the latter category.

reappear in judicial opinions. One would expect that the strength of the judge's concerns will depend on the nature of the illness, the inherent danger of the situation, the (possible) temporary character of the injury, the difficulties in establishing the duration of the psychiatric damage, questions of causation and the flood-gate argument all playing a part. In light of the treatment of claims of damage to the psyche in the past, it should come as no surprise if these traditional concerns play a strong role as courts sort out the claims in the relatively new factual context of fear of asbestos-related disease. A relatively new case on the issue from the Supreme Court of the United States well illustrates the problems.

III. The Buckley Case

A. *Buckley in the Lower Federal Courts*

The plaintiff, Michael Buckley, was employed as a pipe-fitter for Metro-North Commuter Railroad Co. in 1985. His job required him to help maintain the pipes in the steam tunnels located below Grand Central Terminal, a huge railroad station in New York City. The pipes were covered with asbestos; Buckley and his co-workers had to cut the asbestos to obtain access to pipes in need of repair. Fans used to circulate air in the intensely hot steam tunnels spread asbestos dust. Buckley and his fellow pipe-fitters were nicknamed the 'snowmen' because they would emerge from their daily work covered from head to toe covered with a white powder asbestos dust.³⁶ Buckley worked in this environment for three years.

The defendant, Metro-North, admitted that it knew that the insulation was made of asbestos and that asbestos can cause cancer. The railroad also conceded that it did not warn Buckley and his co-workers of the problem and that it did not even attempt to train or equip them to handle asbestos safely until late 1987. Buckley's claim became the test case for approximately 100 'snowmen' who filed claims against the railroad under the Federal Employers' Liability Act (FELA).³⁷

Because none of the workers had yet shown signs of asbestos-related diseases, the workers sought damages for emotional distress and for medical monitoring only.³⁸ Because the railroad conceded that it was negligent, only causation and damages had to be decided by a jury. The trial court dismissed Buckley's claim at the close of his case and dismissed the jury because it agreed with Metro-North

³⁶*Buckley v Metro-North Commuter R.R. Co.*, 79 F.3d 1337, 1340 (2d Cir. 1996), rev'd 117 S.Ct. 2113 (1997).

³⁷45 USC sec. 51. FELA is a federal statute, first passed in 1906, which specially protects railroad workers from the negligence of their employers. See, eg, *Atchison, Topeka & Santa Fe Ry v Buell*, 480 US 557, 561-62 (1987) ('The coverage of the statute is defined in broad language, which has been construed even more broadly.').

³⁸Buckley did not seek to recover for the increased risk of developing any disease because the evidence from experts did not support a claim that it was more probable than not that Buckley would develop any asbestos-related disease. 79 F.3d at 1343 n. 1.

that Buckley had not suffered a 'sufficient impact with asbestos' and he had failed to prove 'a real emotional injury.'³⁹

In reversing the federal trial court's ruling, the Court of Appeals for the Second Circuit held that a reasonable jury could easily conclude that Buckley had suffered a physical impact with asbestos; the court pointed to such details as Buckley's testimony that he could taste the material in his mouth and the nickname of 'snowmen.' In addition, Buckley's expert witnesses testified that he had inhaled a large quantity of needle-like asbestos fibers which had caused subclinical changes to his lungs. Thus, a reasonable person who had endured a comparable impact with asbestos would reasonably fear that he might contract an asbestos-related disease, such as cancer, in the future.⁴⁰

The appellate court also reversed the district court's holding that no reasonable jury could find that Buckley had suffered emotional distress. Buckley offered no corroborating evidence of his emotional distress; moreover, he continued to smoke cigarettes even after learning that smoking further enhanced the risk of contracting disease once someone has been exposed to asbestos. Nevertheless, the Second Circuit held that Buckley had presented objective evidence of his distress - primarily evidence of frequent complaints about the asbestos - even if it was not in the form of medical proof of emotional distress. Because Buckley demonstrated the genuineness of his claim by proving physical impact with asbestos, he was not required to demonstrate the presence of 'severe' emotional distress as well. Thus, although the appellate court said that Buckley's case for emotional distress was 'not overwhelming,' it was legally adequate to permit a jury to decide whether to grant him some compensation.⁴¹

