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## Asbestos Litigation in New South Wales

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## ASBESTOS LITIGATION IN NEW SOUTH WALES

*Hon. John Lawrence O'Meally\**

### INTRODUCTION

In New South Wales, Australia, asbestos related claims are litigated in a specialist court created specifically to deal with dust diseases. The procedural parameters of the Dust Diseases Tribunal Act 1989 (NSW) and the related jurisprudence offer an insight into how asbestos related claims are handled in New South Wales. This article provides a brief overview of the main procedures of the Tribunal and some of its jurisprudence.<sup>1</sup>

### I. AN OVERVIEW OF THE MINING AND USE OF ASBESTOS-BASED PRODUCTS IN AUSTRALIA

With some interruptions, asbestos was mined in Australia from 1918 to 1979. Products containing asbestos were manufactured in Australia until the mid to late 1980s.<sup>2</sup> The increase in migration and the natural increase of the population after World War II, when Australia's population was 7 million, led to a need for cheaper housing which could be constructed

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\* Judge John Lawrence O'Meally is President of the Dust Diseases Tribunal of New South Wales.

<sup>1</sup> The author spoke at the 2006 8th Science for Judges Program held in New York at Brooklyn Law School and that presentation served as the foundation for this article.

<sup>2</sup> D.F. Jackson, *Report Of The Special Commission Of Inquiry Into The Medical Research And Compensation Foundation*, ANNEXURE J: Asbestos and James Hardie 117 (2004).

quickly, together with associated infrastructure including new power houses.<sup>3</sup> There was also an increased need for new commercial premises.<sup>4</sup> Many houses, commercial premises and powerhouses were constructed using asbestos cement products, asbestos insulation and other asbestos products.<sup>5</sup> Throughout the twentieth century, tens of thousands of Australians were exposed to asbestos, mainly in working environments, but also in home renovation.<sup>6</sup>

In the 1950s, Australia was the world's highest user per capita of asbestos.<sup>7</sup> The incidence of malignant mesothelioma in Australia appears to be higher than that of any other country.<sup>8</sup> Today, Australia's population is 21 million, most of whom live in cities and towns on the eastern seaboard.<sup>9</sup> It is in two of the eastern states, NSW and Victoria, where most cases of mesothelioma occur.<sup>10</sup> Dr. James Leigh, an eminent epidemiologist and thoracic physician, has noted that by 2020, Australia could expect 18,000 cases of mesothelioma and future asbestos cancers, with a ratio of 2:1 to mesothelioma, to be in the order of 30,000 to 40,000.<sup>11</sup>

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<sup>3</sup> *Id.* at 117.

<sup>4</sup> *Id.* at 118.

<sup>5</sup> T. Blundell, *Asbestos—Related Disease Compensation 2006: at the Crossroads*, (2006) 22 (5) J. OCCUP. HEALTH SAFETY AUSTL. N.Z. 427, 429.

<sup>6</sup> Charles Pickett, *The Fibro Frontier: A Different History of Australian Architecture*, Sydney Powerhouse Publishing 1997: 109-10.

<sup>7</sup> J. Leigh & T. Driscoll, *Malignant Mesothelioma in Australia, 1945-2002*, (2003) 9 INT'L J. OCCUP. ENVTL. HEALTH 206, 206.

<sup>8</sup> Report of the New South Wales Chief Health Officer: *Respiratory Disease Mesothelioma Incidence*. (Oct. 16, 2006).

<sup>9</sup> Australian Bureau Of Statistics, 2006 Year Book Australia 104, 114.

<sup>10</sup> Leigh & Driscoll, *supra* note 7, at 206.

<sup>11</sup> *Id.* at 206-17. Recent research by Dr. Anthony Johnson et al., in Past and Future Incidence of Mesothelioma in Men New South Wales (unpublished manuscript), undertaken for the NSW Dust Diseases Board Research and Education Unit, predicts that the number of mesothelioma cases in males aged 20 years and over in New South Wales will reach almost 7,000 and will continue to occur until about 2050. This research was presented at the 2007 Annual Scientific Conference of The Australian and New Zealand Thoracic Society in Auckland, New Zealand.

