In the Supreme Court as High Court of Justice

HCJ 6971/11

Before: The Honorable President A. Grunis
His Honor Justice N. Hendel
His Honor Justice Z. Zylbertal

The Petitioner

1. Eitanit Construction Products Ltd.

v.

The Respondents:

1. The State of Israel
2. The Knesset
3. Minister of Environmental Protection
4. Minister of the Treasury
5. Mate Asher Municipality
6. Israel Union for Environmental Defense
7. Association for Quality of Life and the Environment in Nahariya

Petition for Temporary Injunction and Interim Order

Date of session: 23th Elul 5772; October 9, 2012

Adv. Pinchas Rubin
For the Petitioner

Adv. Sharon Rotanshker
For Respondents 1, 3-4

Adv. Avital Semplinski
For the Second Respondent

Adv. Eitan Maimoni
For the Fifth Respondent

Adv. Keren Halperin-Mosseri
For the Sixth Respondent

Adv. Moshe Goldblat
For the Seventh Respondent

Judgment

Justice N. Hendel

1. A petition against the constitutionality of section 74 of the Prevention of Hazards from Asbestos and Harmful Dust Act, 2011 ("Asbestos Act") is before us. This section declares the launch of a project to remove asbestos waste from the Western Galilee ("The Project"). The petition objects primarily to the requirement that the Petitioner, Eitanit Construction Products Ltd. ("Eitanit"), to shoulder half of the expenses of the project, up to NIS 150m.

General Background – Asbestos:

2. Asbestos is an umbrella term for a group of fiber minerals, with high insulation and resilience properties. Because of these qualities, for hundreds of years asbestos has been widely used for industrial purposes, such as producing protective gloves and other gear, acoustic insulation boards and more.

   Currently, it is known that crisp asbestos, that is: asbestos in ground or powder state, is a dangerous substance that may cause cancer. Crisp asbestos releases tiny fibers into the air, which enter the respiratory system and harm lung tissue. Among the first diseases recognized as linked to asbestos was asbestositis: the shrinking and scarring of lung tissue, which causes shortage of breath and a decline in lung functions. Another disease is mesothelioma: a cancerous tumor that harms the lungs, heart and abdomen.

   The petition before us, as will be explained below, deals with a material called asbestos-cement. It is a compound made of approximately 10% asbestos and 90% cement, in hard from. Out of this asbestos-cement mixture products such as pipes and boards may be manufactured. As long as the asbestos-cement remains in hard from, the asbestos fibers are contained in the cement. This may change when the asbestos cement – or the product manufactured from asbestos-cement – is eroded, cracked or broken, then the dangerous asbestos fibers are released into the air.

   Awareness of the dangers of asbestos has grown over time. As early as the beginning of the 20th century, information about the prevalence of asbstositis among workers exposed to asbestos has accumulated. Later reports proliferated about different cancers among asbestos workers. In 1976, after a comprehensive examination of the scientific material, the International Agency for Research of Cancer (IARC) recognized asbestos as a substance certain to cause cancer in humans (Class I). Additional research indicated that health risks were caused not only to asbestos workers but to those who live in close proximity to asbestos mines, as well as family members of asbestos workers (generally, for an updated review of asbestos risks by IRAC, see Monographs.iarc.fr/ENG/Monographs/vol100C/mono100C-11.pdf)

The Petitioners and the Asbestos Industry

3. In 1952 Eitanit set up an asbestos-cement factory in the Nahariya area ("the factory"). Work in the factory included two stages: in the first stage, the factory imported raw asbestos to Israel and made asbestos-cement out of it. In the second stage, final asbestos-cement products, such as pipes and boards, were manufactured. The factory was closed in 1997.

Over the years, and during production processes, a significant amount of industrial asbestos waste was amassed in the factory ("the waste"). Eitanit disposed of the waste in two ways: one, it sold or gave away the waste to third parties, which I will refer to as end users, that used the waste primarily for surfacing, for instance to pave roads or parking lots. Second, Eitanit buried the waste in the ground. The first method of removing the waste – that is, selling or giving it away, probably stopped around the late 70's.

In any event, the waste was distributed in dozens of locations around the Western Galilee. Both the waste that was buried and the waste that was used for surfacing risks area residents' health to this day. The waste is partly crumbled, causing asbestos fibers to be released into the air. Additionally, the daily use of the surfaces which were covered with asbestos uncovers masses of crisp asbestos and create a health hazard. Surveys commissioned by the State revealed that the asbestos waste distributed in the Western Galilee amounts to about 30,000 cubed meters and the State evaluates that the clean soil that was polluted by this waste amounts to about 150,000 cubed meters The Petitioner, however, believes that the ratio between the waste and the polluted soil is 1:3, not 1:5.

The Previous Proceedings Regarding the Petitioner:

4. The petition before us deals, as mentioned, with a project to remove asbestos waste that arguably came from Eitanit's factory. But this is not the first round of proceedings on this matter between Eitanit and State authorities.

As some point, Eitanit began to remove some of the asbestos waste to a site within Shlomi municipality (Hanita mine), without permit or license to do so. In 1981 the Ministry of Health demanded Eitanit cease from this practice and the site was closed. Consequently, Eitanit buried waste at the Sheikh Danon site, also without permit or license. In March 2002 the Ministry of Environmental Protection ("the Ministry") issued conditions for temporary permits that would allow restoring the site at Sheikh Danon. In a petition by Eitanit against the Ministry, which was dismissed, the court pointed out that the demand to require Eitanit shoulder the cost of the site's restoration is "natural and obvious" (AP 589/02). Ultimately, in 2003, after additional legal proceedings, the Sheikh Danon site also closed.

In 1998, after the factory was shut down, the City of Nahariya initiated a project to build an amusement park called "The Children's Land." The park was meant to be located on the beach, adjacent to the closed factory.

When it was revealed that the area was polluted with asbestos, the Ministry issued a decree to preserve cleanliness, according to section 13b of the Maintenance of Cleanliness Act 1984. The City of Nahariya announced it would clean the area from asbestos, and consequently sued Eitanit for reimbursement of costs. In 2007 the dispute between the City and Eitanit regarding that area was settled.

In 2005 the Minister of Environmental Protection (the Minister) met with representatives of Eitanit and of the City, in an attempt to reach an agreement for co-funding asbestos waste removal from the Western Galilee. The attempt failed. In May 2007 negotiations between the parties resumed. Eitanit proposed, among others, that it remove the waste on its own. In November 2008, the Ministry notified Eitanit of a decision that the State would no longer facilitate a mutual agreement.

In December 2008 the Asbestos Act memorandum was distributed. The Act aimed to resolve a whole host of environmental issues around asbestos hazards in Israel. Among others, the Act included a specific section that addressed the project of removing asbestos waste from the Western Galilee. This is section 59 of the bill, which eventually became section 74 of the final Act and is the section at the center of this petition. We will address the Act and the section in further depth. Briefly, the section required Eitanit to fund half the project to remove asbestos waste from the Western Galilee. In 2009 the bill passed its first reading, and was referred to the Interior Committee and the Environmental Protection Committee. Eitanit's representatives attended the committee's meetings, and presented their arguments against the proposed arrangement. In March 2011, the bill passed its second and third readings.

Simultaneously, the Ministry published a tender to select a corporation that would manage the removal project. Negotiations were conducted with Eitanit, along with others, and in December 2009, it proposed participating in the project at the cost of NIS 10m, a sum that was later updated to NIS 15m. There were big gaps between parties regarding calculating costs, including due to different estimations of the amount of soil polluted and of the cost of removal. In November 2010, when the negotiation was complete, the Ministry of the Treasury notified Eitanit that its financial proposal for the project was rejected and Eitanit responded by withdrawing the proposal altogether.

In June 2011, after the Act's publication, Eitanit complained to the Minister of Environmental Protection that section 74 creates extraordinarily important constitutional problems. It suggested the Minister institute regulations that would prevent, or at least reduce, the infringement of Eitanit's rights. In response, the Minister emphasized that the constitutional issues were already discussed comprehensively and thoroughly before the bill passed. Later, in August 2011, the Minister provided Eitanit with a draft of instructions for implementing section 74 for its review. The draft did not satisfy Eitanit, and correspondence between the parties continued. Eventually, in September 2011, the Minister signed the final version of the instructions. Once Eitanit

concluded it had exhausted the proceedings to temper section 74, without a satisfactory minimization of its harm, it filed the petition before us.

On the Prevention of Hazards from Asbestos and Harmful Dust Act (Asbestos Act)

5. The Asbestos Act was designed to reduce the environmental and health hazards caused by asbestos or by other harmful dusts. The purpose is ensuring an adequate environment under the principle of preventative care and the improvement of quality of life and the environment (section 1).

The Act expressly prohibits manufacture, import, possession and use of asbestos in any way and for any purpose, unless permitted by the Act (section 3). The Act regulates the continual use of existing asbestos in public places and factories (sections 4-8). The Act prohibits anyone from creating an asbestos hazard, that is: causing the existence of asbestos fibers in the air, and requires the creator of the hazard to remove it at their own expense (sections 10-11). The Act also regulates methods for handling asbestos, including the granting of licenses and working with asbestos (chapters E-F). There is also an option to apply several of the Act's provisions to other materials that may be defined as harmful dust (section 71).

Section 74 was designated to address the asbestos hazards in the Western Galilee. This is the section the petition before us focuses on. The language of the section is as follows:

"(a) In this section –

"the project to remove asbestos from the Western Galilee" – a project to locate, remove, and bury asbestos waste which originated from a factory for asbestos manufacture in the Western Galilee, which was buried or distributed in a radius of up to 15 KM from the factory, except for land owned by asbestos companies, at an extent and measures instructed by the Minister in consultation with the Minister of the Treasury, and as it pertains to the funding aspects of the project, with the consent of the Minister of the Treasury;

"Asbestos Companies" – companies that manufactured asbestos in the Western Galilee prior to the day this Act came into effect.

(b) The project of asbestos removal from the Western Galilee will be funded through the State budget, payments from asbestos companies, and payments from local authorities within whose jurisdiction the project will take place ("local authorities").

(c) A separate account will be managed in a trust to preserve cleanliness and will be used to fund costs, direct or indirect, of the project for asbestos removal from the Western Galilee (in this section – "the separate account").

(d) The Minister, with the Minister of the Treasury's consent, after providing the local authorities and the asbestos companies the opportunity to present their arguments, will order the sums that the local authorities and the asbestos companies will transfer into the separate account and the schedule for payments, as long as the entire sum from asbestos companies will be equal to the entire sum from the state budget and the local authorities combined. However, the entire sum from the asbestos companies may not exceed NIS 150m.

(e) While setting payment sums and schedules according to section (d), the Minister will consider, among others, the scope of the state budget dedicated to funding the project generally, the sums already actually expended, and regarding local authorities – the identity of property rights holders in the land where asbestos is found, the use of these lands and the extent of the authorities' responsibility over them, as well as the local authorities financial state.

In other words, a project for the removal of asbestos waste from Eitanit's factory that was buried or distributed in a radius of up to 15 KM from the factory would be launched. In this regard "asbestos waste" includes asbestos that was broken, cracked or fractured, or broken as well as asbestos that is unused (as defined in section 2). It should be noted that the statute does not explicitly mention Eitanit's name, but instead uses general language – "asbestos companies" and "a factory for asbestos manufacture". Still, as will be clarified below, there is no dispute that the statute in effect targets only Eitanit and its factory; it is the only company in the Western Galilee area that manufactured asbestos.

The project would be funded from three budgetary sources: the State, the local authorities in whose jurisdiction the project will take place, and Eitanit (who, as mentioned, is not explicitly mentioned by name in the section.) The Minister will establish the extent and process of the project. Additionally, the Minister will set the sums that the local authorities and that Eitanit will transfer, once their arguments are heard. Setting the amounts of participation is subject to two restrictions. First, the sum that Eitanit transfers will be equal to the total sum the State and the local authorities transfer, combined. Second, the sum Eitanit transfers must not exceed NIS 150m.

In September 2011 the Minister signed the implementation instructions. They stipulate that the project will take five years, and will be executed by a managing company chosen by tender. A local authority's participation will be calculated as 10% of the removal cost, through equally valuable operations, including restoration. To set the sums required from Eitanit, the company will receive itemized reports of expenses every three months, along with a detailed report of the sites where the removal was done and the amount of waste removed. Eitanit will have 30 days to respond to each bill (annexure 20 to the State's responding papers.)

The Parties' Arguments

6. Eitanit claims, in essence, that section 74 infringes its right to property and rights to equality, without passing the conditions of the limitations clause.

The infringement on property rights manifests in the very imposition of financial burdens, exacerbated by the severe and retroactive responsibility without demonstrating fault or liability. The infringement of equality was caused by discriminating against Eitanit compared to others – asbestos importers, end users and future polluters – who have been partially or fully absolved from any liability regarding asbestos waste.

The infringement of property and equality does not pass, as the argument goes, the tests set by the limitations clause. It is not an infringement or restriction by statute, as this is personal legislation. It is not for a worthy purpose that befits the values of the State of Israel, as Eitanit was retroactively tainted as a lawbreaker without evidence it actually did pollute the land. And finally, the infringement is not proportional: the statute does not advance the end of channeling the conduct of offenders or to deter them, so that there is no rational connection between the ends and the selected means. Other less restrictive means were available, for instance: allowing Eitanit to execute the project on its own or valuing its participation in funding the project according to the extent of its liability. In any case, the benefits of this section are minimized compared to the harms caused to Eitanit.

Ultimately, Eitanit asks we void section 74. Alternatively, it suggests other remedies, in the following order of preference: directing the Minister to set regulations that would *de facto* release Eitanit from the mandates of section 74, allowing more proportional means (such as paving paths or performing other aspects of the project by Eitanit), directing the Minister to hold a proceeding where Eitanit could be heard and the Minister would be able to consider the extent of its liability regarding the entire area effected by the project.

