Blue Reaper

An asbestos mine's grim legacy sparks two huge compensation payouts

The Wittenoom mine in operation around 1962: according to some, it is the nation's worst industrial disaster, an Australian Bhopal

Suddenly, finally, the legal log jam began to move: Twenty-two years after closure of the Wittenoom mine in Western Australia—where lethal lung-lacerating blue asbestos fiber had been mined for a quarter of a century—two massive compensation payouts were awarded last week to former mineworkers suffering crippling lung afflictions. Both cases were important firsts. But 245 suits are still in the works and hundreds, possibly thousands, are yet to be launched. Potentially, more than a billion dollars in compensation payments could be at stake.

Shares in CSR Ltd., the parent of the company that operated the Wittenoom mine, trembled momentarily last week. But CSR stalwartly maintained that it was not financially involved. Western Australia's State Government Insurance Commission (SGIC) was in the firing line, CSR insisted, because it had insured the mine operator, CSR's 100%-owned subsidiary Australian Blue Asbestos, now Midalco Pty. Ltd.

But the SGIC was weaving frantically. It claimed the judgment should be paid from a statutory industrial diseases fund levied under WA workers' compensation law upon the whole of the state's mining industry. The WA Chamber of Mines loudly rejected this suggestion. Clearly, the mining industry was not about to be saddled with Wittenoom's tragic legacy without a fight.

More than 6,000 workers passed through the Wittenoom mine and mill. Some 20,000 men, women and children lived at various times in Wittenoom township, where blue asbestos tailings literally paved the roads and playing fields. One epidemiological survey, disputed by the company, suggests that one in six Wittenoom workers can expect to die of asbestos-related diseases, either the creeping breathlessness of asbestosis or lung cancer- chiefly mesothelioma, a malignant tumor that has been described as feeling like having cement poured into the lungs. How many of their families and other townspeople will be affected is unknowable. But some who were children in Wittenoom, now nearing middle age, are known to have contracted mesothelioma. Workers in downstream industries—those who shipped the lethal blue material and worked with it in factories and on building sites—are also at risk.

Thus, the 245 cases in the legal pipeline may be only the start of a horror that will continue well into next century. Some commentators have already labeled Wittenoom the nation's worst industrial disaster, an Australian Bhopal—a reference to the 1984 Indian chemical leaks disaster that claimed 2,500 lives.

The litigants argue that the mine operators were almost recklessly indifferent to the hazards of asbestos dust. They point to widespread medical knowledge then existing about the link between asbestos and lung disease. Key mine executives admitted being aware of the link. Yet worsening dust conditions at the mine were the subject of repeated adverse reports by inspectors of the WA Department of Mines through the '50s and early '60s.

The company and its insurer have nevertheless fought tenaciously to contain the damage. And the legal mill has ground with frustrating slowness for the growing list of asbestos litigants. In one case, the litigant was ruled not to be suffering from an asbestos-related disease. In another, the fatally ill ex-worker died on the eve of his day in court. The backlog of cases pending in the hard-pressed WA Supreme Court mounted. Then, last week, the two crucial judgments:

▶ A Victorian Supreme Court jury awarded $683,000 to a mesothelioma-stricken businessman, Klaus Rabenalt, 52. The sum comprised compensatory negligence damages of $426,000 and exemplary damages of $257,000. Rabenalt had worked in the Wittenoom mill for six months in 1960. He now has about six months to live.