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## II. COMPENSATION FOR ASBESTOS DISEASE

In New South Wales, compensation for asbestos related diseases is of two types: (1) workers compensation<sup>12</sup> and (2) damages at common law and for breach of statutory duty. Claims for workers' compensation are dealt with by the Dust Diseases Board.<sup>13</sup> The Dust Diseases Board<sup>14</sup> is a statutory body which administers a no fault scheme.

When deciding whether a claimant is entitled to workers compensation, the Dust Diseases Board employs a two pronged approach. First, inspectors verify the employment of a claimant by a New South Wales employer.<sup>15</sup> Medical reports and x-rays are then 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.<sup>16</sup> The entitlement to and level of compensation are determined by the degree of incapacity.<sup>17</sup>

The Dust Diseases Board also funds 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.

## III. DUST DISEASES TRIBUNAL OF NEW SOUTH WALES

*A. Creation of the Tribunal*

Early in 1989 the then-New South Wales Minister for Energy was approached by a group of union officials when

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<sup>12</sup> Workers Compensation (Dust Diseases) Act 1942 (NSW); *See also* T. Blundell, *supra* note 5, at 431.

<sup>13</sup> The functions of the Dust Diseases Board and the Dust Diseases Tribunal are separate and distinct. For functions of the board, see Dust Diseases Board, *Annual Report 2001-2002* 4 (2002).

<sup>14</sup> Workers Compensation (Dust Diseases) Act 1942 (NSW) § 5.

<sup>15</sup> *Id.* § 8H.

<sup>16</sup> *Id.* § 7.

<sup>17</sup> *Id.* § 8.

visiting a power house.<sup>18</sup> They expressed to the Minister their concern that members of their union were dying before their compensation claims for asbestos related diseases were being heard in the Supreme Court.<sup>19</sup>

The Minister for Energy then took a proposal to the Cabinet for the creation of a specialist court to deal with asbestos litigation. The Cabinet approved and early in 1989 the then Attorney General presented a Bill for the creation of the Dust Diseases Tribunal to the Parliament.<sup>20</sup> In his second reading speech on the evening of May 3, 1989 the Attorney General told the House that the Government was committed to asbestos claims being dealt with expeditiously.<sup>21</sup> This expeditious remedy was to be achieved through the creation of a separate tribunal that would provide a fast track mechanism for resolving asbestos claims.

There was no opposition to the Bill.<sup>22</sup> On May 9, 1989 the Shadow Attorney General<sup>23</sup> applauded the Bill and it passed without further debate.<sup>24</sup> On July 21, 1989, Parts 1 and 2 were proclaimed.<sup>25</sup> Part 3 commenced on November 1, 1989, and on that day the Tribunal sat for the first time.<sup>26</sup> The object of the

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<sup>18</sup> Dust Diseases Tribunal NSW, Annual Review 2003 at 7.

<sup>19</sup> The Supreme Court of NSW is a court equivalent to Superior Courts in the USA or the High Court in the United Kingdom. It has a number of trial divisions and an appellate division. The final court of Appeal is the High Court of Australia which, like the Supreme Court of the United States, is also the interpreter of the Constitution. The High Court of Australia was established by the Commonwealth of Australia Constitution Act 1900 (Imp.)

<sup>20</sup> New South Wales, Legislative Assembly, *Parliamentary Debates (Hansard)*, No. 207, May 3, 1989, 7398.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 7737.

<sup>23</sup> The "Shadow Attorney General" is a member of parliament who is the opposition's spokesperson on matters within the ministerial responsibility of the Attorney General and hence "shadows" the Attorney General. Each Cabinet Minister has a Shadow in the opposition.

<sup>24</sup> *Id.* at 7738.

<sup>25</sup> New South Wales Government Gazette no.84 (July 21, 1989), at 4495.

<sup>26</sup> Dust Diseases Tribunal, *supra* note 18, at 7.