7. The State emphasizes that section 74 is designed to apply only to industrial waste that resulted from Eitanit's factory's operations. It does not apply to complete asbestos-cement products that were purchased by end users and then disassembled and discarded, but only to the waste that Eitanit produced.

The State is willing to assume that the statute infringes upon Eitanit's property rights. However it disputes the infringement to the right to property: it raises misgivings as to whether the right to equality should apply to corporations, and argues that in any case Eitanit's right to equality was not infringed here as there is a relevant difference between Eitanit and the other entities it had identified.

The State continued its constitutional analysis on this foundation. The infringement is by statute, albeit personal legislation. The infringement is for a worthy purpose – the removal of serious environmental hazard in the

Western Galilee. The statute relies on the principle of "the polluter must pay" that derives from rationales as efficiency, deterrence, and justice. As for the issue of proportionality, there is an obvious connection between the ends – cleaning the Galilee from asbestos waste, and the means – launching the project. The mean selected is mild, as Eitanit shoulders only about half of the project's cost, and in any case no more than NIS 150m. The proposal that Eitanit itself will clear the land was discussed between the parties for a long period of time, but turned out to be impractical and ineffective. Finally, the benefit derived from the statute (eliminating proven health risks) far outweighs the harm caused to Eitanit, if any.

8. Many of the sites intended for waste removal are located within the territory of the local authority of Mate Asher, the Fifth Respondent. In its response to the petition, the local authority emphasized that Eitanit turned a substantial profit from selling asbestos-cement waste, though it knew in real time, or at the very least should have known – about the dangerous outcomes of asbestos exposure. The local authority additionally notes that the basic rights on which Eitanit hangs its hat, if any, should yield to the rights to life and to bodily integrity of those actually and potentially harmed by asbestos.

The Sixth and Seventh Respondents are public non-governmental organizations active in environmental preservation and protection. They reiterate that the statute was born out of all the failed attempts to consensually address Eitanit's financial liability. In this regard, the Respondents refer to the principle of extended producer responsibility (EPR), which would have manufacturers responsible for their products' environmental impact during the entire life cycle of the product. This principle is applied in different contexts in many of the OECD states, an organization of which Israel is now a member.

9. To paint a complete picture, we should note that on October 9, 2012 a hearing was held for this petition. At the end of the hearing we ordered the parties to notify the Court, within 60 days, whether a settlement was possible. On November 16, 2012, the Respondents notified the Court that they believe any arrangement different to that which the legislature mandated in section 74 would be inappropriate. We must therefore rule on this petition.

It should also be noted that Ms. Ayelet Bruner has moved to join as respondent. As the motion explains, her husband – a resident of Kibbutz Kabri, which is adjacent to the factory – died of mesothelioma due to asbestos dust exposure, and Ms. Bruner has therefore filed a tort suit against Eitanit and the State. Ms. Bruner argues that she holds additional evidence that Eitanit and the State notified here at the relevant times about the risks of asbestos. Under the circumstances her arguments were included, explicitly or implicitly, in the other parties' arguments, and thus we do not believe it appropriate to formally join her to the petition.

Discussion and Ruling

I. Comparative Law

10. The issue before us is universal. It stems from the connection between humanity and the land. In more detail, it is a result of the conflict between humanity's desire to control the environment and the cost of this progress.

The dialectics that arise because of humanity's ambition to develop and evolve is addressed in Jewish law, and is timeless. Its roots can be found in the first human himself. In the Book of Genesis, man is commanded: "be fruitful and multiply and inherit the earth" (Genesis 1, 28). In his monumental manifest, "The Lonely Man of Faith," written almost 50 years ago, Rabbi Yosef Dov Halevi Soloveitchik mentions that in the beginning of the Book of Genesis there are two descriptions of the creation of man to emphasize his two facets. The first man, described in chapter 1 of Genesis, about whom it was said that he was "created in God's image" (Genesis, 1, 27), is creative. "He engages in creative work, trying to imitate his Maker … In doing all this, Adam the first is trying to carry out the mandate … "to fill the earth and subdue it." … man's dignity, manifested in man's awareness of his responsibility and ability to fulfill his duty, cannot be realized as long as he does not control his surroundings… there is no dignity without responsibility, and one cannot shoulder responsibility as long as one cannot fulfill the commitments involved… we have obtained the following triple equation: human dignity-responsibility-majesty." (The Lonely Man of Faith, J.B. Soloveitchik, Tradition Magazine (summer 1965), Rabbinical Council of America. Hebrew translation by Mossad HaRav Kook Publishing, 8th edition, 2002, pp. 13-18.) Control over the environment – a mixed blessing. In conquering nature, humanity is impressive in its creativity and progression from one generation to the next. However, its comprehension is limited. Humanity cannot know, at the same time it controls the environment, what toll this "progress" may take.

Jewish law was even sensitive to this aspect. The rule is – do not destroy (Talmudic Encyclopedia, volume 3, under "do not destroy", in Hebrew – "*Bal Tashchit*".) Originally, the prohibition is on destroying fruit-bearing trees during a wartime siege: "should you siege a city many days in order to fight and conquer, you shall not destroy its trees." (Leviticus 20, 19-20). However, Jewish law's sages interpreted the prohibition broadly. The Book of Education (=*Sefer ha-Chinnuch*), that summarizes all 613 commandments (authored in the 13th century, likely by Rav Aharon Levi of Barcelona), explains the reasons and application of this commandment:

> "The root of the commandment is known to be teaching us to love good and utility and stick to it, and in turn good will stick to us and we will distance from all evil and destruction. It is a way of the pious and men of action, peace lovers, those who rejoice in the good of people and bring them closer to the Torah, who will lose not even a mustard seed, and will grieve any loss or destruction that they come across, and if they could they would rescue anything from ruin with all their might." (Torah portion of "Judges" [=*Shoftim*].)

Rav Shneor Zalman of Lyadi, (founder of Chabad Russia in the 18th century) believes the "do not destroy" prohibition applies even to the abandoned:

> "Just as one must be careful of loss, damage or harm to one's body, so must he be careful of loss, damage or harm to his funds. And anyone who breaks tools or clothes or demolishes a building or clogs a pool or discards food or spoils anything else that should be enjoyed by people is violating the commandment 'do not destroy'… even if abandoned." (*Shulchan Aruch Harav, Choshen Mishpat*…)

Therefore the matter is not preserving the property rights of others in the private sense, but of the environment as a right to property.

The above functions as normative background to the issue at hand. In recent years, all around the world, countries have been required to face different dilemmas regarding the environment. A significant portion of these dilemmas incorporates legal, economical and moral aspects, among others. Among these, the removal of polluting waste – the issue at the core of this petition – is a matter that carries real weight. Asbestos, specifically, has proven to be a strong, efficient material, with many uses. Over time, its harm was discovered to tremendously outweigh its utility.

Since the 20th century, different countries have faced the problem of cleaning the environment from asbestos, determining who must shoulder the burden of implementing and funding the task. Therefore, I found it fit to turn to the relevant legal framework in several key countries overseas. Of course, we should not automatically apply those here. But because of the universal character of the issue before us, I believe there are benefits to paying attention to legal trends in the world. It should be noted, before presenting the legal situation in other countries, that the legislation I mention applies to asbestos as part of a broader group of polluting or dangerous materials.

11. In 1980 the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) was passed in order to address environmental hazards. CERCLA was designed to regulate the removal of polluting materials from dangerous waste sites that were abandoned or stopped operating. It places the obligation to fund the cleaning process on the creator of the hazard (see Karen S. Danahy, *CERCLA Retroactive Liability in the Aftermath of Eastern Enterprises v. Apfel*, 48 BUFF L. REV. 509, 530 (2000)). Below we focus on two elements of CERCLA that are particularly pertinent to the case at hand: strict liability and retroactivity.

The case law has found CERCLA to establish strict liability. There is no question whether, and to what extent the hazard creator violated its duty of reasonable care or is in any way blameworthy for the risk it created. Therefore the creator of the hazard will be liable even without proof that a duty of care was not fulfilled (Alexandra Klass, *From Reservoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability*

Environmental Claims, 39 WAKE FORREST L. REV. 903 (2004) and see Israel Gilad, *Tort Law – Liability's Limits*, 1190 B.H.S. 167 (2012), which addresses the distinction between strict liability and absolute liability, where the latter "is not subject to any defenses.") Although the principle of strict liability was not written explicitly into CERCLA, the case law found that the legislative history – including minutes from committees and general discussions in the House of Representative and Congress – reveal this was the legislature's intent (see *New York v. Shore Reality Corp*., 759 F.2d 1032, 1042 (2nd Cir. 1985); *General Elec. Co. v. Litton Indus. Automation Sys. Inc.*, 920 F.2d 1415, 1418 (8th Cir. 1990); *Burlington N. Santa Fe Ry. V. United States*, 556 U.S. 599, 608 (2009)).

The strict liability standard did not appear out of nowhere. At common law, strict liability is a prevalent standard for particularly dangerous tortuous activity. A British judgment from the 19th century, *Rylands v. Fletcher*, considered a water reservoir that exploded and flooded a neighboring coalmine (*Rylands v. Fletcher*, L. R. 3 H.L. 330 (1868)). The House of Lords held the defendant liable, though no negligence by him was proven, because the reservoir was found to be "likely to do mischief if it escapes." Nowadays, the second and third Restatement of Torts notes that whoever conducts abnormally dangerous activity will be liable for damages resulting from that activity, even if maximal precautions were taken (RESTATEMENT (SECOND) OF TORTS § 519(1) (1977); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 20 (2010)). This is the historical-legal foundation from which CRECLA's strict liability standard stems.

Based on the legislative history, the case law and the scholarship presented about CERCLA, another reason for strict liability arises: conventional legal methods have failed to combat the occurrence of polluting waste. This reason, which is rooted in the legal realism school of thought, has helped to shape legal policy. Among other considerations in favor of placing strict liability are reasons of justice: in the absence of blameworthiness, it is justified to place a risk on the party who created that risk and has financially benefited from it (Lynda J. Oswald, *Strict Liability of Individuals Under CERCLA: A Normative Analysis*, 20 B.C. ENNTL. AFF. L. REV. 579 (1993)). While the legislation has been opposed for placing liability without fault, the position that allocating costs to the polluter was found to outweigh placing those costs on all of society. This was also due to the link between the polluter and harm, both in terms of creating that harm and in terms of profiting from it.

From another perspective, one might ask what is the economic benefit in placing liability without fault? Where is the deterrence in this? The answer is in the distinction between cost internalization and cost externalization. Under this theory, whoever handles material that pollutes or is likely to pollute should consider the possibility of strict liability. To reduce potential future costs, such party would initiate from the get-go research and experimental activity the produce a more cost-effective and environmentally friendly product, or at least one that has less potential for

harm. The polluting party, who has expertise and capabilities, is in a better position to take such preventive measures. Under this approach, it is strict liability that creates deterrence (for more, see MARK WILDE, CIVIL LIABILITY FOR ENVIRONMENTAL DAMAGE: A COMPARATIVE ANALYSIS OF LAW AND POLICY IN EUROPE AND THE UNITED STATES (2002); LUCAS BERGKAMP, LIABILITY AND ENVIRONMENT: PRIVATE AND PUBLIC LAW ASPECTS OF CIVIL LIABILITY FOR ENVIRONMENTAL HARM IN AN INTERNATIONAL CONTEXT (2001)).

As mentioned, CERCLA imposes liability even on whoever produced and distributed dangerous materials before the legislation's enactment, though this activity was permissible at the time. CERCLA had to face facts already on the ground. In this context, too, the American statute did not explicitly create retroactive liability. American law, it should be reiterated, includes a rebuttable presumption that legislation does not apply retroactively, unless the legislative intent was clearly different (*Landsgraf v. Usi Film Prods*., 511 U.S. 244 (1994); *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). However, the case law recognized CERCLA's retroactive application, realizing this was clearly the legislative intent. It was understood from the statute's language, its history and the payment mechanisms it established (*U.S. v. Hooker Chem. & Plastics Corp*., 680 F. Supp. 546 (W.D.N.Y. 1988); *U.S. v. Olin Corp*., 107 F.3d 1506 (11th Cir. 1997)).

CERCLA's retroactive application survived judicial review. The case law held that this aspect of the statute did not violate due process, because of its rational and legitimate purpose to clear sites that are no longer in operation of their dangerous waste. Additionally, the legislation was not arbitrary or irrational because it burdened the entity that polluted and profited from that pollution (*U.S. v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 732-34 (8th Cir. 1986)). The case law found that without retroactive application achieving the legislation's purpose – cleaning existing waste – is impossible. We should note the similarities between these tests to those in Israeli law's limitation clause.

12. In 2004, a directive was passed by the European Union ("EU") regarding the liability for environmental harms: Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage (ELD). The core principle of the directive is "the polluter must pay" – whoever caused environmental harm through their actions must shoulder the financial consequences.

The ELD's instructions do not require EU member states to set retroactive application. Put differently: liability applies to environmental damage even if it occurred before the statutory prohibition came into effect. As to the scope of liability, the ELD directive distinguishes between categories. The first is that of strict liability and it applies to harm caused by dangerous activities listed in the directive's third appendix. The second category is of fault-based liability, and it applies to all other activity that may have caused harm to nature reserves or protected animal species. Notably, earlier versions of the directive expressed support for broader application

of strict liability. In 1993 the Commission issued a "green document", a non-binding working paper of sorts, that detailed the justifications for a strict liability standard for environmental damage (Commission Green Paper on Remedying Environmental Damage (COM 1993) 47 final (May 14, 1993)). Consequently a semi-binding principles document, a "White Paper" was issued in 2000 (Commission White Paper on Environmental Liability (COM 2000) 66 final (Feb. 9, 2000)). This document discussed at length the evidentiary challenges of a fault-based standard, which may be resolved by a strict liability standard, and argued that there is greater level of justice in imposing strict liability on polluters. Additionally, the doctrine of cost internalization was emphasized as a measure of deterrence.

