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Cremers, J.

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Jan Cremers,
CLR

NEVER LET INERTIA RULE; THE LONG ROAD TO AN ASBESTOS FREE WORKPLACE¹

Introduction

Because of its insulation capacity, its resistance to fire, heat, electrical and chemical damage, its sound absorption and relatively cheap price asbestos was used as 'everlasting' insulation (for hotplate wiring and in building insulation, fireproof roofing and flooring). The asbestos cement patent was called 'Eternit' by its Austrian inventor L. Hatschek referring to its eternal characteristics. In construction asbestos was often used in a mixture with cement (fibre cement). Early concern on the health effects of asbestos exposure was reported in the annual reports of the British Chief Inspector of Factories (as early as 1898) and in first studies of mortality among asbestos workers in France. Scientific evidence of hazardous risks related to the use of asbestos stem already from the early 1900s. From that moment on specialists started to publish articles that stated that asbestos workers generally declined on account of health-injurious conditions in the mining of asbestos. According to the first studies that reported on an unknown respiratory problem (Murray 1907, Hoffman 1918) the inhalation of asbestos dust had at least contributed to, if not actually caused, the death of the workers. In the US compensation claims were formulated in the late 1920s. Several empirical studies conducted later on made clear that asbestos is the most important single cause of mesothelioma, a mostly fatal cancer of the pleura. Studies that correlated male pleural cancer death rates with per capita asbestos consumption 25 to 30 years earlier found a linear relationship. By the 1930s, asbestos manufacturers and their insurance companies knew that asbestos was killing workers at alarming rates. The Attorney's Textbook of Medicine published in 1934 devoted a full chapter to asbestos exposure, noting that asbestosis was incurable and usually resulted in total permanent disability followed by death². Soon there was enough evidence to conclude that lung cancer

and asbestosis correlate with past asbestos consumption rates and that no safe use exists³. This evidence applied to all forms of asbestos, including chrysotile⁴. However, asbestos based products remained popular and the production peaked worldwide in the late 1970s and early 1980s, when it was being mined in some 25 countries.

Asbestos consumption varied considerably in European countries, with low per capita use in less industrialised countries and vast use in the US and North West Europe. For over 100 years the workforce in construction, ship building and other insulating industries was confronted with occupational diseases stemming from the handling of asbestos although the general public (and the workers) knew only briefly about the risks for workers. Since there is a calculated time lag from asbestos exposure to disease onset of 10 to 45 years, recent increases in mesothelioma incidence might reflect the intensified use of asbestos during the peak period (around 1976 the world production peaked at approximately 5.2 million tons). Thus, the asbestos-related incidence is expected to reach maximum levels between 2010 and 2020 in industrialised countries (Leithner 2006). Beyond this, the occupational threat from the demolition of existing structures (particularly system-built construction, sprayed or partitioned between 1948 and 1980 with mixed asbestos) will remain topical.

The legal fight for a healthy and safe workplace

Although the carcinogenic properties of asbestos were established scientifically in the interwar period, the first large-scale measures at national level to control the asbestos use were taken in the 1970s. The first legislative initiatives at European level date from the mid-1970s. The political deliberations were strongly influenced by effective global lobby groups specialised in downplaying the dangers and in postponing the adoption of bans. Although chrysotile asbestos is found to be potentially similarly harmful as

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amphibole asbestos (Smith 1998) the Chrysotile Institute, first formed in 1984 to promote the use of chrysotile asbestos, insisted for instance on behalf of Canada's asbestos mining industry that the use of chrysotile asbestos poses little risk to workers if handled safely⁵. Most lobbying organisations are nowadays based in countries that have economic ties to asbestos like Russia, India and Brasil⁶. But also inside the labour movement the debate was sometimes tough between the producing industries and the users. The loss of jobs in the industry was an argument that often counterbalanced the worries of trade unions that defended the interests of exposed workers.