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Bill was to establish the Dust Diseases Tribunal. Part 1 deals with commencement and definitions. Part 2 outlines the constitution of the Tribunal. Part 3 deals with its jurisdiction and procedural matters. The Tribunal was the first of two specialist courts of this type in Australia.<sup>27</sup> There are no other known specialist courts of this ilk anywhere else in the world. Rather, all other countries handle asbestos cases in courts of general jurisdiction.<sup>28</sup>

*B. Procedures*

Procedures were developed initially by regulation, then by rule and subsequently by amending legislation, which enabled cases to be dealt with and finalized swiftly.<sup>29</sup>

The Tribunal is a court of record<sup>30</sup> with exclusive jurisdiction to hear cases in which damages are sought in respect of, or as consequence of, a dust related condition.<sup>31</sup> It also deals

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<sup>27</sup> The state of South Australia created a similar body in 2005. Dust Diseases Tribunal Act, 2005 (SA).

<sup>28</sup> A system, similar to that operated by the NSW Dust Diseases Tribunal, is one of several presently being considered in the United Kingdom. *See* Master Steven Whitaker, Royal Courts of Justice, London, paper delivered at Mealey's International Asbestos Conference, London, Nov. 2006.

<sup>29</sup> Initially the Tribunal adopted, so far as they were relevant to its jurisdiction, the Rules of the Supreme Court of New South Wales. It also made a number of Rules which were specific to its operation. The Dust Diseases Tribunal Regulation 2001, amended in 2005 and replaced in 2007 progressively refined the Tribunal's procedures to achieve more efficiency in hearing and concluding claims. In 2005, the New South Wales Parliament passed the Civil Procedure Act. The Uniform Civil Procedure Rules, made under that Act, were designed to standardise civil procedures in all courts in New South Wales. These Rules, however, authorised the Tribunal to deviate from them when necessary to maintain fast track operation. *See* Uniform Civil Procedure NSW Rule 1.5.

<sup>30</sup> Dust Diseases Tribunal Act, 1989 (NSW), § 4 (2).

<sup>31</sup> *Id.* § 10. Section 3 and Schedule 1 of this Act define a dust related condition to include "aluminosis, asbestosis, asbestos induced carcinoma, asbestos related pleural diseases, bagassosis, berylliosis, byssinosis, coal dust pneumoconiosis, farmers' lung, hard metal pneumoconiosis, mesothelioma,

with claims for indemnity<sup>32</sup> and contribution between tortfeasors<sup>33</sup> and questions arising under policies of insurance.<sup>34</sup> It has the same jurisdiction and powers previously exercised by the Supreme Court in such cases.<sup>35</sup> A judge of the Tribunal has the same protection and immunity as a judge of the Supreme Court.<sup>36</sup> In respect of proceedings before it, a judge of the Tribunal has the same powers for punishing contempt as a judge of the Supreme Court.<sup>37</sup>

Cases are heard by a judge alone<sup>38</sup> and the Uniform Civil Procedure Rules apply to proceedings in the Tribunal as they do in the Supreme Court and the District Court. There are, however, some exceptions in respect of the Tribunal which take account of the nature of its work and the need to react quickly in urgent cases.<sup>39</sup>

All asbestos cases brought before the Tribunal are now subject to compulsory mediation.<sup>40</sup> Under certain circumstances, cases may be removed from the compulsory mediation process. For example, if a mediation is unsuccessful, if a case becomes urgent (through deterioration of a plaintiff's state of health or in a capacity to give evidence), or if one or more parties fail to comply with requirements of the mediation process, the case may be removed from the process on application to a judge.<sup>41</sup>

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silicosis, silico-tuberculosis, talcosis" or "any other pathological condition of the lungs, pleura or peritoneum that is attributable to dust." *Id.* § 3 (1); Sched. 1.

<sup>32</sup> Dust Diseases Tribunal Act, 1989 (NSW), § 11 (4). This section gives an ancillary jurisdiction to the Tribunal and claims for indemnity and contribution are ancillary or related matters. *See Carnuccio v. Francesco Cinzano & CIA (Australia) Pty. Ltd.* (1991) 6 NSWCCR 70, 73.