In reality, European countries adopted various approaches (on the legal state in Europe, see: Chris Clarke, Update Comparative Legal Study (2001); Robert v. Percival, Katherine H. Copper & Matthew M. Gravens, *CERCLA in a Global Context*, 41 SW. L. Rev. 727 (2012); N.S.J. Koeman, Environmental Law in Europe (1999). Sweden imposes strict liability for any pollution that harms or may harm people and the environment (Sweden Environmental Code, 1998). Such is the law in Switzerland, which is not a member of the EU (Environmental Protection Act of 1983, §4), and in France (Percival, Cooper & Gravens, 740). Holland distinguishes between two pieces of legislations: the statute from 1982 (Soil Clean-up (Interim) Act of 1982) applies retroactively from 1975 onward, because a polluter from that date forward ought to know it may be liable for its actions. This means that should the state remove pollution created after 1975, it may demand the polluter to shoulder costs, as held by the Holland Supreme Court (State v. Van Wijngaarden and State v. Akzo Resins (24.4.1992)). The legislation from 1994 focuses on administrative orders for removal of hazards. The agency employs this legislation, with a degree of success, to order a polluter or landowner to remove pollutions created before 1975. There is also a mechanism of environmental insurance shared by Dutch insurance companies (Nederlandse Milieupool), which aims to provide coverage, including for costs incurred by removing pollution, through direct payments to end users (Percival, Cooper & Gravens, 744; WILDE 203). In Spain, the relevant statute (Wastes Law tit. V (B.O.E. 96, 1998)) places responsibility for cleaning the polluted site on the polluter. This is retroactive and strict liability. In 1998 Germany adopted the federal statute that regulates protection of land from pollution (The Federal Soil Protection Act). The Act establishes strict liability, but the scope of actual compensation may be reduced according to the extent of the polluters' liability. In Finland, new legislation from 2000 (Environmental Protection Act) applies strict liability on any kind of pollution, but not retroactively. The situation in Britain is highly similar to the legal situation in the United States under CERCLA. The British Environmental Protection Act of 1995 imposes retroactive strict liability for removal of hazards, regardless of the time the pollution was created and without an exhaustive list of polluting materials.

In Canada, relevant environmental legislation is not federal. Generally, legislation in most of Canada's provinces is based on the principle of "the

polluter must pay" while adopting strict liability standards. In Saskatchewan, legislation imposes strict liability to remove hazards on their creator (Environmental Management and Protection Act). In Nova Scotia, anyone who releases polluting material into the environment is obligated to reverse the pollution and remove the polluting material (Nova Scotia Environment Act, 1994-1995 S.N.S., ss. 67(2), 68(2)). The most restrictive standard of liability is that of British Columbia (Environmental Management Act, S.B.C.). This statute requires the manufacturer of a dangerous material, or anyone interested in that dangerous material's removal, to remove it, as well as places retroactive strict liability upon them for the removal and rehabilitation of the polluted area. The statute clarifies that this obligation applies even when no legislation prohibited pollution at the time the pollution was created.

The Constitution of South Africa guarantees the right of each person to an environment that is not harmful to health or welfare (S. AFR. CONST. §24(a), 1996). Following this right, South Africa's National Environmental Management Act of 1999 (NEMA) requires anyone who has polluted or harmed the environment to remove that hazard and rehabilitate the damaged area. The statue does not explicitly establish strict liability, but the South African High Court (Transvaal Provincial Division) ruled that strict liability applies to owners of polluted land. However, the court ruled that the legislation is not retroactive as the legislature did not intend as such (*Chief Pule Shardrack VII Bareki and Others v. Gencor Limited and Others* (2005)).

13. To end this part, let us recall that the environmental policy termed "Extended Producer Responsibility" (ERP) is widespread in Europe. This policy aims to extend the manufacturer's liability to a product's entire life cycle, even after the product is out of the manufacturer's possession, or is no longer in use. It is rooted in the expectation that a more suitable policy would incentivize manufacturers to factor in, as early as when a product is being designed, environmental concerns such as improving the prospects for recycling the product, reducing the use of materials, etc. (see an overview by the OECD: www.oecd.org/env/tools-evaluation/eprpoliciesanIsrSCroductsdesigneconomictheoryandselectedcasestudies.htm).

In practice, the EPR doctrine brings different policy tools together: burial tolls, deposits, subsidies, and other taxes. Therefore, for example, in 1994 the EU issued a directive regarding packaging waste. The directive regulates manufacturing packages, as well as sets quantity goals for collecting and recycling packaging waste (for more on implementing the EPR policy in European Union countries see: Aaron Ezroj, *Extended Producer Responsibility Programs in the European Union*, 20 COLO. J. INT'L ENVTL. L. & POL'Y 199 (2009)).

14. In summary, the overview above reveals different and similar components. As far as imposing strict liability on the polluter, a consensus emerges, certainly regarding inherently dangerous materials such as asbestos. Of course there are countries that have tied the extent of that strict liability to

the level of fault. As for retroactive application, it appears there are different approaches: those who support retroactive application and those who oppose it. The implication of this review on our case will be clarified below.

II. Constitutional Analysis

15. We now turn to examining the constitutionality of section 74 in Israeli law. First we must consider the rights Eitanit argues were violated. Then we may discuss whether that violation, if any and to what extent, passes the tests established in the limitation clause of section 8 of Basic Law: Human Dignity and Liberty.

A. The Violated Rights

(1). The Right to Property

16. The right to property is enshrined in our law in section 3 of Basic Law: Human Dignity and Liberty. This right is accorded to corporations as well (see HCJ 4885/03 *Israel Poultry Farmers Organization, Cooperative Agricultural Union Ltd. v. the Government of Israel*, IsrSC 59(2) 14, (2004) at para 41 of Justice Beinisch's opinion and citations there.)

The State agrees that section 74 infringes Eitanit's right to property. In any event, this point needs no elaboration. I will only remark that according to Eitanit its property rights are violated not only by imposing financial obligations, but also by imposing a seemingly retroactive obligation without examining whether Eitanit is at fault. I will address these to aspects of section 74 in depth below.

(2) The Right to Equality

17. Eitanit's argument is twofold. First, it should enjoy constitutional protection of its right to equality. Second, this right has been violated.

Still, the first prong is not at all simple. In Israel, constitutional protection of equality rights flows from the constitutional protection of human dignity. This is because the right to equality is not explicit in the Basic Laws. It is a hybrid model of sorts, in the sense that violations of equality rights are recognized only in the – rather broad – context of harms to human dignity. In regards to the latter the case law has adopted the approach that the constitutional protection covers not only humiliation or indignities, but also other aspects closely related to human dignity. For our purposes, this means that the constitutional protection of equality applies only to discrimination that humiliates and disgraces, or discrimination that is closely linked to human dignity (HCJ 5427/02, *Movement for Quality of Government v. the Knesset*, IsrSC 61(1) 619, at para 38 of President Barak's opinion (2006); HCJ 6304/09 *L.H.B v. the Attorney General*, at para 76 of Justice Procaccia's opinion (Sep. 2, 2010)). In this view, it is doubtful whether the constitutional right to equality should extend to a legal entity that is not flesh and blood (compare: HCJ 4593/05 *United*

Mizrahi Bank Ltd. v. the Prime Minister, at para 10 of President Barak's opinion (Sep. 9, 2006); HCJ 956/06 *Israel Bank Union v. Minister of Communication*, at p. 12 of Justice Hayut's opinion (March 25, 2007); Ofer Sitbon, *On People, Corporations, and everything in between*, Kiryat HaMishpat 8, 107 (2009)).

In the case before there is no need to decide the general issue of the scope of constitutional protection for corporations' equality rights. The reason for it is that I believe, as detailed next, Eitanit was not discriminated against at all. Incidentally, there may be instances where discrimination or lack of equality in the corporation context would require consideration. Two examples suffice: first, a statute that taxes a company owned by Arabs differently than a company owned by Jews. Even if the State would argue that the taxation applies to the corporation and not the individual, this is a matter that must be adjudicated. This example is easier because although there is discrimination between corporations – it is based on grounds involving people. The second example, which is the more pertinent for our purposes, is that of a corporation that claims a certain tax is imposed only on that corporation and not on any other corporation in the country. The argument is clear and notable, and renders discussion. However the violation, to the extent it exists, is not one of human dignity as applied to a corporation but of the right to property. The approach that infringements upon human dignity do not apply to a corporation, does not absolve the state from its duty to fend off the argument that the statute infringes upon the right to property, even if that infringement stems from a discrimination claim. Clearly, fleshing out the infringement upon property is different than fleshing out a direct infringement upon equality. The State may overcome the argument about violations of property rights in at least two ways: first, that there is no violation, and second, that the violation withstands the limitations clause. In our case, to me, the State's response on this point is satisfactory even if we assume that a corporation has a constitutional right to equality, and this is also true when we explore the lack of equality in the context of infringement of property rights.

18. On one hand, Eitanit claims it suffered discrimination because it was required to shoulder the costs of removing asbestos waste discarded by asbestos importers. Additionally it is required to bear removal costs instead of those who have purchased final asbestos-cement product from Eitanit over the years, used them, and ultimately discarded of them. Obviously, there are financial ramifications to this.

Yet these arguments must be rejected in light of the statute's language. The "waste population" subject to section 74 is industrial waste that came from operations at Eitanit's factory. This definition excludes two types of waste: (a) completed asbestos-cement products, such as pipes and boards, that have been passed on to end users and then dismantled, discarded and gradually became waste ("the first exception"); (b) asbestos waste that came from production processes of others besides Eitanit ("the second exception"). These two exceptions are not included in the definition of "waste population" to which section 74 applies.

To clarify, the record reveals that professionals can easily distinguish asbestos waste that originated in production processes from completed asbestos-cement products that have been discarded post-use (the first exception). First, asbestos waste is a batter-like, non-homogenous mix that comprises of lumps and excess raw asbestos, cement, board and pipe debris made out of asbestos-cement. Additionally, some of the waste sites are built in layers: a layer of waste, above it a layer of soil, then again a layer of waste, and so on. In some sites the sacks used to bring in the waste were visible. These techniques indicated the methodical and lengthy process of waste removal, through burial or surfacing. These are not random or accidental piles of asbestos-cement products that have been worn out and discarded absentmindedly.

This said, the language of the statute releases Eitanit from paying for the second exception – asbestos waste that originated in the production processes of others. This raises a separate question: how do we know that Eitanit will not be required to pay for waste that did not come from its own factory, under the second exception? There are several indications for this. First, section 74 targets only waste found in a radius of 15 KM from Eitanit's factory. Second, Eitanit's factory was at the time the only factory in Israel to process raw asbestos into final asbestos-cement products. The industrial waste from these production processes has unique characteristics, as discussed above. Other factories processed completed asbestos-cement products, and thus their industrial waste would have been consistent of only asbestos-cement and dust. Third, there is no evidence that other factories had indeed removed their waste in the same manner Eitanit did. Fourth, there is no evidence that asbestos importers operating in Israel alongside Eitanit at the relevant time, distributed asbestos in the area, and in any event the State clarifies that those importers used materials for acoustic and thermal isolation without cement. Fifth, in a survey from 2007, different witnesses reported out of their personal knowledge purchasing or receiving the waste from the factory and scattering it in the ground. These finding have been confirmed, the State argues, by soil samples and drilling.

The mounting of all this evidence, along with the above findings about the type of waste and its systematic discarding, indicates – to me – that there is a "presumption of burial" against Eitanit in the context of section 74. This presumption means that asbestos waste with certain common characteristics, that was buried in systematic and organized methods, all in a limited and confined area in the factory's vicinity, would have come out of Eitanit's factory. Lest we forget: this is a rebuttable presumption. After all, the legislature afforded Eitanit a right of hearing before the Minister, about specific areas where waste did not originate from Eitanit's factory (according to section 74(d) of the Act and according to the instructions by the Minister – see above section 5, and the State's attorney declaration that the content of the objection and the relevant instruction's interpretation – p. 9, line 28 of the hearing transcript).

To summarize, the Act requires Eitanit to bear the cost of removing industrial waste that originated from the operations in its factory. Eitanit's arguments in this regard cannot be addressed to the legislature, as the legislature expressly stipulated that Eitanit is only responsible for its own waste. These arguments may be relevant, at most, at the administrative level, if and when there are challenges to the Act's implementation, and not at the clearly constitutional level we are concerned with here.

19. The argument regarding the end users, who received asbestos waste from Eitanit and used it to cover soil, is more complicated. Analytically, Eitanit's argument is twofold. First, Eitanit was required to pay while the end users were exempted from direct payments. Second, Eitanit was required to pay for waste from which the end users also benefited. In my mind, the answers to the first aspect effectively resolve the difficulties in the second aspect. The main point is there is a relevant difference that justifies distinguishing the end users, who were not directly required to bear costs, and Eitanit. Recall that not every distinction is prohibited discrimination. Warranted distinctions, which are based on a relevant difference, will not usually be seen as prohibited discrimination (for example see the matter of LHB, para 77; HCJ 10203/03 *The National Census Inc. v. The Attorney General*, para 53 of Justice Procaccia's opinion (August 20, 2008)). To me, there are three differences between Eitanit and the end users: the awareness test, the control test, and the profit test. Each and every one of these independently, let alone put together, constitutes a relevant difference that separates Eitanit from the end users and that warrants the distinction between them – from both aspects.