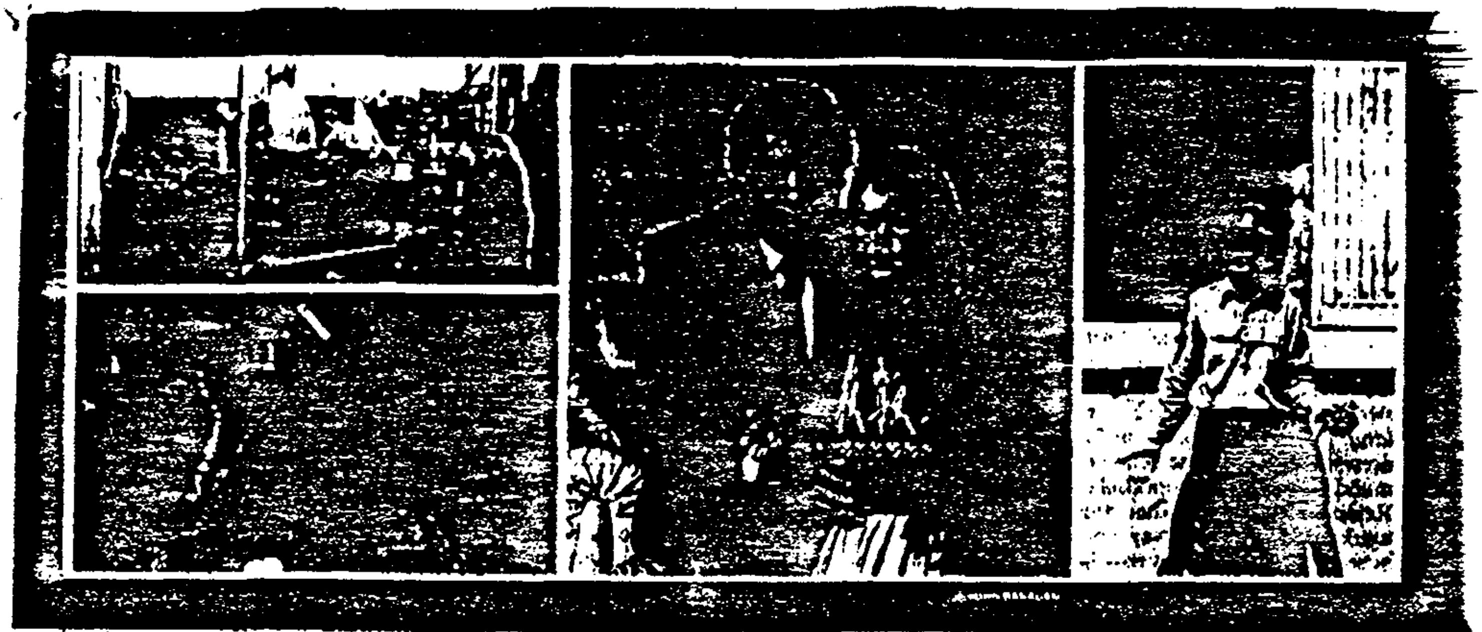
▶ A WA Supreme Court judge awarded $370,000 damages to Asbestosis Suffer[er] Colin Watson, 52, who worked in 1959 a[t] the state-owned Port Sampson facility th[at] serviced the Wittenoom mine. Watson ha[d] been a clerk and lumper, lugging and sor[t]ing bags of asbestos for shipment to Pert[h]. He sued the state government. The judg[e] found that the government should hav[e] been aware of the risk from asbestos dust.

The Victorian judgment represents a milestone in Australian law. The award o[f] exemplary damages—in effect, a financia[l] punishment upon the company additiona[l] to the sum awarded to the victim in compensation—is a first in Australia. The SGIC will appeal. The exemplary damages appeal, many experts believe, may end up in the High Court because of its widespread implications for general compensation law.

The WA case also broke new ground. It was the first indicator of how the state's judiciary would assess asbestos disease claims. Significantly, Justice William Pidgeon chose to make the biggest-ever financial award for a case of simple asbestosis. The decision, if not overturned on appeal, also stands as a precedent for future asbestos disease cases. (The Victorian judgment, coming from a jury rather than a judge, does not.)

Moreover, in holding that the state government should have had knowledge of the link between disease and asbestos, Pidgeon potentially widened the door to asbestos litigation against a number of public instrumentalities. Power, water and drainage authorities and railways, for example, were all significant users of asbestos. Further, if state governments should have known about the health hazards, so presumably should Federal Government asbestos users. This might make litigation targets of the defense forces and such bodies as the old PMG (now split into Telecom and Australia Post).

James Hardie Industries and Mineral Commodities are two public companies already deeply mired in asbestos damages



At work among Wittenoom's blue death, with Klaus Rabenalt and granddaughter, center: the horror may continue well into next century

claims. James Hardie owned and operated the opencut Baryulgil white asbestos mine in northern New South Wales from 1942 to 1976. But Hardie's biggest association with asbestos was in manufacturing. A number of its building products were once strengthened with asbestos, though the fiber was phased out of all Hardie products between 1981 and 1986. Last year, James Hardie was defending ten common-law cases for asbestosis, and "there are probably 15 cases at the moment because of the interest in asbestos," according to Ian Kelso, a company spokesman.

Mineral Commodities, which, as Woodsreef Mines, bought the Baryulgil mine in 1976 and closed it three years later, also owned and operated a white asbestos mine and mill at Barraba in northern NSW, which closed in 1983. Mineral Commodities Managing Director David Barwick says no cases against the company have arisen out of the Barraba operation, and claims that while a number of actions have been launched by workers at the Baryulgil mine, none so far has succeeded.

Many companies that used asbestos in their processes or products will almost certainly be seeking reports from their litigation departments on the implications of last week's judgments. Perth Lawyer John Gordon, of the firm Slater and Gordon, solicitor for Watson, one of the successful litigants, says: "Industry can take no comfort from the Pidgeon decision. If a peripheral body like a state port authority should have known the risk from asbestos and taken steps to prevent it, then surely so should miners and manufacturers."

Whoever loses from the asbestos tragedy, the legal profession will not. Asbestos litigation promises to be a more lucrative industry than asbestos mining ever was. Victorian-based Slater and Gordon is one legal firm that has recognised the potential. It briefed the successful barristers in both the Rabenalt and Watson cases. The firm gained initial experience in small Victorian asbestos-related industrial cases. It then decided that the field was being largely neglected in WA, where the majority of asbestos cases were being listed, and opened offices in Perth last year.

For the giant CSR company, however, last week's legal developments are merely one phase in a war that is still far from lost. Executive Director Bill Bennett issued a statement stressing that the Victorian decision did not constitute a precedent, and underlining that the award was against Midalco, not CSR; indeed, he said, the full court of the Victorian Supreme Court had earlier rejected a bid by Rabenalt's lawyers to enjoin the parent company in the action.

