

Asbestos Litigation in France

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Further information

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Asbestos Litigation in France

Asbestos is a substance that has been widely and lawfully used by industries, before being identified as dangerous and triggering significant litigation.

Asbestos-related illnesses have appeared later in France than compared to other countries due to the fact that French companies started using asbestos later than their foreign counterparts. While in other countries the number of patients seems to decrease, this is not the case in France where asbestos, used in a professional context is said to kill approximately 2,500 people each year with an increase of 25% every three years. Scientists estimate that the peak of mortality should occur between 2025 and 2040¹ and that asbestos will claim the lives of 100,000 victims in France.

If civil courts have often had to hear claims of asbestos victims, criminal proceedings, rarely gave rise to prosecutions. Yet, for some time now, legal entities, either private or public, have been "indicted", and even sentenced, in the same way as their managers and since more recently their company doctors. Moreover, the tendency of asbestos victims to revert to courts increased with the appearance of a new kind of litigation in 2008, initiated by former employees who left for early retirement.

The objective of this note is to inform readers of the actions available for asbestos victims before French courts as well as of the resulting growing judicial risk for companies.

The victims who suffer from asbestos-related illnesses mainly revert, since its creation, to the fund for the compensation of asbestos victims ("*Fonds d'indemnisation des victimes de l'amiante*" - hereafter "FIVA"), specially created by the Social Security Financing Act of 23 December 2000 to manage the increasing number of claims to receive compensation (2nd part).

Despite the existence of FIVA, a number of civil proceedings are brought by people who are exposed, directly or indirectly, to asbestos against companies using asbestos, and this regardless of whether or not they are suffering from an asbestos-related illness (3rd part). The criminal proceedings have also recently become a true threat for companies and their managers (4th part).

The French State, which authorised asbestos until 1996, is, to the contrary, only slightly concerned. Its liability has yet already been held by the Courts (5th part).

¹ Report from the Work Group led by Jean Le Garrec on the reform of the asbestos workers' early retirement scheme published in April 2008 quoting "*Future trends in mortality of French men from mesothelioma*", *Occup Environ Med*, 2000.

1. HISTORICAL BACKGROUND: THE USE OF ASBESTOS IN FRANCE

In 1906, a link between asbestos and certain illnesses suffered by workers was established by Denis Auribault, a factory inspector from Caen, who made an inventory of the "*multiple deaths*" and cases of "*lung sclerosis*" suffered by the workers of an asbestos factory in the Calvados region.

In 1945, several asbestos-related illnesses (including asbestosis) were officially classified as professional illnesses thus giving rise to the right to a pension. Other asbestos-related illnesses have only recently been added to the official list. For example, broncho-pulmonary cancer resulting from contact with asbestos was only recognised as a professional illness in 1996.

In a decree dated 17 August 1977, the French government fixed the maximum average level of exposure of employees to asbestos at two fibres per cm³. During the same year, it prohibited the use of asbestos for limpet spraying in buildings.

The average level of exposure of employees to asbestos was reduced to 0.1 fibre per cm³ by a decree dated 24 December 1996.

Pursuant to this decree, since 1 January 1997, it is prohibited to manufacture, transform, sell or import any form of asbestos in France. Exceptions to this rule were provided for, particularly where there was no harmless or reliable substitute but these have been gradually abolished by the Ministry of Health.

2. THE FUND FOR THE COMPENSATION OF ASBESTOS VICTIMS (FIVA)

This fund was created by the Social Security Financing Act of 23 December 2000² in order to reduce the number of asbestos-related claims brought before French Courts. Its aim is to compensate all the victims of asbestos-related illnesses, whether this is due to their working environment or not. The fund awards lump sums to victims in order to fully compensate them for the damage suffered. In this respect, FIVA takes into account the compensation already granted by the Social Security system, if any.

