Asbestos Litigation in Australia: Past Trends and Future Directions

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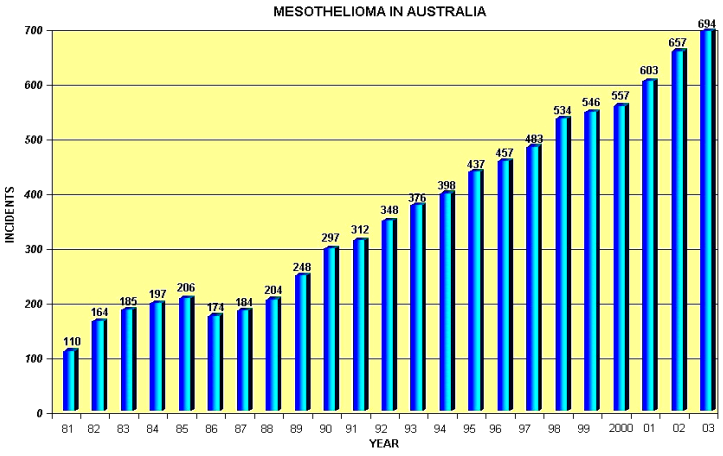
Abstract

Australia had the highest per capita use of asbestos in the world from the 1950s until the 1970s. We now have the highest per capita incidence of mesothelioma in the world. Mesothelioma is now contracted by more than 500 Australians per year. It is expected that up to 18,000 Australians are likely to die from the condition by 2020.
Inherent in this national epidemic is the tragic legacy of Wittenoom, in Western Australia. Crocidolite was first mined at Wittenoom in 1938. The mine was not decommissioned until 1967 and during this time period it is estimated 20,000 men, women and children lived in the town, worked at the mine and played in the raw asbestos tailings that lined the streets of the townsite. Wittenoom is clearly the greatest industrial disaster in Australia's short history.
Slater & Gordon have been acting for victims of asbestos related diseases for over 2 decades and was the first legal firm in Australia to obtain a damages verdict for asbestos related mesothelioma and asbestos induced lung cancer. Since this time, claims for compensation have been brought and won against defendants involved in the manufacture and supply of asbestos and employers who expose their workers to asbestos in the workplace.
The first landmark cases were fought in the 1980s and the fight for justice for victims of asbestos disease continues today. Traditionally, claims are bought in negligence against defendants; however as time progresses, different challenges in the litigation landscape present themselves.
We now act for victims who represent the 'fourth wave' of victims of asbestos disease, those who experience exposure to asbestos in sedentary occupations, in schools or at home. Combined with the forensic challenges these cases present is the growing uncertainty as to whether Government will introduce legislative reform which will curtail the ability of victims of asbestos disease to bring common law claims in negligence.

Incidence of Asbestos related diseases in Australia

Australia currently has a population of 20 million people. It had the highest per capita use of asbestos in the world from 1950 until the 1970s. About every 3rd domestic dwelling constructed in Australia before 1982 is thought to contain asbestos. James Hardie continued to use asbestos in the manufacture of their products until 1987. Asbestos was only finally banned in Australian workplaces



[1] In writing this paper I have drawn greatly on the expertise of those who fought the initial battles, both in and out of the Courts, in particular, Mr. Robert Vojakovic AM JP and the Asbestos Diseases Society of Australia (Inc). The legal experts who fought (and still fight) the battles include: Mr. Peter Gordon, Mr. John Gordon, Ms. Luisa Dropulich and my colleagues at Slater & Gordon Lawyers.

from 1 January 2004. Sadly, Australia has the highest per capita incidence of mesothelioma in the world. Approximately 700 people are diagnosed with malignant mesothelioma in Australia per year. To date, more than 7500 individuals have died from mesothelioma. By 2023 it is expected more than 45,000 Australians will die from asbestos caused malignancies (lung cancer and mesothelioma)[2].