Bennett added that "we all feel deep compassion for Mr Rabenalt and others suffering from asbestos related disease." But CSR had already demonstrated that compassion by contributing about $2 million to the Wittenoom Trust—established to aid people associated with the mine—even though it had been under no legal obligation to do so. Bennett's statement went to the core of CSR's Wittenoom survival strategy. Whatever a subsidiary company might or might not have done, CSR maintains, any liability for those actions is confined to it and it alone. "A parent company is not liable for the actions of a subsidiary, even a 100%-owned subsidiary," CSR Public Relations Chief Keith Roberts said bluntly last week. "We deny any responsibility in regard to Wittenoom." In effect, therefore, CSR is claiming that Wittenoom litigants must confine their attentions to an operationally inactive subsidiary, which, while insured, is itself virtually bereft of assets. (CSR's latest accounts state that the group's total investment in Midalco Pty. Ltd. is a mere $98,000.)

The litigants, however, maintain their sights on the prosperous parent. Midalco (or ABS as it then was) opened the Wittenoom mine in 1943 and operated it until its closure 22 years ago. But the plaintiffs point to such matters as the powerful management links between parent and subsidiary, and CSR's central role in negotiating sales of Wittenoom asbestos, as evidence of parental complicity in the mine's now well-documented shortcomings.

The Victorian decision gives CSR some respite from these attacks in that the company avoided being enjoined in the Rabenalt action. But that possibility is still open in other Wittenoom cases now under way in WA, where the court has reserved decision on whether CSR can be jointly sued with its subsidiary.

Last week, the sharemarket voted its belief that CSR would continue to hold at arm's length the consequences of unpleasant events more than a quarter century ago in the faraway folds of the Kimberley plateau. CSR shares blipped 8¢ down to $3.72 on Tuesday in a nervous kneejerk to the Rabenalt decision. But by the close of trade on Friday the company's price had rebounded to $4.12—a high for the year.

For thousands of ordinary Australians who once happened to work or live at Wittenoom, the consequences of the nation's most disastrous mining venture are less easily dismissed. Those who do not join the toll of the dead and disabled will spend the rest of their lives with mounting unease. Families already have been decimated.

Wittenoom's week in the news coincided with moves by the Australian Law Reform Commission to reactivate the issue of class actions in Australia. These would enable one person to take court action on behalf of others. Overseas examples include the Dalkon shield contraceptive case and the Zeebrugge ferry disaster damages action.

Business, in particular, strongly opposes class actions, claiming they would be a further costly and unwarranted trough for the legal community to feed at. But growing public awareness of Wittenoom and the sluggish response to it by an overloaded legal system last week lent momentum to the Law Reform Commission's case. —By A.H. Maiden

CSR News Release

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WITTENOOM INSURANCE

CSR was suprised and dismayed to learn through the SGIC's press release of the SGIC's views on its insurance cover of Midalco for asbestos-related diseases.

Midalco and the SGIC agreed in 1983 on the handling of claims by employees consequent upon their exposure to asbestos while working at Wittenoom. This agreement was confirmed by Mr Frank Michell, managing director of SGIC, during a meeting in Perth as recently as 25 August 1988.

CSR believes the SGIC's actions are in breach of the 1983 agreement between the SGIC and Midalco and of its obligations under the insurance policy.

Regrettably if the SGIC pursues the course of action foreshadowed in its press release Midalco will have no alternative but to seek a declaration in the court that the SGIC honour its commitments under the 1983 agreement and the insurance policy.

Acting in good faith and in accordance with the 1983 agreement, Midalco has initiated settlement discussions in relation to claims brought by people employed at Wittenoom prior to 31 December 1958.

It is most unfortunate that should the SGIC proceed with the actions foreshadowed in its press release there will inevitably be delays in the resolution of claims by people employed after 1 January 1959, the date from which Midalco has unlimited cover with the SGIC.

CSR and Midalco will be seeking to meet with the SGIC and the Western Australian Government to find a solution which would allow the speedy resolution of the post-1959 claims.

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MEDIA RELEASE

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21 SEPTEMBER, 1988

The State Government Insurance Commission said today the insurance policy for CSR subsidiary, Midalco Pty Ltd was considered to be inoperative. Midalco Pty Ltd was the operator of the Wittenoom asbestos mine.

Managing Director, Mr Frank Michell, said recent court action in Western Australia had placed direct responsibility on CSR for the Wittenoom mine. It was also apparent from yesterday's court decision in Victoria that Midalco had been aware of the dangers associated with asbestos dust, that it had failed to take reasonable precautions to protect employees and had failed to fully disclose the dangerous nature of the Wittenoom mine operations to the Insurance Commission.

In dismissing the appeal against exemplary damages in the Victorian case the Full Court of Victoria said a strong case was made supporting a finding of recklessness, indeed of continuing, conscious and contumelious disregard by Midalco for the employee's right to be free from risk of injury or disease.

Mr Michell said even though the policy was considered inoperative this should not affect the speedy settlement of claims which have been or are made against CSR/Midalco.

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