ASBESTOSIS AND FEAR OF CANCER IN THE UNITED STATES: WHAT ARE THE LESSONS?

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ABSTRACT

Australian courts and tribunals are beset by cases relating to the compensability of mental harm in the contexts of Post-Traumatic Stress Disorder (PTSD) and/or Generalized Anxiety Disorder (GAD) which is alleged by applicants to be war- or service-caused for the purposes of Commonwealth military pensions. Such an applicant must satisfy, among other things, a requirement that the anxiety or other mental condition that he/she experiences is not idiosyncratic and personal but service-related and is a diagnosed mental illness described in the Statements of Principle (SoP) issued by the Repatriation Medical Authority. This article argues that the tradition of skepticism and circumspection taken toward service-caused mental harm claims in this jurisdiction has been confirmed in *Todd v Repatriation Commission*[1] to apply to the situation in which an applicant wishes to argue entitlement to a pension because diagnosis with asbestosis has triggered a fear of cancer. In *Todd*, the Federal Court found that, because there was

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1 [2008] ATAA 264; [2008] FCA 1276.

evidence that the applicant had been experiencing most, if not all of these symptoms for some time previously he could not satisfy the SoP requirement that there was a connection between his GAD and the conditions of his military service. The strict approach in *Todd* is compared in this article with the liberal "genuine and serious fear" of contracting cancer standard applied to the US railway workers/asbestosis sufferers in *Norfolk & Western R. Co. v Ayers.*[2] In Australia, the CLA regimes of normal fortitude in tort and proof of increased mental harm resulting from asbestosis diagnosis in *Todd* have a significant role in stemming a high volume of fear of cancer (FOC) litigation in Australia. In this article it emerges that, the lack of prominence of such settings in the US has left federal employers wide open to employees bringing compensation actions for asbestosis-related mental harm.

I INTRODUCTION

Exposure to asbestos dust can give rise to a number of health issues, including asbestosis, asbestos-related pleural conditions such as plaques, as well as carcinoma of the lung and mesothelioma. Although it is not currently possible for medical science to determine whether a particular case of lung cancer is caused by exposure to asbestos or not, a large body of scientific knowledge supports a correlation between the level of exposure and the occurrence of such cancers.

Asbestosis is a non-cancerous scarring of the lungs by asbestos fibres; it was described by the majority of the US Supreme Court in *Norfolk & Western R. Co. v Ayers* (hereafter '*Ayers*') as "rarely fatal" but rather it is a chronic and debilitating disease which has symptoms including shortness of breath, coughing and fatigue.[3] Seven years ago

[2] 538 US 135 (2003).
[3] Ibid 142.

Ayers ruled that an employee with asbestosis can recover damages for fear of cancer without having to prove physical manifestations of their emotional distress or wait until the cancer actually occurred. However, it was subject to provision of proof that their fear was "genuine and serious".[4] The case concerned six railroad workers suffering asbestosis who brought an action against their ex-employer under the Federal Employers' Liability Act ('FELA').[5] They contended that they should be awarded damages for their pain and suffering for fear of developing cancer and were successful. The Court in *Ayers* departed from earlier approaches to FELA which resulted in fear of cancer claims being disallowed (e.g. *Consolidated Rail Corporation v Gottshall).*[6] In *Ayers*, the majority ruled that "[t]here is an undisputed relationship between exposure to asbestos sufficient to cause asbestosis, and asbestos-related cancer"[7] yet the minority found that there was no established link between asbestosis and cancer and that "to state that some relationship exists without examining whether the relationship is enough to support recovery, however, ignores the central issue in this case."[8] Thus, with a link between asbestos exposure, asbestosis and cancer being recognised, it was ruled to be legitimate to fear cancer as a result of exposure to asbestos if such fear was 'genuine and serious'.

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4 *Norfolk & Western R. Co. v Ayers,* 538 US 157 (2003).

5 *The Federal Employers Liability Act* (FELA), 45 USC 51 et seq. (1908) is a US statute that compensates railroad employees injured at work by imposing a negligence liability on their employers. There are four key evidentiary tests an applicant must satisfy to bring a successful claim under FELA: (1) He or she must prove that the employing railroad company is a common carrier by railroad engaged in interstate commerce; (2) the worker must establish that he or she was employed by the railroad company and had been assigned duties which advanced the railroad's interest; (3) harm must be demonstrated to have been sustained while the worker was employed by the common carrier; and (4) there must be proof that the harm resulted from the negligence of the railroad company.

6 512 US 532 (1994).

7 538 US 135, 154 (2003).

