

# The Wittenoom judgments



by David Ashley Q.C.

Reasons for judgment, handed down by Rowland J. in the Supreme Court of Western Australia on 4 August 1988 in favour of the plaintiffs and against the defendants, brought finality (at least at first instance) to the longest civil trial ever conducted in that State.

**T**he trial of the actions (heard together) in *Barrow v. CSR Limited & Anor* and *Heys v. CSR Limited & Anor* commenced on 19 November 1987 and concluded on 14 July 1988. It occupied 132 sitting days, and the transcript ran beyond 11,000 pages. There were some 750 exhibits, many of them volumes rather than individual papers. In the course of the trial leading counsel for CSR Ltd., D. K. Malcolm Q.C., was appointed Chief Justice of the Supreme Court of Western Australia. He retired from the case and was replaced by Tom Hughes Q.C. So also, one of the junior counsel for the plaintiffs, R. J. Viol, was elevated in the course of the trial to the District Court Bench. In all, fourteen counsel appeared for the various parties.

Mr Heys died on Good Friday, 1988. His claim was pursued by his estate, and a claim by the widow and children under the provisions of the *Fatal Accidents Act* was raised.

The trial had about it, as I reflect, some of the features attributed by Dickens to Chancery Practice in *Bleak House*.

## THE CLAIMS

Each of the plaintiffs sued the defendants for damages for personal injuries. The actions were framed, essentially, in negligence. So much would place them in parallel with many thousands of actions brought throughout the common law world. But the actions were conducted in a milieu, and raised issues of fact and law that went beyond the common experience.

## THE MILIEU

Each of Messrs Barrow and Heys had worked at the Wittenoom blue asbestos mine and mill — Mr Barrow for about three years between 1948 and 1951 and Mr Heys for about two months in 1955. Each of them had contracted the tumour pleural mesothelioma, a tumour rare in the ordinary community but regrettably much less rare in persons with exposure to blue asbestos. It is a tumour two of whose important characteristics are a long latent period (anything between 15-40 years) from

first exposure to development of disease, and a short period (the mean is about 8-10 months) between diagnosis and death. It is a tumour which is, for practical purposes, untreatable. There was really no argument that the mesotheliomas contracted by the plaintiffs were attributable to their employment at Wittenoom. Beyond the plaintiffs, however, some 6,000 persons had worked at Wittenoom in the period of operation of the mine and mill (between late 1943 and December 1966), and more than that number again had been incidentally exposed to inhalation of blue asbestos fibre — as wives or husbands or children of those employed. At the time when Messrs Barrow and Heys went to trial a large number of former employees and residents had contracted diseases allegedly by reason of that asbestos exposure — not only mesothelioma, but also lung cancer, asbestosis and non-malignant pleural thickening; a substantial number of actions (around 400) had been commenced. Moreover, because of the latency factor — not only in the case of mesothelioma, but also with lung cancer — it could be safely predicted that many more instances of Wittenoom-caused disease would arise in the future. While each action — those on foot and those predicted — would have its own individual facts, the actions brought by Messrs Barrow and Heys raised issues fundamental to all actions; and they raised the accuracy of recall and credibility of certain witnesses for the defendants whose evidence would likely be common and important to the defendants in the litigation generally.

The plaintiffs went to trial with actions well prepared on liability and suffering from a disease inescapably linked with their exposure at Wittenoom. Two other cases had earlier got to trial in Western Australia in actions brought solely against the employer. Each had failed. In 1979 a Mrs Joosten, suffering from mesothelioma, had failed to establish breach of duty by the employer. Looked at in 1987/88, the evidence in support of her action was much thinner than the evidence assembled for trial in the case of the plaintiffs. In 1987

a Mr Simpson had failed, the trial judge finding that his lung disease, claimed by him to be asbestosis, was not asbestos related; the trial judge then not dealing with the negligence issue at all. It was almost certain, in my view, that the Barrow and Heys' actions were the last chance by plaintiffs to succeed in actions arising out of Wittenoom in Western Australia. Money shortages alone would very probably have precluded prosecution of other actions.

In their actions the plaintiffs sought damages not only from their employer a Wittenoom, Midalco Pty. Ltd., but also from CSR Ltd. The basis of the claim against the latter will be referred to subsequently. The claim against CSR was of importance to the plaintiffs, and to many other prospective claimants, because it appeared that Midalco did not have full insurance cover against common law damages awards for employment of workers at Wittenoom prior to 1959; and it is a company now without any significant assets. Bearing in mind that the Wittenoom mine and mill operated between late 1943 and December 1966, failure to implicate CSR would likely have left very many plaintiffs or prospective claimants with the prospect of nearly barren judgments. Whether or not CSR had insurance at relevant times was not really important. It has the assets to meet judgments.

The actions were tried before a judge alone. That is the almost inevitable situation in Western Australia in personal injuries cases. The Rules of Court mirror the English position. In the eastern State manufacturers and employers have become very reluctant to litigate cases of asbestos-related disease to a conclusion. Jury trials have not proved a favourable environment for defendants. But in Western Australia there was no such ethos. Indeed, the failure of earlier actions was a serious impediment — albeit that they had been resolved on their own facts. To this should be added the observation that the mining industry in Western Australia has been and remains of very great importance to that State. The actions arising out of Wittenoom involve an attack on the conduct of an aspect of the



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industry which involved not only the employer, but in an oblique way the action or inaction of certain government departments. This provided an undercurrent during the trial addressed on a number of occasions by the trial judge.