That the legislator was aware of the risks related to the exposure became clear as a first list of occupational diseases was formulated in 1962. The central purpose of the list was the recognition of *the right to be compensated*. With reference to article 117 and 118 of the Treaty of the European Economic Community (EEC), it was noted in the recitals of the Recommendation that the EEC Commission had the task to stimulate a narrow cooperation between Member States especially in the field of social security and related to the 'prevention of occupational diseases' (EEC 1962). In the Annex, asbestosis (with or without lung tuberculosis or cancer) was listed in the category 'occupational diseases by inhalation', based on the notion that danger to human health arose mainly from the inhalation of fine asbestos dust, particularly during the production and processing of asbestos products.

The first legal notions related to a joint *protective* policy on asbestos stem from the intentions to formulate EEC regulations and provisions related to the placing on the market of dangerous substances. The European Commission had noted that the rules formulated by the Member States differed; the differences could constitute an obstacle to trade and thus directly affect the functioning of the common

market. In a Council Directive on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (Directive 76/769/EEC) an important new legal feature to move 'gradually to a complete ban' on certain dangerous substances was introduced⁷.

In the Council Resolution of 29 June 1978, on an action programme of the European Communities on safety and health at work, asbestos figured in a long list of toxic substances (Official Journal C 165/1). The necessity was expressed (in Article 4) to develop a *preventive and protective action* for substances recognised as being carcinogenic, by fixing exposure limits, sampling requirements and measuring methods, and satisfactory conditions of hygiene at the work place, and by specifying prohibitions where necessary. Asbestos was listed as one of the substances that asked for specific Directives to be put forward. The European Commission had in the meantime commissioned an expert group that, after assessing the latest medical and scientific findings, came to the conclusion 'There is no theoretical evidence for an exposure threshold below which cancers will not occur. A safe exposure level to asbestos has not been established' (Zielhuis 1977)⁸.

In parallel, the European Parliament discussed several initiatives tabled by the British labour MEP John Evans. After an 18-month investigatory period, Evans concluded that asbestos presented 'a danger both to workers in the asbestos industry and to those exposed in other situations' and that 'all varieties of asbestos in use in the Community can present a danger to human health' (EP 1978). A parliamentary committee chaired by Evans asked for the ban on crocidolite and on the spraying of asbestos. The committee asked the asbestos use to be gradually phased out and finally be forbidden where safe substitutes exist⁹.

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The Council Directive on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work (Directive 80/1107/EEC) formulated more detailed measures. The formulated policy spoke about limit values and additional measures to *prevent exposure* to chemical, physical and biological agents at work or keep it at as low a level as reasonably practicable, not about prohibition or market banning. Additionally, it prescribed, in the case of asbestos, appropriate surveillance by the state of the health of workers during the exposure and access for workers and/or their representatives at the workplace to appropriate information on the dangers. Moreover, a specific instrument for asbestos was announced.

This specific instrument, the Council Directive on the protection from the risks related to exposure to asbestos at work, was concluded in 1983 (Directive 83/477/EEC). Asbestos, and notably crocidolite, was called a harmful agent with potential health risks. In the absence of 'scientific knowledge' that could underpin a level 'below which risks to health cease to exist' the European legislator formulated *minimum requirements*. Most of the formulated measures did not apply as long as exposure stayed below certain limits during an eight-hour reference period. Measures had to be taken as long as 'reasonably practicable', the number of workers exposed must be limited to 'the lowest possible figure' and waste must be collected in 'suitable sealed packing' (and this measure did not apply to mining activities). Yet, the asbestos application by means of spraying was prohibited. The soft measures in the 1983 Directive led to much criticism as the collection of scientific evidence had progressed much further while asbestos consumption was still at a high level. The European Parliament expressed its disappointment and came up with proposals for a complete ban in 1990: 'the use of asbestos shall be prohibited except in cases classified as essential by a Commission group of experts' (OJ No C 284, 12-11-1990).

In the first revision of the 1983 Directive (Directive 91/382/1991) it was noted that the prohibition of the asbestos application by means of the spraying process was not sufficient to prevent asbestos fibres being released into the atmosphere. The legislator concluded that other working procedures that involve the use of certain materials containing asbestos must also be prohibited. In 1998 amendments necessary to adapt the asbestos policy to technical progress were integrated in the procedure laid down in Article 17 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at the workplace. The articles of this so-called framework Directive applied from that moment to the exposure of workers to asbestos.

