Foreseeability, proximity and a manufacturer's duty to warn

Wren v CSR Limited & Anor
Tanya Segelov, Parramatta

Norman Wren was employed by Asbestos Products Pty Limited for a period of twelve months between 1 January 1950 and 31 December 1952. The Asbestos Products (herein referred to as AP) factory at Alexandria manufactured asbestos cement flat and corrugated sheeting, ridge capping and other asbestos cement building products. The manufacturing process involved the use of crocidilite (blue asbestos) imported from Wittenoom in Western Australia. AP was wound up and removed from the register of companies some time during the 1960's. At the relevant time, AP had little or no relevant insurance cover. AP was a wholly owned subsidiary of CSR Limited.

Mr Wren contracted mesothelioma. An action was brought in the Dust Diseases Tribunal of New South Wales suing CSR Limited alleging that it so directed and controlled AP as to be responsible in law for its negligent acts and omissions. The plaintiff also sued Midalco Pty Limited, formerly Australian Blue Asbestos Limited (herein referred to as ABA) as the occupier, manager and operator of the blue asbestos mine at Wittenoom. CSR was also the parent company of ABA. In addition there was an agreement between CSR and ABA whereas CSR was appointed as ABA's managing agent and sole distributor.

The Dust Diseases Tribunal proceedings

The case was heard before His Honour Judge O'Meally. Because of the plaintiff's state of health an ex tempore judgment was delivered on 8 August 1997. The plaintiff succeeded against CSR Limited however the plaintiff was unsuccessful against Midalco Pty Limited.

A great deal of evidence was tendered at the trial in relation to the relationship between CSR and AP including Annual Reports of CSR, CSR Board Minutes, correspondence between CSR and AP and CSR Company Newsletters. These documents, showed that all of the Directors of AP were CSR staff, all of the management positions at AP were held by CSR staff, CSR directed the movements of staff to and from AP. CSR referred to the AP's factory as *"our factory"* and spoke of the building material produced as manufactured by CSR, CSR took decisions for AP on matters of significance such as issuing of share capital and of matters of minutiae such as the purchase of minor plant and equipment. Based on the evidence His Honour concluded that CSR governed the enterprise of AP and was in effective control of its operations.

His Honour concluded that in these circumstances if AP would have been liable for the plaintiff then so would CSR. The defendant argued that what the plaintiff was trying to do was in effect to lift or pierce the corporate veil and that no grounds had been established for doing so. The plaintiff argued that it was not necessary to lift the corporate veil, it was sufficient to establish a relationship of proximity between the plaintiff and CSR. His Honour held that the plaintiff was a person so closely affected by CSR's acts and omissions that it ought to reasonably to have had him and his fellow employees in contemplation as being affected by those acts and omissions now called into question.

The evidence clearly established that as at 1950 there was a foreseeable risk of injury to a person exposed to the inhalation of asbestos

His Honour went on to find that AP owed a duty of care to the plaintiff. During the trial a large number of medical articles dealing with dangers of asbestos dating back to 1900 were tendered and evidence was called from a librarian in relation to the availability of this mat[illegible]. His Honour found that an examination of the available literature confirmed that by 1950 it was known that asbestos was toxic, that it was dangerous, that it was carcinogenic, and that it was capable of causing fibrosis leading to death. Further precautions to reduce the dangers of exposure to asbestos, and the consequences of such exposures were repeatedly made in literature published by each of the medical, scientific and industrial communities before 1950. In addition, a number of documents were tendered which showed CSR's actual knowledge including evidence as to the CSR library and the CSR research team. His Honour found that there was sufficient material in CSR's library, material which was available t[illegible] as well, to make each of them aware that asbestos dust was dangerous and that it was a carcinogen.

The standard of five million particles per cubic foot, the standard used in the 1945 *Harmful Gases, Vapours, Fumes, Mist, Smoke and Dust Regulations of Victoria*, was said to be the standard of the day. The defendants argued that the plaintiff had not proved that he was exposed to concentrations of asbestos dust in excess of five million particles per cubic foot and that therefore the plaintiff had not proved that AP had exposed him to a risk of foreseeable injury. There was no evidence that any dust measurements had been taken at AP. The plaintiff called evidence of an industrial hygiene and environmental consultant who was of the view that if dust

was visible in the air then it would have been of concern to him and that in order to rule out the possibility of an adverse environment, measurements needed to be taken. Further, the plaintiff called evidence of employees of AP and CSR to the effect that none of the long established recommendations for control and suppression of dust such as separation of dusty processes, wearing of respirators, water dampening, use of vacuums, cleaning methods, use of mechanical and exhaust ventilation, enclosure of machinery and warnings were implemented in the AP factory. In these circumstances His Honour found that:

"the processes conducted in the factory and the means of conducting them were by the standards of 1950 and 1951 unsafe. In the atmosphere in which the plaintiff and other employees who worked there was a risk of developing an asbestos related disease, namely asbestosis."

