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ASBESTOS LITIGATION IN NSW

JUDGE W P KEARNS, SC

DUST DISEASES TRIBUNAL OF NEW SOUTH WALES

A SPECIALIST TRIBUNAL WITH EXCLUSIVE JURISDICTION

The Dust Diseases Tribunal of New South Wales was established by the **Dust Diseases Tribunal Act** as a specialist tribunal in 1989. It was established because, at the time, plaintiffs were dying of dust diseases without being able to have their cases heard in the Supreme Court or the District Court.

It was considered that a specialist tribunal would be able to hear such cases before plaintiffs died of their disease. Subject to a couple of exceptions, this has proved to be so. The first exception consists of cases where plaintiffs are so ill when their proceedings are commenced, that it is not humanly possible to complete their cases before they die. The second exception is that judges of the Tribunal are prevented from hearing asbestos cases until certain processes have been completed[1]. This has the result that the health of several plaintiffs deteriorates to such an extent that they die before a judge is able to hear and determine their cases. I shall expand on this later.

The Tribunal has exclusive jurisdiction to hear and determine proceedings for damages in respect of a dust-related condition[2]. That statement raises a couple of matters worth looking at. The first relates to the exclusive jurisdiction and the second relates to a dust-related condition.

Exclusive jurisdiction

The Tribunal is a specialist tribunal and it has exclusive jurisdiction. These things combined provide a distinct advantage in the disposal of asbestos litigation.

The early days of this litigation included what might be called "state-of-the-art" type litigation. There were serious and lengthy contests on, for example,

[1] **Dust Diseases Tribunal Regulation** 2007, cl 12, 14, 18, 19
[2] **Dust Diseases Tribunal Act** 1989 ss10 and 11.

causation issues, such as what type of asbestos causes asbestos-related illnesses and what quantity of asbestos causes them.

Another "state-of-the-art" issue that has been contested over time concerns the duty of care and the state of knowledge of the health risks associated with the use of asbestos by those under a duty of care. Evidence in cases over time has informed the Tribunal on this issue so much so that Fitzgerald AJA in the New South Wales Court of Appeal was driven to say in 1998[3]:

Whatever might have been the position earlier, it is futile for an employer which exposed an employee who now has an asbestos-related disease to substantial asbestos dust during a period within the last 35 years to litigate foreseeability in the Dust Diseases Tribunal in other than exceptional circumstances. The fact that asbestos dust was generated or given off from products obtained from an apparently reputable supplier who provided no warning is not a circumstance which excludes foreseeability, at least if the employer was aware of the dust which was occurring, as Baldwin plainly was.

Knowledge of the health risks associated with the use of asbestos is something that has developed over time. It is something that doctors and engineers have learned before members of the general public. Companies that employed doctors and engineers had actual knowledge of these risks before members of the general public. The result is that the content of the duty of care owed to a particular plaintiff by a large company employing doctors and engineers could be entirely different to the content of the duty of care owed by the proprietor of a corner hardware store who sold asbestos product to a customer.

An advantage that a specialist tribunal with exclusive jurisdiction has over a non-specialist court is that it is informed on many of these matters and is able to get to defining evidence and the answer to issues quite quickly. This assists in the quick

[3] *EM Baldwin & Son Pty Limited v Plane* (1998) 17 NSWCCR 434, 488[111]

disposal of litigation. Judges are able to take on cases at short notice and hear and decide them expeditiously. Another advantage is that the Tribunal is able to express a view about certain technical issues. The Court of Appeal has held that a judge of the Tribunal is entitled to rely on his own knowledge as a member of a specialist tribunal to express a view about the quantity of exposure to asbestos dust which might cause mesothelioma, as opposed to the quantity which might cause other diseases[4]. The High Court, however, has said that a judge of the Tribunal is not entitled to take his experience into account in determining what caused silicosis. Cases have to be decided on evidence or on matters of which judicial notice may be taken. [5]

DUST-RELATED CONDITION

The jurisdiction is to hear and determine proceedings in respect of a dust-related condition. The definition of "dust-related condition" specifies particular diseases set out in a schedule and it adds "any other pathological condition of the lungs, pleura or peritoneum that is attributable to dust"[6]. The diseases set out in the schedule are:

Aluminosis

Asbestosis

Asbestos induced carcinoma

Asbestos-related pleural diseases

Bagassosis

Berylliosis

Byssinosis

Coal dust pneumoconiosis

Farmers' lung

[4] *ICI Australia (Operations) Pty Limited v WorkCover Authority of New South Wales* (2004) 60 NSWLR 18, 64 [232]
[5] *Dasreef Pty Limited v Hawchar* (2011) 243 CLR 588 [47]; [2011] HCA 21
[6] **Dust Diseases Tribunal Act** 1989, s3

Hard metal pneumoconiosis

Mesothelioma

Silicosis

Silico-tuberculosis

Talcosis

The predominant asbestos-related illnesses that come before the Tribunal for determination are mesothelioma, asbestosis, asbestos-related pleural diseases and asbestos induced carcinoma.

Mesothelioma is a disease predominantly of the pleura or peritoneum and it is fatal. It has a delayed onset of symptoms from first exposure. Anywhere between 10 and 60 years has been known. This is called the latency period. The latency period is commonly around 30-40 years. Once symptoms are contracted, it is quick acting and it can be expected that death will occur within about 12 months. It can be quicker and there have been cases of longer survival.

NEED FOR URGENCY

It can be seen that a plaintiff with a claim arising from mesothelioma needs access to speedy justice. Before the establishment of the Tribunal in 1989, that often did not occur. Since 1989 and up to 2005, the Tribunal had been able to provide such speedy justice. Cases have been heard and disposed of within weeks, sometimes days or even hours, of a statement of claim being filed.

Before 1 December 1998, the urgency was greater than it has been since. This is because before 1998, general damages did not survive the death of the plaintiff. In 1998, general damages approaching $150,000 might have been awarded for mesothelioma and a further nominal amount for loss of expectation of life. Plainly, it was important for a case to be determined before that was lost. To meet

this urgency, the Tribunal frequently sat extended hours. It also sat on weekends and at night, even beyond midnight on one occasion. It also travelled to take a plaintiff's evidence. It travelled to a plaintiff's home or to a hospital or nursing home. It travelled interstate and even overseas.

An amendment, effective from 1 December 1998, was introduced which enabled general damages, including damages for loss of expectation of life, to survive the death of a plaintiff[7]. The survival of general damages beyond death took a degree of urgency out of hearing cases.

CONTINUING NEED FOR URGENT HEARINGS

Whilst the survival of general damages ensures that a plaintiff's rights to full damages are protected, it does not ensure that a plaintiff will survive to benefit from his or her entitlement.

Since 2005, many plaintiffs have been denied the benefit of having their cases determined before their death. In 2005, the Government introduced a regulation which set up a process called the claims resolution process (CRP). The aim was to provide speedier and cheaper justice.

The 2005 Regulation has been superseded by the 2007 Regulation. I shall use references to the 2007 Regulation.

The CRP provides for contributions assessment and mediation in asbestos cases. Its objects include the early settlement of cases and the reduction of costs[8].

[7] **Dust Diseases Tribunal Act** 1989, s12B
[8] **Dust Diseases Tribunal Regulation** 2007, cl 13

The CRP operates to the exclusion of judges. Judges may not hear asbestos cases or even deal with them on an interlocutory basis, with some insignificant exceptions, unless one of four conditions is satisfied:

(1) the CRP has been exhausted;

(2) "the Tribunal is satisfied that, as a result of the seriousness of the claimant's condition, the claimant's life expectancy is so short as to leave insufficient time for the requirements of the claims resolution process to be completed and the claim finally determined … on an expedited basis" (underlining added). There is clearly something amiss with a regulation, that has as a requirement for a plaintiff to get a hearing, that he prove he is likely to die before even an expedited hearing can be completed;

(3) the parties agree that the claim should not be subject to the CRP. Agreement is rare and this ground is probably intended to be reserved for cases that need some definitive judicial ruling such as a case involving a novel point of law;

(4) a party has failed to comply with a requirement of the CRP and the failure is continuing and has caused substantial prejudice or substantial delay. Applications to remove cases from the CRP on this ground are common, but are invariably defeated when the failure of the non-complying party is remedied shortly before hearing of the application so that then the failure is no longer continuing.[9]

[9] **Dust Diseases Tribunal Regulation** 2007, cl 22

The CRP does more than that, but that is sufficient for present purposes.