8 538 US 135, 171 (2003).

That the *Ayers* bench was divided about a point as fundamental as the relationship between asbestosis and cancer is an indication of how amenable to different interpretations the current asbestos science is, and it is a problem that arises frequently in fear of cancer (FOC) litigation. On one hand, it may not be reasonable to fear cancer if there is no connection between it and asbestosis or pleural plaques, but, on the other hand, fear is often irrational or fixative and a test of reasonableness would often lead to a conclusion that an asbestosis patient has an unreasonable fear.It is argued here that in *Ayers,* the Supreme Court's 'genuine and serious fear' standard tries to respond to the irrationality and subjectivity of human fear but only succeeds in allowing compensation recovery by undeserving plaintiffs.

The path to fear of cancer claims recognised in *Ayers* has been entirely sidestepped in Australia. *The Civil Liability Act 1936* (SA) provides that a defendant owes no duty to a plaintiff not to cause mental harm unless it can be shown that a reasonable person in the defendant's position would have foreseen that a person of normal fortitude in the plaintiff's position might suffer a psychiatric illness in the circumstances of the case.[9] The normal fortitude bar for mental illness claims has been enacted in most states and territories of the Commonwealth.[10] Australian courts require that a patient concerned that asbestosis pleural plaques will lead to cancer must show that a post diagnosis depressive illness developed, i.e. a "generalized anxiety disorder" (GAD) is required to found a claim in mental illness. For instance, in *Todd v Repatriation Commission* the Administrative Appeals Tribunal (AAT) and, on appeal, Logan J in the Federal Court, both found that the Plaintiff had failed to show a causal link between the circumstances of his naval service and his current psychiatric condition.

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9 See *Civil Liability Act 1936* (SA) s 33.

10 *Civil Law (Wrongs) Act 2002* (ACT) s 34; *Civil Liability Act 2002* (NSW) s 32; *Civil Liability Act 2002* (Tas) s 34; *Wrongs Act 1958* (Vic) s 72; *Civil Liability Act 2002* (WA) s 5S. Similar provisions are not made in the remaining jurisdictions: *Civil Liability Act 2003* (Qld); *Personal Injuries (Liabilities and Damages) Act (NT)/Personal Injuries (Civil Claims) Act 2003* (NT).

Due to the fact that there had not been any increase in the intensity of his GAD symptoms following his 2002 diagnosis with asbestosis, his claim failed.[11] As the AAT in *Milenz v Repatriation Commission*[12] recognised, the Federal Court has frequently ruled in the context of PTSD cases, that mental conditions not triggered by a legitimate stressor are not compensable on the basis that a Plaintiff's fear is "idiosyncratic and personal" [13] or is an "irrational perception" or a "baseless apprehension"[14] or is caused by "a fertile imagination with a selective rendition of the evidence".[15] Arguably, this level of circumspection has, in general, assisted Australia to avoid many of the excesses of the federal position in the US.

The skepticism of Australian courts and tribunals, often buoyed by reference to Statements of Principles published by the Repatriation Medical Authority or other statutory guidelines, has followed in the wake of the four-step process set down by the Federal Court in *Repatriation Commission v Deledio,*[16] which held that a plaintiff must show that the worsening of their psychiatric disorder follows a reasonable hypothesis. It was pointed out recently in *McDonald v Repatriation Commission* that this "does not involve fact-finding but requires a consideration of the hypothesis to determine whether it is reasonable. This requirement will be met if the hypothesis fits or is consistent with the template provided by a relevant factor in the SoP."[17] As *Todd* demonstrated in the same vein, a tribunal will not accept uncritically that anxiety over the presence of an asymptomatic, inconclusive precursor condition such as asbestosis or pleural plaques amounts in fact to GAD.

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11 [2008] AATA 264; [2008] FCA 1276. See especially [19] – [23], [34]
12 [2005] AATA 1038, [76].
13 *Stoddart v Repatriation Commission* [2003] FCA 334, [50].
14 *Delahunty v Repatriation Commission* [2004] FCA 309, [27].
15 *Hill v Repatriation Commission* [2005] FCAFC 23, [98].
16 (1998) 83 FCR 82.
17 [2012] AATA 344, [23].