March 2003 brought the definite 'ban' Directive that workers had been waiting for since the 70s (Directive 2003/18/EC). In the Directive asbestos is taken to mean six fibrous silicates (actinolite, asbestos grunerite, anthophyllite, chrysotile, crocidolite, and tremolite).

Nowadays, the EU rules regarding asbestos risks can be found in two legislative regimes:

- ✓ The REACH Regulations prohibit the importation, manufacture, use and supply of asbestos-containing articles; thus preventing new asbestos risks arising.
- ✓ Directive 2009/148/EC introduces controls on exposure to workers and places requirements on employers of workers who may be exposed to existing asbestos and asbestos containing materials (for example in buildings) as part of their work activity.

The broader legislative agenda

With a ban the problems with asbestos are of course not solved. A widespread use in the after Second World War period in residential and non-residential building and

installation combined with an incubation time of 10-45 years gave the presence of asbestos containing items and objects the character of a ticking time bomb. Over a longer period of time serious problems related to asbestos removal have become manifest, which ask for further regulation. In an own initiative report, the European Parliament has sought an all-encompassing and comprehensive approach (European Parliament 2013)¹⁰. The starting point is that the protection of workers from asbestos must be improved. It needs to be ensured that only an authorised and well-trained workforce can strip asbestos from buildings. The report refers to existing asbestos in private and public buildings, land, residential and non-residential housing, infrastructure, logistics, ships, trains and piping. It is noted that the hazardous impact of all asbestos types has been documented and regulated and that increased cancer risks have been observed in populations exposed to very low levels of asbestos fibres, including chrysotile. Although specialised training has been developed for maintenance workers and others who work with the removal of asbestos-containing materials, younger workers and construction workers often do not recognise asbestos in buildings when performing refurbishment or demolition work. The report asks for a mandatory asbestos audit of buildings that would provide a solid and informed basis for national, regional and European removal programmes.

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1. This is a shortened section of the CLR-book *The long and winding road to an asbestos free workplace*, www.i-books.nl

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2. The Manville Personal Injury Settlement Trust stated in 1988 that corporate knowledge of the dangers 'dated back to 1934', http://www.ewg.org/sites/asbestos/documents/pdf/Austern_Full.pdf
3. Researchers that correlated male pleural cancer death rates in 18 European countries with per capita asbestos consumption 25 to 30 years earlier, found a linear relationship (Leithner 2006).
4. A 2002 expert report thoroughly resumed all scientific evidence collected since the early 1970s and concluded that chrysotile fibres produce 'lung and pleural cancer in man' (EC 2002).
5. In its last Newsletter (2011) the Institute wrote: 'In fact, many scientists indicate that when properly used under controlled conditions, chrysotile asbestos in its modern day high-density applications does not present risks of any significance to public and/or worker health' (Newsletter Chrysotile Institute, Volume 10, Number 1, November 2011).
6. The USSR became the main producer in the late 1970s; its share in the total global production increased to 60% in 1987.
7. It took 29 years before this legal possibility became reality for asbestos as the ban on the marketing concluded in the Commission Directive 1999/77/EC and completed with Directive 2003/18/EC of the European Parliament and the Council was taken effect on 1 January 2005 at the latest.
8. In a reaction to the European Parliament own initiative report the UK government still stated in 2012 that any calls to lower existing limit values must be based on a consideration of robust scientific evidence and detailed impact assessments.
9. Until 1989 the legislative power was exclusively in the hands of the Council of Ministers. The European Parliament could only come up with opinions. The position of the European Parliament enhanced through the Maastricht Treaty (in 1992) and increased considerably with the Amsterdam Treaty (May 1999) as the EP became co-legislator.
10. The report passed the EP plenary session on 14 March 2013 with a huge majority of 90% of the votes. The UK government expressed worries about the business environment, as 'some of the proposals in the report (for example, action plans for the removal of all asbestos from buildings) could place considerable burdens on business without corresponding benefits to workers' (UK Government briefing on the Hughes report, dated October 2012).