

## Asbestos Abroad – An International Overview

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There has been a growing realization that national asbestos developments impact internationally. A legal victory by French asbestos victims caused panic amongst British insurers.<sup>1</sup> The landmark decision by the French Supreme Court (February, 2002),<sup>2</sup> combined with the escalation of U.S. asbestos claims and the House of Lords decision in the Fairchild case (May, 2002) led German insurers to “consider recommending an asbestos exclusion.” On June 27, 2003, foreign nationals secured compensation for asbestos-related diseases from the British defendant Cape plc, formerly the Cape Asbestos Co. Ltd; in the London High Court, bank drafts totalling £10.7 million (\$17.28 million) were handed to English solicitors representing injured South Africans who worked at or lived near Cape’s asbestos operations. Although this was not the first time lawyers had succeeded in bringing a legal action in England on behalf of foreign claimants against a UK parent company, the Cape case achieved a particularly high profile. According to Solicitor Richard Meeran, who pioneered the action:

“Central to the Cape case was the principle that multinational companies undertaking hazardous operations overseas should be held legally accountable for resultant injuries. The largest multinationals are wealthier than many nations, yet unlike states they are not subject to international law. This settlement is an example not just of Cape being held to account by these victims, but also a salutary warning to any multinationals which apply ‘double standards’ in developing countries. They must now face up to their responsibilities or bear the financial and other consequences.”

### International Asbestos Production and Consumption

From the beginning of the 20<sup>th</sup> century until the outbreak of World War II, world production of asbestos rose by 2000%. Output continued to grow steadily, peaking in 1975 at 5 million tons. Despite a slight downturn, annual production remained at over 4 million tons until 1991. In 2000, approximately 2 million tons of chrysotile were mined:

**Chrysotile Production and Export in 2000 (tonnes)<sup>3</sup>**

Country	Produced	Exported
Russia	752,000	332,417
China	350,000	11,814
Canada	320,000	315,326
Brazil	209,332	63,134
Kazakhstan	178,400	174,000

While Kazakhstan was the 5<sup>th</sup> biggest chrysotile producer, it was the 3<sup>rd</sup> biggest exporter.

Asbestos is a growth industry in Kazakhstan. In 1999 and 2001, the Kustanayasbest Asbestos Mining and Concentration Plant in Almaty, Kazakhstan extracted, processed and sold 109,000 tons and 200,000 tons of asbestos, respectively. This year, the company is aiming to increase annual output to 225,000 tons. According to a presentation by John Gilbert to the Latin American Asbestos Meeting (October, 2001), in Kazakhstan there is:

- no asbestos legislation;
- widespread use (John observed a queue to purchase asbestos products in an open-air market in Almaty);
- no public awareness of the health risks;
- fully operational asbestos factories and mines: the largest factory producing asbestos roofing material in the Former Soviet Union is located in the Semipalatinsk Republic of Kazakhstan
- extensive contamination of antiquated but still operational installations with damaged friable asbestos products.

The conditions depicted in the photographs which John showed in Buenos Aires were horrific. Examples of the uncontrolled use of asbestos included:

- open storage silos full of chrysotile in the Semipalatinsk plant;
- an open skip of asbestos waste in a factory setting;
- an asbestos grinding machine covered with dust;
- thousands of tons of finished asbestos cement roofing material in an open warehouse;
- thousands of tons of asbestos waste dumped within the city limits.

As industrialized nations reduced their use of asbestos, producers have increasingly targeted consumers in the developing world. According to the U.S. Geological Survey:

“Countries in Asia, South America, and the former Soviet Union remain the largest users of asbestos. More specifically, Brazil, China, India, Japan, Russia, and Thailand are the only countries that consumed more than 60,000 tons of asbestos in 2000. These six countries accounted for more than 80% of (the) world’s apparent consumption in 2000... Consumption has increased in India, Indonesia, and Thailand during the past couple of years while that of Japan has declined. Several countries have maintained low levels of consumption and a few of these small consumers have increased consumption in recent years.”<sup>4</sup>

Of the countries named in the paragraph above, only Brazil (1990) and the Russian Federation (2000) have endorsed ILO (International Labor Organization) Convention No. 162, concerning safety in the use of asbestos, and its accompanying Recommendation 172;<sup>5</sup> these ILO instruments underline the necessity of national asbestos regulations to minimize occupational exposure:

“According to ILO Convention No. 162, the employer assumes full responsibility for the establishment and implementation of practical measures

for the prevention and control of the exposure of workers to asbestos and for their protection against health hazards due to asbestos.”<sup>6</sup>

Despite the fact that Brazil is a signatory to ILO Convention 162, “the majority of Brazilian employers do not fulfil their responsibilities for protecting workers from occupational asbestos exposure.” During twenty years of workplace inspections, Senior Labor Inspector Fernanda Giannasi routinely finds hazardous conditions:

“The controls specified by ILO Convention 162 are frequently absent, especially in smaller companies. Even when these firms are aware of the risks, they continue to treat asbestos as just another raw material; no safety measures or protective equipment are used. Employers prefer to pay fines which are cheaper than adequate controls. The highest fine ever imposed for infringement of safety and health regulations is US\$3,000. It is very cheap to kill and injure Brazilian workers. Another serious problem in Brazil is asbestos waste; as it is expensive to dispose of this waste appropriately, many companies dump it in secluded spots such as abandoned warehouses and derelict buildings.”

