

14. ETERNIT AND THE “DOUBLE AGONY” OF ASBESTOS VICTIMS IN THE NETHERLANDS

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The first known victim of asbestos in the Netherlands was recognised in 1930. The link between asbestos and lung cancer was confirmed in 1942 and the first victims of mesothelioma appeared in the medical literature during the 1950s. It was, however, 1984 before a worker affected by an asbestos-related illness claimed compensation from his employer. Since 1984 there has been an unbroken series of court cases brought against employers and producers. To this day victims of asbestos are forced to go to court to receive recompense for the damage caused to them. Below, I give a short summary of these developments, appropriately described as “the double agony” – the legal agony on top of the medical.

The Belgian Eternit Group

Even before 1920, the Belgian Eternit company (Belgische Eternitbedrijf), which had at its disposal Hatschek’s Eternit patent, was a major competitor of the sole Dutch asbestos firm, which also held rights to the Hatschek patent, the Amsterdam company known as Martinit. By 1928, Martinit could no longer stand up to Eternit Belgium and in 1930 it was taken over by its Belgian competitor. A large proportion of Martinit’s production of asbestos cement moved to Belgium and from there Eternit Belgium exported its products on a large scale to the Netherlands. In 1937, in order to serve the Dutch market, Eternit established a new asbestos cement factory in the village of Goor. Eternit Goor quickly grew to become the biggest asbestos cement company in the Netherlands.

Two years earlier, in 1935 in Harderwijk, the Salomons brothers had founded the asbestos cement firm Asbestona. Initially, Asbestona strongly resisted the establishment of the rival Eternit factory in Goor, but a few years later the Emsens family, which owned the Belgian Eternit company, surreptitiously took over the Salomons brothers’ Asbestona shares. After the war the Emsens family also took over the Oosterhout-based *Nederlandse Fabriek van Asbestproducten* (Dutch Asbestos Products Factory), “NEFABAS,” where the principal

activity involved the use of asbestos paper and cardboard for the production of insulation material. Because Eternit Belgium at the same time also took over the small asbestos cement factory Ferrocal, from 1950 the whole of the asbestos cement market in the Netherlands was in the hands of the Belgian Eternit group. Since then all important decisions regarding investment, expansion and company closures in the Dutch asbestos/asbestos cement industry have been taken in Eternit’s Brussels head office.

Asbestos victims of Eternit

The first known victim of asbestos in an Eternit factory was a Mr Christiaanse, a worker in Eternit’s Amsterdam asbestos cement factory, in 1956. He had been hired ten years earlier as a machine operator. According to an investigation conducted by Eternit in 1951, Christiaanse worked in “a practically dust-free environment,” but in 1956 he was confirmed as suffering from asbestosis.² In 1972, asbestosis was confirmed in a NEFABAS employee. From 1945 to 1972 he had worked at NEFABAS in Oosterhout and there suffered prolonged exposure to asbestos. In 1975, both asbestosis and lung cancer were confirmed in an employee of Eternit Goor, and in 1976 he died as a result of these illnesses. Mesothelioma was recorded in three further workers at Eternit Goor in 1975, 1981 and 1982, respectively. In none of these cases did Eternit publish any information outside the firm. None of the victims was able to establish Eternit’s liability. In view of the long latency period of asbestos-related diseases, it is worth mentioning that before 1967 it was not possible under Dutch labour law for a worker to hold his or her employer responsible for an occupational illness and on that basis to claim compensation.

First legal cases against NEFABAS and Eternit

In the mid-1980s, as a result of a number of complementary factors, a sea change occurred in the position of asbestos victims in the Netherlands. For the first time

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² Between 1945 and 1950 the Van Breevoort brothers also worked at Eternit Amsterdam in the manufacture of asbestos cement fittings. In 1998 one of the brothers was diagnosed with mesothelioma, and in 2001 this was also diagnosed in the other brother. Both held Eternit responsible and were awarded compensation.

scientists came forward who took the side of the victims and put their expertise at their disposal. Previously the scientists were almost always employed by, or otherwise in the pay of, the asbestos industry. A second factor was the decision by a former employee of NEFA-BAS, who was suffering from asbestosis, to take his former employer to court. That meant that the asbestos industry, which enjoyed huge influence over government and had long met with a great deal of sympathy for its views, would for the very first time be held responsible before a judge for its policies, for working conditions within the industry and for health and safety measures. Importantly, the first organisation of and for asbestos victims was established; these same victims received significant political, organisational and financial support from the Socialist Party (SP). In addition, state-financed legal aid provided encouragement for the asbestos victims.

