

9. DISPENSING JUSTICE TO ETERNIT’S VICTIMS – THE FRANCO-ITALIAN EXPERIENCE¹

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APPENDIX: THE CIVIL SUIT WITHIN THE CRIMINAL TRIAL IN ITALY

Sergio Bonetto

On September 24 of this year, 2011, while the trial of an emblematic case involving two Eternit industrialists continued in Turin, the Association for the Defense of Asbestos Victims in the Tarn Department, France (AD-DEVA 81) unveiled a stele in memory of workers and other victims of the Eternit factory in Terssac, near Albi in France (see box below). On that day, and with complete impunity, the heads of the factory were “celebrating” its fortieth anniversary! And yet in Terssac as in Casale Monferrato, asbestos has killed many people.

This text examines the strategies being used in France and Italy for obtaining justice for asbestos victims, and attests to the urgency of creating a full-fledged international criminal court for cases involving workers and the environment.

Excerpts of a speech delivered on September 24, 2011, by Jean-Marie Birbes, President of ADDEVA 81

1971-2011: Forty years: a history, our history, made of suffering and struggles but also comrades and hope.

The 1970s: The inter-union collective of the two Jussieu universities [University of Paris 6 and University of Paris 7] and women workers at Amisol decide to join forces to alert French society to the dangers of asbestos. The scandal breaks. Eternit France, headed by the Cuvelier family, is part of a network of European Eternit companies ...

July 1996: Monsieur Barot, then labor minister, announces the banning [of asbestos] as of January 1, 1997. That same year, the national association for the defense of asbestos victims (ANDEVA) is founded. ANDEVA grew out of the synergy of revolt, the revolt of professors’

widows, who filed a lawsuit at Gérardmer, and of workers and retirees with asbestos-caused diseases: workers at Amisol, in the naval yards, at the Arsenal, Eternit, Everite, in the steel industry, together with association activists, unionists, journalists and a few occupational health professionals and researchers. And in 1996 our Association too was created. ...

The problem of the criminal responsibility of the [company] directors in place at the time remains to be dealt with. The first lawsuit was filed in 1996 by comrades at the Thiant factory, backed by the CGT’s Construction Federation. Some time later, lawsuits filed by the widows of Terssac factory workers were approved for trial by the state prosecutor in Albi, who transferred the case to a judge in the public health section of the Paris court.

This is what is at stake in our combat today.

In France: the shift from “inexcusable offense” (*faute inexcusable*) to “anxiety damage” (*préjudice d’anxiété*)

When the scandal of asbestos-injured workers first surfaced in France, worker-victims of asbestos and their lawyers chose the strategy of filing a civil suit for “inexcusable offense” on the part of an employer – an infrequent move in France before that time. Victims suffering from an officially recognized occupational disease or their legal successors can sue an employer if they can prove he or she has committed what is called an “inexcusable offense,” implying a deliberate breach of official safety and hygiene regulations. In its legal decisions of February 28, 2002, concerning “inexcusable offenses” by employers who processed or used asbestos or asbestos products (decisions considered historic in France), the Court of Cassation chamber in charge of judging labor-related cases put an end to the myth that the company heads in question were unaware

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of the dangers of asbestos, demonstrating that those dangers were already known in France at the turn of the century [1]. Worker-victims of asbestos and their families have won thousands of “inexcusable offense” cases in French courts since 2002.

Faced with a wave of such cases, the public authorities decided in 2000 to create a fund for compensating asbestos victims, the FIVA. The law stipulates that the FIVA may turn around and sue employers for “inexcusable offense” when there is reason to believe such an offense has been committed. While the FIVA has enabled asbestos victims to obtain compensation who otherwise would only have obtained it after extremely long trials, it also definitively curbed the filing of “inexcusable offense” lawsuits by asbestos worker-victims, thereby transferring the burden of compensating those victims from the industries who committed the “inexcusable offenses,” and should therefore have to pay for them, to a common fund for occupational injuries and diseases called “ATMP” to which all employers contribute, and to the state. Eternit even managed to get out of paying anything at all in “inexcusable offense” cases won by its former employees by getting the courts to have “inexcusable offense” claims paid by the common ATMP fund due to errors in the procedure for officially recognizing that the victims in question had an occupational disease. As for FIVA suits against employers, they brought in less than 4% of the overall total of €2,782 million paid out by that fund to asbestos victims from 2003 to 2010. Clearly asbestos companies in France have not been forced to bear the financial burden of compensating the victims for whom they were responsible.