Since 2005, cases that judges get to hear are often ones where a plaintiff's health deteriorates to a point where he or she is not likely to survive the mediation timetable. These are usually cases of mesothelioma. When medical evidence to this effect is presented to the Tribunal, an order is made for the urgent taking of the plaintiff's evidence. This is usually at his or her home or in a hospital or other place of care. The Tribunal travels to any part of New South Wales, interstate or even overseas, if need be, to meet this exigency. The problem at this stage is that if a plaintiff with mesothelioma has the type of deterioration required to remove the matter from the CRP, he or she is usually within weeks or even days of death and the state of health when giving evidence can be extremely poor. Such plaintiffs are frequently heavily medicated, very weak and do not have the mental capacity or physical stamina for the proper giving of evidence. This gives rise to the following problems:

(1) plaintiffs cannot properly give a full account of their relevant personal history or of their case;

(2) defendants are unable to test fully and properly the plaintiff's case or explore their cases with the plaintiff. Frequently, a *Browne v Dunn*[10] undertaking is given by the plaintiff so that no comment may be made or adverse inference drawn against a defendant for not cross examining a plaintiff on issues. That offers a protection to a defendant, but it does not enable a defendant to explore its case with a plaintiff;

[10] (1893) 6 R.67

(3) the Tribunal is deprived of the opportunity of assessing the parties' cases with the benefit of full and complete evidence;

(4) plaintiffs frequently die before their cases can be concluded, sometimes even before they give evidence.

In the last of these situations, this means that plaintiffs who are entitled to a verdict do not see the benefit of it and they die without knowing whether some provision has been made for their dependants or loved ones. Plaintiffs who are not entitled to a verdict cannot know the reason they lost.

Since the introduction of the CRP, over 200 plaintiffs have died before their cases could be completed. This is a situation that would occur far less frequently if judges could undertake management of cases from the time of the filing of the statement of claim. This is a regrettable state of affairs in New South Wales. It is a situation that I have commented on in the course of some interlocutory applications before me and also in a published judgment[11]. I have called for reform. The call has been considered, but it has been determined that the status quo should remain. Whilst New South Wales has enacted some very good pioneering legislation dealing with dust diseases cases, this consequence of the CRP is an unfortunate one.

LIMITATIONS ACT

There is no limitation period for personal injury actions arising from a dust disease[12]. There was a strong case for that reform in dust diseases litigation in New South Wales, especially as nearly all cases involve a long latency period between exposure and the ultimate onset of illness.

[11] (re Dawson) *Novek v Amaca Pty Limited* [2008] NSWDDT 12
[12] **Dust Diseases Act** 1989 s.12A

At one level, this reform may have been unnecessary, particularly if the view is taken that the cause of action did not accrue until the onset of the illness. Even so, there is nothing lost in this particular amendment and there was plenty gained, especially as the Tribunal had very large lists of applications for extension of time. In nearly all cases, either they were unnecessary or the plaintiff's reason for not commencing proceedings sooner was irresistible and the prejudice irremediable that the case for extension was compelling.

RELATED AND ANCILLARY JURISDICTION

Section 10 of the **Dust Diseases Tribunal Act** 1989 specifically gives the Tribunal exclusive jurisdiction to hear and determine cases. The cases in which it is has exclusive jurisdiction are cases where a person suffers or has suffered a dust-related condition and cases where a person is claiming through a person who had a dust-related condition and has died.

The Tribunal also has jurisdiction, though not exclusive jurisdiction, to hear claims for contribution by one tortfeasor against another. It is a measure of the utility of the Tribunal that practically all such claims for contribution are brought in the Tribunal and not in other courts.

The Tribunal also has what is called a related or ancillary jurisdiction.

In s11, subsections (3) and (4) provide:

> (3) If the cause of action giving rise to proceedings to be brought under subsection (1) or (1A) also gives rise to a claim in respect of some other matter, the claim may be included in those proceedings even though it does not relate to a dust-related condition from which a person is suffering or has suffered.

(4) Any matter that is ancillary or related to a matter that is the subject of proceedings to be brought under subsection (1) or (1A) may also be included in those proceedings.

What might be included in this jurisdiction would be claims for medical negligence against a doctor who negligently treated a plaintiff suffering a dust-related condition; a claim against a solicitor for professional negligence in, for example, failing to file a statement of claim before death of a client with a dust-related condition resulting in loss of general damages; partnership or other agreements between tortfeasors that affected their rights inter se; and disputes as to whether or not a policy of insurance exists and, if it does, the extent of cover under the policy.

