

Asbestos Litigation in New South Wales

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Abstract

Asbestos was mined and used extensively throughout Australia. As a consequence Australia has the world’s highest incidence of asbestos disease. In order to deal with increasing asbestos litigation in New South Wales (the most populous State in the Australian Federation) its Parliament created the Dust Diseases Tribunal in 1989, and invested it with exclusive jurisdiction to hear and determine claims for damages in respect of dust related conditions. It has a concurrent jurisdiction with the Supreme Court of New South Wales to determine the liability of insurers and claims for indemnity or contribution between tortfeasors. The New South Wales Parliament enacted substantive and procedural provisions to permit claims to be dealt with and finalized expeditiously. The practice and procedure of the Tribunal and the Statute under which it operates will be discussed.

Introduction

With some interruptions asbestos was mined in Australia from 1918 to 1979. Products containing asbestos were manufactured in Australia until the late 1980s.

Increasing migration after the 1950s, and the natural increase in Australia’s population created a need for cheaper housing which could be constructed quickly. Much of such housing was constructed using asbestos cement products. Throughout the 20th century, tens of thousands of Australians were exposed to asbestos, mainly in working environments. The greater proportion of exposure occurred in asbestos products factories and in the mining of asbestos in Western Australia and New South Wales, but as products were sold, asbestos moved along the chain to builders and other tradespeople, and to wives who washed their husbands’ work clothes. It also affected office workers, teachers, nurses, doctors and others who worked in buildings which contained friable asbestos.

Australia has the world’s highest incidence of asbestos disease, and New South Wales, the most populous State in the Australian Federation, has Australia’s highest incidence of asbestos disease.

Compensation for the consequences of asbestos related diseases is of two types:

- (1) Workers Compensation; and
- (2) Damages at Common Law and for breach of statutory duty.

Claims for workers compensation are dealt with by the Dust Diseases Board which administers a no fault scheme. Inspectors verify the employment of a claimant by a New South Wales corporation and medical reports and X-Rays are submitted to a panel of doctors who determine whether, and if so to what extent, a worker has been incapacitated for work by reason of the disease. The entitlement to compensation is determined by the extent of incapacity.

It should be recorded also that the Dust Diseases Board funds asbestos research projects into the treatment and cure of dust diseases. Not all research projects are carried out in New South Wales and funds have been made available for interstate and international research.

The Dust Diseases Tribunal of New South Wales

Early in 1989 the then NSW Minister for Energy was approached by a group of Union Officials when visiting a power station. They expressed to the Minister their concern that members of their Union were dying before their claims for compensation for asbestos related diseases were being heard in the Supreme Court. The Minister for Energy then took a proposal to Cabinet for the creation of a special court to deal with asbestos litigation. Cabinet approved, and early in 1989 a Bill for the creation of the Dust Diseases Tribunal was presented to the Parliament.

In his second reading speech on the evening of 3 May 1989 the Attorney General told the House:

“The Government is committed to these claims being dealt with expeditiously by the creation of a separate tribunal that will provide a fast track mechanism”.

The Bill which became an Act at that time provided no fast track mechanism. Procedures were developed initially by regulation, then by rule and subsequently by amending legislation which enabled cases to be dealt with and finalised swiftly.

The rules of the Supreme Court of NSW apply to proceedings in the Tribunal unless the rules of the Tribunal otherwise provide. The Tribunal is the only specialist of its type in Australia and, so far as is known, in the world.

The Tribunal is a Court of Record with exclusive jurisdiction to hear cases in which damages are sought in respect of, or as consequence of, dust related conditions.

Procedure

A category is assigned to each case upon the filing of a Statement of Claim. Usually a case is placed into one of three categories: urgent, priority or ordinary. Cases of carcinoma and mesothelioma are categorised as urgent, cases of asbestosis are given priority and all other diseases and cross-claims are categorised as ordinary. The status of a case may change at any stage; for example, if a plaintiff suffering from mesothelioma dies, the urgency disappears from the case; on the other hand, if a person suffering from an asbestos related pleural disease (ARPD) or asbestosis develops mesothelioma, the case will be re-categorised. Parties always have liberty to apply, and cases will be listed for directions on request.

Each case is individually managed. Soon after a Statement of Claim is filed the case is listed for directions in the interlocutory list conducted every Monday. A timetable appropriate for the nature of the case is handed to the judge conducting the interlocutory list and orders made either in accordance with it or varied either by the judge or with consent of a party. If an expedited hearing is sought, unless otherwise ordered, it is necessary that the party seeking expedition file and serve an application specifying the grounds upon which expedition is sought and if made on medical grounds, to produce a doctor's report justifying expedition.

