Chapter 9

General problems in relation to compensation for disease, suggested by the Baryulgil experience

9.1 The matters discussed in previous chapters, and particularly in Appendix III Chapters 1–5, disclosed a number of problems in the area of compensation for occupationally-caused disease which are not confined to the Baryulgil situation. It is the Committee's hope that relevant authorities will examine the problems and the steps that might be taken to correct them.

PROBLEMS ARISING FROM ABORIGINALITY

9.2 One problem which goes beyond the Baryulgil situation could affect Aboriginal people in other areas seeking compensation through the remedies of common law.

Title to land of Aboriginals living on reserves

9.3 It was seen in Appendix III, Chapger 4[1], that Aboriginals living on reserves will not have standing to sue for private nuisance, for trespass to land or under the rule in *Rylands* v *Fletcher*[2] unless they have been granted a lease from the body in whom title to the reserve is vested, even though they and their families may have been living in that place for generations[3].

9.4 The broad issues of land rights are beyond the scope of this Inquiry. Nevertheless it appears less than just that Aboriginals who have lived for generations on reserve land, as have the Baryulgil community, should have no rights to compensation for injuries arising from the encroachments of others on that land, merely because the practices of an earlier society, whose protectionist policies often involved substantial disadvantage to and neglect of Aboriginal people, denied them any possessory title to the lands to which they were restricted. This situation is being gradually overcome, by policies and programmes fostering transfer of title to the Aboriginal people themselves, but, as Appendix III, paragraphs 4.21 to 4.27 and 4.67 show, its effects are still operative. The Committee suggests that the negotiations envisaged in Recommendation 1. could, until the new policies have completely eradicated the effects of old arrangements, lead to ways in which such possible injustices could be remedied.

PROBLEMS RELATING TO DISEASES OF LONG LATENCY AND OF GRADUAL PROCESS

Limitation of actions

9.5 The discussion in Appendix III, paragraphs 1.89 to 1.104 suggests that the extensions provided in the New South Wales *Limitation Act* 1969 cover most of the problems in relation to limitation of action that arise with diseases of long latency. However, the fragility of that coverage is attested by the fact that a case based on those sections had to be taken all the way to the High Court (and that the interpretation given there disclosed no clear *ratio decidendi*).[4]

9.6 There still appears to be a need for amendment to the *Limitation Act* 1969 clarifying its intention. Western Australia has recently adopted that approach in the *Acts Amendment (Asbestos Related Diseased) Act* 1983. However, the same sort of provision is needed for

other diseases of long latency. Furthermore, it would be desirable if uniform legislation could be achieved on this issue.

9.7 The Baryulgil situation also suggest that any investigation directed at possible amendment of the various Limitation Acts should reconsider the question whether the existence of a cause of action should be a material fact, ignorance of which would necessitate an extension of the limitation period.[5] There seems little justice in closing off the legal rights of persons who, through lack of education, unfamiliarity with the Australian legal system, or insufficient command of the language, are unaware of those rights; particularly when they are rights to compensation for diseases contracted in unpleasant and often ill-paid work which, however little it contributes to their own wellbeing, does contribute to the wellbeing of society. In such cases, moreover, the families of the persons denied compensation become a charge upon the public purse through the welfare services. Economics as well as equity could be served by a reappraisal of the approach in question.

9.8 Any projected amendment to the Limitation Acts should also consider their operation in relation to Compensation to Relatives claims, and in particular that feature of the New South Wales Act whereby it is the deceased's ignorance of material facts and not that of the dependant claimants which is effective to extend the period.[6] This could create hardship for dependants in ethnic groups where the father, as head of the household, did not discuss legal or financial matters with his family, as not being 'women's business'. In such a situation, if the father died having known the material facts for longer than the period allowed, but mistakenly having failed to act on them, the dependants would be unable to gain any compensation to aid them in their ensuing poverty, despite the fact that *they* had at no time failed to exercise legal rights with expedition.

9.9 In the light of these various matters, and particularly of the desirability of uniform Limitation Laws, the committee suggests that the Standing Committee of Attorneys-General initiate a nationwide review of the various Acts with a view to drafting and procuring the passage of uniform statutes in all the states and territories.

Causation problems

9.10 The discussion of causation in Appendix III, Chapter 1 pointed out that in the case of diseases of long latency, such as mesothelioma, it will be difficult to establish exactly when the disease was contracted.[7] Where the person suffering the disease was, during the likely period of contraction, employed at more than one place where he or she was exposed to the risk of contracting that disease, it will be impossible to prove which employer was responsible and therefore which is the proper defendant.[8]

9.11 In the case of such diseases, and also diseases such as asbestosis which are not only diseases of long latency but also contracted by gradual process, there is also the possiblity that during the relevant latency period, one or more of the possible defendants will have died (in the case of an individual) or gone into liquidation (in the case of a company). Whilst, in appropriate circumstances, actions may be brought against the estate of a deceased individual[9] and a liquidated company may be restored to the Register of Companies to allow access to its insurance policies, these measures may not always be available, and the plaintiff may be without a defendant or without the full complement of defendants. Even without these problems, plaintiffs suffering diseases contracted by gradual process who had been employed in a number of places contributing to the development of their diseases would have the inconveniences of needing to join all the relevant employers as defendants.

9.12 The New South Wales *Workers' Compensation Act* 1926 has handled that difficulty in relation to compensation claims by allowing the claim to be made against the

last employer who subjected the claimant to the risk.[10] The apparent unfairness to that employer in the individual claim is evened out by the 'knock-for-knock' operation of the provision over-all.

9.13 A similar approach could be applied in the circumstances outlined in paragraph 9.10 by a Law Reform (Miscellaneous Provisions) Act allowing common law claims to be brought against one employer as defendant, and giving that employer the right to seek indemnity from any other employers who had contributed to the risk of the plaintiff's disease. The philosophy of negligence claims is more and more becoming one of loss distribution. Such a suggestion would be in keeping with that aim, and would place the burden of dealing with joint contributions to any injury on a party more able to cope with that burden than an injured worker.

GENERAL ISSUES IN RELATION TO DAMAGES

9.14 A number of the matters arising from the Inquiry related to the award, computation and successful receipt of damages.

Problems relating to the once-and-for-all rule

9.15 Damages are paid, as seen in Appendix III paragraphs 1.116 to 1.118 in a lump sum 'one and for all'. The *Limitation Act* 1969 (N.S.W.) required that damages must be sought (by and large) within six years of the contraction of a disease. However, many diseases will not disable the sufferer seriously until quite a few years after diagnosis. Yet on diagnosis the plaintiff has (probably) only six years to claim — maybe only one year if diagnosis established the last remaining material fact, ignorance of which had extended the time period. Within six years of diagnosis, the plaintiff's disease may not have attained its full disabling extent. But the damages will have to be assessed at that time, and the court's estimation of the degree of loss that will result, even though assisted by medical evidence, may underestimate the future loss and therefore the damages needed to compensate it.[11]

9.16 This is one of the matters that has led to proposals for a comprehensive statutory compensation scheme providing for periodic payments, reviewable as the injured persons's circumstances alter.[12] However, these schemes have not been adopted in any serious way in Australia. Yet even without a comprehensive compensation scheme, this particular problem could still be tackled within the existing procedures of the common law, by legislative provision for interim awards and periodic review when damages have been granted to persons suffering from slowly developing diseases. The Committee suggests that this possibility would be an appropriate subject for reference by state Attorneys-General to their Law Reform Commissions.[13]

Problems of insolvent or impecunious defendants

9.17 Appendix III, Chapter 1 explored in some detail the difficulty that would face persons succeeding in an action against Asbestos Mines Pty Ltd in attaining payment in full of damages awarded to them. This situation is not limited to Baryulgil claimants. Many injured persons discover that, though the courts uphold their claims for damages, the defendants do not have funds, or sufficient insurance cover, to meet the damages. In relation to any loss suffered as a result of employment after 1981 (in New South Wales), the requirement in Section 18(1) of the *Workers' Compensation Act* 1926 of an unlimited common law extension insurance policy will avoid this problem (provided the defendant had complied with the Act). But claims yet unmade will still arise for damages for diseases of long latency, though negligently caused, is not occupationally caused, the

plaintiff would have to rely on public liability policies where there is no legislative control of limitations on liability.

9.18 Protection could be given in such cases, at least where the claim is based on employer's liability, by creating a statutory fund, composed of sums to be paid annually by insurance companies dealing in the business of Workers' Compensation insurance, to which a worker could have recourse when an employer defendant could not pay damages above the amount insured. Such a fund could be closely modelled on the Uninsured Liability Fund set up under the New South Wales *Workers' Compensation Act* 1926.[14] The Committee suggests that state Attorneys-General consider the possibility of amending the Workers' Compensation legislation to provide for such funds.

Problems for injured employees of impecunious subsidiaries in piercing the corporate veil

9.19 Appendix III, paragraphs 9.19 to 9.50 pointed out that where the employer unable to meet a prospective award of damages is a wholly owned subsidiary company, the injured employee could perhaps succeed not only in gaining an award of damages but in having the award paid if the action could be brought against the parent company. However, even where evidence can be produced that the subsidiary acted in all material respects as the agent of the parent company, Australian courts are not willing to lift the corporate veil to allow the action to be brought against the parent company. It was also stated in Appendix III, paragraph 1.39 that Companies legislation authorises the lifting of the corporate veil for certain other specified purposes.

9.20 It would therefore be possible to provide for the circumstances of injured employees of an impecunious subsidiary by an amendment to the Companies legislation authorising actions by such employees against the parent company in cases where the factors pointing to an agency situation (outlined in Appendix III, paragraph 1.40 could be shown to have existed. Those factors are:

(1) that the profits were treated as those of the parent company;
(2) that the persons conducting the business were appointed by the parent company;
(3) that the parent company was the head and brain of the trading venture;
(4) that the parent company governed the venture and decided what should be done and what capital should be embarked on it;
(5) that the profits were made by the parent company's skill and direction;
(6) that the parent company was in effectual and constant control.[15]

Legislative provision for actions against the parent company in such a situation was foreshadowed by Ford when he wrote in *Principles of Company Law*:

> The increasing tendency of English and American courts to look behind the corporate veil . . . is not matched in Australia, and probably *future development lies with the legislature* rather than the courts. (emphasis added)[16]

Damages for non-pecuniary loss in compensation to relatives actions

9.21 In Appendix III, paragraphs 1.16 to 1.23 the measure of damages in Compensation to Relatives Actions was outlined. It was seen that, except in South Australia and the Northern Territory, no account is taken of the emotional loss suffered by the dependent relatives — what Sir Owen Dixon described as 'the natural ties of their relationship or close association and the moral comfort and companionship arising therefrom'[17] but that all that is compensated is the loss of expected financial support.

9.22 Since in many cases, the emotional or non-pecuniary loss will be of much greater importance to the relatives than the lost financial support (however impecunious their situation), it is arguable that common law damages to the relatives should make provision

for compensating that loss, and that amendment to the legislation of the states (other than South Australia) and the A.C.T. to allow such damages to be awarded is desirable.

PROBLEMS RELATING TO ADMISSIBILITY OF EVIDENCE

9.23 The application of the hearsay rule could cause serious problems to persons seeking to bring actions for breach of statutory duty if any considerable period of time has elapsed since the occurrence of the breach on which the particular action is based. In most cases, evidence of the breach will be contained in reports by members of the relevant Inspectorates (as, for example, reports of dust counts by the Mines Inspectorate which disclose airborne asbestos fibres in excess of statutory standards). Such reports are not admissible as evidence because they are treated as hearsay.[18] To produce admissible evidence of such levels, and therefore of breaches of the standards, it would be necessary to call as witnesses the Inspectors who made the reports and the scientists who made the readings. If the action were brought within the normal six-year limitation period, it would not be excessively difficult to find the inspectors, and to elicit their testimony. But if the lapse of time is greater because the limitation period has been extended under provisions relating to ignorance of material facts, those witnesses may be dead, or may not be able to be traced, or may not be able to recall the matters contained in the reports.

9.24 A number of Acts make provision for certain certificates to be accepted as proof of the facts certified.[19] It would be possible, without involving any serious disadvantage to other parties, to make reports of inspections and tests admissible as evidence of the matters contained in them. It would not be necessary to make the reports and tests conclusive. If they were merely admissible, countering evidence could be brought to show that the matters reported did not occur, or that the test results were not accurate. But if such countering evidence were not forthcoming, the evidence provided by the reports would support a finding of a breach. Without such a provision, claimants who had successfully overcome the hurdle of the normal limitation period might well be unable to produce any admissible evidence of a breach that had actually occurred and caused injury to them. The Committee recommends, therefore, that industrial safety legislation setting standards and authorising inspection to enforce those standards should contain provisions making the inspection reports admissible as evidence in any court trying the issue of whether a breach of the standards took place.

PROBLEMS RELATING TO THE DIAGNOSTIC CRITERIA OF THE DUST DISEASES BOARD

9.25 While the Committee has found no evidence to substantiate the suggestion that the Dust Diseases Board adopts conservative diagnostic criteria for asbestos-related diseases,[20] it appears difficult to establish with certainty what the Board's diagnostic criteria for asbestosis are. Since the 1983 amendment to the *Workers' Compensation (Dust Diseases) Act* 1942 allows appeal against the decisions of the Board and the Medical Authority to the Workers' Compensation Commission, and since that appeal is to be conducted as a hearing *de novo*, it is surely necessary that the diagnostic criteria be clearly stated, if appellants are to be able to challenge an unfavourable diagnosis before the Commission. The Committee recognises that the absence of a statement of criteria has value in allowing a flexible and beneficient approach to claimants, but suggests to the Board that it attempts to formulate a statement of criteria that will assist intending appellants, while at the same time protecting flexibility as much as possible.

PROBLEMS RELATING TO THE AVAILABILITY OF REMEDIES TO THE SURVIVING PARTNERS OF DE FACTO RELATIONSHIPS

9.26 Throughout the analysis of existing legal remedies in Appendix III and in the Committee's resultant conclusions in Chapter 8, the problems for the surviving partners of de facto relationships in bringing actions under the *Compensation to Relatives Act* 1897 (N.S.W.) and the *Law Reform (Miscellaneous Provisions) Act* 1944 (N.S.W.) have been raised.

9.27 This issue was thoroughly canvassed by the New South Wales Law Reform Commission in its June 1983 Report on De Facto Relationships. The Committee's investigations and conclusions support the Law Reform Commission's discussion, and the Committee supports its recommendations.

9.28 The Committee notes the stated intention of the New South Wales Government to introduce legislation to implement the recommendations of the Law Reform Commission,[21] and, in support, urges the Attorney-General of the Commonwealth to make representations to the New South Wales Attorney-General that Section 3 of the *Compensation to Relatives Act* 1897 (N.S.W.) be amended to include surviving de facto spouses in the class of persons entitled to bring actions under the Act, and that the *Wills, Probate and Administration Act* 1898 (N.S.W.) be amended to allow de facto spouses to seek letters of administration of an intestate estate and to benefit under a distribution of such estate.

9.29 The position of surviving partners of tribal marriages also prevents them from bringing actions under the *Compensation to Relatives Act* 1897 (N.S.W.) and the *Law Reform (Miscellaneous Provisions) Act* 1944 (N.S.W.).[22] The Committee therefore recommends to the Attorney-General for the Commonwealth that priority be given to legislation, under the Commonwealth marriage power, according recognition to Aboriginal tribal marriages, at least for the purposes of actions for damages for lost support by surviving dependants in cases of death caused by personal injury.

COMMENTS ON THE GENERAL CONCLUSIONS AND RECOMMENDATIONS

9.30 The matters outlined in paragraphs 9.3 to 9.29 do not involve interference with the substantive law on compensation. They do not create new rights. Their effect would be to remove procedural difficulties which would otherwise prevent particular plaintiffs from successfully presenting their claims for compensation for injuries arising from negligent acts or acts in breach of statutory duty where all the essential elements of the causes of action could be made out, or difficulties which would prevent successful plaintiffs from receiving payment of the awards for compensation which the courts have made.

9.31 The various common law actions for compensation and the statutory compensation schemes enshrine a particular approach to the distribution of the loss consequent on injury and disease. The central feature of that approach, in the area of occupational injury, is to distribute the loss to the community as a whole through the employer (and the employer's insurer). At the same time, bounds are put on that distribution by the concepts of causation and foreseeability, practicability of precautions and reasonable reaction to the hazards (in common law claims) and by the concepts of injury, disease and course of employment (in the statutory schemes). While doubts have been expressed for some time about the effectiveness of this approach, and radical alterations have been suggested, the recommendation of such comprehensive change is beyond the scope of this Committee, and the inquiries on which such recommendations would need to be based are not within its terms of reference. The suggestions in paragraphs 9.3 to 9.29 are not of that kind. They

do not run against any of the central concepts on which the existing approach to compensation is based. On the contrary, they enable those concepts to operate in cases where otherwise procedural and technical details would prevent their full realisation, and they prevent unfortunate discrimination between worthy claimants.

ENDNOTES

1 See Appendix III, Chapter 4, paragraphs 1.130 to 1.138.
2 (1866) L.R. 1 Ex. 265.
3 See Appendix III, paragraphs 4.21 to 4.27.
4 *Do Carmo* v *Ford Excavations Pty Ltd* 1984, High Court of Australia, unreported.
5 See Appendix III, paragraphs 1.96 to 1.104; and compare *Acts Amendment (Asbestos Related Diseases) Act* 1983 (W.A., Section 4, inserting Section 38A(7) of the *Limitation Act* 1935–83 W.A.
6 See Appendix III, paragraphs 1.139 to 1.146.
7 See Appendix III, paragraphs 1.52 to 1.57.
8 See Appendix III, paragraph 1.57.
9 *Law Reform (Miscellaneous Provisions) Act* 1944 N.S.W., Section 2(1).
10 *Workers' Compensation Act* 1926 N.S.W., Section 7(4). The section further provides that any other employers 'who, during the twelve months preceding a worker's incapacity, employed him in any employment to the nature of which the disease was due, shall be liable to make to the employer by whom compensation is payable, such contributions as, in default of agreement, may be determined by the Commission.'
11 See *Sharman* v *Evans* (1977) 13 A.L.R. 481 in connection with the increase in medical costs.
12 See, for example Report of the National Committee of Inquiry into Compensation and Rehabilitation in Australia, 1974 (the 'Woodhouse Report').
13 This step has already been taken in South Australia by Section 30C of the Supreme Court Act 1930.
14 *Workers' Compensation Act* 1926 N.S.W., Section 18C.
15 See *Smith, Stone and Knight Ltd* v *Birmingham Corporation* [1939] 4 All E.R. 116, and L.C.B. Gower, J.B. Cronin, A.J. Easson and Lord Wedderburn of Charlton, *Principles of Modern Company Law*, 4th ed., London, 1979, p. 130.
16 H.A.J. Ford, *Principles of Company Law*, 3rd ed., Melbourne, 1982, p. 154.
17 'The Survival of Causes of Action', *University of Queensland Law Journal* Vol. 1, 1951, pp. 4–5.
18 *Myers* v *D.P.P.* [1965] A.C. 1001.
19 E.g. *Factories, Shops and Industries Act* 1962 N.S.W., Section 148; *Construction Safety Act* 1912 N.S.W., Section 21(2).
20 See paragraph 8.33.
21 *Sydney Morning Herald*, 12 September 1984, p. 1.
22 And their equivalents in most other states — see Australian Law Reform Commission, *Discussion Paper* No. 18, August 1982.

CHAPTER 10

Conclusions and recommendations

CONCLUSIONS

10.1 In Chapters 3–6 of this report the Committee has directed its attention to the first term of reference. We broadly conclude that the manner in which the mine and mill were operated was capable of producing asbestos-related disease. In Chapter 7 we conclude that although there is evidence of some disease both in the past and among former miners still living, that it is, on the evidence available, not widespread. In Chapters 8 and 9 we have addressed the third term of reference which was to examine the provisions currently available to secure just compensation for those who can prove themselves to have been adversely affected. It is concluded that, provided a former employee can prove that he/she has an asbestos-related disease caused as a result of employment at the mine or mill and that he/she is incapacitated thereby, then existing remedies are adequate to ensure compensation. These Chapters examine technical impediments which might defeat an otherwise just claim. We have concluded that where those technical difficulties are related to the prospective claimants' Aboriginality, steps should be taken to give Baryulgil claimants the same rights of action at law as are enjoyed by non-Aboriginal Australians and recommend accordingly.

10.2 The Aboriginal Legal Service, in its submission, as well as pressing for an alternative scheme for compensation for individuals argued that we should also recommend general compensation for the community. In putting forward these claims the Aboriginal Legal Service had identified a program of remedial and compensatory measures which would include:

1. public health measures;
2. environmental rehabilitation;
3. a building program;
4. job creation and development;
5. educational facilities; and
6. land.[1]

10.3 To the extent that compensation is being sought then we must be satisfied that the conditions said to be compensable resulted from the actions of some person or authority who can be called upon to make recompense.

10.4 We consider it important to make a distinction between compensation as such and measures which, as a matter of government policy, it might be desirable to take to ameliorate the condition of the people at Baryulgil. A series of measures have been taken by the Commonwealth on behalf of the community which have been described in Chapter 2. These included the decisions to rehouse the people at Malabugilmah and to acquire Collum Collum station on their behalf. These measures were taken by the Commonwealth through the Department of Aboriginal Affairs as an aspect of programs administered by that Department on behalf of Aboriginal people generally. They were actions of the Commonwealth inspired by its policy of advancing the welfare of Aboriginal people.

10.5 Claims for rehabilitation of the old Baryulgil Square or re-location of the community might have been justified had the Commonwealth not intervened when it did and relieved the mine operators and State Government from such potential obligation. The question does not now arise. The majority of former residents of the Square have been decently rehoused at Malabugilmah, six kms from the Square. Those remaining at the Square have chosen to do so and in doing so have rejected the Commonwealth's offer to

rehouse them. The Commonwealth, rightly in our opinion, was not prepared in the face of public health advice it had received, to outlay funds on housing at the Square. We cannot see how a claim for rehousing at the Square can be regarded as a sensible part of any compensation package.

10.6 The Aboriginal Legal Service recommends a community based program without prejudice to the rights of individuals to pursue claims separately for compensation. They do not say who should provide this compensation or why they should do so. This part of the claim is in reality a list of needs that the Aboriginal Legal Service has identified on behalf of the people. These claims are very loosely related to any suggested culpability of the mine operators or the N.S.W. or Commonwealth Governments. Nor has the Aboriginal Legal Service directed the Committee's attention to any principles that might assist in sheeting home the responsibility for providing the compensation requested.

Public health measures

10.7 The Committee has concluded and it later recommends that an Aboriginal Medical Service should be established in Grafton and that the Service conduct regular clinics in the Baryulgil, Tabulum, and Muli-Muli areas. The Medical Service should cater to the general health needs of the Aboriginal people, and have expertise in the diagnosis and management of asbestos-related disease. However, it is not perceived as a body set up to gather evidence for future compensation cases. Its prime purpose would be the health care of these communities. This facility should be established by the Commonwealth as part of its Aboriginal Health Care Program along similar lines to existing health services.

Environmental rehabilitation

10.8 The Legal Service has produced evidence to support its claim for continuing serious asbestos pollution of the vicinity of the operation of the old mine. This issue has presented the Committee with some dilemmas. Measures to rehabilitate the area largely turn on perceived damages to the health of people in the area. If Baryulgil Square was uninhabited then measures that might be required would be mainly cosmetic and aesthetic. The decision of a significant group to continue to reside at the Square and the presence of the school serving not only the Square residents but the Malabugilmah people as well, precludes that simple option. If the decision of those people who elected to stay is to be respected, as we think that it should, then it is probable that the Square will be inhabited for some years to come.

10.9 The location of the school in proximity to the Square raises particular difficulties. The school is a comparatively new building completed shortly before the closure of the mine. The presence of a school close to the two communities is vital for the educational welfare of the children at the two communities. It has one of the highest proportional enrolments of Aboriginal children of any school in the State. If the school was closed, without another school being built in this location, it would be a total disaster as far as the educational welfare of these children is concerned. Experience of other Aboriginal communities suggests that were the children transported to Grafton or some other large centre in the region, there would be a dramatic decline in attendance. The closure of the school would be utterly demoralising for the Baryulgil/Malabugilmah people. It is therefore imperative that schooling in the area continue to be available without interruption. However, the future health of the children is of equal concern. As long as there is a possibility of future malignant disease resulting from the environment, the future health of the children is at risk. We recommend measures to ensure that the Pollution Control Commission monitors the hazard near the school and indicate steps that should be taken if moving of the school is indicated. However, for reasons already stated, we are

totally opposed to any solution that would involved the children being transported outside the area for their education, even as an intermediate solution.

10.10 We have also concluded that measures should be taken to discourage continued residence at the Square beyond the lifetime of those families that have elected to remain. Even if these recommendations are adopted and limits placed on the duration of permanent residence, the Square will continue to be inhabited for some considerable time to come. The presence of senior members of the community and the significance of the area to the community will mean that there will be a continued flow of people to the Square. These activities will involve a larger group than the actual residents and those people will necessarily be exposed to the potential health hazard. If people are to continue to live at and use the Square then we conclude that effective measures should be taken to reduce, if not eliminate, the health risk.

10.11 However, the dilemma will be readily apparent. If the Square is capable of such rehabilitation that the danger is eliminated or reduced to insignificance and if this result could be achieved without prohibitive cost, then the other measures that we propose would be unnecessary. If, however, no measures could eliminate, or significantly reduce, the potential danger or if the cost was so high as to be unsupportable, then the undertaking of such an enterprise would appear futile. If, as we suspect, the danger (albeit limited) cannot be eliminated or significantly reduced without excessive cost, then, in our view, every step that can be taken should be taken to discourage the continued use of the Square for residential and even social purposes and the placing of strict limitations on the residents as to the uses that they can make of the Square. This would, of course, be almost impossible to enforce in the absence of co-operation by both communities. Implementation of such a measure would require delicate handling and intensive consultation with the groups involved. If the families still resident at the Square can be persuaded to move to Malabugilmah or to houses out of the contaminated areas then that would be the most desirable outcome. Should such entreaties fail to have effect, then the residents should be impressed with the dangers to children and young people and their co-operation in restricting access sought.

10.12 It is evident to the Committee that a campaign for upgrading the housing and improving living conditions at Baryulgil Square has been waged in this Inquiry by representatives of the interests of the residents at the old Square. There is a danger that the Aboriginal Development Commission might be persuaded to fund development beyond the proper needs of the original residents (i.e. who elected to remain at Baryulgil when the majority voted to move to Malabugilmah on 9 June 1980).

10.13 The Committee has been informed that the population of Baryulgil Square has increased by nine people in the course of the current year. It is understood that this is only the beginning of a migration of people from Sydney and elsewhere back to Baryulgil which is an aspect of a general trend that has been discerned for Aboriginal people in N.S.W. living in Sydney to move back to their communities. It is related to the difficulty of obtaining employment and the higher cost of living in Sydney. The people moving back have tended to congregate at the Square. Three previously unoccupied dwellings, which the Department of Aboriginal Affairs regards as sub-standard, have been occupied by the newcomers. There is also evidence of the construction of temporary dwellings. This migration is likely to continue. The Department of Aboriginal Affairs has been informed that a further nine families are contemplating the move back over Christmas and the New Year (1985). Unless it can be established that the risk to health of residence in this area is negligible, then public health authorities in N.S.W., the Department of Aboriginal Affairs (N.S.W), and the Commonwealth Department of Aboriginal Affairs should be taking active steps to discourage this re-population of the Square area. Our recommendation 3 is directed to this end.

Housing and environment

10.14 The Aboriginal Legal Service has identified employment and housing among the major needs of the community. The community for these purposes would extend well beyond Baryulgil and Malabugimah and include residents of Tabulam and Muli-Muli areas. The Aboriginal Legal Service has suggested an ingenious scheme that would involve the establishment of a building co-operative that could employ members of the community. Its efforts would be directed to meeting the community's need for adequate housing. We can see much merit in such a proposal. However, for reasons already given it cannot be reagarded as a measure of compensation. The needs of many of the people for housing have been met at Malabugilmah. The need for housing and employment, which we readily acknowledge, does not proceed necessarily from the manner in which the mine and mill were operated. The housing needs of the people who lived at the Square and were affected by pollution from the environment have been met or are in the process of being met. The employment needs of the people flow not from the operation of the mine but from the closure of the mine. The effect of the closure of the mine was to remove the stable source of employment that the mine provided.

10.15 The need of the Aboriginal people on the North Coast of N.S.W. for employment is a problem they share with aboriginal communities throughout N.S.W. and, indeed, all over Australia. We believe that the appropriate context for these needs to be considered, is the field of government policy on the advancement and welfare of Aboriginal people.

10.16 The Committee has, however, noted some proposals that have been submitted that have sought to create a viable economic base for the Malabugilmah/Baryulgil community. In Chapter 2, we have noted the acquisition of the cattle station property of Collum Collum on behalf of the people. It is currently managed by the Collum Collum Aboriginal Corporation on behalf of both communities. The operation of the property provides some income for the community and employment for about 12 people.

10.17 In paragraph 2.28, we refer to a proposal of the Aboriginal Development Commission to establish a tourist enterprise at Collum Collum. It is understood that opposition to the proposal from within the two communities is such that the proposal in that form is unlikely to proceed. However, consideration is being given to a scheme that would be sponsored by the Sydney City Mission and the Aboriginal Development Commission for rural holiday camps for urban Aboriginal children at Collum Collum. This proposal has wider support in the local community. It would appear to the Committee that these negotiations are a good example of how the resolution of issues of this nature are best left to the communities involved, mediated through Aboriginal organisations such as the Aboriginal Development Commission and the National Aboriginal Conference.

10.18 Similar considerations apply to other representations we have received for services to provide employment and an economic future in the area. Mr Frank Roberts, the National Aboriginal Conference representative for the area, put forward a proposal for the development of rural-based industries and possible future mining operations in the area.[2] Funds were sought from the Committee to facilitate an 'identification study' into the provision of stable employment opportunities. The Committee of course has no funds to disperse for such purposes and the request was referred to the Minister for Aboriginal Affairs, the Hon A.C. Holding, M.P..[3] We have also obtained some information from the New South Wales Department of Mineral Resources covering the outlook for future mining operations in the area. The Committee was told by Woodsreef that it was developing plans to resume operation of the asbestos mine using wet milling techniques to reduce the dust hazard. Such a development might later lead to renewed employment for the community. The area has some potential for development but not in the immediate future.

10.19 The grim reality is that the outlook for securely based employment for the Aboriginal communities in this area is bleak. It is a problem for Aboriginal communities throughout the State and for rural areas generally. The tragedy for the community with which this Inquiry is concerned is that the mine, despite the negative aspects of its operation with which this report is concerned, did provide the community with stability, income, employment and a common experience which appears to have been unifying in its effect. Many of the present discontents stem from the closure of the mine and the loss of the purpose that it provided for the life of the community.

10.20 The Commonwealth government through its Aboriginal affairs programs and its agencies such as the Aboriginal Development Commission, provides funds to support Aboriginal communities and attempts to foster enterprises to provide them with economic support. Both the Commonwealth and N.S.W. Governments are addressing the complex and controversial questions of Aboriginal land rights. We believe that the question of providing employment, housing and land for the communities is best considered in this context. The issues do not arise because of the manner of the operation of the mine and mill and it would not be appropriate for us to address them further.

10.21 In relation to the Aboriginal experience in Australia, the Baryulgil community could not be regarded as particularly disadvantaged. It is mainly with respect to its health that the community can be said to have suffered as a result of the mining operation. We believe that our Recommendation 1 regarding the health care of the community, if implemented, would ensure that the health needs of the community are met promptly. Our recommendations relating to the rehabilitation of the environment flow directly from the mining operation. Hardie Trading have offered to make a contribution in this regard and we have acknowledged this in the recommendation we have made. We have noted that the closure of the school would be a severe blow to the community if it meant that the local children had to be transferred outside the area for their schooling. We believe that such an outcome should be avoided at all costs. The Commonwealth, through the Schools Commission, provides some funds for capital expenditure on schools with a high proportional enrolment of Aboriginal children.[5] The Baryulgil school certainly has a sufficiently high enrolment of Aboriginal children to bring it within the category of schools eligible for funding. The process whereby access to these funds is made involves application to a national panel set up to assess applications for funding. Applications must be made for government schools by the State Education Department and we make recommendations on steps which the Commonwealth and N.S.W. Governments should take regarding the matter of the school.

RECOMMENDATIONS

Individual compensation

10.22 The Committee does not believe it appropriate to recommend any scheme to make individual payments of compensation. It believes that, subject to some technical difficulties, there are adequate avenues of compensation available to members of the Baryulgil community who contract, or have contracted, an asbestos-related disease. However, where those technical difficulties are related to the prospective claimants' Aboriginality (as discussed in paragraph 8.36), the Committee believes that Baryulgil claimants should have the same rights of action at law as are enjoyed by non-Aboriginal Australians. We recognise that any action which may achieve this end would involve a retrospective element. It is our opinion that responsibility for damages which may be awarded as a consequence of the conferral of retrospective rights of action should lie with government rather than with the company which operated the mine and mill.

RECOMMENDATION 1

That the Attorneys-General of the Commonwealth and New South Wales consider ways and means whereby the technical difficulties presented by Aboriginality in seeking compensation may be removed.

Medical Service

10.23 The Committee recommends that an Aboriginal Medical Service be established in Grafton, and that the Service conduct regular clinics in Baryulgil, Tabulam and Muli-Muli. The Medical Service should cater for the general health needs of the Aboriginal communities in the area and have expertise in the diagnosis and management of asbestos-related disease. In the course of the public hearings, Mr Kelso of Hardie Trading (Services) Pty Ltd indicated that the Hardie group would be prepared to assist in the provision of medical services to the Baryulgil people.[6] The Committee is of the view that Hardies' offer be accepted. However it believes that such assistance should be in the form of financial contributions only, and that it would be inappropriate for the Hardie group to have any control over or part in the running of the medical service.

RECOMMENDATION 2

That the Commonwealth establish an Aboriginal Medical Service based in Grafton to cater for the general health needs of the local Aboriginal communities and having expertise in the diagnosis and management of asbestos-related diseases.

Baryulgil Square

10.24 The Committee respects the desire of those persons who remained at Baryulgil Square to continue to live in the place of their choosing. It acknowledges their attachment to an area which has been their home, and their families' home, since 1918. However, the Commitee is gravely concerned about the continuing health risk involved in residence at the Square. It believes that the people who elected to remain at the Square are not truly aware of the risk to themselves and, even more importantly, to the children of their families. The Committee views with extreme concern the possibility that other persons may move to Baryulgil Square with their families, thus exposing themselves and their families to the risk of contracting mesothelioma and/or bronchogenic carcinoma as a consequence of asbestos exposure. The Committee believes that any further migration there should be actively discouraged.

10.25 In the event of new residents of the Square contracting as asbestos-related disease in the future, they might in principle be able to bring actions for negligence or nuisance against Asbestos Mines Pty Ltd, the lessees of the mine site. However, in practice, such actions would face substantial difficulties. Negligence actions would be unlikely to succeed given issues of practicability of precautions available to the lessee of the mine site and the balance of their costs with the risks involved.[7] In any event, persons moving to Baryulgil with knowledge of the continuing health risks would undoubtedly be held to be contributorily negligent (perhaps to a substantial degree).[8] Nuisance actions would also be unlikely to succeed, since the existence of the health hazard prior to new residents having moved to the Square would make it unlikely that the continuing existence of the tailings dump would be held to be a substantial and unreasonable interference with their beneficial use of the land of the Square.[9] In practice, therefore, new residents of the Square would most likely be fully responsible themselves for any health problem occurring as a consequence of asbestos exposure there.

10.26 Accordingly, the Committee suggests to the New South Wales Government that they pass legislation abrogating the 99-year lease of Baryulgil Square to the Baryulgil

Square Co-operative, and replace it with a lease to those members of the Co-operative who, at meetings at the Square on 9 June 1980 relating to the establishment of Malabugilmah, elected to continue to reside at the Square. The user clause of the new lease should permit permanent residence by those persons only, and should make clear that, if the lessees permit any other person to reside permanently at the Square, the lease will be forfeit. The term of the new lease should be expressed to be for the lives of those persons. On the death of the last surviving lessee, all rights in the land would revert to the New South Wales Government, which should prohibit any further residence at the Square unless completely satisfied that no risk to health from residence there remains. The Committee further urges the Minister for Aboriginal Affairs to liaise with the New South Wales Minister for Aboriginal Affairs with a view to having this recommendation put into immediate effect. The Committee realises that this recommendation may appear harsh to those who wish to return to the Square and to current residents who wish their wider families to join them there. However, in the light of the potential health hazard, the Committee considers such measures to be justified.

10.27 The Committee recommends also that the New South Wales Government provided alternative land in the Baryulgil area, sufficiently removed from the mine site, and make that land available for lease, under the terms of the original lease of the Square, by any of those persons now resident at the Square who decide to move away. Such land should also be available to the families of those members of the Co-operative who decided to remain at the Square when the new lease of the Square determines.

10.28 The Committe recommends that the Department of Aboriginal Affairs should continue to use every effort to persuade the residents of the Square of the health risk involved in their remaining there and to encourage them to move to another site sufficiently removed from the danger.

10.29 The Committee further recommends that the Commonwealth Minister for Aboriginal Affairs make representations to the New South Wales Government that they immediately put in train a vigorous decontamination programme at the Square with the aim of reducing as far as possible the health risk to the lessees and their dependants from tailings previously spread at the Square. The Committee notes that Mr Kelso of Hardie Trading (Services) Pty Ltd had stated that the Hardie group would be prepared to join in a programme of environmental rehabilitation,[10] and therefore recommends that the Department of Aboriginal Affairs invite the James Hardie group and Woodsreef Mines Limited to contribute to the decontamination and rehabilitation of the Square.

RECOMMENDATION 3

That the Commonwealth Minister for Aboriginal Affairs recommend to the New South Wales Government that they pass legislation abrogating the lease of the Baryulgil Square to the Baryulgil Square Co-operative Limited, and that the New South Wales Government negotiate a new lease for the lives of those persons who decided in 1980 to remain at Baryulgil Square, and that the lease contain a clause by which the land will be forfeit and revest in the Crown if the lessees permit any person not resident at the Square in 1980 to take up residence or to remain there.

RECOMMENDATION 4

That the Commonwealth Minister for Aboriginal Affairs recommend to the New South Wales Government that they offer to the people who elected in 1980 to remain at Baryulgil Square a 99 year lease of other land in the Baryulgil area, removed from

any risk to health by pollution from the Baryulgil mine site, and that, if and when they accept the offer, the New South Wales Government acquire such land, and negotiate a lease to those persons on the terms of the 1980 lease at Baryulgil Square.

RECOMMENDATION 5

That the Commonwealth Department of Aboriginal Affairs continue to use every effort to persuade the residents of Baryulgil Square to move to another site removed from any risk to health from the Baryulgil mine site.

RECOMMENDATION 6

That the Commonwealth Minister for Aboriginal Affairs recommend to the New South Wales Government that they institute a vigorous programme to decontaminate Baryulgil Square as far as possible.

Baryulgil School

10.30 The Baryulgil school is located 500 metres east of Baryulgil Square and one kilometre north-east of the tailings dump. The prevailing winds do not blow from the direction of the Square or tailings dump towards the school. The potential health hazard at the school arises, therefore, mainly as a result of the former practice of spreading asbestos tailings in the grounds. Since 1977, considerable efforts have been made to eradicate the hazard by sealing heavy use areas with asphalt and adding topsoil and turf elsewhere. At present, there is no evidence of any measurable level of airborne asbestos fibre in the vicinity of the school, and therefore no quantifiable hazard. However, the Committee is mindful of the opinions expressed in a geological survey of the area that asbestos tailings may resurface,[11] and therefore, the possibility of a future health hazard cannot entirely be ruled out. The State Pollution Control Commission should therefore continue to monitor the situation at the school and take any remedial measures to decontaminate the area that become necessary, and the Committee urges the Minister for Aboriginal Affairs to make representations to the New South Wales Government to this effect.

10.31 The Committee has been informed by Woodsreef Mines Limited that renewed development of their mining leases at Baryulgil may occur if the wet process of mining and milling asbestos becomes commercially viable.[12] The Committee recommends that if such renewed development takes place, consideration should be given by the State Pollution Control Commission and the New South Wales Department of Education to any health risks at the school arising from such development, and to the possible need to move the school. If such a need is perceived, the Committee recommends in the strongest terms that the school be re-established at another (safer) site in the Baryulgil area.

10.32 The Committee regards it as imperative that the Baryulgil/Malabugilmah communities contine to be served by a school located in close proximity to the two communities. The school has a very high enrolment of Aboriginal children (80%). It would therefore appear to qualify for assistance under the Capital Grants Program (Aboriginal and Torres Strait Islander element) of the Commonwealth Schools Commission should it be necessary to close the existing school. The Committee recommends that the Minister for Education (Commonwealth) take up the matter with the Minister for Education in the N.S.W. Government with a view to ensuring that appropriate and urgent action is taken, in the event of a decision to close the school on health grounds, to protect the children from health risks in their environment whilst ensuring that there is no interruption to the continuity of their education.

RECOMMENDATION 7

That the Commonwealth Minister for Aboriginal Affairs request the New South Wales Government to direct the State Pollution Control Commission to continue to monitor the health risks from asbestos tailings at Baryulgil Square and to take whatever remedial measures may become necessary.

RECOMMENDATION 8

That, if future redevelopment of the asbestos deposits at Baryulgil should take place, consideration should be given to its possible creation of a renewed health risk at Baryulgil School, and that, if necessary, the school should be resited at another place within the Baryulgil area.

RECOMMENDATION 9

That in the event of the closure of the school, funds should be made available for the immediate construction of a new school building at Malabugilmah; that application by the State Government should be made on the school's behalf to the National Assessment Panel which provides funding under the Capital Grants (Aboriginal and Torres Strait Islander Schools Element) program of the Commonwealth Schools Commission, and that the balance of funds should be provided by agreement between the Commonwealth and State Governments.

Baryulgil mine site

10.33 The Committee considers that it is desirable that the site of the Baryulgil mine and mill be decontaminated and rehabilitated as far as possible. It does not believe that the reafforestation program which has been undertaken there is adequate. Rehabilitation and decontamination of such a site needs more than simple restoration of the appearance of the land. The asbestos fibre remaining in the tailings should be sealed by revegetation to prevent escape through wind or water erosion.

10.34 The Committee notes that the New South Wales Department of Mineral Resources has powers under the *Mining Act* 1973 (N.S.W.)[13] to require the current holders of mining leases to rehabilitate an area, and that in the event of a lessee not complying with that requirement, the Department of Mineral Resources may undertake the work itself and finance the work by the security deposits lodged under the provisions of the Act by the lessee.[14] The extent to which this power would be effective in relation to Baryulgil depends (1) on the conditions relating to rehabilitation attached to the lease, (2) on whether or not the Department of Mineral Resources considers it appropriate to enforce these conditions, given the possibility of the mine being reopened at a future date,[15] and (3) on whether, in the event of the lessee failing to carry out the rehabilitation conditions, if so required, the security deposits lodged under the Act are sufficient to cover the cost of the Department's carrying out the necessary rehabilitation itself.