OTHER INNOVATIVE PROVISIONS

Section 11A allows for the awarding of provisional damages. This is a significant matter that makes an exception to the once-and-for-all rule in the assessment of damages. It is important because often a plaintiff suffering from a dust-related condition suffers from a mild disease, for example, an asbestos-related pleural disease, at the time his or her case is to be heard. The Tribunal, in the absence of this provision, would have to assess damages on the basis of injury caused by the mild disease, with perhaps some allowance for the risk of the plaintiff's contracting a more serious condition.

The plaintiff could later suffer, and some plaintiffs do suffer, a more serious related illness such as asbestosis, cancer or mesothelioma[13]. Such a plaintiff would not be able to recover again in the absence of this provision. In this situation now, the Tribunal may award damages on the basis of the plaintiff's condition as at the time of trial and on the assumption that the plaintiff will not

[13] Bernie Banton's case was such a case. There have been others.

develop another condition. If the other condition later develops, the Tribunal may award further damages. The Act and the rules do not assist as to how the second assessment is to be undertaken. It is to be undertaken, therefore, in accordance with general law principles and that will include the avoidance of double compensation[14]. This amendment to the legislation is clearly contrary to established common law principle in the assessment of damages, but a worthwhile amendment ensuring fairness to all interested parties.

BENEFICIAL EVIDENTIARY PROVISIONS

There are three significant provisions that aid in proof of matters. They are s25(3), s25A and s25B. They all facilitate proof of matters that recur in the Tribunal from time to time.

Section 25(3) provides:

> Historical evidence 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 as evidence in any other proceedings before the Tribunal, whether or not the proceedings are between the same parties.

Historical evidence would include publications such as journals, periodicals, articles, books, newspapers in which there was material about the health risks associated with the use of asbestos. It would also include evidence about the extent to which knowledge of the dangers of the use of asbestos was available to various bodies and persons such as Government departments, engineers and doctors at particular times. This sort of evidence can be used to determine when particular defendants ought to have had knowledge of these risks. Evidence of dust levels at particular times and places is capable of coming within the section.

[14] *Allianz Australia Insurance Limited v McGrath* [2011] NSWCA 153

General medical evidence would include evidence as to the nature of particular diseases, how they are contracted, what causes them and the effect of the diseases on the human body.

In the early days of the Tribunal's existence, much bibliographic evidence was given and much medical evidence was given about these matters. Instead of recalling witnesses to prove these things over and over again, a transcript or exhibits may be tendered. This has considerable advantages in speedier litigation, less inconvenience to witnesses, a considerable saving in court time and in the cost of litigation. It can result in large volumes of material being tendered in a particular case, but parties confine themselves to the relevant parts of those materials.

The precursor to s.25(3) was a rule of the Tribunal described by the Court of Appeal as an "entirely sensible rule"[15].

In *James Hardie & Coy Pty Limited v Cameron* [16], the former President of the Tribunal, O'Meally P, said:

> *By judicious use of this provision, which has replaced rule 4 of the Tribunal's Rules, a significant amount of hearing time is saved. It frequently happened that material admitted pursuant to rule 4 exceeded 12 inches in height and it is beyond question that use of this rule saved a significant amount of time in the hearing of a case. Members of the Tribunal have become quite familiar with the contents of material which was tendered under rule 4 and now is tendered under section 25(3). The time which might otherwise be taken in receiving evidence, broadly on the issue of foreseeability, could, without the use of section 25(3), occupy up to a week of court time, and in other jurisdictions in Australia has occupied considerably longer.*

[15] *Woods v Hanoldt* (1995) 11 NSWCCR 161
[16] (1995) 12 NSWCCR 286, 305F

New South Wales has adopted a section, similar to s25(3), for hearing loss cases in the District Court[17].

Section 25A provides that material obtained by way of discovery and interrogatories in particular proceedings may be used in other proceedings. This obviously is useful in cases where, for example, a party has made admissions in interrogatories in an earlier case and similar issues arise in a later case.

The Tribunal has a number of defendants who are commonly sued, including James Hardie & Coy Pty Limited, now known as Amaca Pty Limited, the major supplier of asbestos products, the Commonwealth in respect of shipbuilding and the State or its corporations in respect of power stations. These are far from exhaustive. These defendants have answered interrogatories as to their state of knowledge at different times of the health risks associated with the use of asbestos. Rather than undertake the whole process of interrogating on the same subject matter again, this provision allows for the tender of interrogatories already answered.