In relation to the second defendant, his Honour found that ABA, as a producer and supplier was at fault in failing to place on the bags of asbestos a warning as to the dangers of asbestos. The evidence of the plaintiff was that he worked in the areas of the factory where the asbestos cement sheets were guillotined. He did not come into contact with the bags of raw asbestos fibre. In these circumstances His Honour found that:

"the plaintiff was not an end user of ABA's asbestos and that the plaintiff had no opportunity to read a warning even if one had been placed on the bags. His Honour was of the view that only those workers of AP who came into direct contact with the bags were in a relationship of proximity with ABA. Employees such as the plaintiff who did not come, or only on one or a few occasions came, into contact with the bags of asbestos were not. In these circumstances the plaintiff's injury was not as a result of the failure of ABA to place a warning on its bags, but rather as a result of his exposure to their contents." His Honour held that ABA's duty was only to place an appropriate warning on the bags.

His Honour's findings in relation to *Limitation Act 1969 (NSW)* are also of interest. The plaintiff began to feel unwell in December 1996. He was diagnosed with mesothelioma in January 1997. The Statement of Claim was filed on 21 February 1997. His Honour found that the Statement of Claim was issued well within the limitations period on the grounds that damage had only been suffered by the plaintiff a short time before December 1996. That is, the damage caused by the breach of duty was not sustained until the tumour had developed shortly before the plaintiff began to feel unwell in December 1996.

The Court of Appeal proceedings

CSR appealed the decision. A cross-appeal in relation to the second defendant was filed on behalf of the plaintiff. The appeal was expedited and heard over a period of six days in October 1997. The bench consisted of Powell, Beasley and Stein JJ. The verdict in the Court of Appeal was handed down on 18 December 1997. The appeal was disallowed on all but one ground by all Judges, the cross-appeal was allowed by Beasley and Stein JJ. The main judgment, a joint judgment by Beasley and Stein JJ, contains important findings in relation to the issues of proximity, foreseeability and a manufacturer's duty to warn.

1. Foreseeability

In relation to foreseeability, the appellant argued that there was no clear evidence that CSR's library contained publications relevant to the issue of dangers to asbestos nor was there any evidence that CSR had in fact access to various reports referring to the dangers of asbestos. It was argued that the law of negligence did not import a concept of constructive foreseeable knowledge. The Court of Appeal disagreed. The Court held that:

"if there was information readily available to participants in the industry that exposure to asbestos carried with it a risk of injury, the mere failure of the participant to have been aware of it does not mean that the risk was not foreseeable."

The Court also held that:

"the available literature was such that the risk of injury from exposure to asbestos was foreseeable at the time of the plaintiff's employment and that, having regard to the evidence of the comprehensive nature of CSR's library and library services, there was sufficient evidence to support His Honour's findings in relation to CSR's library". The Court held that the evidence contained in the medical articles, together with other expert evidence, clearly established that as at 1950 there was a foreseeable risk of injury to a person exposed to the inhalation of asbestos.

2. Proximity

The Court was taken through the development of the law of proximity, from Heaven v Pender to the recent decision of the High Court in Hill v Van Erp. The judgment of Beasley and Stein JJ provides a useful summary of the role of proximity in determining the existence of the duty of care.

The Appellant argued that no duty of care arose for a number of grounds:

1. CSR does not fall within any recognised category in which duty of care is owed.
   The Court held that the fact that there was no recognised category did not provide a barrier to the existence of a duty of care. *"The question in all cases is to determine, whether, in a particular set of circumstances, a duty of care arose."*
2. CSR was not an employer of the plaintiff.
   The Court examined the evidence as ▶

Cumpston Sarjeant Pty Ltd
CONSULTING ACTUARIES

We are a new firm of actuaries, committed to making life easier for lawyers.

We can help you prepare evidence for personal injury, wrongful dismissal and family law cases.

Economic loss calculations can be intricate, and we have developed a personal computer program to allow lawyers to make most normal estimates themselves.