With the SP's support, three widows who had lost their husbands to asbestos-related diseases were together the first to take Eternit Goor to court. At the same time, an employee of the Vlissingen shipyard De Schelde, who had been exposed to asbestos between 1949 and 1967, went to court with the support of his union to claim compensation for the asbestos-related illness mesothelioma. The ex-employee's case led to a decision in the High Court in his favour, considerably strengthening the legal position of those affected by asbestos-related diseases [1]. Among the ruling's consequences was a decision by Eternit Goor to pay compensation to the "three widows." The De Schelde worker was also successful, the High Court ruling in his favour in 1993, with which decision the Court accepted that mesothelioma is a disease which can be contracted through the inhalation of asbestos dust, that it can be provoked by a relatively short exposure – "through the inhalation of one asbestos crystal"– and that the incubation period amounts to between twenty and forty years [2].

Organisation and Tactics of the Asbestos Victims

In 1995, on the initiative of the SP, the Asbestos Victims' Committee (CAS) was established. This committee was an immediate success and answered a pressing need: in the first year after its establishment 600 victims and their relatives went to the CAS for advice and assistance.³ With the support of the CAS, financial aid from the SP and the assistance of scientific experts, numerous legal actions were taken against employers, of which Eternit was one of the most important. Developments in the administration of justice were, given the problems occasioned by the lapse of time and thus the

Statute of Limitations, generally positive. In ever more cases the employers were held liable and ordered to pay compensation for both material and non-material damages. The amount awarded to victims of mesothelioma in the 1990s was in the region of €40,000, increasing after 2000 to around €50,000. The position of asbestos victims attracted growing attention in the media, while the SP continually ensured that the whole spectrum of asbestos problems and the issue of the victims remained on the agenda. In doing so the SP recorded a number of achievements, including ensuring that the Statute of Limitations, the effects of which were for victims of asbestos extremely unjust, would be reformed.

Five Categories of Eternit Asbestos Victims

Victims of asbestos-related illnesses – asbestosis, lung cancer and mesothelioma – can in practical terms be divided into various categories depending on the nature of their exposure and the degree to which compensation for damages can be claimed in a court of law. I have distinguished five groups, which I shall now briefly illustrate group by group.

1) Employees and Ex-employees

The first and also biggest group of asbestos victims has always consisted primarily of employees and former employees of industries that process asbestos, asbestos products, and materials containing asbestos, and this continues to be the case. The insulation industry played a major role in this in the 1950s, followed by shipbuilding and later by the asbestos cement industry and the building trade. Because until 1967 it was not possible, on the basis of the *Ongevallenwet* (Accident Law), to hold an employer liable, claims based on occupational sickness were not heard until that year. From the 1980s onwards, however, the number of court cases grew rapidly. Against the claims of victims who had been exposed to asbestos in Eternit's factories, the company defended itself with the argument that it had always behaved "as a good employer," that before 1970 the firm could not have known of the risk of cancer associated with asbestos, and that after 1970 it had taken every appropriate safety measure. Eternit also cited the fact that until 1990 there had been no scientific consensus regarding the danger from white asbestos. In most instances, the asbestos victims succeeded in court, with the help of scientists, in refuting these arguments. After Eternit had lost a number of court cases, the firm changed tack and declared itself prepared to pay compensation to all employees and former employees of its factories who suffered from an asbestos-related disease.

³ The number of victims of mesothelioma in the Netherlands had by 1969 reached 70 per annum, by 1990 270 p.a., by 2000 390, and by 2009 470. This means that proportionally the Netherlands belongs to the top five countries with the highest incidence of mesothelioma.

2) Family Members and Co-habitants

At the beginning of the 1990s two further categories of victims of Eternit asbestos were evident: those who had shared living space with employees or former employees of the firm's factories, and members of their families. These were exposed to asbestos via the work clothes of their husbands or fathers who had worked with asbestos in these factories. In the first instance the company refused to pay such victims any compensation. The most important of Eternit's grounds for defence was the position that, at the time, the company could not have foreseen that exposure via clothing was dangerous. So these victims too were obliged to go to court. Among the first to do so were Mr and Mrs Van Gemmert, who both contracted mesothelioma early in the 1990s. Mr Van Gemmert (1924-1993) was exposed between 1946 and 1982, during which period he worked at the Eternit factory in Goor. His wife (1921-1994) was exposed during the same period through contact with her husband's work clothes. Following a long court case, Eternit agreed to accept responsibility and paid the compensation demanded.⁴ The second, comparable instance concerned Marino Grootenhuis, born in 1964, who was diagnosed with mesothelioma at the beginning of 1996, when he was 32. He turned out to have been exposed via the work clothes of his father, who in 1966-67 and 1976-77 had worked for relatively short periods at the Eternit factory in Goor. Marino Grootenhuis died in 1997. Once again, in Grootenhuis's case, Eternit contested liability in court, but to no avail. Soon after this, Eternit altered its policy and announced that the company was prepared to pay compensation to any "co-habitant" of an employee or former employee confirmed as suffering from mesothelioma.⁵