The Tribunal has a rule that provides for a standard list of documents. This is particularly useful for defendants who commonly appear in the Tribunal. A party may file with the Tribunal a standard list of documents and then rely on that list as compliance with an order for discovery in later cases. Continuing discovery obligations apply in the sense that if a party later becomes aware of other documents that come into its possession that are not on the list, the list is to be amended. There are at least seven parties who have taken advantage of this process.

[17] **District Court Act** 1973, s142L

Section 25B(1) provides:

> Issues of a general nature determined in proceedings before the Tribunal (including proceedings on an appeal from the Tribunal) may not be relitigated or reargued in other proceedings before the Tribunal without the leave of the Tribunal, whether or not the proceedings are between the same parties.

This saves the re-agitation not only of recurring issues, but also of any issues of a general nature that have been the subject of contested litigation. It is frequently invoked by plaintiffs and defendants, but not all that often used by the Tribunal. Its intent and meaning are not well understood by many practitioners. Frequently, we see lists with 20-30 items, sometimes more, on them. All claim to be issues of a general nature that have been determined by the Tribunal or by the Court of Appeal when they are nothing of the sort. One item commonly appearing on the lists is the statement by Fitzgerald AJA referred to earlier[18]. That was not a statement of an issue that had been determined. Matters peculiar to a particular party can hardly be issues of a general nature and yet we see frequently in section 25B lists, findings of fact against a particular defendant, based on evidence particular to that case.

There are cases where the section has been invoked. O'Meally P, in *Eaton*[19] said,

> *It is beyond controversy that all asbestos exposure during the course of the latency period, which generally is accepted to be anything between 10 and 60 years, is causative of mesothelioma and makes a material contribution to it.*

[18] p2 hereof
[19] *Eaton v Carrier Air Conditioning Pty Limited* (2004) 1 DDCR 716, para 11

That has been used by plaintiffs in s25B notices, but it has been argued that it was not an issue "determined" by O'Meally P in that case. It cannot be doubted now, however, that a proposition to the same effect is well entrenched under s25B.

In *Booth*[20], Curtis J rejected a s25B notice because it did not comply with the requirements of rule 9. The case then proceeded over 10 days where one of the issues was the mechanism by which mesothelioma is caused. The case was strenuously fought by the most experienced defendant in the Tribunal and conducted on its behalf by one of the most experienced senior counsel in the jurisdiction. There can be no doubt about the intent and seriousness with which it was fought, nor about the resources available to the defendant to fight it. These matters might bear on any application to re-agitate the issue. Curtis J made a determination, upheld on appeal, much to the same effect as O'Meally P had already pronounced. He said, "Upon the facts of this case, I specifically determine, for the purpose of s25B, that all exposure to chrysotile asbestos, other than trivial or *de minimis exposure*, occurring in a latency period of between 25 and 56 years, materially contributes to the cause of mesothelioma.[21]

The section has also been called in aid following another decision by O'Meally P. In *McDonald v State Rail Authority of NSW*[22], in deciding causation of lung cancer from exposure to asbestos, in the absence of asbestosis, O'Meally P looked at two competing hypotheses being the fibre burden hypothesis and the necessary precursor hypothesis. The former hypothesis postulates that asbestos exposure can cause cancer in the absence of asbestosis if a plaintiff is subjected to a particular fibre burden. The latter hypothesis postulates that asbestosis is necessary before it can be determined that asbestos exposure caused cancer. O'Meally P determined in favour of the fibre burden hypothesis and stated that

[20] *Booth v Amaca Pty Limited* [2010] NSWDDT 4
[21] *Booth v Amaca Pty Limited* [2010] NSWDDT 8 [62]
[22] (1998) 16 NSWCCR 695

cancer may be due to exposure to asbestos in the absence of asbestosis if the exposure was sufficient to cause asbestosis. Then, adopting the parties' position, O'Meally P accepted that 25 fibre/mL-years was sufficient exposure to cause asbestosis.