Buckley also won his claim for medical monitoring before the Second Circuit. Buckley's expert physician explained that he should undergo tests which would cost about \$950 per year. The court held that given the evidence of physical impact, increased risk and medical necessity, a jury could award those medical monitoring costs which would be incurred as a direct result of Buckley's exposure to asbestos. The court pointed out that it would not be appropriate to award expenses for tests and monitoring necessitated by other causes, such as his smoking.⁴²

B. Buckley in the Supreme Court

The Supreme Court of the United States accepted the case for review and, on June 23, 1997, reversed the Second Circuit. The key holding of seven members of the high Court was that Buckley's exposure to asbestos did not constitute a 'physical impact' as the Court had used the term in an earlier emotional distress case,

³⁹*Buckley*, 79 F.3d at 1343.

⁴⁰*Id.* at 1343-44.

⁴¹*Id.* at 1346.

⁴²*Id.* at 1346-47.

Consolidated Rail Corp. v Gottshall.⁴³ (In *Gottshall*, the Court adopted the zone of danger test, which allows bystanders to recover for their emotional distress when they were in immediate risk of physical harm as a result of defendant's negligent conduct.) The Court held in *Buckley* that, even though in *Gottshall* it had used the term 'physical impact,' it did not mean to include every type of physical contact - in particular contact which amounts to no more than exposure to a substance that poses only some future risk of disease.⁴⁴

In rejecting *Buckley*'s claim, the Supreme Court pointed to several concerns courts have traditionally raised about such emotional distress claims: (1) The facts of the case illustrated the difficulty of separating out 'valid, important claims from those that are invalid or 'trivial.'"⁴⁵ The physical contact with the asbestos did not offer sufficient help in separating out valid claims because of the contacts people commonly have with known carcinogens.⁴⁶ (2) The Court pointed to the concern of unlimited liability because of the large number of people exposed to asbestos, and the possibility that allowing large numbers of emotional distress claims in the immediate future might make it more difficult for those who actually contracted disease in the more remote future to recover any compensation. The Court saw these policy concerns as further evidence that it should not depart from what it saw as the common law consensus denying claims such as *Buckley*'s.⁴⁷

Buckley's medical monitoring claim was also rejected. The Court stated that the claim had to be rejected because *Buckley*'s emotional distress was not an 'injury' as defined in the statute. The Supreme Court went on, however, to confirm that it was also incorrect to consider the medical monitoring expense as a separate economic injury in the absence of a traumatic physical impact or the presence of a physical symptom. In addition, at least some of those state courts which had allowed medical monitoring in the absence of physical injury had imposed special limitations on the remedy, such as using a court-supervised reimbursement fund rather than a lump-sum payment. The Court expressed doubt that medical experts, let alone judges and juries, would be able to predict what medical monitoring would be necessary as a result of the exposure to asbestos alone.⁴⁸ The Court also expressed concern that granting a lump-sum award would lead to a flood of cases, which would lead to a vast use of testing and a re-allocation of scarce medical resources.

⁴³512 US 532 (1994).

⁴⁴*Buckley*, 117 S.Ct. at 2117.

⁴⁵*Id.* at 2119 citing *Gottshall*, 512 US at 557.

⁴⁶The Court cited to the large number of people exposed to asbestos, second-hand tobacco smoke and benzene. *Id.* at 2119.

⁴⁷Although the case had to be decided under the FELA, it is clear that the Court assumed that its ruling would be decisive in other contexts as well. Since the Supreme Court saw itself as determining the common law on this issue, it saw the potential impact of its ruling to be wider than did the Second Circuit. See *Metro-North Commuter R.R. Co. v Buckley*, 1997 WL 68237, at 49-50 (Oral Argument, Feb. 18, 1997). The Court's assumption has proven to be true. See *First National Bank v. Drier*, 574 N.W.2d 597, 600 (South Dakota Supreme Court, 1998) (following *Buckley* because it relied on an analysis of common law cases).

⁴⁸*Id.* at 2122.