In the US, a restrictive approach has developed the supreme court of most states, which achieves the same outcome as the Australian insistence on a reasonable hypothesis for the development of mental illness, but does so through essentially procedural means. The approach in many such courts has been to rule that a general tort claim for asbestosis causation should only be succeeded by a second tort claim for cancer (including the fear and anxiety of its anticipation) *if* the cancer actually develops, in other words, when the fear of a patient becomes reasonable when cancer emerges. This is what can be termed the pay later approach. The pay later/wait-and-see approach comprising the US states' position is far from universal. It was disavowed in Scotland in favour of making pleural plaques a compensable disease because of the long latency and shortness of the period between diagnosis of mesothelioma and death from it [18] (the reasoning being that compensation should be given to a person with pleural plaques while they have the health to enjoy it). This approach is to say that pleural plaques are an indicator of impending mesothelioma. This approach is the opposite, for instance, of the position taken by the minority in *Ayers* that there is insufficient evidence of a relationship between (asymptomatic) asbestosis and cancer to support recovery.

The position of the minority in *Ayers* has been backed recently by the scientific finding of Fuhrer and Lazarus who state categorically that in several studies "pleural plaques and asbestosis were not associated with an increased risk (above the risk of asbestos exposure) for pleural mesothelioma." [19] As for the exposure/cancer risk, the Australian epidemiological example of Wittenoom shows that the risk of a person exposed to crocidolite-type asbestos of developing mesothelioma is around 1 in 10,[20] and this is in accord with scientific evidence presented

[18] Rohan Price, 'Judicial Review of the Damages (Asbestos-Related Conditions) (Scotland) Act 2009' (2010) 14 *Edinburgh Law Review* 145-150.

[19] Gregory Fuhrer and Angeline Lazarus, 'Mesothelioma' (2011) 57 *Disease-a-Month* 40-54, 41.

[20] AW Musk, NH de Klerk, JL Eccles and MST Hobbs, 'Mesothelioma: the Wittenoom Experience' (1993) 9 *Lung Cancer* 405–408.

on behalf of the plaintiff in *Ayers*. The 1 in 10 probability is unhelpful, however, for assessing the FOC claims of people who have been exposed to asbestos and contracted the fibrotic condition of asbestosis. Asbestosis patients do not have a materially higher risk of contracting pleural or peritoneal mesothelioma. The Scottish position (pay compensation now) and the US states' position (pay compensation later) are both different from the Australian approach. The Australian approach is to say that for a pension to be paid now the fear must be more than idiosyncratic or based on a perception without hypothesis (the principle in *Todd* is that the GAD must be diagnosed to have intensified as a result of asbestosis diagnosis).

As we have noted, the Australian approach in *Todd* to require proof that a claimant's generalized anxiety disorder (GAD) stemmed directly from the diagnosis of an asbestos-related precursor condition. This is preferable because the claimant must establish that a) their anxiety amounts to a mental disease, and b) that it was caused or worsened by diagnosis with the marker condition of asbestosis or pleural plaques. Rather than go down the path of compensating claimants for irrational but genuine and serious fears for future health, it is contended that Australian courts should continue to hold the line on asbestosis/FOC claims that mental illness be shown. It is further argued that Logan J in the Federal Court in *Todd* has articulated a best-practice approach to managing FOC claims. This is the case notwithstanding his Honour's concern that, "there is every reason for sympathy for Mr Todd's lung condition having regard to the circumstances of his naval service".[21]

This article examines FOC claims by using the following schema:

(1) The first section outlines the difficulties in comparing US and Australian approaches to FOC;
(2) The second section an argument is presented that, once US nuances are

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[21] [2008] FCA 1276, [35].

allowed for, the Australian approach to FOC is quite different to that in the US in that it effectively places a bar on FOC claims through insistence on a) the development of a mental illness as the result of the diagnosis with a precursor condition (not merely fears), and b) the expectation of normal fortitude in the Civil Liability Acts of Australian jurisdictions; and

(3) The last section argues that, even after considering the state Supreme Courts in the US, the law would not be improved in Australia by implementing a wait-and-see compensation system. The Australian approach is a simple, consistently applied and best way to handle FOC claims fairly.

II THE U.S. FEDERAL APPROACH TO FEAR OF CANCER CLAIMS

There are a number of factors that need to be taken into account before undertaking a comparison FOC claims in the US and Australia. Over the last three decades the US Supreme Court has decided a raft of cases on fear of cancer, which are principally concerned with railroad workers who bring claims under the Federal Employers Liability Act (FELA). This means that federal statutory law applies to them but other claims are firmly in the province of state courts. In the US, aside from the FELA cases, the great majority of asbestos-related claims are governed by state tort law, even if the cases are litigated initially in federal district courts. Unlike the highest federal courts in Australia and Canada which can exert leadership in FOC matters, the US Supreme Court does not usually have the final word on how US asbestos-related tort claims including FOC matters are to be resolved but it does set a framework of sorts for state courts through its pronouncements on FOC under FELA. To gain a full view of the law in the US on this issue, one needs to examine state Supreme Court decisions as well as those of the federal Supreme Court. The US approach makes for a patchwork of principles and jurisdictions but a few common themes can be spelt out.

