

COURT OF APPEAL, ARNHEM

27 February 2007

Judgement
in the case of:

Hermannus Laurentius Jansman,
living at Wierden,
attorney Mr R.F. Ruers of Utrecht

versus:

the private company with limited liability
Eternit Fabrieken B.V.,
established at Goor, in the local authority district of Hof van Twente,
attorney Mr J.W. Bruidegom of Rotterdam

INTRODUCTION

4.1

Jansman, born on 5 September 1961, lived until 1983 in the home of his parents, a farm at 1, Kremersweg in Enter in the local authority district of Wierden. In 1967 his father paved the yard around the farmhouse with industrial waste containing asbestos, waste which came from the Eternit factory in Goor. Eternit produced asbestos cement, creating in the process waste containing asbestos. To get rid of it, this waste was put at the disposal of local authorities and private individuals. Around 1971 Jansman's father removed the waste and took it to a tip. In December 2005 the diagnosis was determined that Jansman had malignant mesothelioma, cancer of the lining of the lung or the abdomen.

Illegality?

4.5

Whether Eternit, judged by the standards prevailing in 1967, were guilty of negligence in their treatment of Jansman when they in that year put asbestos cement waste at his father's disposal, is dependent on the circumstances of the case as well as the question which the judge in interim injunction proceedings correctly took as his starting point, of whether in 1967 the social circle to which a producer such as Eternit would belong, had to have been aware of the health risks attendant upon asbestos to third parties such as Jansman.

4.6

It was already known during the first half of the twentieth century that the use of asbestos could involve dangers to health. Originally this concerned the danger of asbestosis consequent

upon the inhalation of fine asbestos dust. Personnel of firms where asbestos was processed were exposed to this, as well as those who were involved in sawing up, for example, asbestos cement plates (according to the Explanatory Statement attached to the legal regulation of 16 December 1949 regarding the prevention and combating of silicosis and other dust-related lung diseases, Exhibit 5 in the First Instance Jansman). Eternit has been aware since 1931 of the danger of asbestosis and the importance of applying precautionary measures, as is shown by a letter from the parent company Eternit SA Belgium dated 14 April 1950 to the Swiss SAIAC SA (Exhibit 6 in the First Instance Jansman), in which they wrote, amongst other things, that they were continually occupied with the application of precautionary measures for the personnel "(the need for) which we have for many years been aware" and moreover that it was "not subject to doubt that the general interest demands precautionary measures in all places where the danger exists." That Eternit were fully and in detail informed concerning the danger of asbestosis linked to asbestos can be seen from a letter from SAIAC SA to Eternit NV of Amsterdam, dated 6 July 1950 (Exhibit 7 in the First Instance Jansman) in which amongst other things is written:

We permit ourselves to return to both of your letters, of 14th February and 29th March 1950. In the meantime we have received from our members quite extensive scientific and statistical material regarding asbestosis, which will without doubt interest you and which we enclose..." (there follow 16 enclosures, court)

4.7

Although even before 1960 the disease of mesothelioma was already extensively known amongst scientists, while the suspicion of a link with asbestos was already evident (Exhibit 5 in the First Instance Jansman, the publication written by J.C.Wagner, C.A.Sleggs and Paul Marchand in the British Journal of Industrial Medicine, 1960, p.25, right-hand column), this connection, which would come to be generally accepted, was first persuasively demonstrated in J.C.Wagner et al's aforementioned publication from 1960. Furthermore, it referred not only to cases of "industrial exposure" to asbestos but also exposure of those living in the vicinity of asbestos mines, "childhood exposure". Interestingly, the first International Asbestos Conference was held in New York in 1964. That this conference actually came to the firm conclusion that some forms of exposure to asbestos, industrial exposure and exposure of those living in the vicinity of asbestos mines, could lead to the disease mesothelioma is not disputed (Exhibit 11 & 15 in First Instance Eternit, further Exhibit 27, page 68, in First Instance Jansman).

Consequently in 1965 the publication appeared of the study by M.L. Newhouse and H. Thompson, again in the British Journal of Industrial Medicine (Exhibit 9 in the First Instance Jansman). This publication was generally regarded as important evidence that mesothelioma was caused by both occupational exposure and contamination of the home, or "domestic exposure", stating that:

"There seems little doubt that the risk of mesothelioma may arise from occupational and domestic exposure to asbestos."