3) Environmental Victims

Between 1945 and 1975 the asbestos cement company Eternit Goor and its sister firm Asbestona gave away, free of charge and on a large scale, factory waste containing asbestos to people living in their factories' vicinities, which the recipients used to pave and level up yards, roads, paths and gardens. In this fashion, to a radius of some 25 kilometres around the factories, several thousand locations came into being where dangerous industrial waste could be found, without any warning ever being given from Eternit and Asbestona to the users that they could be in danger. A 34-year old man from the neighbourhood of the Eternit factory in Goor, who in

1991 died from the results of mesothelioma, was the first known victim of the Eternit waste. In his youth he had often ridden his motor cycle over roads reinforced with this waste. A few years later, more victims of the waste emerged, and Eternit for the first time paid compensation for this type of exposure; but without admitting liability and with the proviso that the payment be kept secret. The recipient was a woman of 38, who had come into contact with the waste as a child. In the same year, mesothelioma was confirmed in a 44-year-old woman who had been exposed to Eternit waste from early childhood. Eternit refused to admit liability, after which the woman was forced to take legal action against the firm.⁶ In 2003, the court dismissed her claim, arguing that Eternit had not acted unlawfully, because in the period from 1945 to 1972 the firm neither knew, nor could it have been expected to know, of the potential dangers attached to the practice of making asbestos waste available for surfacing roads. Another female victim of mesothelioma from the immediate vicinity of the Eternit factory in Goor was exposed to the waste in the farmyard of her home between 1960 and 2000. In 2000 she died, at the age of 62. She had, together with her husband, during the period 1960-1975, regularly used Eternit waste for paving paths and yards on their farm. After his wife's death, the widower brought a liability action against Eternit, but Eternit denied responsibility. When the case was heard in 2006, the court in Almelo dismissed the claim, but the Appeal Court in Arnhem ruled in 2007 that Eternit had indeed acted unlawfully:

"...in, from 1967 to 1970, without any warning or indication regarding the danger attached to the use of (freely released) asbestos (and/or processing and/or wear and tear), regularly and in an uncontrolled fashion distributed quantities of asbestos cement waste."

Eternit were ordered to pay compensation for damages to the widower. The company acceded to the ruling and paid the damages.

In 2003, epidemiologists Burdorf et al conducted research into the occurrence of pleural mesothelioma amongst women in the vicinity of the Eternit factory in Goor. They found five cases of mesothelioma amongst women who had suffered no exposure either in paid employment or in their housekeeping tasks. That number indicated a mortality rate of over ten times the ex-

⁴ In 2008, mesothelioma was also confirmed in their daughter G. van Gemmert, who was born in 1955. She established Eternit's liability and received compensation. In June 2008 she died, at the age of 52.

⁵ After 1994, 30 mesothelioma victims were diagnosed in the category "co-habitant"; in 8 cases these were family members of Eternit employees.

⁶ Because of the fundamental nature of the case, she received financial support from the SP.

pected incidence [3]. In a more extensive investigation a few years later, Burdorf et al looked into whether “a disease cluster of 22 cases of pleural mesothelioma amongst women in the period 1989-2002” was linked to sources of exposure in the environment, such as asbestos-reinforced roads and yards [4]. The researchers confirmed that in ten women in the region of Goor, the occurrence of pleural mesothelioma could be attributed with certainty to exposure in the environment, while in four more environmental exposure was the most likely cause of their disease. On the basis of this finding the researchers concluded that environmental exposure to asbestos in the area around Goor was the most significant explanation for the “sharply increased incidence of pleural mesothelioma amongst women” and that with an equivalent risk to men the result of asbestos contamination in the area in the following 25 years would be an additional two cases of pleural mesothelioma per annum.

In 2005, Eternit decided that, in respect of this category of victim also, they would no longer offer any defence and instead declared themselves prepared, under certain conditions, to pay compensation to this group.

4) Consumers and the Self-employed

The fourth category of asbestos victims consists of consumers and the self-employed. The first victim of mesothelioma in this category was a Mrs Nieborg-Horsting, born in 1950, who was diagnosed with mesothelioma in 2002. In 1971, she was exposed for several months on her parents’ farm during the construction of a shed in which corrugated sheets containing asbestos were used as a roofing material. The sheets came from Eternit. Mrs Nieborg’s claim against Eternit was upheld, on the grounds, according to the court, that Eternit should in 1971 have warned users of its asbestos sheets of the danger attached to their intended use. The ruling was confirmed on appeal. On further appeal, however, the Supreme Court quashed the ruling of the court on Statute of Limitations grounds. The Court of Appeal in Hertogenbosch ruled on referral that Eternit’s Statute of Limitations-based defence was unacceptable as it was in conflict with reasonableness and fairness [5].