Current Regimes and Limits on a Plaintiff's Right to Recovery

Generally speaking, the right to recover compensation for asbestos related injuries is dealt with either through a statutory 'no fault' scheme or through the traditional fault based system of bringing a claim in negligence against a defendant at common law.

Individual Claims/Class Actions

Almost without exception, claims on behalf of victims of asbestos related disease are brought individually. The diversity of the asbestos exposure, the number of defendants and different types of asbestos related illnesses mean that in the Australian jurisdiction, the various class action provisions that exist are an unsuitable vehicle to pursue claims on behalf of victims of asbestos related diseases[3].

Statutory Schemes

Under a statutory scheme, a victim of an asbestos related disease (invariably a worker) does not have to prove that their employer's negligence was a cause of their condition. They must simply prove their asbestos related disease arose out of the course of their employment. If such a link is established, in most States in Australia, the injured worker has recourse to weekly payments of compensation, payments of medical expenses and in some circumstances lump sum payments for permanent disabilities.

Almost all States in Australia have implemented no fault statutory schemes as part of their respective workers compensation systems, including the Commonwealth. The trade-off in most, if not all, of these jurisdictions are considerable restrictions on the ability of an injured person to bring a common law claim in negligence against their employer[4].

Common Law Negligence Claims

In most jurisdictions in Australia the ability to bring a common law claim in negligence still exists for asbestos claims. To establish a successful civil case in common law there are a number of propositions which must be proved by a plaintiff:

(a) Duty – that a duty of care exists and is owed by a defendant to a plaintiff (usually an employer or a manufacturer of an asbestos product);

(b) Breach – that there is a breach of that duty, that is, whether the defendant either did something or failed to do something that resulted in them failing to meet their requisite standard of care; and

[2] Source: Asbestos Diseases Society of Australia (Inc).
[3] Spender, P. Blue Asbestos and Golden Eggs: Evaluating Bankruptcy and Class Actions as Just Responses to Mass Tort Liability. [2003] SydLRev 11.
[4] Disparities of each jurisdiction are too numerous to mention in this paper. In most circumstances, provided a work related injury is permanent and of considerable severity, an injured worker will also have access to a common law claim.

(c) Causation – that by breaching their duty of care, the defendant's act or omission was a cause or contributing factor to the plaintiff's disease.

If a plaintiff is successful in proving these elements then they are entitled to an award of damages for their loss. Damages are calculated on the basis a plaintiff should be awarded a sum of money so as to restore them to the position they would have been in if there had been no negligence[5].

Common law claims, in the context of asbestos litigation, usually exist in the following circumstances:

(a) negligent exposure to asbestos causing injury or disease in the workplace;

(b) negligent exposure to asbestos by users of asbestos cement products; and

(c) 'residents' claims, which involve negligent exposure to asbestos as a result of people visiting and living in the town of Wittenoom.

The Primary Defendants : James Hardie and CSR

James Hardie and CSR are the primary private sector defendants in the context of Australian asbestos litigation.

James Hardie

The first sheets of asbestos cement sheeting came off the production line at James Hardie's factory in Camellia, NSW, in May 1917[6]. James Hardie soon established factories in Victoria, Western Australia and Queensland. The first reports of unsafe working conditions followed soon thereafter. The earliest claim for compensation the author is aware of is a claim made against James Hardie in New South Wales 1938[7].

James Hardie was Australia's largest manufacturer of asbestos containing products including sheeting, piping and friction materials, particularly brake and clutch lining. It had a dominant market position particularly in asbestos cement products from the 1930s until the mid 1980s.

James Hardie knew of the dangers of asbestos from at least the 1930s and the danger of asbestos causing cancer from at least the 1950s. No warnings or directions were placed on Hardie's products until 1978 and even then no general warnings regarding the dangers of asbestos have ever been given by the company to the community.

