

16. BELGIAN FAMILY WINS HISTORIC COURT CASE AGAINST ETERNIT

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Introduction

On November 28, 2011, after eleven years of litigation, Belgian pilot Eric Jonckheere (52) and his family won a civil case against Eternit, the fourth largest producer of asbestos materials in the world. At stake was the tortious death of Françoise Jonckheere (67), Eric's mother, who died of mesothelioma caused by exposure to asbestos on the contaminated work clothes of her husband, who worked at a Belgian Eternit factory, and by environmental exposure from that same factory. Together, the claimants were awarded the sum of €250,000 for economic and non-economic damages, effective immediately. The scathingly phrased verdict is considered to be ground-breaking in Belgium, where asbestos litigation has not occurred before due to constricting liability and social security laws. According to official (Asbestos Fund) literature, over 200 Belgians die of mesothelioma every year; the Belgian victims' group ABEVA believes the figure to be much higher. Eternit has already announced it will appeal the verdict, which, given the company's truculent attitude in litigation, will surprise nobody.

How the Case Started

For many years, the Jonckheere family lived besides the Eternit factory in Kapelle-op-den-Bos, where Pierre Jonckheere was employed by Eternit. Father Pierre, mother Françoise and their sons Eric, Pierre-Paul, Xavier, Stéphane and Benoit lived and grew up there, in a house close to the factory and right next to two designated areas of discarded asbestos waste material. The Jonckheere children used to love playing there with their friends, whose fathers also worked for Eternit. Asbestos would be trucked into the factory in open wagons, covering the entire area in a permanent thin layer of asbestos dust. The first alarm bells rang in 1977, when the RBTF TV programme "Autant Savoir" spelled out the dangers of asbestos to viewers. After watching that, Mr. Jonckheere promptly went to his supervisor and asked for clarification. Eric remembers what his father told him happened next: "The supervisor

brushed some asbestos dust together on his desk, pinched it up with his fingers and then swallowed the dust with a smile. He said: 'surely I wouldn't do this if it were dangerous, now would I?'" And that was that. In 1986, Pierre Jonckheere started coughing and died six months later.

In early 2000, Eric's mother Françoise – co-founder of the Belgian asbestos victims' group ABEVA – decided to sue Eternit for damages. At the time, she herself was already close to death with mesothelioma. Eternit offered her the customary "silence money" of some €42,000 if she agreed not to litigate. But Françoise refused and on her deathbed, only some months later, charged her five sons to continue the lawsuit she had begun that year in order to call Eternit to account. In 2003 and 2009 respectively, sons Pierre-Paul and Stéphane also died of mesothelioma, only in their forties. Their widows and children were entitled to continue the case as heirs to the claim and joined their brother-in-laws and uncles. So at the end of the day, Françoise Jonckheere's case is continued by her remaining sons, daughter-in-laws and grandchildren.

Eternit did not stop producing asbestos materials in Kapelle-op-den-Bos until 1998.

Eric explains the anxiety that plagued the family after their discovery that asbestos exposure could be fatal:

"My mother mainly worried about us, the five children. 'I have washed my husband's clothes, stroked his hair, kissed him. Perhaps that is how I inhaled asbestos. But what about our boys?' We had ourselves, all five of us, checked for asbestos. It turned out that all five of us were chock-full of asbestos. That was doubly hard to accept. We weren't surprised that asbestos was to be found in our bodies, but rather by the amounts: as much as a labourer who had worked all his life at the Eternit factory."

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Understandably, one question now clouds every day's joy for Eric and his two remaining brothers: who will be next?

Some Legal Aspects

It was not possible for father Pierre to claim damages from Eternit, as, according to the Belgian Occupational Diseases Act, employers are immune to civil liability, except where wilful intent of the employer to cause harm can be shown. However, this immunity would not apply to Françoise nor to her sons, as they had not been employed by Eternit – and they were therefore not barred from litigating against Eternit.