### **Rates of Exposure: How Safe is “Controlled Use?”**

#### ***Western Europe***

Despite a rash of asbestos codes of practice, guidance manuals and statutory instruments, occupational and environmental exposures continue in the UK. The “surprise” discovery of asbestos products or waste materials by contractors often tempts them to take shortcuts. Prosecutions have resulted from: failing to adequately supervise asbestos removal operations; lack of management records; illegally storing and disposing of asbestos-containing waste.<sup>7</sup>

Although the use of asbestos is banned in France, as in many other industrialized countries, dangerous exposures still take place. While conditions have improved for workers in big companies, at sites where asbestos is being removed, the situation is completely out of control. According to Dr. Annie Thebaud-Mony:

“In France, asbestos removal is a lucrative industry and involves the use of many sub-contractors. At the first level, there is usually a prevention plan but by the time the job has been sub-contracted out two or three times, all precautions are abandoned. Much of the risk is being incurred by immigrant workers from Southern Europe, Turkey, the Magreb or Southeast Asia. Thus, the French asbestos epidemic is being transferred to the less well-off and most vulnerable sectors of the working population who remain uninformed of their rights.”

#### ***The Developing World***

In general, the use of asbestos throughout the developing world has been and remains unregulated; where health and safety laws exist, compliance is negligible. In India, the ubiquitous use of asbestos presents a serious hazard to workers and the public:

“the present annual consumption of asbestos is about 100,000 metric tons, one fifth of which is mined in India... There are 13 large-scale and 673 small-scale asbestos units in the country. The annual sale of the Indian asbestos industry is about U.S. \$500 million. It is estimated that some 6000 workers directly exposed to asbestos and another 100,000 workers are employed by the industry.”<sup>8</sup>

Although there are standards set for occupational exposure in India, they are not observed:

“A study of asbestos in the milling process found airborne concentrations of asbestos fibers higher than the Indian standard for chrysotile asbestos of 2 f/cm<sup>3</sup>. The highest fiber count observed was 33 times greater than the prescribed limits... The Central Pollution Control Board under Union Ministry of Environment and Forests monitored eight major asbestos products manufacturing units in India. Six of them were not complying with the emission standards, for the remaining two, compliance or non-compliance could not be ascertained. In most cases there were no monitoring platforms; bag houses and stacks were not properly maintained, and operations were intermittent.”

Unfortunately, the Government of India continues to turn a blind eye towards the hazards of asbestos:

“Despite high exposures and widespread use of asbestos in India, occupational health and safety measures are not found in place. There are no reported morbidity and mortality figures compiled by the Ministry of Labour.”<sup>9</sup>

At meetings in Brussels (June, 2001) and Buenos Aires (October, 2001), representatives from Eastern Europe and Latin America identified common problems:

- a lack of national asbestos legislation; where legislation exists, little or no enforcement;
- a failure of national policies based on the principle of “controlled use;”
- a total absence of regulation at demolition sites and amongst small and medium-sized companies;
- dangerously low levels of public and professional awareness of the hazards of asbestos;
- a gross under-reporting of asbestos-related diseases;
- sub-contracting of asbestos work to unskilled and unsupervised workers;
- lack of asbestos audits resulting in on-going hazards to people who work or live in asbestos-contaminated buildings;
- widespread use of asbestos-containing materials in construction.

During presentations, speakers reported specific hazards:

- new laws to minimise exposure to asbestos were flouted in Poland; according to inspections carried out by labor inspectors at sites employing 45,000 people, 497 were directly exposed to asbestos during repair or removal work;

a further 1,244 people had been exposed to asbestos fibers released during these dangerous activities.

- In the Slovak Republic, uncontrolled occupational exposure is most common amongst electricians and building trade workers, especially those involved in demolition and reconstruction of buildings. There is no information about the numbers of workers being exposed in these circumstances. Environmental exposure to asbestos is “practically uncontrolled.”
- In Latvia, the Department of Labor, responsible for controlling the use of asbestos, has no authority to regulate its import. Despite an asbestos ban which came into effect on January 1, 2001, 1380 tons of asbestos-cement products and products containing asbestos were imported during January and February, 2001.
- In Costa Rica, asbestos-cement products are widely used in construction and asbestos is used in brake linings for motorcycles and cars. A database is kept of companies which import asbestos products but this registry is not overseen by any government department. There is no training of workers, no awareness of the hazards of working with asbestos, no protective clothing or product labeling.
- In Ecuador, the use of asbestos-cement products by the construction industry for pipes and roofing materials is widespread. Construction workers have no knowledge of the risks, no training and no protection. Although ILO convention 162 was ratified in 1990, there is no enforcement of its provisions. There is no registry of asbestos-related cases.