First, it appears from the material before us, that in the relevant time period, Eitanit had a notable advantage of information compared to the end users. This advantage manifested, primarily, in scientific knowledge that existed – or should have existed – for Eitanit even at that time about the potential health risk posed by asbestos waste. Indeed, there is no intention to find fault in Eitanit on neither the criminal or tort levels. Rather the presumption is that Eitanit must pay due to strict liability, not as a result of a finding that it breached any duties of care. However, the focus is on Eitanit's awareness of potential risk caused by asbestos compared to other entities – the end users – to whom it asks to be considered similarly situated. The relevance of the awareness issue will be discussed more below.

In May 1969 Professor Schilling visited Eitanit's factory. At the time, Professor Schilling headed the Department for Occupational Health at the London School of Hygiene & Tropical Medicine. After his visit, Professor Schilling authored a report, which was attached as Annexure 7 to the Respondents' reply. In the report, Schilling points to severe health risks that are caused by exposure to dust in asbestos factories, including asbestositis, lung cancer and mesothelioma. He emphasized that the factory must take immediate precautions to reduce the risk of these diseases' development.

In 1970, an organization of Israeli occupational doctors dedicated a conference to issues of employees and asbestos-cement factories. During the conference, an article written in collaboration with the factory representatives was presented. This article was submitted as Annexure 8. As early as the opening paragraph, the authors state that there is "clear awareness of health risks caused by asbestos and the prevalence of cases of asbestositis on one hand, and cancer on the other.

In April 1976, Yekutiel Federman, one of the holders of controlling interest in Eitanit, sent a letter to the factory manager, Mr. B. Friedrich. In that letter Mr. Federman states that: "The asbestos industry is currently the target of a witch hunt… Should we receive a positive report that proves the allegations are exaggerated and are not serious, and that it is more dangerous to walk down a street breathing in gas emissions from cars, and this report will be prepared by the Ernst Bergman Foundation, which is renowned in the science community, we will be able to combat the attacks academically and scientifically." This letter, too, demonstrates that Eitanit was aware, at this stage if not sooner, of the scientific claims that were common at the time about the severe health risks caused by asbestos.

What is more, certain aspects of that time's labor laws indicated the dangers of asbestos. As early as 1945 the British Mandate defined asbestositis as an occupational disease. This meant that a diagnosis of a factory worker with the disease was required to be reported. Additionally, the employment of women and teenagers in processing asbestos or its industrial use was prohibited. These directives were incorporated into Israeli law in the early 1950s. In 1964 The Safety at Work Regulations (Medical Examinations of Workers with Asbestos Dust, Talc and Silicon) 1964 were legislated. The Regulations set restrictions on the ways asbestos workers were employed, and required that workers receive periodic medical examinations. In 1978 The Safety at Work Regulations (Restrictions on Spraying Asbestos) 1978 were added. Those prohibited spraying crisp asbestos for isolation purposes. All of these were in force during the same period when, by Eitanit's own admission, it passed on the waste to the end users, let alone when the waste was buried in the ground. Later, in 1984, the old Regulations – from both 1964 and 1978 – were incorporated into The Safety at Work Regulations (Occupational Hygiene of the Public and Workers with Harmful Dust) 1984. The new Regulations additionally prohibited the use of asbestos to pave roads. In 1988 this prohibition was expanded to manufacturing, importing and selling asbestos for road paving.

On the other hand, we do not have a sufficient factual foundation about the scope and depth of the end users' awareness of the health risks caused by asbestos waste. However, on its face, it is doubtful that Eitanit and the end users are in the same category as far as what was known or should have been know. For decades, Eitanit imported raw asbestos, processed it into asbestos-cement, and manufactured final products from it. In effect, it was the dominant – if not only – entity in this industry. By virtue of this position Eitanit was likely familiar in real time with the relevant scientific

research about Asbestos' health risks. Not only did Eitanit apparently follow the developments, but was an active observer in the research (see, for example the article from 1970 and the Mr. Federman's letter from April 1976, mentioned above). As an employer of asbestos workers, Eitanit was also subject by law to different duties that reflected the health risks asbestos posed. The end users, on the other hand, are in a different category. The material shows that they were not manufacturers of asbestos, nor were they industrial factories, but mainly the towns, kibbutzes and private persons in the area. These are probably not experts in asbestos, asbestos employers or workers, or even active in the scientific research scene.

Analogously, tort law attributes significant weight to knowledge gaps between parties. For instance, a doctor's duty to disclose to clients stems from the presumption that there are major knowledge gaps between the parties, though their scope may change from case to case (see for this topic, CA 2342/09 *Joubran v. Misgav Ledach Hospital* (April 6, 2011)). Similarly, the scope of an insurance agent to a consumer depends, among others, on whether there are information gaps between the consumer and the insurance agent or insurer (LCA 5696/06, *Saif vs. Mari*, para 14 (Sep 21, 2009)).

Truth be told, factoring in the knowledge gaps between Eitanit and the end users is only part of a broader context. Eitanit is distinct from the end users because the products and waste left a factory it owns. This fact points to the material difference between Eitanit and the end users – Eitanit is the manufacturer of the waste. The end users were Eitanit's customers. These are two different groups that must be distinguished. The distinction is consistent with the principles of EPR, mentioned above. The duties placed on manufacturers are not as the duties placed on the user. The manufacturer has control over the product's design, assembly, and finalization. In any event is it highly logical to place extended liability on the manufacturer and placing financial burdens upon it, both for reasons of justice and fairness and of economic efficiency. In the matter at hand, the control test has an additional aspect. It is appropriate to weigh the fact that arises from the record, that Eitanit sold the waste for a low price, sometimes giving it away. This, too, solidifies the link between Eitanit and the waste, including that which is not on factory grounds, but in the land around it up to 15 KM. The awareness test thus connects to the control test and to economical aspects, and we must not neglect the profit test.

Applying economic approaches to law, it is clear that Eitanit and the end users are not similarly situated, as a function of the profit test. Comparative case law, primarily American case law, finds merit in placing the costs of asbestos removal on the manufacturing corporation because of its status as manufacturer. This consideration is relevant not only from an economical stand point, which may justify shifting the financial burden of removing hazards to the manufacturer's shoulders, but also for reasons of justice and fairness. From this perspective, there is no discrimination against the petitioner but achieving the statutory purpose of "the polluter

must pay." We come back to this point when examining the issue of a worthy purpose which is, of course, one of the tests established by section 8 of Basic Law: Human Dignity and Liberty.

To summarize this point: there were knowledge gaps – actual and theoretical – between Eitanit and the end users. Moreover, Eitanit, as a manufacturer is clearly distinguishable from the end users. This distinction reflects the difference between the two aspects of the control test, as well as the profit test. The combination of all these – awareness, control and profit – establish, in my view, a relevant difference between Eitanit and the end users, in terms of its obligation to share up to half of the costs of removing the waste.

20. Eitanit additionally, claims it suffered discrimination compared to the local authorities. Eitanit bases its claim on the right to be heard by the Minister which section 74 grants the local authorities and which allows them to reduce the rate of their participation in funding the project. In reality, an arbitrary and low rate of only 10% was set in regulations which go as far as permitting "payment" of this rate by provision of services. Eitanit, on the other hand, was denied the option of carrying out the project on its own.

Here, too, I believe Eitanit and the local authorities are not similarly situated. There is a relevant difference between Eitanit and the local authorities, based on reasons stated above: Eitanit is the manufacturer of the waste, and created its implications. The local authorities, as the record reflects, are not even part of the "end users" addressed earlier. Their link to the waste is indirect, and they are merely a default in funding the project. Furthermore, the mechanism set in the Act splits the costs equally between Eitanit (on one end) and the local authorities and the state (on the other end.) Each and every Shekel that is reduced from the local authorities' obligations will be added to the bill served to the State. Put together, the local authorities and the State will fund only half of the project's cost. The result, therefore, is that – willing or not – taxpayers will directly shoulder at least half of the project's costs. For this reason, too, the discrimination claim must fall.

21. Finally, Eitanit claims it was discriminated against in comparison with future polluters. It argues the Act stipulates that anyone creating asbestos hazards will bear the costs of removal according to their share of liability, and they will be permitted to remove the hazard (section 11(e) of the Act). Additionally, a bill for Prevention Soil Pollution and Restoration of Polluted Grounds 2011 ("the bill") is pending before the Knesset. The bill, Eitanit maintains, is more lenient toward owners of polluted properties and considers the extent of their fault. Contrastingly, Eitanit bears the brunt of a strict liability standard regardless of fault and it is denied the opportunity to remover the waste on its own.

Regarding the claim of discrimination in terms of the bill, I see no reason to discuss a claim of discrimination in a bill that has yet to have been passed. As far as the discrimination claims about other statutory provisions

go, I do not find it necessary to examine these provisions in detail, nor to consider whether they are discriminatory against Eitanit or perhaps favor it. This is because the project of removing asbestos waste from the Western Galilee merits regulation unique to it. I will elaborate on this point below, in relation to the argument that the Act constitutes personal legislation. As an aside, recall that the new asbestos statute prohibits manufacture of asbestos products, places full responsibility for pollution on the polluter, and only allows the polluter to remove the waste independently with the property owner's consent. On its face, it does not appear that the statutory arrangement that applies to the petitioner is clearly more egregious than statutory arrangements that will exist going forward. Quite the contrary.

22. To conclude this part, I accept Eitanit's argument that section 74 infringes upon its property rights. However, Eitanit's argument about a violation of its equality right, insofar that it is a right independent of the property right, and this for the reasons described above. Based on these conclusions, I move on to examine whether the infringement on Eitanit's right to property passes the tests set in the limitations clause of section 8 of Basic Law: Human Dignity and Liberty, entitled "Violations of Rights":

> "There shall be no violation of rights under this Basic Law except in legislation befitting the values of the State of Israel, designed for a worthy purpose, and to an extent no greater than required or by such a law enacted with explicit authorization therein."

B. Violation of Rights In Legislation Or By Explicit Authorization Therein

23. Eitanit's position is that the said violation of the right to property (and in its view the right to equality, too) is not in legislation or by authorization in legislation, because the Act constitutes personal legislation, with a specific target – Eitanit. Eitanit maintains that a statute that is not generally applicable cannot be considered legislation for the purposes of the limitations clause.

I cannot accept Eitanit's position. Recall that the case law found the prong "in legislation or by authorization therein" to be a formalistic test that seeks whether the infringement upon basic rights was done by primary legislation or was authorized by primary legislation (see the matter of *The National Census*, para 9 of President Beinisch's opinion; the matter of *L.H.B*, para 104 to Justice Procaccia's opinion; see also Aharon Barak, INTERPRETATION IN LAW Volume 3 – Constitutional Interpretation, 489-498 (1994)). To compare, section 5 of the European Covenant of Human Rights addresses ways to limit liberties, including a requirement that the limitation is done in legislation, or in the Covenant's language: "in accordance with a procedure prescribed by law). Similar language appears in section 10(2) of the Covenant regarding limits on free speech. The European Court of Human Rights pronounced, in various contexts, on the interpretation of "in legislation," and concluded that in order for a particular provision to be considered legislation for these purposes, it must

be clear and accessible, that is, published to everyone (see: Tonilo v. San Marino & Italy, §46 (26.6.2012); Telegraaf Media v. Netherland, §§89-102 (22.11.2012)).

The piece of legislation at hand is a product of extended preparation. After passing the Knesset's first reading, the Act was considered by the Knesset's Interior and Environmental Protection Committee. The Committee dedicated over ten meetings to discuss the details of the Act. During the discussions, the constitutional issue was also examined. Eitanit argued boisterously, but its arguments were rejected. Once the Committee completed is process, the Act passed in second and third readings and was published officially. This in mind, the argument that the final produce is not legislation must fail. It appears Eitanit's arguments about the lack of the Act's general application repeat, in a sense, the arguments about discrimination against it – arguments I have addressed at length above – or, in a different sense, are claims about the Act's wrongful purpose, claims that I will address below. And again recall: the Act does not expressly mention Eitanit or its factory. Instead, it uses terms such as "asbestos companies" and "factory for the manufacture of asbestos." It is true, however, and undisputed, that only Eitanit meets the definitions in section 74. This matter might increase the need to guarantee the Act is proportional and does not overly infringe Eitanit's property rights. Still, that the Act effectively only applies to Eitanit is not in and of itself sufficient for a finding that the Act is not "legislation."

C. For a Worthy Purpose Befitting the Values of the State of Israel

24. What is the purpose of section 74, and is this purpose worthy and befitting? Section 1 states the Act's general purpose: to minimize asbestos hazards in Israel. This is also the source for section 74's actual purpose: to launch a project for the removal of asbestos waste from the Western Galilee. The explanations that accompanied the Act's bill, as well as the State's response in this petition, described how this severe and unique environmental hazard was formed in the Western Galilee. A very large amount of asbestos waste was scattered or buried in many dozens of sites. Some of the waste is buried deep underground, and some is used in surfacing trails, private gardens, agricultural land and the like – all, as mentioned, in dozens of different locations. I elaborated upon the harms caused by this waste in depth, and it is unnecessary to repeat it all here. The purpose of section 74, therefore, is to remove or reduce as much as possible this health risk, which in some ways is a "time bomb" threatening the health and welfare of many of the area's residents. There is no doubt then that it is a worthy and important purpose, and the sooner it is achieved, the better.

This purpose is not only worthy, but also befits the values of the State of Israel as a Jewish and democratic State. I recently discussed Jewish law's approach to protecting the environment, from a religious and civil perspective (HCJ 1756/10 *The City of Ashkelon v. The Minister of the Interior* (January 2, 2013)). I specifically mentioned Jewish law's

approach to attending to waste and the financial mechanisms it put in place in order to achieve this.