10.35 The Committee considers that the New South Wales Department of Mineral Resources should ensure that the rehabilitation conditions in the Baryulgil leases are immediately carried out in full, whatever the plans for future reopening of the mine. If the lessee fails to perform any outstanding conditions, the Committee recommends that the Department perform the necessary work itself, utilising the security deposits held against Baryulgil leases.

10.36 The Committee notes that Mr Kelso of Hardie Trading (Services) Pty Ltd indicated that the Hardie group would be prepared to participate in a program for the rehabilitation of the Baryulgil area,[16] and recommends that, in the event of the lessee failing to carry out a requirement to rehabilitate, the Department of Mineral Resources accept the offer of the Hardies group if the $37 000 held in security deposits is insufficient to finance a complete rehabilitation of the site. The Committee further recommends that the Commonwealth Minister for Aboriginal Affairs make representations to the New South Wales Minister for Mines, urging him to ensure that the necessary rehabilitation work is commenced as soon as possible.

RECOMMENDATION 10

That the Commonwealth Minister for Aboriginal Affairs request the New South Wales Government to direct the Department of Mineral Resources to require the lessees of the site of the Baryulgil mine and mill to carry out a complete rehabilitation of the area, and, in the event of the lessee failing to comply, to direct the Department of Mineral Resources to carry out such rehabilitation work itself.

EMPLOYMENT OPPORTUNITIES

10.37 The Committee recognises the need for expanded employment opportunities in the Baryulgil area. It believes that the establishment of such schemes is properly within the province of the Aboriginal Development Commission which is already investigating the feasibility of several projects. The Committee does not consider it necessary to make any special Recommendations on this matter, nor does it consider that such Recommendations would be properly within its Terms of Reference as relating to the alleged health problems created by the mine and mill and to the compensation appropriate for persons suffering disease as a result of the operation of the mine and mill.

ENDNOTES

1 Transcript of Evidence, p. 2316.
2 Transcript of Evidence, pp. 238–239.
3 Transcript of Evidence, p. 240.
4 Transcript of Evidence, pp. 2139–2141.
5 Commonwealth Schools Commission — Program Guidelines 1983 — (Canberra 1983) — at page 9.
6 Transcript of Evidence, p. 1787.
7 Appendix III, paragraphs 1.10 to 1.11 and 1.75 to 1.88.
8 Appendix III, paragraphs 1.119 to 1.123.
9 Appendix III, paragraphs 4.28 to 4.29.
10 Transcript of Evidence, pp. 26, 2633.
11 Transcript of Evidence, pp. 1800–1807.
12 Transcript of Evidence, pp. 2138–2142.
13 Transcript of Evidence, pp. 2523–2527.
14 Transcript of Evidence, p. 2524.
15 Transcript of Evidence, pp. 2138–41, 2521.
16 Transcript of Evidence, pp. 26, 2633.

G.L. HAND
Chairman

APPENDIX I

House of Representatives Standing Committee on Aboriginal Affairs, Resolution of Appointment, 33rd Parliament

(1) That a standing committee be appointed to inquire into and report on such matters relating to the circumstances of Aboriginal and Torres Strait Island people and the effect of policies and programs on them as are referred to it by —

(a) resolution of the House, or

(b) the Minister for Aboriginal Affairs.

(2) That the committee recognise the responsibility of the States and Northern Territory in these matters and seek their co-operation in all relevant aspects.

(3) That the committee consists of 8 members, 5 members to be nominated by either the Prime Minister, the Leader of the House or the Government Whip, 2 members to be nominated by the Leader of the Opposition, the Deputy Leader of the Opposition or the Opposition Whip, and 1 member to be nominated by the Leader of the National Party, the Deputy Leader of the National Party or the National Party Whip.

(4) That every nomination of a member of the committee be forthwith notified in writing to the Speaker.

(5) That the members of the committee hold office as a committee until the House of Representatives is dissolved or expires by effluxion of time.

(6) That the committee elect a Government Member as its chairman.

(7) That the committee elect a deputy chairman who shall perform the duties of the chairman of the committee at any time when the chairman is not present at a meeting of the committee and at any time when the chairman and deputy chairman are not present at a meeting of the committee the members present shall elect another member to perform the duties of the chairman at that meeting.

(8) That the committee have power to appoint sub-committees consisting of 3 or more of its members and to refer to such a sub-committee any matter which the committee is empowered to inquire into.

(9) That the committee appoint the chairman of each sub-committee who shall have a casting vote only, and at any time when the chairman of a sub-committee is not present at a meeting of the sub-committee the members of the sub-committee present shall elect another member of that sub-committee to perform the duties of the chairman at that meeting.

(10) That the quorum of a sub-committee be a majority of the members of that sub-committee.

(11) That members of the committee who are not members of a sub-committee may participate in the proceedings of that sub-committee, but shall not vote, move any motion or be counted for the purpose of a quorum.

(12) That the committee, or any sub-committee, have power to send for persons, papers and records.

(13) That the committee, or any sub-committee, have power to move from place to place.

(14) That a sub-committee have power to adjourn from time to time and to sit during any sittings or adjournment of the House.

(15) That the committee, or any sub-committee, have power to authorise publication of any evidence given before it and any document presented to it.

(16) That the committee in selecting particular matters for investigation take account of the investigations of other Parliamentary committees and avoid duplication.

(17) That the committee have leave to report from time to time.

(18) That the committee, or any sub-committee, have power to consider and make use of the evidence and records of the Standing Committees on Aboriginal Affairs appointed during the previous Parliaments.

(19) That the foregoing provisions of this resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.

4 May 1983

APPENDIX II

Witnesses who appeared before the Committee and persons and organisations who made submissions to the Inquiry but did not appear at public hearings

I. WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Australian Workers' Union (N.S.W. Branch)
Mr R.E. Macbeth

Aboriginal Development Commission
Mr P. Donnelly†
Mr G.A. Miller
Mr M.A. Stewart

Aboriginal Legal Service of New South Wales Ltd.
Mr R. Bell
Mr J.F. Boersig
Mr C.C. Lawrence
Mr C. Patten
Mr A.D. Simpson
Mr R. Tickner

Aboriginal Medical Service Co-operative Ltd.
Dr P. Fagan

Baryulgil Square Co-operative Ltd
Ms V.G. Abraham
Mr N. Walker

Copmanhurst Shire Council
Mr D.K. Andrews
Mr W.N. Munns
Mr I.S. Preston

Department of Aboriginal Affairs
Mr G.N. Brownbill
Mr G.E.P. Hansen

Doctors' Reform Society
Dr J.E. Harrison
Dr M.H.Y. Lim
Dr G. Nossar

Hardie Trading (Services) Pty Ltd

Mr J.C. Kelso

National Aboriginal Conference

Mr F. Roberts

New South Wales Government

Department of Health

Dr A.I. Adams

Dr T. Goh

Department of Industrial Relations, Division of Occupational Health

Dr E. Francis

Mr R.F. Marshall

Dr I.F. Young

Department of Mineral Resources

Mr O.J. Cole

Mr R.J. Jackson

Dr N.L. Markham

Workers' Compensation (Dust Diseases) Board

Dr E.O. Longley

Mr B. Virgona

Private Citizens

Mr G.F. Burke

Dr C.W. Clarke*

Dr G.B. Field

Mrs R. Foley

Professor B.H. Gandevia

Mrs P.N. Gordon

Mr G. Harrington

Mrs I. Harrington

Mr W.H. Hindle

Mr M.J. Joseph

Mrs L. King

Dr J.C. McNulty

Mr R. Marshall

Mr E. Olive

Mr C.R. Sheather

Rev. C.L. Steep

Mr G. Torrens

Mr D.R. Wilson

Public Interest Advocacy Centre

Mr P. Cashman

Mr M. Lynch

Mr L. Strange

Woodsreef Mines Limited

Mr D.K. Barwick

II. PERSONS AND ORGANISATIONS WHO MADE SUBMISSIONS BUT DID NOT APPEAR AT PUBLIC HEARINGS

The Amalgamated Metals, Foundry and Shipwrights' Union
Asbestos Diseases Society Inc.
Australian Building Construction Employees and Builders Labourers' Federation
Australian Consumers Association
Mr P. Brandenburg
Building Workers Industrial Union of Australia (N.S.W. Branch)
Department of Health
Newcastle Workers' Health Centre
Plumbers and Gasfitters Employees' Union
Queensland Workers' Health Centre
Society for the Prevention of Asbestosis and Industrial Diseases
South Pacific Asbestos Association
Survival International for the Rights of threatened Tribal People
Workers Health Centre — Lidcombe

†Mr P. Donnelly also appeared before the Inquiry on behalf of the Department of Aboriginal Affairs.

* Dr C.W. Clarke appeared with representatives of the Doctors' Reform Society.

APPENDIX III

Existing legal remedies available to the Baryulgil people and the difficulties they may involve

Adrian Merritt
B.A., LL.B., Ph.D.
Senior Lecturer in Law
University of New South Wales

Introduction

This Appendix has been prepared at the Committee's request by Dr A.S. Merritt, one of the consultants to the Committee's Inquiry. It is directed to the third term of reference and analyses the adequacy of existing legal provisions to ensure compensation to members of the Baryulgil community who can establish a right of action. References to chapters and paragraphs are references to this Appendix unless indicated as references to chapters and paragraphs in the body of the Committee's report.

Chapter 1
Employer's liability in negligence

NATURE AND ELEMENTS OF THE COMMON LAW CLAIM

1.1 Employees injured as a result of their work, or who contract diseases as a result of their work, can claim damages from their employer if they can establish that the injury or disease was the result of the employer's negligence.[1] The employer has a duty, which can be founded alternatively in contract[2] or in tort[3], to take reasonable care to avoid exposing employees to unnecessary risks of injury or disease.[4] Breach of that duty entitles the employee to claim as damages the loss occasioned by the breach. There are a number of constituent elements of this cause of action, which are outlined briefly below.

Causation

1.2 The attempt to fix liability on the employer must begin with the establishment, as a question of fact, that some act of the employer 'caused' the injury or the disease. To establish causation in a legal sense, it is not necessary that the employer's act should be the sole cause, or even the proximate cause. One merely needs to establish by evidence the chain of events leading to the accident or disease, to identify one of those events as an act of the employer, and to demonstrate a simple 'but for' connection between that event and the various subsequent events in the chain culminating in the injury or contraction of disease.[5]

1.3 The employer's act may be the direction of a particular system of work,[6] the provision of unsafe tools,[7] the arrangement for use of a carcinogenic substance[8] etc. It is sometimes suggested that the employer's act may be an omission[9] — that is, the omission to take precautions or institute safety procedures. It is better, however, in establishing causation to concentrate on a positive act.[10] As will be seen below,[11] the omission to take possible and practicable precautions is best treated as a separate element of the cause of action.

1.4 Once the evidence shows a chain of events, connected causally in the 'but for' sense — i.e. 'but for that event, the following event would not have occurred', and once it is shown that one of those events is an action of the employer, the element of causation is made out *unless* between the employer's act and the eventual injury or disease, an event occurs which is of such positive causal significance that *it*, and not the employer's act, must be seen as the effective cause of the injury or disease.[12] Such an event is said to 'break the chain of causation' between the employer's act and the culminating condition, and is referred to by lawyers as the '*novus actus interveniens*'. It would be a fairly safe generalisation to say that the establishment of a *novus actus interveniens* in cases of occupationally related disease is statistically unlikely — though somewhat less unlikely in the case of occupational injuries.

Foreseeability

1.5 Establishing that the employer has, in a legal sense, 'caused' the injury or disease is not sufficient to fix him or her with liability. It is necessary also to show that the injury or disease was a reasonably foreseeable result of the employer's act.[13] The standard is an

objective, rather than a subjective, one.[14] It is not whether the employer actually foresaw the possible outcome which is relevant, but whether the reasonably prudent employer in those circumstances would have foreseen it. What is more, it is not every event which a reasonably prudent employer would have foreseen which creates liability, but only those which are 'real' even though 'slight' possibilities.[15] The formulae used by the courts to define and describe foreseeability are confusing and descend close to semantic nonsense at times. Perhaps the best way to describe what is necessary is to say that a foreseeable event is one which is not unlikely.[16] An event which, though possible, is unlikely is not 'reasonably foreseeable', but to establish foreseeability, the law does not require an event to be likely.

1.6 Furthermore, it is foreseeability of risk to the particular injured worker which is the basis of liability in this element of the cause of action.[17] Therefore, any characteristics of that worker which make the risk more or less likely are relevant in determining whether an injury to him or her, or the contraction of a disease by him or by her, are reasonably foreseeable.

Preventability

1.7 The third element which must be established is that there were possible and practicable precautions available which would probably have prevented the injury or disease.[18]

1.8 If there were no possible precautions, there can be no liability, for — as stated above — the employer's duty is to take reasonable care to avoid exposing the employees to unnecessary risks of injury or disease, and where there are no possible precautions against a risk, that risk becomes a necessary one.

1.9 Even though precautions are possible, they may not be practicable because of excessive cost, interference with the production process or the involvement of separate risks.[19] The employer is not required to take precautions which are not practicable. It is for the employee to show, by expert evidence if necessary,[20] that there were possible and practicable precautions, though if the employee shows that precautions were possible and alleges that they were practicable, a jury would be entitled to accept that allegation in the absence of evidence from the employer that the precautions were not practicable.[21]

Reasonable Care

1.10 The final element is the establishment that the evidence discloses a lack of reasonable care. Would the reasonable employer have taken care so to organise his or her production process as to eliminate or diminish the risk of which he or she was or should have been aware, and against which possible and practicable precautions were available?[22]

1.11 The answer to that question depends on the weighing of a number of factors. Essentially one must weigh the degree of likelihood of the injury or disease, the gravity of the injury or disease which will result, and the expense and inconvenience of the precautions.[23] In determining what will be reasonable care in the circumstances, the practice of the industry is a relevant though not decisive factor.[24]

Damages

1.12 If the employee can make out the constituent elements of the cause of action, he or she will be entitled to receive a sum of money in damages which will put him or her in the same position, so far as money can do it, as if the breach of duty — and thus the injury or disease — had not occurred. There are a number of established heads of damages under which the courts assess the loss to determine what appropriate pecuniary compensation will be.[25] These are briefly described below. It should be noted that common law damages

are assessed 'once-and-for-all' at the time of trial, and paid in the form of a lump sum.[26] There is no provision for review of the progress of the plaintiff's disability, or for periodic payments.

1.13 (i) *Special Damages* (losses which can be exactly quantified) — (a) medical expenses incurred between the injury or contraction of disease and the date of assessment;[27] and (b) loss of earnings between the injury or contraction of disease and the date of assessment.[28]

1.14 (ii) *General Damages — (a) Pecuniary Losses:* (1) Needs created — expected medical expenses from the date of assessment to the time of recovery or of death if the injury or disease is permanent. In the former case, the expected annual sum is multiplied by the number of years until probable recovery, medically estimated. In the latter case, the expected annual sum is multiplied by the plaintiff's post-accident or post-disease expectation of life, medically estimated;[29] and (2) loss of earning capacity — money which the worker would have earned but for the injury or disease between the date of trial and the date of recovery or retirement (whichever would occur first). The pre-accident wage or salary is the multiplicand. It is the wage or salary *after* tax which is used in this calculation.[30] The multiplier is the number of years between the plaintiff's age at the time of assessment and recovery or retirement age. This calculation is thus based on the plaintiff's pre-accident or pre-disease expectation of life.[31] The resulting sum is discounted to allow for the vicissitudes of life — the chances of interruption to the plaintiff's hypothetical earning pattern due to unemployment, lengthy illness or early death.[32]

1.15 The total sum assessed as pecuniary loss is discounted at 3% because it represents a present receipt of hypothetical or future earnings or expenditures. The sum assessed is intended to be the amount which, invested and earning interest, would provide that hypothetical future sum. The low notional interest rate of 3% is intended to allow for the effect of inflation.[33]

1.16 (b) *Non-pecuniary losses* — Certain standard sums are awarded for the following non-pecuniary losses: (1) loss of expectation of life — where the injury or disease has, on medical evidence, reduced the plaintiff's life expectancy;[34] (2) loss of enjoyment of life — where the injury or disease results in permanent or long-term disability. The underlying basis of this head of damage is to enable the plaintiff to provide him or herself with enjoyments and occupations in place of those no longer able to be pursued because of the disability;[35] and (3) pain and suffering resulting from the injury or disease.[36]

1.17 The aggregate of the sums assessed under these various heads represents the loss resulting from the employer's breach. However, where the court determines that the injured or ill worker negligently contributed to the occurrence of the injury or the contraction of the disease, the damages assessed will be reduced in proportion to the extent of the plaintiff's contribution.[37]

1.18 There are a number of factors in the situation of the Baryulgil community which would cause particular problems in pursuing common law claims for damages arising out of the operation of the mine and mill, and these will be discussed in following sections of this chapter.

Difficulties — establishment of damage: diagnostic problems of asbestos-related diseases.

1.19 The discussion in paragraphs 1.1 to 1.17 has outlined the constitutent elements of a claim by an injured employee against the employer. Such outline is predicated on the fact that the employee is injured, and can therefore show damage. Without assessable damage, there is no case. Where the damage suffered is in the nature of an injury simpliciter — a burn, a broken limb, a cut etc — that necessary precondition presents little problem. But

where the damage is a disease, the position may be more complicated. Some diseases are easily diagnosed. Others are not. If medical science is unable to certify that a prospective plaintiff has a disease, he or she has no loss to put before a court as deserving recompense. Asbestos-related diseases are, in their various ways, particularly troublesome for diagnosticians. The problems that this causes are different in the case of the various diseases, but all of these problems create pitfalls for plaintiffs at various stages of the legal process.

1.20 The main asbestos-related diseases, in the sense of those currently widely recognised, are asbestosis, bronchogenic carcinoma and mesothelioma.[38] It seems possible also that asbestos inhalation can cause, or contribute to, a number of other diseases such as cancer of the larynx and the gastrointenstinal tract.[39]

1.21 One division that could be made of asbestos-related diseases is into those which have high specificity and those which have low specificity. Asbestosis and mesothelioma are diseases of high specificity. In the case of asbestosis, the specificity is 100% — it is caused *only* by inhalation of asbestos fibre. In the case of mesothelioma, medical opinion differs about the degree of specificity. Some would place it at 100%,[40] some at less.[41] However, whatever the opinion, all would agree it is a disease of high specificity, which, in the majority of cases, is caused by asbestos fibre inhalation. It is also a disease of low frequency,[42] so that the number of cases which cannot in any way be linked to asbestos inhalation is very small.

1.22 On the other hand, bronchogenic carcinoma (commonly called lung cancer) is a disease of low specificity — that is, there are a large number of recognised 'causes',[43] so that there is no necessary link to asbestos fibre inhalation; and it is a disease of high frequency so that the number of cases where there is no apparent connection to asbestos fibre inhalation is large.[44] Nevertheless, it is accepted by medical science that asbestos fibre inhalation is one of the various causes of bronchogenic carcinoma.[45] To further complicate matters, the causative link is much greater where the person inhaling asbestos fibre is also a smoker, and smoking, without any asbestos fibre inhalation, can of itself cause bronchogenic carcinoma.[46]

1.23 Bronchogenic carcinoma is a disease of comparatively easy diagnosis and the problems associated with it will be discussed later (paragraphs 1.51 to 1.57). Asbestosis and mesothelioma, however present distinct but serious diagnostic difficulties. In the case of mesothelioma, the difficulty is that the disease is impossible of diagnosis until (usually) some thirty years after the inhalation of asbestos fibre responsible for it.[47] Thus the problems related to this disease are more appropriately discussed elsewhere, particularly in the sections related to limitation of actions and the Compensation to Relatives claim, and the measure of damages in such claims.[48] The disease is fatal, incurable, and the expectation of life after diagnosis is measured in months rather than years.[49] There is very little chance that a person diagnosed as suffering this disease could survive the period between initiation of a claim and the actual court hearing of that claim.[50]

1.24 Asbestosis, on the other hand, is not necessarily fatal, and, even when it is, it provides a much more lingering form of death[51] and quite different diagnostic problems. The problem here is that, while the disease is relatively easy to identify by autopsy, it is difficult to diagnose in a living sufferer.[52] Medical science has established a number of indicative factors,[53] but differs as to the number and priority ranking of those which would justify a positive diagnosis. The generally recognised indications of asbestosis are:

first (and essentially)	—	exposure to asbestos fibres or dust
thereafter	—	breathlessness
	—	clubbing of the fingers
	—	basal rales and crepitations
	—	radiological changes
	—	altered lung function.[54]

The literature[55] — and the evidence given to this Committee[56] — indicates serious disagreement as to the relative significance to be given to these various factors (other than the first). It is therefore possible that a disabled plaintiff will be unable to obtain a positive diagnosis of asbestosis on which to base a claim — even though, on eventual death, autopsy may establish an advanced case of the disease.[57]

Difficulties in finding a solvent defendant — action against the employing company

1.25 The evidence supplied to the Committee in submissions and hearings[58] shows that, from 1944 to 1979, the employing company which operated the Baryulgil mine and mill was Asbestos Mines Pty Ltd, a company registered in New South Wales.

1.26 As employer, this company — Asbestos Mines Pty Ltd — would be the logical defendant in any actions for damages by members of the Baryulgil community employed at the mine and mill. However, the mine and mill ceased operation in 1979.[59]

1.27 On 6 December 1983, a company search carried out at the Committee's request[60] disclosed that Asbestos Mines Pty Ltd was still in existence, the current shareholders being Woodsreef Mines Limited (hereafter referred to as Woodsreef) who hold 19 999 shares and Clarence River Exploration Ltd who hold one share. The company's balance sheet as at 31 December 1982 showed that it had no funds whatsoever. That Balance Sheet is reproduced below.

ASBESTOS MINES PTY LTD

Balance Sheet as at 31st December 1982

Share Capital and Reserves	*1982*	*1981*
Authorised Capital		
50,000 ordinary shares of $2 each	$100 000	$100 000
Paid up Capital		
20 000 ordinary shares of $2 each fully paid	40 000	40 000
Share Premium Reserve	9 000	9 000
Capital Reserve on Restructure	74 729	74 729
	123 729	123 729
Less: Accumulated Losses	123 729	123 729
	$ —	$ —

1.28 It is therefore clear that in the event of any successful claims being made by members of the Baryulgil community, previously employed by Asbestos Mines Pty Ltd, against that company, the company would be unable to pay any damages out of its own funds.

1.29 In such a situation, the plaintiffs would normally look to the damages awards being paid by the insurers of the defendant company. As a company operating in New South Wales, Asbestos Mines Pty Ltd would have been required by Section 18(1) of the Workers' Compensation Act to carry not only a workers' compensation policy covering all their employees but also a policy covering common law liability to their employees. In its present form, Section 18 requires the common law cover to be in an unlimited amount. That form is the result of several successive amendments to the required amount of cover. This requirement of a common law extension policy was introduced by the *Workers' Compensation (Amendment) Act No. 21 of 1953* with a minimum cover of £3000 per award of damages.[61] By Act No. 32 of 1958 it was increased to £20 000,[62] by Act No. 98 of 1967 to $50 000,[63] by Act No. 44 of 1975 to $100 000[64] and by Act No. 79 of 1980 to an unlimited amount.[65]

1.30 While it is not inevitable that a company would have taken out Workers' Compensation extension policies limited to the statutory minimum, most companies did so, and it is extremely likely that Asbestos Mines Pty Ltd would have adopted that approach.

1.31 As well as the Workers' Compensation common law extension policies, most companies also hold public liability policies which would cover liability for damages awards at common law to persons injured by the company's operations, whether those persons injured were employees, independent contractors or members of the 'general public'. There is no legal bar to limitations of the insurer's liability in such policies, and most companies would negotiate a lower premium by agreeing that the insurer would be liable only to a limited amount of the damages award. It is likely that any public liability policies held by Asbestos Mines Pty Ltd would have contained such a limitation on the insurer's liability.

1.32 In the event of a successful damages claim by an employee against the employer where the amount of the award is greater than the sum to which the insurer's liability is limited, the employer-defendant would satisfy that part of the award covered by the insurance policy by calling upon the insurer for the appropriate sum, and would then satisfy the remaining portion of the award out of his or her own funds.

1.33 Where a successful claim was made by a former employee of Asbestos Mines Pty Ltd, if the award was greater than the sum to which the insurer's liability was probably limited, while the insurance policy might be available to satisfy the award to the extent of the limitation, Asbestos Mines Pty Ltd, having no funds, would be unable to supply the shortfall.[66]

1.34 In the case of the Workers' Compensation Common Law Extension Policies, the relevant date determining the amount of the insurer's liability is the date of the damage for which the award of damages is made. In the case of occupationally-induced diseases, the date of damage is the date on which the disease is contracted.[67] (As will be seen, there are particular problems in determining the date on which an asbestos-related disease is contracted.)[68] Thus, if a Baryulgil claimant achieves an award of damages against Asbestos Mines Pty Ltd, the amount of the award as to which he or she could look to that company's insurer for satisfaction would be the amount to which the Workers' Compensation common law extension policy was limited at the time of contraction of the disease. (The amendment of S.18(1) to require policies in an unlimited amount — by Act No.79 of 1980 — occurred after the mine and mill had closed and therefore after the last

date on which a worker could have contracted a disease as a result of the operation of the mine and mill, even though the symptoms might not appear till after 1980.)

1.35 In the case of public liability policies, there are two possible forms in which the date determining the amount of the insurer's liability may be set. In one type of policy, the relevant date is — as in the Workers' Compensation Common Law Extension Policies — the date on which the damage was done. In the other type of policy, it is the date of the claim against the insured. Thus, if the public liability policies of Asbestos Mines Pty Ltd were of the first type, and contained a limitation on liability, a successful Baryulgil claimant would be able to look to the insurer for satisfaction to the amount of the limitation in force at the time the disease was contracted. If the policies were of the second type, he or she would be able to look to the insurer for satisfaction to the amount of any limitation in force at the time he or she makes the claim for damages. Since the amount of limitations has tended to be gradually increased, it would clearly be to the advantage of Baryulgil claimants if the public liability policies of Asbestos Mines were of the second type.

Difficulties in finding a solvent defendant — problems related to the 'corporate veil'

1.36 In the event that the insurance policies of the employing company were limited to sums substantially less than the damages likely to be awarded (and, as seen, the employing company has no funds to pay the difference),[69] the claimants could attempt to fix liability as employer not on Asbestos Mines Pty Ltd but on the parent company. This involves the procedure which the law describes as 'piercing the corporate veil' and can be done only in exceptional circumstances.

1.37 Corporations — companies in Australian parlance, by the process of incorporation pursuant to the various States' Companies Codes,[70] acquire a legal personality independent of the corporators, the shareholders.[71] It is this independent corporate entity which carries on the company business, enters into contracts, such as contracts of employment, and incurs rights and liabilities under those contracts. It is therefore the company which is the employer, obliged to take reasonable care for the safety of the company's employees, and liable for damages for breach of that duty.

1.38 Courts have been traditionally averse to allowing any lifting of the veil of incorporation to allow liability to pass from the company to the corporators.[72] However in certain circumstances they will take this step, more readily in the United Kingdom than in Australia. As Gower says in his text on company law:

> In cases where the veil is lifted, the law either goes behind the corporate personality to the individual members, or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated companies. The latter situation is often merely an example of the former, the individual members being corporate rather than human beings, but even where that is so the two situations are worth distinguishing since there seems to be a greater readiness to lift the veil in the latter.[73]

1.39 The corporate veil may be lifted either where the Companies Acts expressly provide for it,[74] or — *in exceptional cases — without express statutory provision where* the courts deem such action to be required in the interests of justice.[75] It is the latter situation which is relevant in relation to fixing liability for damages for lack of reasonable care on a parent company, for this is nowhere covered by legislative provision. However it is worth noting that, in England at least, companies legislation treats the various companies in a group as one for certain purposes, where there is a relationship between the grouped companies such that a parent company controls the various subsidiary or sub-subsidiary companies.[76]

1.40 To a large extent, the courts, in fixing liability on a parent company within a group, treat the subsidiary companies as having acted as *agents* for the parent or holding company, conducting the parent company's business for it. It is not necessary for such a result that there be an express agency contract. In *Smith, Stone, and Knight Ltd* v *Birmingham Corporation*,[77] Atkinson J. listed six factors which pointed to an agency relation between parent company and subsidiary. Gower summarises the six points thus:

1) Were the profits treated as those of the parent company?
2) Were the persons conducting the business appointed by the parent company?
3) Was the parent company the head and brain of the trading venture?
4) Did the parent company govern the adventure and decide what should be done and what capital should be embarked on it?
5) Were the profits made by its skill and direction?
6) Was the parent company in effectual and constant control?[78]

1.41 However, these points, even if satisfied, are merely indicators, They are not conclusive. Gower states that 'it seems impossible to deduce from the decisions any one set of criteria which will be decisive in all circumstances. Much will depend on who will benefit or be damnified if the veil is lifted.'[79] A little later he states that 'much seems to depend on the nature of the legal issue. If that concerns the construction of a commercial contract and a rigid application of the corporate entity principle would defeat the probable intention of the parties, the courts will tend to put a construction on it which involves disregarding that principle,'[80] since in the words of Lord Reid in *Holdsworth & Co.* v *Caddies* [81] 'an agreement *in re mercatoria* . . . must be construed in the light of the facts and realities of the situation.'

1.42 This might suggest that the further one gets from commercial questions, the less likely are the courts to agree to a lifting of the veil. Claims for personal injury damages against companies are not in any way 'agreement[s] *in re mercatoria*.' In fact, the award of damages will give rise to the very situation with which *limited* liability was initially intended to deal — the attempt to make the corporators personally liable for debts which the corporation could not meet. For a damages award is a judgment debt. The successful plaintiffs are judgment creditors, and it would seem a case par excellence for leaving the corporate veil in place.

1.43 Nevertheless, after stating that much 'seems to depend on the nature of the legal issue involved and on whether the courts are being asked to lift the veil in the interests of the members or group or in the interests of their creditors',[82] Gower goes on:

> However, to this last *cui bono* factor, the attitude of the courts seems somewhat ambivalent. In some respects they find it easier to lift the veil when that is in the interests of the members or group since then the circumstances are remote from those in *Salomon's* case and they are less clearly constrained by it. On the other hand, though generally unexpressed, there is a very reasonable feeling that those who have chosen the benefits of incorporation must bear the corresponding burdens, so that if the veil is to be lifted at all that should only be done in the interests of third parties who would otherwise suffer as a result of that choice.[83]

1.44 Of those who would suffer as a result of the corporators' choice of the benefits of incorporation, none could be more obvious, or arguably more deserving, than employees injured in the pursuit of the corporators' financial advantage. Therefore, it is possible that this unexpressed feeling amongst English judges would lead them to lift the veil in the case of injured employee plaintiffs seeking to find a solvent defendant in the parent company. However, as no such case has yet arisen in England — or, at least, been reported — this remains supposition.

1.45 More immediate, however, is the question of the approach of Australian courts to the lifting of the corporate veil in the interests of third parties. Given the approach so far taken in this country, it seems unlikely that such an avenue would be available to any claimants from Baryulgil. In his *Principles of Company Law*, in the appropriate chapter dealing with 'Delimitation of the Corporate Entity', Ford noted that:

> Windeyer J. in *Gorton* v *F.C.T.* (1965) 113 C.L.R. 604 at 627 discerned 'an increasing tendency of courts in England, and perhaps more markedly in the United States, to retreat from the position where they must refuse to look behind the legal personality which the law has given to a private corporation, and to examine the purpose of its creation and the manner of its control.'[84]

and he concluded that: 'The increasing tendency of English and American courts to look behind the corporate veil noted by Windeyer J. is not matched in Australia and probably future development lies with the legislature rather than the courts.'[85]

1.46 Thus, there is little likelihood that claimants from Baryulgil, formerly employed by Asbestos Mines Pty Ltd, could circumvent the problems presented by an employing company with no assets and an unavailable or limited insurance policy, by making the parent company liable as effective employer.

1.47 On the other hand, if the court — which, in the Baryulgil situation, would in the first instance be either the District Court or the Supreme Court, depending on the size of the damages claim — were prepared to entertain a case against the parent company of Asbestos Mines Pty Ltd, there would seem to be quite a good chance of proving the necessary agency relationship — at least where the damage could be shown to have been sustained during the period between 1953 and 1976 when the parent company of Asbestos Mines Pty Ltd was James Hardie Asbestos Ltd.

1.48 The evidence given to the Committee shows that the Hardie companies operated very much as one, with direction and technical expertise emanating from the top.[86] Thus, if the court was prepared to lift the corporate veil, a plaintiff who could show he had contracted an asbestos-related disease at some time between 1953 and 1976, would probably be able to show that James Hardie Asbestos Ltd was the effective employer. If that plaintiff could then establish the other necessary elements of his cause of action — causation, foreseeability etc. — so as to achieve an award of damages against James Hardies Asbestos Ltd, that company would have the funds to meet any shortfall between the cover provided by its insurance policies (supposing that the policies have not been invalidated by the current litigation) and the actual sum of damages awarded, (or to meet the complete award, if the insurance policies are invalidated).

1.49 However, if the disease was contracted after 1976, or was contracted by gradual process which extended into the 1976-1979 period, it would be necessary to sue or to join as defendant the parent company after the sale of the Hardie group's shareholding in Asbestos Mines Pty Ltd to Woodsreef. It would therefore be necessary to show again that the new parent company was the effective employer and that Asbestos Mines Pty Ltd was merely the agent of that company. The evidence given to the Committee by Woodsreef discloses an integrated structure here also,[87] though a court might not find it as compelling as that relating to the Hardie group.

1.50 The point must be reiterated, however, that Australian courts are extremely unlikely to be prepared to lift the corporate veil to allow such actions to be brought. Therefore, it would seem that claimants from Baryulgil would be restricted to suing Asbestos Mines Pty Ltd and relying for satisfaction of successful claims on the insurance policies of that company with whatever limitations they contain.

Difficulties — establishing causation.

1.51 As seen in paragraphs 1.2 to 1.4, the first of the elements of a claim for damages against an employer by an injured employee is causation. It must be shown that some act of the employer caused the injury in the sense that it was a link in a (legally) unbroken chain of causation — that, 'but for' that act, the injury would not have occurred. The establishment of a system of working in which a plaintiff was exposed to the inhalation of asbestos fibre would be such an act. However, that fact would not be sufficient in a claim for damages for an occupationally-induced asbestos-related disease. It would need to be proved that the inhalation of asbestos, to which the employer subjected the employee, was the cause of the disease from which the employee suffers.

1.52 Two problems result for employee claimants from the necessity to prove this second fact, depending on whether the disease is of high or low specificity. These problems would arise in a claim based on mesothelioma on the one hand and bronchogenic carcinoma on the other. Asbestosis does not present serious problems in the establishment of causation. The problems it presents arise in the establishment of damage, (possibly) of foreseeability and preventability, and in the measure of damages. This is because asbestosis is generally dose-related.[88] It is generally necessary for a person to be exposed to high doses of inhaled fibre over a medium term or lower doses over a long term to cause the scarring of lung tissue which produces the condition known as asbestosis. Where a plaintiff can show first, a diagnosis of asbestosis and second, occupational exposure to large doses of asbestos fibre over a moderately short period or to moderate doses over a long period, then it would be readily accepted on the balance of probabilities that it was the occupational exposure which caused the disease, rather than any possible minor exposure encountered in his or her non-work environment.

1.53 Mesothelioma, however, is generally regarded as not being so clearly dose-related.[89] It can apparently be caused by a very small exposure to asbestos fibre, both in quantity and in duration. Since asbestos products are very widely used in this country — or were up till a short time ago, it may be difficult to establish that it was the exposure at work which caused the disease, rather than exposure in some other place and at some other time. Thus even where a plaintiff can show that he or she has mesothelioma and that he or she was exposed to asbestos fibre at work, the causative link between these two facts may be difficult to prove, and as already stated it is the chain of causation between employer's act and injury, unbroken by an independent intervening cause — a *novus actus interveniens* in legal terminology — which is the first constituent of an employee's claim for damages.

1.54 Bronchogenic carcinoma presents a different problem in relation to the establishment of causation. Whereas with mesothelioma it is (relatively) certain that asbestos exposure caused the disease but uncertain if it was the occupational exposure and not some other, where a plaintiff is suffering from a disease of low specificity it may be possible to establish first that he or she has the disease, second that he or she was exposed to asbestos at work, but not possible to establish that asbestos exposure — whether at work or elsewhere — caused it, rather than one of the other possible causes. This is particularly so where, as with bronchogenic carcinoma, the disease is of high frequency in the general population even without any significant exposure to asbestos. And where the person can be shown to have been subject to another widely recognised cause of the disease, such as cigarette smoking, the problem of proving that it was the occupational exposure to asbestos which caused the disease can be seen to be a serious one.

1.55 There is a further difficulty concerning the establishment of causation which may be encountered in relation to all of the asbestos -related diseases, and which could stand in the way of Baryulgil claimants if, despite the associated problems discussed in paragraphs

1.36 to 1.50 they attempted to make the parent companies of Asbestos Mines Pty Ltd liable as employer. It is not enough to prove that a disease is contracted because of one's employment. One must show that it was contracted in the service of the *defendant* employer. Again, this difficulty operates slightly differently in cases of asbestosis and mesothelioma.

1.56 Since asbestosis is caused by exposure over a period of time, it is possible that a plaintiff has been exposed in two separate, probably consecutive employments, and it is the sum of that exposure which has caused the disease. It is not accurate to say that either the first or the second employer independently caused the disease. That plaintiff would therefore need to join both employers as defendants, and — if he or she were successful in obtaining an award of damages — they would be apportioned between the defendants. Baryulgil claimants would have been employed by only one immediate employer — Asbestos Mines Pty Ltd. For even though the entire shareholding changed in 1976, the corporate entity remained intact. Therefore, if they chose to sue Asbestos Mines Pty Ltd for asbestosis contracted over a period spanning the 1976 sale, no problem of suing two defendant employers would arise. But if claimants whose asbestosis was contracted over that period wished to ensure a solvent defendant by seeking to pierce the corporate veil, they would have to sue, as joint defendants not simply James Hardie Asbestos Pty Ltd as effective employer up until September 1976 but also Woodsreef Mines Ltd as effective employer after that date.

1.57 Mesothelioma is not contracted by gradual process. Therefore if it were possible to pinpoint the time of contraction, a claimant suffering from this disease would be able to sue the employer at that time, even though before and after that time he or she had been in other employments which also involved exposure to asbestos. But it is not possible to pinpoint the time of contraction. Mesothelioma, as mentioned in paragraph 1.23, is a disease of long latency, impossible to diagnose during the latency period. While some cases have occurred where symptoms appeared only a year or so after the exposure responsible for the disease, the more usual latency period is about 20 to 30 years.[90] Thus where a person is diagnosed as suffering from mesothelioma, the exposure responsible could have occurred at any time in the preceding 30 years. If that person had been in a number of employments involving asbestos exposure during that period, it will be impossible to identify the one in which the disease was contracted. It is not possible to overcome the problem by joining all the employers as defendants since only one will have caused the disease, and it is not possible to tell which one. A Baryulgil claimant diagnosed at some future date as suffering mesothelioma would therefore be able to sue a more solvent parent company only if his employment at the Baryulgil mine and mill had been solely pre-September 1976 (in which case he could sue James Hardie Asbestos Ltd), or solely between September 1976 and 1979 (in which case he could sue Woodsreef). He could of course simply sue Asbestos Mines Pty Ltd, but — as seen in paragraphs 1.27 to 1.28 — a successful claim against that company might not be paid.

Difficulties — establishing foreseeability

1.58 As seen in paragraphs 1.5 to 1.6, it will be necessary for a Baryulgil claimant to show that his contraction of an asbestos-related disease was a reasonably foreseeable result of his exposure to inhalation of asbestos fibre at the mine or mill. This does not mean that he must establish that Asbestos Mines Pty Ltd (or James Hardie Asbestos Pty Ltd or Woodsreef, in the event of a successful piercing of the corporate veil),[91] actually knew that the disease he contracted could result from exposure of the degree he suffered, but simply that a reasonably prudent employer, in those circumstances, would have realised that contraction of the disease was a not unlikely result of the exposure.

1.59 In the absence of evidence that the defendant actually knew of the risk, the question of what the reasonably prudent employer would have foreseen will depend on the knowledge available within the industry at the time the claimant was exposed to the inhalation.[92] In the case of *Stokes* v *Guest, Keen and Nettlefold (Bolts and Nuts) Ltd*[93] Swanwick J. said:

> the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know, . . . where there is developing knowledge, he must keep abreast of it and not be too slow to apply it . . .

1.60 The Committee has received a considerable amount of evidence from the Aboriginal Legal Service and the Doctors Reform Society on the state of knowledge of the risks created by exposure to asbestos fibre inhalation.[94] It has also received evidence from Hardie Trading (Services) Pty Ltd, hereafter referred to as Harding Trading,[95] and Dr Geoffrey Field[96] commenting on the position presented by those other witnesses.

1.61 The question of the foreseeability of various asbestos-related diseases has already been judicially determined in a number of cases. These need to be examined in some detail as the different diseases present different problems.

(a) Foreseeability of Asbestosis

1.62 The question of when a reasonable employer would have become aware of the risks involved in exposing employees to inhalation of asbestos fibre was explored in *Grove* v *Bestobell Industries Pty Ltd* [97] and *Cuthill* v *State Electricity Commission of Victoria.*[98] Both cases were applications for extension of the limitation period (see paragraphs 1.89 to 1.104) and the issue for decision was, inter alia, whether there was evidence on which the Court could form an opinion that the applicant had a right of action for negligence against the defendant. This necessitated the Court deciding whether there was evidence that the risk of injury was foreseeable.

1.63 In *Grove's* case, the applicant had been employed as a storeman, working in close and continuous proximity to products containing asbestos particles, from 1945 to 1977. In the latter year, a writ claiming damages for negligence and/or breach of statutory duty was issued. Given the nature of asbestosis, which results from a continued exposure, it was necessary for the applicant, in establishing evidence of foreseeability, to show that the risk of asbestosis was foreseeable at the beginning of his period of exposure — that is, in 1945. In his judgment, Dunn J. said:

> It was submitted on behalf of the respondents that there was no evidence that, at material times, reasonable employers knew facts which would make it their duty to take precautions to protect employees who had close and continuous contact with asbestos particles from asbestosis . . .
>
> *The inference is, I think, available that persons conducting businesses such as the business conducted by the respondents knew or ought to have known, at material times, that employees such as the plaintiff were from time to time made so uncomfortable by the presence of asbestos particles in the air as to voice complaints.*
>
> *The inference is also available,* this being so, *that a reasonable employer* concerned to take care for the reasonable comfort and health of his employees *would have made inquiries, of persons well versed in matters of industrial hygiene, as to means of improving the lot of the employees.* Such persons have been available in Queensland since at least 1937 (see s. 61 of the Health Act 1937-1976).
>
> *The inference is thus available that the making of such inquiries would have provided the employer with an expert opinion such as was expressed by Dr. Ringrose.*
>
> *The inferences are therefore available that a reasonable employer ought to have known of the risk and of the necessity for precautions,* and that the failure to take precautions was a breach of duty.