The actions involved an investigation of knowledge, beliefs and conduct of persons occurring some 33-44 years ago; in circumstances where memories were dimmed; and where documentation relating to the conduct of the mine and mill was imperfect. It was easy for former workers to recall and describe dustiness in the mill and its surrounds. But it was more difficult to identify what plant and equipment had been in place at different times — so as to enable evaluation of the adequacy or otherwise of the operator's response to the dust menace. Few workers had stayed long at Wittenoom; the mean period was about four months. Few workers had been concerned with installation or maintenance of plant; most, particularly in the mill, had been process workers — not really concerned to identify what dust control equipment (if any) was in place, and how it was working. The plaintiffs' case as to what dust control equipment was present from time to time, and how it was working, was therefore necessarily developed by reference to company, Mines Department

and Health Department records and correspondence — which on occasions were apparently contradictory, whereas the case for the defendants on the safeguards issue was centred upon the (document-assisted) recollection of former senior company engineers, who proclaimed a recall based upon expert evaluation of equipment at the time. One of the important tasks for the plaintiffs was to demonstrate the inaccuracy and selectiveness of that recall.

#### THE MAIN ISSUES AND THEIR RESOLUTION

**NEGLIGENCE:** The plaintiffs alleged that Midalco (called Australian Blue Asbestos Ltd. (ABA) at relevant times) owed a duty of care to them, and ABA admitted that it did so. The plaintiffs further contended that, by reason of "proximity," CSR owed them a duty of care; alternatively, they contended that the relationship between CSR and ABA was such that the "corporate veil" should be lifted so as to enable a finding that the actions of ABA were the actions of CSR. CSR denied that, in either way, it owed a duty of care to the plaintiffs. The plaintiffs relied upon the same breaches in the claims against ABA and CSR.

Given the existence of a duty of care, that duty was to take reasonable care to avoid a foreseeable risk of injury to each plaintiff. The standard of care was that appropriate to employment in the late 1940s-mid-1950s, but differences between present-day standards and those of the times should not be exaggerated, as the trial judge said, relying on the majority judgment in *Bankstown Foundry Pty. Ltd. v. Braistina* (1986) 65 ALR 1 at 7.

The plaintiffs' cases were that, in the context of serious dangers to health that were or should have been foreseen by the defendants, the defendants failed to reduce the dust hazard and otherwise alleviate risk of harm.

The plaintiffs contended that "serious dangers to health" included asbestosis and lung cancer, each of which, it was said, was a recognised consequence of asbestos exposure before either of Messrs Barrow or Heys came to be employed at Wittenoom. The plaintiffs drew attention to the fact that instances of mesothelioma had been included in lung cancer statistics pre-1950, but conceded that mesothelioma had not been, prior to the conclusion of Mr Heys' employment, identified as a distinct lesion particularly related to blue asbestos inhalation.

The plaintiffs contended that, even taking account of minimum risks to health, conceded by the defendants as being known to them at relevant times, there was failure of reasonable care by the defendants; a fortiori where the dangers that should have been apprehended were greater than those with which the defendants admitted a familiarity.

The defendants' case on this issue was to say, on the one hand, that all that could have been done to reduce the dust hazard had been done, particularly bearing in mind the necessary dry-milling requirement with asbestos treatment, and that their conduct was the more reasonable because their knowledge of the dangers to health of asbestos exposure — being less than the plaintiffs contended was appropriate — was the proper standard of knowledge of the day. In particular, the defendants' position was to contend that lung cancer at relevant times was related to asbestos exposure only in a speculative way, and that neither asbestosis nor lung cancer was believed to occur without long and heavy exposure to asbestos — an exposure rarely encountered at Wittenoom because workers stayed for short periods only. It was said further that literature of the day identified hazards in the manufacturing phase of asbestos, rather than in its mining and milling, where the percentage of asbestos fibre in dust created would be less.

The learned trial judge, in response to the competing arguments, said: "The overwhelming impact of the evidence . . . is that, insofar as dust collection is concerned, there was too little undertaken, and what was done was too late and there was almost always insufficient equipment on site or installed capable of doing the job".

He found that equipment and techniques existed as would have enabled the defendants to control dusts to then acceptable limits; and that there was a then acceptable limit, being much less than the standard which the defendants set themselves. He was critical of failure of enforcement of use of respirators at the dustiest workplaces, and of failure of warning of workers of health dangers and of instruction and supervision in dust-reducing work practices.

As to an argument for the defendants based on the geographical remoteness of Wittenoom, His Honour said: "... I do not understand how the geography and isolation could affect the proper design of manufacture of equipment. I find that dust collection equipment was simply not a priority."

His Honour rejected arguments that the conduct of the defendants could be adjudged reasonable by the standards of the day because relevant government departments did not seek to close down the mine or prosecute its operators; and because the main union did no more than seek a dust allowance for the workers.

His Honour found further that the defendants' knowledge of asbestos hazards was quite deficient by the standards of the day; that there had been a failure of enquiry, where enquiry should have been made and would have been revealing; and that actual warnings of asbestos health