We provide initial training and on-going support for this program. Please ring Richard Cumpston or Hugh Sarjeant on **03 6914 5099**, or visit us at **Level 24, 500 Collins Street Melbourne**

referred to above in relation to the relationship of CSR and AP. Of particular importance to the Court was the fact that the management staff, from the manager to the foreman were CSR employees. Further, CSR controlled the placement of its staff to and from Asbestos Products. The Court found that,

"given the fact that the whole of the management staff, who had the responsibility for the operational aspects of AP enterprise, and therefore the conditions in which the plaintiff worked, were CSR staff, CSR had a duty directly to the plaintiff and that that duty was co-extensive with that owed by an employer to an employee."

Further, the Court found that there was no policy consideration requiring this duty to be modified or abrogated. The appellants argued that to pose a duty of care to CSR in these circumstances was to expose it to a liability in an indeterminate amount for an indeterminate time in an indeterminate class. The Court held that this was not so. *"The reasons CSR is liable in these circumstances is because it brought itself into a relationship with the employees of AP by placing its staff in the role of management at AP".*

Their Honours found this finding sufficient to dispose of this aspect of the appeal. It did however deal with further submissions raised by the appellant.

3. CSR had not undertaken any task of, or assumed any responsibility concerning, providing a safe system of work at the premises of AP.

   Their Honours found that there is no case law which stands for the proposition that the assumption of responsibility is a necessary ingredient for the finding of a duty of care.

   "The existence or otherwise of such a factor is merely a matter which may be relevant to the resolution of the question of whether a duty of care exists in the circumstances". Further, their Honours held that in this case, "CSR, by causing its staff to undertake the entire management functions of AP, did assume responsibility for the working conditions in the factory. In this regard, it was not in a different position to an employer".

4. The plaintiff gave no evidence that he relied in any way upon CSR, nor is there any evidence to infer that he relied upon CSR.

   Similar comments were made in relation to this argument as to the previous argument. The Appellant in both these arguments were relying on statements made by Deane J in *Sutherland Shire Council v Heyman* and Mason CJ, Deane and Gaudron JJ and Bryan v Maloney. Both of these cases however referred to reliance being one of a common features found in a special category of cases where a duty of care had been held to exist in respect of pure economic loss. Their Honours did however find that CSR *"would have known, although unexpressed, reliance. In this case an employee in the position of Mr Wren would have no choice but to rely upon "the bosses" for the provision of a safe system and a safe place of work .... The "bosses" were in fact CSR employees. ..... They would have known that AP employees depended on them and were dependent on them for their working conditions. There was no-one else responsible. In such circumstances, reliance does not need to be expressed. Indeed, it would be fanciful to expect that anyone in Mr Wren's position would have expressed his reliance, just as it is nonsense to believe that CSR would not have known of Mr Wren's reliance and would have expected him to express it".*

5. The plaintiff's injury is not the type which springs from the ownership, occupation or use of land by CSR.

Their Honours did not find this point necessary to consider given their finding that CSR was in no different position to an employer.

6. The intention of complaint against CSR is that it failed to act, not that it acted in any way which was negligent. There is usually no liability for non feasance.

   Their Honours found that CSR had a duty to provide a safe system in a same place of work. *"Such duty may be breached by omission as much as by positive act. Issues of non feasance only arise where there is no duty to act".*

   The appellant argued that even if CSR owed a duty of care to Mr Wren, it did not breach this duty. This argument was based largely on the submission that there was no evidence that dust levels in the factory exceeded the accepted safety level (that is the five million particles per cubic foot) which existed at the time. Their Honours concluded that the findings of the trial judge as outlined above were open on the evidence *"There were no statutory standards in New South Wales which regulated or controlled the use of asbestos. Nor were there any formal industry guidelines. The evidence of those who worked in the factory was that the conditions in which they worked were "crummy". That was a colloquially evocative description of what Mr Stewart described as giving rise to a concern and calling for implementation of measures to reduce the amou[illegible]f dust. There were reasonable practical methods available in 1950 - 1951".*

The cross claim

Counsel for the plaintiff argued that it there was no proper basis for the trial judge to limit the class of persons to which ABA was in a proximate relationship to those persons who handled the bagged asbestos. Counsel for the plaintiff referred to the evidence at the trial which showed that there was no physical barrier isolating the dusty processes in the factory, that ABA's asbestos polluted the air which was breathed in by the plaintiff, that ABA had actual knowledge as to the dangers of asbestos, that ABA was aware of the physical layout of the premises and the use to which its pr[illegible]t was put by AP and that on occasions [illegible]e Directors of ABA were present in the AP factory and had an opportunity to observe the circumstances in which there product was used. Of importance was the fact that the Board of Directors of ABA and AP were comprised of identical personnel, or CSR staff. ABA board meetings were held at the AP factory.