The evidence of a plaintiff is commonly given by affidavit when the disease is mesothelioma or carcinoma or where plaintiffs are feeble by reason of other diseases, or in hospital or a hospice.

Where a cross-claim has been issued, its hearing is usually severed from the plaintiff's case. If an issue in a cross-claim is related to the plaintiff's exposure to its product (in the case of a manufacturer) or at its premises (in the case of an employer or occupier), leave, if sought, will usually be given to a cross-defendant to attend and cross-examine the plaintiff. Such cross-examination is always subject to the direction and control of the trial judge, and conducted so that there is no duplication of questioning.

The health of many plaintiffs is extremely poor and often renders them immobile. Some who can travel may go into respiratory distress. For that reason a sickroom was constructed adjacent to the Registry where the Tribunal provides a bed and oxygen, as well as a television and videotapes, to accommodate and distract those who may find it difficult to remain in court, or, who being in court, have required a break. In respect of those who have difficulty in travelling to court, applications are made, supported by a medical certificate, that evidence be taken at their home, or at a hospital or hospice.

Something in the order of one third of the Tribunal's work is conducted at the bedsides of terminally ill plaintiffs. Often by reason of pain control therapy, plaintiffs

have limited lucidity at certain times of the day. For these plaintiffs, hearings will be fixed to take place at a time when it is expected they will be at their lucid best. As a consequence, the Tribunal will sit at any hour of the day, on any day of the week, at any place in the Commonwealth of Australia to receive the evidence of a plaintiff who is unable to travel. Those who practice in the Tribunal generally are experienced and skilled in handling the work. As a consequence, there have been cases where as few as four hours have elapsed between filing a Statement of Claim, the hearing and the entry of judgment.

Provisions in the Dust Diseases Tribunal Act

Provisional Damages

S 11A authorises the Tribunal to award provisional damages. It not infrequently happens that a person with one asbestos disease will later develop another. Thus, it has happened that a person with ARPD or asbestosis will later suffer carcinoma or mesothelioma. The common law rule enunciated in *Fitter v Veal* (1701) 3 Mod 543 is that damages are assessed on a once and for all basis, so that if a plaintiff receives damages in respect of one cause of action, that plaintiff may not obtain further damages based on the same cause of action if the injury worsens or if further injury occurs. The approach to be taken by other courts where there is a risk of further injury occurring is governed by the decision of the High Court of Australia in *Malek v JC Hutton Pty Limited* (1990) 169 CLR 638. Where proof is necessarily unattainable, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect that degree of probability and increases or decreases the damages otherwise to be awarded.

S 11A applies where there is proved, or admitted to be, a chance that at some definite or indefinite time in the future, a person suffering one dust disease in respect of which proceedings are brought, may develop another dust disease. In these circumstances the Tribunal may award damages on the assumption that the person will not develop another dust disease. These are provisional damages. If the person later develops another disease he or she may return and seek an award of further damages. **S 11A** applies only to cases commenced after 1 August 1995.

When provisional damages are claimed, the rules require that the Statement of Claim specify the diseases for which provisional damages are claimed and also specify the diseases in respect of which a claim for further damages may be made. When awarding provisional damages the Tribunal is required to specify the dust related conditions in respect of which an award of further damages may be made. So, if provisional damages were awarded for, say, ARPD, it would be usual to order that a plaintiff might return if asbestosis, carcinoma, mesothelioma or any of them subsequently occurred.

No Limitation Act for New South Wales Cases

S 12A permits proceedings to be brought in the Tribunal at any time and exempts proceedings in the Tribunal from the operation of the **Limitation Act, 1969**. **S 12A** operates from 1 December 1998, but applies to causes of action arising before or after that date. It exempts only cases where the negligence or breach of statutory duty occurred in New South Wales.

General Damages Survive Death

S 12B which commenced on 1 December 1998, overcame the effect of **s 2(2)(d)** of the **Law Reform (Miscellaneous Provisions) Act, 1944** which provides, in effect, that general damages die with a plaintiff, that is, damages for pain and suffering and for loss of expectation of life consequent upon the injury. By force of **s 12B** general damages survive death and, to some degree at least, it is now possible to avoid the unseemly haste, with all its attendant consequences, to finish a case before a plaintiff dies.

