

7. A TRIAL WITH FAR-REACHING IMPLICATIONS

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On 4 July 2011, Turin public prosecutor Raffaele Guariniello concluded his statement of case by calling for 20-year jail sentences against the two men in the dock – Swiss billionaire Stephan Schmidheiny and Belgium’s Baron Louis de Cartier de Marchienne.

The Turin trial is special – obviously not for being the first time the asbestos industry has found itself in the dock, but rather due to the conflation of three things:

1. It is the outcome of nearly half a century’s direct worker action for criminal justice driven basically by Eternit’s Casale Monferrato factory workers.
2. It is a criminal trial focused on the social and public policy import of cancers caused by work.
3. It is the first time that representatives of the Eternit group’s top decision-makers have been indicted for the consequences of what they have done in a particular country. This gives the trial transnational importance.

A Trial Crowning nearly Half a Century of Direct Worker Action

One thing that sets the Turin trial apart from other trials is its storyline of workers and the population of Casale Monferrato forming a collective actor. In many other cases, especially in class action litigation in the United States, a collective actor tends to emerge as the result of legal action. "Victimhood" becomes a clustering force built up by the momentum of a trial. The Casale Monferrato situation is very different. Awareness of the dangers of asbestos grew out of direct worker action that gradually became radicalized and spread to the community as a whole. It was a process punctuated by lawsuits of one kind or another – not all successful – but was not shaped by them.

By and large, the monumental investigative work carried out by the justice administration authorities could only be done because of the collective memory developed with its own means of recording and investigating facts. Direct worker action found ways of taking critical ownership of the reality of work. It produced alliances between workers and scientists. It challenged the establishment’s take on reality. This self-empower-

ment through knowledge comes through with clarity in the detail with which the trial was able to delve into the history of working conditions, the business organization and the health impacts of Eternit’s business. It was an indispensable foundation for an innovative reinterpretation of classical legal concepts like causality, liability and deliberate tortious intent.

The wide-ranging judicial investigation unearthed 2,969 cases – more than 2,200 deaths and some 700 cancer sufferers. The roll of death in Casale Monferrato reads: around 1,000 Eternit workers, 500 local residents and 16 sub-contract workers. Added to those are some 500 cases in Bagnoli near Naples, 100 in Cavagnolo in the province of Turin, and around 50 in Rubiera in the province of Reggio Emilia. The liability of Eternit’s boardroom for the deaths of 11 Italian workers who had worked in Switzerland will also be looked at. This part of the case was one of the hardest to put together as the Swiss National Accident Insurance Organization (SUVA) long refused to hand over the records until it was forced to do so by a Swiss court order.

Eternit’s Casale Monferrato factory started up in 1906. Located near the Balangero mine, it was a major production centre for asbestos cement goods, especially the renowned corrugated sheeting synonymous with the name Eternit. The Balangero mine’s output could not keep up with production demand. Casale Monferrato had the dubious claim to fame of sourcing its asbestos supplies from countries in four continents – Brazil, Canada, South Africa and Russia. Up to 1980, the asbestos bags were unloaded and slit open by hand, and their contents forked into huge silos. The production process at this stage differed little from peasant farmers’ hay-gathering techniques. So severe was the pollution that the factory seemed shrouded in a permanent haze. During the second world war, US bombers’ repeated attempts to blow up the strategically important Po bridge failed, with pilots reporting a bizarre atmospheric phenomenon whereby the small town seemed to be enveloped in thick white clouds in all seasons.

Eternit was a paternalistic business, and offered its workers free asbestos cement “tiles”. The bags the asbestos had come in could be taken home and used to harvest potatoes. Local people were free to take the

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factory spoil to use for roof insulation, or garden paths. It was a soothing paternalism when works medical officers gave assurances that working with asbestos carried no risks. Workers who voiced concerns might be provided with largely useless protective equipment. But it turned harsh and repressive when challenged. One production shop universally known as the Kremlin was situated in a canal-side building on its own. This was where exposure to asbestos was the highest. It was where the tubes and pipes were finished, turned at breast height in a very low-ceilinged room. This is where management put activists from the Italian General Confederation of Labour (CGIL) to work. Few workers exiled to the Kremlin saw their 60th birthday.

The first workers' struggles against asbestos-related health damage date from the 1950s. Recognition of occupational diseases came in dribs and drabs: the first case of asbestosis was recognized only in 1947. The workers' growing realization was stonewalled by the company's constant denials. Since Eternit was adamant that the work was not dangerous, even the most basic protective measures were considered too costly. In 1961, the workers' discontent turned to strikes and protests that were savagely put down by the police. It would take another 20 years for the company to yield for the first time to union demands.