<sup>33</sup> Dust Diseases Tribunal Act, 1989, § 11 (1A) (NSW).

<sup>34</sup> *Id.* § 11 (4).

<sup>35</sup> *Id.* § 10 (4).

<sup>36</sup> *Id.* § 8.

<sup>37</sup> *Id.* § 26.

<sup>38</sup> *Id.* § 6.

<sup>39</sup> Uniform Civil Procedure Rule 1.5 sets out these exceptions.

<sup>40</sup> Dust Diseases Tribunal Regulation 2007, Clause 31.

<sup>41</sup> *Id.* Clause 22.

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The plaintiff's evidence is commonly given by affidavit which is served on the defendants in advance of settlement conferences and hearings.<sup>42</sup> Witness statements, copies of documents and experts' reports are also served in advance.<sup>43</sup>

Approximately, one third of the Tribunal's work is conducted at the bedsides of terminally ill plaintiffs. The Tribunal will sit at any hour of the day, on any day of the week, at any place in Australia to receive the evidence of a plaintiff whose case is properly before the Tribunal and who is unable to travel.<sup>44</sup> Sometimes the Tribunal sits outside Australia.<sup>45</sup>

Finally, the lawyers who practice in the Tribunal generally are experienced and skilled in handling the asbestos related work. As a consequence, there have been cases where less than four hours elapsed between filing a Statement of Claim (i.e., the originating process) and conclusion of the case.<sup>46</sup>

#### IV. SOME PROVISIONS IN THE DUST DISEASES TRIBUNAL ACT

##### *A. Provisional Damages*

Section 11A authorizes the Tribunal to award provisional damages. Occasionally, a person with one asbestos disease will

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<sup>42</sup> Uniform Civil Procedure Rules, Part 35 generally. Section 31 of the Dust Diseases Tribunal Act also grants wide powers to the Tribunal in procedural matters.

<sup>43</sup> Dust Diseases Tribunal Act, § 31.

<sup>44</sup> The need for and ability of the Tribunal to take evidence of a plaintiff at very short notice and to travel to the homes of plaintiffs to do so has been noted by the NSW Court of Appeal. *See Commonwealth of Austl. v. Cockatoo Dockyard Pty. Ltd.* (2004) 1 DDCR 34.

<sup>45</sup> Recently, after a commission to take evidence had been granted, the evidence of a former member of the Australian Navy was taken in San Antonio, Texas. *Laurie v. Amaca and Ors DDT 6057/2006* (unreported) (one file with author).

<sup>46</sup> One such case was *Belz v. Amaca P/L*, NSW DDT matter number 310/2001 (Austl. unreported). The Statement of Claim was issued at 2:52pm and the hearing commenced at the hospital at 4pm. Judgment was entered shortly afterwards.

later develop another. For example, a person with asbestos related pleural disease (APRD) or asbestosis may later suffer carcinoma or mesothelioma. The common law rule enunciated in *Fitter v. Veal*<sup>47</sup> 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. This rule was affirmed in *Todorovic v. Waller*,<sup>48</sup> but abrogated by Section 11A.

Section 11A applies where there is a chance that at some time in the future, a person suffering one dust disease for 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.<sup>49</sup> These are *provisional damages*. If the person later develops another disease he or she may return and seek an award of *further damages*. Section 11A applies only to cases commenced after August 1, 1995.<sup>50</sup> Its application is confined to those cases where the negligent conduct or breach of a statutory duty occurred in New South Wales.<sup>51</sup>

When awarding provisional damages the Tribunal is required to specify the dust related conditions for which an award of further damages may be made.<sup>52</sup> So, if provisional damages were awarded for, say, ARPD, the Tribunal would typically order that a plaintiff might return if asbestosis, carcinoma, mesothelioma or any other dust related condition, nominated by that plaintiff, subsequently occurred.

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<sup>47</sup> 12 Mod. 542; 88 Eng. Rep. 1506 (K.B. 1701).

<sup>48</sup> (1981) 150 CLR 402, 412.

<sup>49</sup> Dust Diseases Tribunal Act § 11A.