A *Existence of injury*

As for the substantive law governing FOC claims, the US state and federal courts both distinguish between cases in which the claimants have suffered a physical injury already and those who have not. Consider, for example, someone who has been run over by a motor vehicle and has lost a foot and there some chance that he will later on have his leg amputated as well. For such a claimant, US courts almost always not only allow a tort claim now, but also give appropriate compensation now for that future possibility, which is comprised of a mix of a) fear of loss of the rest of the leg, and b) the chances of that actually happening.[22] In 'pure' FOC claims, however, there are special legislative and case-based measures which have developed in the US. Most of the state courts limit FOC claims through applying a two disease approach, i.e. (1) you can recover now for the asbestosis and (2) if you get cancer later you can sue again for that, and at that time you can also recover for the emotional harm you suffered in fear of getting the cancer.[23] The retrospective recovery for FOC applied at the state level is not nearly as generous to plaintiffs as the federal Supreme Court's allowance of FOC claims of asbestosis sufferers under FELA if they can show "genuine and serious" concern that the condition will develop into cancer. In contrast, Australian courts use a concept of normal fortitude to put a check on mental harm related claims[24] and will only allow recovery if a diagnosed mental illness develops, and this makes psychiatrists and their role in Australian asbestos-related legal proceedings particularly questionable. The fine line in determining whether a claimant has 'asymptomatic' fear and 'symptomatic' mental illness puts pressure on psychiatrists to support the claims of applicants with the finding of a mental disease.[25]

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22 See, eg, *Mauro v Raymark Industries*, 561 A.2d 257 (NJ, 1989).

23 *Simmonds v Pacor Inc*., 674 A.2d 232, 237 (PA, 1996).

24 *Tame v New South Wales* (2002) 211 CLR 317.

25 Rohan Price, 'The Need for a Regulatory Response to Diagnosis Fraud in Mesothelioma Cases' (2011) 19 *Journal of Law and Medicine* 196-200.

When US courts began getting asbestos claims, some plaintiffs had pleural plaques only, others had plaques and asbestosis and some had neither. The claimant in *Metro-North Railroad Company v Buckley*[26] did not have any physical injury yet but he feared it for the future. Thus, the court could only consider his position at the time (Buckley was a pipe fitter who feared cancer from asbestos exposure but was healthy when he brought his claim). This was a pure emotional harm case and the question was whether he met the threshold required to bring such cases. The US Supreme Court, drawing partly on state case law, interpreted the FELA to require more than mere exposure to win a cancer fear case on the theory of emotional distress. It did this by concluding that exposure to asbestos alone (in someone who was otherwise symptom and disease free) did not qualify as the sort of physical impact needed to trigger such claims was not present. This article is concerned only about cases in which a claimant has asbestosis already. This is not to ignore 'pure' emotional harm claims such as in *Metro-North* but it is necessary to limit the discussion to asbestosis and development of carcinoma of the lung or mesothelioma because this is where the controversy is. Key issues from the Australian point of view also include whether the alleged mental harm gets through the limitation imposed on recovery for mental harm in the Civil Liability Acts. This concerns recovery for pure mental harm as opposed to consequential mental harm and the question of when the limitation period commences/expires.

B *Emotional distress*

US case law on emotional distress claims in general has undergone significant change over the past few decades and in some respects mirrors the position found in Australia. Originally, no claims for emotional distress were allowed by US courts absent physical impact. This has been observed by Abele to be based on "a history of judicial reluctance to acknowledge [emotional distress claims] as legitimate due

[26] 521 US 424 (1997).

to the ease with which such claims can be manufactured, especially in the absence of contemporaneous physical injury".[27] This line led to certain injustices. For instance, if you were struck by a vehicle then you could recover your lost wages and medical expenses of treating, say, your broken leg, but also for pain and suffering generally which included a wide range of emotional harms you have from having lost the use of your leg, concerns about your future life without your leg, and so on. But if you merely saw your child run over by a vehicle or if a vehicle almost struck you but did not, your claim for emotional distress would be denied because of no physical impact on you, even if most people would concede that you had suffered emotional distress.

