

10. THE CRIMINAL TRIAL OF STEPHAN SCHMIDHEINY IN TURIN, ITALY

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The Schmidheiny family is one of Switzerland's wealthiest families, their fortune founded on a vast cement production empire. Stephan Schmidheiny was only 29 when he inherited part of that empire – the Eternit asbestos-cement company – in 1976. Though resigned to the eventual abandonment of asbestos, he continued to run Eternit subsidiaries in Europe, South America and South Africa for varying lengths of time through the 1980s, whereupon some were sold off or closed and others converted to non-asbestos fiber-cement production.

Italy is practically the only country in the world where business executives have been prosecuted and imprisoned for toxic corporate crime. In the latest of such cases, Italy's most famous prosecutor, Raffaele Guariniello, has indicted Stephan Schmidheiny and Baron Louis de Cartier de Marchienne of the Belgian Eternit. They faced a range of charges: manslaughter (for killing Italians with asbestos dust in Italy, Switzerland, and Brazil), failure to comply with safety rules, negligence, and causing an environmental disaster. At the outset of the trial, Guariniello called for sentences of 12 years on conviction.

It is noteworthy that, in the course of his lengthy investigations, the Italian prosecutor had little success in getting the Swiss government to turn over records of factory inspections and compensation for occupational disease of Eternit workers, and other relevant documents.

As the criminal trial loomed closer, Schmidheiny's representatives tried to settle the civil claims of some people, at the same time requiring that they remove themselves from the criminal case; they were generally offering people only €30,000-50,000. Around the time Guariniello decided not to prosecute Stephan's cement billionaire brother Thomas Schmidheiny, on the basis that he had no direct connection with the asbestos-cement business, Thomas donated €3,000,000 to victims in the town of Casale Monferrato, home to Italy's biggest Eternit factory. This was used for cancer research, payment to lawyers, and restitution of the town itself.

The trial started in December 2009 and, when I gave my evidence in November 2010, was expected to finish in mid 2011. It followed 10 years of investigation starting in 1999 and, initially, trial was scheduled to take place only on Mondays (towards the end of the trial there were to be two sessions some weeks). If convicted, Schmidheiny would be able to appeal at two more levels of the justice system in Rome and remain free during such appeals under Italian law.

It was the people of Casale that brought me to Turin to testify. I was there to provide a global perspective on what went on in the asbestos industry, and draw attention to documents implicating Eternit. Much of what I had to contribute was based on what the US and UK industry leaders did – we have seen their documents in US legal cases. But since Eternit avoided the US market, possibly in some cartel deal with the others, most of what we know about Eternit comes from Johns-Manville (J-M) and Turner & Newall (T&N) correspondence and documents mentioning them in some way.

In the courtroom, the translator and I took our place immediately in front of the three judges, and the proceedings started without the formality of swearing me in as a witness. They asked to see my passport, recorded my name, and we began. The translation turned out to be even worse than I realized at the time; the audio recording showed that both key questions and answers were defectively communicated. (Journalistic reports in *La Repubblica* criticized the court for not providing a sufficiently competent translator.)

The Eternit documents I introduced included a 1950 letter from the Swiss parent group, then run by Ernst Schmidheiny, to the Eternit subsidiary in Holland, which discussed articles on asbestosis. I testified that anyone reading the literature on asbestosis in 1950 could hardly avoid coming across data and comments also linking asbestos to lung cancer. From the Johns-Manville archive came a report by consultants for J-M on a 1971 interview with Max Schmidheiny and his associates at his villa in Switzerland. Schmidheiny and his associates were critical of Johns-Manville President Burnett for placing the first vague health warnings on sacks of asbestos exported from J-M's Quebec mine,

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starting in 1969. (The Eternit men were said to have suggested, as an alternative, to change to dust-free sack materials!)

Later in 1971, the transcript of the International Conference of Asbestos Information Bodies (from the T&N archive provided by the International Ban Asbestos Secretariat), which Eternit people from four countries attended, shows a rapid growth of national asbestos industry propaganda and lobbying offices at that time. Only one such group existed in 1969: the Asbestos Information Centre. This UK group shared offices with experienced tobacco industry damage control specialists Hill & Knowlton. By 1971, there were asbestos industry groups in 11 countries including the US. The UK speakers detailed the role the UK asbestos industry played in blunting the impact of government regulation and influencing the text of materials the government issued on how the public and institutions should assess and deal with asbestos exposures. In warning all the others to prepare for trouble, one of the British speakers observed that things were still “relatively tranquil” in Belgium, Italy, Germany and France. The presentations show that problems were raging over asbestos in the UK, US, and Holland: as a mortal hazard to asbestos factory workers and shipyard workers, over resulting union demands, publicity about the public at large being endangered, increased insurance costs, and the increased attentions of government inspectors and regulators.