<sup>50</sup> Section 11A of the Dust Diseases Tribunal Act of 1989 commenced on Aug. 1, 1995. Dust Diseases Tribunal Act, 1989.

<sup>51</sup> *Lawrence v. BHP Billiton Ltd.* (2004) 1 DDCR 50, 53.

<sup>52</sup> Dust Diseases Tribunal Rules, Rule 5.

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When the Limitation Act of 1969 applied to proceedings in the Tribunal,<sup>53</sup> applications to extend time rarely failed but hearing the applications was time consuming.<sup>54</sup> Section 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. Section 12A operates from December 1, 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.<sup>55</sup>

*C. General Damages Survive Death*

Section 12B, which commenced on December 1, 1998, overcame the effect of Section 2(2)(d) of the Law Reform (Miscellaneous Provisions) Act of 1944 which provides, in effect, that general damages die with a plaintiff; that is, damages for pain and suffering, for loss of amenities and for loss of expectation of life consequent upon the injury.<sup>56</sup> By force of Section 12B, general damages survive death and, to some degree, it is now possible to avoid the unseemly haste, with all its attendant consequences, to finish a case before a plaintiff dies.

Since Section 12B was enacted, four other states—South Australia, Victoria, Queensland and Tasmania—have followed and general damages now survive death in dust disease cases in New South Wales and in those four states, but only if proceedings were commenced before death occurred.<sup>57</sup>

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<sup>53</sup> The Act is still in force, but does not apply to proceedings in the Tribunal.

<sup>54</sup> New South Wales, Legislative Council, *Parliamentary Debates (Hansard)*, No. 52, Nov. 17, 1998, 9975 ff.

<sup>55</sup> *Brear v. James Hardie & Coy Pty Ltd. & Anor* (2000) 50 NSWLR 388.

<sup>56</sup> Law Reform (Miscellaneous Provisions) Act 1944 (NSW) § 2(2)(d).

<sup>57</sup> Survival of Causes of Action (Dust-Related Conditions) Amendment Act, 2001 § 3 (SA); Administration and Probate (Dust Diseases) Act, 2000 §

*D. Decisions May Be Reconsidered*

Alone among courts in Australia, the Tribunal, by reason of Section 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.<sup>58</sup> No indication is given in the Act of the circumstances in which the Tribunal may reconsider or amend any decision previously given. The Court of Appeal has opined that the power would only be exercised when something basic to the decision had been falsified by subsequent events.<sup>59</sup> The approach taken in the Tribunal is that this provision authorizes it to correct errors of fact or law.<sup>60</sup> In some instances, this has obviated appeals; however, the importance of finality of litigation is paramount and, as a consequence, Section 13(6) may not be used to alter a decision after it has been made by reason of events which occurred after that decision was made.<sup>61</sup>

*E. Evidence and Admissions*

Section 23(1)(a) of the Act authorized the Tribunal at any stage of the proceedings to dispense with the rules of evidence for proving any matter which was 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. Section 3 of the Dust Diseases Tribunal Amendment (Claims Resolution) Act 2005 No 22 (NSW) repealed the whole of Section 23 on August 17 2005, but its provisions were repeated in Section 70 of the Civil Procedure Act 2005 (NSW) and now apply to civil proceedings in all

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4 (Vict); Civil Liability (Dust Diseases) and Other Legislation Amendment Act, 2005 § 3 (Qld); Administration and Probate Amendment Act, 2005 § 4 (Tas).

<sup>58</sup> Dust Diseases Tribunal Act (NSW), § 13(6). *See* *Browne v. Cockatoo Dockyard Pty. Ltd.* (1999) 18 NSWCCR 618.

<sup>59</sup> *CSR Ltd. v. Bowhuis* (1991) 7 NSWCCR 223, 247.

<sup>60</sup> *Ellul v. Norton Pty. Ltd.* (1991) 7 NSWCCR 24, 35.

<sup>61</sup> *CSR Ltd.*, (1991) 7 NSWCCR at 247.

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courts of NSW.