In the 1989 case of *Thing v LaChusa*, the approach began to change and it was ruled that as long as the plaintiff is present when an injury occurs and be closely related to the injured party, he or she can recover damages for a claim of negligent infliction of emotional distress.[28] In recent decades courts in most US states have liberalised recovery in such cases to various degrees. Hence, in many (but not all) states today, if you reasonably fear that the vehicle was about to strike you and now have recurrent nightmares about it and need psychiatric treatment, you can successfully sue the driver even though he did not actually hit you. Recovery is possible, assuming that the driver negligently endangered you and it can be shown that you suffered "severe emotional distress".[29] However, the requirement that you actually witness the event remains strong in the US.[30] The liberalisation of emotional distress and anxiety damages commenced in Australia in 1984 with *Jaensch v Coffey.*[31] Although Australia has witnessed an ongoing refinement of the law, *Jaensch* extended the "direct perception rule". Most torts practitioners

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[27] Jon Abele, *Emotional Distress: Proving Damages* (Lawyers and Judges Publishing Co, 2003) 8.

[28] 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865, 1989 Cal.

[29] *Town of Stonington v Galilean Gospel*, 722 A 2d 1269 (Me, 1999).

[30] *Bird v Saenz* 28 Cal.4th 910, 123 Cal.Rptr.24 465, P.3d 324, 123 Cal.Rptr.2d 465 (2002).

[31] (1984) 155 CLR 549.

would be familiar with this decision and it constitutes a policy setting that the US states and Australian state courts broadly share.

C *The principle in Ayers*

What about someone who had not only been exposed to asbestos but also had a disease related to exposure? This was the situation in *Norfolk & Western R. Co. v Ayers,* where the victim already had asbestosis, a non-malignant respiratory disease resulting in fibrosis of the lungs. This is different to a situation where psychiatric harm is the primary injury, and sustained by a plaintiff without suffering any physical injury at all. However, *Ayers* needs to be seen as a special category in the light of US case law on emotional distress claims, because the genuineness hurdle faced by "nervous shock" and emotional distress claimants is clearly higher than that of FELA second injury claims – including requirements that the emotional distress was of a severity that it took medical intervention to improve,[32] or that the emotional distress was medically diagnosable and medically significant.[33]

Ayers established that an employee with asbestosis can recover damages for fear of cancer without having to prove physical manifestations of their emotional distress and falls short of diagnosed GAD. However, it was subject to provision of proof that their alleged fear was 'genuine and serious'.[34] The case concerned six railroad workers suffering asbestosis who brought an action against their ex-employer under the Federal Employers' Liability Act (FELA).[35] They contended that they should be awarded damages for their pain and suffering for fear of developing cancer and were successful. The Court in *Ayers* departed from earlier approaches to FELA which resulted in fear of cancer claims being disallowed and the majority emphasised that

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[32] *Jessamy v Erhen*, 153 FSupp 2d 398 (SDNY, 2001).
[33] *Sell v Mary Lanning Memorial Hospital Association*, 498 NW2d 522 (Neb, 1993)
[34] *Ayers*, 538 US 135, 157 (2003).
[35] See *The Federal Employers Liability Act* (FELA), above n 5.

"[t]here is an undisputed relationship between exposure to asbestos sufficient to cause asbestosis, and asbestos-related cancer",[36] and the minority found that there was no established link between asbestosis and cancer and that "to state that some relationship exists without examining whether the relationship is enough to support recovery, however, ignores the central issue in this case".[37]

The plaintiff in *Ayers* wanted to recover for the emotional distress he suffered because of his fear that later on he would have cancer. The majority treated this as a case of someone who clearly had suffered physical impact and put the case in the category of someone like in the example above of the victim who lost his foot and feared later he might lose his entire leg. The US Supreme Court in *Ayers* treated the fear as an emotional harm to be compensated like any other emotional harm or pain and suffering of a victim who clearly otherwise had a tort claim now and was suing now. The only issue is whether there is evidence that this is a genuine harm/fear. The minority in *Ayers* sought to separate out asbestosis as one thing and the fear of cancer later as something else that was not sufficiently tied to the asbestosis and therefore the minority would have treated the case just like *Metro-North* and cited the two injury approach applied in the states as the preferable way to handle FOC claims. The *Ayers* standard of an essentially subjective, but still genuine fear of harm is clearly a more liberal approach than that taken to PTSD in Australian benches in *Stoddart*, *Delahunty* and *Hill* and in relation to asbestosis/FOC in *Todd*. It is necessary to further consider the implications of the 'genuine and serious' standard.

[36] *Ayers*, 538 US 135, 154 (2003).
[37] *Ayers*, 538 US 135, 171 (2003).

