

Eternit bis hearing March the 29<sup>th</sup>, 2023.

By

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"There was neither malice nor guilt in the defendant's conduct. I ask that Mr. Schmidheiny be acquitted because the alleged fact does not exist due to lack of proof of the causal link. Otherwise, that he be acquitted because the fact does not constitute a crime." Such were the closing words of defence lawyer Guido Carlo Alleva's closing speech. He is one of the two lawyers in the Eternit Bis trial at the Novara Court of Assizes defending the Swiss entrepreneur accused of the murder, with possible intent, of 392 people from Casale who died due to asbestos exposure. His colleague Astolfo Di Amato had delivered the first part of the defence's closing statement in the hearing on March the 10<sup>th</sup>, 2023.

Prosecutors Drs Gianfranco Colace and Mariagiovanna Compare had concluded their indictment asking for a life sentence. Dr Gianfranco Pezone, Chief Justice of the Court, has set the next hearing for June the 7<sup>th</sup>: written reports must be filed by mid-May, and oral additions will be heard on that date. Then the Court will go to into chamber and give the verdict. The June hearing will be the 42<sup>nd</sup> of the Casale Eternit Bis trial: exactly two years as the first hearing was on 9 June 2021.



defence Lawyers Alleva (standing) and D'Amato (sitting)

## **DEFENCE LAWYER ALLEVA**

Defence lawyer Guido Carlo Alleva [...] started with Wednesday 29 March was emotional and, perhaps understandably, also rhetorical, starting from his own personal experience of 'a terrible, tragic situation. I, too, played in Monferrato as a boy, on a dusty football pitch, and I'm a little afraid of it... And I played with friends who unfortunately died of mesothelioma, to whom my heartfelt thoughts go. But, here, in this courtroom, I must exercise my role, as a lawyer in a

criminal trial, trials which make us a democratic civilisation and distances us from revenge'.

## **THE PREMISE**

"First let us deal with time," Lawyer Alleva premised. "It will be a trip through time: we have to go back to the 1970s and 1980s to see things from that perspective, to understand the context of the time, when the plaintiffs lived and developed mesothelioma, and it is our duty to be aware of today's scientific knowledge".

In short, let's take yesterday into account for somethings, and today for other things.

## **FOUR CHAPTERS**

The lawyer divided his speech into four 'chapters': 1) Improper Uses. The *polverino*, the compacted dust; 2) diagnoses; 3) the causal link; 4) the subjective element, intent.

### **1. IMPROPER USES. The *polverino*, or compacted dust**

Extensive discussion was devoted to this subject, as the indictment makes specific reference to processing waste and dust: the accusation against Schmidheiny is that of "*not having prevented its supply to private individuals and public bodies*" who used it for road surfacing, courtyards, farmyards, football pitches and attic insulation, thus causing "*uncontrolled and continuous exposure*". Lawyer Alleva agrees on the danger of this misuse, but states that they concerned the seventy years of management preceding that of the Swiss, who took over from the Belgians in the early 1970s. He reiterated that the use of the waste caused enormous pollution: 'Dust is ubiquitous in the Monferrato. In Casale and in all the villages on the hills: it was in all the courtyards, in all the chicken coops, in all the parish playgrounds... I played on the small field in Vignale that was insulated with dust...!'

Stop: rhetoric vehemence is all very well, but one must remain within the bounds of practicality, even when an argument aims to prove the defence thesis that the so-called 'improper uses' were almost equivalent to the pollution produced by the factory and related places. Scraps and dust were used and spread, and plenty of them, around the town and the surrounding villages. It was used in many, too many places, but not in all of them: not all courtyards, not all parish playgrounds, not all squares, not all villages, my dear lawyer. For example, in the interests of fairness, and also to reassure defence lawyer Alleva and other former children of the time, a thorough check rules out the possibility

that there was asbestos dust on any of Vignale's pitches on which he played. Just so that the hype does not become overblown and turn into a baseless suggestion.

However, what the defence is interested in emphasising, and he emphasises it forcefully, is that 'the Swiss forbade production waste to be sold from the factory: sacks, felts, powder, broken pieces. Clear instructions were given to that effect'. So, where did it all come from? "The distribution of dust and waste," the lawyer states without a shadow of a doubt, "was a previous practice", i.e., dating back to the Belgian period, not the Swiss decade.