The Court held that *"in the circumstance, ABA, as a supplier of goods known to be dangerous, if precautions as to its use were not observed, owed a duty to AP to warn it of the dangers associated with the product. In our opinion, ABA also owed a duty to AP's employees, it being obvious from the nature of the product and its intended use, both being matters known to ABA, that AP's employees would be handling the product either in own*

process of process form. The question arises, therefore, as to what the contents of that duty was. In our opinion, it was not a duty to withdraw the asbestos from the market. Although the product was known to be dangerous, the received learning at the time was that it was only at the time was that it was only dangerous at certain levels. However, there was a duty to warn... Given the nature of the risk, ABA was under a duty to warn that care should be taken so as to minimise the liberation of asbestos dust into the atmosphere in the proximity of persons who would be liable to inhale the dust. The warning had to be given in a way which would come to the attention of AP's management, employees of CSR, and it was these officers who were responsible for the conditions under which the asbestos was handled and used in the factory. A warning on the h[illegible]n bags in which the asbestos was delivered would not necessarily have come to management's attention, and therefore, would have been insufficient. However, there were other reasonably practicable ways for ABA to give a direct warning to management staff. For example, a warning could have included on the invoices or statements forwarded by APA to AP in respect of AP's purchase of ABA's asbestos. A warning could have been given on the delivery dockets. A warning letter could have been forwarded at regular intervals. A need for regular warning, by what ever means it was given, arises from the possibility of change of staff or from corporate amnesia."

Further, the Court held that the fact that AP and CSR's knowledge of the dangers of asbestos was co-extensive with that of ABA did not prevent ABA's duty of care from arising. The Court then turned their attention to the question of causation. They found that ABA's breach of duty was the cause of the plaintiff's injury. The Court held that *"although there was no evidence that management would have acted upon any warning, it is open to the Court to infer or warn, or at least that its failure to warn contributed to the risk of injury to which Mr Wren was exposed."*

Damages

The trial judge awarded general damages in the sum of $125,000. Mr Wren was aged seventy-two at the time of trial. The Court of Appeal stated that: *"We do not consider, however, that the award of general damages in total was outside the bounds of a sound discretionary judgment."*

The trial judge apportioned $100,000 to the past. On appeal this apportionment was overturned and an award for past general damages of $50,000 was substituted.

CSR Ltd and Midalco Pty Ltd have subsequently settled a number of other cases involving employees of Asbestos Products. ■

If you would like any further details in relation to the contents of this article please contact **Tanya Segelov** at Turner Freeman Solicitors. **Phone** 02 9633 5133, **email** ts@turnerfreeman.com.au

Scrutiny of judicial questions to juries

Wynbergen v The Hoyts Corporation Pty Ltd (High Court of Australia, 11 November 1997, unreported)

Simon McGregor, APLA Policy Officer

As is a common practice in many personal injuries claims, a jury was given a series of questions to answer to provide them with a logical framework in which to return their verdict. The jury returned a verdict of 100% contributory negligence against the plaintiff, but answered a further question in a manner which implied some minor fault on behalf of the defendant.

The case involved a slip and fall in the work place. The jury were asked:

...

2. *"Was the plaintiff negligent by failing to take care of his own safety?"*

-Yes, 100%

3. *"What is the assessment of damages arising out of the defendant's negligence?"*

-$38.

Hayne J (with whom Gaudron, MgHugh, Gummow and Kirby JJ concurred) held:

The jury's answer to the third question assessed the damages "arising out of the defendant's negligence". (Its seems that the figure of $38 was arrived at in response to an invitation by counsel for Hoyts to allow the appellant no more than the cost of his visit to his local doctor on the day that he said he slipped at work if, contrary to the principal submission advanced on behalf to Hoyts at trial, the jury found that Hoyts was "in some way negligent and there was a fall".) *Plainly, the jury's answer to this question amounted to a finding that the negligence of the defendant was a cause of the plaintiff's loss. But if the jury found, as the answer which was given to the third question indicated, that the defendant's negligence was a cause of the plaintiff's loss, it was not open to the jury to find that the plaintiff had been contributorily negligent to the extent of 100%.*

Having ruled that the jury's answers to questions 2 and 3 were inconsistent, his Honour held the judgement in favour of the defendant at trial in effect ignored the answer to the third question. On this ground the appeal should be allowed. Further, because the answers are inconsistent and the jury had not been asked a sufficiently general question to authorise their verdict, a new trial was the only appropriate remedy. The appeal was allowed with costs, and costs of the first trial were to be awarded at the discretion of the retrial judge. ■

Simon McGregor is APLA's Policy Officer. Simon can be contacted on **phone** 03 9601 6439 or **email** smcgregor@apla.com