Two justices entered a separate opinion. Although they agreed that Buckley could not recover for his emotional distress, they disagreed with the majority's reasoning. They would have found that Buckley had proven a sufficient physical impact with asbestos fibers but still could not recover because he did not present evidence of 'severe' emotional distress. His generalized fear of developing an asbestos-related disease had not led to symptoms such as 'nervous breakdown ... hospitalized, lost weight, suicidal preoccupations, anxiety, insomnia, cold sweats, and nausea.'⁴⁹ They saw the majority's opinion as leaving the door open to a medical monitoring claim for the difference in cost between the medical care unexposed and exposed persons should obtain reasonably, so long as Buckley did not request a lump sum award.⁵⁰

C. Buckley Compared

The harshness of the rule announced in *Buckley* can be seen when it is compared to what had been to that date the most stringent common law case decided on a claim for fear of cancer, the California Supreme Court's decision in *Potter v Firestone Tire and Rubber Co.*⁵¹ The plaintiffs, landowners living near a landfill for garbage, sued the defendant for disposing of toxic wastes in the landfill in violation of state environmental laws. The toxic wastes leached into the ground water, exposing the plaintiffs to many carcinogens. The California court held that if the plaintiffs could demonstrate the existence of a physical injury caused by the defendant's negligence, such as cellular damage or impairment of the immune system, the plaintiffs could recover as 'parasitic damages' any anxiety specifically due to a reasonable fear of a future harm. However, where the plaintiffs could show only exposure or ingestion of carcinogenic substances, without any physical injury, the court imposed a stricter standard. The California court held that in cases of non parasitic emotional distress, fear of cancer could be compensable only when the plaintiff proved that as a result of the defendant's negligent breach of duty owed to the plaintiff, the plaintiff was exposed to a carcinogen and the fear was based on knowledge that it is more likely than not that the cancer will develop.

The *Potter* Court made two important exceptions to its new rule. First, plaintiffs who can prove that defendants had acted with conscious disregard of the rights and safety of others do not have to meet the more probable than not standard. Such plaintiffs need only show that their fears are reasonable, genuine and serious. Second, the court held that reasonable medical monitoring could be compensable even if the more probable than not threshold were not met. The court permitted the trier of fact to make a determination on a case by case basis, if there were competent expert testimony given to explain what specific monitoring was necessary as a result of the defendant's conduct. General preventive medical care, which everyone should undergo in any event, would not be compensable.

⁴⁹Id. at 2124.

⁵⁰Id. at 2130.

⁵¹863 P.2d 795 (Cal 1993).

In contrast, *Buckley* is much harsher than *Potter* for several reasons. The US Supreme Court seemed to reject the evidence that Buckley had suffered sub-clinical (ie, asymptomatic) injury, while in *Potter*, the California court seemed to recognize that evidence of this type might be sufficient to meet the injury requirement. Second, *Potter* distinguished defendants who were conscious wrongdoers, while the *Buckley* Court did not. (This is especially surprising when one considers that the *Buckley* plaintiffs were in a statutorily-protected class of railroad workers, while the *Potter* plaintiffs enjoyed no special legal status.) Third, the *Potter* Court clearly accepted a claim for medical monitoring even as it rejected the emotional distress claim; it is less clear whether the *Buckley* Court ultimately would accept or reject an independent claim for monitoring.

IV. Our Opinion Regarding Claims for Fear of Asbestos-Related Diseases

In our opinion, the physical injury requirement imposed in *Buckley* is too strict and will prove difficult to enforce as the lower courts are forced to split hairs.⁵² For example, before *Buckley* was decided, US courts had not reached a consensus on whether asymptomatic pleural thickening of the lungs constituted an ‘injury.’ At least two courts had rejected fear claims on the grounds that the plaintiffs’ pleural thickening, caused by asbestos exposure, was not a cognizable physical injury because it was asymptomatic,⁵³ while other courts had considered pleural thickening to qualify as an injury.⁵⁴ The *Buckley* Court did not provide any guidance on the issue. It merely indicated that a plaintiff falling in a category where the law already permitted recovery for emotional distress could recover. However, in citing the *Marchica* case with approval as an example of an acceptable ‘traumatic injury,’⁵⁵ the *Buckley* Court is just inviting lower courts and smart attorneys to stretch the injury requirement out of meaningful recognition.⁵⁶