In 1996, Eternit workers and their families also filed a suit in the *criminal* court. This case is still in the pre-trial investigation stage. At a hearing in 2005 held as part of the French parliament’s asbestos fact-finding mission, the investigating magistrate Marie-Odile Bertella-Geffroy, coordinator of the public health section of *Tribunal de Grande Instance* of Paris (the rough equivalent of a county court), challenged the attitude of the public prosecutor’s office in the following terms: “The fact that the public prosecutor’s office never itself opens a preliminary investigation is a problem: [it is never] the issue of the public health disaster itself or all the people affected by it in a given company [that gets handled] but only the file of a single victim or several victims, as in the contaminated blood scandal [contamination by the AIDS virus of blood used in transfusions]” [2]. In France, then, no prosecutors have opened any pre-trial investigations against those responsible for the asbestos-caused health disaster.

But other means have been used to bring the matter before the criminal courts. In a suit against the multinational corporation Alstom for “endangering others’ safety,” the corporation and its directors were ordered to pay damages for “causing anxiety” to employees exposed to asbestos. This decision has become a legal precedent. According to the court-approved definition, “anxiety damage” is “damage caused to a victim by knowing that he or she has been contaminated, regardless of the nature of the contamination (biological, physical or chemical), when that contamination carries with it the risk that a life-threatening pathology will appear in the near or more distant future” [3]. In cases of causing “anxiety damage” the company’s criminal responsibility is recognized and the company itself must pay all related damages.

In Italy: suing bosses of the multinational corporation Eternit for their criminal strategy

The Eternit trial in Turin represents a judicial turning point in the international history of cases against asbestos industrialists. It targets the strategic behavior of a few heads of multinational asbestos firms, those who organized the international-scale disinformation campaign on the health effects of asbestos that led to disaster not only in Italy but everywhere that asbestos was being used. The conditions for compensating Italian victims in this case are described, in the appendix to this article, by Sergio Bonetto, a lawyer for some of the private parties associated with the public prosecution.

Here I will just indicate some points of comparison with the French situation. Firstly, in Italy it is the public prosecutor himself/herself, independently of the political authorities, who takes the case to court. Secondly, the criminal case bears on the responsibility of a production system and an overall type of work organization that extends far beyond local or national boundaries. The accused are international-level decision-makers who deliberately exploited the fact that the health effects of asbestos appear only after a certain time lapse. Lastly, any damages granted in this trial must be paid in full by the companies associated with the accused industrialists. The judges in Turin should be reaching their decision in the coming months, whereas in France we are still waiting for an actual trial to begin 15 years after the victims’ lawsuits were filed.

Conclusion

Whatever the differences between the French and Italian strategies, the judicial progress made, thanks to the committed involvement of a wide range of different

actors in the two countries, suggests the urgency of taking industrialists to court at an international level. The market for asbestos is flourishing in India, China and many other countries. This industrial crime will only cease when the impunity of the people running

these companies is shattered. This is what we must fight for in the years ahead.

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Appendix

THE CIVIL SUIT WITHIN THE CRIMINAL TRIAL IN ITALY³

Sergio Bonetto⁴

The civil suit within the criminal court trial in Italy is regulated by the penal code. This means that the penal system principles determine the limits within which a private party can act within a criminal trial.

Above all it should be specified, especially for readers familiar with legal systems in English-speaking countries, that the Italian system, like most systems of Roman and Napoleonic origin, is based on the compulsoriness of engaging in criminal proceedings. That is, through the penal code or specific laws, the state defines all conduct it considers criminal and sets minimum and maximum sentences. If such conduct has occurred (and the judicial authorities are made aware of it in any way), then a criminal investigation must be conducted. The institution qualified to conduct such investigations is the Public Prosecutor's office.

These are secret investigations, in which the Prosecutor is entirely independent and at liberty to use, guide and assign specific tasks to the criminal investigation department and any technicians and specialists he or she deems necessary. In this phase, private persons who deem they have been harmed by the offense in question can appoint a defense lawyer who may in turn furnish documents and information to the Prosecutor, thus indicating the names of people familiar with the acts under investigation. The Prosecutor is under no obligation to use such documents or to hear persons with knowledge of the acts in question.

All persons heard by the Prosecutor are interrogated without legal assistance (not to mention the presence of the lawyer for private party-victims associated with the Prosecutor), unless the Prosecutor himself informs one or several witnesses that an investigation is under way against them. In that case, only indicted persons can have a defense lawyer and the victim cannot participate in the interrogatory.

When the investigation is complete, the Public Prosecutor's office must have the results evaluated by a judge, making available to him or her all the documents collected in the investigation process. At a special hearing in which both defendants' and private plaintiffs' lawyers actively participate, the judge has to decide whether the necessary conditions have been met for taking the case to trial or if instead further investigation is necessary or the case should be dismissed. A trial is held only if this first judge finds that the necessary conditions have been met. Trial judges are different from the one who decided the case could go to trial.