### **Identification of Asbestos Defendants**

For decades, a handful of North American and European multinationals controlled the asbestos industry; fiber produced in their mines was processed and distributed all over the world. A brief examination of UK asbestos multinationals Turner & Newall, Ltd. (T&N) and Cape Asbestos Co. Ltd., and Eternit International, a Swiss enterprise, reveals a typical modus operandi. In 1974:

“Turner & Newall were exposed as one of several companies that paid indigenous workers below the poverty level and operated wage discrimination.”<sup>10</sup>

T&N’s workers in Africa were exposed to levels of asbestos contamination not tolerated in the UK. In 1976, Dr. Hilton C. Lewinsohn, T&N’s Chief Medical Officer, visited the company’s factories in Durban, Natal, South Africa. There was:

“an obvious lack of safety consciousness... and the general housekeeping was of such a poor standard that it would have to be considered as constituting a hazard in some instances.”

In the Durban factory of Turners Asbestos Products, workers and supervisors:

“had obviously not been instructed in the rudimentary elements of working in a safe and dustless manner. At tea-breaks, African workers simply sat on the shop-floor and consumed their food among the dust. Of 600 workers X-rayed, 82 possibly had asbestosis – in Lewinsohn’s view, an ‘epidemic.’”

T&N’s Havelock Mine in Swaziland employed 500 workers underground and 300 in the mill. Dust levels at the mine were up to 25 times as high as those permitted in Britain at that time. Dr. Lewinsohn was appalled by the conditions in the mill:

“I was in two minds as to whether I should enter the grading mill without the protection of a positive pressure respirator. Going through the mill to a storage shed and then through the shed was frightening. The operative sitting in a glass box and operating the scoop which feeds fibre to the conveyor was covered in fibre.”

Within two years of Lewinsohn’s visit, T&N commissioned a number of surveys at Havelock. According to Historian Jock McCulloch:

“The first survey of 271 workers at Havelock found 23 per cent of employees had asbestosis, a debilitating fibrosis of the lung, while the incidence among mill workers was 54 per cent. In addition, 17 per cent of workers had chronic bronchitis and other chest disorders, including pneumonia and tuberculosis. Those results need to be put into context. In 1978 the rate of asbestosis at T&N’s Quebec mines was 5 per cent. A follow up study at Havelock found two cases of asbestosis in miners’ wives. Presumably the women, who had no occupational exposure, contracted the disease from the dust pouring out of the mill and from the massive tailings or waste dumps which surrounded the mine.”<sup>11</sup>

In 1995, T&N sold their Zimbabwe operations to a local company: Africa Resources. According to an observer in Zimbabwe, there have been no occupational safety improvements at the Havelock mine since the mid 1980s. The sale of overseas asbestos operations to local interests is a typical “exit” strategy for asbestos multinationals. No compensation is paid to former workers; no attempt is made to deal with decades of asbestos waste. The local companies, generally backed by powerful and influential businessmen, are not susceptible to the same international pressure as the multinationals whose shareholders and directors can be influenced by adverse publicity. None of the former workers from the South African asbestos operations have obtained compensation for their asbestos illnesses from T&N; due to the financial status of T&N and that of Federal Mogul, its parent company, it is unlikely they will.

From its incorporation in Britain in 1893, Cape plc (formerly the Cape Asbestos Co. Ltd., Cape Industries Ltd. and Cape Industries plc) played a leading role in the British asbestos industry. The company had factories in Barking, Hebden Bridge, Uxbridge, Manchester, Glasgow, Newcastle, Liverpool, Belfast and the Isle of Wight and significant overseas interests. In 1915, a report by the Government Mining Engineer of South Africa noted:

“The history of the asbestos industry in the Cape has been, until quite recently, practically that of the Cape Asbestos Company, and that corporation still controls the great bulk of the production... (Cape) is also much the largest European manufacturer of blue asbestos goods.”

Until 1979, when it sold its South African mining operations, Cape was one of that country’s biggest producers; Gefco, a subsidiary of Gencor, a wealthy South African mining company with holdings in gold mines, was the other. In 1981, Gefco took over asbestos mines previously owned by Cape, closing the Pomfret crocidolite mine in 1986 and the Penge amosite mine in 1990.<sup>12</sup> Until 2003, neither Cape nor Gefco had compensated South Africans injured through asbestos exposure.

The Swiss company Eternit International, now Anova, had global asbestos-cement interests, amongst which was the Everite company in South Africa. During the time that Eternit was the main shareholder in Everite, it is alleged that miners and local residents were exposed to high levels of asbestos; the mining towns remain contaminated by waste from Everite’s operations. South African lawyer Richard Spoor maintains:

“There was a tacit agreement between the authorities and the industry to avoid any measures susceptible (sic) to improve the workers’ health.”<sup>13</sup>

In Spring 2003, Spoor travelled to Switzerland for discussions with Anova. Spoor said: “We want to talk, not make threats.” Hans-Rudolf Merz, Anovo’s Chairman, said:

“We are prepared to talk, but legally I don’t see how Anova can be held responsible since Eternit gave up any control it had 20 years ago.”