Employees affected by an asbestos-related illness can thus seek compensation from FIVA even if they have already filed a claim with Social Security or before special courts known as Social Security Courts ("*Tribunaux des Affaires de Sécurité Sociale*" - hereafter "TASS"). When an employee files a claim for compensation with FIVA, he must indicate whether or not he has benefited from a compensation granted by the Courts (to avoid double indemnification).

FIVA's offer for compensation must be made within six months as from the claim. If the fund does not, or expressly refuses to make this offer, the claimant may bring legal action against it directly before the Court of Appeal.

If, on the contrary, FIVA makes an offer that is accepted by the employee, the latter must waive all claims against the company in question (see 3.1.2). It will then be up to FIVA to bring legal action against this company in order to recover damages, but only to the extent of the amount paid to the victim.

It is only from April 2002 that FIVA really started to exercise its activity. Since the creation of FIVA, a bit more than 2 billion Euros has been paid to asbestos victims and their beneficiaries.

FIVA has adopted a table of compensation for asbestos victims in January 2003. Two objective criteria have been used to establish the amount of compensation offered to victims:

- the victim's pathology and its degree of seriousness measured according to disability,
- the age of the victim at the time the illness was acknowledged.

In the event of aggravation, the compensation is reviewed according to the increase of disability.

FIVA's table of compensation was first called into question in February 2004 when the Court of Appeal of Bordeaux³ almost tripled the compensation granted to an asbestos victim by FIVA. In the same way on 4 March 2004, the Paris Court of Appeal⁴ ordered that FIVA's offers of compensation be increased in decisions concerning seven victims of asbestos who were challenging the amounts which they had been offered. On 20 September 2007, the same Court of Appeal⁵ also doubled the amount offered by FIVA for the moral and physical loss of the victim who died of mesothelioma, multiplied the compensation of the moral loss of the widow by 2.5 and that of the daughter by 6. In another case, it had increased by 60% the moral loss and by 70% the physical loss of the deceased. It had also multiplied the moral loss of the widow by 2.5.

This tendency, which started in 2004, still continues. Indeed, the high amounts of compensation granted by certain Courts of Appeal and an increased representation of the claimants by lawyers, associations or unions, favour such recourses. Therefore, according to the activity report of FIVA for 2008, out of all the

² Article 53 of the Social Security Finance Law for 2001.

³ Bordeaux Court of Appeal, Ch. Soc., Section B, 24 February 2004, 03/2696.

⁴ Article published on 16 March 2004 on the website LeMonde.fr entitled "*Justice improves the compensation of asbestos victims*".

⁵ Paris Court of Appeal, 20 September 2007, docket no. 06/10413.

litigations for compensation against FIVA brought before the Courts of Appeal in 2008⁶, 90% of the employees and 56% of the beneficiaries were granted an increase of their compensation.

With the increase of compensations granted by FIVA, the issue regarding the subrogatory actions available for the latter occurs. Since its creation, FIVA initiated 1,220 subrogatory recourses against companies, number that is very low compared to the 45,658 compensations granted during the same period. FIVA does indeed not have the resources that would enable it to handle all the actions it has to lead, such that even though it is compulsory⁷, FIVA today only initiates subrogatory actions when the victim or its beneficiaries have an interest in terms of additional compensation. For 2008 alone, 85% of the decisions were in favour of the subrogated claimant, most of these acknowledging the gross negligence of the employer.

Faced with the financing difficulties of FIVA, the French Senate had considered, in its report of 2005⁸, that reforms should be implemented to make the subrogatory recourses of FIVA systematic.

Despite all this, FIVA's subrogatory actions are increasing (2,227 in 2008 compared to 1,175 in 2007 or 931 in 2006), which led to the development of case law of the French Supreme Court (*Cour de Cassation*) on this point. Thus, in 2006, the 2nd Civil Chamber confirmed the admissibility of the subrogatory action of the fund in the scope of the actions for gross negligence, if the offer for compensation

has been notified and the advance payment paid⁹.