Another characteristic of the Italian penal system which distinguishes it sharply from others (particularly systems in English-speaking countries) is that in Italy only physical persons can be held criminally responsible.

The penal code can only be applied to physical persons. No legal entity (organization, company, institution, association or party) can be charged with a crime or sentenced.

A company cannot be indicted or sentenced for murder or pollution of the environment; only the person running the company at the time the crime was committed can be so indicted or sentenced. However, companies and legal entities in general can participate in the penal process, either as victims or as civil entities responsible for the harm caused by the defendants. In the first case, legal entities assume the status of private parties to the prosecution, like any private person. In the second case and with the court's permission, private plaintiffs can bring legal entities that are financially responsible for the damages caused by physical-person defendants into the trial.

Clearly, then, penal action by the state, action against physical persons accused of violating criminal law, is at

³ Appendix translated from Italian to French by Laura Centemeri; then translated from French by Amy Jacobs.

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the center of the Italian penal system. No other parties – crime victims, persons who have suffered damages, companies financially responsible for defendants’ conduct – are considered necessary components of the case. On the contrary, and at the extreme, they are often thought of as impediments because in these trials only two main actors are absolutely indispensable: the public prosecutor (*la pubblica accusa*) and defense lawyers for the accused. In fact, the accused are not even required to take part in the trial, since all that is required is the presence of lawyers with the necessary powers of attorney. If the defendants have not hired their own lawyers, the Court appoints them a lawyer as a matter of course.

This arrangement creates obvious disparities in how the different parties are treated, especially when the number of “non-indispensable” parties is high. Given that, for the system as a whole, having the trial proceed properly is a higher priority than any demands by “accessory” parties, it often happens that those parties find themselves limited in number or that the Court refuses to hear witnesses, let documents be produced or let those parties or their lawyers have the floor for more than a few minutes.

The reason justifying this disparity is the presumed difference between the demands that private parties may make and the state’s prerogative to exercise its fundamental punitive role. Indeed, in criminal trials, private parties associated with the prosecution can *only* claim compensation for the injuries *they* have suffered. They can only claim in the criminal trial what they could sue for in a civil case. They are only allowed to be present in the criminal trial for reasons of “procedural economy”; that is, to ensure that a single trial – the criminal one – will fulfill the state’s function of punishing criminals *and* meet claims for compensation by persons who have suffered from that criminal’s conduct.

If it appears likely that assessment of the damage claims of private parties to the prosecution will slow down the criminal trial, then the criminal court can decide not to recognize those parties’ claims and to send them instead before a civil court, which will examine them in relation to civil law only *after* the criminal case has been definitively concluded.

An important clarification is required here: “definitive conclusion” means the definitive sentence, which in Italy is determined only after three judicial levels (*gradi di giudizio*) have intervened: the court, the appeals court and court of cassation. From five to ten years is usually required for all these levels to reach their consecutive decisions.

The alternative available to private parties in a criminal case is to take their case to civil court from the outset. In this case, it is up to the suing party to prove all its assertions against the party being sued; legal costs are high; there is of course no *publica accusa*, and such trials generally take much more time than criminal court cases.

It has been rightly claimed that the Italian trial system does not adequately protect crime victims and more generally those who have suffered a wrong (damage?). But that’s the system.

To sum up, anyone who thinks they have suffered harm due to a crime has to act in person if they wish to collect damages; they can interfere only slightly in the criminal trial process and have no influence on the sentence. On this point also, victims (i.e., private parties associated with the prosecution) can have only an indirect role.

Having paid out damages already is a mitigating circumstance for persons convicted of a crime, but it in no way exonerates them from sentencing if the court finds them responsible.

The state never surrenders its punishment prerogative. If the victim states that he or she has been fully compensated and the court finds that compensation adequate (*congruo*), the base sentence alone is reduced. On the other hand, if the court finds that compensation amount too low, it will not take the act of compensation into account. The opposite also holds: if a convicted defendant refuses to pay damages, this is considered an aggravating circumstance and the base sentence can be raised.

This arrangement is fairly complex and I have given only a rudimentary description of it. There are many possible complications I have not mentioned, but in general it can be said that crime victims are not likely to obtain any material results in a reasonable length of time.

It is clear that victims’ choices in such a context are always difficult and debatable. The difficulties increase when there are a great many victims suing for damages and not all of them are in the same situation, as in the Eternit trial in Turin.