Clearly the implications of the settlement extricated by 7,500 injured workers and residents from Cape plc were not lost on Mr. Merz who told a Swiss journalist of his fears:

“If there are proven cases of illnesses due to asbestos, I don’t see how we could avoid our responsibility...(a global settlement) would open a Pandora’s box and we would be submerged by demands from around the world.”

According to the article written by this journalist, legal actions against Eternit are now proceeding in Greece, Italy, Brazil and Nicaragua. As the Group had subsidiaries in 20 countries, who knows where the next writ will come from? Eternit victims in Latin America who, until now, have been barred from bringing claims because of lack of legal representation, may find a new avenue open to them. An internet initiative has been launched by [defiendeteonline.com](http://defiendeteonline.com) which aims to provide access to justice for injured citizens in Latin America:

“We offer administrative and economic support to the victims so they can have the best lawyers to appeal to the courts in each country. We are a profit organization so we can continue to defend people in the region.”<sup>14</sup>

This new service might well find potential clients amongst former Eternit workers in Mexico where the commercial use of asbestos began in the 1930s. Techno Eterno Eureka, S.A., a subsidiary of the Swiss Eternit Group, opened the first asbestos-cement factory in Mexico in 1932. Eternit's investment in the country increased with factories set up by subsidiaries: Eureka del Norte, S.A. de C.V. in Nuevo Leon in 1956 and Eureka de Occidente, S.A. de C.V. in Jalisco in 1960. It would be surprising if none of the 793 people who died from malignant mesothelioma of the pleura between 1979 and 2000 were former Eternit workers, though

“None of these deaths was recognised as occupational disease, according to records of Social Security.”<sup>15</sup>

There would appear to be a plethora of unrepresented claimants in Mexico.

### **Different Legal Systems, Different Results**

Within the Member States of the European Union (EU), there is a diversity of schemes and protocols for compensating victims with asbestos-related diseases. While the EU favors harmonization within the single market, no attempt has been made to introduce an EU-wide compensation scheme. An amendment to *EU Directive 83/477/EEC on the protection of workers from the risks related to exposure to asbestos at work* was proposed in March, 2002 to the Committee on Employment and Social Affairs of the European Parliament. Although this Committee approved the amendment, it was not incorporated into the final directive.<sup>16</sup> The rejected amendment stated:

“Adequate compensation shall be available to all victims of asbestos-related disease, including those exposed to asbestos in non-occupational contexts.”<sup>17</sup>

In the following sections, we will briefly examine contrasting EU compensation schemes such as: asbestos personal injury litigation in the UK, the German public-law occupational disease insurance scheme and the mixed system in Holland whereby victims can choose to sue or mediate.

#### ***The United Kingdom***

In the UK, personal injury litigation is the prime private legal remedy for securing compensation for industrial disease; the most usual legal action for asbestos compensation is taken by an injured worker against a former employer. According to official statistics, more than 5,000 people died from asbestos-related diseases in 2002; the fact that there are only 1,500 asbestos personal injury claims brought every year leads one to conclude that the majority of claimants do not litigate.

UK asbestos settlements are influenced by the following:

- the nature of the plaintiff's disease; mesothelioma warrants a much larger payout than pleural plaques;
- the plaintiff's age; the younger the victim, the more working years lost and consequently the greater the amount of compensation sought;
- the nature of the plaintiff's employment; a company director will receive a larger settlement than a manual worker;

- the resources and ability of the plaintiff’s legal representation. A union-funded case handled by a specialist asbestos solicitor has a greater chance of receiving a large sum than a legal-aid case brought by a high street solicitor;
- the condition of the plaintiff: if a claimant is still alive, compensation is likely to be less!

Recent decisions in mesothelioma cases include the following:

- Anthony Farmer’s family was awarded a landmark £4.37 million (\$7.06 million) by the Leeds High Court in 2003; the defendants were his former employers; the record amount of damages acknowledged Mr. Farmer’s meteoric rise from butcher’s boy to power-station worker then to gifted entrepreneur; Mr. Farmer, who died at 47, was co-owner of Tyre Technics, the world’s biggest tyre retread firm; in 1998, this company was sold for £30 million (\$48.5 million);
- the widow of Joseph Martin, who died in 1998 aged 51, received compensation of £285,000 (\$460,252) from Manchester City Council, his former employer, in April 2003;
- the estate of the late Mr. H, who was 52, received £50,000 (\$80,746); he had no dependents;
- the widow of Mr. A, who was 56 years when he died, received damages of £200,000 (\$322,951);
- Sylvia Barker, widow of Vernon Barker, was awarded £152,000 (\$245,443) for his death aged 57; the Judge reduced the damages by 20% because of “contributory negligence;”<sup>18</sup>
- Mr. T’s widow was awarded £175,000 (\$282,562) for his death at 62;
- Mr. O, 66 years old, received £125,000 (\$201,830);
- Mrs. S, a 73-year old living claimant, received £100,000 (\$161,464);
- Mr. F, a 76-year old claimant, received £86,000 (\$138,845).