## 2 DIAGNOSES

Let us return to the indictment where it says that the defendant, as the actual manager of Eternit Ltd (of which the Casale plant was part), caused the death of 392 people from mesothelioma because of asbestos exposure. In other words, according to the prosecution, Stephan Schmidheiny, knew his actions (or omissions) caused the mesotheliomas and deaths. In this trial, mesothelioma is what in the jargon is known as a '*causal event*' important and foundational. Therefore, Alleva is categorical: 'The 392 diagnoses must be totally certain', i.e. it must be ascertained without beyond any reasonable doubt 'whether these people really developed mesothelioma', otherwise the defendant cannot be held responsible for those deaths. For the prosecutor's expert witnesses, who reviewed case by case, there were 392 certain diagnoses (62 former Eternit workers and 330 citizens). For the defence expert witness, the pathologist Massimo Roncalli, they are not and of the 354 cases he reviewed out of the total of 392 (for 38 he did not have the biological material available and did not perform additional analyses) he reached the following conclusions: 140 cases with a certain diagnosis, 116 with a probable diagnosis, 98 with a possible diagnosis. Lawyer Alleva explains: 'We have to use the knowledge we have today (i.e., the current markers for immunohistochemical tests,) to say that the diagnosis is certain. Where it is probable or even possible, it could have been a different cancer: another type of carcinoma or metastasis of another tumour'. He excludes that, in order to confirm the certainty of a diagnosis, one relies on survival time (which could be common to other types of pathologies), or on cytological samples, or on the use of negative markers, or on the evaluation of the environmental context; 'one needs immunohistochemistry', that is, 'an investigation based on a few selected and reliable markers that, taken together, with morphology and the clinic signs to a diagnosis of certainty'. And again: 'In the absence of immunohistochemistry, it can only be diagnosed as "mesothelial neoplasia"'.

According to Alleva, however, 'the prosecution experts' approach to diagnosis was approximate'. And, therefore, 'if there is a margin of doubt, that is, if the diagnosis of mesothelioma is not totally certain certainty, it is not possible to identify responsibility'. The defendant says that if the diagnosis is not certain - using the most current immunohistochemistry, adopted by his consultant Prof Roncalli - [the Court will have to consider whether to accept it and draw the consequences for its own decision.]

### **3 CAUSATION**

In what does causation mean? Action A causes effect B, based on accepted scientific laws, and beyond reasonable doubt. As the lawyer said, 'the causal link is the "heart" of the criminal trial': one must be certain that the defendant's conduct caused the event (in this trial, the event is the occurrence of mesotheliomas). Now, lawyer Alleva wonders, can we prove beyond reasonable doubt that Stephan Schmidheiny's conduct caused the illness of each of the 392 people listed in the indictment? On some feature even in cross-examination of the expert witnesses, there was a consensus; for example, that mesothelioma is an asbestos-related pathology, that there is no threshold dose below which one is sure not to fall ill, that the oldest doses to which one has been exposed are the most relevant for the development of mesothelioma, that latency is long and variable, and that there is a moment when the tumour is irremediably formed in the body even if it cannot be seen and cannot yet be diagnosed -- exposures after this moment are irrelevant, i.e. they no longer count towards the disease.

The phase in which the tumour 'forms', even though it is still invisible, is called 'induction'. For the defence 'it is not possible to establish when the neoplastic process takes place', i.e., 'one cannot place then exact time when the mesothelioma arises'. The defence criticises the arguments of the prosecutor's expert witnesses: to identify the time, 'they use the epidemiological tool, which makes it possible to make a statistical and probabilistic assessment', but, in their opinion, 'it is impossible to transfer the epidemiological level to an individual case '. For Alleva (and his expert witnesses), one cannot establish whether a specific mesothelioma developed in the body of that specific person as a result of exposure that occurred precisely in the 'period' for which the defendant is held responsible (i.e., between 1976 and 1986). The defence also rejects the notion of 'cumulative exposure', on which several studies were based, which the prosecutor's experts Prof Corrado Magnani and Dr Dario Mirabelli gave an account of, namely that all exposures subsequent to the initial ones must in any case be taken into account because they all contribute or hasten the onset of the disease.