The subrogatory actions exercised by FIVA could shortly increase in the field of environmental illnesses, as these are not compensated by Social Security bodies. Moreover, the dispute resolution department of FIVA created, in 2008, a "unit" of three lawyers specialised in these matters, the aim being to gather the litigations per site to launch "common actions in the relevant cases"¹⁰.

3. CIVIL CLAIMS

Two categories of claimants are likely to bring civil liability proceedings: employees who have been exposed to asbestos at their work place (3.1) and third parties who have been exposed to asbestos used by a company (3.2).

3.1 Actions brought by employees

3.1.1 The role of the Social Security system

Any person suffering from an asbestos-related illness contained in the official list of professional illnesses (tables 30 and 30B for asbestos-related illnesses) may seek compensation from the French Social Security system.

The compensation awarded by Social Security is based on the employee's average wages and the extent of his inability to work resulting from his asbestos-related disease. It is either a lump sum or a pension paid every month or every quarter, depending on the amount awarded.

Employees must file their claims for compensation within a time period of, in principle, two years from the date when they were forced to stop their professional activity due to the illness or when the work-related origin of the illness was medically proven.

3.1.2 The employer's "gross negligence" ("*faute inexcusable*")

• General presentation

Pursuant to Article L. 452-1 of the French Social Security Code, "when a [work] accident is due to the gross negligence of the employer [...], the victim or its beneficiaries are entitled to obtain additional compensation [...] [from the Social Security system]. In such cases, employees can also obtain compensation for their non-financial damage, such as physical and moral harm, and for the loss or reduction of professional promotion possibilities"¹¹.

In the event of the death of an employee, the latter's heirs have the right to bring a judicial action or to pursue an ongoing action on the deceased's behalf to obtain compensation for the loss suffered by this employee.

"Gross negligence" is defined as a serious fault. In theory, it requires the combination of the following elements:

- a voluntary act or omission,
- the employer's awareness of the danger, and
- the absence of any justification.

However, following judgments handed down by the Social Chamber of the *Cour de Cassation* on 28 February 2002¹², it is no longer a requirement that the employer's act or omission was carried out deliberately: The *Cour de Cassation* indeed ruled that an employer who:

- was, or who should have been aware, of the danger to which the employee was exposed, and
- did not take the necessary steps to protect them,

⁶ Report available on the website of FIVA: <http://www.fiva.fr/pdf/rapport-fiva-08.pdf>.

⁷ Article 36 of Decree no. 2001-963 dated 23 October 2001.

⁸ Report available on the website of the French Senate: <http://www.senat.fr/rap/r05-037-1/r05-037-1.html>.

⁹ Cass. Civ. 2, 31 May 2006, *pourvoi* no. 05-18-918.

¹⁰ Report on the fund for the compensation of asbestos victims (FIVA) prepared by Alain Dorisson and Pierre-Louis Remy, July 2008.

¹¹ Article L. 452-3 of the French Social Security Code.

¹² Cass. Soc. 28 February 2002, *pourvois* no. 00-10.051, 99-18.389, 00-11.793, 99-21.255, 99-17.201, 99-17.201 and 00-13.172; RJS 5/02 no. 835, 837, 838, 842, 844 and 845.

was guilty of gross negligence.

In the same decisions, the Social Chamber of the *Cour de Cassation* ruled that employers are under an obligation of guarantee, to the extent where the latter are deemed to have committed gross negligence as soon as an employee has contracted an asbestos-related illness. The burden of proof has been reversed. It is now the employer's responsibility to prove that all the necessary measures were taken to protect the employees' health.

Since asbestos-related illnesses have been classified as professional illnesses since 1945 and since scientists have warned about the dangers related to asbestos for many years, the *Cour de Cassation* considers that employers are deemed to have been aware of the dangers of asbestos. According to this reasoning, it may be inferred from the sole fact that certain employees have been infected by asbestos, that their employers did not take the necessary measures and therefore committed gross negligence, in spite of the employer's compliance with the applicable regulations, notably in terms of health and safety. This is how the *Cour de Cassation*, in a decision dated 9 July 2009, considered that even if the samples gathered and analyses carried out by an employer had demonstrated that the number of asbestos fibres did not exceed the legal threshold, the employer "*should have been aware of the danger to which his employee was exposed*"¹³.