In March 2007, the Belgian government established the Asbestos Fund. This provides asbestos victims with compensation quickly (ranging from approx. €1,500 per month to the mesothelioma victim, while living, to one-time payments of approximately €33,000 for his partner, €17,500 for ex-partners and €27,600 for every child; and similarly about half of this for victims of asbestosis and pleural plaques). The Fund is fairly easy-going on the question of how the asbestos disease was contracted. But there is a downside: by applying, asbestos victims give up the right to go to court against the tortfeasor. The Asbestos Fund is wholly financed by taxes paid equally by each and every employer in Belgium, meaning Eternit pays no larger a share to this Fund than any other employer in the country. The Jonckheere family did not apply for asbestos related social security benefits from the Fund, as it would have denied them the right (individually) to go to court against Eternit. Legal aid amounts to little or nothing in Belgium: it is every man for himself, basically. Lawyers' fees are considerable and as such are considered to be very practical barriers to litigation. This explains to some extent why neither occupational victims nor environmental victims have litigated against Eternit before.

The Case for the Plaintiffs

The claimant's lawyer, Mr. Jan Fermon, based the case on two main arguments: that a) Eternit knew of the health dangers of asbestos as early as 1964 and that b) Eternit had tortiously failed to take adequate safety measures to protect its employees, their families and everybody in the environmental vicinity of the Eternit factory against asbestos dangers. Fermon said:

“That asbestos causes cancer was already known in the Forties and it was mentioned in the Encyclopaedia Britannica of 1952. The relationship between asbestos and mesothelioma has been known as of 1952 and has been established irrefutably in 1964. It's totally unbelievable that the

directors of Eternit were not aware of the problem.”

He pointed out that not only did Eternit keep using and producing dangerous asbestos materials, it lobbied actively to repress any ban or limitation:

“To do so, public bodies and the public itself were misled and pressure was exerted on labour unions and politicians. Even as late as 1978, Eternit refused to put warning labels on its products.”

The Case for the Defence

The defendant's lawyer, Mr. Johan Verbist, also relied on two main arguments for the defence: that a) the case was limited (“expired”) and should be dismissed out of hand for that reason and that b) the case lacked cause, as Eternit had never acted tortiously against Françoise Jonckheere and so had no duty to compensate any of the claimants. In support of this Verbist said:

“The previous CEO of Eternit NV and the company doctor also died of mesothelioma. Those people would never have worked with asbestos if they had known of the risk involved.” Also: “Mesothelioma was actually not [officially] recognised as an occupational disease until 1982.”

He explained that the dangers of asbestos really were not all that clear at the time of exposure as the claimants would have believed that safety measures had indeed been taken: “At first, it was assumed that health risks were related to direct exposure and so, through the years, the production process was adjusted thoroughly.”

On presenting his plea on the last day of the trial, Mr. Verbist was confident that the claim would be completely refuted. He stated that the company was saddened by the fact that people had become ill, but it was certain that no act of Eternit had caused this.

The Judge's Analysis

In a 48-page verdict, Judge Thiery of the Brussels District Court examined all the arguments extensively and, in rather unusually sharp language for a judge, denied all Eternit's arguments one by one. Considering that the environmental asbestos exposure had continued for many decades until late in Françoise Jonckheere's life and that the environmental damage around the vicinity of the Eternit factory and her home was extensive and still existing (as implicitly admitted), he denied the defendant's argument that the claim was limited, thereby allowing the case to be heard fully. He also made short

work of the second main argument that Eternit had not known of the health dangers of asbestos until the Seventies and could therefore not be faulted for not having taken safety measures until then, pointing out that after the Seventies, the level of safety measures was miserably and intolerably low, too:

“At the very latest, the relationship between asbestos and mesothelioma was known in 1967, but Eternit has always minimized the negative consequences and covered up the truth. The cynicism with which the company preferred the pursuit of profit above public health is unbelievable and it made every possible effort to continue the production of the extremely poisonous substance, without giving a hoot about the people who worked with it.”

That perhaps Eternit had acted no differently or worse than other asbestos companies at the time was no excuse: Eternit was to be judged according to its own merits. Much was made of a letter dated April 14, 1950, addressed to the Swiss SAIAC SA in which the Belgian branch of Eternit clearly professed to be aware of the health dangers of asbestos and the need for safety measures. Also, Judge Thiery considered the role of Eternit as part of a vast global conglomerate, in which scientific knowledge had been shared for many decades; the famous First Asbestos Conference in New York of 1964 had been attended by Eternit directors, etc.