The defence rejects this thesis because it is the result of epidemiological science and repeats what has already been said: 'The observation of what happens in a group of individuals cannot be applied to an individual'. The PP's expert witnesses had already replied: it is a widely accepted practice, for example, when testing a drug.

#### **4 THE SUBJECTIVE ELEMENT. INTENT**

The subjective element: a delicate and complex chapter, difficult to understand and explain. We shall try to simplify it to make it as clear as possible. For there to be a crime, it is not enough for a person to engage in unlawful conduct (perhaps resulting in an event), but it is also necessary for that person to have expressed the will to engage in that unlawful conduct. This is stipulated in Article 42 of the Criminal Code: 'No one may be punished for an act or omission designated by law as a criminal offence or crime unless he has committed it knowingly and wilfully'. Therein lies the subjective element, which can be expressed in different forms: wilful intent (according to intention), guilt (without intention), premeditation (stronger than intention). There is intent when a person performs an action and is aware of committing an offence/crime (for instance shoots knowing and intending to kill), while there is guilt when it is the consequence of carelessness, negligence, inexperience (the careless driver hits the pedestrian who dies but the driver did not intend to kill the person). Malice can be intentional or possible. In the Eternit Bis trial, the defendant Stephan Schmidheiny is charged with the crime of voluntary murder with possible intent (*omicidio colontario, con dolo eventuale*).

#### **POSSIBLE INTENT AND WILFUL MISCONDUCT**

The distinctive features of possible intent (*dolo eventuale*) are very close to those of wilful misconduct (*colpa cosciente*), so much so that the distinction is often complex and subtle. They have many similarities. A key element in telling them apart is the 'acceptance of risk': i.e. accepting that, as a result of one's own conduct, an event that the law considers a crime will occur. In the case of wilful misconduct, the event may possibly occur, the person accepts the risk and does not cease the act. In this case one is aware of the consequences of one's conduct but considers it unlikely that those consequences will occur or believes one can control or dominate them. Let us start with a generic example: the employer who omits to implement the necessary precautions in the company to prevent harm to employees. Which of the two is it? Let us try to examine the case using - as the prosecutor and the defence have done - some indices that are not in the Code but are contained in the ThyssenKrupp judgment (case law) [where six

workers died because the German company ceased maintenance given it was going to close the Turin plant].

A) Did the manager act by accepting the risk of harm because profit was put before the safety of workers, or was the conduct the result of negligence and carelessness?

B Duration: were those precautions omitted for years or for a limited time, perhaps a few weeks or months?

C Subsequent behaviour: were any actions to mitigate the harm or eliminate it, taken?

D Cultural level and personality: what was the level of training and competence in the relevant field?

## **THE DEFENDANT'S CONDUCT**

Let us now move to the conduct of the Swiss entrepreneur in the light of this grid, gradually reporting the defence's arguments, argued point by point by lawyer Alleva:

according to the prosecution's indictment, Schmidheiny's behaviour can be described as follows: the industrialist told himself that, by continuing the production of asbestos, hundreds of people could have died, but nevertheless he did it, he continued to produce, because this was part of his decision, his precise choice.

A Purpose - Prosecutors Colace and Compare argue that the defendant did not adequately invest in safety and prevention, allowing an indiscriminate spread of asbestos and serious exposure for people, because his interest in profit and the protection of his own substantial market share prevailed.

The defence replied: 'Profit motive? No, in fact he lost out. I have not seen any profits in the 10-year balances. Schmidheiny incurred huge expenses for security. Carlo Castelli (first court appointed receiver for Eternit who had to deal with creditors and then acted as a receiver in the bankruptcy of Holding Eternit spa, ed.) wrote that Eternit was at a disadvantage when competing with rival companies because it had incurred safety costs that others did not have". Lawyer Alleva insists: 'No other company in the industry had behaved in a comparable manner and moved to try and limit the risk; there have not been other companies... the competitor Fibronit, for example... that introduced monitoring bodies like Sil and Copae in Eternit for the detection of fibres '.