Additionally, the purpose of section 74 is worthy because it realizes area residents' rights to health and to quality environment. There is no need here to go into the constitutionality or the scope of these rights (see: HCJ 3071/05 *Luzon v. The Government of Israel* (July 28, 2008); HCJ 11044/04 *Solomtin v. The Minister of Health*, paras 11-13 to Justice Procaccia's opinion (June 27, 2011); Daniel Sperling and Nissim Cohen, *The Impact of The Arrangements Act and Supreme Court Decisions on Health Policy and the Status of the Right to Health in Israel*, LAWS (4) 154, 218-225 (2012)). All these are complex, serious and weighty questions, but they are irrelevant to the case at hand. All that matters here is that cleaning waste is meant to remove a grave hazard that threatens the health of residents, and it is a welcome initiative. As presented above, this concern to the health of residents is typical of democratic states, which have invested substantial efforts in regulating removal in modern environmental legislation.

25. The State presents an additional reason for the way section 74 sets the funding mechanism: the principle of "the polluter must pay". Truthfully, I am not convinced this principle is in fact the purpose of the Act in terms of the limitations clause. Arguably, this principle justifies choosing this particular mechanism, rather than the legislative goal. Put differently: it is the justification for the means chosen to achieve the end. Therefore, the principle must pass the limitations clause in the context of proportionality, not in terms of purpose. Yet the state explicitly argues that the Act has the purpose of realizing the principle of "the polluter must pay" (p. 9 of the record). However, even under this approach the principle is not a single purpose, but is intertwined with the central purpose, which is cleaning the Western Galilee from Asbestos Waste.

As I said, I doubt whether the principle of "the polluter must pay" is a purpose – even secondary – of the Act. It is possible this position, which upgrades the means to the level of an end, is meant to boost the legitimacy of the selected funding mechanism. Another possibility is that the State grabbed the bull by its horns. In other words, being aware of the distinct difficulties presented by the principle of "the polluter must pay" and by applying it, the State categorized it as a secondary purpose, willing to subject it to the proper constitutional review. But, as I will clarify, I cannot accept that this categorization of the principle as an end will injure Eitanit and prevent it from examining the proportionality of the funding mechanism established in section 74. For the purpose of ruling in this petition, I am willing to assume – for the sake of a complete discussion – that the principle of "the polluter must pay" is a secondary purpose of the Act in terms of the limitations clause. This approach demands that the matter be subject to a strict review of proportionality. Lest we forget, the worthy purpose test is but a threshold requirement (Aharon Barak, PROPORTIONALITY IN LAW, 297 (2010)). That is, in the absence of a worthy purpose, a statute must fail constitutional review. For this reason precisely

the worthy purpose test is not conclusive. It is not the end of the enquiry, but its beginning. The difficult task of constitutional review is yet before us. As former President Barak wrote: "It is a mistake to examine constitutionality of means through the lens of the end's constitutionality. It would be too premature" (Id. at 299). Thus we must first evaluate whether the principle of "the polluter must pay" is indeed a worthy purpose befitting the values of the State of Israel. This discussion is separate from the discussion whether the principle of "the polluter must pay" and its application in the present case is proportional, given that it places strict liability, and does so retroactively.

The principle of "the polluter must pay" is simple. Whoever caused the pollution will fund its removal and be liable for harms that have and will continue to be caused. This principle stems also from efficiency reasons, with the premise that placing the financial burden on polluters will incentivize them to minimize the scope of the pollution. The goal is to reduce the amount of waste to be removed and to encourage the polluter to take precautions and develop "green" technology. This economical approach finds support in the theory of costs internalization. Coupled with the considerations of justice, which dictate that it is unfair for the polluter, who has profited from polluting, would deflect costs toward the public (see: Marsha Glefi, Ruth Plato-Shinar and Amichai Kerner, *Lenders' Liability for Environmental Hazards Caused by Borrowers*, THE ATTORNEY (50) 439, 443-47 (2010); Isaschar Rozen-Tzvi, *Who The Hell Does This Waste Belong To? Waste Removal and Environmental Justice in Israel*, LAW RESEARCH (23) 487, 553-54 (2007)). This approach was recognized by many democratic states, as reviewed above.

We will note that in Jewish law, too, the basic obligation of waste management is placed on the waste's owner. It is thus generally prohibited to remove raw materials – such as rocks and dust – or actual waste into public spaces, and the owner is expected to be liable in torts, or subjected to fines (*Tosefta Bava Kamma* 2; *Tosefta Bava Metzia* 11, *Babylonian Talmud, Bava Kamma* 30, 1; Maimonides, *Yad ha-Chazaka, Hilchot Nizke Mammon* 13, 13-17; *Shulchan Aruch, Choshen Mishpat*, 414, 2; also see my opinion on the matter of *The City of Hulon*.)

The principle of "the polluter must pay" is well established in our current law. It is also the answer to the Petitioner's claim that section 74 is out of place in the legal landscape. The Prevention of Environmental Hazards Act (Civil Suits) 1992, authorizes courts to order anyone who causes environmental hazards to cease from doing so, to correct the hazard, or to restore, and this regardless to the level of fault, if any (section 2-4.) Additionally, a string of legislative amendments in this vein was incorporated into The Environmental Protection Act (The Polluter Must Pay) (Legislative Amendments) 2008. Further, in terms of industrial waste, the principle of "the polluter must pay" translates into a similar principle of "manufacturer responsibility". That practical meaning of this is that the costs of taking care of and recycling waste will generally be placed upon the factory that manufactured the polluting products in its production

processes (see above regarding EPR policies). This has many aspects in the new environmental legislation in Israel. We will mention here The Environmental Care for Electric and Electronic Equipment and Batteries Act 2012, The Regulation of Care for Packaging Act 2011, The Beverage Container Deposit Act 2001 – amended in 2010 to set quotas for bottle collection by manufacturers, The Removal and Recycling of Tires Act 2007, and The Preservation of Cleanliness Act 1984 – amended in 2007 to set a mechanism for burial tax (see the matter of *The City of Hullon*, para 31 of Justice Barak-Erez's opinion).

Incidentally, the State points out that the principle of "the polluter must pay" is reflected in statutes that were already in effect when Eitanit created the asbestos waste. For instance, section 54(1) to The People's Health Ordinance, num. 40 of 1940 stipulates that the local authority or the ministry are authorized to order a person who created a hazard to remove it. For these purposes, a hazard is any place whose state or use endanger or damage public health (section 53).

To summarize, Eitanit does not dispute that the purpose of the Act insofar that it is to remove asbestos waste from the Western Galilee is a "worthy social purpose" (see section 107 of the petition). The Petitioner's primary opposition is for the principle of "the polluter must pay", particularly in terms of the strict liability standard and the retroactive application. In this context, Eitanit challenges the efficiency of applying the principle of "the polluter must pay" and the fairness in applying it. Therefore, assuming that "the polluter must pay" is a worthy purpose because of its contribution to ecology, the question remains whether the funding mechanism is proportional. This question leads us to the main issue, which is the establishment of retroactive and strict liability.

D. Proportionality

26. The last requirement of the limitations clause is that the infringement of a constitutional right is "to an extent no greater than required". This is the proportionality requirement. The case law has articulated three sub-prongs for evaluating the proportionality of infringements of constitutional rights: the rational connection test, the least restrictive means test, and the cost-benefit test (narrow proportionality).

Before we begin, recall that the proportionality criterion does not dictate selecting only one mean to achieving the legislative end. There is a collection of – perhaps many – alternative measures, all of which may in themselves be proportional. These measures are different in terms of the scope of their infringement on constitutional rights, as well as how they may achieve the legislative purpose. This creates a range of proportionality within which the legislature may operate. The legislature has room to maneuver, and it may choose certain alternatives over others so long as they sit within the range of proportionality (compare: HCJ 2605/05, *The Academic Center for Law and Business v. The Minister of the Treasury*, para 46 of President Beinisch's opinion (November 19, 2009)).

(1) Rational Connection

27. Under the first proportionality sub-test, we must examine whether there is a logical link between the Act's purpose and the means selected to achieve it. As I have discussed above, for purposes of our discussion, the Act has two goals: to clean the Western Galilee of asbestos waste, and to realize the principle of "the polluter must pay". These are the legislative ends. The means that legislature selected is the mechanism set in section 74, specifically its funding aspect (which is at the core of this petition). We will explore the link between the selected means and each of the purposes.

28. Regarding the first purpose, I do not find it necessary to elaborate, because the link here between the means and the end is practically obvious. The first purpose is to remove asbestos waste from the Western Galilee. The selected means is the relevant project, arranging for its budget and funding and authorizing the Minister to establish operative regulations. The means leads directly to the end.

29. As for the second purpose, the case is more complex. Eitanit raises a string of questions about the link between the funding mechanism established and the principle of "the polluter must pay". Eitanit's criticism includes four arguments. First, Eitanit claims there is no evidence it scattered the waste. Second, Eitanit is subjected to strict liability, and it is required to pay for conduct that was not legally proscribed at the time. Second, Eitanit maintains that a significant portion of the waste was distributed by the end users and not by Eitanit. Third, Eitanit challenges the strict liability imposed upon it, along with the requirement to pay for conduct that was not statutorily prohibited at the time. Fourth, Eitanit argues that it must pay for past-conduct such that the aspect of channeling behavior and deterrence is non-existing here. Retroactive payment, Eitanit believes, is also unfair. Therefore there is no link, to Eitanit, between the type of payment the Act imposed upon it and the principle of "the polluter must pay".

The first argument raises a factual issue, which I have addressed above. Repeated briefly, the accumulation of several indications demonstrates that there is a "presumption of burial" against Eitanit in terms of section 74: the asbestos waste, that has similar characteristics, was buried by organized and systematic techniques, and all in a limited area around the factory. Even if this not an absolute presumption, Eitanit has the opportunity to argue that the waste in a specific location did not originate in its factory. To what extent a petitioner may attack the factual basis for the Act is a good question. I my view, such attack is not identical to attacking the factual basis for an administrative decision, or even to an administrative petition in the High Court of Justice, or to a factual dispute between parties of the civil or criminal case. Yet, as mentioned before, the broad legal issue need not be decided here, as the factual basis is well substantiated. The truly relevant question is what this factual basis means.

The second argument does not negate the rational connection between the means and the end either. It is true that some of the waste was layered on

the ground by the end users. However, one of the important justifications for the principle of "the polluter must pay" is cost internalization by whoever benefited from creating the pollution. In our case, Eitanit fits this criterion because it profited from the production processes that resulted in buildup of industrial waste. Additionally, it profited – albeit indirectly – from passing the waste from the factory on to the end users. In any event, there is a clear rational link between the means – mandating that Eitanit share the cost of removing the waste – and the relevant purpose – the principle of "the polluter must pay". Eitanit's arguments on this point may be seen from a different angle that focuses the discussion on the question of equal burden. In other words, why would Eitanit alone shoulder the financial burden and not the end users? The answer is twofold. First, there is no discrimination between Eitanit and the end users. I discussed this in depth above. Second, the possibility of a different allocation of financial burdens as to reduce the harms to Eitanit. I will discuss this below, when analyzing proportionality's second and third sub-prongs.

The third and fourth arguments revolve round the strict liability and its retroactive application. Regarding the rational link between the means – the funding mechanism – and the secondary purpose – the principle of "the polluter must pay," it seems that imposing payments on the entity that created the hazard and benefited from it advances this purpose and puts it into practice. Refer to the discussion above as to how the principle of "the polluter must pay" is based on justice and fairness. It is only reasonable and logical that whoever created a hazard and was the primary beneficiary of it would be the one required to pay for it. In this context, it would be appropriate to combine the two purposes the State finds in the Act. It is necessary, as Eitanit also agrees, to remove the asbestos waste from the Western Galilee. The legislature elected, as did other legislatures in democratic states, to impose special costs on the asbestos company – the manufacturer and direct profit-maker – compared to others, including the public.

To sum up this point, this is not a case where the means do not promote the end. The contrary is true. Recall that the "the rational connection test, like the worthy purpose test – is a threshold test. It is not a balancing test. It does not weigh the worthy purpose against the infringement" (PROPORTIONALITY IN LAW, p. 387). However, there is the approach that the first sub-prong is not technical: "this sub-test is not satisfied with the existence of a merely technical causal connection between the means and the end. Therefore the requirement for a rational link is designed, among others, to restrict arbitrary, unfair or illogical means" (HCJ 2887/04 *Abu Madigam v. Israeli Land Authority*, IsrSC 62(2) 57, para 37 of Justice Arbel's opinion (2007)). In my own opinion, the natural place for testing the justice and fairness of a means is in the contest of the second sub-prong, and more so in the third sub-prong. That said, I am willing to assume that in extreme cases where the means' arbitrariness and unfairness are obvious this should be considered even in the first sub-prong. This certainly is not the case: here, applying the second and third sub-prongs will shed light on the extent of justice and fairness in the chosen means.

(2) The Least Restrictive Means

30. We now approach proportionality's second sub-test. The question before us is whether, of all the alternative means that may achieve the purpose of the Act, the means selected is that which least infringes Eitanit's right to property. Put differently, we ask whether there is a less restrictive alternative that will similarly achieve the Act's purpose (compare HCJ 10202/06 *The City of Nahariya v. The West Bank Military Commander*, p. 12 (November 11, 2012)).

In this context, Eitanit identifies two alternatives for the mechanism established by the Act. One is to "repair" the sites where the waste serves to cover the land. The second is allowing Eitanit to execute the removal project on its own. We will explore each alternative.