(I should mention that, whilst considering the matter, I happened upon the Asbestos Industry Regulations of the United Kingdom. They — in their original form, they may have been amended — are to be found in 1931 S.R. and O., at p. 410. They were not produced at the hearing. They may in the end prove relevant, having regard to the date when they were promulgated and to the circumstance that the respondents are an English company and one of its subsidiaries.[99] (emphasis added)

His honour concluded that an order extending the limitation period should be made. This decision involved the conclusion that there was evidence supporting the claim that the risk was foreseeable.

1.64 In *Cuthill* v *S.E.C.*, the appellant was employed as a trade assistant to a fitter and boilermaker from 1964 to 1978, an occupation which exposed him to inhalation of asbestos fibre. In 1979 he was diagnosed as suffering from asbestosis. He sought an extension of the limitation period to bring a claim for damages for negligence and breach of statutory duty. While the circumstances of this case only necessitated his establishing that the risk of his contracting the disease would have been foreseeable in 1964, Starke J. in his judgment stated:

. . . I turn then to the Harmful Gases, Vapours, Fumes, Mists, Smokes and Dusts Regulations 1945. These regulations were made pursuant to the Health Act and were gazetted on 7 February 1945. There have been amendments in 1949, 1955 and 1965. None of these amendments has any bearing for present purposes. The long recital indicates, inter alia, that the purpose of the regulations is to safeguard the health of persons having to work where quantities of gases, vapours, fumes, mists, smokes or dusts are inhaled and to limit the quantities inhaled so that health will not be endangered or impaired. The limit set in the regulations in respect of asbestos is 5 million particles per cubic foot of air. Various safety devices are required by the regulations including a suction exhaust apparatus respirators and air masks. A breach of the regulations is made an offence with a penalty prescribed. The fact here is that there is no suggestion that any of the safeguards were being used. The fact is that the applicant was heavily exposed to asbestos dust for about 12 years. He testified that at the end of a shift his hair, eyebrows and clothes were covered with white dust. He also testified that he breathed in this dust. The fact is that his condition was said by a medical expert to have been caused by the inhalation of asbestos dust. The regulations were designed to protect the health of employees against inhaling noxious dusts. The appellant was long exposed to the inhalation of such dusts. He contracted a disease as a result of such inhalation. *The inference to be drawn in my opinion is that since 1945 material could be procured to provide evidence that to expose a man in such a way without safeguards constituted negligence* on the part of the respondent. I am also of opinion that these facts permit an inference to be drawn that that material existed to show that there had been a breach of statutory duty. If I am right in either or both of these conclusions it was quite apparent that the negligence or breach of statutory duty were a cause of the injury sustained by the appellant. The only other matter standing in the way of the appellant is whether there was material to justify the inference that the respondent knew or ought to have known of the hazard to health and the safeguards. It is to be remembered that the regulations became law in 1945. It is notorious that the respondent is a State instrumentality which employs many workers in different spheres of employment in this State. In my opinion an inference may be drawn that evidence must be available that such an employer knew or ought to have known the dangers attendant on inhaling asbestos dust and the attendant safeguards, particularly when such dangers and such safeguards are emphasized in regulations as early as 1945.[100] (emphasis added)

In addition, he considered the case of *Grove* v *Bestobell Industries Pty Ltd*, saying:

There is however another basis in my opinion for allowing this appeal.

In *Grove* v *Bestobell Industries Pty Ltd.*, [1980] Qd. R. 12, Dunn, J. had a similar application before him. At p. 13 he said:

". . . I shall rule on an objection which was taken to paragraphs 8 and 9 of Dr. Ringrose's affidavit. Those paragraphs read as follows:

> "8. The dangers associated with working with asbestos have been apparent for at least 25 to 30 years.
>
> "9. Precautions should be taken to avoid the danger to health by protecting the worker from the inhalation of asbestos dust. It has been apparent for at least 20 years the best precautions which should be taken are to ensure the place of work has plenty of air ducts and good ventilation and that face masks are worn by people exposed to the asbestos dust."
>
> It is to be remembered that the exercise is to ascertain whether evidence exists to support the plaintiff's claim. Where better to find such evidence than in the judgment of a Court of coordinate jurisdiction? The truth of the facts stated is not proved but on the probabilities the existence of such facts is proved. The paragraphs of Dr. Ringrose's affidavit set out above were found by the Judge to be the personal, expert opinion of the doctor. *In effect he says to medical experts the danger has been known for 25-30 years and the best precautions for 20 years. Australia is not such a large country that knowledge of facts in this industrial area over a long number of years in Queensland would not have been filtered over the border.* On the probabilities *I would infer that such knowledge was known in Victoria during the same period and either was or ought to have been known to the respondent.* I might add that neither the learned Chief Justice nor the parties would have had the judgment in Grove's case available to them prior to the delivery of judgment. Accordingly in my opinion the appellant has established what it is necesssary for him to make out in order to obtain an extension of time under the section.[101] (emphasis added)

Anderson J. agreed with Starke J.[102] Brooking J. disagreed that there was evidence before the court on which a finding of foreseeability could be based,[103] but his disagreement was based on a technical point — that the *Harmful Gases, Vapours, Fumes, Mists, Smokes and Dusts Regulation*[104] did not form part of the material before the court on which the opinion that there was a cause of action could be formed, and that in relation to the decision in *Grove* v *Bestobell Industries Pty Ltd:*

> . . . the existence and availability of the necessary evidence must be proved by admissible means; and, except where the evidence is receivable as an admission, there is no principle of law whereby evidence given in legal proceedings between different parties (assuming for the moment the giving of that evidence to be sufficiently proved by reference to a law report) can be used in other legal proceedings as evidence of the truth of what was asserted . . .[105]

On the basis of *Grove* and *Cuthill,* it could be argued, then, with some confidence that, in a claim for damages by a Baryulgil worker, the risks of asbestosis would be held to have been foreseeable to the defendant by 1950 if not by 1945.[106]

(b) Foreseeability of Bronchogenic Carcinoma and Mesothelioma

1.65 It is incontestable that knowledge of the risks of contraction of these diseases is much more recent than knowledge of the risk of asbestosis.[107] Roughly stated, the risk of bronchogenic carcinoma in relation to asbestos was established in the 1950s[108] and that of mesothelioma in the 1960s.[109] Thus, these risks would not have been foreseeable to the reasonably prudent employer in the years before the establishment of that knowledge even though the risk of asbestosis was foreseeable in the 1940s. It was for this reason that the plaintiffs in *Joosten* v *Midalco Pty Ltd*[110] and *Footner* v *Broken Hill Associated Smelters Pty Ltd*[111] failed in their claims. In both cases, the plaintiffs had contracted mesothelioma. Joosten was from 1950 to 1953 an office worker in the office of Midalco Pty Ltd, which was situated some 60 to 100 yards from that company's crocidolite mine at Wittenoom. She contracted the disease through exposure to fibres blown from the mine to the office. Footner was a boilermaker at Port Pirie from 1944 to 1952 and contracted mesothelioma following exposure to asbestos fibre through cutting gaskets from a material known as millboard which contained asbestos.

1.66 The crucial factor in both these cases was the amount of fibre to which the two workers were exposed, and the distance from the point of exposure in *Joosten's* case.

Briefly put, it was found not to be foreseeable at the time in question that exposure to quantities of fibre as small as those to which the workers were in fact exposed presented a risk of contraction of an asbestos-related disease. The amount was (arguably at least) not sufficient to create a risk of asbestosis, and the risk of other diseases was not known.

1.67 Thus in *Joosten*'s case, Wallace J. said:

> . . . it is common ground that knowledge of the disease Mesothelioma did not exist at the time the plaintiff was in the defendant's employ and certainly not its cause. Mr. Olney has endeavoured to surmount that problem by equating the existence of knowledge of the hazards of asbestos mining generally but I am unable to accept that proposition, *particularly so where the plaintiff was employed in the defendant's office some distance from its mill.* In my opinion, what happened to the plaintiff could not have been reasonably foreseen by the defendant's officers during the period 1950-1953 and it would be unreasonable to contend to the contrary.[112] (emphasis added)

And in *Footner*s case, Jacobs J. said:

> . . . the plaintiff seeks to impute to the defendant knowledge of the hazards of asbestos which could be gleaned from overseas journals, some of which at least were available to the defendant in Australia. None of the literature referred to by Dr. Kilpatrick was produced, but it is clear from the titles, from his own evidence, and from the evidence of Dr. Fraser, that it spoke of asbestosis, and was directed to the risk to workers in the asbestos industry — in the mining of asbestos and the manufacuture of asbestos and asbestos products — *who were necessarily exposed day by day to high levels of asbestos concentration in the atmosphere. Any risk to the occasional user of fabricated materials containing asbestos, such as is known to exist today, was not recognized or identified.* In short, *the literature did not speak to an employer such as the defendant who occasionally used finished asbestos products in its plant.*[113] (emphasis added)

1.68 The facts put in evidence in a claim by a Baryulgil worker suffering bronchogenic carcinoma or mesothelioma would however be different. Those facts, as shown in Chapters 5 and 6 of the Report, would establish exposure to high levels of airborne asbestos fibre, and — in many cases — over a considerable number of years. They would establish an exposure great enough to have resulted in asbestosis. As seen above, it is very likely that a court would hold that, during the period of the operation of the mine and mill at Baryulgil, asbestosis was a foreseeable result of the manner of operation. Thus during that period, it was foreseeable that the manner of operation could result in a worker contracting *an asbestos-related disease.*

1.69 In the landmark decision of *The Wagon Mound (No. 1)*[114] Viscount Simonds stated that:

> . . . the essential factor in determining liability [in negligence] is whether the damage is *of such a kind* as the reasonable man should have foreseen.[115] (emphasis added)

The signficance of this passage is that it acknowledges the principle that foreseeability relates to the *kind* of harm for which damages will be recoverable in a particular case, but not to the *extent* of that harm. This means that, in cases of physical injury or harm:

> the plaintiff must show that the *type* of injury inflicted was a reasonably foreseeable consequence of the [defendant's act], but he need not show that the *losses* consequent on that injury were equally foreseeable.[116]

1.70 Two cases illustrate the application of the principle. In *Hughes* v *Lord Advocate*,[117] the appellant — a child of eight — entered an unattended canvas shelter over an open manhole, erected for work on telephone cables. The Post Office employees working on the cables had placed red paraffin warning lamps around the shelter. The appellant took one of the lamps into the shelter to explore the manhole. In some way, the lamp was knocked or dropped into the manhole and a violent explosion took place. The appellant fell into the manhole and was badly burnt, particularly on the fingers as a result of

attempting to climb out up a metal ladder whose rungs had become extremely hot in the explosion.

1.71 It was foreseeable that the unattended paraffin lamp created a foreseeable risk of injury by burning, which was the injury that in fact occurred, even though it was through the probably unforseeable medium of an explosion. Even more relevant to the Baryulgil situation is *Smith* v *Leech Brain*.[118] There, a worker was burnt on the lip by a splash of molten metal. The burn resulted in a cancerous growth in the tissues of the lip, and the cancer ultimately resulted in the worker's death. The worker's widow succeeded in an action for damages: the injury — the burn — was foreseeable, and it mattered not that the extent of the injury — cancer and death — was not a foreseeable consequence of a work procedure involving splashing molten metal.

1.72 These two cases are accepted as being applications of the principle that what must be foreseeable is the type of injury, not its extent.[119] However, their use by the courts has often been for a rather different purpose. In alleged reliance on their authority, courts have found particular injuries foreseeable by a categorisation of the type of injury which was foreseeably broad enough to include the injury which occurred, and by a corresponding categorisation of the type of injury which occurred broad enough to bring it within the foreseeable type.[120] To some extent, *Hughes'* case is itself an example of this, where injury by burning was held to be foreseeable and the appellant's injury was categorised as an injury by burning rather than an injury by explosion.

1.73 This approach would be of considerable assistance in the Baryulgil situation. A plaintiff suffering mesothelioma or bronchogenic carcinoma would be able to argue that the acts of Asbestos Mines Pty Ltd created a foreseeable risk of *asbestos-related disease* — the 'type of injury', that he had contracted an asbestos-related disease, and that there is no requirement that the exact features of that asbestos-related disease, or its extent, be foreseeable.

1.74 It would thus appear that, despite the initally troublesome aspect of decisions such as *Joosten*[121] and *Footner*,[122] the element of foreseeability is one part of an action for damages by a former Baryulgil worker which would not present serious difficulties for the plaintiff.

Difficulties — availability of practicable precautions

1.75 In paragraphs 1.7 to 1.9, it was stated that a plaintiff seeking damages for negligence by his/her employer must show that there were possible and practicable precautions which, on the balance of probabilties, would have prevented the injury had they been adopted. A number of difficulties could arise for a Baryulgil claimant in relation to this element of the cause of action.

1.76 The precautions which could have prevented exposure to dangerous levels of asbestos fibre inhalation are of two kinds: first, methods of mining and milling which avoid the release into the atmosphere of dangerous amounts of fibre, and second, the provision and use of protective equipment which prevents the inhalation of the fibre released into the atmosphere.

(a) Production techniques preventing release of fibre:

1.77 The questions here would be whether there were available at the time of the mine and mill's operation more efficient processes and plant which would have lessened the fibre content in the air, and if so, whether it would have been practicable for those processes or that plant to be employed at Baryulgil. The evidence put before the Committee is somewhat contradictory on the issue of whether the mine and mill were using the most up-to-date technology. Hardie Trading argue that they were.[123] Mr Burke, a

former mine manager, gave evidence suggesting he made a number of requests for updating or maintenance which, if met at all, were met slowly.[124] Woodsreef refer to their programme of improving dust control when they purchased Asbestos Mines Ltd,[125] and state that in large part this involved transferring machinery, no longer needed in their Barraba operation, to replace that at Baryulgil.[126] The Committee's conclusion on this issue was stated in paragraphs 5.79 to 5.84 of the Report. However, irrespective of this conclusion, a court hearing a claim for damages would form its own opinion, and it is possible that the court would conclude that the Baryulgil operation was, at any given time, using the most up-to-date equipment available.

1.78 Even if the court should decide that the equipment or the processes were less up-to-date than was possible at the time,[127] the further issue of practicability would arise. Would it have been practicable for Asbestos Mines Pty Ltd to have utilised more modern technology? The major problem here would relate to cost. Given the profitability of the mine and mill, would it have been practicable for Asbestos Mines Pty Ltd to have incurred the cost of installing more modern machinery or of adopting more modern processes? The evidence given to the Committee by Hardie Trading[128] and Woodsreef[129] is that the Baryulgil mine and mill operated on a very small margin of profit when a profit was made, and for a large part of its operating life was in fact a loss enterprise. Disproportionate cost is a potent factor in courts' decisions that precautions are not practical.[130] The common law does not require employers to discontinue their businesses if they cannot afford to operate them safely. It is possible that, even given the evidence advanced on the possibility of updated techniques, a plaintiff would fail to convince a court that they represented practicable precautions.

(b) Provision and use of protective apparatus:

1.79 If the operation itself could not have possibly or practicably been made safer, it might have been possible to give greater protection to workers contending with the environment produced by that operation. This would have been done primarily by provision of masks and/or respirators. Were masks and respirators available? Were they provided? Was their use explained, and urged or enforced? Evidence on these matters is again conflicting.[131] It would be for the court to decide whether Asbestos Mines Pty Ltd had provided the employees with the best available masks and/or respirators. Further evidence would be necessary on this point to establish at what time the company commenced to stock supplies of masks or respirators, of what type, in what numbers, subject to what standard of maintenance and storage, and as to the manner in which they made these available to their employees. It is possible (but unlikely)[132] that this evidence might show, to the satisfaction of a court hearing a claim by a Baryulgil worker, that adequate supplies of adequate masks and/or respirators were kept by the company and adequately maintained, and that adequate information as to their availability was given to the workers.

1.80 That evidence would not, however, completely thwart a claim that Asbestos Mines Pty Ltd failed to take possible and practicable precautions. For the law is not entirely settled on the issue of what constitutes taking adequate precautions in relation to protective clothing etc. Specifically the matter as to which there is doubt is the extent to which an employer should not only supply protective equipment but also urge or even enforce its use. While the cases of *Qualcast (Wolverhampton) Ltd* v *Haynes*[133] and *James* v *Hepworth Grandage*[134] accepted supply as sufficient, the judgment of Morris L.J. in *Woods* v *Durable Suits*[135] sounds a different note:

> If a time comes when there is knowledge of the neglect of, or the rejection of, safety precautions, then, on the facts of a particular case, it may be that it can be established that

there has been a failure to take reasonable care to supervise the smooth working of a safe system.

This failure to enforce use of safety precautions was described by Wanstall J. in *Czislowski* v *Read Press Pty Ltd*[136] as 'negligence by ineffective supervision'.[137]

1.81 Thus it is possible that the 'difficulty' faced by a Baryulgil claimant in being unable to displace evidence which might be produced of adequate supply of protective equipment might be overcome by the court's acceptance that not only supply but also encouragement or enforcement of use was a practicable precaution not adopted. This would depend, however, on the evidence before the court and the conclusion the court reached on that evidence. The evidence given to the Committee concerning encouragement or enforcement of the use of respirators is unsatisfactory. Members of the community who worked at the mine have no recollection of such steps being taken.[138] Hardie Trading have no concrete evidence that such steps were taken since they would have been the responsibility of the mine manager.[139] Mine manager Burke stated the workers were encouraged to use respirators, but they were unsatisfactory because they became clogged very quickly.[140]

1.82 However, even if the company expected or required the manager to take such steps and they were not taken through the neglect of the manager, the company — Asbestos Mines Pty Ltd — would be vicariously liable for the failure of their employee to take a necessary precaution,[141] if the court decided that, in this case, encouragement or enforcement, rather than mere supply, was indicated as a necessary measure.

1.83 As to whether such extra steps would be indicated as necessary in a Baryulgil case, it is relevant to note that the employer's duty whether personal or vicarious, is owed not to employees generally but to the particular employee claiming damages.[142] This issue usually arises in relation to foreseeability — was it foreseeable that a particular piece of equipment or method of work would create a hazard for a particular employee, given his or her personal characteristics, including disabilities, degree of skill, training, understanding or even temperament. It is also relevant to precautions, since the risks resulting from a method of work etc. are risks resulting from that method as it stands — minus the possible precautions. Thus, while it may not be foreseeable that — for example — handling molten metal without being forced to wear available safety spats will not foreseeably prevent a risk to an experienced moulder who knows of their availability, since the employer would be entitled to assume he would avail himself of them, it would be a foreseeable risk to a novice who has not the experience to realise he should for his safety use such available equipment.[143]

1.84 The knowledge, education and experience of the Baryulgil workers would thus become relevant to the question of whether encouragement and/or enforcement of the use of masks and respirators was a (clearly) practicable precaution which Asbestos Mines Pty Ltd should, as a reasonable employer in the circumstances of this particular case, have adopted.

1.85 The outcome of the previous discussion, then, is that there are a number of evidentiary difficulties in the presentation of this element of the cause of action. Did the company have the best practicable processes and equipment to minimise release of fibre into the atmosphere? Did they supply the best practicable protective apparatus? Did they take all necessary measures to ensure use of that protective apparatus? The answers to these questions lies in the province of the court hearing the case.

1.86 Even if a Baryulgil claimant could establish that the company failed in its duty in one of these respects and thus did not take all practicable precautions, he would also need to show that adoption of the omitted precaution would probably have prevented the contraction of his disease.[144] There might be difficulties here also.

1.87 First, in relation to failure to use more up-to-date plant and processes, this would only be an element of a breach of duty if use of the more up-to-date technology would have resulted in a level of airborne asbestos fibre low enough not to present a risk of the disease from which the plaintiff suffers. If his disease is asbestosis, this issue may not be such a problem, depending on the period of his employment. Over a moderate to short period of employment, fairly high levels of exposure are generally regarded as necessary to produce asbestosis.[145] Therefore, any appreciable lowering of the level of airborne asbestos would probably have eliminated or greatly diminished the risk. Over a longer period of employment a lower level of exposure is sufficient to produce the disease,[146] and therefore the improvement in emission levels resulting from the suggested technology would need to be greater for the court to be able to satisfy itself that introduction of that technology would probably have prevented the plaintiff's injury. If, on the other hand, mesothelioma can be contracted by exposure to a comparatively small amount of asbestos fibre over a short period,[147] it would be much more difficult to establish that lowering the level of exposure, unless it were lowered to zero, would have necessarily been an effective precaution. Of course, it is only required that the plaintiff show the precaution would *probably* have been effective. Nevertheless, it is clear that the establishment of probable effectiveness could present difficulties for a plaintiff claiming damages for mesothelioma where the suggested precaution is more efficient plant and/or processes.

1.88 Second, if the allegedly omitted precaution is the provision of protective devices, it must be shown that these devices would have sufficiently prevented inhalation. Expert evidence would therefore need to be brought[148] to show that the devices available at any time were effective to prevent inhalation to the degree relevant to the particular disease the plaintiff suffers. The differences in amounts of inhaled fibre producing the various diseases over varying periods, discussed in the preceding paragraph, would apply here also. And even if the devices were proved to be completely, or at least sufficiently, effective, it would be necessary to show that, had they been provided (if they were not), or had their use been encouraged (if it was not), they would probably have been used. The court in *James* v. *Hepworth Grandage*[149] was prepared (on arguably scanty evidence) to conclude that the employee would not have used safety spats even if he had known they were available.[150] It is possible that a court hearing a claim by a Baryulgil worker would reach a similar conclusion. Of course, if the allegedly omitted precaution is failure to enforce the use of masks and/or respirators, it would be much less likely that the court could conclude they would not have been used even if that precaution had been taken. Again it must be stated that the evidence on protective devices given to the Committee is not detailed or conclusive enough to reach any satisfactory hypotheses on the probable outcome of this part of a claim by a Baryulgil worker. But if the evidence before the court was in the same state, a conclusion unfavourable to the plaintiff would be quite possible.

Difficulties — the Limitation Act

1.89 Generally speaking, an employee's action for damages must be brought within six years of the date on which the injury was suffered. This is established in New South Wales by Section 14 of the *Limitation Act*, No. 31 of 1969, which states that:

> (1) An action on any of the following causes of action is not maintainable if brought after the expiration of a limitation period of six years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom he claims —
>
> (a) a cause of action founded on contract (including quasi-contract) not being a cause of action founded on a deed;
>
> (b) a cause of action founded on tort, including a cause of action for damages for breach of a statutory duty; . . .

1.90 An employee's action for damages for breach of the employer's duty to take reasonable care may be founded either in contract (as being for breach of an implied term in the employment contract that the employer shall take reasonable care to avoid exposing the employee to unnecessary risk of injury)[151] or in tort (as being negligence in that the employee has failed to take reasonable care).[152] Whichever way the action is founded, it will be caught by Section 14(1) of the *Limitation Act*, either by Section 14(1) (a) or by Section 14(1) (b) — except in the rare instance that the contractual duty is expressly set out in a deed, in which case the limitation period is 12 years,[153] a situation not relevant to possible Baryulgil claimants.

1.91 While in the normal run of industrial injuries — cuts, bruises, broken bones, skin disorders, etc. — the six-year limitation period will pose little problem to a plaintiff, in the case of asbestos-related diseases it poses a severe problem. For the date on which 'the cause of action first accrues' is the date on which the injury occurs, not the date on which it becomes apparent. This was firmly established in the case of *Cartlege* v *E. Jopling and Sons Ltd*,[154] a case concerning silicosis. The case is of particular relevance to asbestos-related diseases because, like them, silicosis has a long latency period. There is damage to the lungs from the inhaled substance many years before the existence of that damage can be medically discovered. Thus in the case of asbestosis, the latency period is generally some 10 to 15 years and in the case of mesothelioma some 30 years. It can be immediately appreciated that if Section 14 stood alone, persons suffering these diseases would (almost) never be able to maintain a cause of action, since the limitation period would have elapsed long before their disease — the injury — was discoverable.

1.92 In order to alleviate such an obviously unjust situation, the *Limitation Act* contains an exception, based on amendment to the English Act following *Cartledge* v *E. Jopling and Sons Ltd*.[155] By Section 58(2) of the Act:

> Where, on application to a court by a person claiming to have a cause of action to which this section applies, it appears to the court that —
>
> (a) any of the material facts of a decisive character relating to the cause of action was not within the means of knowledge of the applicant until a date after the commencement of the year preceding the expiration of the limitation period for the cause of action; and
>
> (b) there is evidence to establish the cause of action, apart from any defence founded on the expiration of a limitation period,
>
> the court may order that the limitation period for the cause of action be extended so that it expires at the end of one year after that date and thereupon, for the purposes of an action on that cause of action brought by the applicant in that court, and for the purposes of paragraph (b) of subsection (1) of section 26 of this Act, the limitation period is extended accordingly.

Section 58(1) states that the extension of time:

> applies to a cause of action founded on negligence nuisance or breach of duty, for damages for personal injury, not being a cause of action which has survived on the death of a person for the benefit of his estate under Section 2 of the Law Reform (Miscellaneous Provisions) Act, 1944, and not being a cause of action which arises under Section 3 of the Compensation to Relatives Act of 1897.

It would thus apply to claims against employers by employees who had contracted asbestos-related diseases as a result of their employment.

1.93 By Section 57(1) (b) the 'material facts' referred to in Section 58(2) include:

(i) the fact of the occurrence of negligence nuisance or breach of duty on which the cause of action is founded;

(ii) the identity of the person against whom the cause of action lies;

(iii) the fact that the negligence nuisance or breach of duty causes personal injury;

(iv) the nature and extent of the personal injury so caused; and

(v) the extent to which the personal injury is caused by the negligence nuisance or breach of duty;

1.94 Clearly, the existence of hitherto-undiagnosable damage to the lungs (in cases of asbestosis or bronchogenic carcinoma) or to the pleura or peritoneum (in the case of mesothelioma) would be 'material facts' within Section 57(1) (b) as being 'the fact that the negligence nuisance or breach of duty cause[d] personal injury'. Thus, if the disease of a Baryulgil claimant was not diagnosed until more than five years after it was in fact contracted, that claimant would have a year from the date of the diagnosis within which to bring his claim, provided that he could satisfy the court to whom application for an order extending the limitation period was made of the matters referred to in Section 57(1) (c); that is, that:

> material facts relating to a cause of action are of a decisive character if, but only if, a reasonable man, knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing —
>
> (i) that an action on the cause of action would (apart from the effect of the expiration of a limitation period) have a reasonable prospect of success and of resulting in an award of damages sufficient to justify the bringing of an action on the cause of action; and
>
> (ii) that the person whose means of knowledge is in question ought, in his own interest, and taking his circumstances into account, to bring an action on the cause of action;

1.95 Thus, limitation problems arising simply from delayed diagnosis will be fairly easily overcome by application for an order under Section 58(2). A further problem may face Baryulgil claimants however if, although they had been diagnosed as suffering from asbestosis (or possibly bronchogenic carcinoma), they failed to bring an action in time because they were not aware that their contraction of the disease gave them a claim against their employer. Doubts as to whether Sections 57 and 58 would cover this situation have not, unfortunately, been resolved by the decision of the High Court in *Do Carmo* v *Ford Excavations Ltd.*[156] The situation that arose in that case is concisely set out in the judgment of Murphy A.C.J.:

> The applicant plaintiff is about 40 years old. He was born in Portugal and migrated to Australia in 1971. He is poorly educated and is barely able to speak English. Whilst he was employed in work with the respondent he was exposed to silica dust which caused progressive pulmonary disease and disability. The appellant claims that his first solicitor did not advise him that he had a cause of action; but it was well known in the industry in 1971 when he began working for the respondent as a labourer, that water hosing and the wearing of face masks were available to minimize the risk of silicosis by the reduction of dust concentration. He claims that he only became aware of this after his second solicitor had obtained a report from Dr Lee on 10 September 1979. Upon such discovery he promptly sued his employer for damages for negligence and breach of statutory duty. However, by that time the six years limitation period specified in s.14(1) of the Act had expired.[157]

The essence of this passage is that the availability of practicable precautions against the risk of silicosis, an essential element of a cause of action against Do Carmo's employers (see paragraphs 1.75 to 1.88), was not known to him until after the expiration of the limitation period.

1.96 Given that basis for the application for an extension of time, the High Court decided, by a majority of three to two, that the application should be allowed, thus overturning the decision of the New South Wales Court of Appeal.[158] However, the reasons supporting the majority's judgments appear to differ in significant ways. Murphy A.C.J. appears to hold that 'material facts' can include legal concepts or causes of action, so that there would be ignorance of a material fact if a person did not know that, as an employee, he has a right to sue an employer for injury caused by the employer's failure to take reasonable care.

1.97 His Honour referred to the decision of the Court of Appeal as being that:

> the words in S.57(1) (b) (i), "negligence, nuisance or breach of duty on which the cause of action is founded", refer only to the acts or omissions alleged to constitute the relevant tort and not to legal concepts or causes of action . . .[159]

He stated the decision of the Court of Appeal as being that Do Carmo:

> had within his means of knowledge "material facts" within the meaning of S.57 (1) (b) of the Act, which, once he took the appropriate advice, would show "that an action on the cause of action would (apart from the effect of the expiration of a limitation period) have a reasonable prospect of success . . ."[160]

leading to their holding that Do Carmo was not entitled to an extension of time. Given this decision and the appeal against it, he presented the question for the High Court as being:

> whether the existence in law of a right of action is a relevant "material fact" for the purposes of the legislation.[161]

1.98 Briefly alluding to the case before him, he stated that:

> the appellant did not know until after the commencement of the year preceding the expiration of the limitation period that the risk of injury was real or proximate and could reasonably have been foreseen and avoided by his employer. He thus did not know "material facts of a decisive character" before the period expired.[162]

He therefore accepted 'that the existence of a worthwhile case is also a material fact' within Section 57 (1) (b).[163]

1.99 These passages, and those which His Honour highlighted in the judgements of the House of Lords in *Smith* v *Central Asbestos Co.*,[164] suggest very strongly that the existence of legal rights of action, rather than merely the facts (in the everyday sense), on which those rights of action are based, are 'material facts'. He was, however, alone in that view. The other judges of the majority, Dawson and Brennan, JJ., decided in Do Carmo's favour on narrow grounds. They held that the availability of practicable precautions was a material fact of a decisive character and that — given Do Carmo was an uneducated man who had taken reasonable steps by seeking the advice (flawed, as it transpired) of his union solicitor who failed to apprise him of that fact or act on it on his behalf — he had no means of knowledge of the fact.[165]

1.100 The significance of the case for possible Baryulgil claimants is as follows: if a Baryulgil worker did not know until after the commencement of the last year of the limitation period that he had an asbestos-related disease, or did not know it was contracted through exposure to asbestos at the Baryulgil mine and mill, or did not know it was foreseeable to Asbestos Mines Pty Ltd that their operation exposed him to the risk of contracting that disease, or did not know that there were practicable precautions available to Asbestos Mines Pty Ltd which would probably have protected him against the risk of contracting the disease, then he was ignorant of a material fact of a decisive character.

1.101 The further question of whether that material fact was nevertheless within his means of knowledge is, however, on the basis of the High Court decision, a little more problematic. Is it reasonable for a person in the position of a former Baryulgil worker to seek any advice about his position, given those facts? If such a man had for over six years done nothing to find out about his legal position, could it be said he had failed to take reasonable steps? A number of matters will be relevant here. If the Baryulgil people had no knowledge of actions for damages or claims for compensation, it would scarcely be unreasonable to seek no advice. However, it is unlikely they had no such knowledge at all. Cyril Mundine had been awarded compensation by the Workers' Compensation (Dust Diseases) Board (hereafter referred to as the Dust Diseases Board) on the basis of 40% incapacity and his widow had been awarded compensation by the Dust Diseases Board on his death.[166] But would the Baryulgil workers have also known they could claim common

law damages? If not, their failure to seek advice about initiation of such proceedings could scarcely be a failure to take reasonable steps. Thus while — despite the judgment of Murphy A.C.J. [167] — the actual existence of a cause of action may not be a material fact, knowledge of its existence must be relevant to whether the prospective claimant had means of knowledge of a material fact.

1.102 Following the Matt Peacock broadcasts in 1977, the Aboriginal Legal Service took up the case of the Baryulgil workers.[168] The solicitors of the Aboriginal Legal Service would obviously have known that common law actions might be possible, and it is likely that they would have communicated this fact to members of the community. It would still be a matter of some nicety whether that contact, in the circumstances of an isolated community which had not had the advantage of much education, amounted to giving particular possible claimants means of knowledge of the material facts on which their cause of action would depend.

1.103 In relation to this point, the judgment of Dawson J. is significant. He said:

> Moreover, it is to be noted that unlike s.57(1) (c), s.58(2) posits a *subjective* rather than an objective test. It is the means of knowledge which were *available to the appellant* which are relevant and *not the means of knowledge of a hypothetical reasonable man*. And s.57 (1) (e) provides that a fact is outside his means of knowledge if he does not know it and he has taken reasonable steps to ascertain it. The remarks of Lord Reid in *Smith* v *Central Asbestos Co.*, above at p. 530, made in reference to a similarly worded provision, are to the point:
>
> > In order to avoid constructive knowledge *the plaintiff must have taken all such action as it was reasonable for him to take to find out*. I agree with the view expressed in the Court of Appeal that this test is subjective. We are not concerned with "the reasonable man". *Less is expected of a* stupid or *uneducated man than of a man of* intelligence and *wide experience*.
>
> It is also to be noted that *it does not matter what advice the appellant received*. In fact he sought advice and, it would appear, did not receive the advice which he ought to have been given. However, s.58(2), unlike s.57(1) (c), makes no assumption that appropriate advice was received when it was sought. What is important is the means of knowledge which were reasonably available to the appellant. And that must mean available in a practical and not a theoretical sense. (emphasis added)[169]

1.104 The passages underlined are important. While His Honour was looking at a fact situation where the applicant was (erroneously) advised he had *no* cause of action, his remarks are not necessarily limited to such a situation. They could also apply to a situation where the injured person was advised he had a cause of action, but was by reason of his isolation and inexperience of the legal system unable to appreciate fully the significance of that advice and direct the taking of action on his claim. It may be that evidence could be brought to substantiate that that was the position in which Baryulgil workers were placed. If so, the Master of the Supreme Court might, on the basis of *Do Carmo*'s case direct that an extension of time be allowed. But in the light of the uncertainty concerning the full implications of that case, he might very well decide that such an applicant had 'means of knowledge' of material facts and therefore refuse the application. The *Limitation Act*, even with the extension of time provided in Section 58 and the interpretation of that section in *Do Carmo* thus could still pose difficulties to Baryulgil claimants.

Measure of Damages — difficulties in the position of possible Baryulgil claimants

1.105 In paragraphs 1.12 to 1.17, the various compensable heads of damage in a personal injury claim are set out, together with the formulae for assessing the sums referrable to those heads of damage in a particular case. In the following paragraphs, the application of those heads of damage to a Baryulgil claimant is explored in more detail. It

will be seen that the circumstances of former Baryulgil claimants could lead the court in its application of those principles to award lower sum of damages than is usual in other personal injury cases.

Special Damages (pre-trial losses which can be exactly quantified)

1.106 (i) Pre-trial medical expenses:— The Baryulgil worker could claim medical expenses which he incurred as a result of the disease from the date of its contraction to the date of trial[170]. As previously explained, asbestos-related diseases have along latency period during which they cannot be diagnosed and during which they exhibit no symptoms. Thus, during the latency period, no medical expenses referrable to the disease would have been incurred. However, it is likely that even when symptoms appeared, a Baryulgil worker currently showing diagnosable symptoms would not have incurred large medical expenses, due to the isolation of the community and possibly the reluctance of Aboriginal people to use white medical services. It is possible that he will have received his medical treatment through the Aboriginal Medical Service. Furthermore, it appears that many former Baryulgil workers are in receipt of unemployment or sickness benefits or invalid pensions, and therefore the cost of their treatment, such as visits to thoracic specialists, radiologists etc, may have been met by the social security services.[171]

1.107 Thus, it is unlikely that these workers, or those who are diagnosed in the future as suffering asbestos-related diseases, will be able to claim very much in the way of actually incurred medical expenses.

1.108 (ii) Pre-trial loss of income:— The second component of special damages covers income lost as a result of the injury between the date of injury and date of the award of damages. Luntz's statement of the method here is useful:

> A plaintiff in a steady job who is completely disabled from working, either temporarily or permanently, will normally claim and receive so many days' or weeks' pay, according to the period between the accident and the trial for which he was unable to work. If he would probably have worked overtime, loss of such overtime-pay is to be included . . .
>
> Where his disability has extended over a period during which he would have received a rise in pay, the plaintiff is not limited to the amount which he was earning at the date of the accident, but is entitled to the increased sums which he would have earned . . . It does not matter with regard to the pre-trial period whether such increase resulted from greater recognition of the value of the work which he was doing or merely counteracted the fall in value of money . . . But if the increased amount claimed would have been due to promotion and such promotion might have been subject to delay and uncertainty, only a discounted amount will be allowed . . .
>
> There must be set off against the loss any sick pay which is payable, at least if the plaintiff was entitled to receive it as of right . . . Other receipts are generally not deductible, though sometimes by legislation sums received by way of social service payments and workers' compensation have to be repaid when damages are awarded . . .
>
> One can, of course, never be certain that even a plaintiff who had a steady job would have continued to earn if he had not been injured. At least to the date of trial it can usually be shown with some certainty that work would have been available to him during the period of his disability; but if, for instance, the factory where he worked was closed by a strike or laid off men in the plaintiff's section while he was away from work, a deduction must be made for the contingency that he would have been adversely affected. It can never be known for certain whether even if work had been continuously available, he would not have suffered some other accident or illness so as to prevent him from earning. However, since in most cases today workers receive sick pay or other compensation during periods of temporary disability, the only contingency that need be taken into account is the slight one of a serious, uncompensated injury. This slight risk is more than outweighed by the fact that the damages will not be received until long after the time when the wages would ordinarily have been enjoyed . . .[172]

1.109 However, Baryulgil cases would not come in to the typical run. They would not be cases where there was a *possibility* that work might not have been available during the period between injury and judgment. The mine closed in 1979 and there has been virtually no work in the area since. It is an established principle that courts do not speculate where the issue is certain.[173] Thus, a Baryulgil claimant who had been incapacitated by his disease before the closure of the mine and mill would receive as special damages the income he would have earned between the date of his incapacity and the date of the closure, plus a small amount to represent the contingency that he might have succeeded in obtaining subsequent employment elsewhere but for his incapacity. In asssessing that contingency of substitute employment, the court would look at actualities, and in particular the high rate of Aboriginal unemployment, particularly in a period of high unemployment generally. Had the claimant's incapacity manifested itself after the closure of the mine and mill, he would therefore receive only that small sum that would represent the faint contingency of re-employment elsewhere but for the incapacity.

General Damages

1.110 (i) Lost earning capacity:— Again, Luntz states the general principles of assessment:

> The simples case to deal with is that of a mature person, in a steady job, with little or no prospect of advancement, whose earning capacity is totally destroyed. Even in such a case one needs to be able to predict the number of years for which he would probably have gone on working, i.e. whether he would have retired from his job at, before, or after, the age of 65, and whether he would have sought other employment, and at which remuneration, thereafter, Assuming a figure for the number of years which would probably have been left of the plaintiff's working life, one cannot simply multiply this figure by the annual rate of which he would have earned at the date of the trial, since the sums which he would have earned in the future must be discounted because the money will be received immediately and can be invested, and so earn interest, theoretically until the time when it would ordinarily have been received . . . Furthermore, the receipt of the money now becomes certain, whereas *previously it was subject to various contingencies, such as* the plaintiff continuing to be alive and to enjoy health good enough to enable him to work, and *work continuing to be available to him;* thus a further deduction is in order . . . (emphasis added)[174]

1.111 Here also, the court will look first at actualities, and in particular at the fact that there is virtually no work available in the Baryulgil area, and will therefore have to assess the possibility that the plaintiff might have been able to find work elsewhere despite the high rate of Aboriginal unemployment.

1.112 (ii) Needs created:— The probable cost to the plaintiff of future medical treatment. As seen in paragraph 1.14, this head of damages involves the calculation of future medical (and associated) expenses based on the plaintiff's post-injury expectation of life. Two difficulties could arise here for Baryulgil claimants, one related to the expenses and one to the expectation of life. First, the future expenses for which a plaintiff receives compensation are those which he or she *will* (probably) *incur.* It was pointed out in paragraph 1.106 that many of the medical services needed by Baryulgil claimants would be provided largely free of charge, for example, through an Aboriginal Medical Service, supported by Government funding. This factor would be taken into account in assessing this part of the damages to be awarded to a successful Baryulgil claimant.

1.113 Secondly, the expectation of life of such a claimant will be affected by the particular disease from which he suffers. The expectation of life of a mesothelioma sufferer will be almost nil by the time of trial. In fact, many would not survive from the initiation or proceedings to the date of judgment and the action would be completed in their name by their estate.[175] The amount of damages under this head awarded to such a

person would therefore be small (and if the plaintiff had died before judgment damages would not be awarded at all for this item).[176]

1.114 While death as a result of asbestosis may not be so swift, the fact that many asbestosis sufferers die from the complications of respiratory illnesses,[177] taken together with the predisposition of Aborigines to respiratory illnesses,[178] could lead to a lower estimation of expection of life being arrived at for a Baryulgil claimant suffering asbestosis than for a non-Aboriginal asbestos sufferer.

1.115 (iii) Loss of expectation of life:— What is compensated here is not the actual amount of expected life lost, but the plaintiff's lost satisfaction or pleasure in the prospect of a continuing life.[179] The obvious difficulties in making a genuine and subjective assessment of the value of that lost satisfaction in a particular case has resulted in the adoption of a standard sum of damages — about $3000.00.[180] While this approach is probably essential, it does mean that a mesothelioma sufferer who at the date of judgment would know that his expectation of live was virtually nil will receive no more than the person who contemplates a further twenty or thirty years of life but would have been able to contemplate forty or fifty had the injury not occurred. It would of course be impossible to arrive at a sum which would compensate for the knowledge of imminent death. Nevertheless, there might seem to be an illogicality, if not injustice, in the approach taken.

The Once-for-All rule

1.116 The description in paragraphs 1.12 to 1.17 and 1.110 to 1.115 shows that the general damages which will be assessed in a particular case depend on what, in the court's estimation, will be the duration of the incapacity caused by the injury (or the duration of the plaintiff's life as a result of the injury) and what will be the extent of the incapacity and the consequent needs and losses. It is a hypothetical estimation of a future loss which cannot be known with certainty. The court must endeavour to see into the future and decide, on the best evidence possible, what will probably occur. It is necessary to do this because common law damages are given 'once-for-all' in a lump sum.[181] There is no provision, as there is with Workers' Compensation,[182] for periodic payments proportioned to the incapacity as it exists from time to time.