This case has been used to found a use of s25B in other cases to the extent that it determined that cancer could be caused by exposure to asbestos in the absence of asbestosis if the exposure was sufficient to cause asbestosis. That may be a determination that is good for s25B. Parties have also relied on that case and on s25B for the determination that 25 fibre/mL-years was the test of sufficiency for causation of asbestosis. That, however, was not a determination of the President as it was merely something adopted by the parties and accepted by the President. The point was made evident by Judge Curtis in a later case where he decided on the evidence that the relative risk of contracting lung cancer doubles at 50 fibre/mL-years of cumulative exposure[23]. Relative risk, to a minor extent, is dealt with below[24].

There is a built-in safety mechanism in each of sections 25(3), 25A and 25B in that they are subject to the leave of the Tribunal.

There has not been a definitive determination at appellate level as to whether these provisions are substantive or procedural. In *Barry*[25], Spigelman CJ expressed the view that s25B would be characterised as substantive, but I do not think that was part of the ratio. Priestley JA thought s25B was probably substantive, but did not make any determination about this. Mason P queried whether it was substantive. In *Schultz*, Callinan J raised the question but did not determine it[26]. O'Meally P

[23] *Judd v Amaca Pty Ltd* (2003) NSWDDT 12 [44]
[24] p20 hereof
[25] *James Hardie & Coy Pty Limited v Barry* (2000) 50 NSWLR 357 [16],[123],[78]
[26] *BHP Billiton Limited v Schultz* (2004) 221 CLR 400 [242]

felt constrained by this weight of judicial opinion to hold that s25B was substantive[27]. The resolution of this point may have relevance in determining whether these sections can apply if the Tribunal is hearing a case involving a tort committed in another Australian jurisdiction or another Australian court is hearing a case involving a tort committed in New South Wales.

THE CLAIMS RESOLUTION PROCESS

Broadly, the CRP does two things.

The first thing it does is that in cases where there is more than one defendant or cross defendant, it requires a process of contribution to be undertaken. It is undertaken by a contributions assessor appointed by the Tribunal. It is done on the papers and on the assumption that each defendant or cross defendant is liable. There are formulae for the contributions assessor to apply with some room for variability in the application of the formulae. Generally speaking, the formulae take into account the size and type of enterprise of the defendant or cross defendant and the developing state of knowledge in the community over time as to the health risks associated with the use of asbestos. As time has passed, the formulae acknowledge steps in the community's growing knowledge as to the health risks in the use of asbestos so that a small enterprise is allocated, under the formulae, a small percentage of contribution in the 1950s, but a larger percentage of contribution after 1990[28]. If a party does not accept the assessment, it can have the matter litigated, but if the party does not materially improve its position, there are costs consequences. In a large majority of cases, parties accept the assessment of the contributions assessor. There is clearly a utility in this part of the CRP.

[27] *Stavar v Caltex Refineries (NSW) Pty Limited* [2008] NSWDDT 22
[28] **Dust Diseases Tribunal (Standard Presumptions - Apportionment) Order** 2007, cl 5

The second part of the CRP is a mediation process. Many cases are mediated successfully and one cannot be critical of that. What I have been critical of is the process denying plaintiffs with legitimate claims access to a judge until the last few weeks or, often, the last few days of their lives.

CAUSATION

I have referred earlier to what is almost established doctrine in the Tribunal and that is that all, except *de minimis,* exposure to asbestos within the latency period causes or makes a material contribution to the development of mesothelioma. There have been cases where relatively minor exposure to asbestos has been held to have caused a plaintiff's mesothelioma. One case held that exposure of about five minutes near a spraying process was sufficient to cause mesothelioma[29].

The Tribunal has accepted evidence and taken the view that mesothelioma is an indivisible disease. That is to say it is one damage caused by all exposure. What has contributed to that damage is the totality of exposure to asbestos within the latency period. A plaintiff may obtain judgment for the full amount of his damage against each defendant. The same applies with lung cancer.

Lung cancer, nevertheless, provides interesting causation issues. In the case of lung cancer, in the absence of asbestosis, it can be difficult to establish causation. As indicated earlier, O'Meally P took the view in *McDonald* that the fibre burden hypothesis was the correct hypothesis for the attribution of cancer to asbestos exposure.