We think that it would be better for the courts in the US and Europe to handle fear of asbestos-related diseases as they would any other type of tort claim, i.e., the standard rules of tort law should apply. A court should examine the claim to determine if there has been a breach of duty to a foreseeable plaintiff and whether

⁵²See STOLKER & LEVINE, *Aids Phobia*, at 886

⁵³*Busfield v A C & S, Inc*, 643 A 2d 1095 (Pa Super 1994), *In re Hawaii Federal Asbestos Cases*, 734 F. Supp 1563 (D Hawaii 1990).

⁵⁴*Sullivan v Combustion Engineering*, 590 A 2d 681 (N J Super 1991)

⁵⁵117 S Ct at 2121-22 The Court must be referring to the fact that *Marchica*, who was allowed to sue for fear of contracting AIDS, had been stuck in the hand once with a discarded hypodermic needle. By the time of trial, it was known that *Marchica* had not been exposed to any HIV-positive blood. *Marchica v Long Island RR Co*, 31 F 3d 1197 (2d Cir 1994), cert denied, 513 US 1079 (1995). This momentary needle stick is a rather trivial ‘traumatic injury’ in comparison to *Buckley*’s three years as a snowman.

⁵⁶See, eg, *St Elizabeth Hospital v Garnard*, 730 S.W 2d 649, 652-53 (Texas 1987), rev’d on other grounds, *Boyles v Kerr*, 855 S W 2d 593 (Texas 1993) “[I]n most instances of severe mental disturbance some deleterious physical consequence can, with a little ingenuity be found” and characterization of an injury as physical or mental may depend on the ingenuity of counsel in framing the pleadings.”

the plaintiff has truly suffered psychiatric damage as a result of this breach.⁵⁷ The Second Circuit opinion in *Buckley*, which the US Supreme Court rejected, nevertheless is a good illustration of the approach we believe is sound for courts to take.

Even if a plaintiff like *Buckley* can state a cause of action, he may not obtain a large award. The plaintiff would have to prove all elements of a standard cause of action in order to recover and the trier of fact would be able to set the non-pecuniary damages at an appropriate level based on all of the circumstances. Mullany and Handford note that the damages for post-traumatic psychiatric disorders tend to be less than those awarded for physical injury, even though 'it is easier to fake or magnify a bad back than a psychiatrically imbalanced mind'.⁵⁸ The approach of the Second Circuit in *Buckley* is consistent with the familiar starting point that 'the tortfeasor takes the victim as he finds him'. The victim will not always be a 'reasonable person', but the court should protect the victim if the standard elements of a claim are proven.⁵⁹

This was also the approach taken in the Dutch 'compensation neurosis' ruling. Henderson, a student and member of a steelband, fell off a float during the carnival in Aruba. In the chaos he was beaten several times with a baton by Gibbs, deputy inspector of police, due to a misunderstanding. The victim developed a 'compensation neurosis'. In psychiatry, compensation neurosis is regarded as a serious form of neurosis. The Supreme Court supported Henderson's claim:

In an unlawful act, consisting of inflicting injury, the consequences of a reaction determined by the personal predisposition of the victim will be generally regarded as a result of the unlawful act and imputed to the perpetrator, even when this reaction is also caused by the neurotic need of the victim to receive compensation and even when the consequences are thereby more severe and last longer than normally would be expected.⁶⁰

The Dutch law professor (and former Justice on the Hoge Raad [the Dutch Supreme Court]) Hans Nieuwenhuis points out that an actual compensation neurosis leads to a real, not simulated, disability. Similar to a victim who can not be condemned for the fact that he is suffering from exceptionally brittle bones, a person with compensation neurosis can not be condemned for the fact that he is suffering from an involuntarily, and thereby non-culpable need for compensation.