1.117 The once-for-all rule can thus result in a windfall or in an inadequate award. If the court estimates damages on the basis of an expected twenty years of total incapacity but the plaintiff unexpectedly recovers after five years, the plaintiff will have received a windfall. Much more likely however is that the plaintiff's condition will turn out to be much more severe than expected and the expenses of its treatment correspondingly higher.[183] The award received by the plaintiff will therefore be exhaused long before his or her need for it ends. For this reason, plaintiffs in personal injury cases are generally advised to delay bringing proceedings as long as possible so that a clearer picture of the severity of their injury can be given to the court. In this situation, (which is not, unlike that discussed in paragraphs 1.89 to 1.104, a case of ignorance of 'material facts') the plaintiff can delay for five years and some months, but must initiate the proceedings within six years of the date of injury.[184] If there had been ignorance of material facts and an extension of time were granted, the plaintiff must initiate proceedings within one year of learning the material facts.[185]

1.118 Particularly in the case of asbestosis, the symptoms may not yet be severe when the limitation period dictates commencement of proceedings. Such plaintiffs will be at risk of an underestimation by the court of the extent of future incapacity and of future medical expenses, and also of the extent of future loss of enjoyment. The risk of underestimation is not so great in the case of mesothelioma, since the probable severity

(death within months) is easier to establish. There is thus a difficulty here which may affect Baryulgil claimants with an early diagnosis of, as yet, not seriously incapacitating asbestosis.

CONTRIBUTORY NEGLIGENCE

1.119 The fact that a plaintiff had contributed to the causation of his or her own injury used to operate as a complete defence to a claim. As a result of the *Law Reform (Miscellaneous Provisions) Act* 1965, the effect of contributory negligence is merely to reduce the damages.[186] The award will be reduced by the same proportion as the plaintiff's carelessness contributed to the causation of the injury.

1.120 What will amount to contributory negligence in a claim by an injured employee was stated clearly by Windeyer J. in *Sungravure Pty Ltd* v *Meani*.[187] At the same time, His Honour strongly rejected the claim, which might have seemed substantiated by the language of some previous judgments,[188] that a different standard existed for contributory negligence in the case of worker plaintiffs. He said:

> When a worker in a factory is alleged to have been wanting in care for his own safety, the jury may, of course, as part of the totality of circumstance, have regard to such things as inattention bred of familiarity and repetition, the urgency of the task, the mans preoccupation with the matter in hand, and other prevailing conditions. They may consider whether any of these things cause some temporary inadvertence to danger, some lapse of attention, some taking of a risk or other departure from the highest degree of circumspection, excusable in the circumstances because not incompatible with the conduct of a prudent and reasonable man.[189]

1.121 In a case by a former Baryulgil worker, the defendant might attempt to argue that the plaintiff, in not consistently wearing a respirator, was contributorily negligent. Such an argument would only succeed if it could be shown that the plaintiff should properly have understood the dangers to which he subjected himself by failing to wear a respirator. To establish that, one must look at the plaintiff's circumstances, for Windeyer's test talks about the reasonable man in the situation of the particular plaintiff and the situation for the Baryulgil plaintiff is that of a person with little education living and working in an isolated area.

1.122 It would also be necessary to show that failure to use resirators did contribute to the injury — that is, that they worked when worn. The Committee has received evidence that the respirators were effective for only a short time after which they became clogged and had to be discarded.[190]

1.123 It would appear unlikely that the circumstances of the Baryulgil mine and mill would permit a finding of contributory negligence by a former Baryulgil worker.

COMMON LAW ACTION FOR DAMAGES FOR NEGLIGENCE BY DEPENDANTS OF DECEASED WORKERS

Elements of the Compensation to Relatives Claim

1.124 Where a person injured by the negligence of another dies of his or her injuries before bringing an action for damages for the injuries, his or her dependants have a cause of action against the person responsible for the loss they suffered as a result of the death. The action derives from the *Fatal Accidents Act* 1846 UK (also known as Lord Campbell's Act) which has been re-enacted in all Australian jurisdictions. In New South Wales, the equivalent of Lord Campbell's Act is the *Compensation to Relatives Act*, No. 31 of 1897, and an action under this Act is commonly known as a Compensation to Relatives action (or, in legal shorthand, a 'comp. to rels' claims).

1.125 Section 3(1) of the *Compensation to Relatives Act* states that:

> Whensoever the death of a person is caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.

1.126 The persons who may benefit from such an action are described in Section 4 of the Act:

> Every such action shall be for the benefit of the wife, husband, brother, sister, half-brother, half-sister, parent, and child of the person whose death has been so caused . . .

The action is to be brought for the benefit of such persons:

> by and in the name of the executor as administrator of the person deceased . . . (Section 4)

The measure of damages is also set out in Section 4:

> . . . and in every such action the jury may give such damages as they may think *proportioned to the injury resulting from such death to the parties* respectively for whom and for whose benefit such action is brought . . . (emphasis added)

1.127 Thus, if a Baryulgil worker dies from an asbestos-related disease contracted as a result of his employment at the mine or mill, his dependants (if they fall within the categories of relationship mentioned in Section 4) may bring an action against Asbestos Mines Pty Ltd for the loss they have suffered as a result of that death.

1.128 Section 3, as it describes the action, somewhat misrepresents the sequence of events that will take place. It gives a right of action where the death results from a wrongful neglect or default which would have given the deceased a right of action. It makes the person responsible liable in that case to an action by the dependants. However, if the injured person initiates the action himself but dies before judgment, that action will be continued by his estate. The Compensation to Relatives action is brought only where the injuured person dies before he commences proceedings based on his injuries. Therefore it would not have been established that his death was such as would have entitled him 'to . . . recover damages in respect of . . .' his injury. That is the point that would have been decided by the action he was not able to (or failed to) bring before his death. The Compensation to Relatives action therefore hears and determines those very issues which would have been determined in an action by the injured person. If those issues are decided in favour of the injured person — that is, if (in the case) the employer is found negligent — then the relatives within Section 4 are entitled to damages for the injury resulting to them from the death.

1.129 Therefore if a Baryulgil worker dies before bringing a claim, his relatives would have to show (a) that an act of Asbestos Mines Pty Ltd caused the disease resulting in his death, (b) that the disease was a foreseeable consequence of that act, (c) that there were possible and practicable precautions that would probably have prevented the contraction of the disease, and (d) that a reasonable employer in the circumstances of Asbestos Mines Pty Ltd would have adopted those precautions. Thus the problems identified in paragraphs 1.19 to 1.88 would apply to such an action also. However, a number of further problems, particular to the Compensation to Relatives action, may also arise.

Whether the Claimants are Relatives within Section 4

1.130 Considerable difficulties could face Baryulgil claimants falling within many of the categories of relationship in Section 4 because of the question of de facto relationships (and conceivably of tribal marriages). De facto relationships are not recognised under the *Compensation to Relatives Act* 1897, although, in its Report on De Facto Relationships in

June 1983, the New South Wales Law Reform Commission recommended an amendment to the Act providing for this. On 12 September 1984, the Sydney Morning Herald reported the New South Wales Premier as announcing his government's intention to introduce legislation implementing the Law Reform Commission's recommendations in this session of the State Parliament. In relation to tribal marriages, briefly, for most purposes Australian law does not recognise tribal law, and therefore does not recognise tribal marriages.[191] In the absence of express definition (and the *Compensation to Relatives Act* has none) the meaning given to the words in Section 4 will be the general understanding of marriage in Australian law, and an Aboriginal marriage by tribal law is not a valid marriage within that general understanding.[192]

1.131 Section 4 states:

> Every such action shall be for the benefit of the wife, husband, brother, sister, half-brother, half-sister, parent and child of the person whose death has been so caused . . .

Given the position set out above, this will mean that where a Baryulgil worker was not married or was married under tribal law, his de facto spouse or tribal wife will not be a 'wife' with Section 4 and will be unable to bring a Compensation to Relatives claim. (The same would apply if a husband was claiming as a result of the death of his wife.)

1.132 A person's brother or sister is the natural child of the person's own biological parents or the adopted child of the person's biological parents. Where the person's biological parents are not married or are married by tribal law, it would be necessary,in order for that person's brother or sister to bring a Compensation to Relatives claim, to produce evidence that he or she was the child of both those parents and that the deceased was also the child of both parents. It will not be difficult to show that the mother was the biological mother of all the children, but more difficult in the case of the father. Fortunately, proof on the balance of probabilites is all that is required.

1.133 A person's half-brother or half-sister is the biological child of one of that persons parents. There would be no difficulty in showing this relationship where the shared parent is the mother, but evidence would be required, where the shared parent was the father, to show that he was in fact the biological father of both the children.

1.134 Again, where father and mother of the deceased were not married or were married by tribal law, the mother will have no difficulty in bring a claim as a 'parent . . . of the person whose death has been so caused' but a father wishing to claim as 'parent' would need to bring some evidence of paternity.

1.135 Finally, where a claimant is the 'child' of a worker married by tribal law, the child would have had to produce evidence of the worker's paternity. However, the *Children (Equality of Status) Act* 1976 now gives ex-nuptial children the same rights as nuptial children.

1.136 The evidence accepted as probative would in all probability be easy enough to produce, but the fact remains that, whereas the law asssumes that children of a valid marriage are in fact the biological children of the partners, it would not make a similar assumption where the parents are not married, and it will treat couples married under tribal law as not married.[193]

1.137 It is possible that persons claiming through relationships deriving from tribal marriages might be able to establish a right of action by analogy to principles developed in the Conflict of Laws in relation to recognition of foreign marriages,[194] but there is as yet no precedent for this approach in cases with no foreign element.

1.138 The difficulty described in relation to de facto relationships and tribal marriages will not necessarily prevent a person thus rendered unable to claim from sharing in the benefits of the verdict, for the damages will be awarded to all the claimant's relatives,[195]

and relatives who have been able to establish the right to claim would almost certainly, in an Aboriginal community with its close kinship ties, share the sum received with the relatives who had not been included in the claim. However, the award of damages is 'proportioned to the injury of the parties'[196] claiming and would therefore be less, as representing the loss of fewer people, than it would be if all the relatives were able to claim.[197]

Limitation Act Problems in Compensation to Relatives Claims

1.139 In paragraphs 1.89 to 1.104, we set out the provisions of the *Limitation Act* 1969, requiring actions for damages to be brought within six years of the date on which the cause of action accrues, and explored the extension of time in Section 57 and 58 and the interpretation of those sections in *Do Carmo* v *Ford Excavations Pty Ltd.*[198] It was pointed out that Section 58(1) limits the application of the extension provision in Section 58(2) to:

> . . . a cause of action founded on negligence nuisance or breach of duty for damages for personal injury, *not being a cause of action* . . . which arises under Section 3 of the Compensation to Relatives Act of 1897. (emphasis added)

1.140 Section 19 of the *Limitation Act* applies to Compensation to Relatives actions a similar limitation period to that imposed by Section 14 on actions brought by the injured persons. Section 19 states:

> An action on a cause of action arising under Section 3 or Section 6B of the Compensation to Relatives Act of 1897, by virtue of a death, is not maintainable if brought after the expiration of a limitation period of six years running from the date of death.

1.141 Section 60 of the Act deals with extensions of time in a Compensation of Relatives action. Section 60 (1) states that:

> This section applies to a cause of action for damages which arises (or which would arise, but for the *expiration as against the deceased* of a limitation period . . .) under Section 3 of the Compensation to Relatives Act of 1897 by virtue of the death of a person caused by a wrongful act neglect or default. (emphasis added)

1.142 The actual details of the procedure for extension of time in such cases is contained in Section 60(2):

> Where, on application to a court by a person claiming to have a cause of action to which this section applies, it appears to the court that —
>
> (a) *any of the material fact of a decisive character relating to the cause of action of the deceased* in respect of the wrongful act neglect or default *was not within the means of knowledge of the deceased* at any time before the year next preceding the death of the deceased; and
>
> (b) there is evidence to establish the cause of action which the applicant claims to have, apart from the expiration as against the deceased of a limitation period.
>
> the *court may order that the expiration as against the deceased of a limitation period for a cause of action by him* in respect of the wrongful act, neglect or default *have no effect* in relation to the cause of action which the applicant claims to have and thereupon, for the purposes of an action brought by the applicant in that court on the cause of action which he claims to have, that expiration has no effect. (emphasis added)

1.143 The passages underlined indicate that the lack of knowledge and means of knowledge of material facts which gives rise to the right to an extension of time is to be the lack of knowledge of the deceased, *not* the lack of knowledge of the applicant relative. Thus, where a deceased Baryulgil worker did not, up to a year preceding his death, have knowledge or means of knowledge of a material fact decisive to his claim, this does not extinguish the right of action under Section 3 of the *Compensation to Relatives Act* of his dependants. They may still bring an action claiming damages for the loss resulting from his death, *providing* that they do so within six years of the death. In other words, the claim

by the relatives is completely covered by Section 14 of the *Limitation Act*, and there is no provision for any extension of time for *that* claim, only for the deceased's right of action on which it is founded.

1.144 Thus, if a Baryulgil worker dies more than six years after contraction of an asbestos-related disease (and dies as a result of the disease) without knowing all of the material facts relevant to a claim for damages, his relatives will have only six years to bring a Compensation to Relatives claim even if at the expiration of that period they still lack knowledge or means of knowledge of material facts on which this claim would depend. There could quite conceivably be a number of cases where the death of a worker in such circumstances would make it very unlikely that his relatives would come to know of all the material facts.

1.145 Another possible situation is that a worker does know all the material facts at some time before the year preceding his death, but for various reasons does not institute proceedings within the six years from the date on which his cause of action arises. In that case his cause of action will die with him and his relatives will be unable to make a claim, even if *they* had not known of the material facts during his lifetime. On the one hand, this may seem just, since if the worker allows a cause of action to expire, he has no rights under it to 'leave' to his dependants. On the other hand, the purpose of the action is to recompense the relatives for the support they have lost as a result of his death, and it seems harsh to deprive them of that right because of choices (not to sue) made by him during his lifetime.

1.146 The possible injustice of this situation would be even greater if, as suggested in paragraphs 1.89 to 1.104, the reason for his failure to sue was ignorance of the existence of a cause of action (or failure to fully understand its import) despite means of knowledge of the facts on which the action would be based. It was suggested in paragraphs 1.103 to 1.104 that following *Do Carmo*'s case,[199] a court might hold that the involvement of the Aboriginal Legal Service with the community would prevent an applicant establishing that he lacked means of knowledge of material facts in that he had received 'appropriate advice' as defined in Section 57(1) (d):

> ''appropriate advice'', in relation to facts, means the advice of competent persons, qualified *in their respective fields to advise on the . . . legal . . . aspects of the facts . . .*

If this were the approach of the courts, it would extinguish any right of action in the dependants of a worker who, at no time before his death, had any real appreciation of the rights of action possibly open to him and the need to seek, and attend to, appropriate advice as to matters relating to those rights.

Measures of Damages in Compensation to Relatives Claims

1.147 The measures of damages in an action by a person injured through the negligence of another (such as his or her employer) was examined in paragraphs 1.12 to 1.17 and 1.105 to 1.118. Although the Compensation to Relatives action is based on, and involves proof of, the cause of action which the deceased person could have brought on account of those injuries had he or she not died as a result of them, the measures of damages in the Compensation to Relatives action is not the same. The relatives, if successful, will not simply receive the damages the deceased would have received had he or she brought the action during his or her lifetime.

1.148 Section 4 of the *Compensation to Relatives Act* states that:

> . . . the jury may give such damages as they may think proportioned to the *injury resulting from the death to the parties* respectively *for whom* and for whose benefit *such action is brought* . . . (emphasis added)

That damages discussed in paragraphs 1.12 to 1.17 and 1.105 to 1.118 are the damages

resulting to the *injured person* from *his injury*. Section 4 makes the damages payable in a successful Compensation to Relatives action the damages resulting to *the relatives* from *the injured person's death*.

1.149 There are two possible heads of damage which relatives suffer from the death — first, a pecuniary loss: the loss of financial support, or expected financial support, from the deceased had he or she lived; and second, a non-pecuniary loss, the loss of the comfort and companionship of the deceased had he or she lived, which could be summed up as relating to grief for the death. Only one of these heads of damage is compensated in an action of this type. This position is forcefully stated by Luntz in his *Assessment of Damages for Personal Injury and Death:*

> Australian courts have been compelled to follow the view which prevailed after *Blake v Midland Railway* (1852) 18 QB 83, that the damages 'proportioned to the injury' which are to be awarded may not include anything by way of consolation to the dependants for grief or suffering; that their assessments, as Lord Wright said in *Davies* v *Powell Duffryn Associated Collieries Ltd* [1942] A.C. 601 (HL) 617 ' a hard matter of pounds, shillings and pence'.[200]

and again:

> Although Sir Owen Dixon . . . advocated giving [the] relatives "fair and just compensation" for the destruction of their intangible interest the life of the deceased — consisting of the natural ties of their relationship or close association and the moral comfort and companionship arising therefrom — only the South Australian and Northern Territory legislatures have made a move in that direction. The former was prompted to do so, according to Dixon J. in *Public Trustee* v *Zoanette* (1945) 70 C.L.R. 266, 285, by the remarks of Cleland J. in *Matthew* v *Flood* [1939] S.A.S.R. 389, 392, that in the assessment of damages under Lord Campbell's Act "items of real damage", such as mental anguish or loss of society due to the death, had to be disregarded "unless and until the legislature had altered that position if it should think fit to do so".[201]

1.150 Therefore the only compensable matter in a Compensation to Relatives action in New South Wales is loss of financial support, or expected financial support. In this way, the range of possible claimants in such an action is limited at the point of *damages* rather than at the point of entitlement to bring the claim.

1.151 Where it is virtually certain that a relative would have received financial support from the deceased had he or she lived, the court will estimate the amount of support that would have been received, and discount the amount for the slight contingency that support would not have received.[203] In estimating the amount that would have been received, the court must assess the period for which it would have been received. This will involve estimating the deceased's pre-injury expectation of life and the applicant's likely period of dependency. Thus in the case of a non-working wife, the likely period of dependency would have been the remainder of her life and therefore the expectation of life must be ascertained. In the case of a school-age son, the likely period of dependency would have been until he gained a job that paid an adequate wage. However, it would have also been possible that during times of unemployment or sickness that prevented him earning, he would have received financial assistance from the deceased had he or she lived, and allowance would be made for that chance of support in the award.[203]

1.152 Even where it is unlikely that a relative would have received financial support from the deceased, an award may be made to cover the lost chance of support, scaled down to represent the improbability of the eventuality. This would apply, for example, in the case of an adult child already in receipt of a good wage or an estranged wife.[204]

1.153 In many cases, the negligence act injuring the deceased, from which he or she would have gained the right of action on which the Compensation to Relatives action is based, results also in the death — that is, the injury and resultant death are

contemporaneous. Clearly, in these cases, the support (or chance of it) which the relatives have lost is support out of the income which the deceased could have earned or generated but for the negligent act and resultant death. The damages awarded to the relatives — 'proportioned to the injury resulting from the death to the parties on whose behalf . . . the action is brought' — are damages resulting from the tortious action of the defendant vis-a-vis the deceased. In other cases, and cases of asbestos-related disease would generally be amongst them, there is a period of incapacity between the injury caused by defendant's act and the resultant death. Because of that injury, the deceased would not, at the time of his or her death, have been earning an income, and the relatives would thus not have lost the support of his or her income through the death but through the earlier tortious act. Strictly speaking then, their loss of that support is not an 'injury resulting from the *death* to [them]'[205] but an injury resulting from the tortious act. Despite this, in such cases also, the lost support which will be compensated is the support from the income lost through the tortious act. This is a necessary approach since otherwise the action would be of no benefit to relatives other than in the cases where injury and death were contemporaneous. Such a method for assessing damages in Compensation to Relatives claims is important and of value to Baryulgil claimants since the deceased workers would in most cases have lived through some years of incapacity to work and earn income before *their disease (whichever of the diseases it might be) resulted in their death.*

1.154 The damages in a Compensation to Relatives action will thus be in some way equivalent to the 'lost earning capacity' segment of a normal personal injury claim,[206] discounted for several contingencies. However it will not be the full amount of the deceased's probable lost income which the relatives will receive, but only that part of it which the deceased might have been expected to have expended on their support. Matters such as pain and suffering or loss of expectation or enjoyment of life will not be compensated, for they do not cause any lost support to the relatives.[207]

Difficulties in Relation to the Person in whose Name the Action is Brought

1.155 Section 4 of the *Compensation to Relatives Act* states that:

> Every such action . . . shall be brought by and in the name of the executor or administrator of the person deceased . . .

It seems unlikely that many Baryulgil workers would have made a will. Therefore there would be no executor and they would die intestate. In that situation the action is to be brought by the administrator. This means that someone must apply to the court for a grant of letter of administration. The persons entitled to apply, and the priority of their claim for a grant, is set out in the *Wills, Probate and Administration Act* 1898. Basically the entitlement follows the order of persons entitled to benefit in an intestacy: the widow or widower, the children, etc.[208] The same problem will arise here as was discussed in paragraphs 1.130 to 1.138. Where the intestate had been living in a de facto relationship, his partner would not be entitled to benefit, as there was no marriage, and she was not his 'wife', and could not therefore be his widow. The forthcoming legislation (see paragraph 1.130) is intended to deal with this matter also and give de facto spouses the same rights as well as de jure spouses. Where the intestate had been married under tribal law, his widow *will not be entitled to benefit under his estate, or to seek letters of administration as* widow, since in the eyes of the law there was no marriage and she is not a 'widow'.[209] Furthermore, this effect of the law would have also disentitled the children of a de facto relationship or tribal marriage. Fortunately that position no longer applies as a result of the *Children (Equality of Status) Act* 1976, NSW, by virtue of which ex-nuptial children have the same rights as nuptial children.[210]

1.156 Therefore if the relatives of a deceased Baryulgil worker who had been married under tribal law include children, one of those children can apply for a grant of letters of administration and bring a Compensation to Relatives action in his or her name as administrator for the benefit of those relatives who can prove their entitlement as discussed in paragraphs 1.130 to 1.138. But if the only relative is a de facto spouse or a wife married under tribal law, she will not only be lacking in entitlement to damages, but also be unable to initiate the proceedings, since she will not be granted letters of administration (unless the proposed legislation has retrospective effect).

Difficulties — the Action on Behalf of the Estate

1.157 The discussion in paragraphs 1.147 to 1.154 has shown that a Compensation to Relatives claim will involve the defendant in paying in damages only a portion of one of the heads of damage in a personal injury claim brought by the injured person. However, the defendant can be made liable for other loss under a separate action brought pursuant to the *Law Reform (Miscellaneous Provisions) Act* 1944, N.S.W., which provides for the survival of causes of action for the benefit of a deceased person's estate. Section 2(1) of the Act states that:

> . . . on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or as the case may be, for the benefit of, his estate . . .

1.158 Where a person dies with a cause of action for damages for personal injury, the estate may bring a claim for all the heads of damage which the person him- or her-self could have been awarded if living, other than certain heads of damage specifically excluded by the statute. The heads of damage excluded are set out in Section 2(2). Section 2(2) (a) (ii) was inserted in the Act by the *Law Reform (Miscellaneous Provisions) Amendment Act* 1982. It excludes:

> any damages for loss of the capacity of the person to earn or for loss of future probable earnings of the person, during such time after his death as he would have survived but for the act or omission which gives rise to the cause of action.

Section 2 (2) (d) excludes:

> where the death of that person has been caused by the act or omission which gives rise to the cause of action . . . any damages for the pain and suffering of that person or for any bodily or mental harm suffered by him or for the curtailment of his expectation of life.

1.159 The result of Section 2 (1) and Section 2 (2) is therefore that the estate can claim in damages only the special damages — pre-death medical expenses and pre-death lost income. Loss of earning capacity, loss of expectation of life, pain and suffering and loss of amenities are expressly excluded, and there will be no needs created for the future.

1.160 It is customary, in the case of a death resulting from a personal injury caused by negligence, for the executor or administrator to bring two actions — a survival action under the *Law Reform (Miscellaneous Provisions)* Act for the special damages and a Compensation to Relatives action for the lost financial support. In the case of the latter, the damages go to the executor or administrator 'to be divided amongst the before-mentioned parties in such shares as the jury by their verdict find and direct' (Section 4). In the former case, the damages go to the estate, and thus, at least in the case of an intestate estate, indirectly to the relatives, as beneficiaries under the intestacy.

1.161 Again, problems will arise in the case of an intestate deceased who was living in a de facto relationship or was married by tribal law.[21] His children will, because of the *Children (Equality of Status)* Act 1976, be able to apply for a grant of letters of administration in order to bring the action for the benefit of the estate, but there will be

difficulties if there are no children but only a wife, since a de facto spouse or a wife married under tribal law has at present no status under the law relating to wills and intestacies.

ENDNOTES

1 *Wilsons and Clyde Coal Co.* v *English* [1938] A.C. 57.

2 *Smith* v *Baker and Sons* [1891] A.C. 325 at 362 per Lord Herschell; *Wilsons and Clyde Coal Co.* v *English* [1938] A.C. 57 at 78.

3 *Hamilton* v *Nuroof (W.A.) Pty Ltd* (1956) 96 C.L.R. 18 at 19.

4 *Ibid.* at 25 per Dixon C.J. and Kitto J.

5 A. Merritt, *Guidebook to Australian Occupational Health and Safety Law*, Sydney, 1983, pp. 70-72.

6 *Wilson* v *Tyneside Window Cleaning* [1958] 2 Q.B. 110.

7 e.g. *Baker* v *James Bros* [1921] 2 K.B. 674; *Harrison* v *South Clifton Coal Mining Co. Ltd* [1963] S.R. (N.S.W.) 689.

8 *Stokes* v *Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 W.L.R. 1776.

9 J.H. Munkman, *Employers' Liability*, 9th ed., London, 1979, pp. 52-54.

10 Merritt, *op. cit.*, pp. 68-70.

11 Paragraphs 1.76 to 1.89.

12 e.g. *Sherman* v *Nymboida Collieries Pty Ltd* [1962]S.R. (N.S.W.) 757; (1963) 109 C.L.R. 580.

13 e.g. *Footner* v *Broken Hill Associated Smelters Pty Ltd*, 1983, Supreme Court of South Australia, unreported.

14 e.g. *The Wagon Mound (No. 2)* [1967] 1 A.C. 617 at 643.

15 *The Wagon Mound (No. 1)* [1961] A.C. 388; *The Wagon Mound (No. 2)* [1967] 1 A.C. 617.

16 *The Heron II* [1967] 3 All E.R. 686 at 693 per Lord Reid.

17 *Qualcast (Wolverhampton) Ltd* v *Haynes* [1959] A.C. 743 at 755 per Lord Keith of Avonholm.

18 e.g. *Latimer* v *A.E.C. Ltd* [1953] A.C. 643.

19 *Ibid.*

20 *Bressington* v *Commissioner for Railways* (N.S.W.) (1947) 75 C.L.R. 339.

21 *Nelson* v *John Lysaght (Aust) Ltd* (1975) 49 A.L.J.R. 68.

22 H.H. Glass, M.H., McHugh and F.M. Douglas, *The Liability of Employers*, 2nd ed., Sydney, 1979, pp. 39-46; Merritt, *op. cit.*, pp. 81-86.

23 *Paris* v *Stepney Borough Council* [1951] A.C. 367.

24 *Cavanagh* v *Ulster Weaving Co. Ltd* [1960] A.C. 145.

25 See generally H. Luntz, *Assessment of Damages for Personal Injury and Death*, 2nd ed., Sydney, 1983.

26 *Darley Main Colliery Co* v *Mitchell* (1886) 11 App. Cas. 127 (HL).

27 Luntz, *op. cit.*, pp. 56-63.

28 *Ibid.*

29 *Sharman* v *Evans* (1977) 13 A.L.R. 481.

30 *Cullen* v *Trappell* (1980) 29 A.L.R. 1.

31 *Skelton* v *Collins* (1966) 115 C.L.R. 94.

32 *Paul* v *Rendell* (1981) 55 A.L.J.R. 371.

33 *Todorovic* v *Waller* (1981) 37 A.L.R. 481.

34 *Thurston* v *Todd* (1966) 1 N.S.W.R. 321.

35 *Teubner* v *Humble* (1963) 108 C.L.R. 491 at 505-6 per Windeyer J.

36 *Skelton* v *Collins* (1966) 115 C.L.R. 94 at 132 per Windeyer J.

37 *Law Reform (Miscellaneous Provisions) Act* 1965-68 (N.S.W).

38 D.H.K. Lee and I. Selikoff, 'Historical Background to the Asbestos Problem', 18 *Environmental Research* 1979, pp. 300-314.

39 Report of Royal Commission on Matters of Health and Safety Arising from the Use of Asbestos in Ontario, 1984, Vol. 1, pp. 101-2.

40 *Ibid.*, p. 98.

41 *Ibid.*, pp. 98-100.

42 *Ibid.*, p. 97.

43 *Ibid.*, p. 100.

44 See generally R. Doll and R. Peto, *The Causes of Cancer*, New York, 1981.

45 Royal Commission Report, *op. cit.*, pp. 100-101.

46 Doll and Peto, *op. cit.*, pp. 1220-1224.

47 Royal Commission Report, *op. cit.*, pp. 290-291.

48 See paragraphs 1.89-1.104 and 1.124-1.156.

49 Royal Commission Report, *op. cit.*, p. 97.

50 Currently about two and a half years from the initiation of proceedings. See Australian Institute of Judicial Administration. *Discussion Paper* No. 1, August 1983, p. 22.

51 Doctors Reform Society Submission, Transcript of Evidence, pp. 390-391.

52 Submission of Dust Diseases Board, Transcript of Evidence, pp. 1145-54, 1168; Submission of Dr Geoffrey Field, Transcript of Evidence, pp. 1703-4.

53 Transcript of Evidence, pp. 1145-54, 1168, 2284.

54 D. McIntosh and B. Seigne, 'Defending an Asbestosis Claim', *The Insurance Record*, May 1980, pp. 153-158 at 155.

55 I.J. Selikoff and D.H.K. Lee, *Asbestos and Disease*, Academic Press, New York, 1978, pp. 226-33.

56 Transcript of Evidence, pp. 596-601; pp. 1148-1154, 1168; pp. 1738-9; Submission of the Society for the Prevention of Asbestosis and Industrial Diseases (U.K.), Transcript of Evidence, pp. 551-3.

57 Submission of the Society for the Prevention of Asbestosis and Industrial Diseases (U.K.), Transcript of Evidence, pp. 551-3.

58 Submission of Hardie Trading (Services) Pty Ltd, Transcript of Evidence, pp. 2636-7 and p. 1387.

59 Submission of Woodsreef Mines Ltd, Transcript of Evidence, p. 2122.

60 Exhibit No. 22. Evidence was given by Woodsreef Mines Limited that on 13 January 1984, a change of name of Asbestos Mines Pty Ltd to Marlew Mining Pty Ltd was registered. The Report and this Appendix refer to the company at all times as Asbestos Mines Pty Ltd, since that was the name it bore during (almost) the entire period of operation of the mine and mill from 1944 to 1979.

61 Section 6 (1).

62 Section 2 (d).

63 *Workers' Compensation (Dust Diseases) Amendment Act* 1967, Section 6 (2) (b) (i).

64 Section 6 (a).

65 Section 5 Schedule 4 (1).

66 See paragraphs 1.27 to 1.28.

67 *Cartledge* v *E. Jopling and Sons Ltd* [1963] A.C. 758.

68 See paragraphs 1.56 to 1.58.

69 See paragraphs 1.27 to 1.28.

70 e.g. *Companies Code* 1981 (N.S.W.).

71 *Salomon* v *Salomon and Co. Ltd* [1897] A.C. 22.

72 *Ibid.*

73 L.C.B. Gower, J.B. Cronin, A.J. Easson and Lord Wedderburn of Charlton, *Principles of Modern Company Law*, 4th ed., London, 1979, p. 112.

74 H.A.J. Ford, *Principles of Company Law*, 3rd ed., Melbourne, 1982, pp. 146-7.

75 *Ibid.*, pp. 147-154; Gower et al., *op. cit.*, pp. 123-138.

76 Gower et al, *ibid.*, pp. 118-120.

77 [1939] 4 All E.R. 116.

78 Gower et al, *op. cit.*, p. 130.

79 *Ibid.*

80 *Ibid.*, p. 31.

81 [1955] 1 W.L.R. 352 at 367.
82 Gower et al., *op. cit.*, p. 137.
83 *Ibid.*, pp. 137-8.
84 *Op. cit.*, p. 148.
85 *Ibid.*, p. 154.
86 Transcript of Evidence, pp. 1390-1404 and 1318-59.
87 *Ibid.*, pp. 2154-58, 2161, 2163-65.
88 Royal Commission Report, *op. cit.*, pp. 275-281.
89 *Ibid.*, pp. 284-290.
90 See paragraph 1.23.
91 See paragraphs 1.36 to 1.50.
92 Glass, McHugh and Douglas, *op. cit.*, p. 30; Merritt, *op. cit.*, pp. 73-5.
93 [1968] 1 W.L.R. 1776 at 83.
94 Transcript of Evidence, pp. 1480-1484, and 581-9.
95 Transcript of Evidence, pp. 1628-45.
96 Transcript of Evidence, pp. 1714-17.
97 [1980] Qd. R. 12.
98 [1981] V.R. 908.
99 [1980] Qd. R.12 at 18.
100 *Cuthill* v *Bestobell Industries Pty Ltd* [1980] Qd. R. 12 at 18.
101 *Ibid.*, pp. 912-3.
102 *Ibid.*, p. 913.
103 *Ibid.*
104 1945, Victoria.
105 *Op. cit.*, p. 915.
106 See also paragraphs 3.41 and 5.111 to 5.116 of the Report.
107 Lee and Selikoff, *op. cit.*
108 *Ibid.*, pp. 309-310. See also paragraphs 3.42 to 3.44 of the Report.
109 Lee and Selikoff, *op. cit.*, pp. 308-9. See also paragraphs 3.45 to 3.46 of the Report.
110 1979, Supreme Court of Western Australia, unreported.
111 1983, Supreme Court of South Australia, unreported.
112 *Op. cit.*, p. 20.
113 *Op. cit.*, p. 18
114 [1961] A.C. 388.
115 *Ibid.*, p. 426.
116 A. Ogus, *The Law of Damages*, London, 1973, p. 69.
117 [1963] A.C. 837.
118 [1962] 2 Q.B. 405.
119 Ogus, *op. cit.*
120 See, for example, Glass J.A., in dissent, in *Rowe* v *McCartney* [1976] 2 N.S.W.L.R. 72 at 78-80.
121 *Op. cit.*
122 *Op. cit.*
123 Transcript of Evidence, pp. 1410-11.
124 Transcript of Evidence, pp. 181-2, 191.
125 Transcript of Evidence, p. 2119.
126 Transcript of Evidence, p. 2142.
127 See paragraphs 5.149 to 5.153 of the Report.
128 Transcript of Evidence, p. 2637.

129 Transcript of Evidence, p. 2119.

130 *Latimer* v *A.E.C. Ltd* [1952] 2 Q.B. 701..

131 Transcript of Evidence, pp. 1424-76, 49-54, 151-2, 154, 159-60, 172, 174-6, 194-6, 212-3, 217-220, 261-263, 275-6, 289-291, 302-03, 1074-81, 1099-1100. See also paragraphs 5.85 to 5.97 of the Report.

132 *Ibid.*

133 [1959] A.C. 743.

134 [1968] 1 Q.B. 94.

135 [1953] 1 W.L.R. 857 at 864.

136 [1968] Qd R. 131 at 135.

137 See also *Mount Isa Mines Ltd* v *Bates* (1972) 46 A.L.J.R. 408.

138 Transcript of Evidence, pp. 151-76.

139 Transcript of Evidence, pp. 1426-7. See also paragraphs 5.85 to 5.97 of the Report.

140 Transcript of Evidence, pp. 194-5, 218-220.

141 J.G. Fleming, *The Law of Torts*, 6th ed., Sydney, 1983, Ch.18, pp. 338-64.

142 *Paris* v *Stepney Borough Council* [1951] A.C. 367.

143 *Qualcast (Wolverhampton) Ltd* v *Haynes* [1959] A.C. 743.

144 Merritt, *op. cit.*, pp. 76-77.

145 Royal Commission Report, *op. cit.*, pp. 274-81.

146 *Ibid.*

147 *Ibid.*, pp. 284-90.

148 *Bressington* v *Commissioner for Railways (N.S.W.)* (1947) 55 C.L.R. 339.

149 [1968] 1 Q.B. 94.

150 *Ibid.*, pp. 104-5 per Sellers L.J., p. 106 per Davies L.J., p. 107 per Russell L.J.

151 *Wilsons and Clyde Coal Co.* v *English* [1938] A.C. 57 at 78 per Lord Wright.

152 *Hamilton* v *Nuroof (W.A.) Pty Ltd* (1956) 96 C.L.R. 18 at 19.

153 *Limitation Act* 1969 N.S.W., Section 16.

154 [1963] A.C. 758.

155 Per Murphy A.C.J. in *Do Carmo* v *Ford Excavations Pty Ltd* 1984, High Court of Australia, unreported at p. 3.

156 4 April 1984, unreported.

157 *Ibid.*, pp. 2-3.

158 *Ford Excavations Pty Ltd* v *Do Carmo* [1981] 2 N.S.W.L.R. 253.

159 *Do Carmo* v *Ford Excavations Pty Ltd, op. cit.*, p. 3.

160 *Ibid.*

161 *Ibid.*

162 *Ibid.*, p. 4.

163 *Ibid.*

164 [1973] A.C. 518.

165 *Do Carmo* v *Ford Excavations Pty Ltd, op. cit.*, p. 28-30 per Dawson J., p. 18; per Brennan J. concurring.

166 Transcript of Evidence, pp. 1135-7.

167 *Do Carmo* v *Ford Excavations Pty Ltd, op. cit.*, p. 4.

168 Transcript of Evidence, p. 1449.

169 *Do Carmo* v *Ford Excavations Pty Ltd, op. cit.*, p. 29.

170 Luntz, *op. cit.*, pp. 194-204.

171 Furthermore, the duty of a plaintiff to mitigate damages has been said to require the use of free facilities where they are available. See *Taccone* v *Electric Power Transmission Pty Ltd* [1962] Qd. R 545; *Carnsew* v *Bruhn* [1966] S.A.S.R. 397.

172 Luntz, *op. cit.*, pp. 240-42.

173 *Willis* v *The Commonwealth* (1946) 73 C.L.R. 105.

174 In the first edition of the abovementioned work, 1974, p. 144.

175 See paragraph 1.23.

176 *Law Reform (Miscellaneous Provisions) Act* 1944, N.S.W., Section 2(2) (d).

177 Selikoff and Lee, *Asbestos and Disease*, *op. cit.*, pp. 234-6.

178 N.S.W. Select Committee of the Legislative Assembly upon Aborigines, Second Report, 1981, p. 145, paragraph 16.17.

179 Luntz, 1983, *op. cit.*, p. 180.

180 *Sharman* v *Evans* (1977) 13 A.L.R. 57.

181 *Darley Main Colliery Co.* v *Mitchell* (1886) 11 App. Cas. 127 (H.L.).

182 *Workers' Compensation Act* 1926, N.S.W., Sections 9 and 11.

183 See, for example, *Sharman* v *Evans* (1977) 13 A.L.R. 57.

184 See paragraphs 1.89 to 1.90.

185 *Limitation Act* 1969 N.S.W., Section 58.

186 Section 10.

187 (1963-64) 110 C.L.R. 24.

188 *Caswell* v *Powell Duffryn Associated Collieries Ltd* [1940] A.C. 152.

189 *Sungravure Pty Ltd* v *Meani* (1963-64) 110 C.L.R. 24 at 37.

190 Transcript of Evidence, p. 220.

191 See generally *Australian Law Reform Commission. Discussion Paper* No. 18, August 1982.

192 A valid Australian marriage is one celebrated in accordance with the formal and essential requirements of the *Marriage Act* 1961 (C/W).

193 For a discussion of the presumption of legitimacy, see Gobbo, Byrne and Heydon, *Cross on Evidence*, 2nd Aust. ed., Sydney, 1979, paragraphs 6.16-6.19A.

194 For a discussion of the circumstances in which a polygamous or potentially polygamous marriage will be recognised at common law, see P.E. Nygh, *Conflict of Laws in Australia*, 4th ed., Sydney, 1984, pp. 299-301.

195 Luntz, *op. cit.*, p. 408. See, however, the approach of the New South Wales Supreme Court in *Johnson* v *Ryan* [1977] 1 N.S.W.L.R. 294.

196 *Compensation to Relatives Act* 1897, N.S.W., Section 4.

197 Luntz, *op. cit.*, p. 408.

198 4 April 1984, High Court of Australia, unreported.

199 *Ibid.*

200 *Op. cit.*, pp. 405-6.

201 *Ibid.*, pp. 457-8.

202 *Ibid.*, p. 406.

203 *Ibid.*

204 *Ibid.*, pp. 406-7.

205 *Compensation to Relatives Act* 1897 N.S.W., Section 4.

206 See paragraphs 1.110 to 1.111.

207 Luntz, *op. cit.*, pp. 405-6.

208 *Wills, Probate and Administration Act* 1898 N.S.W., Section 63.

209 Australian Law Reform Commission. *Discussion paper* No. 18, *op. cit.*, p. 16.

210 *Children (Equality of Status) Act* 1976 N.S.W., Section 6-9.

211 See paragraphs 1.130 to 1.138 and 1.155 to 1.156.

Chapter 2

Common law action for damages for breach of statutory duty — by workers, residents and their dependants

ELEMENTS OF THE ACTION FOR BREACH OF STATUTORY DUTY

2.1 Where a person on whom a statutory duty is laid is in breach of that duty and, as a result of the breach, another person suffers injury, the person in breach may be liable in damages to the person injured for the loss caused by the breach.

2.2 However, not *every* breach of a statutory duty gives rise to a civil action for damages. Where the obligation imposed by the statute is for the benefit of the public as a whole, an individual member of the public injured by a breach of the obligation will not have a private right of action. Where the obligation is for the benefit of a class of persons less extensive than the public as a whole, then *prima facie* a member of that class will have a private right of action for losses resulting from a breach of the obligation, *unless* the statute expressly or by implication negatives an intention to give such a right.[1]

2.3 It is unusual for there to be express words in a statute relating to this matter, as Lord du Parcq noted in *Cutler* v *Wandsworth Stadium Ltd*:[2]

> To a person unversed in the science or art of legislation it may well seem strange that Parliament has not by now made it a rule to state explicitly what its intention is in a matter which is often of no little importance, instead of leaving it to the courts to discover, by a careful examination and analysis of what is expressly said, what that intention may be supposed probably to be. There are no doubt reasons which inhibit the legislature from revealing its intention in plain words. I do not know, and must not speculate, what those reasons may be. I trust, however, that it will not be thought impertinent, in any sense of that word, to suggest respectfully that those who are responsible for framing legislation might consider whether the traditional practice, which obscures, if it does not conceal, the intention which Parliament has, or must be presumed to have, might not safely be abandoned.

His Lordship remarked a little later that 'the courts have laid down, not indeed rigid rules, but principles which have been found to afford some guidance when it is sought to ascertain the intention of Parliament'.[3] In *O'Connor* v *S.P. Bray Ltd*,[4] Evatt and McTiernann JJ. suggested that a private right of action will not be denied where breach of the statutory duty in question is likely to cause death or (personal) injury or where the penalty set by the statute is small, and therefore an inadequate sanction.