If the fibre burden hypothesis for causation is correct, then it may be possible, not compulsory, to find that asbestos caused the cancer if the exposure was sufficient

[29] (re Rowley) *The University of Adelaide v BI (Contracting) Pty Limited* [2007] NSWDDT 3; on appeal *BI (Contracting) Pty Limited v University of Adelaide* [2008] NSWCA 210, see also *McNeill v Seltsam Pty Limited* [2005] NSWDDT 51 (overruled on appeal, but not on this point)

to cause asbestosis. That opens up another debate in itself as to what exposure is sufficient to cause asbestosis and that is beyond the subject of this paper. It is sufficient to note that in *McDonald*[30], a fibre burden of 25 fibre/ml years was adopted by O'Meally P on the basis of a concession in that case that that was so. In *Judd*[31], it was noted that a relative risk of 2 doubles the background risk and, in the absence of anything else, something more than double is required to satisfy the onus of proof. Judge Curtis considered that the relative risk of contracting lung cancer from exposure to asbestos was doubled at 50 fibre/ml years.

I will not go into detail on this, but *relative risk* is a term commonly used by epidemiologists. It is important to bear in mind that epidemiologists are concerned with general causation and not particular causation. Their concern is whether a particular agent is capable of causing a disease, not whether it did in a particular case.

Relative risk is a measure of the incidence of a disease in a population. "1" is the background incidence of the disease in a non-exposed population. "2" indicates that, statistically, the risk is double. If, for example, the incidence of disease X in a non-exposed population is 100 in every 1000, that is represented by a relative risk of "1". If epidemiologists are inquiring as to whether disease X is caused by agent Y and they ascertain that in an exposed population 200 out of 1000 contract the disease, that is represented as a relative risk of "2". As 100 out of the 1000 may be expected to have contracted the disease in any event, the fact that 200 have contracted the disease reveals that the relative risk from exposure to the agent is double. Epidemiologists may be able to draw the conclusion that agent Y causes disease X. That is general causation. They cannot go to the next step and say that in any one of the 200 cases agent Y did cause the disease X. This is

[30] *McDonald v State Rail Authority (NSW)* (1998) 16 NSWCCR 695
[31] *Judd v Amaca Pty Limited* 4th July 2003, Curtis J

because it can be expected that 100 of the 200 with the disease X would have contracted disease X in any event and there is no way of knowing purely from the epidemiological evidence whether that was so in any individual case.

Statistically, if the relative risk is 2, one in every two cases may be attributed to the agent. That is an even balance of probabilities. A plaintiff who has nothing other than epidemiological evidence will need to establish a relative risk of over 2. If there are other factors, a plaintiff may succeed if the relative risk is less than 2.

In asbestos cases, we frequently deal not with a chain of causation, but a cable. A cable has strands. The breaking of a strand in a cable does not necessarily affect its integrity. A plaintiff must be able to establish sufficient strands to make his cable good. We have cables rather than chains, because many issues in the Tribunal need to be determined inferentially from circumstantial evidence.

This approach was well explained by Spigelman CJ in *McGuiness*[32]. There, the issue was whether a renal cell carcinoma was caused by exposure to asbestos. At paras 91 and 98, Spigelman CJ said:

> *Causation, like any other fact can be established by a process of inference which combines primary facts like "strands in a cable" rather than "links in a chain" ...*
>
> *The courts must determine the existence of a causal relationship on the balance of probabilities. However, as is the case with all circumstantial evidence, an inference as to the probabilities may be drawn from a number of pieces of particular evidence, each piece of which does not itself rise above the level of possibility. Epidemiological studies and expert opinions based on such studies are able to form "strands in a cable" of a circumstantial case.*

[32] *Seltsam Pty Limited v McGuinness* (2000) 49 NSWLR 262

With circumstantial evidence, one has to draw all the circumstances or "strands in a cable"[33] together to see if there is sufficient to justify a finding of causation on the balance of probabilities. Circumstances that might need to be considered include:

the length and intensity of exposure;
the type of asbestos to which the plaintiff was exposed;
the type of cancer;
epidemiological evidence including consistency with other epidemiological studies;
biological plausibility;
laboratory experiments; and
medical opinion.

When evidence on factors such as these is considered along with epidemiological evidence, it may be possible to make a finding of causation even if the relative risk is less than 2.