⁵⁷Therefore, we agree with the Law Commission's provisional view that there should continue to be liability for negligently inflicted psychiatric illness that does not arise from a physical injury to the plaintiff (Consultation Paper (1995), *Liability for Psychiatric Illness*, at par 5 3)

⁵⁸MULLANY & HANDFORD, *Tort Liability*, at 310

⁵⁹See also *Marchica*, 31 F 3d at 1204

⁶⁰Hoge Raad der Nederlanden, February 8, 1985, *NJ* 1986, 137 (annotation by C J H BRUNNER), *AA* 1985, 417 (annotation by J H NIEUWENHUIS)

This is also the position of the Hoge Raad.⁶¹ If this is the case, then the question remains if the victim also has a right to claim damages for the pecuniary and non-pecuniary injuries resulting from his fear of contracting an asbestos-related disease.

V. What is the Limit?

It is understandable that in many countries the judges are hesitant to award damages in cases of psychiatric damage, because of the nature of the injury. Lord Macmillan established this in 1943: ‘... in the case of mental shock there are elements of greater subtlety than in the case of an ordinary physical injury and those elements may give rise to debate as to the precise scope of legal liability’⁶². Let us assume that when Henderson was beaten by Gibbs, he was taken to an older hospital where he developed an intense fear of breathing asbestos fibers without having had any contact in the hospital with anything that could have shed fibers. Would Henderson have a claim against Gibbs for his emotional distress? Or have we reached the limit?

Without doubt Henderson would not have developed this fear without having some kind of predisposition, but, in itself, this is no reason to reject any claim. One who agrees with the Hoge Raad’s ‘compensation neurosis’ ruling also might be in favour of awarding the claim in Henderson’s hypothetical case because here also an unlawful act causing psychiatric damage is involved. Awarding the claim is not unthinkable, when one remembers that the plaintiff still will have to establish that the fear of an asbestos-related disease is real⁶³ and that it was caused by a breach of the duty of care by the perpetrator. This result would be in line with the House of Lords’ ruling in *Page v Smith*, which allowed a plaintiff with a predisposition for an unusual psychiatric illness to bring a claim based on defendant’s negligent driving having caused the illness to return. It would also be consistent with the case of Marchica, another railway employee, where it was established that the fear of contracting AIDS he experienced, during the relatively short period between being stuck with the needle and the scientifically definitive test result that he was HIV-negative, had been so intense that he would suffer from severe physical and mental complaints for the rest of his life. On the basis of this evidence, the court

⁶¹This question is related to the Consultation Paper’s unresolved discussion (par 5.13) of whether the plaintiff is assumed to be a person of reasonable fortitude. In our opinion, this should not be necessary. See, however, the German minimum requirement (‘ein Minimum an psychischer Widerstandskraft’), discussed in the following paragraph of this article.

⁶²*Bourhill v Young* [1943] A.C. 92, 103.

⁶³The lower court in *Buckley* recognized that his evidence of emotional distress was ‘not overwhelming’, 79 F.3d at 1346, and even the two most sympathetic justices of the Supreme Court did not find that he had suffered sufficiently severe distress, 117 S.Ct. at 2125.

upheld an award granted for future emotional distress for his lifetime.⁶⁴ A similar rule can also be found in the Dutch court's ruling in Henderson's case.⁶⁵

The person who finds it absurd to award damages in these cases, might consider the German approach, with its requirement of 'ein Minimum an psychischer Widerstandskraft'. The German author Lange notes that the rule that the tortfeasor must take the victim as he finds him leads to difficulties when the victim lacks a minimum of physical or psychiatric resistance.⁶⁶

A court could well find that in a case where contracting an asbestos-related disease, both practically and theoretically, is virtually impossible, the predisposition of the victim is obviously so strong and his psychological resistance thereby so low, that the emotional distress damage resulting can no longer be held to have been caused by the defendant.⁶⁷ Thus in *Page*, Lord Lloyd, who would generally allow such claims by primary victims to proceed, pointed out that there was a question of causation which needed to be resolved before the plaintiff could recover.⁶⁸

Similarly German law makes a distinction regarding causation between cases where there is an 'inner connection' between the tort and the neurosis and cases where the connection is merely 'external', the accident being a mere 'point of crystallization for psychiatric defects which would have caused damage sooner or later. The distinction is based on the contrast between cause and occasion'.⁶⁹