2.4 The elements of the cause of action (once its existence has been established as above) are:

(1) a proper plaintiff: i.e. a member of the class for whose benefit the duty was imposed;[5]

(2) a proper defendant: the person on whom the legislation imposed the duty;

(3) a breach of the duty;

(4) injury to the plaintiff caused by the breach,

(5) that injury being of the type against which the statute had intended to give protection.[6]

STATUTORY OBLIGATIONS APPLYING TO ASBESTOS MINES PTY LTD

I. The Mines Inspection Act 1901 (N.S.W.)

2.5 The full title of this Act is 'An Act to make better provision for the regulation and inspection of mines other than coal and shale mines; to regulate the treatment of the products of such mines; and for purposes incidental to or consequent on those objects'.

2.6 In 1944, when Asbestos Mines Pty Ltd was formed to operate the Baryulgil mine and mill,[7] 'mine' was defined as follows:

> 'Mine' means and includes any place, open cut, shaft, tunnel, drive, level, or other excavation, drift, gutter, lead, vein, lode, or reef wherein or whereby any operation is carried on for or in connection with the purpose of obtaining any metal or mineral other than coal or shale, by any mode or method, and any place adjoining thereto on which any product of the mine is stacked, stored, crushed, or otherwise treated and also includes any quarry.

The Baryulgil operation fell within this definition. In 1958, the definition was extended, but the amendment was of no relevance to the Baryulgil operation.[8]

2.7 In 1963, a further amendment[9] omitted the concluding words 'any quarry'. Instead the following paragraphs were attached:

> (a) any quarry;
>
> (b) any place where two or more men are employed in connection with prospecting operations for the purposes of the discovery or exploration of or for any metal or mineral whether by drilling, boring or any other method; and
>
> (c) so much of the surface of any place and the buildings, workshops, changehouses, structures and works thereon, whether completed or in course of construction or erection, surrounding or adjacent to the shaft, outlets or site, of a mine as hereinbefore defined as are occupied by the owner together with the mine for the purposes of or in connection with the working of the mine, or the removal from the mine of refuse, or the health, safety or welfare of persons employed in, at or about the mine.

Paragraphs (a) and (c) applied to Baryulgil. In 1967, paragraph (b) was amended, but this did not apply to Baryulgil.[10]

2.8 In 1968,[11] the opening portion of the definition was amended by changing the words 'stored, crushed or otherwise treated' to 'stored or treated'. The sense however was not altered, because of the insertion of a new definition of 'Treatment':

> 'Treatment', in relation to any product of a mine or a quarry, means the crushing, grinding, classifying, reducing, smelting, concentrating, precipitating or separating of that product or any other process, or part of a process, for obtaining any metal or mineral therefrom, and includes the mixing of any such product with any substance so as to produce ready mix concrete or bitumen hot mix; and 'treat' and derivatives therefrom have a corresponding meaning.

2.9 In 1978 a further paragraph (al) was added after '(a) any quarry;' relating to mining operations by dredging, pumping, etc.[12] This amendment did not apply to the Baryulgil operation.

2.10 The Baryulgil mine and mill would have fallen within the opening words of the definition. It was further covered by the definition of 'quarry':

> 'Quarry' includes any place, open cut, or excavation wherein or whereby any operation is carried on above ground for or in connection with the purpose of obtaining any metal or mineral other than coal or shale and any place adjoining thereto on which any product of the quarry is stacked, stored or crushed.[13]

2.11 This definition was amended in 1958 by changing 'crushed' to 'crushed or otherwise treated'.[14] In 1968 this phrase was changed in the same way as the

corresponding phrase in the definition of 'Mine' (see paragraph 2.8) — to 'stored or treated' — the reference to crushing being provided by the new definition of 'Treatment'.[15]

2.12 Clearly, then, Asbestos Mines Pty Ltd was covered by the *Mines Inspection Act* 1901, and obligations imposed by that Act bound the company.

Obligations Imposed by the Act Which Might Have been Breached by Asbestos Mines Pty Ltd

2.13 Many of the obligations imposed by the Act would not have applied to the Baryulgil operation since they cover underground mines only. However, a number of sections impose duties which did apply and which may have been breached, or which, on the evidence given to the Committee, appear to have been breached. These are in Sections 12 to 18A, 30, 55 and 65. Obligations could have arisen under Sections 37 and 37A had notices and directions been given, but no notices and directions were given under these sections.

Sections 12 to 18A

2.14 These sections relate to persons being in charge of machinery powered by steam, water, electricity, gas, oil or air without holding the required certificate of competency. Section 12 stated, in 1944:

> (1) Any person —
>
> (a) who is not registered as the holder of a certificate of competency or of service as an engine-driver granted under this Act or of a certificate approved by the board of examiners of engine-drivers; or
>
> (b) who (whether or not the holder of the certificate as aforesaid) by reason of deafness, total or partial, or defective sight or being subject to fits, giddiness or any other infirmity is unable to discharge his duties efficiently;
>
> and who is in charge of machinery in use at any mine in which steam, water, electricity, gas, oil, or air, or any two or more of them are used as motive power (except water power used for pumping) and any other person who, knowing that such person is not registered as the holder of such certificate, or that he is subject to such defect or infirmity, employs any such person as aforesaid, shall be guilty of an offence against this Act.
>
> (2) Any person who being registered as the holder of a certificate as aforesaid is in charge of any machinery in use at any mine and such machinery is not of the class or description of machinery of which he may be in charge or have the management under the authority of such certificate shall be guilty of an offence against this Act.
>
> (3) This section shall not extend to persons in charge of —
>
> (a) electric motors, other than those used for operating winding engines, in which the starting, stopping and acceleration are effected by contactor switches operated either automatically or by push buttons, and which are so used that in the opinion of an inspector there exists no risk to life or limb by such method of control, and provided the person who performs the duties of periodic inspection and servicing of such motors is registered as the holder of an electric motor driver's certificate of competency granted under this Act;
>
> (b) boring machines, sinking pumps, electric motors not exceeding five horse power, air motors not exceeding ten horse power, and air winches not exceeding ten horse power when installed for hauling stope supplies.

In 1958,[16] paragraph (b) of subsection (3) above was removed and the following paragraph substituted:

(b) boring machines, sinking pumps, electric motors not exceeding five horse power, air motors not exceeding twenty horse power, and air winches and air hoists not exceeding ten horse power when installed for raising or lowering supplies to underground working places (not being places where men are engaged in winze sinking or shaft sinking) and moving trucks at filling and emptying stations.

In 1967, several minor amendments were made to the wording of Section 12.[17]

2.15 If machinery at the Baryulgil mine and mill came within the description in Section 12(1) and was not excluded by Section 12(3), and the workers operating that machinery did not hold certificates of competency appropriate to the class of machinery involved, there would have been breaches of the Act. The worker himself and the employer would both have been in breach and guilty of an offence. The evidence given to the Committee does not reveal whether any uncertificated persons operated the machinery. On the other hand, it does not suggest that any members of the community working at the mine and mill held any such certificates.

2.16 If it were discovered that uncertificated persons had operated machinery, that fact would nevertheless be unlikely to give any Baryulgil workers an action for breach of statutory duty. Arguably, this section does not fulfil the guidelines for finding a parliamentary intention to give a private right of action, but even if it does give such a right, the injury against which it would aim to give protection would be direct injury from incompetent operation — not a disease caused by inhalation of fibre from rock processed by the machinery. Moreover such disease could not be said to have been *caused* by a breach of sections 12 to 18A.

Section 30

2.17 This section stated:

30.(1) No person in charge of machinery in which steam, water, electricity, gas, oil, or air, or any two or more of them are used as a motive-power in connection with any mine or for the treatment of the products of any mine, shall be so employed for more than eight consecutive hours at any time, or for more than eight hours in any twenty-four hours, except when changing shifts at the end of the week; such period of eight hours shall be exclusive of any time occupied in raising steam or supplying air and in drawing fires and exhausting steam in connection with the machinery in the charge of such person, and of any time in which such person is employed in case of breakage, emergency, or necessity.

(2) Any such person who is guilty of negligence in such employment as aforesaid, by which any property is destroyed or damaged, shall be guilty of an offence against this Act.

It was amended in 1968 to insert the words 'in or about a mine' after the word 'treatment'.[18]

2.18 Subsection (2) makes it appear that the purpose of this section is to prevent careless work by machine operators through weariness or inattentiveness resulting from long shifts. The obligation in Section 30 is placed on the worker, but Section 31(2) makes the owner and manager also guilty of an offence.

2.19 Possibly the section would give a private right of action to a person whose property was damaged through the negligence of a worker who had worked longer than the 8 hours limit. It would not, however, be available for a worker who had contracted an asbestos-related disease. The breach could not have caused that injury, nor was that injury of the type against which the statute intended to give protection.

Section 55

2.20 This is perhaps the most important section of the Act for it lays down General Rules for the operation of mines. Two of the General Rules could be relevant in the Baryulgil situation: General Rules 8, 65B.[19] Several others may have been breached by Asbestos Mines Pty Ltd — for example General Rule 2 which concerned the use and storage of explosives and General Rule 9A which required persons oiling or greasing machinery to wear close fitting garments — but breach of those rules could not be a cause of the injury for which a former Baryulgil worker would be seeking to make a claim.

General Rule 8

2.21 General Rule 8 states:

> All boilers, compressors, engines, gearing *and all other parts of machinery*, when used for any mining purposes, or for the treatment of ores, or for the treatment of the products of any mine, shall be kept in *a fit state and condition for work*, to the satisfacton of an inspector. (emphasis added).

'Machinery' was defined in Section 4(1) as meaning:

> steam or other engines electric motors, boilers, furnaces, stampers, or other crushing apparatus, ore-reduction or concentrating plants, winding or pumping gear, whims, whips, windlasses, chains, trucks, tramways, tackle, blocks, ropes, and tools, and includes all appliances of whatsoever kind used in or about or in connection with a mine, or for the treatment of any product of a mine.

The definition was amended in 1978, to insert the word 'dredges' after 'engines'.[20] Clearly, the machinery of the mill at Baryulgil came within this definition, and was required by General Rule 8 to be 'kept in a fit state and condition for work, to the satisfaction of an inspector'.

2.22 To make out a claim for damages for breach of this Rule, it would be necessary first to establish that it was intended to give a private right of action. By application of the criteria discussed in paragraphs 2.2 to 2.3 and by analogy to cases[21] concerning breach of other industrial safety statutes such as the *Factories, Shops and Industries Act* 1962, General Rule 8 would in all probability be held to give rise to a private right of action.

2.23 The second necessary element of the action for breach of statutory duty is a proper plaintiff — a member of the class for whose benefit the section was passed. General Rule 8 would undoubtedly have been passed for the benefit of workers in mines, and a former Baryulgil worker would thus be a proper plaintiff.

2.24 The obligation imposed by General Rule 8 rests on the owner and/or manager of the mine. Asbestos Mines Pty Ltd would be the proper defendant.

2.25 The next element of the action is to establish that there was a breach of General Rule 8. Evidence has been given to the Committee suggesting that the machinery of the mill was not always in a fit state, at least in the general understanding of that phrase — for example, evidence of inadequacy of the dust collector socks.[22] To establish a breach, it would be necessary to determine whether such problems amounted to the machinery not being 'in a fit state and condition for work' within the meaning of General Rule 8, and that meaning is for the Court to decide.[23] Even if the Court gave to that phrase a meaning such that the inadequacies of the machinery alleged rendered it not 'in a fit state', that is not enough to establish breach, for the General Rule requires that the fit state is to be 'to the satisfaction of an Inspector'. It would thus appear that without further evidence that an inspector had expressed dissatisfaction with the state and conditon of the particular part of the machinery and that Asbestos Mines Pty Ltd had failed to remedy the state and condition complained of, there would be no breach.

2.26 With respect to the question of whether there has been a breach, it is necessary to give some attention to Section 71(2) which states:

> An inspector shall not institute any prosecution under this Act against the owner or manager or an employee of a mine if satisfied that he had taken all reasonable means to prevent the commission of the offence.

This might seem at first glance to mean that, if it could be shown that such reasonable means had been taken, there would be no breach (and therefore no possibility of an action for breach of statutory duty). Such an interpretation would give the provisions of this Act the same effect as sections of the *Factories, Shops and Industries Act* 1962 (N.S.W.) which require certain standards to be met 'so far as is reasonably practicable',[24] or Section 2(1) of the *Health and Safety at Work etc. Act* 1974 (UK) whereby 'It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees'. However, when Section 71(2) is read in conjunction with Section 71(1), one sees that if all reasonable steps have been taken there will still be a breach, but there will be no prosecution. In that case, an action for breach of statutory duty could be brought, even though no prosecution could be initiated. Section 71(1) states:

> Where *an offence has been committed*, for which the owner or manager of a mine *is liable under this Act*, but which has not personally been committed by such owner or manager, *no proceedings for such offence* shall be instituted against such owner or manager except by an inspector or with the consent in writing of the Minister. (emphasis added).

2.27 If evidence of the nature discussed in paragraph 2.25 were forthcoming, the plaintiff would have to prove that the breach caused his injury — that is, the contraction of the disease. Obviously, this would require that the unfit state of the machinery resulted in a release into the atmosphere of asbestos fibres. But even if this could be shown — as it would, for example, if the matter in question was inadequate dust collector socks — there could be further difficulties in establishing causation.

2.28 If the plaintiff's damage were asbestosis, it could not really be said that the fibres to which he was exposed by the particular breach had caused his contraction of the disease, since asbestosis results from exposure over a considerable period to a large quantity of fibre. However, it could be shown that the exposure resulting from the breach would have *contributed* to his disease, would have been part of the total exposure which caused the illness, and that would probably be sufficient to establish causation to the satisfaction of the court.

2.29 If the disease were mesothelioma, it would not really be possible to say that it was the fibres to which the plaintiff was exposed by the particular breach alleged which had been the ones which resulted in the malignancy. As seen earlier, it will be impossible to tie down the contraction of this disease to a particular month or even year, because of the long but not rigid latency period. The plaintiff might have already contracted the disease at the time of the breach or he might not have contracted it till months or years after the breach. However, although mesothelioma is not dose-related in the same sense as asbestosis, it is dose-related in the sense that the greater the exposure, the greater the chance that some of the inhaled fibres will cause malignant disease. Therefore it is at least arguable that a court would hold that a breach which increased the plaintiff's exposure to the inhalation of asbestos fibre established causation.

2.30 There would be little difficulty in establishing the final element — that the injury was of the type against which protection was intended. Here the principles of *Grant* v *National Coal Board*[25] would undoubtedly be applied. In that case, the House of Lords acknowledged the correctness of the statement of Kelly C.B. in *Gorris* v *Scott* [26] that:

> When the damage is of such a nature as was not contemplated at all in the statute, and as to which it was not intended to confer any benefit on the plaintiff, they cannot maintain an action . . .

but denied its applicability to injury caused by a breach of the *Coal Mines Act* (U.K.). Lord Reid stated that:

> it seems to me a very different thing to say that, where the object of the enactment is to promote safety, the implication is that liability only arises if the breach causes injury in a particular way.[27]

Their Lordships' view seemed to be that industrial safety statutes are aimed at preventing injury per se, so that whatever type of injury results from a breach will be the type of injury that the statute was intended to prevent.

General Rule 65B

2.31 This rule was inserted in the Act by amendment, under Section 56(1) (b) and (2), on 24 July 1964.[28] It states:

> The concentration of dust in any mine or part thereof where any person or persons are required to be employed shall be determined by taking the average of the numbers ascertained by six tests made at intervals of not less than five minutes over a period of not more than thirty minutes, or by any other method which may be approved by the Chief Inspector of Mines for the purpose. The number of dust particles per cubic centimetre less than five microns in size shall be determined by the use of a konimeter with dark field illumination or in the case of asbestos dust by an impinger of a type approved by the Chief Inspector of Mines and shall not exceed the limits set out in the table to this Rule or shall be determined by any other instrument which may be approved by the Chief Inspector of Mines for the purpose and at such concentration as may be approved by him: Provided that the type of instrument to be used, the particle size range to be counted and the maximum allowable concentration may be specified by the Chief Inspector of Mines in respect of any particular type of dust. The determination of the free silica content shall be made on airborne material provided that if, in the opinion of the Chief Inspector of Mines, this is not practicable the determination shall be carried out on the parent material. The analytical method to be adopted for the determination of the free silica content shall be approved by the Chief Inspector of Mines.

The Table attached to the Rule set the maximum limit for the concentration of asbestos dust at 5 million particles per cubic foot of air. In 1973, pursuant to the power given in General Rule 65B, the Chief Inspector of Mines notified to Asbestos Mines Pty Ltd a variation of that limit to 4 fibres per millilitre as measured by the membrane filter method.[29] On 3 March 1978, the Chief Inspector of Mines notified to Asbestos Mines Pty Ltd a further variation to 2 fibres per millilitre of air.[30]

2.32 General Rule 65B would give a private right of action to a worker in a mine as defined in the Act, as being a member of the class the General Rule intended to protect. Thus, a Baryulgil claimant formerly employed by Asbestos Mines Pty Ltd would be a proper plaintiff. The proper defendant would be Asbestos Mines Pty Ltd, the person on whom the obligation was imposed.

2.33 The plaintiff in an action based on General Rule 65B could, however, have difficulties in proving that there had been a breach. Evidence received by the Committee from the Aboriginal Legal Service has included copies of what purport to be the results of dust counts by the Industrial Hygiene Division of the Hardie Group.[31] A number of these show levels well above the maximum of 5 million particles per cubic foot prescribed in 1964, the 4 fibres per millilitre prescribed in 1973, or the 2 fibres per millilitre maximum prescribed for Baryulgil in March 1978. Evidence submitted by the Public Interest Advocacy Centre[32] and the Departments of Mines and Health (Division of Occupational Health),[33] contain copies of the dust counts made by those bodies in the exercise of their

statutory powers of inspection. These documents also show dust or fibre levels above the prescribed maximum.

2.34 In the case of the Burke documents, authentication would be essential before there was any chance that a court would accept them as admissible. Even if that hurdle were overcome, those reports and the official departmental reports would merely be hearsay.[34] It would be necessary for the person who had done the testing to give evidence of the fibre concentration which the tests disclosed. Given the lapse in time since the tests in question were made, such evidence could be difficult to obtain.

2.35 In the event that such evidence could be obtained to establish that there had been a breach, the problems in showing that the breach had caused the injury where that injury was a disease of long latency and (in the case of asbestosis) a disease contracted by gradual proccess would again arise but would probably be surmounted in the manner outlined in paragraphs 2.27 and 2.28.

2.36 There would be no doubt, if these matters had been established, that the injury — an asbestos-related disease — was an injury of the type against which General Rule 65B was intended to give protection.

Section 65

2.37 Section 65 requires that:

> For the purpose of making known the provisions of this Act and the special rules (if any) to all persons employed in and about a mine, an abstract of this Act supplied, on the application of the owner or manager of the mine, by an inspector, and a correct copy of the special rules (if any) shall, if deemed necessary by an inspector, be published as follows:—
>
> (a) The owner or manager of the mine shall cause the abstract of the Act and copy of the rules (if any), with the name of the mine and the name of the owner and of the manager to be posted up, in legible characters, in some conspicuous place at or near the mine, where they may be conveniently read by the persons employed therein; and so often as such abstract or copy becomes defaced, obliterated, or destroyed, shall cause it to be renewed with all reasonable despatch.
>
> (b) The owner or manager shall, on request, supply a printed copy of the abstract and the special rules (if any) gratis to each person employed in or about the mine.
>
> In the event of any non-compliance with the provisions of this section the owner and manager shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means, by enforcing, to the best of his power, the observance of this section to prevent such non-compliance.

2.38 It may be that evidence could be produced that Asbestos Mines Pty Ltd had failed to comply with this requirement. (There is no suggestion either way in the evidence received by the Committee.) If such evidence were produced, and if Asbestos Mines Pty Ltd could not show that it had taken all reasonable means to ensure compliance, then a breach would be established.

2.39 It is unlikely that such a section would be held to confer a private right of action. Even if it were so held, it would give no claim to a former worker suffering an asbestos-related disease, since the breach could not be said to have caused that injury.

Limitation of Actions

2.40 Since the breaches of statutory duty on which such actions would be based would, of necessity, have occured before September 1979 when the mine and mill closed,[35] most such actions would now be statute-barred as having accrued more than six years ago. The cause of action accrues when the damage — the contraction of the disease — occurs.[36] Unless the prospective Baryulgil claimants could bring themselves within the provisions

for extension of time in Sections 57 and 58 of the Limitation Act, by establishing ignorance of a material fact, they would be unable to pursue this remedy. (See paragraphs 1.9 to 1.104.)

STATUTORY OBLIGATIONS APPLYING TO ASBESTOS MINES PTY LTD

II The Clean Air Act 1961 (N.S.W.)

2.41 The full title of this Act is 'An Act relating to the prevention and minimising of air pollution; to repeal the *Smoke Nuisance Abatement Act*, 1902; to amend the *Local Government Act* 1919, and certain other Acts, and for purposes connected therewith'. The Act's main concern is to control air pollution issuing from industrial premises. Certain categories of premises likely to emit air pollutants are required to be licensed. Licensed premises must conform to standards set under the Act and introduce pollution control equipment required under the Act. Even unscheduled premises, likely to cause harmful emissions, can be required to install control equipment. Responsibility for the Act and the enforcement of the obligations it imposed rests with the State Pollution Control Commission.

2.42 Part III of the *Clean Air Act* makes provision for the licensing of Scheduled Premises and gives the Department (and, after 1970, the State Pollution Control Commission) certain powers to control air pollution emitted from Scheduled Premises. Part IV of the Act gives powers to control air pollution emitted from premises other than Scheduled Premises. By Section 5(1), Scheduled Premises means 'any premises for the time being included in the Schedule to this Act'.

2.43 The Baryulgil mine and mill came within the Schedule following an amendment on 11 January 1963[37] which extended the Schedule to include premises devoted to 'Grinding, milling or size separating of minerals, chemicals or grains'. This description was further amended by proclamation published in the N.S.W. Government Gazette of 14 February 1964[38] to read:

> Grinding and milling works, being works in which rock, ores, minerals, chemicals or natural grain products are processed by grinding, milling or separating into different sizes by sieving, air elutriation or in any other manner.

2.44 Thus, prior to 11 January 1963, the powers of control of the Baryulgil mine and mill were those contained in Part IV of the Act relating to premises other than Scheduled Premises. In the case of such premises, control was basically vested in the local authority, which in this case was the Copmanhurst Shire Council.

2.45 By Section 19, as passed in 1961:

> (1) The occupier of any premises shall not, unless he is in special circumstances exempted from the provision of this section by the Minister, conduct any trade, industry or process, or operate any fuel burning equipment or industrial plant in or on such premises in such a manner as to cause, permit or allow the emission at the prescribed point of air impurities in excess of the standard of concentration and rate, or the standard of concentration or the rate, prescribed in respect of such trade, industry, process, fuel burning equipment or industrial plant.
>
> (2) Where any such standard has not been so prescribed the occupier of any premises shall conduct any trade, industry or process, or operate any fuel burning equipment or industrial plant, in or on such premises by such practicable means as may be necessary to prevent or minimise air pollution.

This section was amended in 1974,[39] but by that time it had ceased to apply to Asbestos Mines Pty Ltd, which came within the Schedule in 1963.

2.46 Section 20 gives the local authority power to require remedial measures where air impurities were being emitted or were likely to be emitted from premises other than Scheduled Premises:

(1) Where any air impurities are being or are likely to be emitted from any premises in or on which is conducted any trade, industry or process or in or on which there is any fuel burning equipment or industrial plant, the local authority may by notice in writing require the occupier of such premises, if he has not taken all practicable means to prevent or minimise the emission of air imurities from such premises to —

(a) install and operate control equipment in or on such premises;

(b) repair, alter or replace any control equipment installed in or on such premises; or

(c) erect, or alter the height of, any chimney through which air impurities may be discharged from any such premises,

within such time and in such manner as may be specified in the notice.

(2) The local authority may by notice in writing require the occupier of any premises in carrying on any trade, industry or process or in operating any fuel burning equipment or industrial plant to operate, in accordance with any directions contained in such notice, any control equipment in or on such premises.

(3) Where in the opinion of the Under Secretary the occupier of any premises has not taken all practicable means to prevent or minimise the emission of air impurities from such premises or is not operating any control equipment in or on such premises in an efficient manner, and the local authority has not served a notice under subsection one or two of this section requiring such occupier to carry out any work referred to in paragraph (a), (b) or (c) of subsection one of this section, or operate such control equipment, as the case may be, the Under Secretary may by notice in writing require such occupier to carry out such work within such time and in such manner as may be specified in the notice; or to operate such control equipment in accordance with any directions contained in such notice.

(4) Where any requirement made in respect of any premises by a local authority under subsection one or two of this section is inconsistent with any exemption granted by the Minister under section nineteen of this Act to the occupier of such premises, the requirement shall not have effect to the extent of the inconsistency.

This section was also amended in 1974,[40] after it had ceased to apply to Asbestos Mines Pty Ltd.

2.47 With the amendment to the Schedule on 11 January 1963, the Baryulgil mine and mill became Scheduled Premises, and the relevant powers of control were those in Part III of the *Clean Air Act*. However, the licensing provisions in Division 1 of Part III did not apply to Baryulgil until 1 August 1976. It was only as of that date that Division 1 was applied to the Copmanhurst Shire by proclamation of 23 January 1976.[41] Divison 2 of Part III, which gave the Department (and after 1970 the State Pollution Control Commission) powers of control over air pollution emitted from Scheduled Premises did, nevertheless, apply to the Baryulgil operation from the moment that it came within the Schedule.

2.48 Sections 14 and 15 imposed certain obligations on the occupier of Scheduled Premises. As at 11 January 1963, those obligations were as follows:

14 The occupier of any scheduled premises shall maintain any control equipment installed in or on such premises in an efficient condition and shall operate such equipment in a proper and efficient manner.

15 (1) The occupier of any scheduled premises shall not, unless he is in special circumstances exempted from the provisions of this section by the Minister, conduct any trade, industry or process, or operate any fuel burning equipment or industrial plant, in or on such premises in such a manner as to cause, permit or allow the emission at the prescribed point of air impurities in excess of the standard of concentration and rate, or the standard of concentration or the rate prescribed in respect of such trade, industry, process, fuel burning equipment or industrial plant.

(2) Where any such standard has not been so prescribed the occupier of any scheduled premises shall conduct any trade, industry or process, or operate any fuel burning

equipment of industrial plant, in or on such premises by such practicable means as may be necessary to prevent or minimise air pollution.

These sections were amended in 1974.[42] The amendment to Section 14 inserted the following subsections:

(2) The occupier of any scheduled premises who operates any fuel burning equipment or industrial plant in or on those premises in such a manner as to cause or increase air pollution from those premises is guilty of an offence if the air pollution so caused or increased, or any part thereof, is caused by reason of his failure —

(a) to maintain that equipment or plant in an efficient condition; or

(b) to operate that equipment or plant in a proper and efficient manner.

(3) The occupier of any scheduled premises who processes, handles, moves or stores any materials in such a manner as to cause or increase air pollution from those premises is guilty of an offence if the air pollution so caused or increased, or any part thereof, is caused by reasons of his failure to process, handle, move or store those materials in a proper and efficient manner.

(4) Subsections (2) and (3) have effect notwithstanding anything contained in section 15 or any exemption from the provisions of section 15 granted by the Minister.

(5) In subsection (3), 'materials' includes raw materials, materials in the process of manufacture, manufactured materials, by-products and waste materials.

Section 15(1) was amended by omitting the words 'the prescribed point' and substituting 'any point specified in or determined in accordance with the regulations'. Section 15(2) was amended by omitting the words 'or operate any fuel burning equipment or industrial plant'.

2.49 The powers to control breaches of Sections 14 and 15 are contained in Section 17. As at 11 January 1963 it provided that:

(1) Where any air impurities are being or are likely to be emitted from any scheduled premises in or on which is conducted any trade, industry or process or in or on which there is any fuel burning equipment or industrial plant, the Under Secretary may by notice in writing require the occupier of such premises to —

(a) install and operate control equipment in or on such premises;

(b) repair, alter or replace any control equipment installed in or on such premises; or

(c) erect, or alter the height of, any chimney through which air impurities may be emitted from any such premises within such time and in such manner as may be specified in the notice.

(2) The Under Secretary may by notice in writing require the occupier of any scheduled premises in carrying on any trade, industry or process or in operating any fuel burning equipment or industrial plant to operate, in accordance with any directions contained in such notice, any control equipment in or on such premises.

(3) The Under Secretary shall in exercising his powers under this section have regard to any recommendations made by the Committee with respect to the scheduled premises concerned.

By the 1974 amending Act, a new sub-paragraph was added to Section 17 (1):[43]

(d) install fuel burning equipment or industrial plant, or use fuel of a specified type, in or on such premises, where the Commission is satisfied that the use of that equipment or plant, or fuel, will reduce the emission of air impurities from such premises;

Section 17(3) was omitted and Section 17(4) was inserted.[44] It read:

(4) A notice under subsection (1) shall not have force—

(a) until the time limited for appealing against the Commission's decision has expired; and

(b) where within that time an appeal against the decision has been made under this Act, until the District Court confirms the decision.

2.50 As well as the specific powers for control of Scheduled Premises in Part III and for control of premises other than Scheduled Premises in Part IV, there are a number of powers in Part V of the *Clean Air Act* which relate to control of all premises, whether Scheduled or not. Section 25 of the Act provided (in 1961):

> 25. Where the Committee reports to the Minister that the emission of air impurities from any premises is or is likely to be injurious to public health, the Minister may, by order, direct the occupier of such premises to cease conducting any trade, industry, or process, or operating any fuel burning equipment or industrial plant, in or on such premises for such period as may be specified in the order.

That section was amended in 1974[45] to read:

> (1) Where the Commission reports to the Minister that the emission of air impurities from any premises is or is likely to be injurious to public health, or is causing or is likely to cause such discomfort or inconvenience to any persons not associated with the management or operation of any trade, industry or process in or on such premises as warrants the making of an order under this section, the Minister may, by order, direct the occupier of such premises to cease conducting any trade, industry, or process, or operating any fuel burning equipment or industrial plant, in or on such premises for such period as may be specified in the order.
>
> (2) The occupier of premises upon whom an order under subsection (1) has been served shall not neglect or fail to comply with the direction contained in the order.
>
> Penalty for an offence under this subsection: $10,000 and, in addition, $5,000 for each day the offence continues.

Section 25A, inserted by the amending Act in 1974,[46] provides:

> (1) Where pollution has been or is being caused by the emission of air impurities by any person, any statutory body or local authority may and shall, if directed to do so by the Commission, take such action as is necessary to remove, disperse, destroy or mitigate the pollution and may recover all costs and expenses incurred by it in connection with the removal, dispersal, destruction or mitigation of the pollution from that person.
>
> (2) Any such costs and expenses may be recovered as a debt in a court of competent jurisdiction.

Section 27 empowers an authorised officer to enter any premises to examine and inspect in relation to air pollution.

2.51 On 1 August 1976, the provisions of Part III, Division 1 of the *Clean Air Act* were extended to cover premises within the Copmanhurst Shire. From that date, Asbestos Mines Pty Ltd was required to hold a licence in respect of its premises. By Section 11(3), licences remained in force for one year, and were to be renewed annually.

2.52 Section 10 is the section requiring licensing. As passed in 1961, it stated:

> Any person who is the occupier of any scheduled premises in any part of the State to which this Division applies and who is not the holder of a license issued in respect of such premises shall be guilty of an offence against this Act.
>
> The provisions of this section shall not apply to any person —
>
> (a) who at the time when the provisions of this Division are applied to any part of the State is the occupier of any scheduled premises within that part and who within the prescribed period after such time makes application for a license in respect of such scheduled premises;
>
> (b) who at any time after the provisions of this Division are applied to any part of the State commences to use any premises within that part as scheduled premises and who within the prescribed period after his so commencing makes application for a license in respect of such scheduled premises; or
>
> (c) who has made application under the provisions of subsection four of section eleven of this Act for the transfer to him of a license in respect of any scheduled premises and

made such application within the prescribed period after he became the occupier of such premises, and his application has been finally determined.

This section was amended in 1974[47] by the substitution of the following paragraph for subsection (b):

> who after the provisions of this Division were applied to any part of the State, but before the commencement of section 3(1) (g) of the Clean Air (Amendment) Act, 1974, commenced to use any premises within that part as scheduled premises and who within the prescribed period after his so commencing made or makes application for a license in respect of those premises.

2.53 'Occupier' is defined in Section 5(1) to mean:

> the person in occupation or control of the premises and in relation to any premises where different parts are occupied by different persons, means, in relation to any such part, the person in occupation or control of such part.

2.54 By Section 11(2) of the Act, licences may be made either subject to conditions or unconditionally. Initially Section 11(2) also provided that conditions attached to a licence might:

> (i) require the holder of the license —
>
> (a) to install and operate control equipment in or on any scheduled premises specified in the license;
>
> (b) to repair, alter or replace any control equipment installed in or on any such premises;
>
> (c) to erect, or alter the height of, any chimney through which air impurities may be discharged from any such premises;
>
> (d) to carry out any of the requirements imposed on him under the foregoing provisions of this paragraph within such period as may be specified in such conditions;
>
> (ii) prohibit the holder of the license from altering or replacing any control equipment installed in or on any such premises except with the approval of the Department.

That portion of subsection (2) was omitted by the amending Act of 1974[48] and therefore before the licensing provisions applied to Asbestos Mines Pty Ltd.

NATURE OF A BREACH OF STATUTORY DUTY ACTION AGAINST ASBESTOS MINES PTY LTD FOR BREACH OF THE *CLEAN AIR ACT* 1961

2.55 The purpose of this Act is, as the title and sections discussed show, to prevent harmful or unpleasant emissions from premises into the surrounding environment. The persons intended to be benefited are therefore not workers in those premises, but persons living, working or for some other reason present in the affected areas *outside* those premises. The appropriate plaintiffs here would therefore be residents of the Square who had contracted an asbestos-related disease as a result of the pollution of the Square by asbestos fibres and dust emitted from the mine and mill.

OBLIGATIONS IMPOSED BY THE *CLEAN AIR ACT* 1961 WHICH MIGHT HAVE BEEN BREACHED, OR WHICH WERE BREACHED, BY ASBESTOS MINES PTY LTD

2.56 Not all of the obligations imposed by the sections of the Act set out in paragraphs 2.42 to 2.54, are available as possible foundations for breach of statutory duty actions. Sections 11(2), 17, 20, 25 and 25A could only have been breached if there had been

conditions imposed, or notices or directions issued. The evidence suggests that no notices or directions were issued to Asbestos Mines Pty Ltd,[49] and clearly states that no conditions were attached to their licence when or after it was issued.[50] The sections of which there was, or may have been, a breach are sections 10, 14, 15 and 19.

Section 10

2.57 This is the section requiring the occupiers of scheduled premises to apply for a licence. As seen in paragraph 2.51, Asbestos Mines Pty Ltd, the 'occupiers' under Section 5(1), became subject to the requirements of the Act on 1 August 1976. The evidence as to the date on which they obtained a licence is conflicting. The submission of the Public Interest Advocacy Centre quotes from a response made by the State Pollution Control Commission to questions put by the Aboriginal Legal Service that 'Subsequent to an application a licence (no. 3644) was issued under the Act on 28 April 1977 to Asbestos Mines Pty Ltd'.[51] However the submission of Woodsreef Mines Ltd annexes a letter dated 16 November 1977 to that company from the State Pollution Control Commission which reads:

> On 3rd November 1977, officers of the Commission inspected the premises known as Asbestos Mines Pty Ltd, Baryulgil, N.S.W., following receipt of a complaint.
>
> As you are aware premises such as the one in question are required to hold a licence under the Clean Air Act 1961. Such does not appear to be held by Asbestos Mines Pty Ltd and the premises are therefore operating in breach of Part III, Section 10 of the Clean Air Act . . .[52]

The Woodsreef Submission also annexes an application for a licence, made in response to that letter, dated 23 November 1977.[53] Thus, Asbestos Mines Pty Ltd were in breach of Section 10 either from 1 August 1976 to 28 April 1977 or from 1 August 1976 to 23 November 1977.

2.58 The State Pollution Control Commission's letter to the Aboriginal Legal Service, quoted by the Public Interest Advocacy Centre, further stated:

> The mine closed, we believe on 24 April 1978, and thus renewal of the licence was not sought.[54]

The Woodsreef submission makes no reference to any renewal of the licence (apparently) applied for on 23 November 1977. In fact the mine closed on 24 April 1979.[55] Thus, since licences are valid for one year only (see Section 11(3), paragraph 2.51), if the licence was issued on 28 April 1977, Asbestos Mines Pty Ltd was in breach again from 28 April 1978 to 24 April 1979. If the licence was issued sometime after the application of 23 November 1977, their second period of breach of the licensing provisions extended from December 1978 to 24 April 1979.

2.59 It would not be possible, however, for Baryulgil residents to bring an action based on these breaches. First, it is unlikely that the licensing provisions create private rights of action. Second, even if they were held so to do, it would not be breach of those provisions which caused the injury — the contraction of disease — for which such plaintiffs would be claiming. It would be the emission of disease-causing fibre, not the failure to hold a licence, which caused that injury.

Section 14

2.60 Section 14 would in all probability be held to create private rights of action, and Baryulgil residents, being clearly members of the class of persons the section intends to benefit, would be proper plaintiffs to bring such actions. The evidence received by the Committee suggests that it could well be possible to show that (after 11 January 1963 when the Baryulgil premises came within the Schedule — see paragraph 2.43) Asbestos Mines Pty Ltd had not maintained the equipment intended to prevent the escape of dust

and fibre in an efficient condition nor operated it in a proper and efficient manner, as required by the section, and/or that they had processed, handled, moved or stored the serpentine rock or the asbestos fibre obtained therefrom in a manner not proper and efficient, thus causing or increasing air pollution.[56] If such evidence were produced to the satisfaction of the court, the first major element of the cause or action — establishment of a breach of the statute — would be made out.

2.61 The second major element — that the breach caused the injury — would be more problematic. It is clear that airborne asbestos fibre can cause mesothelioma even when the point of emission is at some distance from the plaintiff's place of work, residence, etc. *Joosten* v. *Midalco Pty Ltd* [57] accepted that. But it would not be possible for a resident of the Square to prove conclusively that it was the airborne fibre which had caused the disease rather than fibre introduced onto the Square by some other means. As suggested in paragraph 2.29, a court would probably accept that causation was established on the argument that the airborne fibre had increased the plaintiff's risk by increasing exposure.

2.62 There would be little difficulty in establishing that the injury was the type against which the section intended to give protection. Section 14 is intended to protect persons in the neighbourhood of the source of pollution from whatever harm or inconvenience the particular pollutant might cause. Thus, given satsifactory evidence of the breach, and subject to *Limitation Act* questions discussed earlier,[58] an action based on Section 14 would have a good chance of success.

Section 15

2.63 Section 15(1) imposes on the occupier the obligation to keep the emission of pollutants below the standard of concentration prescribed in the regulations. Regulations under the *Clean Air Act* 1961 were first passed in February 1964. Regulation 17(2) set the standards of concentration and rates of emission. Paragraph (1) of Regulation 17(2) dealt with 'any trade, industry, process, industrial plant or fuel burning equipment *emitting dust or other particulate emissions*' (emphasis added). It stated that:

> The standard of concentration at the prescribed point of dust, fly-ash, soot, cement *or other solid particles of any kind in each cubic foot of residual gas before admixture with air*, smoke or other gases, shall be such that the total mass of such solid particles does not exceed 0.2 grains.' (emphasis added)[59]

While the reference to 'dust' and 'other solid particles' would seem to cover asbestos fibre, the reference to the presence of such matter in cubic feet 'of residual gas before admixture with air' does not appear appropriate to cover the nature of operations at Baryulgil. Regulation 17(2) (1) was amended in June 1966, but the amendment (which excepted boilers and incinerators from the paragraph as quoted, and inserted a separate method of measurement for their emissions)[60] does not overcome the problem just referred to. It would therefore appear that the regulations did not prescribe any standards of concentration for asbestos fibres.

2.64 In the event that no standard is prescribed, Section 15(2) has effect. The occupier is to conduct his or her operations 'by such practicable means as may be necessary to prevent or minimise air pollution'. To establish breach of Section 15(2), it would therefore be necessary to establish that there were practicable means by which Asbestos Mines Pty Ltd could have prevented or minimised any emisison of asbestos fibre proved to have been occurring. This issue was discussed in relation to the action in negligence by workers.[61] Once evidence of practicable precautions was given, (assuming that emission had been proved) a breach would be established. The other elements of the cause of action would probably be able to be established also, as described in paragraphs 2.61 and 2.62.

Section 19

2.65 A claim based on breach of Section 19(2) in relation to the period between passage of the Act in 1961 and the amendment to the Schedule on 11 January 1963 would involve the same issues as a claim based on breach of Section 15 after 11 January 1963, and would face the same problems and have the same chance of success.

STATUTORY OBLIGATIONS APPLYING TO ASBESTOS MINES PTY LTD — III THE *CLEAN WATERS ACT* 1970 (N.S.W.)

2.66 The *Clean Waters Act* aims to prevent pollution of waters — waters being defined as:

> any river, stream, lake, lagoon, natural or artifical watercourse, dam or tidal waters (including the sea), or part thereof, and includes any underground or artesian water, or any part thereof. (Section 5)

Responsibility for this Act also rests with the State Pollution Control Commission.

2.67 Section 16 of the Act prohibits the pollution or the causing or permitting of the pollution of any waters by any person, except that by subsection (6):

> . . . it shall not be an offence against this Act . . . for a person to pollute any waters if he holds a licence and does not pollute the waters in contravention of any of the conditions of the licence.

By subsection (7), it is an offence against the Act either for any unlicensed person to pollute any waters or for a licensed person to pollute waters otherwise than in accordance with the conditions of the licence.

2.68 Section 5 defines 'pollutes' as meaning:

> (a) to place in or on the waters any matter, whether solid, liquid or gaseous, so that the physical, chemical or biological condition of the waters is changed; or
>
> (b) to place in or on the waters any refuse, litter, debris or other matter, whether solid or liquid or gaseous, so that the change in the condition of the waters or the refuse, litter, debris or other matter, either alone or together with any other refuse, litter, debris or matter present in the waters makes, or is likely to make, the waters unclean, noxious, poisonous or impure, detrimental to the health, safety, welfare or property of persons, undrinkable for farm animals, poisonous or harmful to aquatic life, animals, birds or fish in or around the waters or unsuitable for use in irrigation, or obstructs or interferes with, or is likely to obstruct or interfere with persons in the exercise or enjoyment of any right in relation to the waters; or
>
> (c) to place in or on the waters any matter, whether solid, liquid, or gaseous, that is of a prescribed nature, description or class or that does not comply with any standard prescribed in respect of that matter.

2.69 Evidence given to the Committee suggests that pollution of waters took place, and is still taking place, as a result of asbestos fibres being carried by way of rain and its run-off from the tailings dump on the property of Asbestos Mines Pty Ltd into the waters serving the Square.[62] No evidence has been received by the Committee to show whether or *not Asbestos Mines Pty Ltd held, or continue to hold, a licence under the Clean Waters Act*. If they did not hold, or failed to renew, a licence and the alleged pollution of the waters were proved, there would be a breach of Section 16(1). If they held and still hold a licence whose conditions were inappropriate to cover a proved pollution of the waters by run-off from the tailings dump, there would be a breach of Section 16(7).