Yet, this gross negligence gives rise for the employees to the right to obtain damages and an increase of their pension.

The employee who considers that his employer has committed such gross negligence must file a claim with the relevant Social Security centre seeking full compensation for the suffered loss. This centre aims at facilitating possible settlement agreements between employers and employees and

assessing the losses suffered by employees. If no settlement agreement is reached, the employee may then bring an action before a TASS which has jurisdiction to hear all the claims related to Social Security matters. The relevant TASS will be that which is located in the county where the employee resides.

The attempt at mediation is compulsory pursuant to the terms of Article L. 452-4 of the French Social Security Code. However, Social Security tends to only organise mediation meetings several months after receiving a claim. In the absence of answer from the conciliation commission ("*Commission de Recours Amiable*" - "CRA") within one month as from its referral, the claimant can consider his claim as dismissed and lodge an appeal directly before the TASS (Article R. 142-6 of the French Social Security Code).

- *Damages granted to employees*

To the extent where French law does not acknowledge the concept of "*punitive damages*" and since the cases are handled by professional judges who strictly apply the principle according to which damages should compensate for the exact loss suffered, the damages awarded by the French courts will probably always be far lower than those allocated by certain foreign courts in similar cases.

Based on judicial decisions available to the public, French courts thus generally grant between 4,500 and 230,000 Euros as damages when the employer is guilty of gross negligence.

However, by decision dated 30 August 2004 handed down by the Court for Social Security Matters of Mont de Marsan, EDF (the French national electricity company) was ordered to pay more than three million Euros of damages to 23 agents infected with asbestos, 10 of whom died from their illnesses, and their families (approximately 45,000 Euros per employee and up to 500,000 Euros for a family who lost a relative). This is the largest amount to date that an employer

has been ordered to pay for an asbestos-related action in France because of his gross negligence.

However, on 14 March 2007, at the time of the recourse for gross negligence filed by 11 colleagues of the 23 agents who had previously been compensated, the same Court granted to the claimants damages of an amount that was three times less important.

It is not possible to draw up a table which could link specific illnesses to specific amounts of damages because the Courts allocate different amounts of damages depending on the specific circumstances of each case, rather than the type of disease.

Under Article L. 431-2 of the French Social Security Code, the victim or his/her beneficiaries normally have two years as from the moment the victim stopped working, as from the medical diagnosis of the professional origin of the illness, as from the time when the payment of the daily indemnity is no longer paid or as from the end of the investigation before their rights to the services and indemnities of the Social Security expire.

This rule has been adjusted for employees victims of asbestos by Article 40 of a Law dated 23 December 1998 (amended by Article 49 of a Law of 21 December 2001 to include the recourses relating to the increase of the pension), which has had as effect to re-open, without any limit in time, the rights of the employees whose asbestos-related professional illness has been acknowledged between 1 January 1947 and 29 December 1998. As a result, a vast number of victims of asbestos was able to benefit from this Law and exercise an action, which under the terms of Article L. 431-2, would have been time-barred.

¹³ Cass. Civ. 2, 9 July 2009, *pourvoi* no. 08-16.934.

3.1.3 The recourses launched in the scope of the asbestos early retirement scheme

- *Presentation of the asbestos early retirement*

Any employee aged less than 50 years old who (i) has developed a professional illness caused by asbestos or (ii) has worked on one of the sites acknowledged by the authorities as sites of exposure to asbestos, can decide to benefit from the "asbestos workers' early retirement scheme". The employee thus receives, until the date on which his right to retirement at the full rate of the general regime is open (between 60 and 65 years old), an early retirement benefit ("*Allocation de cessation anticipée d'activité des travailleurs de l'amiante*" - hereafter "ACAATA"), which is calculated by Social Security on the basis of the latter's last wages and which represents approximately 65% of the last salary.