He goes on: 'What should have been Schmidheiny's 'lawful alternative conduct'? For the prosecutor, the lawful alternative conduct should have been to stop production. Stop and close the factories. Only for Eternit? Not for the other competitors? Neither for the State Railways, nor for the shipyards, nor for the companies that manufactured the asbestos fireproof suits of motorists or firefighters?" The PP is of the opinion that the investments were lacking, not enough and not primarily aimed at safety, but were mostly funding to cover chronic losses. The defence lawyer shakes his head: 'Put yourself in the historical context of that time, of what was known, of the scientific certainties, we have to be there in that industrial activity, in that economic context, in that scenario in which the events occurred and the behaviour took place'. He illustrates several documents, for example those produced by the European Community between 1973 and 1985 on asbestos and health. In particular, he recalls one from 1979, in which the European Economic and Social Committee (the EESC, a consultative body of the then EEC, now the EU, representing workers' and employers' organisations) expresses concern over the incidence of mesothelioma following exposure to asbestos, 'but also stated,' Alleva reports, 'that it is unrealistic to think of an indiscriminate ban on asbestos', while at the same time stating that 'the exposure of workers is not permissible'. The lawyer also mentions a 1983 letter in which Benedetto Terracini, an internationally renowned physician and epidemiologist, and Enrico Anglesio, an oncologist and founder of the Piedmont Cancer Registry, expressed serious concerns because they saw signs of a possible future epidemic of cancers due to asbestos exposure. 'Yes,' the lawyer admits, 'they were concerned, but not scientific certainty, which came later' and he recalls, in particular, a statement by epidemiologist Corrado Magnani: 'Only in the early 2000s did epidemiological evidence allow us to state with certainty that the onset of mesothelioma is also linked to non-occupational exposure and that it is therefore necessary to arrive at a total ban on work and asbestos' containing products. Here Magnani did indeed give an account of studies conducted on the population, but the data concerning workers (and then their families) date back to the 1980s. Just to give an example, an MD's thesis (the doctor was from Casale) who studied the high incidence of mesotheliomas in the area, was illustrated by the head physician of the Santo Spirito hospital at a public conference in 1984. Lawyer Alleva presses on: 'Let's go back to that time, to the 1970s', and he is firm in his statement: ' Back then it was thought we could govern asbestos.

In truth, Schmidheiny, at the Neuss congress in 1976, after explaining the carcinogenic effects of asbestos to his top management, said in more detail, as the minutes show: 'We must realise one thing: we can, indeed we must live with

this problem'. And, a few months later, the Auls 76 manual was published, containing the guidelines given to managers: 'Don't panic', complete with instructions on how to answer those who asked questions. How was it to be answered? By minimising the danger of asbestos and giving reassurances.

B Duration - The defendant's conduct developed, as repeated several times, over the ten-year period between 1976 and 1986. Lawyer Alleva remarked on the 'huge investments made in that decade to make safe the industrial sector of which he was the head, and which carried out a lawful and permitted activity (the law banning asbestos in Italy dates 1992.)'. I would like to recall the Hazemag mill in the early 1980s, into which part of the waste, thus recovered from the production cycle, flowed, waste which, Alleva recalls and emphasises, the Swiss categorically forbade from being passed on to citizens and authorities. It does not matter whether it was an investment to increase production or to increase safety; a new machine, offers better technical performance and improves safety standards. Anyway, the mill was built, and one of its functions was to reuse waste. There is time gap or mismatch, because according to Alleva the ban dates to the early 1970s and the Hazemag came into operation in the early 1980s. However, it is worth highlighting here is another aspect: namely that the waste destined for the mill was not only from Casale, but also from the other Italian plants. Was it used as it arrived? No, first the waste had to be shredded. How? With what technological investment? A bulldozer! A bulldozer that passed over, back and forth, over the expanse of asbestos scrap, an operation that took place in the open in the former *Piemontese* area. One can realistically agree with the defender when he says: 'I find it difficult to think that an entrepreneur at the head of a group, quoted on the stock exchange, with more than sixty companies all over the world would be involved in sweeping the Casale plant', but the scrap crusher, functional to the production cycle, is not a sweeper. One wonders how to describe that crushing practice, that went on for years with the same lack of precautions: production activity or misuse? And who is to blame?