Since the House of Lords reversed “the perverse and absurd” High Court ruling of Mr. Justice Curtis in the Fairchild case,<sup>19</sup> UK insurers have embarked on a high-profile campaign to off-load their asbestos liabilities. Their strategy has succeeded in grabbing the Government’s attention; urgent reviews of the UK liability insurance market and Employers’ Liability Compulsory Insurance regime have been ordered.

### ***Germany***

In Germany, compensation for occupational disease does not come directly from former employers. In return for contributions from all German companies, public-law occupational accident insurers cover corporate liabilities.<sup>20</sup> There are 35 insurers covering various industries and regions; amongst which are 7 for the construction industry and 5 for the metal-working industry. There are also 38 insurers for the public sector and 11 for the agricultural sector. Although the governing bodies of all the insurers consist of equal numbers of representatives of employers and employees, all the costs are covered by the employers. If a German worker qualifies for compensation, he receives his money from the insurance agency covering the specific industrial sector in which he worked. For example, an asbestosis claimant who worked in a brake factory would be paid by the occupational insurance funds of the chemical industry sector (Berufsgenossenschaft der Chemischen Industrie).<sup>21</sup> There

has been an increase in the number of asbestosis and pleural plaque cases recognized in Germany in recent years. In 1994 this category was 4<sup>th</sup> in the list of recognized occupational diseases; in 1996 it was 3<sup>rd</sup> and in 1998-2001 it was 2<sup>nd</sup>, after deafness cases.

According to German Government statistics, in 2000 and 2001 there were 957 and 931 asbestos-related deaths, respectively. Data provided by insurers on the number of newly acknowledged cases of occupational asbestos-related cancers paint a bleaker picture:

**New Acknowledged Cases of Occupational Asbestos-related Cancers  
in Germany**

Disease	Year: 2000	Year: 2001
Cancer of the lung or larynx	667	735
Mesothelioma	627	665
<b>Total</b>	<b>1,294</b>	<b>1,400</b>

Scientists predict that between 2002 and 2020, 20,000 more Germans will die from asbestos-related diseases. These numbers have started ringing alarm bells in the German insurance industry even though, so far, not one German industrial company has been ordered to compensate injured victims. It is of interest to report that under German law, injured employees are prevented from bringing compensation claims against employers through their compulsory membership in a Berufsgenossenschaft. In the case of gross negligence, it is the insurer and not the employee which can sue the company.

According to a report by Eurogip: *Occupational Diseases in Europe: A Comparative Survey Conducted in 13 countries*, (September, 2000):

“In Germany, the doctor sends the declaration to the competent BG (Berufsgenossenschaften Scheme) and/or to the Labour Inspectorate. These two organizations inform one another mutually of the declarations they receive. In theory, the victim’s employer is also required to declare the disease. Moreover, the victim and his/her legal beneficiaries, and also the social insurance organisms (principally health insurance funds, but also employment agencies and old age pension funds), can make a declaration. In practice, the doctors initiate most of the declarations, the social insurance organisms ca. (circa) 20%, the victims ca. 10% and the employers ca. 3%.”

Legally, an occupational disease claim must be made by a German doctor immediately. Unfortunately, according to Henning Wriedt, advice worker at the Hamburg Occupational Health & Safety Advice Centre, this does not always happen; Wriedt asks: “who will find out if the doctor does not file such a claim?”

The insurance organization can consult the Labor Inspectorate during the processing of a claim; however, the final decision remains the responsibility of the insurance organization. Although Berufsgenossenschaft personnel prepare the case and make a recommendation, the case is decided by a two-person committee comprised of one employers’ and one employees’ representative. Usually the preliminary

recommendation is upheld; on the few occasions when no agreement can be reached by the committee members, the bi-partite governing board of the Berufsgenossenschaft decides. According to Mr. Wriedt:

“If the claim is rejected, the claimant can appeal. For an appeal to be successful, both committee members have to vote in favour of the claimant. If the appeal is rejected, the claimant can litigate. If the claim is acknowledged by the local or state court, the Berufsgenossenschaft can appeal; if the claim succeeds in the federal court, it cannot. The process is complicated and can be time-consuming; there are cases which have taken more than ten years for the courts to resolve. Normally, the decisions of the Berufsgenossenschaft, including the appeal, are reached within two years. If, however, the appeal is backed up by relevant arguments, it might take longer, since the Berufsgenossenschaft usually tries to refute the evidence. I have been involved in a case, in which the appeal was acknowledged 8 years after the claim was filed – but that really was an exception.”