The ACAATA is financed by the Fund for the asbestos workers' early retirement scheme ("*Fonds de cessation anticipée d'activité des travailleurs de l'amiante*" - hereafter "FCAATA"), which resources mainly come from the work accidents and professional illnesses division (AT/MP) of Social Security.

The Social Security Financing Act for 2005 dated 20 December 2004 had created a contribution to the benefit of the FCAATA to be paid by the companies using sites opening the right to obtain the ACAATA. The annual contribution owed for the FCAATA by a company reached 21% of the ACAATA (amount subject to a certain number of annual thresholds). This system was cancelled by the Social Security Financing Act for 2009 dated 17 December 2008, which instead favours an increase of the contributions of the AT/MP division borne by every employer.

In April 2008, a report of the Work Group on the reform of the asbestos workers' early retirement scheme highlighted that the financial

participation of the State reached less than 30 million Euros, i.e. between 3 and 4% of the costs incurred. From this observation, the report proposed to gradually increase - over a period of four to five years - the participation of the State to a third of the costs incurred by the FCAATA¹⁴. No reform in this way has been undertaken to date.

- *Asbestos early retirement litigation*

Since 2008, new actions appeared by which former employees who left for early retirement requested damages for the decrease of their income at the time of their departure for early retirement, the ATA representing approximately 65% of their last salary.

The Paris Court of Appeal, by a decision dated 18 September 2008¹⁵, thus granted to 36 employees more than 850,000 Euros for the financial loss that would result "*from the deprivation of a normal career and of a retirement compliant with the increase of life expectancy*". Each claimant received 35% of the average salary paid by the company as damages.

The Paris Court of Appeal based its decision on the fact that the employer has, in the scope of his employment agreement, a strict safety obligation ("*obligation de sécurité de résultat*") towards his employees and that his alleged "*gross negligence*", related to the use of asbestos, would have resulted in "*exposing [the employees] to the risk of asbestos, with as consequence a decrease of their life expectancy, and [would have] thus made them lose the chance to pursue their careers to the end*". Departure for early retirement would just be a "*default choice*", since the employees must, according to the Paris Court of Appeal, either leave for early retirement, or continue their exposure to asbestos.

The Bordeaux Court of Appeal followed the Paris Court of Appeal on 7 April

2009¹⁶ and granted damages to 17 former employees for "*loss of chance*" to benefit from a normal career. Moreover, they each received 7,500 Euros for the anxiety they would suffer from due to the risk of one day developing an asbestos-related illness.

The Bordeaux Court of Appeal, even if it has acknowledged that the employee indeed makes a choice when leaving for early retirement and that "*the ACAATA is a collective and general answer to a factual situation objectively acknowledged in the industrial world, without any reference being made to the employer's behaviour*", awarded the claim of these former employees. It considered that they had suffered from a loss "*related to the fact that a majority of [their] employment agreement was performed in a company where the management of the time did not meet its safety obligations*". According to the Court, these employees could not "*benefit from a normal professional life because of both an objective situation of exposure to an industrial risk, for which one remedy is the ACAATA and the fact that they were seriously put at risk by the employer's wrongful behaviour*".

The Bordeaux Court of Appeal however only granted to the former employees 20% of their former salary, on the basis of loss of chance.

If the decisions of the Paris and Bordeaux Courts of Appeal present differences, both can be criticised.

The causal link between the loss (loss of income) and the alleged fault (use of asbestos on the site, it being specified that the substance being lawful in France until 1996) is for instance eminently challengeable.

The financial loss related to the decrease of income at the time of departure for early retirement does not have as direct cause the presence of asbestos on the site but, in addition to the choice made by each employee, the

¹⁴ See footnote no. 1.

¹⁵ Paris Court of Appeal, 18 September 2008, Juris-data no. 2008-371505.