Bruno Pesce, who headed the Casale Monferrato labour federation from 1979, focused union demands on health protection. A wave of strikes and shop-floor meetings followed. The unions won the right to have a study on harmful exposures carried out by the Pavia institute of occupational medicine, with union involvement and oversight. Union reps would tour the plant with the researchers and technicians, pointing out where samples should be taken. The field work took 40 days, and found very high levels of exposure to asbestos. The employer's response was two-pronged: an attempt to break workers' unity by claiming that improvements could be made, but only if comparatively high danger money payments (24,000 lira a month for the workers most exposed to asbestos dust) were scrapped; and setting up an employer-controlled occupational health service whose first newsheet cautioned workers against smoking! This provoked a two-hour down-tools. The CGIL union decided to hire its own well-qualified doctor, Daniela Degiovanni, who helped uncover the monstrous truth: hundreds dead of mesothelioma and lung cancer; thousands more suffering lung diseases and other asbestos-related conditions.

In 1986, the factory shut down when Eternit's local subsidiary went bankrupt, but the toll continued to rise. The latency period between exposure to asbestos and the de-

velopment of cancer may be up to forty years. And so polluted was the environment that most of the population of Casale Monferrato were constantly exposed to high levels. People in Casale Monferrato are still dying from asbestos: new mesothelioma cases are currently running at around 40 a year, and epidemiologic projections suggest that this will continue until 2015-2020. Casale Monferrato has a population of around 35,000.

At an international conference held in parallel to the trial in March 2010, Bruno Pesce retraced the history and singled out the key features of the direct action movement.

The approach throughout the 1950s and 1960s was to monetize the risks. Workers focused on the physical strain of work, the high noise levels, and dust-filled workshops with the main aim of getting compensation in the form of higher pay. There was no question at the time of looking for an alternative to the production of asbestos-containing materials.

From 1968, the struggles took a more radical turn. An alliance was formed between union reps and doctors conscious of their social and political responsibility for tackling disease. Work organization became central to the agenda. There was no specific demand to scrap asbestos, but a growing conviction that the bosses should not have the sole say on production objectives and methods. It was a time of creative ferment and critical thought which in Italy more than elsewhere in the world was to engage the heart and soul of an entire generation of the labour movement.

Unlike in other factories, local environmental demands and workers' interests in terms of jobs and wages coalesced in the 1980s. The factory shop stewards' committee would organize the growing community opposition to the Eternit group – an alliance fostered by the CGIL trade union confederation's relentless attempts to get the occupational diseases recognised, and the first actions for damages against Eternit from the early 1980s sparked by INAIL's (the Italian social security system's occupational accidents and diseases branch) acceptance of a reduced risk premium on asbestosis despite Eternit's systematic failures in primary prevention.

In 1986, Eternit's Italian branch folded. The promised industrial redeployment never happened. A French Eternit affiliate offered to take over the factory provided it could carry on using asbestos. The union rebuffed the approach and backed the local council ordinance banning any production with asbestos in the Casale Monferrato area.

A first trial in 1993 found only local company managers in the dock. The Supreme Court of Appeal found the case proved for the death of one worker only, and imposed a very light sentence. Charges relating to all the other deaths were found to be time-barred.

Exposing Workers to Carcinogens can be a Crime

The Turin trial is unlike many asbestos-related lawsuits in common law countries where the main aim is compensation for victims. Criminal intent is not at issue in tort actions on liability, which are purely financial. The claimants argue that they have suffered loss that can be assessed in monetary terms. They give evidence that the defendant is at fault and that a causal link exists between that fault and the loss incurred. If they prove their case, they are awarded compensation ... provided the defendant is still solvent. Many multinationals have successfully escaped having to pay compensation through complex arrangements, whereby subsidiaries in countries where they were particularly exposed have filed for bankruptcy. The company that caused the loss may even get away without paying the compensation itself if it is insured.

To be sure, the dividing line between civil and criminal liability in some countries may be less hermetic where punitive damages are awarded. In certain conditions – which may differ between legal systems – the particular severity of the fault introduces a punitive element that is decided by a public authority (a court) and turned into private revenue (victim compensation). In a recent trial in Mississippi, for instance, a jury ordered Chevron and Union Carbide to pay \$322 million to a worker exposed to asbestos while working on drilling wells for the oil industry between 1979 and the mid-1980s [1]. The worker suffers from asbestosis and must use an oxygen assisted breathing system. This is the highest single payout to an individual in an asbestos case in the United States.

That being said, criminal impunity has symbolic political and social significance since it implies that where asbestos is concerned, mass murder is not seen as a sufficiently serious violation of public policy to be considered a crime.

The Turin trial is the latest in a series of prosecutions for exposing workers to asbestos. What is new, however, is that the charges differ from indictments in previous cases. The Italian criminal case law on asbestos can be very broadly summed-up as follows [2].

Most indictments have been on charges of manslaughter or negligent injury so as to look at the criminal liability

of employers in individual situations of workers suffering from asbestos-related diseases. Trials have focused both on diseases that can be considered as specifically resulting from exposure to asbestos (mesothelioma and asbestosis) and cancers that have a range of possible causes but for which there is epidemiological evidence showing a high probability that exposure to asbestos is implicated (mainly lung cancer). Reference to epidemiological data prevents the causal relationship being vitiated because no cancer carries the "signature" of a particular exposure. In a landmark ruling in 2002, the Supreme Court of Appeal held that there was no requirement to prove the precise mechanism of carcinogenesis in each individual, and that a high logical probability could be deduced from epidemiological data and statistics [3].