The allegation that James Hardie knew or ought to have known of the dangers of exposing workers to asbestos dust is irrefutable. Notwithstanding the compensation claims and the raft of available literature which supported a link between respiratory disease and exposure to asbestos that was available, by 1964 a safety officer employed by the company wrote a long memo to senior management warning that asbestos dust is one of the most dangerous of industrial poisons.

[5] *Skelton v Collins* (1966) 115 CLR 94.
[6] Carroll, B. A Very Good Business – One Hundred Years of James Hardie Industries Limited 1888 – 1988. 1987 James Hardie Industries Ltd. p 67.
[7] A claim brought by a widow of a Hardie factory worker who had died of asbestosis.

Regrettably, the response by James Hardie was to look at employing older men, in the hope they would die before an asbestos related tumour could develop[8].

CSR

CSR was the company responsible for the mining and production of crocidolite in Wittenoom, an isolated township in the north-west of Western Australia. Crocidolite deposits were originally discovered by Lang Hancock in the 1930s. In 1943, Australian Blue Asbestos (now known as Midalco Ltd – a subsidiary of CSR) commenced operations at the mine and mill at Wittenoom. CSR and Midalco were also found to have exerted considerable control over the township to the extent they were held to have virtually 'owned' the town.

Factory Mill at Wittenoom.

CSR ran the mine and mill until December 1966, notwithstanding that the first case of mesothelioma in a worker employed at Wittenoom was diagnosed in 1962. During the 23 years of its operation, approximately 7,000 workers were employed by CSR or Midalco. Estimates suggest approximately 161,000 tons of crocidolite fibre were produced. Conditions at the mine and the mill were terrible. Such was the intensity of exposure to asbestos in 1948 Dr Eric Saint made the chilling prediction that Wittenoom was likely to produce the "richest and most lethal crop of asbestosis in the world's literature"[9].

The contamination did not stop at the mine. Mine tailings, rich with lethal crocidolite, were used to cover the red dust at Wittenoom. Children played on tailings dumps and tailings were used to line the roads, cover front yards, on the race tracks and cover the school ovals. It is estimated that during the operating life of the mine and mill at Wittenoom, more than 20,000 men, women and children lived in a town completely contaminated by raw blue asbestos.

The History of Asbestos Litigation in Australia

By the 1970s the Wittenoom mesothelioma toll was rising. Increasing numbers of people were dying from mesothelioma without any recompense for the fact they undoubtedly contracted the disease whilst employed by CSR or its subsidiary. Enormous obstacles faced those contemplating bringing a claim against CSR. Documents were difficult to locate and most claims were statute barred in

[8] As set out in a memo from Dr McCullagh to James Hardie of 31 December 1965 in relation to the biological effects of asbestos. The memo was referred to in the opening of Mr. JT Rush QC in a case bought by Mr. John William Naisbitt (a mesothelioma sufferer) against James Hardie in the Supreme Court of Western Australia on 10 May 1999.
[9] Hills, B. Blue Murder, 1989, Sun Books, p.26.

Western Australia by virtue of a strict Statute of Limitations. Two initial mesothelioma claims against CSR were unsuccessful, and both Plaintiffs died before the claims were determined, one before the case commenced and the other before an appeal was heard[10].

By September 1985 Slater & Gordon had achieved the first successful verdict for damages at common law for a mesothelioma victim in *Pilmer v McPhersons Ltd*[11].

Ironically, two cases which paved the way for hundreds of future claims for victims of mesothelioma were being heard at about the same time on different sides of the country. The case of *Barrow and Heys*[12] was being heard in Perth on behalf of two men employed at Wittenoom by CSR. Both men were suffering mesothelioma, one died before his case was decided. The cases ran concurrently and occupied more than 130 court sitting days. At the time it was the longest running civil trial in Australian legal history.

At the same time, Mr. Klaus Rabenault, a mesothelioma sufferer, was making history in Victoria. Mr. Rabenault, a former Wittenoom miner, was awarded both compensatory and exemplary damages against CSR on 24 May 1988. It was the first common law victory for a Wittenoom worker.