Mr Wolting, a farmer born in 1950, in 1979 built a large shed on his farm, using 669 corrugated asbestos cement sheets as roofing material, the sheets coming from Asbestona (later known as Nefalit). This resulted in exposure to asbestos. In 1999, a lung specialist diagnosed mesothelioma in Wolting, who died from the illness a

year later. After his death, Wolting’s heirs brought a liability action against Nefalit, but the firm denied responsibility. The court’s opinion was that knowledge of the dangers to health of materials containing asbestos was already available in 1970-71 within the circle of producers to which Nefalit belonged and that such was certainly the case in 1979. For that reason, in 1979 Nefalit might have been expected, in distributing corrugated asbestos cement sheets, to have warned the public, and certainly those such as Wolting involved with handling the sheets, of the risks to health. The court concluded that Nefalit had acted unlawfully towards Wolting and his heirs and had thus become liable for damages. The Appeal Court of Arnhem confirmed the ruling in May, 2010.⁷

Another example of exposure to asbestos in relation to a consumer was the case of Mrs Hoeve, born in 1939 and hailing from Amsterdam. In 1972, alterations were made to Hoeve’s home for which around 30 square metres of sheets containing asbestos were used. The sheets were trademarked Nobranda and produced by Asbestona (later Nefalit). The work resulted in Hoeve being exposed to asbestos. In January, 2007, she learnt that she was suffering from mesothelioma, for which she held Nefalit responsible. Nefalit contested Hoeve’s claim, taking the position that:

- (a) Hoeve’s claim was statute-barred through too much time having lapsed;
- (b) it was not certain that mesothelioma had only one cause;
- (c) Hoeve had undergone only an extremely limited exposure during the work that she did or had done in 1972;
- (d) Nefalit did not know and could not have known in 1972 of the potential risk of an exposure to asbestos of extremely short duration, and
- (e) in 1972, there had been no legal duty to provide a warning with its corrugated asbestos cement sheets.

The court’s judgment was that Nefalit’s “limitations” defence was unacceptable on grounds of reasonableness and fairness and must therefore be rejected. To this the court added these remarks:

“It must be judged whether Nefalit at the time these sheets were put on the market, in 1972, was aware, or should have been aware, that serious health risks existed in relation to the working of sheets containing asbestos for those using the

⁷ Gerechtshof (Court) Arnhem 11 May 2010 concerning Nefalit/Schraa, Wolting. In this instance Nefalit, subsidiary of Eternit, had already taken the case to the High Court.

product, of which warning should have been given. A producer does after all in general incur blame should it not take those measures which may be demanded of a careful manufacturer in order to prevent a situation in which the product it brought on to the market causes damage in normal use for the purpose for which the product is intended. For side effects such as a serious health risk a warning must be given, even if the frequency at which the risk arises is low.”

Nefalit’s other arguments were also rejected by the court. Thus, the court concluded that Nefalit had acted unlawfully in relation to Hoeve and ordered the firm to pay damages to her. Nefalit resigned itself to the verdict.⁸

5) Liability of Manufacturers

Finally, a separate group of asbestos victims are those workers who have become ill as a result of exposure in their work, but where their former employer can no longer be held liable because the firm no longer exists, cannot be located or has gone bankrupt. For these workers there exists in the Netherlands the possibility to call to account not only their former employer but the producer of the asbestos-containing materials with which they worked. In order to do so they must demonstrate that they became sick as a result of the use of these materials and that the producers of the materials have neglected to issue a warning concerning their use, despite the fact that such a warning might be expected from the producer.⁹ In March, 2010, the court at Gravenhage found in favour of a certain Mr. Langezaal and against Eternit, as producer. His own employer could not be held liable by Langezaal, who had worked as a carpenter between 1956 and 1967, during which period he was exposed to asbestos, because the firm which employed him no longer existed.

International Solidarity

In many of the legal cases discussed above, in addition to the extensive scientific documentation and support of Dutch experts, the knowledge and information supplied by foreign experts in the area of asbestos have played an important role.¹⁰ It is good to be able to take this opportunity to record the fact that through this unselfish international mutual support many victims of asbestos have been able to realise a stronger position in relation to the internationally organised asbestos industry.

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⁸ Verdict of the Amsterdam court, Hoeve/Nefalit 24 June 2009.

⁹ Verdict of the ’s-Gravenhage court 3 March 2010 concerning Langezaal/Eternit. Eternit appealed this verdict.

¹⁰ Namely, B.I. Castleman, G. Tweedale, J. McCulloch, L. Kazan-Allen and M. Peacock.