The danger of contamination of the home pointed, in this publication, to exposure of those sharing the homes of employees in the asbestos industry via their work clothes. In addition the article made mention of cases in which the only relationship between mesothelioma and asbestos which had been found involved "neighbourhood exposure", exposure to asbestos of those living in the vicinity of an asbestos factory. In the Dutch periodical Tijdschrift voor Geneeskunde (Journal for Medicine) also, a publication written by Dr J.Snijder appeared on 4 March 1967 (evidently based on the text of a lecture to the University of Amsterdam entitled "Clinical Lessons", as shown by the caption, "December 1966"; Exhibit 10 in the First Instance

Jansman) reviewed the international developments from 1930 onwards concerning the health risks associated with asbestos. Snijder indicated amongst other things that asbestos presented dangers not only to those who, in short, work in asbestos mines or asbestos factories, but that as a consequence of the rising number of applications of asbestos and consequent substantially increased asbestos production, also threatened "groups for which these (dangers) are not so obvious", such as "building workers...those living in the same homes as asbestos workers.... and people who live in the environs of asbestos mines and asbestos processing industries or on roads along which asbestos is transported. Not so long ago one could read in the Lancet that asbestos waste had been disturbed in the immediate vicinity of houses!" Furthermore, this article made mention of the relationship which had turned out to exist between the inhalation of asbestos dust and the occurrence of 'certain malignant tumours', and the revelation 'of recent times' of the link between exposure to asbestos and the onset of mesothelioma.

4.8

From the above outline of the development of the scientific discourse, the court draws the conclusion that in 1967 in scientific circles the consideration was generally accepted (a) that exposure to asbestos can cause the disease mesothelioma, (b) that this danger existed for those who came into contact with asbestos in asbestos mines and asbestos factories but also for those subject to so-called domestic exposure and furthermore (c) that serious evidence existed justifying the suspicion that asbestos carried grave health risks for other, larger groups, who were exposed to asbestos only indirectly and on a more incidental basis.

4.9

In 1967 Eternit was a Dutch corporation, forming part of a Belgian group primarily active in the Benelux region. From point 4.6 above it can be seen that well before 1967 these firms were already well aware of how things stood scientifically in relation to asbestos-related dangers and that they had made this information widely available. Continuing this topic, Eternit director C.Doevelaar has told this court that Eternit itself (in 1967) had scientists in its employ who were investigating the subject of asbestos and health, as well as a doctor who monitored the health of the workers in relation to asbestos and who in that context frequently attended conferences and other meetings on this subject. Bearing in mind the interest an undertaking such as Eternit might have in this subject, and noting that they, by their own account, were also informed by their own scientists about developments around the subject of asbestos-related dangers, it must be assumed that they were represented at the First International Asbestos Conference in New York in 1964, a fact which Eternit did not challenge in court when the court asked about it. All of these things justify the present conclusion that Eternit must in 1967 already have been well aware of the seriously indicated dangers to health listed above under 4.8.

4.10

This awareness, already present at Eternit in 1967, taking note of the fact that the firm was indeed monitoring the health risks among its own workers, must lead in addition to the conclusion that the large-scale and uncontrolled putting of asbestos cement waste at the disposal of third parties could give rise to serious and not easily predicted risks to the health of those same third parties. That consideration should have prompted the firm to put an end to the practice. This is all the more valid because there were no good grounds to continue moving the waste on so large a scale (other than that Eternit could in this manner dispose of its waste in a straightforward fashion), while the firm could not monitor in what ways the waste (in the course of time) would be used and/or processed by those taking it and/or by others and what