2.70 Since the object of the Act appears to be to benefit the public as a whole by protecting the purity of waters, it might be that Section 16 would not be intended to give any private rights of action for its breach. It may be however, that the Act would be

interpreted as aiming to benefit not only the public but in particular persons who use the waters which might otherwise be polluted. In that case, the users of any particular waters could be said to be a class less extensive than the public as a whole and Section 16 might be held to give private rights of action to such users.

2.71 If that interpretation were adopted, then residents of the Square who contract asbestos-related diseases would be proper plaintiffs to bring actions for breach of Section 16 against Asbestos Mines Pty Ltd. If the breach were proved (either pollution, or pollution not in accordance with the conditions of a licence), such persons could attempt to argue that their diseases were caused by the ingestion of asbestos fibres as a result of drinking the polluted water. However, the medical evidence suggests that asbestos-related cancers are unlikely to be caused by ingestion of fibres. If, however, countervailing medical evidence were accepted by the Court, and if the Act were to be interpreted as intending to protect particular users of waters as well as the public as a whole, then any personal injury which resulted from the pollution would be likely to be held to be an injury of the type against which the section intended to give protection. Thus, an action for breach of Section 16 appears to depend on whether the pollution is proved, the plaintiff's disease is diagnosed, possible causation by ingestion is accepted, and the Court is willing to interpret the section as giving a private right of action. Success would also be subject to the limitations issues discussed in previous sections.[63]

BREACH OF STATUTORY DUTY ACTIONS BY DEPENDANTS OF DECEASED PERSONS

2.72 Any of the breaches on the basis of which a person contracting an asbestos-related disease could make a claim for damages would be available to found an action by the dependants of that person if he or she had not brought the action personally before death. The problems besetting the Compensation to Relatives claim and the claim on behalf of the estate, discussed in previous sections.[64] would affect these claims equally, as would the application of the *Limitation Act* 1969. The measure of damages for the dependant's breach of statutory duty actions would be subject to the same formulae as discussed above (paragraphs 1.147 to 1.154 and 1.157 to 1.159).

ENDNOTES

1 *Atkinson* v *Newcastle and Gateshead Waterworks Co.* (1877) L.R. 2 Ex. 441 at 445 per Lord Cairns L.C.; *Groves* v *Wimborne* [1898] 2 Q.B. 402 at 407 per A.L. Smith L.J.

2 [1949] A.C. 398 at 410. Compare however *Occupational Health and Safety Act* 1983 N.S.W., Section 22.

3 *Ibid.*

4 *(1936-37) 56 C.L.R. 464 at 485-6.*

5 *See e.g. Bonser* v *Country and Suburban Stock Feeds Pty Ltd* (1964) 65 S.R. (N.S.W.) 198.

6 *Gorris* v *Scott* (1874) L.R. 9 Ex. 125.

7 Transcript of Evidence, p. 1387.

8 Act No. 46 of 1958.

9 Act No. 8 of 1962.

10 Act No. 80 of 1967.

11 Act No. 54 of 1968.

12 Act No. 145 of 1978

13 Section 4(1).

14 Act No. 46 of 1958.

15 Act No. 54 of 1968.

16 Act No. 46 of 1958.

17 Act No. 80 of 1967.

18 Act No. 54 of 1968

19 General Rules 65 and 65A did not create any possible actions for breach of statutory duty, since the requirements they imposed for steps to allay excessive 'dust emission' were dependent on specific directions or requirements directed to mine owners or managers by the Minister or an inspector, and no such directions or requirements were made in the case of Asbestos Mines Pty Ltd. Transcript of Evidence, pp. 736 and 1105.

20 Act No. 145 of 1978.

21 See for example *A.I.S. Pty Ltd* v *Luna* (1969) 44 A.L.J.R. 52.

22 See paragraphs 5.139 to 5.142 of the Report.

23 See the analogous discussion in *Latimer* v *A.E.C. Ltd.* [1953] A.C. 645.

24 e.g. Section 40(1).

25 [1956] A.C. 649.

26 [1874] L.R. 9 Ex. 125 at 128-30.

27 *Grant* v *National Coal Board* [1956] A.C. 649 at 660.

28 N.S.W. Rules, Regulations and By-Laws, 1964, p. 354.

29 Transcript of Evidence, pp. 1072 and 1117.

30 Transcript of Evidence, p. 1185. On 11 June 1979, this standard was made general throughout New South Wales. N.S.W. Rules, Regulations and By-Laws 1979, p. 609.

31 Transcript of Evidence, pp. 2909-3016.

32 Transcript of Evidence, pp. 738-746,

33 Transcript of Evidence, pp. 851-879.

34 *Myers* v *D.P.P.*, [1965] A.C. 1001, e.g. per Lord Reid at 1022.

35 Transcript of Evidence, p. 2119.

36 *Cartledge* v *E.Jopling and Sons Ltd* [1963] A.C. 758.

37 N.S.W. Government Gazette No. 5 of 18 January 1963, p. 80.

38 Pp. 413-4.

39 *Clean Air (Amendment) Act* No. 92 of 1974, Section 3(1) (o).

40 *Clean Air (Amendment) Act*, Section 3(1) (p).

41 N.S.W. Government Gazette, 1976, p. 2807.

42 *Clean Air (Amendment) Act*, Section 3(l) (j) and (k).

43 *Clean Air (Amendment) Act*, Section 3 (1) (n).

44 *Ibid.*

45 *Clean Air (Amendment) Act*, Section 3 (l) (w).

46 *Clean Air (Amendment) Act*, Section 3 (l) (x).

47 Act No. 92 of 1974.

48 Act No. 92 of 1974.

49 Transcript of Evidence, pp. 747-761.

50 Transcript of Evidence, pp. 747 and 751.

51 Transcript of Evidence, p. 747.

52 Transcript of Evidence, p. 2134.

53 Transcript of Evidence, p. 2135.

54 Transcript of Evidence, p. 747.

55 Transcript of Evidence, p. 2119.

56 Transcript of Evidence, pp. 851-879 and pp. 2909-3016.

57 1979, Supreme Court of Western Australia, unreported.

58 Paragraphs 1.89 to 1.104.

59 N.S.W. Rules, Regulations and By-Laws, 1964, p. 66.

60 N.S.W. Rules, Regulations and By-Laws, 1966, p. 541.

61 Paragraphs 1.75 to 1.88.

62 Report of Dr K. Basden, submitted by the Aboriginal Legal Service and incorporated into the Records of the Inquiry as Exhibit No. 20.

63 Paragraphs 1.89 to 1.104.

64 Paragraphs 1.124 to 1.161.

Chapter 3

Claims Under *The Workers' Compensation (Dust Diseases) Act*

NATURE OF ENTITLEMENT TO COMPENSATION UNDER THE *WORKERS' COMPENSATION (DUST DISEASES) ACT*

3.1 The *Workers' Compensation (Dust Diseases) Act* 1942[1] provides a statutory compensation scheme for persons disabled for work as a result of occupational contraction of a dust disease. As the title of the Act suggests, the scheme is an offshoot of the scheme established under the *Workers' Compensation Act* 1926, N.S.W., but it incorporates a number of significant differences from the broader workers' compensation scheme.

3.2 The Dust Diseases compensation scheme provides compensation for persons who are disabled for work by a dust disease contracted as a result of employment. The existence of the disablement is to be determined by a medical authority. Compensation is paid out of a fund composed largely of premiums paid by insurers of employers in industries exposing workers to the risk of contracting a dust disease.

Dust Diseases

3.3 Section 3 of the Dust Diseases Act defines 'dust' as meaning:

> dust of such a nature that the inhalation thereof may give rise to a dust disease.

and defines 'dust disease' as:

> any disease specified in the schedule, and includes any pathological condition of the lungs, pleura or peritoneum, that is caused by dust that may also cause a disease so specified.

The Schedule to the Act in which the specified dust diseases are listed includes asbestosis and mesothelioma. Prior to amendment to the Dust Diseases Act which came into force in January 1984[2] the definition of 'dust disease' read:

> 'dust disease' means any disease specified in the Schedule and includes any pathological condition of the pulmonary organs, that is caused by dust and accompanies a disease so specified.

Before the January 1984 amendment mesothelioma was not listed in the Schedule of specified dust diseases.

The Medical Authority

3.4 The medical authority which certifies as to a person's disablement is set up under Section 7(1) of the Act which states:

> The medical authority, for the purposes of this Act, shall be a medical board consisting of three legally qualified medical practitioners who shall be appointed by the Minister, one of whom shall be appointed chairman, another of whom shall be nominated by employers who employ workers in any industry or process, employment in which exposes the worker to the possibility of contracting a dust disease, and another by such workers . . .

Section 7(5) provides that 'the certificate of a medical authority shall be subject to Section 8I conclusive evidence as to the matters certified'.

The Workers' Compensation (Dust Diseases) Fund

3.5 The fund out of which compensation is paid is established under Section 6 of the Act. By Section 6(1):

> There shall be established a Workers' Compensation (Dust Diseases) Fund which shall consist of —
>
> (a) all balances, investment and moneys of which the Silicosis Fund consisted immediately before the Commencement of Part II of the Workers' Compensation (Dust Diseases) Amendment Act, 1967, and all moneys that, immediately before that commencement, were owing to the Silicosis Fund and are paid after that commencement;
>
> (b) all moneys paid by the Insurance Premiums Committee constituted under the Principal Act (hereinafter referred to as the Insurance Premiums Committee) to the board from contributions paid by insurers under and in accordance with the provisions of this section;
>
> (c) any moneys provided by Parliament for the purposes of the Fund; and
>
> (d) any fees paid under Section 5A.

The contributions by insurers referred to in Section 6(1) (b) are determined and payable under Section 6(6) and (7):

> (6) The amount of such estimate (less the moneys referred to in paragraph (a) and subsection 5) shall be paid to the Insurance Premiums Committee by way of contributions by insurers in accordance with the provisions of this section. The contributions to be so paid by any insurer shall be of such amount and shall be made at such times as the Insurance Premiums Committee determines.
>
> (7) The Insurance Premiums Committee shall, in respect of such estimate, determine—
>
> (a) the insurers or classes of insurers by whom the contributions under this section are to be paid;
>
> (b) the amount of the contributions to be so paid by such insurers or classes of insurers;
>
> (c) the times at which such contributions shall be so paid . . .

The Compensation Payable

3.6 Entitlement to compensation is established by Section 8(1) (a) which states that:

> where the medical authority certifies that a person is totally or partially disabled for work from a dust disease and that his disablement was reasonably attributable to his exposure to the inhalation of dust in an occupation to the nature of which the disease was due, such person shall, if the board finds —
>
> (i) that such person was a worker during the whole of the time he was engaged in such occupation; or
>
> (ii) that such person was a worker during only part of the time he was engaged in such occupation, and, on the report of the medical authority, further finds that his disablement was reasonably attributable to his exposure to the inhalation of dust in such occupation during the time that the board has found that he was a worker in such occupation,
>
> be entitled to an award from the board, and to receive compensation at the prescribed rates from the Fund;

The prescribed rates referred to are identified in Section 8(2) (a) as being 'the weekly compensation payments prescribed by Section 9 of the Principal Act' (that is, the *Workers' Compensation Act* 1926).

3.7 The payments prescribed by Section 9 of the *Workers' Compensation Act* 1926 are differentiated according to whether the incapacity for work (parallelling 'disablement for

work' under the *Dust Diseases Act*) is total or partial. In the case of total incapacity for work, for the first 26 weeks of incapacity, Section 9 entitles the worker to receive a weekly sum equal to his or her current weekly wage at the time of the incapacitating injury. From the 27th week until recovery or death the worker is entitled to receive weekly:

(a) 90% of his or her average weekly wage in the 12 months preceding the injury, subject to a minimum and maximum of $115.90 and $145.80 (these sums being indexed by reference to the C.P.I and amended each April and September);[3]

(b) a payment of $33.40 (indexed as above) for a dependent spouse or de facto spouse;

(c) a payment of $16.70 for each child under 16, student child under 21 or person to whom the worker stands *in loco parentis* (indexed as above).

3.8 In the case of partial incapacity, Sections 9 and 11(l) state that the worker is entitled to receive (for the duration of that incapacity) a weekly sum not exceeding the difference between the amount he or she could have earned but for the injury had he or she continued to be employed in the same or some comparable employment and the amount he or she is or would be able to earn as a result of the injury in an employment suited to his or her post-injury capacities. In relation to such payments, Section 8(3B) of the *Dust Diseases Act* states that:

> Where the board is satisfied that a person who pursuant to this Act is receiving or entitled to receive weekly payments of compensation under an award in respect of his partial disablement for work from a dust disease has taken all reasonable steps to obtain, and has failed to obtain employment of a kind suited to a person so partially disabled, and that his failure to obtain such employment is a consequence, wholly or mainly, of such disablement, the board may order that his disablement shall be treated as total disablement, and the board may at any time rescind any such order.
>
> While such an order remains in force the compensation payable under the award shall be that which would have been payable thereunder had the disablement from the disease been total.

This subsection provides for a 'deemed total' disability, similar to that under Section 12 of the *Workers' Compensation Act* 1926.

3.9 By Section 8(3) of the *Dust Diseases Act*, the provisions of a number of sections of the *Workers' Compensation Act* 1926 are to apply 'mutatis mutandis' to the awards made pursuant to Section 8(2). Among the *Workers' Compensation Act* provisions referred to are Section 15(l) and (3) and Section 60. By Section 15(l):

> the liability in respect of any weekly payment may, with the consent of the worker, be redeemed either in whole or in part by the payment of a lump sum, determined by the Commission, having regard to any dispute as to liability to pay compensation under this Act and the injury, age and occupation of the worker at the time of the occurrence of the injury, as well as to his diminished ability to compete in an open labour market.

Section 15(3) provides that:

> Such lump sum may by agreement or order of the Commission be invested or otherwise applied for the benefit of the person entitled thereto.

Thus by Section 8(3), making the necessary adjustments to the wording of Section 15(1) and (3), the Dust Diseases Board may, with the consent of a person who has been certified as disabled by a dust disease, redeem the weekly payments payable to that person under Section 8(2) (a) by a lump sum payment.

3.10 Section 60 of the *Workers' Compensation Act* will apply to the situation where no such redemption has taken place. It provides for review of weekly payments:

> (1) Any weekly payment may be reviewed by the Commission at the request of either the employer or the worker, and on such review may be ended, diminished, or increased

subject to the maximum provided by this Act, and the amount of payment shall, in default of agreement, be settled by the Commission.

(2) The amount of weekly payments payable in respect of an injury, whether received before or after the commencement of the Workers' Compensation (Amendment) Act, 1971, may be increased to such an amount as would have been awarded if the worker had, at the time of the injury, been earning the wage or salary which he would probably have been earning, at the date of review, if he had remained uninjured and continued to be employed in the same or some comparable employment.

In relation to Section 60, Section 8(3) of the *Dust Diseases Act* states:

Without prejudice to the generality of the foregoing provisions of this subsection, the provisions of the said section 60 shall, for the purposes of the application of the provisions of that section to any such award, be deemed to be amended —

(a) by omitting from subsection (1) the words 'Commission at the request of either the employer or' and by inserting in lieu thereof the words 'board, either of its own motion or at the request of'; and

(b) by omitting from the same subsection the word 'Commission' where secondly occurring and by inserting in lieu thereof the word 'board'.

DIFFERENCES BETWEEN THE DUST DISEASES SCHEME AND THE GENERAL WORKERS' COMPENSATION SCHEME

3.11 There are two major differences between the two schemes. First, in the case of the Dust Diseases scheme compensation is paid on application to the Dust Diseases Board out of a fund administered by that Board. In the case of Workers' Compensation the injured worker applies to his or her employer (and in practice through the employer to the insurer) for compensation. It may be paid by the employer (insurer) without challenge, or the employer may deny liability in which case the issue of entitlement and liability is determined by the Workers' Compensation Commission on the basis of adversarial proceedings between worker and employer little different from ordinary court proceedings; and if the worker is found to be entitled, the compensation is paid, on the direction of the Commission, by the insurer of the employer concerned.

3.12 Second, in the case of the Dust Diseases scheme, entitlement (meaning disability caused by a dust disease) is determined by the medical authority. In the case of Workers' Compensation, in the event that entitlement is contested by the employer, the issue is determined by a judicial, not a medical, body. The decision is informed by expert medical evidence from both sides — worker and insurer — but it ultimately rests with the Commission. Thus the medical issue is evidentiary in the case of Workers' Compensation whereas under the Dust Diseases scheme it is decisive.

DIFFICULTIES IN GAINING COMPENSATION UNDER THE *DUST DISEASES ACT*

3.13 Section 8(1) (a) presents the task for the medical authority as a single one — to certify total or partial disablement through a dust disease (occupationally contracted). In reality, that involves two inquiries: first, is the person suffering from a dust disease as defined?, and second, is the disease totally or partially disabling?

3.14 The first of these inquiries might pose problems to Baryulgil claimants, since as seen in paragraphs 1.19 to 1.24, asbestosis is a disease which is comparatively difficult to diagnose. The submission of the Dust Diseases Board stated that their approach was always to give applicants the benefit of the doubt where a diagnosis was uncertain.[4]

However, others have argued that the diagnostic criteria used by the Board may be unnecessarily restrictive, with the result that persons who are in fact suffering from the disease may be unable to gain compensation.[5] No detailed evidence supporting the allegation of conservative diagnostic criteria has been put before the Committee. Such a problem would have been more severe before January 1984 when the amendment to the Act allowed appeal from a decision of the Board or the medical authority to the Workers' Compensation Commission[6] (subject to the limitation on grounds of appeal discussed in paragraphs 3.32 to 3.36 below).

3.15 The second inquiry to be made by the medical authority, the existence of disablement (whether total or partial), is likely to be less problematical than the diagnosis of disease.

EFFECT OF RECEIPT OF COMPENSATION UNDER THE *DUST DISEASES ACT* ON RIGHTS TO DAMAGES AT COMMON LAW

3.16 A worker who contracts a statutorily compensable disease (or suffers a statutorily compensable injury) may do so in circumstances which would give rise to a claim for damages at common law against his other employer or a third party, as having been caused by the negligence of the employer or third party.[7] Where that situation arises, the principal Act — the *Workers' Compensation Act* 1926 — preserves the worker's rights to sue for damages. By Sections 63 and 64 of the *Workers' Compensation Act*, the injured worker may choose a number of approaches:

(1) claim under *Workers' Compensation Act* only;

(2) claim under the Act and then sue for damages; and

(3) sue for damages only.

3.17 In approach (1), where the injury is caused by the employer, the worker could change his or her mind and sue for damages at any time within six years of the injury (or even later, if there were material facts of which he or she had not had means of knowledge — see paragraphs 1.89 to 1.104 above). If, however, the worker stands by the decision not to sue, he or she is entitled to continue receiving compensation under the Act for as long as his or her incapacity for work continues. If the injury is caused by a third party against whom the worker would have had a claim for damages, the employer can, by virtue of Section 64(1) (b), bring an action against the third party to recover the amounts paid to the worker as compensation payments (to the limit of the damages which the worker would have recovered had he or she sued).

3.18 In approach (2) — which is the advisable one — the worker must (subject to Section 53(1)) make the Workers' Compensation claim within 6 months of the injury. At any time within 6 years of the injury, he or she may sue for damages. But if the worker is successful and receives an award of damages, if the suit is against the employer, the amount of compensation payments received up to the date of the award will be subtracted from the damages payable,[8] and from the date of the award the worker's rights to compensation payments for that injury are extinguished.[9] If the suit for damages is against a third party, and the worker is successful, he or she must repay to the employer the amount of compensation received up to the date of the award, and all future rights to compensation are extinguished.[10]

3.19 Approach (3) is unwise. If the worker seeks damages, without having made a claim for compensation, and is awarded damages, there is nothing to be deducted or to repay out of the award, but all future rights to claim compensation are extinguished.[11] If the worker seeks damages but loses the case, he or she could still claim Workers' Compensation if in

time, but since the 6 month time limit[12] on Workers' Compensation claims is considerably less than the almost invariable duration of common law proceedings it is very unlikely that an unsuccessful common law plaintiff would still be in time to seek alternative compensation.

3.20 In brief, the position under the *Workers' Compensation Act* is that an injured worker can seek either or both compensation or damages but cannot receive both. The *Dust Diseases Act* makes no provision for common law claims, equivalent to Sections 63 and 64 of the Principal Act. In that case, a worker receiving compensation under the *Dust Diseases Act* would not be barred in any way from claiming damages against his or her employer, but those damages would be reduced by the compensation received insofar as it lessened the losses which would otherwise have been attributable to the disease. An assessment would have to be made — requiring some indication of election by the plaintiff to continue to receive or to disclaim future compensation payments — of the effect on future lost earning capacity. The situation of a claim for damages against a third party discussed above would not arise here because of the differences between Section 8(1) of the *Dust Diseases Act* whereby entitlement arises from a disabling dust disease '*reasonably attributable* to his exposure to the inhalation of dust in an occupation to the nature of which the disease was due' (emphasis added) and Sections 6 and 7(1) of the *Workers' Compensation Act* whereby a worker is entitled to compensation for incapacity resulting from an 'injury *arising* out of or *in the course of employment*'. (emphasis added).

CLAIMS UNDER THE *WORKERS' COMPENSATION (DUST DISEASES) ACT* BY DEPENDANTS OF DECEASED PERSONS

3.21 The dependants of persons who die from an occupationally caused dust disease are entitled to compensation under Section 8(1) (b), as are the dependants of persons who die — from whatever cause — subsequent to their receipt of, or certification for, compensation under the Act, by Section 8(1) (c).

DEPENDANTS OF PERSONS DYING FROM A DUST DISEASE — ENTITLEMENT TO CLAIM

3.22 Section 8 (1) (b) states:

> where the medical authority certifies that a person died from a dust disease and that his death was reasonably attributable to his exposure to the inhalation of dust in an occupation to the nature of which the disease was due, the dependants of such a person shall, if the board finds —
>
> (i) that such a person was a worker during the whole of the time he was engaged in such occupation; or
>
> (ii) that such a person was a worker during only part of the time he was engaged in such occupation, and, on the report of the medical authority, further finds that his death was reasonably attributable to his exposure to the inhalation of dust in such occupation during the time that the board has found that he was a worker in such occupation,
>
> be entitled to an award from the board, and to receive compensation at the prescribed rates from the Fund.

In such a case, the award to which the claimants are entitled depends on whether or not the dependants include a widow or de facto spouse or children only.

ENTITLEMENT WHERE THE DEPENDANTS INCLUDE A WIDOW OR DE FACTO SPOUSE

3.23 This situation is provided for by Section 8(2B) (a) which states:

> This subsection applies to every award of the board made, after the commencement of Part II of the Workers' Compensation (Dust Diseases) Amendment Act, 1967, pursuant to paragraph (b) or (c) of subsection (1) in respect of the death before or after that commencement of a person (in this subsection and in subsections (2C) and (2D) referred to as 'the worker') upon whom there was dependent for support, immediately before his death, the following and no other person or persons:
>
> (i) a widow or widower; or
>
> (ii) a widow or widower and a child or children.

(By Section 3, 'widow' and 'widower' include persons who lived with the deceased on a permanent and bona fide domestic basis as wife or husband.)

3.24 The amount these dependants are entitled to receive is governed by Section 8(2B) (b) to (d):

> (b) Where the dependent person referred to in subparagraph (i) or (ii) of paragraph (a) was wholly dependent for support on the worker and an award to which this subsection applies is made by the board under paragraph (b) of subsection (1), the prescribed rates of compensation payable shall be —
>
> (i) the sum of $16,500;
>
> (ii) a weekly payment of $46.50 per week, to continue until the marriage or death, whichever event first occurs, of that person; and
>
> (iii) subject to paragraph (ba) — a weekly payment of $20 per week in respect of each child who was wholly or partly dependent on the worker for support, to continue until the death of that child.
>
> (ba) The payment referred to in paragraph (b) (iii) shall not be made in respect of a child who has attained, or attains, the age of 16 years unless the child is under the age of 21 years and is receiving full-time education at school, college or university.
>
> (c) Where the dependent person referred to in subparagraph (i) or (ii) of paragraph (a) was wholly dependent for support on the worker and an award to which this subsection applies is made pursuant to paragraph (c) of subsection (1), the prescribed rates of compensation payable shall be:
>
> (i) where the disablement for work from the disease was total, the compensation payments prescribed by paragraph (b).
>
> . . . . . .
>
> (d) Where the dependent person referred to in subparagraph (i) or (ii) of paragraph (a) was partially dependent on the worker for support the prescribed rate of compensation payable shall be such payments, not exceeding in any case the amount that would have been payable as compensation under the award had that person been wholly dependent on the worker for support, as may be determined by the board to be reasonable and proportionate to the injury to that person.

3.25 The sums referred to in Section 8 (2B) (b) are, like those referred to in paragraph 3.7, indexed by use of the formula in Section 9A of the *Workers' Compensation Act* 1926. Section 8(3) of the *Dust Diseases Act* provides that:

> For the purposes of the application of section 9A of the Principal Act in accordance with the foregoing provisions of this subsection —
>
> (a) a reference in that section to an adjustable amount (other than such a reference in the definition of 'base rate' in section 9A (1)) includes a reference to each of the amounts of $16,500, $46.50 and $20 referred to in subsection (2B) (b) (i), (ii) or (iii);

(b) the definition of 'base rate' in section 9A (1) shall be deemed to have been omitted and the following definition inserted instead thereof:

'base rate' means —

(a) in relation to an adjustable amount of $16,500 or $20-$178.22; or

(b) in relation to an adjustable amount of $46.50-$144.57;

(c) section 9A (2A) shall be read and construed as requiring the references in this section to the amount of $16,500 to be read and construed in accordance with section 9A (2A) as applied by this subsection; and

(d) section 9A(3) shall be read and construed as requiring the references in this section to the amounts of $46.50 and $20 to be read and construed in accordance with section 9A(3) as applied by this subsection.

The current adjustable amounts under Section 8(2B) are $23,550, $81.70 and $28.50.[13]

ENTITLEMENT WHERE THE DEPENDANTS DO NOT INCLUDE A WIDOW OR DE FACTO

3.26 This situation is provided for by Section 8 (2) (b):

where the award is made pursuant to paragraph (b) of that subsection — the compensation payments prescribed by section 8 of the Principal Act, calculated as if that section as in force at the date of death had been in force at the date of the injury to the person whose dependants are entitled to the award;

Section 8 of the Principal Act — the *Workers' Compensation Act 1926* — states:

(1) Where death results from the injury, and the worker leaves any dependants wholly dependant for support upon the worker, the amount of compensation payable by the employer under this Act shall be —

(a) the sum of $40,000; and

(b) in addition thereto, an amount of $20 per week in respect of —

(i) each dependent child of the worker under the age of sixteen years, such payments to continue in respect of each such child until he dies or attains the age of sixteen years, whichever event first occurs: Provided that where such a child on his attaining the age of sixteen years is a student, such payments shall continue in respect of that child until he dies, or attains the age of twenty-one years, or ceases to be a student, whichever event first occurs; and

(ii) each dependent child of the worker being a student over the age of sixteen years but under the age of twenty-one years, such payments to continue in respect of each such child until he dies, or attains the age of twenty-one years, or ceases to be a student, which ever event first occurs.

The amount of any weekly payments made under this Act, and any lump sum paid in redemption thereof or any lump sum paid as compensation under this Act, shall not be deducted from the amounts referred to in paragraphs (a) and (b).

In this subsection 'child of the worker' means child or stepchild of the worker and includes a person to whom the worker stood in loco parentis; 'dependent child of the worker' means child of the worker who was wholly or in part dependent for support on the worker; and 'student' means person receiving full time education at a school, college or university.

. . . . . .

(2) Where death results from the injury and the worker does not leave any dependants wholly dependent upon him for support, but leaves dependants in part so dependent, the compensation payable by the employer under this Act shall be —

(a) if the employer so agrees — the amount that would have been payable under subsection (1) if those dependants had been wholly dependent on the worker;

(b) where agreement is reached for the payment of an amount less than the amount provided by paragraph (a) and the amount agreed upon is approved by the Commissioner as reasonable and proportionate to the injury to those dependants — the amount so approved; or

(c) in default of agreement as to the amount to be paid or in default of approval by the Commission for payment of an agreed amount under paragraph (b) — such amount not exceeding the amount provided by paragraph (a), as is determined by the Commission to be reasonable and proportionate to the injury to those dependants.

The amounts in Section 8(1) are indexed, pursuant to Section 9A, the current amounts being $57,000 and $28.50.[14]

DEPENDANTS OF PERSONS DYING WITH A DUST DISEASE — ENTITLEMENT TO CLAIM

3.27 The entitlement of such persons to claim is set out in Section 8(1) (c) of the *Dust Diseases Act* whereby:

where a person dies and —

(i) immediately before his death he was receiving, or was entitled under an award of the board or of the Silicosis Committee to receive, continuing payments of compensation at the prescribed rates from the Fund in respect of his disablement for work from a dust disease; or

(ii) (a) he had before his death applied to the board or to the Silicosis Committee for compensation under the provisions of this Act or to be examined by the medical authority and —

(i) the medical authority had before his death examined such person and certified either before or after his death pursuant to the last examination of such person made by the medical authority before his death that such person was at the time of that examination totally or partially disabled for work from a dust disease and that his disablement was reasonably attributable to his exposure to the inhalation of dust in an occupation to the nature of which the disease was due; or

(ii) the medical authority had not before his death examined such person pursuant to such application but after his death certifies that such person was immediately before his death totally or partially disabled for work from a dust disease and that his disablement was reasonably attributable to his exposure to the inhalation of dust in an occupation to the nature of which the disease was due, and

(b) the board finds —

(i) that such person was a worker during the whole of the time he was engaged in such occupation; or

(ii) that such person was a worker during only part of the time he was engaged in such occupation, and the medical authority further certifies that his disablement was reasonably attributable to his exposure to the inhalation of dust in such occupation during the time that the board has found that he was a worker in such occupation.

the dependants of such person shall if they are not entitled under paragraph (b) of this subsection to an award from the board and to receive compensation at the prescribed rates from the Fund, be entitled under this paragraph to an award from the board and to receive compensation at the prescribed rates from the Fund . . .

The award to which such claimants are entitled depends again on whether or not the dependants include a widow or de facto spouse or children only.

ENTITLEMENT WHERE THE DEPENDANTS INCLUDE A WIDOW OR DE FACTO SPOUSE

3.28 In this case, the amount of the award is governed by Section 8(2B), which as seen in paragraph 3.23, applied to awards made 'pursuant to paragraph (b) or (c) of subsection (1)', and is as set out in subsection (2B) (b)-(d), indexed pursuant to Section 9A of the Principal Act and Section 8(3) of the *Dust Diseases Act*.

ENTITLEMENT WHERE THE DEPENDANTS DO NOT INCLUDE A WIDOW OR DE FACTO SPOUSE

3.29 The award in this case is made under Section 8(2) (c) which states:

> where the award is made pursuant to paragraph (c) of that subsection and the disablement for work from the dust disease was —
>
> (i) total — the compensation payments prescribed by section 8 of the Principal Act, calculated as if that section as in force at the date of death had been in force at the date of the injury to the person whose dependants are entitled to the award;
>
> (ii) partial — such percentage of the compensation payments that would have been payable under subparagraph (i) had the disablement been total as is equal to the percentage of the person's disablement for work from the dust disease as certified by the medical authority, where the dependants of the person are entitled to compensation payments by reason of the operation of subparagraph (i) of paragraph (a) of subparagraph (ii) of paragraph (c) of subsection (1), at the last examination of the person made by the medical authority before his death or, where the dependants of the person are entitled to compensation payments by reason of the operation of subparagraph (ii) of paragraph (a) of subparagraph (c) of subsection (1), in the certificate issued by the medical authority pursuant to subparagraph (ii) of the said paragraph (a) . . .

The payments prescribed by Section 8 of the Principal Act are set out in paragraph 3.26.

Lump Sum Redemptions

3.30 The possibility of lump sum redemption of payments under Section 8(1) (a) was discussed in paragraph 3.9. By Section 8(2E), the Dust Diseases Board is empowered to make a similar redemption of payments to dependants:

> (a) At the request of a dependent person referred to in subsection (2B) (a) (i), the board may, if it considers it to be in the best interest of that person so to do, redeem a liability to make weekly payments of compensation to that person by an award of a lump sum as compensation.
>
> (b) The board shall not, under paragraph (a), redeem a liability by awarding a lump sum of an amount that, when added to the total amount payable to the dependant person in pursuance of this Act by way of —
>
> (i) weekly payments in respect of the period commencing on the date of death of the worker upon whom that person was dependent and ending on the date of the redemption; or
>
> (ii) any other lump sum,
>
> or both, would exceed the amount of the lump sum that would have been payable to a widow or widower of the worker under section 8 of the Principal Act at the time of the death of the worker . . .

However, the Board's approach is generally not in favour of lump sum payments.

DIFFICULTIES FOR DEPENDANTS IN GAINING COMPENSATION UNDER THE *DUST DISEASES ACT*

3.31 The diagnostic difficulties discussed in paragraphs 3.13 to 3.15 would apply to claims by dependants as well as to claims by workers, since the dependants' entitlement derives from diagnosis of a dust disease which either caused the death or was disabling the worker before his death.

The 1984 amendments — provision for appeal

3.32 Before 1984, there was no way of appealing against a decision not to grant compensation or a decision to grant only a limited amount of compensation, since Section 5(2) (a) gave the Board 'exclusive jurisdiction to examine into, hear and determine all matters and questions arising out of a claim for compensation under this Act' and by Section 5(2) (c) 'The decisions of the Board shall be final and conclusive'.

3.33 The amendments which took effect in January 1984 changed that position by altering Section 5(2) (c) to read 'The decisions of the Board shall, subject to Section 81, be final and conclusive', and by inserting the said Section 81:

> (1) Where —
>
> (a) a person affected by a decision of the board or the medical authority in relation to a claim for compensation under this Act is dissatisfied with the decision; or
>
> (b) the Minister is dissatisfied with a decision of the board or the medical authority,
>
> being in either case a decision made after the commencement of this section —
>
> (c) the person or the Minister, as the case may be, may appeal against the decision to the Workers' Compensation Commission in accordance with rules made under the Principal Act; and
>
> (d) the Workers' Compensation Commission shall have jurisdiction to hear and determine the appeal.
>
> (2) An appeal under subsection (1) is an appeal by way of rehearing and the decision of the Workers' Compensation Commission on the appeal is final and conclusive.
>
> (3) The board —
>
> (a) is a necessary party to an appeal under subsection (1); and
>
> (b) shall give effect to the decision on such an appeal.

The ambit of operation of the section is, unfortunately, far from clear.

3.34 Subsection (1) (a) and (b) refer to the prospective appellant — a person affected by a decision of the board or the medical authority or the Minister — as being *dissatisfied* with that decision. By itself that would seem to give the right of appeal whatever the reasons for dissatisfaction. However, subsection (1) (c) states that the dissatisfied person (or Minister):

> may appeal . . . to the Workers' Compensation Commission in accordance with rules made under the Principal Act.

3.35 The meaning of the phrase 'rules made under the Principal Act' could affect the available grounds of appeal. It could mean (1) the *Workers' Compensation Rules;* or (2) further rules of the same nature to be made to cover appeals from the Dust Diseases Board, or even (3) rules in the sense of prescriptions, embodied in the sections of the Principal Act. On the wording, the third meaning is least likely. If that was the meaning intended, it would have been more likely expressed as 'in accordance with the provisions of the Principal Act'. However, if meaning (3) were adopted, it could bring into play the limitation in Section 37(4) of the *Workers' Compensation Act* whereby appeals from the decisions of the Commission to the Supreme Court can only be on questions of law or of the admission or rejection of evidence. A further indication of the unlikely nature of such an interpretation of 'rules' is that Section 8I(2) states the appeal is to be by way of

rehearing, with the evidence as well as the law examined by the Commission. As for meaning (1), if that had been intended, one would have expected subsection (1) (c) to read 'in accordance with the Rules made under the Principal Act'. Furthermore, many of the *Workers' Compensation Rules* have no possible application to appeals to the Commission from the Dust Diseases Board.

3.36 It seems, therefore, that Section 8I gives a right of appeal on questions both of fact and of law. To limit the right of appeal to questions of law would greatly restrict its possible scope, since the decisions of the medical authority and the Board will be largely decisions of fact. The only questions of law will be the final diagnosis — that a person has or has not a dust disease, and the final finding of disability, since the question of whether a statutory category, such as 'dust disease' or 'disability,' applies to facts is a question of law.[15] Apart from that, one could allege an error of law only by the claim that a particular decision of fact was one which no reasonable tribunal could have made.[16]

Finality of Review

3.37 As mentioned in paragraph 3.32, before 1984 the *Dust Diseases Act* stated the decisions of the Board to be final and conclusive.[17] Now there is an appeal to the Workers' Compensation Commission, and Section 8I(2) states that the decision of the *Commission* on that appeal 'is final and conclusive'. Nevertheless, the decisions of the Board were not truly 'final and conclusive' before 1984, nor will the decisions of the Commission be so in the future. While legislation setting up tribunals such as the Board and the Commission can determine what rights of appeal there will be from the decisions of the tribunals, it is not possible, by the use of language such as in Section 8I (2), to oust the jurisdiction of the superior courts to review the decisions of lower courts and tribunals through grant to persons aggrieved by those decisions of the prerogative writs of certiorari and prohibition. The Board and the Commission would both be subject to the writs, as bodies 'having legal authority to determine questions affecting the rights of subjects'.[18] By the writ of certiorari, the Supreme Court could remove the record of the Board or Commission's decision into the Supreme Court for review if there were apparent on the face of that record an error of law, and could quash the decision. It would then be possible, by a writ of mandamus, to have the Board or Commission ordered to decide the matter anew according to law.

3.38 Ouster clauses such as Section 8I (2) which purport to exclude such review have been invariably held ineffective to exclude the prerogative writs,[19] except where a time limit is involved, allowing review for a specified period but not thereafter.[20] Section 5(2) (c) and Section 8I(2) are not of that type.

3.39 Therefore, it will be (apparently) possible in the future for a Baryulgil claimant dissatisfied with the refusal of compensation by the Dust Diseases Board, or with the level of disability assessed to appeal to the Workers' Compensation Commission. It will further be possible to have the decision of the Commission quashed and ordered to be made anew if it contains an error of law (as, for example, of the type described in paragraph 3.36).

CLAIMS UNDER THE *WORKERS' COMPENSATION ACT*

3.40 As of January 1984, claims under the principal *Workers' Compensation Act* have become virtually impossible. Before the 1983 amendment to the *Workers' Compensation (Dust Diseases) Act*, persons suffering bronchogenic carcinoma through asbestos inhalation or mesothelioma could claim under either the *Workers' Compensation Act* or the *Dust Diseases Act*.

3.41 That choice was due to the then definition of 'dust disease' in the latter Act which did not actually cover either disease. As mentioned in paragraph 3.3 above, the definition at that time read:

> any disease specified in the Schedule and includes any pathological condition of the pulmonary organs, that is caused by dust and accompanies a disease so specified.

This definition did not necessarily cover asbestos-induced bronchogenic carcinoma and arguably *could* not cover mesothelioma. For mesothelioma is not a disease of the pulmonary *organs*. In the case of pleural mesothelioma, it is a disease of the outer lining of those organs, and in the case of peritoneal mesothelioma, it has nothing to do with the pulmonary organs. Furthermore, neither bronchogenic carcinoma nor mesothelioma necessarily 'accompany' a specified dust disease — asbestosis. It is quite possible for a person exposed to asbestos inhalation to contract *both* asbestosis and bronchogenic carcinoma or asbestosis and mesothelioma but it is not necessary to contraction of either of the cancers for asbestosis also to be present.

3.42 Despite the fact that the definition in the Act did not, in its terms, cover those diseases, the Dust Diseases Board did award compensation to persons suffering asbestos-induced bronchogenic carcinoma and mesothelioma, by a benign policy of ignoring the strict words of the statute. However since their enabling Act did not truly give them jurisdiction over such cases, it was possible for persons suffering those diseases to approach the Workers' Compensation Commission and persuade that body that it, and not the Dust Diseases Board, had jurisdiction over their cases.

3.43 That possibility has been ended by the 1983 amendments which list mesothelioma as a scheduled dust disease and, by the alteration in wording of the definition in Section 3, bring asbestos-induced bronchogenic carcinoma within the Board's patent jurisdiction.

DISADVANTAGES IN THE AMENDMENTS TO THE *DUST DISEASES ACT*

3.44 It is still too early to determine whether these amendments will present more advantages or disadvantages to those persons who previously, through the dubious 'benefit' of their particular disease, had the option of seeking compensation from either scheme. Whether the amendments are advantageous or disadvantageous will depend in large measure on why those persons sought to get into the jurisdiction of the Workers' Compensation Commission prior to 1984. One reason would have been the greater availability of appeal against decisions, a matter partly handled by the amendment (Section 8I of the Act).[31]

ENDNOTES

1 Hereafter referred to as the *Dust Diseases Act*.

2 *Workers' Compensation (Dust Diseases) Amendment Act*, No. 208 of 1983.

3 The indexation of the weekly payments in Section 9 of the *Workers' Compensation Act* 1926 is carried out in accordance with Section 9A of that Act, which, by Section 8(3) of the *Dust Diseases Act*, applies to awards made under Section 8(2) (a). The amounts given in paragraph 3.7 are those in force from 1 October 1984 to 1 April 1985.

4 Transcript of Evidence, p. 1025.

5 Transcript of Evidence, pp. 3462-3.

6 Section 4 and Schedule, paragraph (9) of the *Workers' Compensation (Dust Diseases) Amendment Act* 1983, inserting Section 8I.

7 See paragraph 1.1

8 *Workers' Compensation Act* 1926, Section 63 (5).

9 *Workers' Compensation Act* 1926, Section 63 (2).

10 *Workers' Compensation Act* 1926, Section 64 (1) (a).

11 *Workers' Compensation Act* 1926, Section 63 (2).

12 *Workers' Compensation Act* 1926, Section 53 (1).

13 N.S.W. Government Gazette, 28/9/84.

14 N.S.W. Government Gazette, 28/9/84.

15 *Hays* v *Federal Commissioner of Taxation* (1956) 96 C.L.R. 47 per Fullagar J. at 51.

16 *Brutus* v *Cozens* [1973] A.C. 854.

17 Section 5 (2) (c).

18 *R* v *Electricity Commissioners; Ex parte London Electricity Joint Committee Co. (1920) Ltd* [1924] 1 K.B. 171 per Atkin L.J. at 205; *Ridge* v *Baldwin* [1964] A.C. 40.

19 *Anisminic Ltd* v *Foreign Compensation Commission* [1969] 2 A.C. 147; *Clancy* v *Butchers' Shop Employees Union* (1904) 1 C.L.R. 181.

20 *Smith* v *East Elloe Rural District Council* [1956] A.C. 736; *R* v *Secretary of State for the Environment; Ex parte Ostler* [1977] Q.B. 122.