31. The first alternative is only generally argued by Eitanit, without adding details that can illuminate the primary relevant question: is it expected to achieve the same purpose while harming Eitanit less. Recall, that, as Eitanit presented things, re-covering and sealing the paths that were surfaced with asbestos is a partial solution to the waste problem at best. Whether this is a real fix, including for the paths themselves, is doubtful. Moreover it is unclear to Eitanit what the solution for other types of waste, such as waste that was buried underground. We cannot therefore find that the suggested alternative would sufficiently accomplish the Act's purpose of cleaning the Western Galilee from asbestos waste, while lessening the harm to Eitanit.

32. We are left with the second alternative: Eitanit's consent to removing the waste independently, instead of paying for removal (the "self-removal" alternative). However, the Petitioner did not meet its burden to prove that this alternative will serve the Act's purpose adequately.

The task of removing the asbestos waste was discussed among the parties for a long time. Eitanit's proposal to remove the waste, through a sub-contractor it will employ, was also subject to discussion. After several rounds of negotiation, the proposal was rejected. I will here refer to a detailed and reasoned letter that Mr. Oshik Ben-Atar, a senior deputy to the Accountant General, sent to Eitanit in November 2010, in which the State notified Eitanit that its self-removal proposal is impractical. The letter states that Eitanit estimated the project to cost between NIS 166-300m, if not more (see also section 120 of the petition). These are substantial gaps that elicit concerns that Eitanit's low estimate will prevent it from completely and successfully executing the project. This is coupled with the doubt that Eitanit has, on its face, little incentive to execute the project as best as possible. This is also because it is not expected to profit from executing the project and it has no incentive to conduct thorough surveying and locating all the polluted sites.

Eitanit maintains the recently completed removal of asbestos from a certain area, under State supervision, and the costs of that removal was approximately 65% lower than the costs estimated by the State. The State,

on the other hand, maintains that the experience with Eitanit in this regard is not positive. The State supervises Eitanit's work to restore waste sites in Sheikh Danon and in Shlomi, as well as work to remove asbestos waste in other areas. These projects have been found to have professional deficiencies, and these deficiencies have caused major delays in the projects.

I do not intend to rule on the factual disputes between the parties, as if this were a civil dispute or an administrative petition. Such a ruling is not necessary for our purposes. We are concerned with section 74 of the Act, not with administrative or appellate review. The question before us is whether there is an alternative means that will impose less harm upon Eitanit, while achieving the legislative purpose behind section 74. From this perspective, Eitanit has not met its burden. I am not persuaded that the self-removal option will lead to the end that inspired enacting section 74 – cleaning the Western Galilee from asbestos waste. We were even presented with material that supports the State's position, or at the very least demonstrates its logic.

33. The perspective we so far employed has been negative: whether there are alternatives that achieve the statutory purpose while lessening the harm caused to Eitanit. Eitanit emphasized this approach. However, the issue can be examined, simultaneously, in a positive perspective: whether the mechanism elected by the legislature includes checks and balances that reduce the harm caused. In this contest there are five elements: (1) Eitanit would be required to pay no more than half of the estimated removal costs – half, perhaps less but certainly no more; (2) In any event, Eitanit's funding obligation shall not exceed NIS 150m; (3) The funding mechanism the legislature selected, along with supplementary instructions from the Minister, ensure that this is not a fine or a compensation. Eitanit's financial obligation will be used to (partially) cover the costs of removal alone; (4) The relevant removal project is limited to a radius of 15 KM around the factory. Section 74 does not compel Eitanit to participate in funding the removal of asbestos waste if that waste is in locations beyond that area. Finally, the Minister's instructions create a mechanism of supervision and checks that will allow Eitanit to challenge each and every payment it is required to submit in terms of specific waste sites.

The five elements mentioned are no hypothesis or creative interpretation. These are checks and balances built into the explicit language of section 74 and its supplementary instructions. They reduce the harm caused to Eitanit's property, while still achieving the primary purpose of cleaning the Western Galilee of asbestos waste and the secondary purpose of "the polluter must pay" (to the extent this purpose exists).

The elements above can be categorized through three questions: how much, for what, and how. "How much": 50 percent, which shall not exceed NIS 150m. In examples from the United States and from other countries, some legislation required funding up to 100 percent, without setting a maximum amount. The gap in the amount is substantial. It is another rebuttal for Eitanit's argument that it would have been appropriate

to impose some liability for removing the waste upon the end users. As mentioned before, I am not persuaded that the maximum amount set does not reflect a fair estimate of potential costs. Moreover, even were the Petitioner to dispute the estimates for removal, because the State bears half the costs, it has no interest in inflating costs. "For what": for cleaning a defined area. The significance of this is that there is no penalty or sanction. Restricting the project that Eitanit must fund further supports the conclusion that the means of imposing liability is not an end unto itself. The "for what" element is joined by the scope of the territory – a 15 KM radius around the factory. This area is not only limited but also reflects the history of Eitanit's conduct in terms of distributing industrial asbestos waste. This history include the fact that Eitanit buried some of the asbestos waste, as well as passed it on to the end users in the area for very low cost, or no cost at all. This supports the assumption that implementing the principle of "the polluter must pay" is neither arbitrary nor irrational. The third question is "how": the section includes an internal mechanism that ensures that Eitanit is able to present its position as to the periodical invoices it would receive. The reservations Eitanit may raise in this context are not limited to calculations, but also to the issue of whether particular piles of waste in fact originated in its factory. The State stipulated this in section 121 of its responding papers. This element contributes to the proportionality of the selected means. The internal mechanism emphasizes supervision rather than top-down orders.

(3) Narrow Proportionality

34. We are thus left with the third and last sub-prong of constitutional review: the narrow proportionality test. This tests measures the appropriate ratio "between the public benefit of a statute subject to constitutional review and the infringement of a constitutional right caused by that legislation (the matter of *The Academic Center*, para 50 of President Beinisch's opinion; see also HJC 2651/09 *Association for Civil Rights in Israel v. The Minister of the Interior*, para 22 of Justice Naor's opinion (June 15, 2011). It weighs cost against benefit in the constitutional sense – social gain versus infringement of rights.

The case law expressed the view that "this is the most important of the three sub-prongs" (Justice Dorner in HCJ 4541/94 *Miller v. Minister of Security*, IsrSC 49(4) 94,140 (1995)). Either way, it is not a threshold test. Being the last obstacle in the constitutional journey a spotlight is pointed at this test. Though it is termed "narrow proportionality" is it not narrow at all. It poses a special challenge to judges. In my view, and precisely because of it, the test may develop over time – including setting standards for its application – more than the other sub-tests.

In any event – in our case – it is crystal clear that the Act is immensely beneficial. Therefore, it may be determined that the section is unconstitutional only if the infringement on Eitanit's property rights – the other side of this equation – is so great that it eclipses the benefit.

By imposing financial obligation, section 74 infringes upon Eitanit's right to property. Its arguments articulate three aspects that exacerbating the infringement: (1) the Act is personal; (2) the Act imposes strict liability; (3) the Act is retroactive. For each aspect, I first present the substance of the harm argued, then the actual scope of the harm: has the Act crossed the constitutional line and thus must be struck down; is the harm indeed as severe as argued or can it be mitigated by elements of the Act. This analysis will illuminate the constitutionality of the ratio between the cost and the benefit.

Personal Act

35. It is undisputed that even though the Act does not explicitly mention Eitanit, it is personal legislation as it effectively applies specifically to Eitanit.

In a broad sense, one of the basic traits of a statute, that in principle distinguishes it from other arbitrary norms, is its general application. This trait usually manifests in application over a non-specific group of subjects, or in that the statue mandates, prohibits or authorizes constant or organized conduct (aspects discussed by H. L. A. HART, THE CONCEPT OF LAW (1961); see also Chaim Ganz, *On The Generality of Legal Norms*, IYUNEI MISHPAT (17) 579, 579-85 (1992)). This distinction constitutes one of the differences between a law that addresses the public at large and a judicial decision that addresses a single individual. Therefore, arguably, though this is a statute enacted through the proper legislative process, substantively, it is so flawed that it infringes Eitanit's right to property.

I respond to this with the justification for Act targeting only Eitanit. It is not a question of numbers, that is, how many are subjected to the Act, and the fewer the number, the more personal the statute. Rather, we must ask whether there is good reason for applying a statute only to a limited group. The examination must be done carefully when few are concerned, let alone when only one factory is.

What is the context around section 74? It appears there is no arbitrariness, whim, or specific persecution. The legislature prioritized a project for cleaning the Western Galilee. The section was designed to respond to a unique situation – extensive accumulations of asbestos waste, in a defined geographical area, that was created systematically by one dominant entity. Eitanit presented no arguments to the effect that this is not exclusive to the Western Galilee. It should also be noted that Eitanit enjoyed its status as a lone and dominant manufacturer in the local asbestos market.

The heart of the matter is that Eitanit's special position is not born of legislation but of reality. Presumably, and as reflected in comparative foreign legislation, in a more sizable country, the market would include more than one player. And yet, the Israeli Act was designed to remove the waste through the shared – but not full – participation of the entity that created it and profited from it. That this is a single entity does not compromise justice or fairness. From this perspective, I do not believe that

the fact that Eitanit was a single factory indicates, in constitutional terms, excessive infringement of property rights. In my opinion, these considerations mitigate the alleged harm caused by the sections lack of general application. I will also note that to the extent that Eitanit claims that the Act's lack of general application is discriminatory, I cannot accept this argument for the reasons detailed at length above, when discussing the issue of infringement of equality.

Incidentally, the Israeli legal code already includes complete statues that are clearly personal. For instance, President Haim Weitzman Act (Retirement and Estate) 1953 sets the retirement amount that was paid to the first President's widow. Another example is the Bank Shares Settlement Act 1993, which addressed the nationalization and privatization processes of the four big banks at the time (Leumi, HaPoalim, Discount, and Mizrahi), in light of the bank shares crisis of the 1980s. These examples support the argument that unique situations calls for unique legislation, and may even justify personal statutes.

Strict liability

36. The Petitioner points to another factor that exacerbates the infringement upon its property: the *de facto* strict liability standard. In other words, the legislature imposed upon Eitanit liability for polluting activity it committed in the past, though on its face these activities did not constitute breaching any duty of care at the time, and in any event no court found otherwise. Eitanit argues this aspect exacerbates the infringement upon its property rights.

It is true that on its face, strict liability raises concerns and warrants examination. In my view though, three factors mitigate, or balance out, the constitutional challenge involved in imposing strict liability.

First, the support for imposing strict liability in comparative law, which I elaborate on further below. Second, imposing strict liability in the context of removing polluters relies on weighty considerations. I mentioned justice and fairness, along with the economic rationales of deterrence and cost internalization. Another justification is the evidentiary challenges that follow from a fault-based standard, and may be avoided through a strict liability standard (see above the discussion of European and American law). Third, I believe that in this case there is a unique element that takes a little bit of the sting out of strict liability. Foreseeability is a relevant consideration when it comes to strict liability. Thus in American law, for instance, The Third Restatement of Torts explains that strict liability for abnormally dangerous activity is desirable. Activity is found to be abnormally dangerous when several cumulative conditions are met including that the activity creates a foreseeable and highly significant risk of harm, and that the activity is not one of common usage even when the actor has taken reasonable precautions (RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §20 (2010); see further Gilad, p. 1293-97). In light of this, foreseeability sets the limits of strict liability in one sense, and justifies the imposition itself, in another. It

should be noted that the Restatement is not binding law in the United States, but it is considered to reflect the current state of the law and is commonly used in American case law. It is also true that in the United States, waste pollution is regulated in specialized legislation. However, in my opinion, the above is relevant for constitutional challenges to strict liability.

Jewish law may serve to clarify the point. The Mishna states, in the context of torts, that "one will always err, whether by mistake or on purpose, whether awake or asleep" (*Babylonian Talmud, Bava Kamma* 26a). This is a type of strict liability. Maimonides qualifies the scope of liability:

"When do we say that the person asleep must pay? When two who slept side by side, and one of them rolled over and injured the other or ripped his clothing. But if one was asleep and another joined him and lay by his side – the person coming last is the wrongdoer, and if the person asleep caused the injury, the latter would be absolved. And likewise if a pot were placed next to the sleeping person and the latter broke it, he would be absolved, as the person who placed the pot is the negligent wrongdoer" (*Mishneh Torah, Book of Torts, Hilchot Chovel U'Mazzik* 1, 11.)

This teaches us that if, for example, a person sleeps in another's home by a lamp and during their sleep they strike and break it, they must break it. However, if after a person has fallen asleep, someone places the lamp by their side, and during the night the sleeping person breaks it, they are not liable for the damage. The relevance to our matter is that even with a strict liability standard, putting an object in play without the knowledge of the injuring party, may absolve them from responsibility. This approach is reminiscent of the innocent owner defense: under the CERCLA, a landowner is not liable if at the time they purchased the land they "did not know, and had no reason to know, that they had any hazardous substance" (42 U.S.C §9601(35)(A)(i)).

In our case, the material shows that Eitanit's activity with the waste was not conducted without any foreseeability or knowledge about the harms of asbestos. I have discussed this, when examining the knowledge gaps between Eitanit and the end users. Professor Shilling's report from 1969 detailed the health risks caused by exposure to asbestos dust, including asbestositis and cancer. An article from 1970, authored in collaboration with representatives from Eitanti's factory, states that there is "clear awareness of health risks caused by asbestos, and the prevalence of asbestositis cases on one hand, and of cancer on the other." A letter from 1976 by Mr. Yekutiel Federman, one of Eitanit's controlling shareholders, addresses the scientific research of the time that discussed asbestos health risks. Additionally, Eitanit, as an employer of asbestos workers, was subject to different labor laws that acknowledged the risks caused by asbestos: defining asbestositis as a vocational disease, prohibitions against employing teens and women in asbestos factories, the requirement for periodical medical examinations, and so on.