The industry set up an umbrella group in 1975 to coordinate its defense internationally. A 1978 Asbestos International Association memo records a discussion about warning labeling. It describes how the recently introduced UK “Take Care with Asbestos” label had been adopted in several countries as acceptable to the authorities, and notes the view that when use of some health warning label became unavoidable this should be the style selected. That, it was observed, was preferable to being required to use a label with a skull-and-crossbones symbol or the word “cancer.” At the end, Etienne van der Rest of the Belgian Eternit was recorded as requesting that the British do their “utmost” to avoid having warning-labeled asbestos products shipped into Europe.

Last, an exchange of letters from van der Rest to T&N executive Harry Hardie in March 1980 starts with van der Rest whining that T&N was starting to use a “cancer” warning label on asbestos goods and asking what the justification was. Hardie replied that European asbestos-cement producers had no idea how things were in the asbestos litigation in the US.

[I first met Etienne van der Rest at a conference in Washington in 1977 after speaking about “Hazard Ex-

port,” featuring the asbestos and chemical industries. He was a very tall, pale, cadaverous-looking man, who came over to me and reached down and put his arm around me as he spoke. If you were making a movie, you couldn’t beat this guy for casting as a character personifying evil. When later I saw the 1978 document showing him trying to keep UK-warning-labeled asbestos products from coming into Europe, I wrote to him asking how he could live with himself doing such a thing. The only other time I saw this guy was at the 1986 hearings on the US EPA’s proposed rule to ban most uses of asbestos. There, the Eternit men argued that a US ban on asbestos-cement pipe would be disastrous for poor countries needing it to supply drinking water. I walked over to van der Rest and said that I had always attributed most of the human suffering in the world to the imbalance in power and wealth, but after hearing from Eternit that day I realized it was all because of the lack of asbestos-cement pipe. I can only wonder what van der Rest felt when he lay dying from mesothelioma years later. His Belgian company doctor also died from mesothelioma, I was told.]

The defense lawyers had no time to question me that first day and asked for two weeks to read my book on the history of the asbestos industry. Like it was a surprise! I told the judge I would be able to stick around another week, and he ordered that we continue then.

During that week, I met repeatedly with the prosecutor and his staff, and with the lawyers for the victims in Casale Monferrato (the community most devastated by Eternit’s activities in Italy). At their requests, I prepared a 3½ page summary of what I had tried to tell the Court (which was professionally translated into Italian), and we discussed what additional questions the lawyers might ask me when the trial resumed.

Prosecutor Guariniello has an extensive network of academic consultants and other experts in medicine, epidemiology, industrial hygiene, and accounting. He hopes to institutionalize a judicial entity charged with investigating occupational fatalities that are criminally caused. He has epidemiologists looking through government statistics looking for occupational cancers. This case is something of a breakthrough in charging the foreign owner-executives, not just local managers. It involves legal-accounting detective work in tracing responsibility to the corporate owners for conditions at their factories.

The new court translator, Victoria Franzinetti, did a great job, and the second trial day went well. When none of the lawyers moved for its admission, I offered the judges the summary I had written. The Italian trans-



Photo from documentary: Dust - the Great Asbestos Trial

Barry Castleman giving evidence before Judge Giuseppe Casalbore in the Turin Court

lation of that and my Curriculum Vitae I handed to each of the three judges. When he requested one, I stepped over to Mr. Schmidheiny's lead lawyer and handed him an Italian translation of my summary. It was the defense's turn to cross examine me. As I had suspected, Schmidheiny's main lawyer rose and said he had no questions. A lawyer for Etex, the Belgian Eternit, there for civil claims (there are civil claims for damages wrapped up inside the criminal case), for reasons best known to himself, asked me for dates of the van der Rest documents I had submitted to the court the week before. So, this time with a good translator, I again described these to the judges in some detail and gave the date of each.

The deputy prosecutor then asked me for the story of internal corporate discussions in the US about putting the first mild health warnings on asbestos-containing boards. This was illustrated with internal Johns-Manville memos from 1958 and minutes of the Asbestos Cement Products Association in the period 1968-70. In its first health standard, OSHA required warnings on these products in 1972. But in Europe, the Eternit companies made these products through the 1980s and appear to have never bothered to put health warnings on asbestos-cement sheets and pipes.

The burden on Eternit in this case is to have done what was technically feasible to protect people both in their asbestos plants and in the surrounding neighborhoods. So I cited parts of the 1969 UK asbestos regulations and 1972 OSHA asbestos rules, to show what other major firms were required to do while Eternit was doing little

if anything to protect workers and plant neighbors exposed to its pollution in Italy. I noted the UK and US requirements for wastes to be disposed of in impermeable containers.