21 See paragraphs 3.32 and 3.36.

Chapter 4

Common Law Remedies of Residents of Baryulgil Square against Asbestos Mines Pty Ltd

I. NEGLIGENCE

4.1 The common law action for damages for negligence has been previously dealt with in terms of an employer's negligence. The employer's duty under tort law is to take reasonable care not to expose his employees to unnecessary risk of injury (see paragraph 1.1). This is but a particular example of the general duty which tort law sums up under the rubric of 'negligence' and which received its classic statement in the judgment of Lord Atkin in *Donoghue* v *Stevenson:*[1]

> There must be, and is, some general conception giving rise to a duty of care . . . The rule that you are to love your neighbour becomes in law you must not injure you neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. *You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.* Who then, in law, is my neighbour? The answer seems to be — *persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.* (emphasis added).

4.2 There is a powerfully embracing circularity in this statement, and it was out of that power that negligence grew to be the major area of tort law. The employer clearly ought to have his or her employees in contemplation as foreseeably being affected by his or her acts. Employer's liability thus becomes one of the least problematical branches of negligence. But there are many other persons whom an employer — the conductor of an enterprise — ought to have in contemplation as being closely and directly affected by his or her acts in the carrying out of that enterprise. One situation where this will obviously be so is where the enterprise involves the introduction of dangerous substances into the environment outside the works.

4.3 It is claimed by the Aboriginal Legal Service that the operation of the Baryulgil mine and mill resulted in the introduction, by several means, of potentially dangerous quantities of asbestos fibre into the surrounding environment[2] — particularly into the environment of Baryulgil Square but also into that of other nearby Aboriginal communities, members of whom went to work for Asbestos Mines Pty Ltd. This claim has not been categorically denied by the representatives of the operating company,[3] and in some measure it has been supported by evidence emanating from several of the government departments who made submissions to the Committee.[4]

Elements of a Negligence Claim based on Environmental Pollution by Asbestos Fibre

4.4 The necessary elements of such a cause of action are the same as those discussed in relation to negligence by an employer.[5] It must be shown first, that some act of the company operating the mine caused the asbestos fibre to pollute the neighbouring environment and that the pollution caused injury to persons living or working in that environment; second, that it was foreseeable to the company that such pollution might occur and might cause injury to such persons; third, that there were possible and practicable ways in which the company could have prevented the pollution or the resultant

injury; fourth, that a reasonable operator, in the circumstances of the company, would have adopted those precautions; and finally, that the plaintiff did in fact suffer injury of the type foreseeable.

Causation

4.5 As mentioned in paragraphs 6.54 to 6.73 of the Report, evidence has been given that environmental pollution did take place — that prevailing winds frequently blew clouds of dust containing fibre onto the houses at Baryulgil Square. Hardie Trading (Services) Pty Ltd did not deny that this took place, though they suggested that the clouds would have been composed of serpentine dust and would not have contained any appreciable quantity of asbestos fibre.[6] Furthermore, they stated that no-one had ever succeeded in getting a positive reading of fibre in the air at the Square.[7] To obtain evidence of contamination in the period of the mine and mill's operation would at this stage be extremely difficult. It might also be difficult for a resident or former resident of the Square, diagnosed as having an asbestos-related disease which would have been contracted during that period, to establish that the cause of his or her disease was fibre introduced into the Square in the form of dust blown from the mine and mill. The disease contracted in that way would in all probability be mesothelioma, since the level of exposure produced would be unlikely to be sufficient to produce asbestosis. There is, at least in the cities, a background level of airborne asbestos fibre though it is probably not sufficient to cause an asbestos-related disease.[8] Nevertheless this difficulty might not be insuperable. *Joosten* v *Midalco Pty Ltd*[9] (see paragraphs 1.65 to 1.67) shows that courts are willing to accept that the fibre introduced into an environment from a neighbouring asbestos mine is the cause of mesothelioma contracted by persons living or working in that environment.

4.6 Evidence was also given by the Aboriginal Legal Service[10] and by members of the Baryulgil community[11] that asbestos fibre was introduced into the environment of the Square by being carried in on the clothes of the workers returning from work, there being inadequate showering and changing facilities at the mine and mill, and that as a result the families of the workers were exposed to a risk of contracting mesothelioma.

4.7 The Aboriginal Legal Service has argued not only that environmental pollution at the Square took place while the mine and mill were operating, but that pollution is still taking place, by fibre being blown from the tailings dump and washed into the creek.[12] They produced a report on present environmental pollution from Dr Basden of the University of New South Wales.[13] Claims of continuing environmental pollution at the Square are bolstered by reports made to the Department of Aboriginal Affairs.[14] Such evidence, if accepted by a court in preference to expert evidence tendered by the defendant company, could establish causation.

Foreseeability

4.8 It was argued in paragraphs 1.68 to 1.74 that foreseeability would not be a particularly difficult issue for Baryulgil claimants arguing negligence by their former employer, despite the decisions in *Footner* v *Broken Hill Associated Smelters Pty Ltd*[15] and *Joosten* v *Midalco Pty Ltd*.[16] However, those cases would be much more in point in a claim for negligence based on neighbourhood exposure. It is likely that a court hearing such a claim would hold — as the Supreme Court of Western Australia did, that, at least until the early 1970s, it would not have been foreseeable to Asbestos Mines Pty Ltd that the amount of asbestos fibre introduced into the Square by their acts created a risk to the residents of the Square of contracting an asbestos-related disease. Thus a claim based on exposure before the early 1970s would be unlikely to succeed. However, there is more likelihood that such risk would now be held to be foreseeable, so that persons currently residing at the Square who contract an asbestos-related disease in the future which can be

causally linked to their exposure there during and after the late 1970s might be able to establish that the risk was foreseeable to the owners of the site on which the tailings dump is situated.

Practicable Precautions

4.9 In relation to exposure of residents at the Square caused by windblown asbestos fibre during the period of the mine and mill's operation, the matters raised in paragraphs 1.75 to 1.88 are relevant. Was it practicable for Asbestos Mines Pty Ltd to use more efficient plant that would reduce the level of fibre-bearing dust emitted from the site? Was it possible for them to operate their plant more carefully so as to reduce emissions? Evidence would be needed to establish the answers to those questions. It must be remembered, however, that in assessing practicability of precautions, the cost of those precautions proportionate to the profitability of the enterprise is signficant.

4.10 In relation to exposure caused by fibres carried in to the Square on workers' clothes, it would be less difficult to prove that there were possible and practicable precautions — adequate showers and changing facilities with separate lockers for work and non-work clothes.

4.11 In relation to exposure caused by the tailings dump, it would have to be shown that reafforestation would eliminate the dispersal of fibre, or at least diminish it to a state where it no longer created a risk. Here again, the cost of such a major reafforestation programme could be said to render the precaution impracticable. The same would be true if the suggested precaution was to remove the tailings dumped on the site. Moreover, this would almost certainly create additional risks of exposure while it was being done, and the involvement of separate risk is another factor which can be said to make a precaution impracticable.

APPROACH OF THE REASONABLE OPERATOR

4.12 Even supposing that causation and foreseeability were established by the plaintiff, and the precautions in paragraphs 4.9 and 4.11 were accepted as practicable, it is possible that a court would find that because of the low degree of likelihood of injury (mesothelioma being a disease of very low frequency) and the high cost of precautions, despite the gravity of the injury which could occur, a reasonable operator in the circumstances of Asbestos Mines Pty Ltd would not have taken those precautions.

4.13 However, in relation to the method of exposure and suggested precautions in paragraph 4.10, the comparatively inexpensive nature of the precautions might lead to a different outcome of this process of weighing and balancing the factors involved.

Existence of Damage and Measure of Damages

4.14 Obviously before such action could be sensibly entertained, the plaintiff would have to show damage resulting from the defendant's acts. The diagnostic difficulties discussed in paragraphs 1.19 to 1.24 and the difficulties relating to the *Limitation Act* 1969 discussed in paragraphs 1.89 to 1.104 would apply to an action based on neighbourhood exposure just as to one based on employer's liability.

4.15 The measure of damages discussed in paragraphs 1.105 to 1.115 would be the same measure applied here — special and general damages, with general damages compensating both pecuniary and non-pecuniary loss. The particular application of these various heads of damage to Baryulgil claimants discussed there would also apply.

Contributory Negligence

4.16 In the event of a successful claim and an assessment of damages by the court in the manner described earlier, the actual sum the plaintiff received might, in one of the situations referred to, be cut down on the grounds that the plaintiff had contributed to his or her own injury. A finding of contributory negligence might very well be made in relation to a plaintiff coming from the group of persons who have chosen to continue to reside at the Square and claiming for a disease contracted as a result of exposure from the tailings dump after the closure of the mine, or at least after the commencement of the Committee's inquiry. It is not unlikely that a court would hold that by now those people would be aware of the risk involved in continuing to reside there, and that their doing so amounts to taking less care for their safety than the reasonable man would take in the circumstances.[17] If the plaintiff were to be found to have been contributorily negligent, the damages assessed would be reduced in proportion to the extent of the plaintiff's contribution to the injury.[18] Continued residence in an area of known health hazard could be held to represent a high level of contributory negligence and the reduction of damages could be substantial.

Actions by Dependants

4.17 If a person contracting a disease because of the pollution of the environment dies as a result of that disease before having brought an action, his or her relatives would be able to bring actions under the *Compensation to Relatives Act* 1897 and the *Law Reform (Miscellaneous Provisions) Act* 1944.

4.18 The nature of those actions and the particular problems associated with them for Baryulgil claimants, described in paragraphs 1.142 to 1.156, have equal application to actions based on a death resulting from neighbourhood exposure to asbestos fibre.

II. NUISANCE

4.19 Pollution of the environment of Baryulgil Square (if established — see paragraphs 6.54 to 6.73 of the Report and paragraphs 4.5 to 4.7 of this Appendix) could also give inhabitants or former inhabitants of the Square a right of action in nuisance.[19]

Private Nuisance

4.20 The gist of private nuisance is interference with an occupier's interest in the beneficial use of his land . . . harmful interference . . . may consist in . . . disturbance of the comfort, health and convenience of the occupant by offensive smell, noise, smoke, dust . . .[20]

To found an action, the interference must be substantial and unreasonable. In order to have standing to sue, the plaintiff must be the actual possessor of the land, whether as owner or tenant. Such person will be able to claim damages, and in addition to seek an injunction against continuation of the nuisance.

Standing to Sue

4.21 As stated above, it is the person in actual possession who has standing to sue in private nuisance. The first difficulty that would face a member of the Baryulgil community wishing to bring an action for private nuisance would be to establish that he or she was a 'possessor' of the Square or of part of it.

4.22 Possessors of land include not only owners of estates in fee simple, but also tenants for a term in actual possession . . . A licensee without possession, such as a lodger, cannot maintain an action for nuisance. This disqualification has been applied even against a tenant's wife and family residing with him .[21]

The difficulty arises from the fact that occupation does not amount, in law, to *possession*.[22]

4.23 In Chapter 2 of the Report, the question of title to the Square was discussed. It was seen that when the community first moved to the Square, the land was owned by the then owners of Yugilbar station. Though there was a belief that sometime in the 1940s a 99 year lease was granted to three members of the community as trustees, this proved to be untrue. Thus until 1960, the community lived on the Square as licensees of the owners of the station, and therefore had no possessory rights. In 1960 the land was gazetted as an Aboriginal reserve. Title thus passed to the Crown. Since the establishment of Aboriginal reserves is done by authority of statute, it could be said that after that date the members of the community resided on the Square as statutory licensees. In 1975 title to the land passed to the Aboriginal Lands Trust, and, following the abolition of that body, to the NSW Government. But at no time before 1980 were the community owners or lessees of the land and therefore at no time before 1980, in strict law, did they have a possessory right sufficient to give them standing to bring an action in private nuisance.

4.24 In August 1980, the Aboriginal Lands Trust gave a 99 year lease of the property to the Baryulgil Square Co-operative.[23] Members of the Co-operative from that date on have had a possessory right, as tenants, sufficient to give them standing to sue in private nuisance.

4.25 Thus the outcome of a claim for private nuisance based on injury to health caused by pollution of the Square would depend on the date of the alleged nuisance — the date at which the asbestos fibres which produced the plaintiff's asbestos-related disease had contaminated the Square. If this occured *after* 1980 then members of the Baryulgil Square Co-operative would have standing to sue as 'possessors' of the land through the lease from the Aboriginal Lands Trust. The submissions and evidence received by the Committee do not make completely clear how many residents of the Square were members of the Co-operative. The submission of Vivienne Abraham discusses the setting up of the Co-operative between 1976 and 1978.[24] Membership was restricted to Aboriginals living on Baryulgil Square or descendants of the three original families living there (the Mundine, Daley and Gordon families).[25] However, it appears that quite a number of persons resident at the Square in 1980 (when the lease was granted) had not joined the Co-operative, for Miss Abraham notes, with reference to negotiations for the establishment of the Malubugilmah settlement, that:

> Secretary [of the Co-operative], further reported it appeared that *a majority of the residents who had not joined the Co-operative* had signed for houses of the Square.[26] (emphasis added).

4.26 Persons claiming damages in private nuisance for disease caused by pollution before 1980, and persons not members of the Co-operative claiming in relation to disease caused by pollution after 1980 might however be able to argue standing on the basis of the decision in *Ruhan* v *Water Conservation Commission*[27] — that the mere fact a person is only a permissive occupant will not necessarily rob him or her of standing to sue in nuisance if he or she is the sole occupant. Nevertheless, it would be difficult for any individual member of the community to establish sole occupancy of any identifiable polluted part of the Square. If *Ruhan's* case were to be used as the foundation for a successful argument on standing, it might have to be done by a cumbersome procedure of having all the residents of the Square at the time of the alleged nuisance (and the estates of those who have since died, through the administrators — see paragraphs 1.152 to 1.156 above) sue as joint plaintiffs. Problems of gaining grants of letters of administration where the deceased had been married under tribal law and left only a widow would again arise (see paragraphs 1.150 to 1.151).

4.27 Since the Crown (in right of the State of New South Wales) and the Aboriginal Lands Trust were at various times owners of the land, who retained possession at law as that had not been alienated by lease until 1980, these bodies would presumably have had title to sue for nuisance occurring in the period before possession passed to the Co-operative through the 1980 lease. The Aboriginal Lands Trust has been abolished and could no longer bring an action, but the Crown in right of the State of New South Wales could still do so (subject to *Limitation Act* problems — see paragraphs 1.89 to 1.104). However, it would be difficult for the Crown to show any damage through interference with its beneficial use of the land (see paragraph 4.20).

Substantial and Unreasonable Interference

4.28 Clearly the emission of dangerous quantities of asbestos fibre onto a person's land qualifies as harmful interference. But to constitute a nuisance the interference must not only be harmful but substantial and unreasonable. The fact that 'dangerous quantities' of fibre were emitted does not necessarily make the interference substantial in this particular case, since very small quantities are now known to be dangerous. In determining whether interference is substantial and unreasonable it is necessary to weigh the gravity of the harm done, the character of the interference and its duration. In the case of Baryulgil Square, if instances of asbestos-related diseases are diagnosed among non-worker residents attributable to the emission, the gravity of harm will be great, and in such situation a smaller degree of interference, in character or duration, is sufficient. Since the duration of the interference was substantial, it is likely that even though its character was that of very small quantities of dangerous emissions, the gravity of harm bolstered by lengthy interference would consititute it a 'substantial interference'. Even with a shorter duration it is likely that a court would hold there had been substantial interference. Fleming states:

> Especially in case of physical injury, the fact that the occurrence was momentary and unlikely to recur is ordinarily irrelevant.[28]

4.29 The question whether the interference was unreasonable may be more difficult. The character of a neighbourhood is of significance in determining whether a private nuisance has occurred. While Baryulgil could hardly be described as an industrial district, the mine and mill were virtually the only source of employment for the residents of the Square, and this fact might be taken to make the emission of by-products of the employing enterprise less unreasonable, particularly since the site of the asbestos deposit meant that the operation had to be carried out in that place, whereas — theoretically at least — the people could have lived elsewhere. This is allied to the issue of the public utility of the defendant's conduct, which is given some weight in determining the unreasonableness of interference.

> *some* consideration will be given to the fact the offensive enterprise is essential and unavoidable in the particular locality, like a coalmine quarry, or some public utility or service such as early-morning milk delivery.[29]

However, Fleming goes on to say that:

> [t] his argument . . . must not be pushed too far. In particular, it should be remembered that we are here concerned with reciprocal rights and duties of *private* individuals, and a defendant cannot simply justify his infliction of great harm upon the plaintiff by urging that a great benefit to the public at large has accrued from his conduct.[30]

Therefore, while there might be some difficulty in establishing that the conduct of Asbestos Mines Pty Ltd amounted to 'unreasonable interference', the difficulty would not necessarily be a complete stumbling-block to the action.

Foreseeability

4.30 In order to claim damages for nuisance, the plaintiff's injury must be reasonably foreseeable. This was established by the Privy Council in *The Wagon Mound (No. 2)*.[31] The meaning of 'reasonably foreseeable' was set out in paragraphs 1.58 to 1.74 and the problems relating to foreseeability in cases of asbestos-related diseases was set out there, and in paragraph 4.8. As in a negligence claim for injuries caused by environmental pollution, it is likely that a court hearing a claim in nuisance would hold that the disease was not a reasonably foreseeable result of the nuisance prior to the late 1960s, and this could be an impassable obstacle to claimants alleging a nuisance constituted by emissions before that date. Where the claim is based on emissions since that date (wind- and water-carried fibres from the tailings dump), there is a greater chance that foreseeability could be established. But while the foreseeability of disease caused by fibres emitted through *operation of the mine and mill* might have been foreseeable by then, it is not certain that a court would hold that emission of possibly disease-producing quantities of fibre from *the tailings dump* was also foreseeable. Certainly the issue of foreseeability would present a major hurdle for many if not all residents and former residents of the Square who sought to bring an action in nuisance.

Injunction against Continuation of a Nuisance

4.31 The residents of the Square could seek an injunction against Asbestos Mines Pty Ltd restraining continuation of the emission of wind- and water-borne asbestos fibre from the tailings dump. Insofar as the dump creates a risk of such persons contracting a fatal disease in the future, the injunction would clearly be a better remedy than simply waiting till the possible disease occurs and then claiming damages.

4.32 That consideration encapsulates the reason why persons seeking an injunction would have no difficulty in showing the court had jurisdiction to grant an injunction. For jurisdiction to grant equitable remedies exists where common law remedies — here damages — are inadequate,[32] and clearly damages are an inadequate remedy for a fatal disease.

4.33 Once the court accepts that the case is one where it has jurisdiction to grant the remedy, it must examine the situation to see whether, on established equitable criteria, it should exercise its discretion to grant it. These criteria are:

(1) hardship: the court will not grant an injunction where to do so would cause undue hardship to the defendant. Hardship will be 'undue' where the hardship to the defendant from grant of the injunction overwhelmingly outweighs the hardship to the plaintiff from refusal of the injunction.[33]

(2) unfairness: where the plaintiff's rights which he or she seeks to have protected by injunction were obtained in circumstances such that it would be unjust and unreasonable to grant equitable relief, the court may refuse the injunction. For 'unfairness' to lead to refusal of a decree there must have been a relationship of inequality placing the defendant at a substantial disadvantage, which led to his or her infringement of the plaintiff's rights.[34] Matters such as severe financial hardship, extreme youth, extreme age and illness on the part of the defendant create such a relationship of inequality.

(3) impossibility of performance: equity will not require to be done that which cannot be done. If there is a real likelihood the defendant will not be able to comply with the injunction, the court may refuse to grant it.[35]

(4) futility: if the injunction will be ineffective in providing any benefit to the plaintiff, the court may refuse it.[36]

(5) 'unclean hands': 'he who comes to equity must come with clean hands' is one of the ancient maxims of the equitable jurisdiction. Where the plaintiff's own conduct in

relation to the matter in question has been reprehensible, the court may refuse to grant equitable relief.[37]

(6) lâches: where the plaintiff has delayed unreasonably in seeking equitable relief and as a result the position of the defendant has been altered in such a way that the injunction would be more onerous for him or her than it would have been had the plaintiff brought the action more expeditiously, the court may refuse to grant the injunction.[38]

(7) acquiescence: where the plaintiff has expressly or impliedly represented to the defendant an intention not to seek equitable relief, and in reliance on that representation the defendant has changed his or her position in such a way that an injunction would involve additional prejudice or inconvenience, the court may refuse the injunction.[39]

Discretionary Factors that May be Applicable in the Baryulgil Situation

4.34 Only some of the seven discretionary factors listed above could be of relevance in a claim by Baryulgil Square residents for an injunction to restrain further pollution of their environment. Unfairness, unclean hands and acquiescence are clearly inappropriate.

4.35 *Hardship:* it could be argued that the cost to Asbestos Mines Pty Ltd to prevent any further wind- or water-borne pollution — whether by an elaborate reafforestation programme or by removing the tailings dump altogether — would be so great as to cause them undue hardship. However, on the necessary initial assumption that the tailings dump exposes the Square residents to the risk of a fatal disease, it might not be possible for Asbestos Mines Pty Ltd to establish that the hardship was 'undue' in the sense of overwhelmingly outweighing the benefit to the plaintiff.

4.36 *Impossibility of Performance:* The cost of elimininating the pollution may, however, be higher than the amount of money which Asbestos Mines Pty Ltd could possibly raise. Given their financial statement in paragraph 1.27, that seems obvious. Their only real asset appears to be the lease of the Baryulgil mining tenements, and if they sold that, they would also put it out of their power to reafforestate the land involved in those mining tenements. Impossibility of performance would therefore seem to be a factor making refusal of an injunction quite likely.

4.37 *Futility:* it might be argued to be futile, as producing no benefit to the plaintiff, to grant an injunction restraining pollution if the plaintiff is already suffering the diseases of which that pollution creates a risk. There would still, of course, be a risk to the plaintiff's family. An argument of this type based on futility is sufficiently cold-blooded to be unlikely to win favour with a court exercising equitable jurisdiction.

4.38 *Lâches:* any delay in bringing a claim for an injunction which could be alleged up to the present date would be explicable in terms of ignorance of the risk or ignorance of legal rights and would be unlikely to be found to be unreasonable by the court in its equitable jurisdiction.

4.39 Thus it would appear that the only discretionary factor likely to militate against grant of an injunction is impossibility, but that factor could be decisive in leading the court to refuse equitable relief against further pollution of the environment of Baryulgil Square.

PUBLIC NUISANCE

4.40 In the event that Baryulgil residents were unable to bring claims based on private nuisance because they could not show themselves to be 'possessors' of the Square or part thereof, they might be able to frame their actions as claiming damages for a public nuisance. The essence of public nuisance is 'obstruction, inconvenience or damage to the

public in the exercise of their common rights as subjects'.[40] The most frequent source of public nuisance cases is obstruction to the highways, but that is not the limit of the action. The subjection of any member of the public to the inhalation or ingestion of damaging substances such as asbestos fibres would qualify as creating a public nuisance. Therefore, if asbestos fibres were introduced into the environment around the Baryulgil mine and mill, either by wind or water, Asbestos Mines Pty Ltd would have created a public nuisance.

4.41 In order to bring an action for damages for public nuisance, or to seek an injunction restraining the continuance of the nuisance, a plaintiff must be able to show that he or she has incurred a particular loss as a result, over and above that incurred by the public as a whole.[41] Personal injury caused by the nuisance clearly qualifies as particular loss. In *Walsh* v *Ervin*, Sholl J., speaking there of obstructions, described the requisite particular loss by saying that if it were:

> of a substantial character, direct and not merely consequential, so long as not merely similar in nature and extent to that in fact suffered by the rest of the public, [it] may amount to sufficient damage particular to the individual plaintiff . . .[42]

A plaintiff who had contracted mesothelioma as a result of the emission of asbestos fibres alleged as a public nuisance could obviously prove that his or her loss was 'of a substantial character', that it was 'direct and not consequential', and that it was 'not merely similar in nature and extent to that in fact suffered by the rest of the public'.

4.42 Public nuisance, like private nuisance must be unreasonable and substantial. The comments on this requirement made in paragraphs 4.28 to 4.29 would apply to a public nuisance alleged to arise from emission of asbestos fibres causing the contraction of an asbestos-related disease. Fleming says of this element that 'the task is to weigh the utility of the defendant's activity against the inconvenience thereby caused to others'.[43] Where the inconvenience caused is a fatal disease, the balance would almost certainly favour the plaintiff.

4.43 The measure of damages for public and private nuisance will be the same as for negligence and the limitations problems will be the same, as will the problems which, in the situation of Baryulgil claimants, might arise.

Actions by Dependants

4.44 The dependants of deceased residents of the Square whose death was the result of an asbestos-related disease attributable to the alleged nuisance will be able to claim damages on the basis of that death under the *Compensation to Relatives Act* and the *Law Reform (Miscellaneous Provisions) Act*, subject to the problems outlined in paragraphs 1.125 to 1.156.

III. THE RULE IN RYLANDS v FLETCHER

4.45 In his submission to the Committee, Michael Joseph suggested[44] that among possible causes of action open to the Baryulgil community would be:

> Damages claimed by non-employees based on the principle of *Rylands* v *Fletcher* . . .

4.46 That case was heard in 1860. A millowner constructed a reservoir for the purposes of his mill. The water filled a disused mine-shaft and flooded a mine belonging to the plaintiff on adjoining land. The millowner had been unaware of the disused shaft on the reservoir site, but was held liable to the plaintiff in damages. Blackburn J. stated the principle thus:

> a person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape.[45]

4.47 This rule, as can be seen from Blackburn J.'s formulation, is one of strict liability. It does not depend on any fault in the landholder contributing to the escape of the dangerous substance or thing. However, by definition and refinement of its constituent elements, the scope has been considerably reduced from that which, on its initial pronouncement, might have appeared available.[46]

Bringing onto the Land

4.48 The restriction which would most severely prejudice an attempted claim by Baryulgil Square residents derives not from those refinements referred to above, but from the actual words that Blackburn J. used: 'a person who . . . brings on his lands . . . anything likely to do mischief . . .'[47] A claim by a resident of the Square would relate to the 'escape' of asbestos fibre, as being a thing 'likely to do mischief'. But Asbestos Mines Pty Ltd did not 'bring' the fibre 'on [its] lands'. The fibre was *there*, in the serpentine rock. 'Land' is not only the surface of a property, but everything thereunder, to the centre of the earth.[48] The serpentine rock was part of the land leased by Asbestos Mines Pty Ltd, and the asbestos fibre was part of that rock. In fact, it was the very reason for their acquisition of the land per medium of a mining tenement.

4.49 Despite this strict interpretation of the words of Blackburn J.'s formulation, some cases might support a decision that the escape of asbestos fibre from the property of Asbestos Mines Pty Ltd falls within the rule in *Rylands* v *Fletcher*.[49] Cases suggesting that the situation does not attract the *Rylands* v *Fletcher* principle are, however, more numerous.[50]But since the exact question does not appear to have been addressed by a court in any reported case,[51] the outcome of a claim by Baryulgil Square residents remains in doubt.

4.50 Even if a court were prepared to accept that fibres released from the host rock come within the rule, there are other elements of the cause of action that might present difficulties.

'A thing likely to do mischief'

4.51 Although the operation of the rule in *Rylands* v *Fletcher* has been considerably restricted by interpretation, that has not been due to the interpretation given to the phrase 'a thing likley to do mischief', or — in its more usual modern fomulation — a 'dangerous thing'.[52] The list of things which have been held to be dangerous[53] is so diverse that it appears Blackburn J.'s phrase has been reformulated as 'a thing which is not unlikely to do mischief' or even 'a thing which could conceivably do mischief'. There seems little doubt that asbestos fibres could qualify as things 'likely to do mischief'.

Natural User

4.52 The main area of restriction of the rule has come through an examination of whether the user of the land by the defendant, which caused the escape, was natural or not. If it was, then the defendant is not liable for the damage its escape causes (at least not under this rule, though he or she might be liable in negligence if such were proved — see paragraphs 4.1 to 4.13.) The Privy Council established this exemption from liability in the case of *Rickards* v *Lothian*[54] stating that:

> there must be some special use bringing with it increased danger to others . . . not merely the ordinary use of the land or such a use as is proper for the general benefit of the community.[55]

4.53 The Victorian Supreme Court had held even earlier in *Peers* v *Victorian Railway Commissioners*[56] that mining is an ordinary and natural user of land. Moreover, mining today can only be carried out under licence by holders of appropriate leases of the land or their assignees. It is therefore almost certain that the escape of fibres during the quarrying of the serpentine host rock or during the extraction of the asbestos from the host rock would be held to be the result of a natural user of their land by Asbestos Mines Pty Ltd. It is also likely, though a little more open to question, that the depositing of the residue on the land in the form of tailings heaps would be a natural user so that the escape of fibres from the tailings dump would not have been covered by the rule in *Rylands* v *Fletcher*, at least while the mine and mill were operational. It might be possible to argue that the continued presence of the tailings dump after the mining had ceased and the mill had been dismantled was not a natural user. Against that must be set the fact that there are still considerable reserves of asbestos in the Baryulgil lease which Asbestos Mines Pty Ltd might wish to commence mining again in the future.

Escape

4.54 In *Read* v *Lyons*,[57] the House of Lords denied the protection of the rule in *Rylands* v *Fletcher* to persons injured by mischief done to them by a dangerous thing while on the defendant's premises. There must be an *escape* from those premises to a place outside. This case would prevent use of the rule by Baryulgil workers who inhaled the fibres while at work. In the case of pollution of the Square, there was clearly an escape.

Standing to Sue

4.55 The plaintiff need not be a possessor of the land onto which the dangerous thing escapes.[58] Therefore the problems discussed in paragraphs 4.21 to 4.27 would not arise in a *Rylands* v *Fletcher* case brought by Baryulgil residents. Furthermore, the High Court in *Benning* v *Wong*[60] made it very clear that such a case can be brought on the grounds of personal injury as well as of injury to property.

Defences — Act of God

4.56 While Asbestos Mines Pty Ltd might argue that the fibres escaped onto the Square by an act of God, in the form of wind which blew them there or water which floated them there, this would not be accepted as a defence. Act of God will only excuse a defendant in a *Rylands* v *Fletcher* case if it is so unexpected that it could not have been anticipated by reasonable human foresight[60] (a stricter test than foreseeability,[61] discussed in paragraphs 1.5 to 1.6 and 1.58 to 1.74).

Probable Outcome

4.57 It is likely that even if Baryulgil residents could overcome the problem that Asbestos Mines Pty Ltd did not bring the asbestos onto their land, they would fail in a *Rylands* v *Fletcher* action because the mining, milling and the tailings dump would be held to be a natural user of the land.

TRESPASS

4.58 Another possibility of legal action by members of the Baryulgil community, though not a very promising one, lies in the area of the intentional torts through actions for trespass to the person or trespass to land. As the likelihood of establishing such claims is slight, these actions will be considered only briefly.

Trespass to the Person

4.59 Only one of the several types of trespass to the person would be at all relevant here. That one is the tort of *battery* — the intentional 'bringing about of a harmful or offensive contact with the person of another'.[62] Battery does not require 'an actual and immediate physical contact'[63] between the defendant's person or an object held by him and the person of the plaintiff. It is sufficient if an act of the defendant directly results in a harmful contact with the plaintiff's person. Fleming instances pulling away a chair on which the plaintiff is about to sit so that he falls to the ground, or striking the plaintiff's horse so that the rider is thrown.[64] Thus, releasing asbestos fibres into the air that the plaintiff will breathe or the water that he or she will use could qualify as bringing about a harmful or offensive contact.

4.60 However, Fleming describes the requisite act as being 'positive and affirmative',[65] and goes on to state an allied requirement which would almost certainly rule out any possibility of successfully suing for a battery in the Baryulgil situation. 'Battery is an intentional wrong: the offensive contact must have been intended or known to be substantially certain to result'.[66] That is not to say that the defendant must have intended that the contact be harmful or offensive. He or she must, however, have intended that the contact be made. It would be difficult to establish that Asbestos Mines Pty Ltd *intended* that their workers or the residents of the Square should inhale or ingest asbestos fibres.

4.61 Moreover, trespass, of whatever kind, requires direct rather than consequential injury.[67] While the 'injury' here would be the contact with the fibre, rather than the disease resulting from the contact,[68] it would be difficult to present inhalation or ingestion of fibre by residents of the Square as a direct result of the company's production process, although it was probably direct in the case of the workers.

4.62 A further difficulty with establishing battery is that consent on the part of the plaintiff is a complete defence to an allegation of trespass.[69] Since it is the contact, not the resultant disease, which is the gist of the battery, there would be a strong argument that the workers by accepting employment in an obviously dusty mine and mill *consented* to breathing in the dust (particularly if they failed to use respirators provided). It would be harder for the defendant to argue that the residents of the Square necessarily consented to contact with fibrous dust through its being blown into their houses or through asbestos fibres percolating into their water supply. However, the absence of direct injury in their case would mean the defendant would not, in any case, be put to the necessity of raising the defence of consent.

Trespass to Land

4.63 Intentional invasion, by one's person or by means of some object, animate or inanimate, of the land of another is a trespass. Asbestos fibre would qualify as an inanimate object 'propelled' in some way onto the Square. But the contamination of the Square by wind- or water-carried fibre could not qualify as a trespass to the land of the Square (nor till 1980 could any resident there have sued, even if it were a trespass).

4.64 The invasion of the plaintiff's land must be by a 'voluntary and affirmative act'. It could scarcely be argued that Asbestos Mines Pty Ltd intended to introduce asbestos fibre into the environment of the Square by medium of wind- and water-carriage. They may have known that such occurred. They may have failed to take steps to prevent the occurrence. But those factors are relevant to an action in negligence or possibly in nuisance, not to an action for trespass.

4.65 Moreover, even if they did *intend* to disperse fibre into the surrounding environment, that would only result in trespass in relation to the Square if the passage of

the fibre from the property of Asbestos Mines Pty Ltd to the Square was direct and not consequential. Fleming says:

> Here again, the old distinction between direct and indirect invasion looms large. The discharge of water may be trespass or case according to whether it is immediately powered upon or only ultimately flows onto the plaintiff's property, as by being first discharged on somebody elses's land and later carried down to the plaintiff's.[70]

Thus wind- or water-carried fibres could only amount to a trespass, even if intentionally discharged, if the route they traversed to the Square was over an area where the propertyof Asbestos Mines Pty Ltd and Baryulgil Square were completely contiguous (without even a road in between, which would be property of the Crown).

4.66 Also, Asbestos Mines Pty Ltd could possibly raise the defence of consent, though it would be by implication only. It could perhaps be argued that by voluntarily using tailings as surface and fill on the Square,[72] the residents had consented to having their environment there polluted by asbestos fibres. However, the plaintiffs could argue in reply that consent to pollution by the fibres they carried in themselves was not consent to those which were transported in by any other means such as by blowing in from the mine and mill or by being carried in by the waters.

4.67 Finally, in relation to any alleged trespass to the land before 1980, residents of the Square would not have had standing to sue, for trespass to land, like private nuisance, 'vindicates only violations of actual possession',[73] and before the lease of the Square to the Baryulgil Square Co-operative Ltd, the residents of the Square did not, in law, have possession thereof.[74]

4.68 Even if a trespass to land case could be made out in the face of the problems in paragraphs 4.64 to 4.65, limitation difficulties would arise for any action relating to a trespass before (as of the date of this Report) October 1979.[74] And in relation to trespass the extensions to the *Limitation Act* may be harder to invoke since the gist of this cause of action is *contact* with the plaintiff's person or land, and of that material fact Baryulgil plaintiffs would have been aware. They would have *seen* the dust in the air around them.

4.69 Trespass thus seems a dubious possibility as a means of legal redress. Its only advantage would lie in the fact that damages are not absolutely dependent on proof of loss to the plaintiff:

> The victim of trespass who has not sustained substantial harm can be vindicated by a judgment in his favour, though except in an extreme case warranting exemplary damages, only nominal damages may be awarded.[75]

Trespass might thus seem an appropriate way of overcoming the difficulties of establishing loss or damage, discussed in paragraphs 1.19 to 1.24. However, nominal damages would not be worth the inconvenience of protracted litigation (certainly not if the court ordered that costs should lie where they fell), and, given the continually expressed reluctance of the courts to extend the province of exemplary damages,[76] the facts of the Baryulgil situation would probably be too equivocal as to fault or conscious disregard of the plaintiff's rights or wellbeing to persuade a court to make such an exceptional award in this case.

4.70 If a Baryulgil worker or Square resident dies as a result of an asbestos-related disease without having sought damages (and, if his or her rights of action have not been statute-barred), a Compensation to Relatives action based on the alleged trespass could be brought, and an action on behalf of the estate, subject to the problems referred to in paragraphs 1.124 to 1.161.

1 [1932] A.C. 526 at 580.

2 Transcript of Evidence, pp. 2906-7; also Report of Dr K. Basden submitted by the Aboriginal Legal Service and incorporated into the Records of the Inquiry as Exhibit No. 20.

3 Transcript of Evidence, p. 1424.

4 Transcript of Evidence, pp. 891-3, 1800-1810.

5 See paragraphs 1.1 to 1.11.

6 Transcript of Evidence, p. 1416.

7 Transcript of Evidence, p. 1424.

8 Royal Commision on Matters of Health and Safety Arising from the Use of Asbestos in Ontario. Report. 1984. Vol I, p. 9, 15-16.

9 1979, Supreme Court of Western Australia, unreported.

10 Transcript of Evidence, pp. 39-40.

11 Transcript of Evidence, pp. 163-6.

12 Transcript of Evidence, pp. 2317-8.

13 Submitted by the Aboriginal Legal Service and incorporated into the Records of the Inquiry as Exhibit No. 20.

14 See note 4.

15 1983, Supreme Court of South Australia, unreported.

16 1979, Supreme Court of Western Australia, unreported.

17 *Sungravure Pty Ltd* v *Meani* (1964) 110 C.L.R. 24.

18 *Law Reform (Miscellaneous Provisions) Act* 1965 N.S.W., Section 10.

19 In relation to paragraphs 4.11 to 4.44, see generally I. Fleming, *The Law of Torts*, 6th ed, Sydney, 1983, Ch. 20.

20 *Ibid*, pp. 384-5.

21 *Ibid*. p. 393.

22 B.A.Helmore, *The Law of Real Property*, 2nd ed., Sydney, 1966, pp. 13 and 221.

23 Transcript of Evidence, p. 1797.

24 Transcript of Evidence, pp. 2393-4.

25 Transcript of Evidence, p. 2394.

26 Transcript of Evidence, p. 2398.

27 (1920) 20 S.R. (N.S.W.) 439. See also *Vaughan* v *Shire of Benalla* (1891) 17 V.L.R. 129.

28 I. Fleming, *op.cit.*, pp. 386-7.

29 *Ibid.*, p. 388.

30 *Ibid.*, p. 390.

31 [1967] A.C. 617

32 I.C.F. Spry, *Equitable Remedies*, 2nd ed., Sydney, 1980, p. 356.

33 *Woods* v *Sutcliffe* (1851) 2 Sim. (N.S.) 163; *Attorney-General* v *B.P. (Australia) Ltd* (1964) 83 W.N. (N.S.W.) 80.

34 *Slee* v *Warke* (1949) 86 C.L.R. 271.

35 *Pride of Derby and Derbyshire Angling Association Ltd* v *British Celanese Ltd* [1953] Ch. 149.

36 *Death* v *Railway Commissioners for N.S.W. [1927] 27 S.R. (N.S.W.) 187.*

37 *Hubbard* v *Vosper* [1972] 2 Q.B. 84; *Littlewood* v *Caldwell* (1822) Price 97.

38 *Lindsay Petroleum Co.* v *Hurd* (1874) L.R. 5 P.C. 221.

39 *Archbold* v *Scully* (1861) 9 H.L.C. 360.

40 I. Fleming, *op. cit.*, p. 379.

41 *Ibid.*, pp. 380-383.

42 [1952] V.L.R. 361 at 369.

43 *Op.cit.*, p. 383.

44 Transcript of Evidence, p. 805.

45 *Rylands* v *Fletcher* (1866) L.R. 1 Ex.265 at 279-80.

46 I. Fleming, *op. cit.*, pp. 307-14.

47 *Rylands* v *Fletcher*, *op.cit.*, p. 279.

48 *Mitchell* v *Mosley* [1914] 1 Ch.438 at 450 per Cozens-Hardy M.R.: 'conveyances of the land . . . include (unless you can find something to the contrary) everything down to the centre of the earth. The grant of land includes the surface and all that is supra — houses, trees and the like — cujus est solum ejus est usque ad coelum — and all that is, infra, i.e. mines, earth, clay, etc.'

49 e.g. *Batchelor* v *Smith* (1879) 5 V.L.R. (L.) 176.

50 *Sparke* v *Osborne* (1908) 7 C.L.R. 51; *Bayliss* v *Lea* (1961) S.R. (N.S.W.) 247; *Giles* v *Walker* (1890) 24 Q.B.D. 656; *Pontardarwe Rural Council* v *Moore-Gwyn* [1929] 1Ch.656.

51 Though the judgments in *Sparke* v *Osborne*, *op.cit.*, came very close to confronting this issue directly. See per Barton J. at 61-5, per O'Connor J. at 67-71, and per Isaacs J. at 73-4.

52 I. Fleming, *op.cit.*, pp. 310-11.

53 E.g. 'water, electricity, gas, oil, fire, explosives . . . acid smuts . . . poisonous trees . . . even flagpoles, chimney stacks and the roof of a house.' I. Fleming, *op.cit.*, p. 311.

54 [1913] A.C. 263.

55 *Ibid.* at 280.

56 (1893) 19 V.L.R. 617.

57 [1947] A.C. 146.

58 *Halsey* v *Esso Petroleum* [1961] 1 W.L.R. 683; *Shiffman* v *Order of St. John* [1936] 1 All E.R. 557.

59 [1969] 122 C.L.R. 249.

60 *Commissioner for Railways* v *Stewart* (1936) 56 C.L.R. 520.

61 *Greenock Corporation* v *Caledonian Railway* [1917] A.C. 556; and see I. Fleming, *op.cit.*, p. 317.

62 I. Fleming, *op.cit.*, p. 23.

63 *Ibid.*

64 *Ibid.*

65 *Ibid.*

66 *Ibid.* p.24.

67 *Ibid.* p.16.

68 A distinction must be made in this action between the injury which the plaintiff suffers directly because of the defendant's act, and the resulting loss to the plaintiff for which damages could be claimed. The 'injury' is the contact, the ingestion of the fibre, the 'loss' is the disease and the pecuniary and non-pecuniary losses flowing from it. Previously the plaintiff's loss has been referred to also as injury. The use of the same word in different senses can be confusing.

69 I. Fleming, *op.cit.*, pp. 73-77.

70 *Ibid.*, p. 39.

71 See paragraphs 2.13 to 2.15 of the Report.

72 I. Fleming, *op.cit.*, p. 40.

73 See paragraph 2.21 of the Report, and paragraphs 4.21 to 4.27 of this Appendix.

74 See paragraphs 1.89 to 1.104.

75 Luntz, Hambly and Hayes, *Torts: Cases and Commentary*, Sydney, 1979, p. 566.

76 See e.g. *Rookes* v *Barnard* [1964] A.C. 1129; *Cassell and Co. Ltd* v *Broome* [1972] A.C. 1027; *Uren* v *John Fairfax and Sons Pty Ltd* (1966) 117 C.L.R. 118; *Australian Consolidated Press* v *Uren* [1969] 1 A.C. 590.