Just three months later, His Honour Justice Rowland held that CSR and Midalco were liable in negligence for exposing Heys and Barrow to asbestos in the course of their employment at Wittenoom. By late 1988 the tide had started to turn and settlements started to occur.

Battles to achieve justice for victims of asbestos related diseases continue, but the focus has generally shifted from establishing principles of liability in situations where asbestos workers were exposed to asbestos in the course of their employment to discrete categories of claims, such as:

(a) *CSR v Young*[13] – established principles of liability against CSR for injuries suffered to the townspeople of Wittenoom;

(b) *CSR v Culkin*[14] – established principles of liability in relation to lung cancer cases in the absence of asbestosis;

(c) *Bodsworth v City of Nunawading*[15] – established principles of liability in relation to cases of office workers exposed to asbestos outside the traditional "occupational" exposures;

(d) *Crimmins v SIFC*[16] – a breakthrough case that established the proposition that the SIFC owed a duty of care to waterside workers who were exposed to asbestos in the course of their employment in the casual pool of labour on the waterfront;

(e) *Della Maddelena v CSR*[17] – established liability against CSR in circumstances where the employee at Wittenoom suffered a purely psychiatric injury.

[10] The cases of Cornelius Maas and Joan Joosten.
[11] Unreported Decision, Gobbo J, Supreme Court of Victoria, September 1985.
[12] *Barrow & Heys v CSR Ltd* (Unreported) Supreme Court of Western Australia, 4 August 1988 (Rowland J).
[13] (1998) Aust Torts Rep 81-468.
[14] (Unreported) Full Court of the Supreme Court of Western Australia (19 October 1995)(Lib 940570).
[15] (Unreported) Full Court of the Supreme Court of Victoria (22 March 1995) BC9506630.
[16] 200 CLR 1.
[17] (Unreported) Full Court of the Supreme Court of Western Australia (13 October 2004) [2004] WASCA 231.

Current Issues in Asbestos Litigation

Forseeability

A defendant will not be liable for a disease or injury caused to a person unless the disease was "foreseeable" in the event that a duty were breached. A disease may be foreseeable even if its occurrence is unlikely, provided its occurrence at the time was not "far fetched or fanciful"[18].

As increasing numbers of mesothelioma victims are diagnosed, Australian asbestos litigation lawyers advising their clients are often faced with a scant history of exposure to asbestos from a markedly different category or class of victims than previously seen. They invariably represent the "fourth wave" of victims, those whose exposure to asbestos is not in any way connected to occupation.

Such low levels of exposure inordinately give rise to arguments raised by defendants based on a question of whether their conduct, which gave rise to the contraction of the disease, was such conduct that could have created a reasonably foreseeable risk of injury.

This is always an extremely difficult argument to explain to a plaintiff victim who simply (quite reasonably in the author's view) cannot understand how, if the cause of their disease is not in dispute and the relevant defendant has been identified, a defendant is able to defend such a claim.

Causation

Plaintiffs will not succeed in a claim unless they can prove that the negligent exposure to asbestos caused or made a material contribution to the asbestos related disease. In the context of lung cancer cases, the extent to which exposure to asbestos is held to cause or contribute to the disease is probably the most contentious area of asbestos litigation in Australia today.

The concept of causation is required to be determined with reference to a common sense test of whether the exposure to asbestos made a material contribution, that is more than minimal, to the aetiology of the disease[19]. There remains a considerable amount of contention as to what extent asbestos can be considered to have played a material role in the development of lung cancer in a plaintiff when there is no radiological evidence of asbestosis.

In 1991 Weill purported to prove on an epidemiological basis that without evidence indicating a plaintiff had asbestosis, there was no evidence to support the contention that exposure to asbestos could have been considered to have played a role in the contraction of lung cancer[20]. Much of the medical literature has shifted somewhat away from this view. Perhaps the most significant development occurred in 1997, when a number of international experts formulated the "Helsinki criteria". The Helsinki criteria have been further modified in Australia as a consequence of criteria determined by experts at a conference held in Adelaide in 2000[21].