manner of exposure of third parties there might be as a consequence. To this can be added, in any case, consideration of the effects of moving farm vehicles on asbestos yard surfaces (clouds of dust), on children at play in the yard and of the removal of the waste as was done in this case in 1971 by Jansman's father. This consideration was, wrongfully, lacking at Eternit. According to the provisional judgement of the court, Eternit did, in 1967, treat Jansman negligently, in that, without any warning or indication concerning the use of asbestos and the dangers attached to it, it supplied his father with asbestos cement waste. The assertion that the specific nature of the damage – mesothelioma as a consequence of exposure to asbestos waste – was in 1967 still not known, cannot be upheld by Eternit, because they were then well aware of the link between occupational exposure and domestic exposure to asbestos and mesothelioma on the one hand, and the existence of serious health risks posed by asbestos to larger groups on the other. In this respect the court indicates that this provisional conclusion is not altered by the assertion that regarding the exact relationship between (the various types and applications of) asbestos and the (various) health risks, there remained a great deal of confusion. Bearing in mind what was known about this in 1967, it was incumbent upon Eternit, as an asbestos-producing company, to take opportune measures with the aim of preventing a situation in which third parties could become victims of the fact that, for a more precise determination of the nature and origin of these risks, further research remained necessary. In addition, the fact that the means whereby Eternit dealt with these risks at the time did not differ from the ways others, including public authorities, dealt with them, does not lead to a different judgement than that the primary responsibility of Eternit, as an asbestos-processing company, was to ensure that they processed asbestos in a way which took into account those health risks linked to it which could at that time have been known to the firm. The court will now turn to what all of this means for the progress of Jansman's short suit.

Causal Connection

4.11

Eternit has disputed Jansman's deposition that only one cause of the disease mesothelioma is known, to wit exposure to asbestos. It has further disputed the assertion that any causal connection exists between the distribution of Eternit waste to Jansman's father in 1967 for use in paving a yard and the disease of mesothelioma diagnosed in Jansman in 2005.

4.12

Eternit has, in support of its disputing of the assertion that of the disease mesothelioma only one cause is known, noted a draft article from 1996 by its own medical advisor Dr J van Cleemput (Exhibit 5 in the First Instance Eternit: 'Mesothelioma unrelated to asbestos: the mesothelioma background or spontaneous incidence') In this is demonstrated that exposure to asbestos is not the only cause of mesothelioma, but that also the mineral erionite, radioactivity, and the formation of scar tissue in the lungs can be regarded as other possible causes of mesothelioma, while there is also the possibility of the spontaneous onset of the disease, or of 'cases induced by unknown causes'. Jansman has submitted (Exhibit 33 in the First Instance) the report (part report 1) of the Erasmus Medical Centre, University Medical Centre Rotterdam of June 2005, in which amongst other things is written that malignant mesothelioma is a rare cancer of the pleura (pleural mesothelioma) or of the peritoneum (peritoneal mesothelioma) and that in general it is accepted that in the approximately 80% of all cases of mesothelioma, there turns out to have been previous exposure to asbestos. In this context it should be further

noted that according to Eternit's own statements in the first instance (Plaintiff's notes of Eternit, first instance sub 5.5) '80 to 85% of the diffuse malignant mesothelioma was caused by asbestos', and that according to Jansman's depositions in the first instance (exhibit 36 in first instance Jansman, memo from Dr Ir. A. Burdorf of the Erasmus MC of 9 October 2005), in the case of 80-87% of the patients with a pleural mesothelioma a relation with exposure to asbestos can be established.

4.13

From this instance and others the court provisionally infers that exposure to asbestos counts in any case as by far the most important cause of mesothelioma, a conclusion which is not in conflict with the draft article by Eternit's medical advisor. Nothing concrete has been brought forward by Eternit from which it can be concluded that any other concrete cause (for example, one of the possible causes sketched out by its medical advisor) can have led to Jansman's illness and neither has it, in reaction to Jansman's statement to the effect that he was never otherwise exposed to asbestos, stated facts from which it could be inferred that Jansman became ill from asbestos which was not of Eternit origin.

Advance compensation for damages

4.18

The advance is taken from compensation for damages as intended in article 6: 106 section 1 and under b BW, as well as from compensation for material damage, such as that connected to the fact that Jansman as a result of Eternit's unlawful dealing in 1967 developed the illness mesothelioma. The court considers for the time being that it can be sufficiently assumed that Jansman as a consequence has suffered material and immaterial damage and judges an advance of € 35,000 against a further compensatory sum yet to be determined in every way acceptable, taking into consideration that Jansman as a consequence of the exposure to asbestos has become incurably ill and that his life expectancy is limited.

It is judged that Eternit, by way of an advance against compensation for damages, will pay within eight days of the signing of this order, a sum of € 35,000.