Sentences have generally been based on three provisions of the Italian Penal Code. Article 40.2 specifies the criteria of causation that must be considered in criminal matters. It provides that "failing to prevent an event where there is a legal duty to do so is equivalent to causing it." Article 589 contains the offence of manslaughter while Article 590 criminalizes culpable injury to the person.

The legal duty to ensure a healthy and safe workplace derives from a body of health and safety at work legislation. There is a fairly consistent body of case law to say that such a duty of safety existed where there was sufficient scientific knowledge about the consequences of exposure to asbestos. The Supreme Court of Appeal was clear that an employer's duty of care included taking all technically possible preventive measures and was not limited to mere compliance with statutory limit values.

The Turin trial's take on what law applies to the facts is different. It is based on two types of offence.

Article 434 of the Penal Code contains the offence of malicious commission of a disaster, i.e., a tortious act or omission which caused an outcome foreseen and desired by the person committing it.

Article 437 deals more specifically with working conditions and concerns the malicious removal or omission of protection against disasters or injury in the workplace.

More than technical issues about the definition of offences, this approach focuses on the collective aspect of business, technical and work organization choices by Eternit top management. "Disaster" as a concept goes beyond just multiple unlawful deaths and may well af-



Photo from documentary: Dust - the Great Asbestos Trial

More than 100 journalists and 150 lawyers, along with asbestos victims, their families, and members of the public who could get tickets, pack the courtroom for the first day of the trial in Turin, December 10, 2009.

ford better insights into the full implications of an Eternit-style process of capital accumulation.

One further thing must be said. As with developments in French case law, this asbestos trial is not a case unto itself. The criminal case law on asbestos meshes together with that dealing more generally with all the hazards of work. To argue this further is beyond the scope of this article, but reference can usefully be made to the landmark trials on the Porto Marghera cancers from exposure to vinyl chloride which culminated in a Supreme Court of Appeal ruling of 19 May 2006 [4].

Where work accidents are concerned, it is worth mentioning that on 15 April 2011, the same Turin court currently sitting in judgement on Eternit's top executives handed down a 16 ½ year prison sentence to Herald Espenhahn, managing director of the multinational ThyssenKrupp, for a fire which led to the deaths of seven workers. Four other company executives received jail terms of 13 ½ years. To be sure, this case is different, but the legal arguments around the notion of intent could set a precedent on which the court will rely when deciding the Eternit case.

Group Top Management on Trial

In the Turin dock stand Stephan Schmidheiny and Belgium's Baron de Cartier de Marchienne. Stephan Schmidheiny comes from a family prominent in Swiss economic and political circles which for almost a cen-

tury has been the biggest shareholder in Eternit. It has managed to forge the most varied networks of alliances. During World War Two, the Nazi authorities supplied it with slave labour for Eternit's Berlin factory. Art collector, philanthropist, and the driving force in many networks to promote a new green capitalism, Stephan Schmidheiny has been a leading light of an employers' association – the World Business Council for Sustainable Development.

Stephan Schmidheiny played a key role in the Eternit group's asbestos industry branch from the mid 1970s, where he established a policy of risk denial and double standards on a world scale, delaying the elimination of asbestos in the least developed countries. As Sergio Bonetto, a lawyer for some of the victims, puts it: "Unfortunately for them, Swiss industrialists are meticulous sorts: everything was written down and centralized. For example, we have proof that in Switzerland, all the asbestos samples were controlled and that production parameters were set by dust contamination standards that differed with the country" [5].

Baron de Cartier de Marchienne is a doyen of the Belgian economic establishment who held executive responsibility in the Belgian branch of Eternit (subsequently renamed Etex), and direct management responsibility for Casale Monferrato from 1966 to the early 1970s.

The Turin trial has brought much evidence to show how the two arms of Eternit management - Belgian and Swiss – tried to airbrush away the dangers of asbestos and stave off a ban. On Schmidheiny's watch, Eternit saved money by cutting down on preventive measures while spending on PR. A police search of the offices of lobbyist Guido Bellodi found that from 1984 Stephan Schmidheiny put money into misinformation campaigns in Italy. A journalist infiltrated the Casale Monferrato asbestos victims committee and Judge Guariniello was put under surveillance [6]. Papers found show that Eternit "invested" in buying scientists, prominent politicians and trade unionists, and journalists.

The Turin trial stands in marked contrast to the apathetic criminal justice systems of Belgium and Switzerland where the same industrial group wrought similar havoc. The Casale Monferrato story is not much different to that of other Eternit group factory towns like Payerne in Switzerland and Kapelle-op-den-Bos in Belgium. The legal inaction in both countries is not down to significant differences in the criminal law, as by and large the same offences charged in Italy are found in Belgian and Swiss law. The differences stem much more from the social dynamic around what Eternit was doing, rising from the labour movement to the media and government. Nothing has dented the respectability surrounding the Eternit group's ruling families in their countries of origin. Fortune brings its own fame and Stephan

Schmidheiny's conversion to green capitalism has earned him more bouquets than brickbats.

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The first ticket for the trial - courtesy of Yvonne Waterman.