Guariniello and the chief judge each asked one question, and then I asked to speak. I offered to answer any question the court might have by correspondence, and said I might send additional references to support points made in the trial. Lastly, I thanked them for the wonderful translation. After I left the room, I handed a copy of my book to one of the scientists working with Guariniello to take to him. It was inscribed with respect for his efforts to prosecute corporate criminals of the asbestos industry. It was all over in an hour and a half.

It was widely agreed that the defendants had missed their chance by not all telling the court that they would have no questions for me at the end of the first Monday's proceedings. They would have been better off sending me home then. But it is also believed that the defense lawyers are doing all they can to prolong this trial, then expected to run for another year, so that may explain their actions. Schmidheiny's fleet of lawyers, public relations hacks, etc. is estimated to cost about €10 million a year.

Supplemental Statement to the Court

Upon reflection, I wrote a summary for submission to the court that elaborated on points made in my second trial day, focusing on the issue of warning people about the dangers of asbestos as having central importance.

The apprehension of US asbestos companies about their potential product liability (which would eventually devastate them), even before US federal regulatory agencies were created to protect workers and the environment, goes at least as far back as the 1950s. Soon after it was created by the Congress, OSHA required warnings on products such as asbestos-cement sheets and pipes in its 1972 asbestos regulations (saying that breathing asbestos could cause “serious bodily harm”).

In contrast, the lack of product liability law in Europe and the lack of warning label requirements in European workplace asbestos regulations enabled manufacturers in Europe to avoid warning workers and the public at no financial risk. Eternit executives accordingly weighed in repeatedly against the use of health warning labels and even tried to get UK firms to not export labeled asbestos products to the continent in 1978. Apparently, Eternit went on making these products through the 1980s and never placed health warnings on them or in product brochures. It appears to me that the prolonged ignorance of workers and the public at large was vital in the expansion of markets for asbestos products after the 1930s, by which time the lethality of asbestos dust was well established medically. I quoted a 1975 Union Carbide internal memorandum saying that it would be “between serious and fatal” to the asbestos business to place warnings on sacks of asbestos using the word “cancer.”

I also attached material submitted by the Swiss Eternit Group at the 1986 EPA hearings on banning asbestos in the US. This included statements that the firm regarded worker and environmental protection as the responsibility of top management. One excerpt attached to the company’s testimony came from a 1984 asbestos industry report purporting to describe the best technology available in US asbestos-cement manufacturing plants. “All three asbestos cement pipe manufacturers visited have full time engineers and industrial hygienists devoted to minimizing asbestos dust exposure in all work sites.” Fully automated, “totally enclosed” asbestos bag opening machinery was also described in this excerpt. Airborne asbestos fiber measurements were reported. Eternit’s submission of this to EPA, I thought, invited comparison with conditions at Eternit’s own plants in the mid-1980s.

Conclusion of the Trial

In closing arguments in July 2011, the prosecutors said they had re-evaluated the evidence as it came out in the trial and were now asking for Schmidheiny and the Bar-

on to be sentenced to 20 years each (rather than the 12 years originally sought), based on willful and intentional negligence by the executives and owners of Eternit supporting indictment for willful environmental disaster. They also noted that the disaster was ongoing, with new casualties occurring every year, in addition to the nearly 3000 victims named in the court proceedings.

The judges seemed anxious to complete the trial and limited the remaining civil damages plaintiffs’ lawyers to 15 minutes each orally, with the balance of their statements to be submitted in writing.

In his closing statement, Schmidheiny’s lawyer made none of the usual excuses (Schmidheiny didn’t know asbestos was dangerous or thought it less dangerous than it turned out to be, he thought his plant managers were doing a better job to protect people). Instead, he seemed to ridicule the “sacrosanct” principle of rehabilitation through punishment for things done 25 years ago when “a person” is not the same as he was. This suggested that Schmidheiny’s philanthropy should take precedence over how his fortune was made. The lawyer’s ramblings about the erosion of principles of law in Italian courts compared the persecution of Schmidheiny to acts of the Nazis and Guantanamo. The defense lawyer also claimed that the diagnostic methods used in some of the victims’ mesothelioma cases did not employ state-of-the-art techniques.

Guariniello replied that he had never before asked for 20-year sentences in a case of this kind, but this time he had to because of the enormity of the damage caused and the “intensity of the vicious criminal intent over time.” The prosecutor also pointed out that there was a complex media organization paid to hide Schmidheiny’s role, also involving spying on trade unions, magistrates, and victims’ groups “which the defense carefully avoided mentioning.”

Meanwhile, legislation to better protect the corporates in Italy from criminal prosecution wound its way toward enactment. This would allow endless delays in completing the trial as defense lawyers would be able to call as witnesses virtually everyone touched by the case. Guariniello urged that this case be tried under existing law even if the new law came into force before the trial concluded, and the judges seemed to be anxious to finish the trial, too, before legislative changes came. As it turned out, the feared legislation was sidetracked by the economic and political crisis that rocked Italy in November 2011.

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