Controversies which can lead to court cases after an appeal for an asbestos-related occupational disease is lost include disputes over: the degree of disability caused by asbestosis; the validity of a lung cancer case when the disease is not accompanied by asbestosis, asbestos fiber in lung tissue or proof of high levels of occupational asbestos exposure. While there is no specific time limit for the examination of claims, there is an expectation that they will be processed rapidly. Reports from Germany suggest that this system works reasonably well if there is enough evidence and if the claimant has mesothelioma, asbestosis or cancer of the lung, the bronchi or the larynx.

Respondents to the Eurogip survey were asked for information on what benefits were available to a hypothetical worker with an asbestos-related disease:

“A man aged 50 is affected by an asbestosis complicated by a lung cancer. Twenty years ago, he worked for five years in a firm which produced car brakes incorporating asbestos; he is also a former smoker. His current gross wage is 2,500 euros/month (30,000 euros/year/ \$34,417). He has to take leave from his job to undergo surgery (a lung ablation), followed by major therapeutic treatment (chemotherapy). After eight months away from work, he is incapable of resuming his job.

He dies a few months later leaving behind him a widow, four children from a first marriage (aged 23, 20, 18, 17, all students), and two children from the second marriage (aged 4 and 1).”

In Germany, no account is taken of the fact that the claimant was a smoker. During his 8-month sick leave, he is entitled to:

“full salary maintained for 6 weeks then net wage minus ca. 12% social security contributions (but not more than 80% of the gross wage).”

After his death, the widow will receive a proportion of her husband's Berufsgenossenschaft pension; surviving children will also receive regular payments until the completion of their education up to an age limit of 27.

## *The Netherlands*

With as many as 15,000 pleural mesothelioma deaths expected in the Netherlands by 2028,<sup>22</sup> compensation for asbestos diseases is an important issue in the Netherlands. In the 1990s, the number of asbestos personal injury cases increased dramatically; over that period, two Dutch specialists handled more than one thousand asbestos cases. According to these lawyers, Dutch employers and insurance companies chose to settle the majority of asbestos claims with only 10-15% proceeding to court. The availability to victims and their legal representatives of more and better information led to a significant rise in the size of pain and suffering awards (\$50,000-\$80,000).

While civil claims are an option for Dutch mesothelioma plaintiffs, the legal process, as elsewhere, is not known for its speedy resolution of cases. In an attempt to streamline the compensation process, the Institute for Asbestos Victims (IAV) was set up on January 26, 2000. Asbestos victims entitled to apply to the IAV are limited to mesothelioma patients with traceable employers/insurers whose exposure occurred within the thirty-year limitation period; to bring a claim before the IAV, individuals must renounce the right to bring a civil action. If, however, the mediation fails, victims can instigate legal proceedings. Through mediation with former employers, the IAV aims to resolve claims within four months. Unfortunately, during the two-year period commencing 27 January, 2000, the mediation process took 8-9 months.<sup>23</sup> Between 27 January 2000 and 7 May, 2003:

- 1,238 applications were received by the IAV; 83% were dealt with;
- 234 claimants received damages of \$50,000 or more;
- 336 applicants received damages of \$16,000.

From January 1, 2003, the IAV has been making advance lump sum payments of \$16,000 (€15,882) within a few weeks of mesothelioma claims being received. There is no obligation for recipients to repay this money even if more compensation is forthcoming at a later date. Although the Government will try to recoup its expenditures from negligent employers, the claimant will be paid regardless. The scheme will apply to people who:

- have been diagnosed with mesothelioma;
- can show they were occupationally exposed to asbestos (e.g. were not exposed to asbestos environmentally) and who they were employed by;
- worked in a job which is recognized as one in which occupational exposure to asbestos occurred.

The IAV is incapable of dealing with all Holland's asbestos victims as its rules bar asbestosis, lung cancer and the 30% of mesothelioma patients whose exposure took place more than thirty years ago. Mesothelioma victims disqualified from making an IAV claim, can apply to the Government Asbestos Institute (GAI), a tripartite body which administers a national compensation scheme. There is a significant discrepancy between the levels of compensation available from the two sources, with average settlements of \$45-\$50,000 being awarded by the IAV and \$17,700 by the GAI. By comparison, compensation from a civil case could be in the region of \$68,000. Neither the IAV nor the GAI will compensate asbestosis or lung cancer victims. The

Dutch Asbestos Victims' Group is pressing for the extension of the national compensation schemes to these victims.

### **Concluding Remarks**

On January 30, 2003, it was announced that the U.S. multinational Honeywell International Inc. intended to "sell" its global Bendix operations, with the exception of certain U.S.-based assets, and all asbestos liabilities to the Federal Mogul Corporation (FM). The letter of intent specifies that the Bendix companies which will be sold by Honeywell include those:

"in France, Germany, Italy, the Czech Republic, Spain, Turkey, the Netherlands, Portugal, China, Brazil and the United Kingdom and Honeywell's joint venture interests (the "Asian Joint Venture Interests") in FMP Group (Australia) Pty. Ltd. (formerly Bendix Mintex Pty. Ltd.) FMP Group Pty. Ltd. (formerly Bendix Mintex Pacific Pty. Ltd.), FMP Automotive (Malaysia) Sdn. Bhd. (formerly Don Brake (Malaysia) Sdn. Bhd.), FMP (Thailand) Ltd. (formerly Bendix (Thailand) Ltd.), FMP Distribution Co. Ltd. and their respective subsidiaries (the "Asian Joint Ventures")."