III THE GENUINE AND SERIOUS STANDARD

Is 'genuine and serious' the strictest civil burden requiring clear and convincing evidence to be brought? Or rather, is it a burden merely requiring a preponderance of evidence (in Australian terms the balance of probabilities)? There has been judicial concern in the US over the quantity and legitimacy of asbestos litigation since 1997, when the Supreme Court referred to the "crisis in asbestos litigation."[38] The fear of cancer cases are brought against a backdrop of growing concerns that claimants with spuriously evidenced claims are recovering, at the expense of people who actually have asbestos-related cancer.[39] On the majority's view in *Ayers*, the fear needs to be proven to be more than "a general concern for [one's] future health",[40] but not more than a "genuine, real, believable fear of cancer."[41] This gives it the appearance of being a moderate preponderance-type burden and not obviously something that the court would select if it wanted to curtail asbestos litigation nationwide. Although the Supreme Court purports the *Ayers* standard to be a high one, which in theory makes it onerous to recover damages for fear of cancer in asbestosis-related FELA claims,[42] in a comparative light it is in fact an unclear standard which is likely to do little to stem the burgeoning asbestosis litigation of the US. Part of restoring a sense of reality to asbestos litigation is only achievable by revisiting the *Ayers* standard and replacing it with a federal two disease approach, which seems to be the best on offer in the US.

A *Lavelle*

An alternative to the two disease approach was raised in *Lavelle v Owens Corning Fiberglass Corp,* where it was held that, to be

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38 *Amchem Products Inc. v Windsor,* 521 US 591, 597 (1993).

39 Griffin Bell, 'Asbestos and the Sleeping Constitution' (2003) 31 *Pepperdine Law Review* 1, 7.

40 *Smith v A. C. & S. Inc.*, 843 F. 2d 854, 859 (CA5 1988): 538 US 135, 157 (2003).

41 *Coffman v Keene*, 608 A. 2d, at 424-425: 538 US 135, 157 (2003).

42 45 USC 51-60.

compensated for an increased fear of cancer, a plaintiff with asbestosis needs to be cognisant that there is an increased statistical likelihood of developing cancer, and that "from this knowledge springs a reasonable apprehension which manifests itself in mental distress" [and that] "reasonable in this context is not equivalent to probability or certainty, but is for a fact-finder to determine."[43] By any other name the Supreme Court is referring to this jurisprudential line when it said in the most recent FOC case – *CSX Transportation v Hensley* [44] – that, "a determination that there is sufficient evidence to send a claim to a jury is not the same as a determination that a plaintiff has met the burden of proof and should succeed on a claim outright."[45] In other words, an asbestosis sufferer's apprehension of cancer, when sent to the jury as fact finder, will be determined by the burden of proof. The burden of proof is not probability, as *Lavelle* recognised, but rather something which is idiosyncratic to FOC in the FELA context: the fear must be 'genuine and serious'. In *Ayers* Justice Kennedy (joined by the Chief Justice, Justice O'Connor and Justice Breyer) appears to detect this repackaging of *Lavelle*. In his dissent of the majority's finding allowing recovery for fear of cancer, there was a particular query of the standard applied in *Lavelle*, as it permitted fear of cancer to be recoverable as pain and suffering *before* a cancer diagnosis. It was also considered to be in a group of inferior court cases which allowed recovery for FOC "predicated upon mere exposure to asbestos". [46] *Lavelle* was not revisited by the Supreme Court in *Hensley*. But that there was no attempt to review or give greater explanation of the 'genuine and serious' burden developed in *Ayers* is less easy to explain, especially considering the view of the minority in *Ayres* that the burden would not reduce the chance of unlimited liability and "would be a difficult standard for judges to enforce".[47]

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[43] 507 NE2d 476, 480-481 (1987).
[44] 129 SCt 2139, 2140 (2009).
[45] 129 SCt 2139, 2141(2009).
[46] *Ayers*, 538 US 135, 173 (2003).
[47] *Ayers*, 538 US 135, 180 (2003).