¹⁶ Bordeaux Court of Appeal, 7 April 2009, Juris-data no. 2009-003768.

creation by the French legislature of a retirement system which grants to the person who takes early retirement an allowance only equal to part of his/her salary.

Pursuant to this new case law, companies are thus forced to overcome the choices and deficiencies of the State, which decided not to assign a higher allowance under the asbestos early retirement scheme. In this respect, it should be noted that any employee having worked on designated sites, whatever his position and actual exposure, can request to leave on early retirement in its current standing.

It seems legitimate that the State, which was sentenced by the French State Council ("*Conseil d'Etat*") on 3 March 2004 because of its failure to enact, in the past, a more protective law, should bear the additional cost of the asbestos early retirement, if the grievances of the employees are deemed justified.

Along with a decision from the *Cour de Cassation*, which is hoped to be more rigorous in terms of causality, the French Government should take into consideration the full extent of the responsibilities of the State and oversee this new case law when reforming the early retirement scheme announced as soon as the beginning of 2008.

3.2 Third party claims

These claimants can firstly be buyers or users of products that contain asbestos or individuals who have inhaled particles of asbestos, because they lived near a plant using asbestos for instance. Only a small number of these types of claims have been brought before the French Courts to date.

The employees' relatives or beneficiaries are another category of third parties who are likely to file claims against companies. They may seek compensation for both the damage they suffered due to the illness or death of the victim, and for their own physical damage that would result from their contact with asbestos.

For example, the wife of an employee was awarded 50,000 Euros of damages because she had developed a mesothelioma due to regularly washing her husband's work clothes¹⁷.

Third parties may, in theory, bring proceedings on one of the three following grounds:

3.2.1 Article 1382 of the French Civil Code relating to tort liability

In tort, claimants must prove three elements: a fault committed by the defendant, a loss suffered by the claimant and a causal link between these two elements.

Such proceedings must be filed within 10 years as from the date when (i) the claimant developed an asbestos-related illness or (ii) this illness aggravated.

Negligence may simply result from the breach of a legal or regulatory safety provision. However, such provisions did not exist with relation to third parties before the prohibition of asbestos in France as from 1 July 1997.

Negligence may also result from the breach of a general obligation to "*act as a cautious and diligent man*". French case law considers that an individual has committed negligence and is therefore liable, when, despite compliance with the relevant legal provisions, a cautious and diligent man should have taken further precautions.

One decision may be quoted as an illustration of this type of liability: a decision dated 25 May 1993¹⁸, of the Second Civil Chamber of the *Cour de Cassation* held, on the basis of Article 1382 of the French Civil Code, that a company was liable towards people living near its plant because particles of lead dispersed in the air had been emitted by the plant and had contaminated the soil in surrounding fields. Similar proceedings initiated by

residents living near plants and affected by asbestos-related illnesses could increase, as demonstrated by the case of the former plant of the Counter of Materials and Raw Materials ("*Comptoir des Matériaux et des Matières Premières*" - hereafter the "CMMP") of Aulnay-sous-Bois (see 4.2).

3.2.2 Article 1384 of the French Civil Code relating to liability for damage caused by a thing

This kind of liability is, in theory, easier to prove than tort liability since no fault has to be proved. Indeed, claimants only have to prove that the "*thing*" has caused the damage in question.

The custodian of a "*thing*" is defined as the person who has the use, control and authority over it; usually this is the owner of the "*thing*".

However, case law considers the manufacturers of products as custodians of the structure, which allows retaining their liability in the event of defect that is inherent in the product.

This principle was applied by the Argentan Civil Court and upheld by the Caen Court of Appeal in the abovementioned case involving a woman who had developed an asbestos-related illness through washing her husband's work clothes.

The limitation period to act on the basis of Article 1384 of the French Civil Code is the same as for claims brought under Article 1382, i.e. 10 years as from the date when the claimant (i) developed an asbestos-related illness or (ii) this illness aggravated.