Slamming Eternit’s lobbying efforts, the Judge stated:

“It has been sufficiently proven that Eternit has had its own share in the wrongful manner in which efforts were made to belittle the health dangers of asbestos and to cover up the facts and to fight against legislative measures for the protection of public health, when even at the time that it [Eternit] developed these activities, [it] knew with surety that exposure to asbestos involved a serious risk for the development of diseases such as asbestosis, lung cancer and mesothelioma.”

Judge Thiery considered that Eternit should have taken precautions for the safety of its employees and their families as early as 1965. He berated the firm for having little to show on this score, except for some sheets of unverified and uncertified papers detailing the financial costs of clearly inadequate safety measures when “*very drastic safety measures*” were required:

“The tort of Eternit, which caused the disease and death of [Françoise Jonckheere], has been

amply shown. [...] Rightly, the claimants state that Eternit has exposed [Françoise Jonckheere] and the other members of her family to an extremely toxic, cancer inducing substance, with gross negligence and full knowledge.”

Switching to the matter of compensation (with the emphasis on non-economic damages), the judge reflected on the importance for victims to receive recognition:

“as has been shown in the court case at hand to clearly be the case as evinced by the huge attendance in court. The compensation to be granted may then serve as an expression of this recognition and may possibly serve as a small contribution to the victims so that they may find their peace of mind even partially.”

Continuing, he ruled that as asbestos pollution is an international problem, the levels of awarded damages in other European Union countries, generally considered to be higher than those in Belgium, should be taken into account even if these countries have different legal systems. Judge Thiery acknowledged that Belgium did not recognize punitive damages (usually an almost unmentionable subject in a country that is quite averse to “Americanisms”). However, the attitude of Eternit had surely increased the measure of suffering of Françoise Jonckheere and her family members and this increase should be compensated concretely and accordingly.

The Verdict and Aftermath

The claimants were together awarded the sum of €250,000 in damages, to be paid at once, regardless of whether Eternit will appeal or not. The sum was explained as “5 × €50,000”, which, one might infer, would mean €50,000 for each of the five brothers or for his widow and children in his place, explicitly for both economic and non-economic compensation. Compared to similar compensations in other countries, this is really not that much: almost €500,000 for non-economic damages has been awarded in Italy, €150,000 in France. In The Netherlands, some €57,000 for non-economic damages alone is customary; and this country is actually habitually amongst the lowest ranked of European countries when it comes to non-economic damages. When one further considers that the Judge (according to Belgian rules of law) awarded an amount of merely €7,700 to be paid by Eternit to the claimants for their incurrence of legal fees, when surely eleven years of litigation must have cost them quite a number of times that amount of money, the compensation pales even more.

At the hearing of the verdict, an ecstatic Eric Jonckheere told the crowds of reporters that “just for a moment, my parents and my deceased brothers were with me.” He portrayed the case as that of a small family taking on a global industrial giant.

Mr. Fermon was pleased to tell the world that:

“An impartial judge has given a clear verdict on the way in which an industry has destroyed thousands of lives for the pursuit of money. I hope that this will be the start of a period in which the polluter will truly pay and the costs of this disaster which he has caused, will no longer be shifted on to society.”

The verdict has stirred Belgian politics; politicians are already discussing whether and how to improve social benefits for asbestos victims, to lengthen the period of

limitation, ways to make the asbestos polluter pay, etc. Whether other Belgian victims will follow Eric Jonckheere into court and what precedent value the verdict will have in the eyes of other Belgian judges, remains to be seen. Yet it seems fairly certain that the end of this tale will not be told for a long time.

One wonders, too, what the impact of this verdict will be elsewhere. For Eternit is indeed, as Judge Thiery reflected, a vast, worldwide conglomerate; and if evidence shows the top hierarchy of this conglomerate to have been aware of the health risks of asbestos at an early time, then this might well have considerable liability repercussions in law courts in other countries, even on other continents.

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NB: All translations included in this article were by the author.



Photo: ABEVA archive

An aerial view of the Eternit Kapelle-op-den-Bos factory, 1970s. In the foreground can be seen the Jonckheere's farmhouse (red roof, white walls).



Photo: Eric Jonckheere

The Belgian Press records the historic court victory.