Comparative (or contributory) negligence of the victim can have an effect on the amount of compensation. Had Buckley's case gone to the jury, for example, he might well have had his damages reduced substantially because he continued to smoke even after he was informed that doing so would enhance the risks already posed by the asbestos exposure. Similarly, Rittenhouse did not help her case by continuing to spend time in the hotel even after she saw a sign regarding the asbestos removal project and by selling furniture she purchased at the sale without

⁶⁴*Marchica v Long Island RR*, 31 F 3d 1197 (2d Cir 1994), cert denied, 513 US 1079 (1995) The Alaska Supreme Court has also held that a person who was negligently informed that she was HIV-positive was not foreclosed as a matter of law from recovering for emotional distress beyond the date she learned the test result was incorrect, *Chizmar v Mackie*, 896 P 2d 196 (Alaska 1995)

⁶⁵Hoge Raad der Nederlanden, 8 februari 1985, NJ 1986, 137 (see above) The court held that although he could recover his damages, he had to undergo psychiatric treatment Cf Restatement (Second) of Torts (1979), § 918 (plaintiffs are subject to the avoidable consequences rule)

⁶⁶LANGE, *Schadensersatz*, at 132 'Die erwähnte Regel, dass der Ersatzberechtigte so hingenommen werden müsse, wie er ist, führt zu Schwierigkeiten, wenn es dem Opfer an einem Minimum an physischer oder psychischer Widerstandskraft gebricht'

⁶⁷See, eg, *Rittenhouse v St Regis Hotel Joint Venture*, 565 N Y S 2d 365 (N Y Sup Ct 1990), aff'd in part, rev'd in part, 579 N Y S 2d 100 (1992) (rejecting claim of a plaintiff who sued for mental distress after learning that the hotel in which she had attended a sale over a two week period was simultaneously engaged in an asbestos removal project), *Commonwealth Enterprises v Liberty Mutual Ins Co*, 101 F 3d 705 (9th Cir 1996) (departure of commercial tenants who unreasonably feared airborne asbestos contamination after a fire did not trigger additional coverage under the building owner's business interruption policy)

⁶⁸[1995] 2 All ER 736, 742

⁶⁹See *The International Encyclopedia of Comparative Law*, Volume IX Torts part 1, 7-185, Lange, *op cit*, at 141

disclosing to buyers the possibility that the furniture was contaminated with asbestos.⁷⁰ Finally, it must be remembered that negligence will have to be carefully established. If any element of a standard cause of action can not be proven, the claim should be rejected for this reason alone.⁷¹

Most important, the plaintiff will have to demonstrate that he or she has actually suffered damage to the psyche. As Mullany and Handford point out, '[t]he mind is a remarkably resilient piece of machinery and it is only in the minority of individuals that actual psychiatric damage going beyond the typical emotional reactions experienced when confronted with stressors will be sustained'.⁷² Buckley's evidence of limited damage to his psyche is probably at, if not below, the acceptable minimum.⁷³

In cases like Buckley's, where there is a long latency period between exposure and the potential onset of disease, such as asbestosis or cancer, courts might consider one important change in their approach. One reason for concern about the genuineness of an emotional distress claim is that the case may come to trial without any scientific assurance that the plaintiff is no longer in any reasonable danger of contracting the disease.⁷⁴ In these cases, the court is put in the difficult position of having to award compensation for fear of a disease that will not appear, if at all, for many years in the future. It is understandable when courts shrink from this task and, as in *Buckley* and *Potter*, attempt to draw lines that will relieve them of this duty.

We suggest that in European cases where latency is a problem, courts should not award a lump sum for the fear claim. Rather, we suggest an adaptation of medical monitoring - what we think should be called 'psychiatric monitoring'. Plaintiffs could submit their claims for damage to the psyche on a periodic basis, as the separate opinion of two justices in *Buckley* suggests. Although there may be many claims to begin with in a mass situation, such as poisoning the drinking water of a community,⁷⁵ we would expect that over time, the fears will subside. Some claimants may not wish to continue to revisit their losses.⁷⁶ Only those who are truly suffering extraordinary psychiatric responses, like a Marchica or a Henderson, will be able to demonstrate that their fears are continuing. And even