4. CRIMINAL CLAIMS

Asbestos victims can also initiate criminal proceedings, for instance for manslaughter or unintentional bodily harm (4.1) or for the employer's deliberate breach of a specific safety or precautionary obligation imposed by law or regulation (4.2). This second kind of proceedings can be brought at the same time as the first or may be brought independently. A claim for

¹⁷ Mâcon Civil Court, 2 May 2005, confirmed by the Dijon Court of Appeal, 11 March 2008, Juris-data no. 2008-359276.

¹⁸ Cass. Civ. 2, 25 May 1993 (Metaleurop), *pourvoi* no. 91-17.276.

damages may also be filed within the scope of these criminal proceedings.

4.1 Manslaughter and unintentional bodily harm

Three elements must be proven: a loss, negligence and a causal link. If these three elements can be proven, the managing director of a company, his deputy and sometimes even the company itself can be held criminally liable for the same facts.

4.1.1 Regime applicable to legal entities

Legal entities can be held as criminally liable in France only since 1994. Therefore, only the facts that occurred after this year can be used against these legal entities in the scope of criminal proceedings.

A legal entity's negligence can either be:

- clumsiness, negligence, carelessness, inadvertence, or
- a breach of a specific safety or precautionary obligation imposed by law or regulation.

This negligence must have been committed on behalf of the legal entity (i.e. to its benefit), by one of its organs or representatives.

4.1.2 Regime applicable to managing directors or their deputies

Since the Law of 10 July 2000, the regime applicable to managing directors is not as strict as the regime applicable to legal entities. Indeed, if the managing director in question did not directly cause the damage but:

- created or contributed to the situation that led to the damage, or
- did not take the measures to avoid the damage,

he will only be held liable if he:

- breached, in an obviously intentional manner, a specific safety or precautionary

obligation imposed by law or regulation, or

- committed a blatant fault that exposed others to a serious risk that he could not ignore.

4.1.3 Sanctions incurred

Individuals risk imprisonment and fines. Legal entities risk fines of up to five times the amount risked by individuals (i.e. for example, a fine of 225,000 Euros for manslaughter). Depending on the seriousness of their negligence, legal entities risk accessory penalties, such as the placement under judicial supervision. Moreover, the decision handed down can be posted in public locations or published in newspapers or via any broadcasting means.

4.2 Employer's deliberate breach of a specific safety or precautionary obligation imposed by law or regulation

This act can constitute:

- an aggravating circumstance that leads to the application of stricter sanctions in the scope of proceedings for manslaughter or unintentional bodily harm (for instance the permanent closure or closure for a maximum duration of five years of the establishment concerned), or
- an autonomous offence on the basis of which, in the absence of any damage, a legal entity can be ordered to pay a fine of up to 75,000 Euros and an individual can be sentenced to one year imprisonment and a fine of up to 15,000 Euros.

It should however be noted that criminal proceedings do not have the same objective as civil proceedings. Whereas civil proceedings are intended to compensate the claimants for the harm suffered, criminal proceedings aim to punish employers who have not complied with the legal obligations imposed on them.

Despite the lengthy duration of criminal proceedings, such proceedings have

important repercussions for employers found guilty of one of the criminal offences mentioned above, particularly in terms of image.

In June 1996, ANDEVA (the National Association for the Defence of Victims of Asbestos) filed a complaint against unknown persons ("*plainte contre X*") in order to determine who was liable out of the industry, the public authorities and scientists for the "*asbestos disaster*". To date, no decision has been handed down in this respect, despite the repeated actions of associations who increase the number of demonstrations and appeals to the Government. However, despite the absence of "*contaminated air*" trial, the criminal proceedings, indictments and sentences increase.