It appears that if this deal proceeds, non-U.S. claims for asbestos injuries will no longer be possible against Bendix or Honeywell. This new scheme will mean that all foreign claims will be brought against a paralyzed company, Federal Mogul, instead of a viable company, Honeywell or Bendix. Although it is believed that insurance policies purchased by Bendix will be transferred to FM, the experience in the UK since T&N went into administration leads many to suspect that these policies may not provide the insurance cover needed (Appendix A). What has become increasingly clear to asbestos defendants is the need to find global solutions to their asbestos problems. With so much at stake, multinational corporations and their insurers are exploring every option to minimize their liabilities. While stakeholders in some jurisdictions are adopting constructive means to resolve asbestos-related problems, others are using scare tactics to frighten national governments into allowing them to off-load asbestos liabilities. In the climate of fear and panic which is being created, there is a real danger that the right of workers to be compensated for asbestos injuries will cease to exist. Global action by asbestos victims is needed to:

- expose the "double standards" of multinationals which compensate injured workers, family members and local residents in some countries and not in others;
- reveal the repercussions of "exit" strategies adopted by multinationals to escape their liabilities;
- monitor the evolving "avoidance" tactics of asbestos defendants;
- assess the global impact on the environment of one hundred years of asbestos use;
- devise cost-effective methods of minimizing environmental exposure to asbestos and decontaminating our communities;
- protect future generations from the ravages of asbestos by implementing a global ban on future use.
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To achieve this final goal of an asbestos-free future, it is crucial to expose the duplicity of industrial nations which profit from the export of a product deemed too hazardous to use at home. Canadian asbestos stakeholders continue to lead the global pro-chrysotile lobby telling foreign customers how it can be used safely under “controlled conditions.” In recent years, Canada exported more than 95% of all the asbestos it produced; unless Japanese and Mexican lungs are biologically different from Canadian ones, and this has yet to be proved, this “double standard” is unacceptable. To expose the hypocrisy of Canada’s position, campaigners are organizing a major event in Ottawa entitled: *Canadian Asbestos: A Global Concern*. The September, 2003 conference will, hopefully, kick-start the Canadian debate on this very touchy subject. As in all the best media events, a companion publication will be on hand; it is entitled: *The Asbestos War* and can be obtained from Abel Publication Services: [www.ijoh.com](http://www.ijoh.com)

Article from the *British Asbestos Newsletter*

**T&N: Incremental Progress?**

Since UK legal actions against T&N Ltd. have been frozen by the administration order of October 1, 2001, not one claimant has been paid (newsletter issues 45,46,48). Calls on the Government to set up an interim compensation scheme have fallen on deaf ears; a request to the US Creditors' Committee of Federal Mogul, T&N's parent company, to make 'hardship payments' to UK victims has been rejected. Teams of legal and financial consultants on both sides of the Atlantic continue to milk the cash cow; unconfirmed estimates put the administrative cost of the Federal Mogul-T&N debacle at \$54 million plus. With little visible progress, it is obvious that a speedy resolution of this complex corporate crisis is unlikely. It is difficult to see why anyone, other than dying victims, would wish to resolve this situation quickly. What about insurers? Well, yes there were insurance policies which covered T&N's workforce; unfortunately, T&N's insurers are not inclined to pay compensation for asbestos-related diseases. Why not? The insurers claim that coverage in the policies issued to T&N did not extend to asbestos-related diseases; in addition there was, so they say, an "understanding" that T&N itself, not its insurers, would deal with asbestos claims. In return for premiums received, the insurers would, however, issue a Certificate of Insurance which complied with the terms of the Employers' Liability (EL) Act, thereby enabling T&N, formerly the UK's largest asbestos group, to continue trading. Desperate to escape liability for hundreds perhaps thousands of claims, the insurers stridently maintain that the insolvency of T&N changes nothing vis-à-vis the insurance cover available: no T&N, no asbestos compensation - end of story.

Vehemently denying insurers' restrictive interpretations of T&N's Employers' Liability Policies, the UK administrators of T&N, Kroll Corporate Advisory & Restructuring Group, took legal action to enforce cover. During hearings at the High Court on January 27-31 and February 3, 4, 17-19, 2003, T&N's barristers explained that until the availability of cover is established, leave to commence or continue proceedings by asbestos plaintiffs against T&N was being denied by the administrators under section 11 of the Insolvency Act 1986:

"Where such insurance exists, then the burden of defending and meeting the claim will be borne by the insurer, and the continuation of the claim would not be inconsistent with achieving the purposes for which the administration order was made. By reason of the Third Party (Rights Against Insurers) Act 1930, any claimant who was able to establish a claim against T&N would be entitled to recover from (sic) any available liability insurance directly from the relevant insurer. In the absence of such insurance, however, the granting of leave to proceed against T&N would, the administrators say, cut directly across the purpose of the administration order."