Section 70 of the Civil Procedure Act 2005 (NSW) 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, 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, e.g., 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.<sup>62</sup>

*F. Evidence in One Case May Be Evidence in Another*

Section 25(3) is significant and provides:

Historical evidence<sup>63</sup> 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 before the Tribunal whether or not the proceedings are between the same parties.<sup>64</sup>

Use of Section 25(3) avoids the unnecessary repetition of evidence and contains costs. It is used principally to prove causation, foreseeability of risk and preventability. Before this section was introduced in 1995, proof of these matters occupied

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<sup>62</sup> In Australia, the general rule is that a successful party's costs are paid by an unsuccessful party. *See also* Civil Procedure Act 2005 (NSW), § 98. Costs charged by lawyers are regulated. *See* Legal Profession Act 2004 (NSW), § 329.

<sup>63</sup> Historical evidence is evidence that discloses a plurality of past events in which each discrete event can be seen in relation to the others as probative of a pattern that is relevant to a fact in issue. *Rolls Royce Industrial Power v. James Hardie & Co. Pty. Ltd.* (1991) 18 NSWCCR 385.

<sup>64</sup> Dust Diseases Tribunal Act (NSW), § 25(3).

much court time. Judicious use of Section 25(3) saves time and contains costs.<sup>65</sup>

The Uniform Civil Procedure Rules give a party the right to require another party's experts to attend for cross-examination at the trial.<sup>66</sup> Section 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 admitted under Section 25(3)<sup>67</sup>.

### *G. Use of Discovery and Interrogatories from Earlier Cases*

Section 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.<sup>68</sup> A very significant proportion of costs is generated in the interlocutory stages of proceedings, particularly in relation to discovery and interrogatories.

Section 25A of the Act authorizes discovery given or interrogatories administered in one case to be used in another.

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<sup>65</sup> *Barrow & Heyes v. CSR Ltd. & Midalco Pty. Ltd.* (Aug. 4, 1988, unreported) was tried in the Supreme Court of Western Australia before a judge alone. The hearing lasted from November 17, 1987 to July 14, 1988. Much of the evidence was directed to the issue of foreseeability. Before Section 25(3) was introduced, a similar case, *Olsen v. CSR Pty. Ltd.*, (Dec. 24, 1994, unreported) was tried before the Tribunal, that is the Dust Diseases Tribunal of NSW. That trial lasted six weeks with sittings taking place on up to six days per week and up to twelve hours per day. The plaintiff had mesothelioma and at that time, general damages would have died with her. In each case, evidence on foreseeability took weeks. The issue of foreseeability, if it now becomes an issue, can, by reason of Section 25(3), be dealt with in less than a day. Frequently, and depending on the time at which exposure occurred, foreseeability is not an issue.

<sup>66</sup> Uniform Civil Procedure Rules, 31.43.

<sup>67</sup> *Preston v. Jsekarb Pty Ltd.* (1994) 10 NSWCCR 45, 50; *Murray v. Asbestos Prod. Pty Ltd. & Others* (No. 1) (1994) 12 NSWCCR 657.

<sup>68</sup> *Sybron Corp v. Barclays Bank Plc.*, (1985) Ch 299; *Kimberley Minerals Holdings Ltd. (in liq) v. McEwan* (1980) 1 NSWLR 210, 215.

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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.<sup>69</sup> The Tribunal rules allow a party to file a standard list of documents, that is, a list of documents previously discovered. Before a party may rely on Section 25A, a standard list must have been filed in the Registry of the Tribunal.<sup>70</sup> Relying on Section 25A, the regular defendants—the producers and manufacturers of asbestos products and governments or government instrumentalities—will usually indicate if they rely upon their standard list.<sup>71</sup> Further documents relevant to a particular case must be discovered separately.<sup>72</sup>

*H. Certain Issues May Not Be Relitigated Without Leave*

Section 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. This applies whether or not the proceedings are between the same parties. If a party intends to rely upon Section 25B, a notice particularizing the issues and the cases in which they were determined must be filed and served upon the opposing party or parties.<sup>73</sup>

This section has been used to prevent relitigation of the finding that carcinoma may be attributed to asbestos exposure in the absence of asbestosis where the exposure was sufficient to cause asbestosis.<sup>74</sup>

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<sup>69</sup> Woods v. Hanoldt, (1995) 11 NSWCCR 161.