⁷⁰565 N Y S 2d at 366

⁷¹See C J J M STOLKER, 'Wrongful Life: the Limits of Liability and Beyond', *The International and Comparative Law Quarterly* 1994, at 535-36. The German author LANGE, *Schadensersatz*, at 132, notes that in cases involving a strong personal predisposition, the first step is to consider whether there has been a breach of duty

⁷²MULLANY & HANDFORD, *Tort Liability*, at 312

⁷³Were it not for the fact that Buckley was suing under the special FELA statute, we would be more inclined to agree with the separate opinion in the US Supreme Court opinion, which concluded that his emotional distress was not sufficiently severe to permit any recovery *Buckley*, 117 S Ct at 2125

⁷⁴In contrast, someone who alleges fear of contracting AIDS will probably have had a definitive blood test to determine whether or not the person is HIV-positive or negative by the time the case gets to trial. E.g., *Madrid v Lincoln County Medical Center*, 923 P 2d 1154 (N M 1996), see also STOLKER & LEVINE, *Aids Phobia*, p 886-87 (1996)

⁷⁵E.g., *Ayers v Jackson Township*, 525 A 2d 287 (N J 1987)

⁷⁶MULLANY & HANDFORD, *Tort Liability*, at 313

extraordinary plaintiffs like these two can be required to mitigate their damages by continuing to seek the assistance of qualified mental health professionals to treat their neurotic fears. In contrast, a person like Buckley, who has not suffered a great emotional strain, probably could not sustain proof of injury to his psyche over a long period of time. Thus, a system of periodic payments, based on psychiatric monitoring of the continuing nature of the claim, should meet the real needs of injured plaintiffs without imposing a crushing liability on defendants. This approach would be consistent with what the *Buckley* Court seems to be demanding for an acceptable medical monitoring claim - periodic payments on the basis of need, rather than making a speculative lump-sum payment. The Dutch Civil Code provides one such model:

The judge may wholly or partially postpone the evaluation of damage which has not yet occurred... [t]he judge may order the debtor ... to make installment payments ... To the extent that the judge orders the debtor to make periodic installment payments, he may determine in his judgment that these installments can be modified at the request of each of the parties by the judge who was seized of the demand for reparation in the first instance, if, after judgment, circumstances arise which affect the extent of the obligation to repair, the possibility of which has not been taken into account in determining the installments⁷⁷.

VI. Conclusion

As we have indicated, we believe that when courts face seemingly novel claims for damage to the psyche, such as cases involving fear of cancer or other asbestos-related diseases, they should treat these claims as they would any other type of tort claim. We do not believe that courts in Europe should follow the example of the Supreme Court of the United States in *Buckley*, which reached an unnecessarily harsh result by utilizing limiting criteria lawyers and courts will stretch out of meaningful recognition. Rather, a court should simply examine the claim to determine if there has been a breach of duty to a foreseeable plaintiff and whether the plaintiff has truly suffered damage to the psyche as a result of this breach. The court can make an appropriate award for the proven damage to the psyche and can use our proposed psychiatric monitoring as needed in jurisdictions, such as The Netherlands, which allow periodic payments. We assume that the defendants in asbestos cases and their insurers have the ability and knowledge to bring the problem of potentially unlimited liability to the attention of legislators, who can then make the difficult policy judgment of whether to impose arbitrary limits on compensation for damage to the psyche from the fear of asbestos-related

⁷⁷Article 6:105 Dutch Civil Code.

diseases.⁷⁸ Until its national legislature acts, however, the courts in each country should recognise that the apparently novel fear claims we have reviewed here are really just the same old story. The courts will do best if they remember that when the fundamental rules apply, there is no need to construct artificial lines which will have to be constantly changed as time goes by.

⁷⁸For example, New Zealand set an arbitrary deadline for filing any asbestos claims in court. See Castleman, *op cit*, at 811. See also *Dunn v HOVIC*, 1 F 3d 1371 (3d Cir), cert denied, 114 S Ct 650 (1993) (majority of judges conclude that legislature, rather than the court, should establish arbitrary rules for regulating multiple punitive damage awards in asbestos cases)