In September 2006, it is the company Alstom Power Boilers that was sentenced by the Lille Criminal Court to the maximum penalty, i.e. a fine of 75,000 Euros, and was ordered to pay the amount of 10,000 Euros as damages to each of the 160 claimants, for having "*endangered the life of others*". It was blamed of not having sufficiently protected its employees against asbestos dust between 1998 and 2001 in a plant of Lys-lez-Lannoy. This judgment was upheld by the Douai Court of Appeal on 6 March 2008. The Director of the plant had his sentence decreased in appeal from nine to three months suspended imprisonment and a fine of 3,000 Euros.

Similarly, the Universities of Paris VI, Paris VII and the Institut de Physique du Globe located on the campus of Jussieu were indicted on 12 January 2005 for "*endangering the life of others, harm and manslaughter*". Moreover, their directors were heard by the Courts in the capacity of witnesses and could even incur criminal sanctions. On 26 March 2009, a report of the French High Health Authority noted that 5 cases of pleural mesothelioma had been diagnosed between 2001 and 2002 amongst the staff of the campus of Jussieu, which could be related to passive exposure to asbestos.

This report noted that out of 21 cases observed in Aulnay-sous-Bois, 3 cases of mesothelioma would be related to environmental exposure to asbestos. In April 2005, the CMMP, owner of the plant in question, had been indicted on the basis of "*manslaughter and unintentional harm*". The Investigation Chamber of the Paris Court of Appeal cancelled this indictment on the ground that the facts occurred before the entry into force of the criminal liability of legal entities in 1994. However, the possibility of individual proceedings against former managing directors still exists. This case is the first involving purely environmental cases of contamination by asbestos in the neighbourhood of a former plant (see also 3.2).

More recently, two former Managing Directors of the Harbour of Dunkirk have been indicted for manslaughter and unintentional harm in the scope of an investigation on the death of sixteen dockers. They were blamed of not having taken sufficient action, of particularly serious gross negligence, carelessness and other negligence between 1970 and 1995.

Two company doctors have also been indicted these last two years.

The cases mentioned above are only the most emblematic of a litigation that is increasing. However, amongst this agitation, following the announcement in January 2009 of the disappearance of the Investigating Judges, the association of victims fear that the "*great criminal asbestos trial*" will never take place in France. The State and its representatives would thus be the only ones not to risk anything.

5. THE LIABILITY OF THE FRENCH STATE TOWARDS ASBESTOS VICTIMS

On 3 March 2004¹⁹, the *Conseil d'Etat* upheld four decisions of the Marseille Administrative Court of Appeal which had found the State liable for the

contamination by asbestos of four people during their employment activities for various private companies.

The *Conseil d'Etat* held that although employment legislation imposes a safety obligation on employers, "*it is the duty of the public authorities responsible for the prevention of professional risks to keep themselves informed of the dangers to which employees may be exposed in the scope of their employment activities, taking particular note of products and substances that they use or with which they are in contact, and in view of current scientific knowledge, with the help of study or further investigations, to provide the most appropriate measures to limit and if possible eliminate these dangers*".

In this decision, the *Conseil d'Etat* thus held that the State is also liable for the cases where employees have been exposed to asbestos before the publication of the Decree of 17 August 1977. The *Conseil d'Etat* held that the Administrative Court of Appeal was not mistaken in having ruled as improper the State's failure to carry out any research intended to assess the risks related to asbestos nor to take any measures intending to limit them before 1977. It stated that "*the harmful nature of asbestos dust was known at the beginning of the 20th century and its carcinogenic nature was proven during the 1950's*".

Despite the acknowledgment of the role of the State in the asbestos disaster, the latter is not excessively involved in the financing of the asbestos victims' compensations, and this despite several reports containing recommendations in this respect. It also did not legislate to reduce the judicial risk that the companies in question face, companies that, in majority, are in danger. Torn between the rage of the victims' associations and the torments of the industries, which are badly affected by the economic crisis, the State should intervene to participate, to the extent of its past inaction, in the compensation of asbestos victims.

¹⁹ Council of State, 3 March 2004, case Thomas, D. 2001 IR, page 3253.

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