This means, in other words, that Eitanit had a certain extent of factual foreseeability or knowledge about asbestos health risks. It should be noted, to clear any doubts, that I am not dealing here with the necessary bar to meet the burden of proof for tort, criminal or other liability. This is not the topic of discussion, nor is it the standard. We are concerned with constitutional review. The issue at hand is what the scope of harm Eitanit has been caused is, and particularly – what weight should be attributed to imposing strict liability. In this view, the indicators I have listed should not be ignored, as they demonstrate Eitanit's foreseeability or knowledge – even some – and all to the extent relevant for the matter at hand.

As a court comes to examine whether there is constitutionality of the infringement caused by imposing financial obligations on Eitanit, I believe that even partial knowledge lessens the infringement of her property rights. Put differently, even in the absence of liability or in the existence of strict liability, the link between the liable party and the conduct still warrants scrutiny. Put differently still: had section 74 imposed liability on a different company that did not manufacture asbestos in the relevant time period, or did so but not in the Western Galilee, the concerns around section 74 would significantly multiply. And again recall that section 74 does not impose on Eitanit tort or criminal responsibility. The statute does not convict, taint, or even attribute liability to Eitanit. And the means chosen is not a fine or compensation. It is designed to remove asbestos waste from the Western Galilee. Of course, this does not mean that the legislature may impose liability arbitrarily and as it sees fit. Therefore section 74 must be tested according to the limitations clause. We believe, as explained above, that there is a link between Eitanit and the waste that justifies the strict liability standard set in the section.

To summarize, though strict liability poses difficulties, considering the circumstances as a whole, the existence of similar standards regarding removal of dangerous buried waste in many other countries, the justification of "the polluter must pay", the element of Eitanit's knowledge or foreseeability about the specific harms and risks, and the type of financial obligation that is not a fine or compensation but the cost of cleaning the area in order to halt the development of serious harms to the residents and the environment, it seems that the benefits outweighs the infringement of the right.

Retroactive Legislation

37. A separate issue arises as to the temporal application of the Act. Eitanit claims that this is retroactive legislation, and therefore increases the infringement of its property rights. By this logic a retroactive statute comes into effect after conduct was complete, but changes the rules of the game for the future. The State, though, believes that the statute applies actively, and thus Eitanit's claim is mitigated. That State's position is that retroactive legislation cannot be precluded in every scenario. Who is correct about this? The issue of temporal application is complex. Therefore, first we generally present the relevant terms. Then we analyze

the issue in the context for section 74, including the extent of harm to Eitanit.

Retroactive legislation changes *for the past* the legal status of activity that occurred before the legislation came into effect. Retrospective legislation changes *for the future* the legal consequences of activity that occurred before the legislation came into effect. Prospective legislation changes *for the future* the legal statues of activity that will occur after the legislation comes into effect.

To illustrate the differences, consider the following hypothetical: Reuben smokes a cigarette in a public space on January 1, 2012. At the time this was not prohibited. On February 1, 2012, a statute was enacted that imposes a steep fine on smoking in public places. If the new statute applies only on whoever smokes in public places from February 2, 2012 on, this is a prospective statute. If however, the statute stipulates that it came into effect on January 1, 2012, it is a retroactive statue. It alters the legal status of Reuben's smoking, and subjects him to a fine. However, the statute is retrospective if it stipulates that anyone who smokes between January 1, 2012 and the day the statute was enacted did not commit any offence, but is required to participate in a class offered by the Ministry of Health about the harms of second-hand smoking. The statute did not alter for the past the legal status of Reuben's smoking – which is not an offense – but did change for the future the consequences of his action. In this case, the unique status of a retrospective statute is obvious: the statute clarifies that Reuben did not commit an offense and the consequences he must face are not a fine or penalty, which is inconsistent with retroactive legislation. Reuben would still have to bear certain consequences for his past conduct, which is inconsistent with prospective legislation. It should be noted that this distinction, between retrospective application and retroactive application, is not acceptable by all, but has been established in the jurisprudence of this Court and in several other legal systems, such as Canada (for more on these definitions, see CA 1613/19 *Arviv v. The State of Israel*, IsrSC 46(2), 765 (1992); Aharon Barak INTERPRETATION IN LAW, vol 2 – Legislative Interpretation, 609-45 (1994); Yoram Margaliot, *Discrimination in Regulating Financial Savings and its Proposed Solution*, MISHPATIM 31, 529, 552-56 (2001); Yaniv Rosnai, *Retroactivity: More Than Just 'A Matter of Time'!*, LAW AND BUSINESS 9 395 (2008); Daphne Barak-Erez ADMINISTRATIVE LAW, vol 1, 351-52 (2009)).

Another categorization that may be relevant for our purposes is active legislation: a piece of legislation that changes *for the future* the legal consequences of a situation that already existed the day the statute came into effect. Obviously, active legislation is closely linked to retrospective legislation. The difference between the two is that active legislation applies to *situations* that exist in the present, whereas retrospective legislation applies to *activity* that has already concluded in the past. For the hypothetical above, assume that the new statute would believe the impact of smoking in public places to leave residue for two months, and impose obligations accordingly – this is active legislation. It is another way to

justify obligating whoever had smoked in a public place a month prior to the statute's effect to participate in the course, as the hypothetical goes.

In his book, Professor Barak presents another example to illustrate the difference between retrospective application and active application. The difference depends on the purposive interpretation of the relevant statute:

> "Take a new statue that stipulates that anyone convicted of an offense cannot serve as a Knesset Member. Would the term 'anyone convicted of an offense' point to an activity or a situation? Would applying the statute on anyone who was convicted of an offense before the law came into effect constitute retrospective application?... If the statutory purpose is to set an additional sanction – beyond the criminal sanction – for anyone convicted, then it addresses the activity that led to the conviction in the past. Applying the new law to such activity constitutes retrospective application of the statute. However, if the statutory purpose is to ensure public trust in elected officials and government institutions, then it addresses the situation of 'convicted'. Applying the new statute on a situation that existed before the statute came into effect and continues to exist in the present does not constitute its retrospective application" (Aharon Barak INTERPRETATION IN LAW, vol 2 – Legislative Interpretation, 628 (1994).

38. Equipped with these tools, where does the case before us fall? Section 74 of the Act requires Eitanit to shoulder the costs of removing waste it buried in the ground or passed on to the end users. On one hand, this is not retroactive application: the section does not change the past, and does not define Eitanit's past conduct as an offense or as conduct that creates liability in torts. On the other hand, this is not prospective application, as we are concerned with removing existing waste and not waste that will accumulate in the future. The question is therefore whether this is active or retrospective application. On one had, arguably, this is active application: the Act addressed a current situation – waste that threatens public health. This is the State's position. Alternatively, it can be argued that this is retrospective application: the Act changes the legal consequence of the burial and giving away that Eitanit did in the past, and imposes a new sanction on Eitanit. This is, effectively, Eitanit's position.

The dispute between the parties is not merely theoretical, and the categorization of section 74's temporal application holds constitutional significance, because the four main categories of temporal application – prospective, retrospective, active, and retroactive – may be organized along a "spectrum of legitimacy". This spectrum reflects how we treat a piece of legislation. The premise for the "spectrum of legitimacy" is as such: the more the statute sends its tentacles significantly toward the past – so do more concerns come up about the statute's legitimacy. The intuition behind this has many rationales: the rules of the game must be clearer from the outset, for reasons of justice and fairness, and the legislature should not be permitted to change them retroactively. Additionally, retroactive

changing of rules compromises public trust in the legislature, limits the statute's ability to channel future behavior, and undermines stability and certainty. It should be emphasized that a statute should not automatically struck down only for its location on the spectrum. Yet the justification for a statute's temporal application must be more persuasive (this is not so for criminal legislation, see section 3 of the Penal Law 1977; a similar state exists in Canada: CANADIAN CHARTER OF RIGHTS AND FREEDOMS §11(g), in India: CONSTITUTION OF INDIA, §20(1), in South Africa: CONSTITUTION OF SOUTH AFRICA, CHAPTER 2 – BILL OF RIGHTS, §35(3)(1), and in Norway: KONGERIKET NORGES GRUNNLOV, §97).

On one end of the "spectrum of legitimacy" we find prospective application. This is more acceptable because it has no impact on past actions or past situations. On the other end we find retroactive application. This application is the type most difficult to swallow because it pulls the rug from underneath activity that has already been concluded and changes its legal meaning. Active application is situated between retrospective application and prospective application, because it applies to situations that are rooted in the past but that continue into the present. Therefore, in some sense, it is more acceptable and reasonable than retrospective application, which entirely addresses actions that have ended in the past. Thus the relative importance of the issue before us, about the categorization of section 74 – retrospective or active?

I have given much thought to this question. It is true that the Act applies to an existing situation. We are concerned with removing waste that is already buried in the ground, or is used to cover it in order to create different types of surfaces (roads, pavement, etc.). In this sense, the law applies actively. Yet I believe that categorizing section 74 under active application misses the point. Recall that this is not a case where only several of the factual elements have occurred in the past. Here, all the factual elements have occurred in the past: the waste has already been buried or placed as surfaces. In such a case, I doubt whether active application in the traditional sense is appropriate (compare: CA 6066/97 *The City of Tel Aviv-Yaffo v. Even Or*, IsrSC 54(3) 749, 755 (2000)). Moreover, section 74 does not address the future at all. Consider, for comparison, the example by Professor Barak that I presented above, about the new law that would stipulate that anyone convicted of a crime would be excluded from serving as a Member of Knesset. Such a hypothetical statute is partly concerned with the past (people who have already been convicted), and partly concerned with the future (people who would be convicted in the future). However, section 74 is not future facing at all. It addresses asbestos waste that Eitanit buried in the distant and not so distant past. The section does not address, and neither does it purport to do so, the burial of asbestos waste going forward. This is the concern of other sections of the Act, but not section 74. It is possible, then, that we are faced with a new category – narrow active application. Going back to the "spectrum of legitimacy", I believe section 74 and the category of narrow active application are closer to the legitimacy position of retrospective application than to that of active application. Either way, the probability

that section 74 is not an obviously retroactive statute, weakens Eitanit's claim regarding the extent of the infringement of its property rights.

Still, without deciding the theoretical question of the Act's categorization, we must keep in mind that even were this a strictly retroactive statute – and that is certainly not the case here – it should not mean that statute must be automatically struck down. We would still need to examine the entirety of arguments, factors, and considerations regarding the statute, in light of the limitations clause, including the statutory purpose, its benefits and its infringements of protected rights (compare: HCJ 1149/95, *Arko Electric Industries Ltd. v. The Mayor of the City of Rishon L'Tzion*, IsrSC 54(5) 547, para 10 of Justice Strasberg-Cohen's opinion (2000); HCJ 4562/92, *Sandberg v. The Broadcast Authority*, IsrSC 50(2) 793, para 33 (1996)). In other words, the analysis I have conducted so far regarding temporal application is yet another consideration in the cost-benefit analysis. Indeed, another consideration but not a decisive one.

In my view, balancing benefit against the infringement of rights, there are three considerations that support the former and tip the scale against the harm caused by the statute's retroactive application. Again, I do not believe this is *per se* retroactive application, but for purposes of convenience and brevity I will so term it. Of course this is not merely a matter of convenience: section 74 and its unique formulation, reeks of retroactivity, even if it should not be categorized as such.

As for the first consideration, my position above regarding the element of foreseeability characterizes Eitanit's conduct to a certain extent. This has implications not just for issue of strict liability, but also for that of retroactivity. United States courts, as explained, interpreted CERCLA as having retroactive application, even though this is not explicit in its language, and though American law has a rebuttable presumption against retroactive application. One reason for this interpretation was linked to the foreseeability element: "While the generator defendants profited from inexpensive wasted disposal method that may have been technically 'legal' prior to CERCLA's enactment… it was certainly foreseeable at the time that improper disposal could cause enormous damage to the environment." (*U.S. v. Monsanto Co.*, 858 F. 2d 160, 174 (4th Cir. 1988))

Put differently, while it is true that waste removal activity was formalistically permitted at the time, it was still possible even then to expect that such activity would cause grave harm to the health of residents and to the environment. In other words, foreseeability or awareness of the harm is some justification for imposing "retroactive" liability. We see a similar line of thinking in Holland, as I explained above. The Dutch Supreme Court ruled that a law from 1982 applies retroactively from January 1, 1975 onward. This date was chosen because starting then every polluter should have been aware that it was likely to be liable for polluting. Therefore, foreseeability or expectation of harm – not in the criminal or civil sense, but for the purposes of constitutional review – may justify retroactive application.

This is coupled with a second consideration: the extreme harm to the public. This risk is not reduced over time, and it must be addressed. Doing so increases the social benefit that comes out of section 74, even if it holds quasi-retroactive elements. Ignoring the risk caused by asbestos amounts to exposing citizens to a ticking time bomb. No wonder the legislature seeks solutions. Removing asbestos waste is an urgent priority. Failing to do so is not an option – "You shall not overlook" (Leviticus 22, 3). Regardless, the responsibility for an asbestos hazard already created will be quasi-retroactive. Therefore the question is not whether to impose retroactive liability, but whom to impose it upon (including the option of distributing costs between different parties). Of the options to impose financial obligations on the polluting corporation and imposing it on the public, fairness requires that we opt for the former. Indeed, the Israeli legislature's solution, regulated through section 74, is designed so that at most only half of the expenses are placed on Eitanit.

Regarding the third consideration, we turn again to comparative law. Many countries – though not all of them – have recognized retroactive application. This position, as explained above, is primarily justified by fairness and necessity.