If the validity of the EL policies could be established, the administrators would lift the stay on proceedings, so that asbestos claims could proceed against the insurers.

The May 9, 2003 judgment of Mr. Justice Lawrence Collins is detailed and wide ranging. In 156 pages of text, Collins discusses concepts such as approved policies, pneumoconiosis exclusions, asbestos conditions, deeming clauses and the existence of "a factual matrix... (and) a shared and communicated assumption." Justice Collins reminds us that the Employers' Liability (Compulsory Insurance) Act 1969 states:

“Except as otherwise provided in this Act, every employer carrying on any business in Great Britain shall insure, and maintain insurance, under one or more approved policies with an authorised insurer or insurers against liability for bodily injury or disease sustained by his employees, and arising out of and in the course of their employment in Great Britain in that business, but except in so far as regulations otherwise provide not including injury or disease suffered outside Great Britain.”

As “an ‘approved policy’ for the purposes of the 1969 Act means (section 1(3)(a)) a policy of insurance which is not subject to any conditions or exceptions prohibited by regulations” and as an “employer has to be fully insured,” the fact that EL policies issued to T&N by the Royal Insurance Company Ltd. (1969-1977) and the Brian Smith Syndicate at Lloyd’s of London (1977-1995) seemingly excluded categories of asbestos-related illness was unacceptable: during the relevant period of cover, “the Royal cover... (was) the sole source of T&N’s compliance with the 1969 Act... for T&N to comply with the 1969 Act the policy had to provide full cover.”

Justice Collins cited evidence given by Royal employees Mr. Leslie Owen, Client Development and Relationship Manager at the Manchester office until 1975, and Mr. Hanmer, Head of the Liability Department 1970-72, Liability Underwriter 1972-72, Liability Underwriting Manager from 1973 at the Liverpool head office:

“It hardly needed to be said, but Mr Owen accepted that he knew that the employer had to be fully insured, and... would have realised that even an excess under a policy, a small excess of £50, would not be permitted under the Act. Mr Hanmer also accepted that no-one underwriting EL business could have failed to have been aware that the insured was not permitted to have a pneumoconiosis exclusion...”

“that answer (which was also put forward by Mr Hanmer) is uncommercial, unrealistic, and influenced by the legal arguments which the Royal is now deploying...”

Using terms such as “fronting cover,” “a sham,” “a clean policy,” “a behind-the-scenes agreement” and “ultimate responsibility,” the Court did not accept that “authorised” insurance companies would willingly enter into illegal arrangements. Proceeding on this basis, therefore, the asbestos exclusions in these EL policies were invalid:

“I am satisfied that as a matter of construction the Asbestos Condition (in the Lloyd’s policy) is just that, and not an exclusion... If it had been intended to be an exclusion, there was no reason why it should have been included as a series of undertakings given to the Syndicate and that one of those undertakings involved T&N undertaking to reimburse the Syndicate for the stated aggregate sum.”

The pro-claimants’ decision by Justice Collins will increase the likelihood of compensation for asbestos claims from former T&N workers with post-1969 exposure. The administrators believe that these claims constitute 41% of the 614 current claims brought by UK employees; future claimants will also benefit from this judgment. An additional 200 non-employee claims are currently outstanding; these are for product liability, neighbourhood and bystander exposures. Even though legal actions for these injuries are not covered by EL policies, the plaintiffs “remain creditors of T&N alongside other creditors and the payment by insurers of claims for the period 1969 to 1995 will make more funds available to meet other uninsured claims.” The outcome of this case could have broader implications for insurers. As the wording of the discredited “asbestos

exclusion” was standard throughout the industry in the 1970s, other exclusions could be voided. According to Simon Freakley, Global Head of Kroll and Joint Administrator of T&N: “I suspect this will be a defining point for other companies whose employees are pressing for compensation... Clearly the decision today finds that the terminology does not exclude asbestos related diseases and all insurers may find themselves liable for any other asbestos-related claims against Employers’ Liability Insurance policies.”

Both insurers are now appealing the Collins decision. The appeals will run in parallel with the proceedings on “alleged misrepresentation and non disclosure by T&N” which constitutes the second stage of this action; a one-day Case Management Conference for the avoidance case is timetabled for mid-July, 2003. Until all these matters are decided, insurers will continue to repudiate calls for compensation. Simon Freakley is highly critical of the insurers’ behaviour accusing them of attempting “to avoid their obligations with legal prevarication that considerably delayed the hearing of this action.” The reaction of Susan Wilde, the widow of a T&N worker, to the judgment was muted: “My husband died a cruel and painful death,” she said. “I’m very relieved that the courts have delivered some sort of justice, but angry that we’ve had to wait so long for this day.” It is alleged that Mr. Wilde was exposed to asbestos during his 1967-1970 employment with T&N; he died of mesothelioma in August, 2002.

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