<sup>70</sup> Dust Diseases Tribunal Rule 7 and 8.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Section 25B(1A) added by Dust Diseases Tribunal Amendment (Claims Resolution) Act No 22 2005 (NSW), Requires the Tribunal on and after May 26, 2005 to identify an issue to which Section 25B will apply

<sup>74</sup> McDonald v. SRA (1998) 16 NSWCCR 695; Judd v. Amaca (2002) 24 NSWCCR 532. In each case it was accepted carcinoma could be attributed

*I. Appeals Only on Questions of Law; Some Cases*

Appeals from the Tribunal are restricted to questions of law. Appeals from an interlocutory decision, on a question of costs, or on a final decision where the amount involved is less than \$20,000, require the leave of the Court of Appeal.<sup>75</sup>

Questions have arisen concerning the extent to which judges, as members of a specialist court, may use knowledge which has come to them as a result of hearing evidence repetitively on the same issues. Where medical and scientific knowledge cannot provide the legally certain answers which common law causation principles demand, a trial judge may not complete the evidentiary gap by reliance upon his expertise acquired as a member of a specialist tribunal.<sup>76</sup> A judge of the Tribunal is, however, entitled to rely upon his 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 that which might cause the disease from which a plaintiff suffered.<sup>77</sup>

The Tribunal has extraterritorial jurisdiction over interstate torts, but unlike in the US there is only one common law for all of Australia as distinct from a common law of different states.<sup>78</sup> Where there is a difference between the States, it is the responsibility of the High Court of Australia to resolve that difference.<sup>79</sup>

There is no entitlement to damages for emotional stress caused by fear of developing an asbestos related condition.<sup>80</sup>

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to asbestos exposure in the absence of asbestosis. In each case, however, the plaintiff failed because of the failure to prove sufficient exposure.

<sup>75</sup> Dust Diseases Tribunal Act, 1989 (NSW), § 32.

<sup>76</sup> Wallaby Grip (BAE) Pty. Ltd. (in liq) v. McLeay Area Health Service 17 NSWCCR 355, 365.

<sup>77</sup> ICI Austl. Operations Pty. Ltd. & Anor v. Workcover Auth. Of NSW (2004) 60 NSWLR 18, 64.

<sup>78</sup> Kable v. DPP (1996) 189 CLR 51, 112.

<sup>79</sup> Lipohar v. The Queen (1999) 200 CLR 485, 505.

<sup>80</sup> CSR Ltd. v. Thompson (2003) 59 NSWLR 77, *applying* Tame v. NSW (2002) 211 CLR 317. In *CSR Ltd.*, Justice Ginsburg's views on

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Where, however, there is a diagnosed psychiatric disorder consequent upon exposure to asbestos, a component for that disorder is available in general damages.<sup>81</sup>

## CONCLUSION

Asbestos related claims will continue to occupy the time and resources of courts for years to come. In Australia, the peak for cases of mesothelioma is expected to occur sometime between 2010 and 2014, culminating in approximately 18,000 cases by the year 2020.<sup>82</sup> There are always improvements which may render the process of dispute resolution more effective and efficient. The substantive and procedural law applied by the Tribunal will continue to undergo regular review.

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emotional distress, in *Norfolk and Western Railway Co v. Ayres*, 538 U.S. 135 (2003), were considered.

<sup>81</sup> See *CSR Ltd.*, *supra* note 80. The plaintiff submitted that in the assessment of his general damages he was entitled to a component for the fear of developing mesothelioma. Fourteen years before he did present with mesothelioma, he expressed this fear to his wife and consulted a psychiatrist who treated him. There was, however, no evidence that he suffered any recognizable psychiatric disorder and no damages for fear were awarded. See *Thompson v. CSR Ltd.* (2003) 25 NSWCCR 113.

<sup>82</sup> Leigh & Driscoll, *supra* note 7, at 217.