I am not ignorant to the fact that in terms of section 74 there is some link, perhaps even intermingling, of the concerns about retroactivity with the concerns about strict liability. This is understandable. As far as the infringement of Eitanit's property right, retroactivity and strict liability walk hand in hand. The two, together and separately, raise concerns about imposing financial burdens on Eitanit for actions that were not impermissible when taken, and were not even found to constitute a breach of any duty of care. Ultimately, we must look into the details of section 74. This examination reveals that, on one hand, there is no finding of fault, but on the other hand, there are policy reasons, as mentioned, that warrant the conclusion that the infringement is outweighed by the benefits.

39. For the purposes of the third sub-test, the narrow proportionality test, three of Eitanit's arguments were emphasized for the difficulties they create: personal legislation, strict liability, and retroactive application. Having analyzed each of these arguments independently, it appears the extent of the harm is not as great as initially thought. The additional conclusion is that Eitanit failed to demonstrate that the infringement upon its property rights surpasses section 74's extensive benefit to the public.

Remarks Before Summarizing

40. Before I finish applying the limitations clause to this case, I should emphasize two important points. These were weaved throughout the constitutional analysis, but it would be appropriate to bring them to the fore of the discussion in order to acknowledge their significance.

The first point is the comparative law one. We are concerned with a legal area completely new to Israeli law. The issues raised here, were raised in similar dress in many other countries. Asbestos, as a member in the group

of dangerous and polluting materials, is a problem that crosses borders. When a court subjects a case like this to constitutional review, I believe there is significance to the fact that many countries have walked a similar path to that of section 74. Caution is warranted when looking abroad as the Israeli system is independent. 65 years from the country's founding, Israeli law can be seen as a dynamic creation with a life of its own. Israeli law defines the question, and supplies the answer. However, beyond the fact that this is an issue common to Israel and to other countries, I have not seen the matter to be unique – certainly not clearly or obviously – to Israel and distinct from that in other countries around the world. This is not to say that the State has absolved itself by demonstrating that the statue legislated here is consistent with international consensus. But by the same token, it cannot be said that comparative law is an irrelevant consideration, particularly when it reveals that other countries' constitutional jurisprudence regarding similar statutes enriches our constitutional discussion. The project of comparison supports the state's argument that section 74 is constitutional. This is a factor that should be taken into account here (and see CA 1326/07 *Hammer v. Amit*, para. 34 of Deputy President Rivlin's opinion (May 28, 2012), re wrongful birth). However, this is certainly no substitution for independent constitutional review under section 8 of Basic Law: Human Dignity and Liberty.

Substantively, the above review of the legal state in Western countries reveals one clear point: that a standard of strict liability is common and acceptable in the context of removing dangerous and polluting materials. Thus in the United States, where the courts found the legislative intent behind CERCLA was to establish a strict liability standard. The European Union's Directive, the ELD, recommends imposing strict liability on harm caused by dangerous activities listed in the third annexure. This type of liability was *de facto* imposed in Sweden, France, Holland, Germany (to some extent), Finland and the United Kingdom. This is also the case in many other countries that are not members of the European Union, such as Switzerland, Canada and South Africa. Retroactivity is less common, compared to strict liability, but it exists, too. In the United States CERCLA's retroactivity passed judicial review. So did the statutes of British Columbia. Some European states adopted retroactivity as well, including Spain, the United Kingdom, and Holland (to some extent).

We have seen the commonalities. We have noted that they are material. To the relevance of this, I move onto the second point. We are concerned with constitutional review, rather than administrative. The test is not reasonableness, but the limitations clause in section 8 of Basic Law: Human Dignity and Liberty. The range of possibilities is broader, though in order to remain within this range a statute must meet the specific conditions the legislature set in the limitations clause. A court is aware of its own limits, but also of its responsibility. As noted, there is no single legislative fix for a legal problem. But in our case, it was possible to reach a statutory framework that would have passed constitutional review. Section 8 is the key. In our case, my opinion is that the State is correct that the legislature overcame all the obstacles.

Summary

41. The petition before us focused on the constitutionality of section 74 of the Asbestos Act, and of the project it launched to remove asbestos waste from the Western Galilee.

First, we must locate the rights infringed. My conclusion is that section 74, with which we are concerned, infringes Eitanit's property rights. Indeed, the State conceded this right is infringed. Still, I do not believe that section 74 discriminates against Eitanit compared with other entities: the legislature did not obligate Eitanit to pay for final asbestos-cement products that were discarded by the end users, nor for asbestos waste that originated from other factories' manufacturing processes. The "waste population" that is, the waste to which section 74 applies, includes only the industrial waste that came from the production processes in Eitanit's factory.

In this context, I explained why Eitanit's participation in removing the waste that was used for covering surfaces is justified over that of the end users. I believe there is a significant and relevant difference between Eitanit and the end users, which is based on three tests: the awareness test – Eitanit had an obvious advantage in knowledge compared to the end users. For decades Eitanit was Israel's primary importer, manufacturer and marketer of asbestos. By virtue of this position Eitanit was familiar with the scientific research on asbestos risks and was also subject to the different statutory obligations that reflected these health risks. Under the control test, Eitanit is the manufacturer while the end users were the consumers or customers. As a manufacturer, Eitanit controlled the production of waste and its distribution, and in any event there is much logic in placing the financial burden on it. Under the profit test, there is clear justification for requiring the corporation that produces asbestos, and which more than any other entity had profited from the activity that caused the polluting hazard, to shoulder the costs of removal. All these reasons hold even more force in terms of the distinction between Eitanit and the local authorities, which do not even constitute "end users."

Once I have concluded that Eitanit's right to property was infringed, the issue became whether the infringement could pass muster under the limitations clause of section 8 of Basic Law: Human Dignity and Liberty. The comparative law in the background of this analysis was reviewed at length, among others because this is a novel legal issue that carries clear universal aspects and because no unique characteristics were presented for the Israeli context. Another point that should be emphasized is that we are charged with constitutional review, not administrative review. This influences the breadth of the Knesset's discretion.

I first clarified that the infringement was made through primary legislation, that is, a statute that the Knesset passed appropriately and legally. Eitanit's argument that this is not a "statute" for the purposes of the limitations clause because it is a personal statute is incorrect. It is a formal test that inquires mainly whether the infringement upon basic rights was made in

primary legislation or according to such legislation. In this case, the answer is in the affirmative.

In the next step we explore the purpose of section 74. The sections' primary purpose is to launch a project for the removal of asbestos from the Western Galilee. This is encompassed in the statute's broader purpose: minimizing asbestos hazards in Israel. There is no doubt that this is an important and worthy purpose, befitting the values of the State of Israel. Indeed, it appears even Eitanit does not dispute this. I tend to think that this is the sole purpose of the statute. However, the State articulates another purpose: realizing the principle of "the polluter must pay." I, myself, believe that this principle justifies the funding mechanism selected in the Act, rather than its purpose. Yet for the sake of a comprehensive analysis I assumed that "the polluter must pay" was a secondary purpose of the Act. Here, too, I find this to be an appropriate and befitting purpose: "the polluter must pay" principle relies on important and worthy rationales – efficiency considerations, cost internalization, justice and fairness – and it is even reflected in Jewish law and an array of recent pieces of legislation in Israel.

Is the means selected in section 74 proportional? I first examined the issue of the rational connection, in terms of each of the two purposes. As for the primary purpose, the link between the means and the end are obvious: the project directly leads to achieving the end of cleaning asbestos waste from the Western Galilee. As for the secondary purpose – "the polluter must pay" – here, again, I find a fit between the means and the end: placing financial obligations on Eitanit, which profited from burying the waste or passing it on to the end users, achieves the end of "the polluter must pay." Even the legislature's choice to impose a kind of retroactive and strict liability advances the principle of "the polluter must pay," primarily from the perspective of justice and fairness.

The next step is the least restrictive means test. Here, the main alternative that Eitanit proposed is the self-performance, that is, that Eitanit or a contractor it would hire would remove the waste independently. However this option was already discussed by Eitanit and the State for a long period of time and was ultimately rejected. Under such circumstances I was not persuaded that the self-performance alternative would achieve the purpose behind section 74 – cleaning the Western Galilee from asbestos waste. Additionally, from a positive perspective, the mechanism the legislature opted for incorporates checks and balances that limit the harm to Eitanit. Eitanit would not be required to fund more than half of the removal project's estimated costs, and in any event no more than NIS 150m. The funding mechanism insures that this is not a fine or compensation, but rather a fund dedicated to removing the waste. The removal project is limited to a radius of 15KM around the factory, and in any case there is a mechanism for checking and monitoring the length of the project, which allows Eitanit to challenge any requirement to pay for specific waste piles.

The final step is the narrow proportionality test. In this context I emphasized three points at the heart of Eitanit's claims. On the generality

issue, it is undisputed that section 74 specifically targets Eitanit, and Eitanit alone (aside from the State and the local authorities.) Only that the focus on Eitanit is not a whim that took over the legislature, but an outcome of the reality that was created by Eitanit itself. The section was designed to address a unique situation: a large amount of waste, in a defined geographical area, created systematically by one dominant entity – Eitanit.

On the issue of strict liability, it is true that on its face this is a harsh standard that raises questions and concerns. However, three considerations alleviate these difficulties. First, there are weighty justifications for strict liability, primarily justice and fairness, deterrence and cost internalization, as well as the evidentiary challenges of a fault-based standard. Second, there is support for strict liability in many European countries, in the United States, and in other countries. Third, a certain extent of factual expectation or awareness by Eitanit regarding the risks of asbestos (of course, not in the tort or criminal sense.)

Finally, in the issue of the Act's temporal application, my conclusion is that the Act carries a narrow active application. Though it does apply to an existing state of affairs, there is no active application in the regular sense. All the factual elements have materialized completely in the past and section 74 does not at all address the future. Regardless, even if this was a completely retroactive statute – this is not a determinative factor, but merely another consideration in the constitutional fabric. At this point I discussed three mitigating elements: first, the expectation or knowledge element regarding the risk. Second, the scope of the risk; the finding that failure to treat the asbestos waste leaves many citizens exposed to a ticking time bomb in terms of their health. We cannot leave things as they are. In weighing imposing costs on Eitanit against imposing costs on the public, Eitanit's connection to the waste as its producer puts the thumb on the scale, or at least allows for it. And third, the support for imposing retroactive liability in the United States and in other countries (such as Spain and Britain.)

We cannot ignore the infringement on Eitanit's rights, or that the legislature created a new regime. However, it is my view that the infringement upon Eitanit's constitutional rights – as an outcome of section 74 – passes the tests of the limitations clause.

Final Thoughts

42. Such is the way of the law. It is challenged by an ever-changing reality that requires the legislature to find solutions for problems that in one way or another threaten society. To achieve this purpose, occasionally there is need to design statutes that rely on new perspectives on legal principles. This was also the case in the past, and we shall present several examples of this.

The common law found it difficult to find legal justification to impose upon a stranger the duty to assist another person in distress. Still, for

certain circumstances where official rescue services are far removed, the law has created obligations to rescue, for example the duty to save lives at sea, imposed on ships passing by (*Scaramanga v. Stamp*, 5 C.P.D. 295, 304-305 (1880); *The Beaver*, 3 Chr. Rob. 292 (1801); Sophie Cacciaguidi-Fahy, *The Law of the Sea and Human Rights*, 1 Panoptica Vitoria 1, 4-5 (2007)). Another example is the possibility of filing class action suits. Given the concern that absent a primary injured party who suffered damages in substantial amounts injuring parties would continue their harmful behavior, the law has developed this new procedural tool and recognized the possibility to file suit on behalf of a large group of injured parties. The novelty is both in the legal possibility to create a group of plaintiffs, who in large part did not express any position on the matter, and in the economical consequences even for a strong defendant (see the Class Action Act, 2006). Another example is the development of corporate law, on different levels. First, the recognition of a corporation's independent status as a separate legal entity and the elimination of stock holders' personal liability was a legal novelty and was a significant incentive to use the legal tool of incorporation. Later in legal history the pendulum swung back, to some extent. The legislature began imposing various obligations on the organs and office holders of corporations, such as duties of care and trust, based on understanding the web of interests that dictate their actions (Irit Haviv-Segal, CORPORATE LAW, chapter 10 (2007); P. M. Vasudev, *Corporate Law and Its Efficiency: A Review of History*, 50 AMERICAN JOURNAL OF LEGAL HISTORY, 237 (2010)).

As we can see, the law has gone through an evolution. To fit the it to reality, laws were passed that on their face strayed from the legal norms that were familiar and entrenched up to that point. It seems that our case, too, as part of Israel's new environmental legislation, joins this list. The great potential for harm that asbestos waste causes and the complexity of the issue demand a solution that does not move on the currently acceptable axis of tort liability. As a rule, finding solutions to intricate problems is not necessarily a legal compromise in the sense of giving in. This is how the law advances. Hand in hand, in the constitutional era of recognizing rights, it is the role of the Court to make sure that the legislature's selected solution meets the constitutional standards of the limitations clause. The mere existence of a problem does not open the gate for any solution. Judicial work is subtle, but necessary. In a constitutional regime, one would hope that the legislature would exercise better care. It would be aware that Basic Laws look over its shoulder "watches through the windows, peeking through the cracks (Song of Songs 2, 9.) It would strive to withstand constitutional review. This hope does not always materialize. In our case, section 74 includes elements that reflect the legislature's attempt to meet constitutional standards. This attempt has been successful.

43. Ultimately, I would propose to my colleagues to reject the petition, and under the circumstances and the merits to require Eitanit to pay costs and attorneys' fees as follows: for respondents 1, 3 and 4 together a sum of NIC 100,000; to respondent 5 and respondents 6-7, a sum of NIS 70,000 for the entire group; and for respondent 2 a sum of NIS 25,000.

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Justice

President A. Grunis
I concur.

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President

Justice T. Zylbertal
I concur.

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Justice

Decided according to the judgment of Justice N. Hendel.

Handed down today, April 2, 2013.

President Justice Justice