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[18] *Wyong Shire Council v Shirt* (1980) 146 CLR 40; *Nagle v Rottnest Island Authority* (1993) 177 CLR 423.

[19] Naxakis v Western General Hospital (1999) 197 CLR per Gaurdon J at 279: "*for the purposes of the allocation of legal responsibility 'if a wrongful act or omission results in an increased risk of injury to the Plaintiff and that risk eventuates, the defendant's conduct has materially contributed to the injury that the plaintiff suffers whether or not other factors also contributed to the injury occurring'. And in that situation, the trier of fact..is entitled to conclude that the act or omission caused the injury in question unless the defendant establishes that the conduct had no effect at all, or the risk would have eventuated and resulted in the damage in question in any event."*

[20] Hughes JM, Weill H. Asbestosis as a precursor of asbestos related lung cancer : results of a prospective mortality study. *Br J Ind Med* 1991; 48:229-33.

[21] See Shilkin K. The diagnosis and attribution of asbestos related diseases in an Australian context. *J Occup Health Safety* – Aust NZ 2002, 18(5):443-452.

The consensus emanating from both Helsinki and AWARD conferences is that "lung cancer may be attributable to asbestos exposure in the absence of radiographic or histological changes of asbestosis"[22].

To what extent does one need to be exposed to asbestos before it can be considered to have played a role in the formulation of the disease in the absence of evidence of asbestosis? The multiplicity of factors to take into account is evident upon an analysis of types of asbestos exposure (chrysotile and amphibole) and some types of occupational exposure (e.g. Wittenoom exposure as opposed to other exposures).

It appears that the consensus amongst experts is that "a cumulative exposure to asbestos of 25 fibre/ml years is generally associated with approximately a doubling of the risk of lung cancers, in both smokers and non-smokers"[23]. Upon an analysis of fibre/ml years it is actually possible to conduct a mathematical exercise to attempt to assess the amount of asbestos inhaled by a plaintiff.

Is applying a mathematical formula the approach our common law courts should be taking in relation to deciding whether exposure to asbestos has caused or materially contributed to the development of lung cancer in someone exposed to asbestos? It is the view of the author the answer is in the negative.

There is still a dearth of binding precedent in the Australian Courts on this point, and the argument is likely to continue for the foreseeable future.

Ensuring Corporate Accountability : The James Hardie Experience

Perhaps the most significant development in asbestos litigation does not lie in an analysis of the current case law, rather, it involves an analysis of the conduct of James Hardie in its recent attempts to extricate itself from meeting its future asbestos liabilities.

The history of James Hardie and its involvement in the asbestos industry has been set out above. Between 1995 and 2000 James Hardie Executives sought to separate the Hardie Group's operating assets from its asbestos liabilities by asset transfers, imposition of management fees and dividend payments. In February 2001, James Hardie established the Medical Research and Compensation Foundation (MRCF). The MRCF was established with $293 million dollars in total funds. Hardie's CEO Peter McDonald said at the time that the trust was fully funded to be able to meet all the future claims.

James Hardie solicitors then assured Justice Santow of the New South Wales Supreme Court that Australian asbestos creditors would suffer no prejudice due to a lifeline of partly paid shares held by James Hardie industries in the new holding company. The James Hardie group then moved offshore to the Netherlands, a country with whom Australia does not have a treaty in respect to the enforcement of civil judgments obtained in Australia.

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[22] Ibid. at 448.

[23] As set out by Curtis J in *Judd v Amaca* (2003) 25 NSWCCR 488 (DDT), "A f/ml year is a measure of concentration in the breathing atmosphere of one respirable fibre of asbestos in each cubic centimetre of air. A daily time weighted average of fibre/ml is the daily sum of sub totals, each a product of fibre/ml concentration in the breathing zone of a worker engaged on a particular task, multiplied by the percentage of an 8 hour day occupied upon that task".