Spigelman CJ explained the difference between legal and scientific causation at paras 142 and 143 as follows:

> *When assessing expert evidence on causation, the legal concept of causation requires the court to approach the matter in a distinctively different manner from that which may be appropriate in either philosophy or science, including the science of epidemiology.*
>
> *The commonsense approach to causation at common law is quite different from a scientist's approach to causation … An inference of causation for purposes of the tort of negligence may well be drawn when a scientist, including an epidemiologist, would not draw such an inference.*

[33] *Seltsam Pty Limited v McGuiness* (2000) 49 NSWLR 262, para 91

Asbestosis and asbestos-related pleural diseases are considered by the Tribunal to be divisible diseases. In those cases, a plaintiff may obtain judgment against a defendant only to the extent to which its exposure caused the plaintiff damage. The matter was clearly elucidated by Handley JA in *Commercial Minerals Pty Limited v Hollins*[34]. There, in a silicosis case (one of a divisible disease), the trial judge entered a single judgment against all defendants. There were three defendants who had employed the plaintiff and exposed him to silica dust between 1953 and 1986. The Court of Appeal held that, the disease being divisible, the separate tortfeasors caused separate damage and a single judgment could not be entered against the defendants. At page 6, Handley JA said,

> *Only the first defendant could be liable for damage which accrued prior to the commencement of the worker's employment with the second defendant in 1969. The second defendant could not possibly be liable for damage which accrued before the worker's employment with that defendant commenced in 1969 and the third defendant could not possibly be liable for damage which accrued before employment with that defendant commenced in 1973. The trial Judge assessed the worker's economic loss as having commenced on 1 July 1972 and awarded damages on that basis. Accordingly an identifiable part of the worker's damages was awarded for loss which accrued before his employment with the third defendant commenced on 31 March 1973.*
>
> *BC9302366 at 12*
>
> *It is clear on principle that the single judgment against all three defendants could not have stood...*
>
> *A possible view of the facts in this and similar cases is that the first and second defendants were several concurrent tortfeasors in respect of the period between 1 July 1969 and 31 March 1973 because their independent acts and omissions caused or contributed to the damage suffered then or later as a result of dust inhaled during that period. In other words it may be that damage was suffered by the worker then or later as a result of the combined effect of dust inhaled during his employment by the first defendant and the further dust inhaled during his employment by the second defendant.*

[34] BC9302366; NSWCA 22.12.93. The case was overruled on appeal (*Harris v Commercial Minerals Limited* (1996) 186CLR1), but it remains good on this point.

> *On the same basis it is possible that all three defendants were several concurrent tortfeasors in respect of the period from 1 April 1973 to 15 August 1986 because their independent acts and omissions caused or contributed to the damage suffered then or later as a result of dust inhaled during that period. In other words it may be that damage was suffered by the worker then or later as a result of the combined effect of dust inhaled during his employment by the first two defendants and the further dust inhaled during his employment by the third defendant…*
>
> *BC9302366 at 13*
>
> *If that were the case the appropriate result might be a single judgment against the first defendant for damage suffered solely as a result of the tortious acts and omissions for which it was responsible, a single judgment against the first and the second defendants for the additional damage suffered as a result their combined tortious acts and omissions and a single judgment against all defendants for the additional damage suffered as the result of their combined tortious acts and omissions.*

So far, we have not been put to the test of having to apply any scientific or medical precision in the determination of this issue. If, for example, a person has asbestosis as a result of exposure to asbestos over, say, 30 years, but he can find culpable defendants for only 50% of this time, as a general rule, he will recover damages to the extent of half of his total damage. Questions may arise as to whether some exposure was more harmful than other exposure by reason of a number of factors such as when the exposure occurred, the intensity of the exposure and the nature of the fibre to which a plaintiff was exposed. Should evidence of these matters reveal that some exposure was more harmful than other exposure, adjustments might need to be made to reflect that.

CONCLUSION

The establishment of the Dust Diseases Tribunal in New South Wales in 1989 overcame a critical problem in litigation. Mesothelioma victims, in particular, had been unable to have their cases heard in their lifetimes. The establishment of the Tribunal overcame that problem with very few exceptions. The Tribunal, until the CRP changes in 2005, had been able to proceed with expedition. The CRP changes regrettably have resulted in mesothelioma victims, in particular, in many cases, not being able to have their cases determined in their lifetimes.

The amendments I have discussed above, with the exception of the CRP, came about mainly as a result of suggestions by the former President to the Attorney General of the day as to ways in which the workings of the Tribunal could be made more effective. Experience of practice in the Tribunal had demonstrated that they were all ways in which the Tribunal could be made more effective in its administration of speedier and less costly justice. By and large, I think it is fair to say that the amendments have resulted in speedier and less costly litigation.