C Subsequent conduct - What was Schmidheiny's conduct after - the bankruptcy and closure of the plant in 1986? The warranty period, during which he managed Eternit, ended in that year, but did his entrepreneurial and, above all, ethical and moral responsibilities also end? By law? The Swiss entrepreneur turned to communications manager Guido Bellodi to implement a protection strategy based on concealment and mystification, complete with a Handbook along the lines of Auls 76. Lawyer Alleva didn't deal with it at length because his colleague Di Amato had already addressed the issue on March the 10th. Alleva gave, quite simply, a human interpretation, defining that reliance on



Bellodi (for quite a few years, from as early as 1984 and until at least the year 2000, and for a considerable amount of money) as 'messy and mistaken behaviour' that one sometimes does impulsively 'when faced with the possibility of being prosecuted for a crime'.

So be it. Self-protection may manifest itself in a less than noble way, but it is the fruit of the human soul that does not always take rationality into account. However, there is an aftermath that does not sit well with the sensitivity attributed by the lawyer to his client, a sensitivity and concern that Schmidheiny, according to the defence lawyer, expressed for the health of workers and citizens, and for the healthiness of the environment. That 'after' can be seen in the abandoned plant. Since 1976 he had known of the carcinogenicity of asbestos and despite investments he appears to have failed (it can happen) to manage asbestos safely, but why did he leave the plant at the mercy of decay, full of crumbling bags of asbestos, with broken fixtures, chipping roofs that would later collapse due to exposure to the elements.

A padlock on the gate and off we go? That is cruel.

Q Cultural level - What was Stephan Schmidheiny's personality, what was his cultural level? The defendant also addressed this aspect. This is how he described it: 'In 1976, there was a 28-year-old young man, a law graduate, called upon to take charge of an economic empire without any specific industrial expertise: it was not his field. He used specialists, of course, like the scientist Robock who was the top expert on industry at the time'. Well, after hearing a lot about the role of captain of industry played by the defendant, and his subsequent entrepreneurial experiences in Latin America, and also in the complex art market, one dares not think that he was a fool, even though he was 28 years old (with a certain background in the industry that had been in his family for decades). Incidentally, in Neuss, his first official act as head of the Eternit group, he demonstrated a great deal of in-depth and precise knowledge, which he bestowed on the audience. Schmidheiny showed, and not only at Neuss, knowledge of asbestos and its implications, knowledge that he had as an entrepreneur, helped by scientists and part of the worldwide cartel of asbestos producers. A knowledge that the workers, the citizens, and even the managers (his own high-level managers were informed by him personally) certainly could not have.

## **"NEITHER MALICE NOR GUILT"**

Having completed the analysis of all the passages, the defence lawyer first of all ruled out the possibility of wilful misconduct in Schmidheiny's conduct, but

also ruled out guilt in anticipation of the event (wilful misconduct/negligence), because, he insisted, 'this was the only company (certainly the reference is limited to Italian companies, because, instead, abroad, in Great Britain for example, strict indications for the decontamination had already been issued in 1969 . Eternit also did at Stephan Schmidheiny's request'.

Therefore, Alleva, as Di Amato had already anticipated on 10 March, asked for SS to be acquitted: 'because the fact does not exist' or, alternatively, 'because the fact does not constitute an offence'.

### **HOW TO ASSESS THAT SENSITIVITY?**

The 28-year-old young man of 1976 grew up to be a 38-year-old man in 1986.

Did this man offer, then and subsequently, to contribute to decontamination? Of the plant, the former Piemontese crushing area, the warehouses in Piazza d'Armi, the landfill and the 'little beach' on both banks of the Po? Never, reported all the successive mayors of Casale. Yet they knew (and from 2000 onwards with that certainty that lawyer Alleva has given an account of) what asbestos did. A tragedy. Unfinished. Work in progress.

The 28-year-old young man in 1976, a 38-year-old man in 1986, is now a 75-year-old gentleman. The time has passed when immature age and inexperience can be an alibi.

Stephan Schmidheiny has a chance for redemption: he could come to his senses by financing the search for a cure. And he should not limit himself to a donation of money: it is not a philanthropist that we need, but an entrepreneur who, putting his face and hands and experience (which, over time, he will have had the opportunity to increase), he could coordinate research by hiring the best in the world, who would work well, quickly, and justly remunerated. Recognition as a philanthropist will be a natural consequence if this goal is achieved.