In late 2003 the MRCF announced that it was drastically under funded and unlikely to be able to make the claims. In response to these concerns the New South Wales Government established a special commission of enquiry headed by Mr David Jackson QC.

The Commission commenced in March 2004. It sat for 53 days with over 4000 pages of transcript being produced. Thousands of pages of submissions were filed with the Commission by parties authorized to appear.

On 21 September 2004 Mr David Jackson QC handed down his report. The key findings were:

(a) The report recognized that Hardie should pay the cost of future claims brought by persons injured by the use of Hardie asbestos products. It is not appropriate for victims to meet the shortfall. Mr Jackson explicitly made the comment that "James Hardie has in its pockets the profits made in dealing with asbestos and those profits are large enough to satisfy most, perhaps all, of the claims of victims of James Hardie asbestos".

(b) In connection with the creation of the foundation in 2001, James Hardie and its officers Peter Schaffron and Peter McDonald engaged in misleading and deceptive conduct. There is evidence to support a finding that MacDonald breached s1309 of the Corporations Law, a criminal offence, punishable by fine or imprisonment.

(c) The failure to disclose to the Court that the separation of JHIL and consequent cancellation of the partly paid shares was likely in the short to medium term, was a breach by Hardie and its lawyers of their duty of disclosure.

(d) The report indicates that the Hardie proposal for a statutory scheme (see below) is "embryonic and tentative" and "somewhat contradictory" and does not permit a concluded view being formed in relation to it.

Following the findings, James Hardie has engaged in negotiations with victim groups, trade unions and the MRCF. The trade unions and victim groups are doggedly persisting with their demand that James Hardie unconditionally agrees to meet all future claims by victims of asbestos disease.

The latest reports from the media indicate that James Hardie is reluctant to commit to providing unconditional support to funding future asbestos claims. There is a real danger the MRCF will be placed into voluntary liquidation, which will undoubtedly jeopardise future claims for those who suffer mesothelioma and other asbestos related diseases as a consequence of exposure to Hardie products.

Issues for the Future

Lawyers who fight for the rights of victims of asbestos diseases stand at an uncertain crossroads. On one hand we are seeing more than ever before a greater number of victims of asbestos related diseases. The average life expectancy of a victim of mesothelioma remains in the range of 9 months from date of diagnosis.

On the other hand we see continued attempts by corporate entities to escape their liability to pay full compensation to victims of asbestos diseases. It is ominous that James Hardie's suggestion to implement a statutory scheme for victims of asbestos diseases coincides with the attempt in the United States to implement a no fault statutory scheme in an effort to "deal" with the asbestos litigation "problem".

The statutory scheme proposal advanced by James Hardie should be rejected. It will limit the current rights and entitlements of claimants and represent special treatment for James Hardie. It will demand unprecedented cooperation from all governments and from each and every other party involved or likely to be involved in future asbestos claims. A statutory scheme will shift costs otherwise paid by defendants, to the community (particularly claimants and government) and reward the misbehavior of corporates such as James Hardie and its officers.

Put simply, a statutory scheme is unnecessary, unworkable and will only shift costs from those who ought to pay to the community.

Strategies for the Future

The legal issues in relation to asbestos litigation may have evolved, but the underlying motivations for why these cases are fought remain the same. The primary aim of litigation for victims of asbestos diseases is to obtain adequate compensation in the circumstances of their tragic illnesses and to ensure accountability of those who exposed innocent people to asbestos.

The strategies for fighting these cases for victims of asbestos related diseases have not changed. Again, the themes remain the same – have strong lobby groups, get issues aired in the media, out-think the defendants through persistence, hard work and determination and keep a focus on the big picture. If there are losses along the way do not let them crush you, keep going and aim to win the war; and remember what you are fighting for – the courage and determination of victims of asbestos disease provide endless inspiration to achieve on their behalf.

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