A killer disease

Study design links: Unit 4 Outcome 2: evaluate the processes and procedures for the resolution of criminal cases and civil disputes. Unit 4 Outcome 3: identify and analyse the elements of an effective legal system.


Introduction

Over the past 20 years, Australians have successfully undertaken significant civil law action against major companies, particularly in the tobacco and mining industries. The claims have generally involved plaintiffs contracting fatal diseases as a result of the negligence of defendant corporations. However, have all plaintiffs enjoyed full access to their legal rights? Even with reform to civil pre-trial procedure, to what extent can a defendant still avoid responsibility for past actions that might stretch back more than 30 years? How active are lawyers in seeking a timely resolution of disputes?

Other cases in civil litigation involve claims over contracting the fatal diseases asbestosis and mesothelioma, which have been brought against some of Australia’s largest companies, including CSR, James Hardie Industries and BHP Billiton. An excellent resource for research in this area is the Asbestos Diseases Society of Australia at http://www.asbestosdiseases.org.au.

Background to the asbestosis and mesothelioma cases

For centuries, major concerns have existed about the health hazards associated with asbestos. These concerns focus on the operation of mines and the preparation and use of manufactured building materials. Asbestos was used widely in industry, public buildings (including schools) and private homes until the 1970s. It is still being used in developing countries where mining and processing are inexpensive. As a building material, asbestos is durable and it is an excellent fire preventive. From 1 January 2004, the Federal Government banned the production and export of asbestos products.

The first formal study into the dangers of asbestos was released in 1898, with the Chief Inspector of Factories of the United Kingdom reporting to the British Parliament about the "evil effects of asbestos dust" and in 1926 the Massachusetts Industrial Accidents Board (USA) processed the first successful compensation claim by a sick asbestos worker.

The disease, Asbestosis, is an inflammation of fibrous lung tissue that permanently scars the lungs. Once asbestos particles have been inhaled, death can take up to 40 years. A 1942 Victorian Government Health Bulletin stated that persons likely to contract asbestosis were asbestos miners and workers. By 1960, the disease Mesothelioma was identified as also being caused from inhaling asbestos particles. It is a painful and incurable cancer of the outside lining of the lungs and abdomen (peritoneum). Since 1945, about 7,000 Australians have died of Mesothelioma and because the disease can take up to 40 years to materialise, numbers of reported cases are increasing. The Australian figure for Mesothelioma deaths (not including asbestos-related lung cancer) is expected to rise to 18,000 by the year 2020. The average payout for claims is currently $350,000.

One of the major asbestos producing mines in Australia was at Wittenoom (WA). In 1944 a Mines Inspector reported that levels of asbestos dust were unacceptably high and in breach of international standards. By 1946 the known global asbestos toll had reached 235 in Britain, 16 in France and 30 in Italy, with the first known asbestosis case at Wittenoom being reported. In spite of repeated warnings about major health and safety breaches, the mine (which was operated by CSR) would continue to operate for another 20 years.
By 1979 the first writs for negligence had been issued against CSR and the Asbestos Diseases Society was formed to represent Wittenoom victims, who now number in the thousands. For the year to 31 March 2004, CSR reported that it had 638 claims pending for asbestos-induced injury in Australia, and 2,354 in the USA. Since 1989, the company claims to have settled 1,441 claims in Australia and 127,000 in the USA.

Compensating the victims of asbestos in Australia

In 2001, executives of the building products company James Hardie established a fund to compensate former employees and others made ill by the asbestos it once mined and manufactured. A NSW Government inquiry, which is currently underway, is investigating whether Hardie deliberately minimised the amount of money it allocated to asbestos claims. According to estimates provided by the Medical Compensation and Research Foundation, the funding shortfall means that from 2008, Hardie would not have provided enough money to pay claims for injury caused by its production of asbestos. Hardie is Australia’s largest producer of asbestos products.

According to Business Review Weekly (2 June 2004) senior lawyers for Hardie have admitted knowing that the figures used to calculate the amount of funds required to cover present and future claims were inaccurate. Furthermore, important information about the pattern of claims was not provided by the company to the foundation that is managing the payments to victims. BRW also reported that actually predicting the eventual cost of Australia’s asbestos use is difficult. In 2003, actuaries Trowbridge Deloitte estimated Australia’s asbestos liability for future claims at $6 billion. This amount would be split between the Federal Government (17% or $1 billion); state governments (14% or $840 million); insurers 22% ($1.3 billion); companies 27% ($1.6 billion); and the NSW Dust Diseases Board 20% (or $1.2 billion).

In terms of satisfying future claims, the main issue involving Hardie is that it has now established a parent company in the Netherlands allegedly in an effort to avoid responsibility for over $1.5 billion in extra funds to cover future compensation claims, many of which now come from people who used asbestos products in their own homes. The Asbestos Diseases Society claims that the number of people contracting asbestos-related diseases from Hardie products has not yet peaked. The ASDA said that these diseases were increasingly affecting people who had been exposed to fibreboard materials in their homes. Many people are now arguing that the law should be changed to ensure that corporations such as James Hardie do not escape obligations to sufferers. The move by Hardie to the Netherlands was arranged by legal firm Allens Arthur Robinson under instructions from company directors.

The NSW Government inquiry into the controversy over James Hardie is due to release its findings in late September 2004.