B *CSX Transportation*

In *CSX Transportation,* the plaintiff, an asbestosis sufferer employed as an electrician for the appellant, was awarded $5 million for his fear of cancer by the Tennessee state court and the Tennessee Court of Appeals upheld the verdict.[48] In the following year, the Supreme Court ruled that the Court of Appeals was in error in affirming the trial judge's decision *not* to give the jury an instruction based on the *Ayers* standard that the respondent's fear needed to be genuine and serious. The Court of Appeals had deemed there to be no purpose to give the instruction to the jury as "the mere suggestion of the possibility of cancer has the potential to evoke raw emotions".[49] In the appeal brought by CSX Transportation, the Supreme Court instead averred, "to the contrary, the fact that cancer claims could 'evoke raw emotions' is a powerful reason to instruct the jury on the proper standard".[50] *CSX Transportation* speaks volumes about the problems endemic to compensation for FOC; advocates of a tighter approach refer disparagingly to 'cancer phobia' and point to the high risk of manufactured or overblown mental health claims eliciting the natural sympathies of a jury. The US Supreme Court in *CSX Transportation* rejects the line that, if the judge does not mention mental health the jury will not award damages on such ground. But by insisting that a proper *Ayers* direction be given, much of the pro-victim subjectivity of the standard inevitably reaches the jury.

IV LIMITING DEVICES FOR FOC CLAIMS

There are reasonable public policy concerns in countries such as Australia about opening the door to FOC claims. Australia has avoided unlimited liability in asbestosis/FOC litigation largely through the

[48] 129 SCt 2139, 2140 (2009).
[49] 278 SW 3d 282, 300 (2008); 129 S.Ct. 2139, 2140 (2009).
[50] 129 SCt 2139, 2141 (2009).

common law device of "recognizable psychiatric illness",[51] and a normal fortitude expected of a claimant to control their fears as set down under various CLA regimes.[52] In a pre-CLA case note on FOC, Des Butler reviewed the US Supreme Court's ruling in *Norfolk & Western R. Co. v Ayers* and ventured a view from the Australian position that, if a serious fear of contracting cancer was equated to a reasonable fear then it could be expected that the patient would show normal fortitude and that accordingly their claim would not be recognised.[53] In this view, Butler reflects the enduring position of Australian courts and the CLA regimes – they do not compensate a person for a fear about their health if such a fear, worry or anxiety falls short of recognised psychiatric illness.[54] Although this is no doubt the case, it is important to be mindful that the standard applied to proving mental illness has progressively enlarged over the last decade to recognise new disorders. A sufferer of Generalized Anxiety Disorder (GAD) can show that he or she has more than a collection of fears to which normal fortitude is expected. Rather, he or she suffers anxiety that can be regarded as a mental disorder. GAD will be recognised if the claimant has symptoms that are consistent with those described in the relevant Statements of Principle but, as *Todd* shows, proof must be tendered and accepted by a claimant that the diagnosis of asbestosis materially worsened the mental condition.

A *Diagnosis of GAD*

Diagnosis of GAD is controlled by psychiatrists and GAD is recognised by courts and tribunals as a mental disorder for compensation/pension purposes. Thus, the first hurdle for a claimant will often need to be diagnosis with GAD. This raises the question as to whether diagnosis is acting as a genuine limiting principle in Australia; the situation is

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[51] Des Butler, 'United States Supreme Court Upholds Claim for Emotional Distress from Fear of Cancer' (2003) 11 *Tort Law Review* 132.
[52] *Ayers*, 538 US 135, 171 (2003).
[53] Butler, above n 51, 135.
[54] Ibid.

compounded by alcohol abuse and the transitory nature of GAD in many cases. Over half of all people initially diagnosed with GAD do not retain this diagnosis beyond two years,[55] and there is a difference between common or day-to-day anxieties and GAD, which is a form of anxiety that is "overwhelming and consuming" and "out of proportion for the situation".[56] There are issues do with the interaction of alcoholism and diagnosis of GAD. For a war service medical pension "a clinical worsening of alcohol dependence" can be regarded as evidence of GAD,[57] as a form of self-medication for stress or alcoholism can be akin to a disease which can be argued to be war-caused.[58] Notwithstanding the differences between medical and legal conceptions of causation, it was observed by a medical periodical that: "Most symptoms and presenting problems in dual-diagnosis patients may be misattributed to either substance misuse or mental illness alone, and it may be almost impossible to determine which comes first."[59] Depressive disorder diagnosis has much the same problem; one study has averred that "depressive symptoms can be brought on by excessive alcohol use, which makes it difficult to separate a substance-induced depression from an independent disorder of clinical depression".[60]

By and large the Australian cases have concerned recognition of statutory requirements that must be met to qualify for military pension payments and have not been tort claims *per se*. However, they are instructive for the line they draw between common anxiety and GAD and give insight into the evidential requirements attending mental harm

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55 Christopher Gale and Mark Oakley-Browne, 'Generalized Anxiety Disorder' (2004) 7 *Evidence Based Mental Health* 32-33, 32.