An example: prescription in criminal cases and civil suits

In criminal cases the prescription period is the amount of time the state has to obtain definitive recognition of

the defendant's guilt. In Italy it is determined at the end of the trial on the basis of the real sentence, and in general it corresponds to the theoretical sentence times 1.5. For example, a 10-year sentence equals a 15-year statute of limitations. If the acts for which the defendant was indicted occurred more than 15 years before he is convicted, then prescription or statute of limitations applies (it may also take effect during the trial process itself). This mechanism explains how Berlusconi could be found "responsible" in four cases without being sentenced: the crimes of which he was accused were already prescribed. In cases where the defendant is acquitted due to the statute of limitations, victims of the crime can sue for damages in the civil courts – that is, if their claims have not themselves been "prescribed."

The prescription period in civil cases is timed from the moment a victim becomes aware that there has been damage and that it is possible to identify someone as responsible for it. Usually, in such cases, the victim has ten years to file a written claim for damages. In civil suits the prescription period can be "extended" indefinitely if the claim is renewed every ten years. If the victim takes the case to court, the prescription period is definitively interrupted and trial time does not count.

Once again, the reality is much more complicated than this description of it, but even from the aforesaid rules it is obvious that it is virtually impossible to make realistic predictions about how a trial will come out – there are too many variables.

In the Eternit trial in Turin, for example, it is reasonable to assume that even if the accused are convicted and sentenced as criminals, not all victims and associated private parties will be compensated. It is very likely that some will not be, because they will not have been able to demonstrate the reality and impact of the damage (due to the extremely tight restrictions the court imposes on presentation of evidence by private parties to the prosecution). Others will not be able to do so because the prescription will have kicked in (there are cases in this trial that date back to the 1970s!). Obviously I hope this will not happen. I am simply making a reasonable prediction – I hope it will prove wrong.

In any case, in addition to the fact that it is extremely hard to predict whether one's claim to damages will be recognized, there is the unpredictability of how much time will be needed to actually obtain payment, since the two defendants in this case are foreigners. It may be that when all the trials, criminal and civil, are over, those defendants will spontaneously refuse to pay damages, a situation which would then require getting a civil execution order in Switzerland and Belgium. The

time and cost entailed should this occur cannot be calculated at the present time.

So much for the very real uncertainties that private parties to the prosecution are facing in this case. As always in such cases (e.g., multiplaintiff suits against fraudulent banks), any offers to settle on the part of the accused and the companies responsible for paying damages are considered with the greatest attention.

In the Eternit case, for example, the "Belgian side" (criminal defendant plus civilly – financially – responsible company) have never made any offers. So here the case will have to go through the entire process just described, with the hope that the Belgian defendant, 88 years old, does not die in the meantime or get himself certified unable to testify, for then the criminal case against him would be dismissed in accordance with the above-cited principle that a criminal case can only be filed against physical persons.

The "Swiss side" of the case is different. There the defendant, through the intermediary of various companies implicated in the case as civilly responsible, has made several partial settlement proposals, probably to appear less "extremist" than the Belgian defendant; also to settle most individual cases for fairly low amounts of money.

Shortly before the court debates began approximately two years ago, the Swiss defendant made a unilateral settlement offer to the workers and citizens of Casale Monferrato, an offer then extended to the same groups in other locales implicated in the case. That offer is complex but in substance the proposal was to pay a certain compensation amount immediately to some of the victims suing for damages through the Association of Asbestos Victim's Families of Casale Monferrato – recipients identified by chronological criteria of length of residence and real employment – in exchange for their abandoning all civil suits against the defendant S. Schmidheiny and any claims against the various Swiss companies involved.

The amount for individuals is very low, approximately 5% of what the court might recognize and limited to €60,000 per family, but it has been accepted by most of those concerned and the money has already been paid out.

Furthermore, in the last few months the Swiss defendant has offered to pay damages of €2 million to the smallest of the municipalities involved (Cavagnolo, approximately 3000 inhabitants) so that the city can pay for asbestos decontamination and cleaning activities.

The town Council of Cavagnolo has accepted this offer, arguing that the money could be used immediately and estimating that the amount was equivalent to two years' city expenses. It may be that other settlement proposals will be made to other private parties to the prosecution before the trial ends.

This type of settlement has certainly not had a great effect on how the case is proceeding: individuals and cities who initially sued both defendants but have now been paid damages by the Swiss one are now suing only the Belgian defendant as parties to the public prosecution in the criminal case. Given that they have received only partial rather than total compensation, the sentence the prosecutor is calling for against the Swiss defendant has not been reduced and remains the same as for the Belgian defendant: 20 years.

On the basis of the preceding description, it is important to stress that “big trials” have to cope with realities that may not be very “poetic” and are in fact full of uncertainties and risks. And for the victims the final result is never guaranteed.

To establish uniform procedures in all countries and guarantee trial length and concrete results for victims, it is important to act in favor of setting up an international court competent to judge crimes that bring about environmental disasters.

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Ban Asbestos France members demonstrate in support of Italian victims in Turin, April 2009. Photo: Annie Thébaud-Mony.