Chapter 5

Public Torts — possible actions in negligence against public bodies

5.1 The evidence given to the Inquiry relating to the operation of the mine and mill, the management of the neighbouring area and decisions concerning the school shows, with the benefit of hindsight, that unfortunate mistakes were made by the public authorities involved. Mistakes by public bodies can, in appropriate circumstances, give individuals suffering damage as a result rights of action against those bodies.[1] The most obvious actions that would be sought by workers at Asbestos Mines Pty Ltd and residents of Baryulgil would be actions for damages for negligence. Bodies against which such actions might be available are the Mines Inspectorate, the Occupational Health Division of the Department of Industrial Relations, the Department of Education, the State Pollution Control Commission and the Copmanhurst Shire Council.

5.2 Before examining the possible grounds for an action in negligence against these various public bodies, it is appropriate to set out the principles on which actions against public bodies are founded. The basis of Crown liability in New South Wales is the *Claims Against the Government and Crown Suits Act* 1912. Section 4 of that Act provides that in every case against the Government pursuant to the Act:

> the proceedings and rights of the parties therein shall as nearly as possible be the same . . . as in an ordinary case between subject and subject.

Of this section, Aronson and Whitmore in their text on *Public Torts and Contracts* say:

> First . . . it is a statement that what binds the Crown are all the procedural and substantive laws, mutatis mutandis, which bind the subject. And second, the phrase serves to indicate a legislative awareness that in some very few cases, it is right and proper to pay regard to the public status of the Crown.[2]

The Crown, then, is liable in tort, and thus liable for negligence. But the courts' 'regard to the public status of the Crown' is in these cases illustrated largely by their determination of the situations in which a duty of care arises.[3]

5.3 The general statement of the duty of care is Lord Atkin's 'neighbour' principle in *Donoghue* v *Stevenson*[4] (see paragraph 4.1). In the case of the Crown, two allied factors affect the decision whether such a duty of care exists. One is a distinction between misfeasance and nonfeasance — between doing an act carelessly and carelessly failing to do an act.[5] The other is the question of discretionary acts and decisions, or put another way — acts and decisions done or made on the basis of policy considerations.

5.4 Taking the second factor first, the Courts will not, in general, pass judgment on the wisdom or carefulness of matters involving a policy or discretionary element.[6] The determination of policy and the exercise of discretion are regarded as being properly within the province of the legislature and executive, not of the judiciary. As a result, many instances of nonfeasance will be regarded as being the exercise of a discretion not to act. In relation to the first fact, the courts are unlikely to find a duty on a public body to act, but only to act carefully or properly. Thus nonfeasance will not be a breach of duty but misfeasance may be. This misfeasance — nonfeasance issue proper is more easily got over than the discretionary issue, for courts, where minded so to do, find little difficulty in recasting a failure to act into a positive act. They are far more consistent in their eschewing of comment on discretionary matters, interfering only where they can present

the decision as a failure to exercise the discretion at all. As will be seen in the subsequent paragraphs, many of the actions which might have appeared open against the bodies mentioned in paragraph 5.1 will fall foul of these interlinked conventions.

THE MINES INSPECTORATE

5.5 It might be argued, on the evidence received by the Committee, that the Mines Inspectorate was negligent in failing to make more frequent inspections, failing to prosecute for breaches of the *Mines Inspection Act* 1901 disclosed by their inspection, or failing to issue notices and directions under certain provisions of the *Mines Inspection Act*. Evidence suggesting that inspections were notified in advance by some means to the management at Baryulgil, allowing the mill to be cleaned and the plant to be slowed down,[7] could lead to further allegations of negligence in not noticing or acting on evidence of cleaning, and not making an effort to compare the throughput of the mill during inspections with the likely throughput at other times.

5.6 Most of these alleged instances of negligence would come under the discretionary/nonfeasance headings described above, so that the courts would be likely to hold there was no duty of care on the Inspectorate requiring it to act otherwise than it did. The number and timing of inspections would almost certainly be held to be a matter of discretion, particularly since it would be related to issues of available manpower and the allocation of that manpower to fulfil the State-wide functions of inspection within the Inspectorate's statutory role. The decision whether or not to prosecute a breach is a policy decision par excellence. Suggestions of a conscious anti-prosecution policy in government inspectorates[8] have been confirmed in the case of the Mines Inspectorate in the evidence of Mr R.F. Marshall, the Chief Inspector of Mines:[9]

> It is true. I will never be convinced that prosecution is the answer. The answer is the psychology to get to the people and tell them to work safely . . .
>
> I believe that I am on the right track and I argue strongly with my Under-Secretary on this very matter of prosecutions. I do not think prosecutions are the answer. It may look good on paper and for politicians to say they have done this and done that, but it does not work because it blocks up the source of information which we have used. The Mines Inspection Act and the coal mining legislation are written in blood and the only reason they are there is that we were able to get the information to be able to cure these things — all in hindsight . . .

The policy is to advise and encourage, not to prosecute and punish. The explanation given for that policy is that if employers are in fear of prosecution the access of the Inspectorate to the workplaces will be limited to those visits statutorily required, and that important opportunities of educating and encouraging employers to adopt higher standards will be lost.[10] Whatever may be thought of the ultimate wisdom of that policy, it is clearly one which courts would hold to be within the Inspectorate's province and not to be interfered with by them.

5.7 It is possible also that the failure to prosecute for breaches was related to the provisions of Section 71(2), outlined in paragraph 2.26 above — that is, that in the case of breaches disclosed by inspections at Baryulgil, the inspector was satisfied that the company had taken all reasonable steps to comply with the requirments of the Act. It is very difficult for courts to interfere in decisions which are to be made 'to the satisfaction' of government officers, the achievement of that satisfaction being again subject to matters of discretion and policy.

5.8 The suggestion that the Inspectorate failed to issue notices and directions relates to certain provisions of the *Mines Inspection Act* 1901 not yet discussed. General Rule 65 of Section 55 of the Act states that:

> The Manager of every mine shall take such steps to allay the dust produced during blasting as the Minister, upon the recommendation of the Chief Inspector, may direct. The Minister may, on like recommendation, rescind or modify any direction given under this Rule. Any ore or other material being filled into trucks or moved in any working place under-ground, shall be kept moist with water to prevent the escape of dust into the mine air.

General Rule 65A, as of 1944 when Asbestos Mines Pty Ltd commenced operations, stated that:

> Where dust is produced by any rock crushing plant operating in, upon, or in connection with any mine or quarry to an extent which in the opinion of an inspector of mines is or is likely to be injurious to the health of the persons working upon or in such mine, quarry, or plant, he may in writing addressed to the owner or person in charge of the plant require provision to be made for preventing or allaying such dust or the danger to persons liable to inhale such dust, and no person shall work or cause or allow to be worked the plant until such provision is made and effectively used.

This Rule was amended in 1964[11] by omitting the words 'rock crushing' and substituting 'crushing or screening', by omitting the words 'of mines' and substituting the words 'is offensive or is unduly uncomfortable or seriously impairs visibility or', and by inserting the following paragraph at the end of the Rule:

> On and from the first day of January, 1965, all crushing and screening plants shall be fitted with means, approved by the Chief Inspector of Mines, of suppressing, allaying or removing dust to the satisfaction of the Chief Inspector of Mines.

It might be argued that the failure to direct steps to allay the production of dust in the mine at Baryulgil during blasting, under General Rule 65, and the failure to require any provision to prevent or allay dust produced in the mill at Baryulgil by the crushing and screening of the rock, under General Rule 65A, amounted to negligence on the part of the Mines Inspectorate.

5.9 Assuming that inspections had disclosed excessive dust in the mine and mill, the question of whether or not to issue directions or require provisions for allaying or preventing that dust is less obviously one of policy. However, the failure to issue such directions or requirements is a clear case of nonfeasance, which would be difficult to cast in terms of a misfeasance.

5.10 Provision is also made for notice to be given to mine owners requiring the remedying of defects in Section 37. At the time the Baryulgil mine and mill commenced production in 1944, Section 37 read:

> (1) If in any respect not provided for by express provision of this Act or by any special rule any inspector finds any mine or any part thereof, or any matter, thing, or practice in or connected with such mine, or in connection with the control, management, or direction thereof by the manager to be dangerous or defective, so as in his opinion to threaten or tend to injure the health or the body of any person, such inspector shall given notice thereof in writing to the owner or manager of the mine, and shall state in such notice the particulars in which he considers such mine or any part thereof, or any matter, thing, or practice, to be dangerous of defective, and require the same to be remedied within a period named in such notice; and if the cause of danger is not removed or if such defect is not remedied within the period so named, the inspector may take proceedings against the owner or manager for such default, and on being satisfied that such notice was justified by the matter complained of, the court may impose on such owner or manager a penalty not exceeding fifty pounds, and a further penalty of five pounds for every day after such a decision during which such notice is not complied with.
>
> (2) A copy of every notice as aforesaid shall forthwith be transmitted by the inspector to the Minister.

There were minor amendments to the section in 1978. The penalty was raised to $250, and $50 for continuation of the offence; and subsection (2) was altered to read 'Chief Inspector, who may transmit a copy of the notices to the Minister' in place of 'Minister.'[12]

5.11 The submission of the Public Interest Advocacy Centre referred to a number of questions put to the Chief Inspector of Mines by the Aboriginal Legal Service concerning the Mines Inspectorate's exercise of its functions under the *Mines Inspection Act*. Question 2 asked whether any Section 37 notice had been issued by any inspector. The Chief Inspector's answer was that no such notices were issued.[13]

5.12 In the public hearing of 10 February 1984, the Chief Inspector was questioned about the failure to issue any Section 37 notices:

> CHAIRMAN — Let us have a look at the answer about Section 37, which states that no Section 37 notices were issued.
>
> Mr Marshall — Yes.
>
> CHAIRMAN — On any inspection there was nothing occurring there that would have – – –
>
> Mr Marshall — Section 37 does not say that. A Section 37 notice is issued when something is happening at the mine which is not covered by the regulations. The inspector is then empowered to issue some notice so it becomes part of the regulations.
>
> CHAIRMAN — Right.
>
> Mr Marshall — So because there were regulations in the Act regarding dust and things like that, we would not be allowed to issue a Section 37 notice.
>
> CHAIRMAN — So that would be the reason?
>
> Mr Marshall — Yes. It is only issued when it is not covered by the Act; that is what Section 37 states.[14]

5.13 This answer is clearly correct insofar as it relates to the period after 1964. The promulgation of the 5 million particles per cubic foot standard in General Rule 65B in that year was clearly an 'express provision' within the opening words of Section 37. Thus the level of airborne fibre at Baryulgil was not something that was 'not provided for by express provision of this Act' and Section 37 could not apply.

5.14 It could be argued, however, that before 1964 the Act made no express provision for the levels of airborne asbestos dust and fibre, and that a Section 37 notice could have been issued. A counter argument would point to General Rules 65 and 65A as constituting express provision dealing with the dangers of excessive levels of dust, and thus preventing the application of Section 37.

5.15 Whatever decision a court might take on that question (and it is likely that the counter-argument would be found more compelling), the decision not to issue a notice under Section 37 if the section was applicable would be nonfeasance and would probably be held to be a matter of discretion. It seems very unlikely that Section 37 would give rise to a duty of care.

5.16 Possibly the only area of alleged negligence suggested in paragraph 5.5 which would not be a policy matter that the courts would decline to review and which could be classed as misfeasance rather than nonfeasance would be failure to notice that the mine had been cleaned up for inspections and the plant slowed down. If it were established that such had indeed occured and that the inspector had not noticed or had not taken steps to avoid a resultant atypical dust count, it could be said that the inspection had been performed negligently — that there was a duty on the inspector to take care to carry out the inspection so as to avoid any unnecessary risk to persons foreseeably at risk, and that he had failed to carry out that duty.

5.17 If the situation is accepted as one giving rise to a duty of care, the elements of the cause of action for negligence would have to be established[15] — that injury to the workers was caused by inadequate inspections that did not disclose excessive amounts of airborne asbestos, that it was foreseeable that inadequate inspection could lead to the contraction of disease, that there were steps the inspector could have taken to ensure that clean-ups and

slow-downs did not prevent him getting readings of airborne fibre that represented the typical conditions, and that a reasonable inspector would have taken those precautions in the circumstances of this case. The first element will require the sort of evidence discussed in relation to causation in paragraphs 2.27 and 2.28. Foreseeability would not be difficult to establish. The very setting of the standards in General Rule 65B indicates that exposure to higher concentrations of fibre is a health hazard, and the idea of inspections is to make sure those standards are not exceeded. An inspection which did not properly assess the level of exposure would therefore create the possibility that the workers were being exposed to unsafe levels. A number of precautions to ensure accurate testing could be suggested — such as ensuring that inspections were not known of in advance. Finally, a court would be very likely to hold that a reasonable person in these circumstances would have taken those precautions.

THE DIVISION OF OCCUPATIONAL HEALTH

5.18 Very much the same allegation of negligence could be made against the Division of Occupational Health as discussed in paragraphs 5.5 to 5.17. That is, it could be argued that they negligently performed their duty to test by not noticing and not taking steps to avoid atypically low readings caused by clean-ups of the mill and slow-downs of the plant. The elements of the cause of action would be made out in the same way.

5.19 In addition, it could be argued that, if the Division's tests showed excessive levels of airborne asbestos fibre, they were negligent in failing to make sufficiently vigorous representations to their superiors that steps should be taken to ensure that the standards were complied with.[16] While this could be fairly easily interpreted as misfeasance rather than nonfeasance, it could also be said to be dependent on discretion or policy, and a court might be unwilling to find a duty of care in these circumstances.

5.20 Finally it could be argued that the Division was negligent in not giving more vigorous warnings to the workers about the hazards of the work and the need to wear respirators.[17] Again this could easily be presented as misfeasance (if in fact the Division's warning were found to be inadequate) and it would be less likely to be held a policy matter, though that possibility would still be open. If a court did find a duty of care here, the elements of the cause of action would need to be established, mutatis mutandis, as in paragraph 5.17 above.

THE DEPARTMENT OF EDUCATION

5.21 The allegations of negligence against the Department of Education would relate to their approval or acceptance of the use of asbestos tailings in the school grounds and their failure to move the school to another site.[18]

5.22 The injury that might result from these tailings would probably be the contraction of mesothelioma by a person who had attended the school (mainly the children, but possibly also the teachers). It is unlikely that the exposure experienced as a result of the use of tailings in the playground would be sufficient to cause asbestosis.[19]

5.23 A decision to use, or to approve or allow the use of, tailings would be misfeasance but it might be said to be a discretionary matter, particularly because of the monetary savings it would have permitted. If, however, a court accepted that there was a duty of care here (and because the health of children is involved, they might, subconsciously, be more willing to do so), there would be difficulties in establishing both causation and foreseeability.

5.24 Causation would be a problem because it would be difficult to show that it was exposure at the school rather than at the Square or when playing on the tailings dump at the mine site that had caused the disease. This could probably be overcome by the approach outlined in paragraphs 2.27 and 2.29 whereby all exposure is taken as causative in that it increases the risk of contracting the disease.

5.25 Foreseeability would be a more intractable problem. In cases where the disease was contracted as a result of pre-1960s exposure, it would be impossible to establish that the risk created by the use of tailings was foreseeable (see paragraph 4.8).

5.26 If exposure had been in the mid-1960s or later, foreseeability could probably be established. Practicable precautions would be obvious — use of some other substance, and a reasonable Education Department would surely have taken that alternative course.

5.27 The decision not to move the School to another site after the health risk was established could easily be presented as misfeasance. A decision not to do something is a decision to do something else. But is is also, much more obviously than the use of the tailings in the first place, a policy decision, involving questions of cost, the wishes of the parents, the possible disruption in the community, and an assessment of the degree to which ameliorative measures already taken, such as bitumen surfacing of the playground,[20] had eliminated the hazard. It is unlikely that a court would be willing to accept an allegation of negligence in this respect.

THE STATE POLLUTION CONTROL COMMISSION

5.28 The Commission has powers and duties under the *Clean Air Act* 1961[21] and the *Clean Water Act* 1970[22] which, on the evidence, might be held to have been carelessly discharged. In relation to the *Clean Air Act*, it might be alleged that the Commission was careless in failing to attach conditions to the licence issued to Asbestos Mines Pty Ltd, that it was careless in failing to prosecute Asbestos Mines Pty Ltd for breaches of Section 14 and Section 15 (2), and that it was careless in failing to establish standards of concentration and rates of emission appropriate to the processes used at Baryulgil for milling asbestos.

5.29 All of these alleged failures are very much matters of policy or discretion so that it appears unlikely that a court would hold there to be a duty of care on the Commission such that their acts or omissions could be treated as negligence with the legal consequences that would entail. Moroever, at least the second, and probably the third, allegation mentioned above involves nonfeasance rather than misfeasance. Failure to attach conditions to the licence could be presented as misfeasance — issuing an inappropriate and improperly thought-out licence. But the decision as to the attachment of conditions is so clearly a policy matter that courts would be unlikely to attach to it a legally enforceable duty of care.

5.30 If however the court did accept there was a duty of care in relation to these acts or omissions, a plaintiff alleging the contraction of mesothelioma as a result would have to establish that the Commission's acts (or omission's) 'caused' the disease. The difficulty involved in that, and the probable way of overcoming it was discussed in paragraphs 2.27 to 2.29.

5.31 The plaintiff would have to show that it was foreseeable to the Commission that the disease would result from their manner of performing their functions. Where the pollution causing the disease occured before the mid 1960s, that foreseeability could not be established.[23] Pollution after that time, or possibly after the late 1960s, was a foreseeable cause of mesothelioma. Such pollution could therefore give rise to a claim for damages against the Commission. Because of the long latency period of mesothelioma, such a

claim is unlikely to be known to exist for some years. If Baryulgil residents are diagnosed at some future time as having contracted the disease after the mid or late 1960s, and subject to their establishing causation by the airborne pollution (see paragraph 2.61), they would be able, after diagnosis, to initiate proceedings by relying on the extension provisions of the *Limitation Act* 1969 and their previous ignorance of a material fact (see paragraphs 1.89 to 1.104).

5.32 In such a case, they would be able to point to practicable precautions with little difficulty — the bringing of prosecutions, the attaching of conditions to the licence, the preparation and passage of a regulatory standard of concentrations appropriate to the Baryulgil mill. Once the court had accepted a duty of care on the Commission, it would be likely to hold that a reasonable body in the circumstances of the Commission would have taken those precautions.

5.33 In relation to the *Clean Waters Act* 1970, if Asbestos Mines Pty Ltd did not hold a licence, it might be alleged that the Commission was careless in the performance of its statutory powers in not prosecuting the company for pollution of the local waters in breach of Section 16(1). If the company held a licence allowing that pollution, it might be alleged that the Commission was negligent in issuing a licence with such conditions. If the company held a licence with conditions that did not cover the pollution of waters that occurred, it might be alleged that the Commission was negligent in not prosecuting the Company for breach of Section 16(7).

5.34 All these possible allegations could be said to be matters of discretion, not appropriate for review by the courts. Moreover both the first and third — the failures to prosecute for breach of Section 16(1) or Section 16(7) — would be instances of nonfeasance rather than misfeasance. While the second — the issuing of a licence with overwide conditions — would be a misfeasance, the decision as to appropriate conditions to attach to a licence is very much a matter of policy or discretion. It is therefore unlikely that the court would hold that there was any duty of care on the Commission in relation to the *Clean Waters Act* 1970.

5.35 If, contrary to this hypothesis, a duty of care was found to exist, there could still be problems for a Baryulgil plaintiff in establishing causation and foreseeability. The difficulty of establishing that a particular source of exposure to asbestos fibre actually caused the contraction of mesothelioma has been discussed earlier.[24] It has also been seen that the contraction of mesothelioma through exposure to comparatively small amounts of wind-borne fibre was not foreseeable before approximately the mid-1960s, possibly not before the late 1960s.[25] In the case of exposure to the ingestion of fibre carried by water, the date at which contraction of mesothelioma (if held to be a *possible* result of this exposure) became foreseeable would have been no earlier, and might even be held to be later. Thus, a plaintiff alleging negligence on the basis of acts or omissions of the State Pollution Control Commission before the 1970s might not be able to establish that his or her injury was a foreseeable result of those acts or omissions. However if the acts or omissions relied on related to the 1970s or 1980s, foreseeability could probably be established. (Of course, given the long latency period of mesothelioma, actions against the Commission for disease contracted in the 1970s or 1980s would not be commenced for some years from now, since the disease would not be diagnosable for some time. Those actions would be brought, after diagnosis, by relying on the extension sections of the *Limitation Act* 1969, the contraction of the disease being a material fact of which the eventual plaintiff would have had no earlier knowledge or means of knowledge).

5.36 In the event that a duty of care was held to exist and that causation and foreseeability were successfuly established, there would be little difficulty in pointing to practicable precautions that could have been taken to eliminate the risk. Where the plaintiff's injury was allegedly caused by failure to prosecute, the obvious precaution

would have been prosecution, deterring the defendant company from permitting any further pollution of the waters. If the injury was allegedly caused by the issuing of a licence with inadequate conditions attached, thus allowing unnecessary and unacceptable pollution, the obvious precaution would have been to attach to the licence conditions which would have prevented pollution of an extent sufficient to cause the contraction of disease by persons using the waters.

5.37 Once these precautions were put in evidence before the court, it is unlikely that the court would conclude that a reasonable body in the circumstances of the Commission would have failed to take those precautions.

COPMANHURST SHIRE COUNCIL

5.38 The allegation here would be that the Council had been negligent in using a dangerous substance — the tailings — to surface the roads.[26] Their action in using the tailings was clearly misfeasance rather than nonfeasance but it might be held to be discretionary. Even if a duty of care were established, causation and foreseeability would be serious stumbling blocks to any action (see paragraphs 5.24 to 5.26 above).

LIMITATION OF ACTIONS

5.39 The *Limitation Act* 1969, discussed previously, would apply to any negligence actions that might otherwise be possible against public bodies, as outlined above. The actions would have to be brought within 6 years of contraction of the disease, or within the extended period provided by Sections 57 and 58, if there were ignorance of a material fact.[27]

NEGLIGENCE ACTIONS BY DEPENDANTS

5.40 If the disease caused by the negligence resulted in the death of the person before action could be brought, that persons' dependants would have causes of action under the *Compensation to Relatives Act* and the *Law Reform (Miscellaneous Provisions) Act* on the principles set out in paragraphs 1.124 to 1.161, and subject to the particular problems outlined there.

MEASURE OF DAMAGES

5.41 The measure of damages discussed in paragraphs 1.105 to 1.118 in relation to actions by the injured persons, and in paragraphs 1.147 to 1.154 and 1.157 to 1.160 in relation to actions by the dependants would apply to any successful actions in negligence against public bodies.

ENDNOTES

1 See generally M. Aronson and H. Whitmore, *Public Torts and Contracts*, Sydney 1982, Ch.1.

2 *Ibid.* p. 9.

3 See generally Aronson and Whitmore, *ibid.*, Ch.2.

4 [1932] A.C. 562.

5 *East Suffolk Rivers Catchment Board* v *Kent* [1941] A.C. 74.

6 *Dorset Yacht Co. Ltd* v *Home Office* [1970] A.C. 1004, *Anns* v *Merton London Borough Council* [1978] A.C. 728.

7 Transcript of Evidence, pp. 1385, 1430, 152-5, 208-9, 211-2, 280-2, 297, 1061-8, 2147-8, 2552-2566.

8 W.G. Carson, 'White Collar Crime and the Enforcement of Factory Legislation', *British Journal of Criminology*, Vol. 10, 1970, pp. 383 ff; N. Gunningham, *Safeguarding the Worker*, Sydney, 1984, pp. 267-8; A.S. Merritt, 'Comments on Proposals for Reform of Occupational Health and Safety Legislation in New South Wales' *Industrial Safety, Health and Welfare Reporter*, p. 44.060.

9 Transcript of Evidence, pp. 1122-6, and see also pp. 1087-8.

10 Transcript of Evidence, *ibid.*

11 N.S.W. Rules, Regulations and By-Laws, 1964, pp. 353-4.

12 Act No. 145 of 1978.

13 Transcript of Evidence, p. 732.

14 Transcript of Evidence, pp. 1102-3.

15 See paragraphs 1.2 to 1.11 and 1.51 to 1.88.

16 As suggested in the Submission of the Aboriginal Legal Service, Transcript of Evidence, p. 2304.

17 See Transcript of Evidence, pp. 1074-6, 1085-7, 1098-1100.

18 See paragraphs 2.30 to 2.41 of the Report.

19 Royal Commission on Matters of Health and Safety Arising from the Use of Asbestos in Ontario. Report. 1984, Vol. 1, pp. 275-281.

20 Transcript of Evidence, p. 881.

21 Paragraphs 2.41 to 2.54.

22 Paragraphs 2.66 to 2.71.

23 See paragraphs 1.65 to 1.74 and 4.8.

24 See paragraphs 1.53, 1.57 and 2.71 in particular relation to causation by ingestion.

25 Paragraphs 1.65 to 1.74 and 4.8.

26 Transcript of Evidence, pp. 1459-1460 and pp. 226-7.

27 See paragraphs 1.89 to 1.104.

Chapter 6

Extra compensation available under the deed of agreement between the Hardie Group and Unions representing Hardie Group employees

6.1 A final possible avenue of compensation to former employees of Asbestos Mines Pty Ltd arises out of a deed entered into on 21 May 1979, initally between James Hardie and Coy. Pty Limited and the Miscellaneous Workers Union.[1] Later the deed was accepted by all the major unions whose members were employed by the Hardie Group:

> the Australian Workers' Union in Queensland, the Australian Workers' Union in Western Australia, the Amalgamated Metal Workers' and Shipwrights Union, the Federated Storemen and Packers Union of Australia, the Federated Ironworkers' Union of Australia and so on.[2]

By the Deed, James Hardie and Coy. Pty Limited covenanted to pay compensation, in addition to that already available by legal action, to any person who was employed by the Company on 5 December 1973 and who was or had been a member of the Union where that person was disabled by an asbestos-related disease contracted as a result of his or her employment by the Company.

6.2 On first reading, the Deed does not appear to give any rights to former Baryulgil employees. First, the Deed as initally drawn up applies only to persons who are or were members of the Miscellaneous Workers' Union. Baryulgil employees were covered by the Australian Workers' Union. However, as stated in the last paragraph, in giving evidence on behalf of Hardie Trading (Services) Pty Ltd, Mr J.C. Kelso stated that the Deed had been extended to cover other unions involved with the Hardie Group.[3]

6.3 Second, the Deed defines an employee entitled to benefit as 'Any person who was in the employ *of the Company* . . .' (emphasis added),[4] and 'the Company' is James Hardie and Coy. Pty Limited:

> *This Deed* made the 21st day of May One Thousand Nine Hundred and Seventy Nine *Between James Hardie and Coy Pty Limited*, herein called 'the Company' . . .[5]

Employees of Asbestos Mines Pty Ltd were *not* employees of James Hardie and Coy. Pty Limited. Their contracts of employment were made with Asbestos Mines Pty Ltd, which, because of the separate legal identity of registered corporations, was, despite its being a wholly owned subsidiary of the Hardie group, a completely different (legal) person from James Hardie and Coy. Pty Limited.[6] It is worth noting that if the Baryulgil workers were in fact employees of James Hardie and Coy. Pty Limited, their actions for negligence, described in paragraphs 1.1 to 1.123, would lie against James Hardie and Coy. Pty Limited and not against Asbestos Mines Pty Ltd, which would overcome the problems arising from the impecuniosity of the latter company (see paragraphs 1.25 to 1.35).

6.4 Despite the scope of 'employee' suggested in the previous paragraph, the submission of Hardie Trading (Services) Pty Ltd stated:

> In addition [to compensation from the Dust Diseases Board], some former employees may also be entitled to apply for lump sum benefits provided by the James Hardie Group.[7]

It would appear then that the Hardie Group believe that Baryulgil workers fall within the meaning of persons 'in the employ of the Company'.

6.5 Third, the definition of 'employee' continues: 'Any person who was in the employ of the Company *on the 5th December 1973* . . .'[8] (emphasis added). The Deed would therefore seem to give no rights to Baryulgil workers who ceased employment at the mine and mill before 5 December 1973 or who commenced employment there after 5 December 1973. It would certainly give no rights to workers who commenced employment there after the sale of Asbestos Mines Pty Ltd to Woodsreef Mines Limited on 23 December 1976, since those workers could in no way be said to have been in the employ of James Hardie and Coy. Pty Limited, not even being employed by a Hardie Group subsidiary.

6.6 A worker who fulfils the definition of 'employee' is entitled to make an application for benefit under the Deed only if her or she has commenced proceedings to claim compensation under the *Workers' Compensation Act* 1926 (or in New South Wales under the *Workers' Compensation (Dust Diseases) Act* 1942),[9] and his or her application will only be granted where the Dust Diseases Board[10] certifies that the worker is suffering from an asbestos-related disease, contracted in the course of employment with the Company.[11] However, where a worker had received a favourable determination of a claim for compensation under the *Workers' Compensation (Dust Diseases) Act* before 1 July 1978, no entitlement to benefit under the Deed wil arise.[12]

6.7 In the event of the worker's death before an application for compensation under the Deed, his widow (which includes a de facto spouse of at least two years standing)[13] and his children (if economically dependent on the worker at the date of his death) are entitled to apply for the benefit provided they have previously commenced proceedings for compensation under the Dust Diseases Act.[14] Only one benefit will be paid however many dependants may apply.[15]

6.8 The amount of the benefit is calculated by reference to the lump sum amount payable under Workers' Compensation legislation on the death of an employee:

> C1.I(v) 'the Benefit' shall mean a sum equal in total . . . of an amount equal to 50% of the average of the "lump sum amounts" payable on the death of an Employee under the principal workers' compensation legislation in operation at the date hereof [i.e. 21/5/79] in each of the states of N.S.W., Victoria, South Australia and Queensland (but not under Dust Diseases legislation presently in force or which may become in force during the term of this Deed) . . .

Since the lump sum amounts in Workers' Compensation legislation are amended to follow wage and living cost rises (see paragraph 3.7), the benefit under the Deed would also rise progressively. However, C1.I(v) provides that:

> In the event that changes should occur in the lump sum amounts payable in any such State during the period of this Agreement and notwithstanding anything to the contrary herein provided or implied the maximum sum payable by the Company pursuant to this Deed as a Benefit shall not exceed a sum equal to 75% of the average lump sum hereinbefore referred to computed at the date of this Deed.

There is thus a cut-off point after which the benefit under the Deed would cease to rise in tandem with Workers Compensation lump sum amounts. Where the worker's disability is partial, he or she or his or her dependants would receive a benefit reduced by reference to the proportion of disability.[16]

6.9 Since application for benefit cannot be made until after a claim for compensation under the *Workers' Compensation Act* 1926 (or in N.S.W., the *Workers' Compensation (Dust Diseases Act* 1942) has been made, and since a benefit will not be paid unless an asbestos-related disease contracted in the course of employment is certified, thus entitling the worker to Workers' Compensation or Dust Diseases payments, a benefit under the Deed will always be in addition to the statutory payments. It will also be possible, in appropriate circumstances, for the worker to receive common law damages, for Clause 27 of the Deed states that:

> Any benefit payable hereunder shall be in addition to and not in substitution for any award, verdict, compensation or damages otherwise payable to an employee or to which he or his widow or dependant may be entitled.

6.10 Thus, Baryulgil workers and their dependants may be entitled to benefit under the Deed, subject to the uncertainties as to the meaning of 'employee' noted above. However, since that benefit is dependent on diagnosis of an asbestos-related disease by the Dust Diseases Board, the Board's allegedly conservative diagnostic criteria[17] could act as a barrier to some applications.

ENDNOTES

1 Transcript of Evidence, pp. 3494-3510.
2 Transcript of Evidence, pp. 1435-6.
3 Transcript of Evidence, *ibid.*
4 Clause 1 (i).
5 Preamble
6 See paragraph 1.37.
7 Transcript of Evidence, p. 2647.
8 Clause 1 (i).
9 Clause 2.
10 In New South Wales. In other States, by the Workers' Compensation tribunal.
11 Clauses 5 and 7.
12 Clause 3.
13 Clause 1(vi) and (vii).
14 Clause 4.
15 Clause 10.
16 Clause 7(a).
17 See paragraph 3.14.

Table 2

Dust Counts Conducted at Baryulgil by N.S.W. Government Authorities 1960–1978

Date	*Authority*	*Summarised Dust Counts Various Locations*		*Sampling Method Used*	*Relevant 'Standard' at time of Testing*
22/3/60	N.S.W. Dept of Public Health	(Millions particles per cubic foot)		Midget Impinger and Thermal Precipitator Method	No official "standard" although an unofficial standard of 5 million particles of *dust* per cubic foot existed from 1952 onwards.
		Primary Jaw Crusher	1.9		
		Bagging Room	20.0		
		Mill	1.8		
		Bagging-off Point	2.3		
		Quarry-filling bins	1.9		
11/6/63	N.S.W. Dept of Public Health	(Millions of particles per cubic foot)		As Above	As Above
		General Atmosphere	2.8		
		Bagging Point	0.6		
		Lower vibrator screen	2.3		
24/8/69	N.S.W. Dept of Public Health	(Millions of particles per cubic foot)			In 1964, the N.S.W. Dept. of Mines gazetted the 5 million particles per cubic foot as the standard for asbetos dust.
		Primary crusher	3.9	Midget Impinger and Electrostatic precipitator	
		Right Hand Shaker Screen	6.7		
		Left Hand Shaker Screen	3.8		
		Bagging Point	1.2		
		(fibres per millilitre)			
		Primary Crusher	3.4	Membrane filter method using ten minute samples	
		Drier Room	0.3		
		Dust Collector plant	2.3		
		Right Hand Shaker Screen	1.3		
		Left Hand Shaker Screen	4.6		
		Bagging Point	5.2		

Date	*Authority*	*Summarised Dust Counts Various Locations*		*Sampling Method Used*	*Relevant 'Standard' at time of Testing*
2/10/70	N.S.W. Dept of Public Health	(Particles per cubic centimetre)		—	4 particles per cubic centimetre of air.
		Bagging point	4.0		
		Dust Collector plant	40.0		
		Fine waste disposal	15-30		
1/3/72	N.S.W. Dept of Public Health	(fibres per millilitre)		Membrane filter method using ten minute samples except * 2 hour sample ** 3 hours 40 minutes sample	As above. The N.H. & M.R.C. recommendation of 4 fibres per millilitre over an 8 hours shift had not been adopted at this date by the N.S.W. Dept. of Mines and their standard was 5 million particles per cubic foot.
		Crushing rock	14		
		Crushing rock	12		
		Transport ore	21		
		Screening ore	15		
		Screening ore	15		
		Drilling in quarry	8		
		Bagging asbestos	9		
		Shaking filter bags	280		
		Fine waste disposal	13		
		Outside bin	1.7*		
		Screening & bagging	7.5**		
16/8/72	N.S.W. Dept of Public Health	(fibres per millilitre)		Membrane filter method using ten minute samples.	As above. The standard remained at 5 million particles per cubic foot.
		Crushing shed	2.5		
		Crushing shed	8.4		
		Furnace room	1.3		
		Screen house upper level	4.3		
		Screen house upper level	5.6		
		Screen house lower level	5.4		
		Screen house lower level	7.7		
		Bagging Point	2.1		
		Bagging Point	6.4		
		Bag filter room shaking bags	30.7		
		Fine waste disposal hopper	18.0		
		Fine waste disposal hopper	1.4		
		Quarry drilling	2.0		
		Quarry loading ore	0.4		
		Outside environment	0.3		

Date	*Authority*	*Summarised Dust Counts Various Locations*		*Sampling Method Used*	*Relevant 'Standard' at time of Testing*
11/10/73	N.S.W. Dept of Mines	(fibres per c.c. which is the same as fibres per millilitre) 0-2 fibres per c.c. Mill upper area Crusher Furnace Room Mill forecourt 2-4 fibres per c.c Mill bottom floor Mill bagging Mill bag stack room Quarry loading Quarry drilling 4-6 fibres per c.c. none 6-8 fibres per c.c. Filter house		Membrane filter method using ten minute samples.	On 23/1/73 Chief Inspector of the N.S.W. Dept. of Mines, in a letter to the Baryulgil Manager, advised that the standard for asbestos dust was 4 fibres per c.c.
14/8/75	N.S.W. Dept of Public Health	(fibres per millilitre) Primary crusher Processing mill Bagging operator Tailings removal	 0.8 1.8 1.6 0.6	Membrane filter method using 4 hour samples and personal samplers.	Standard 4 fibres per c.c.
23/8/77	N.S.W. Dept of Mines	(fibres per millilitre) Tailings truck driver Truck driver (quarry) Crusher Furnaceman Bagger (lower floor) Jackhammer (quarry) Inspector of Mines (Roving) Mill hand	 0.19 0.72 0.98 0.76 1.35 0.56 0.84 1.39	Membrane filter method and personal samplers over a full shift.	As Above

Date	*Authority*	*Summarised Dust Counts Various Locations*		*Sampling Method Used*	*Relevant 'Standard' at time of Testing*
8/12/77	N.S.W. Dept of Mines	Fitter Mill	0.07	As Above	As Above
		Bagger (Bottom Section)	0.74		
		Truck driver (Pit & Mill)	0.36		
		Shot firer (pit)	0.12		
		Fitters assistant	0.23		
		Truck driver (quarry)	0.19		
		Jackhammer pit	0.44		
		Drilling pit	0.35		
		Mill hand	0.17		
		Crusher	0.52		
		Mill hand crusher	0.54		
			0.39		
7/2/78	N.S.W. Dept of Mines	Fitters assistant	0.07	As above	This survey was based on the standard of 4 fibres/cc of air and not the newly adopted standard of 2 fibres/cc. However the results were also analysed on the basis of 2 fibres/cc.
		Workshop	0.03		
		Cleaner tailings dam	0.09		
		Foreman mill	0.54		
		Operator (Dryer)	0.18		
		Operator (Crusher)	0.07		
			0.13		
		Bagger crusher	0.48		
		Truck driver (Pit & Crusher)	0.16		
		Staff mine office	0.03		
3/3/78	N.S.W. Dept of Mines	Results of testing unavailable		—	On 3/3/78 the Chief Inspector of the N.S.W. Dept of Mines wrote to the manager of the Woodsreef mine at Baryulgil, advising that the standard was now 2 fibres per millilitre.

Date	*Authority*	*Summarised Dust Counts at Various Locations*		*Sampling Method Used*	*Relevant 'Standard' at Time of Testing*
18/4/78	N.S.W. Dept of Mines	Truck driver (pit/mill)	0.35	As Above	2 fibres per millilitre
		Boiler maker	0.21		
		Crusher	0.42,0.63		
		Bagger	0.32		
		Dozer driver	0.30		
		Mill foreman	0.73		
		Fitter	0.15		
		Driver	0.35		
		Loader driver	0.21		
20/7/78	N.S.W. Dept of Mines	Mechanic	0.24	As Above	As Above
		Crusher	0.24,0.95		
		Truck driver	0.13,0.24		
		Loader (mill)	0.17		
		Furnace operator	0.39		
		Mill foreman	0.81		
		Furnace house	0.26		
		Cleaner	2.61		
14/9/78	N.S.W. Dept of Mines	Cleaner	0.10,0.19	As Above	As Above
		Truck driver	0.31		
		Foreman fitter	0.13		
		Feeder crusher	0.30		
		Bagger	0.68		
		Foreman	0.16		
		Loader (pit/mill)	0.15		
		Loader (mill yard)	0.17		
		Trucker (pit to crusher)	0.44		
		Furnace house	0.13		
		Crusher (static)	0.11		
		Shakers (static)	0.62		

Table 3

Dust Counts Recorded at Baryulgil by the Industrial Hygiene Unit, James Hardie and Coy. Pty Ltd, Camellia

	14-17 Sep. 70	7 Dec. 70	27 Apr. 71	2 Jun. 71	20 Jul. 71	5 Aug. 71	31/8-4/9 71	25 Jan. 72	15 Feb 72	20/4-2/5/ 72	30 May 72	20-27 Jun. 72	17 Aug. 72	16 Oct. 72	16-24 Nov. 72	31/1-2/2 73	9 May 73	29 May. 73	26 June 73	30 Jul. 73	4 Sept. 73	29 Oct. 73	Sept. 74	25 Feb 75	22 Apr. 75	23 Feb 76	7 May 76	Aug. 76
Mill Tailings Hopper	63	32.8	6.2	1.6	1.4	5.2	30.9	—	8.8	5.2	3.6	5.4	8.2	7.2	1.3	11.5	12.6	4.3	1.5	—	7.5	8.2	54.6	3.2	0.3	3.2	1.6	2.5
Asbestos Bagger	8	11.4	5.9	3.6	2.5	4.1	4.8	3.9	1.7	2.8	2.5	1.2	2.5	1.7	3.4	6.3	13.7	6.2		1.7	10.9	7.0	6.5	2.6	1.2	4.2	16.7	5.7
Around No. 7 Screen	3	—	—	3.4	—	—	2.3	5.4	5.7	3.8	1.4	1.0	3.6	13.2	4.4	2.2	20.2	—	3.4	15.7	1.5	—	2.7	2.9	5.4	4.7	9.2	2.8
Between No. 1 and 3 Shaker Screen	33.8	30.7	24.3	6.9	4.4	34.4	70.4	11.3	3.9	5.8	1.4	3.5	—	27.9	8.9	5.0	29.6	15.5	—	11.0	33.0	13.9	12.2	2.3	2.8	—	6.4	8.1
Dust Collector Sock Level	245	1,760	31.4	20	7.6	63.2	39.7	95.6	9.6	8.4	2.6	11.4	—	9.6	14.8	45.9	115.6	58.8	3.7	6.3	43.7	62.8	94.7	18.0	—	—	8.7	0.6
Quarry Drilling	9.4	—	5.6	4.1	1.4	1.5	72.5	4.2	2.2	2.2	1.5	1.0	—	14.2	0.98	7.2	0.9	2.8	4.2	1.6	2.1	—	—	1.2	—	—	—	6.2
Next to No. 1 Shaker Screen	31.1	37.3	11.1	3.4	7.6	7.2	35.2	7.5	4.7	4.4	3.1	5.1	3.6	2.1	10.1	7.2	13.3	6.5	1.2	28.9	20.1	2.1	6.7	3.6	0.9	5.3	26.4	7.7
Primary Crusher	2.9	—	—	2.1	—	—	4.9	5.4	1.3	3.4	0.73	1.6	2.3	1.6	5.2	16.4	7.5	4.8	2.7	1.3	4.6	1.1	2.8	—	3.2	0.5	7.2	4.1
Dust Collector Emptying Storage Hopper	302	197	17.7	9.8	19	5.8	51.2	14.2	7.4	11.6	1.5	17.8	—	8.0	8.2	4.1	27.5	81.4	24.2	12.5	22.0	4.4	—	—	—	19.2	124.6	53.7