Since **s 12B** was enacted, both South Australia and Victoria have enacted similar provisions, and general damages now survive death in dust disease cases in South Australia and Victoria.

Decisions May Be Reconsidered

Alone among courts in Australia the Tribunal, by reason of **s 13(6)** of the **Act** has the power to reconsider any matter it has previously dealt with or to rescind or amend any decision that it has previously made. No indication is given in the **Act** of the circumstances in which the Tribunal may reconsider or amend any decision previously given. It has been held in the Tribunal that this provision authorises it to correct any error of fact or law, but it is rarely invoked.

Evidence and Admissions

S23 (1)(a) of the **Act** authorises the Tribunal at any stage of the proceedings to dispense with the rules of evidence for proving any matter which is not genuinely in dispute and to dispense with such rules of evidence as might cause expense and delay arising from a commission to take evidence, or from any other circumstance. This provision has seldom been invoked.

S 23(1)(b) enables the Tribunal to require any party to proceedings who is sui juris, to make admissions with respect to any document or any question of fact. This provision is frequently invoked and, as a consequence, admissions are usually made by asbestos manufacturers concerning the composition of their products, that is, as to whether they contained crocidolite, amosite or chrysotile and in what proportions, and the times at which knowledge of the dangers of asbestos came to them. Admissions on other issues, eg employment or diagnosis, are frequently sought and made. If a

party refuses or neglects to make an admission on a matter that is subsequently established by evidence, costs penalties apply.

Evidence in One Case May Be Evidence in Another

One of the more significant provisions of the Act is s 25(3) which provides:

Historical and general medical evidence concerning dust exposure and dust diseases which has been admitted in any proceedings before the Tribunal may, with the leave of the Tribunal, be received in evidence in any other proceedings ... whether or not the proceedings are between the same parties.

The purpose of s 25(3) is to avoid the unnecessary repetition of evidence and to contain costs. It is used principally to prove causation, foreseeability of risk and preventability. Before this section was introduced in 1995, proof of these matters sometimes took as long as a week of court time. By judicious use of s 25(3) much time and costs are saved. The issue of foreseeability, if it now becomes an issue, can, by reason of s 25(3), be dealt with in a day or less. Frequently, and depending on the period of exposure, foreseeability is not an issue.

The Supreme Court Rules give a party the right to require another party's experts to attend for cross-examination at the trial. S 25(3) confers no such right, and a witness, the transcript of whose evidence has been admitted in a later case or the author of a report admitted in other proceedings, may not be required to attend for cross-examination in the later proceedings. The absence of cross-examination may, of course, affect the weight to be given to evidence under s 25(3).

Historical evidence is evidence which discloses a plurality of events in which each discrete event can be seen in relation to others and be probative of a pattern.

Use of discovery and Interrogatories from Earlier Cases

S 25A modifies the common law rule that documents disclosed on discovery may not be used other than in the case in which they were discovered. A very significant proportion of costs is generated in the interlocutory stages of proceedings, particularly in relation to discovery and interrogatories.

In respect of interrogatories the Supreme Court Rules do not apply and there is no limitation upon the number of questions which might be asked. This is because proceedings in the Tribunal often concern events which happened thirty or forty or more years ago and involved numerous sites and events.

Where foreseeability is an issue it becomes necessary to interrogate defendants about the time at which knowledge came to their possession or when it might reasonably have been expected to have done so.

S 25A of the **Act** authorises discovery given or interrogatories administered in one case to be used in another. There are two provisos to the use of material obtained by earlier discovery or interrogatories. The first is that the leave of the Tribunal is required. In practice it is always given. Secondly, the consent of the party or the party's solicitors who originally obtained the material is required before it may be used.

The rules allow a party to file a standard list of documents, that is, a list of documents previously discovered. Relying on **s 25A** the regular defendants, the producers and manufacturers of asbestos products and governments or government instrumentalities will usually indicate they rely upon their standard list. Before a party may rely on **s 25A** a standard list must have been filed in the Registry of the Tribunal.

Certain Issues May Not be Re-litigated Without Leave

S 25B provides that issues of a general nature determined in proceedings before the Tribunal or on appeal may not be relitigated or reargued without the leave of the Tribunal and whether or not the proceedings are between the same parties.

If a party intends to rely upon **s 25B**, a notice particularising the issues and the cases in which they were determined must be filed and served upon the opposing party or parties.