56 Marshelle Thobabin, 'Generalized Anxiety Disorder' (2005) 17 *Home Health Care Practice and Management* 140-142, 140.

57 *Lynn v Repatriation Commission* [2011] AATA 903.

58 Ibid [60].

59 Edzard Ernst, 'Dual diagnosis: psychiatric illness and addiction', *Pulse* (28 June 2007) <http://www.pulsetoday.co.uk/main-content/-/article_display_list/10953843/dual-diagnosis-psychiatric-illness-and-addiction >.

60 Helen Pettinati and William Dunson, 'Co-morbid Depression and Alcohol Dependence' (2011) 28(6) *Psychiatric Times* 49-55, 49.

compensation claims. In *Lynn v Repatriation Commission*, it was stated that if there is a war-caused generalized anxiety disorder (GAD) then the patient is suffering from "a clinically significant psychiatric condition",[61] but in *Saunders v Repatriation Commission* it was ruled that GAD would only be made out if the claimant could show that he or she "had difficulty to control [their] worry".[62] In both these cases the claimant argued that he had GAD and that that he was entitled to a pension because war service caused the condition; hence the need by the ruling tribunals to distinguish between ordinary anxiety and GAD. In *Todd v Repatriation Commission* the facts were closer to *Ayers* – it was an application for a war-related medical pension on the argument that a pre-existing GAD condition was made worse by the diagnosis of service-related pleural plaques. For example, like in *Ayers* the claimant had an asbestos-related condition but cancer had not manifested itself. Unlike in *Ayers*, however, the adjudicator found that, on the balance of the psychiatrists' evidence, Mr Todd could not establish the necessary causal link between his service-related exposure to asbestos and his current psychiatric condition.

Conceivably, from the point of view of a pension-seeking asbestosis patient, a psychiatrist who diagnosed that the *cause or exacerbater* of their GAD or depressive or mood disorders was alcohol alone would give a less well-received diagnosis than would be the case if their depression or GAD was found to arise directly from their strong fixation on their asbestosis and their believed predisposition to cancer. The temptation for a doctor to help an undeserving patient, or for a patient to shop around for a diagnosis are thus significant. That a psychiatrist in a given case is genuinely torn between one diagnosis or another is probably the best indication that a pro-victim compensation culture has not taken control. In *Todd v Repatriation Commission*, there was a change of opinion by a treating psychiatrist of depression being in his patient by the presence of pleural plaques rather than by Post Traumatic

[61] [2011] AATA 903, [48].
[62] [2011] AATA 676, [33].

Stress Disorder (PTSD) and this was criticised by the Tribunal.[63] There may be a confluence, in any one case, of PTSD, GAD and other psychological disorders. Putting to one side diagnosis conflation or overstatement of a condition, the risk for misdiagnosis, so that a passing state of mind becomes is labeled a disorder, must be great. Even the most ethical psychiatrist is not protected from this state of affairs, such are the vagaries of the mind.

B *'Two disease' approach as a limiting device on FOC claims*

The normal fortitude bar extends to common stress or anxiety, but not GAD as it is a serious and diagnosable mental illness. Butler defends the normal fortitude bar on policy grounds:

> The importance of such a consideration is readily apparent: it is easy to conceive of cases of plaintiffs fearing for their health on specious grounds.[64]

The requirements of CLA legislation – that an employer need be shown to have foreseen that a person of normal fortitude in the plaintiff's position might suffer a psychiatric illness – contrasts sharply with the way FOC claims are regarded in the US. In a note on *Ayers*, which appeared in the Harvard Law Review in 2003, it was conceded in it that, "there must be some limiting principle within toxic tort cases" but that such a principle should be "reasonableness", rather than "establishing bars to recovery on the grounds of the harmfulness of an agent or the development of an illness".[65] Thus, there is a possibility of a middle way between an Australian-style bar on FOC claims without a mental illness and proceeding as the US Supreme Court does on the basis of subjective fear of cancer. This possibility has best been represented in

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63 *Todd v Repatriation Commission* [2008] AATA 264.

64 *Todd v Repatriation Commission* [2008] AATA 264.

65 Note, 'D. Federal Employers' Liability Act' (2003) 117 *Harvard Law Review* 420, 430.

the supreme courts of the US states where the 'two disease' approach has developed to limit FOC claims.

Some US states have dealt with FOC/asbestosis cases straightforwardly as 'two disease' cases, and such approaches could warrant consideration in Australia. For example, Pennsylvania in *Simmons v Pacor Inc*[66] decided that a) you can recover now for the asbestosis, and b) if you get cancer later you can sue again for that, and at that time you can also recover for the emotional harm you suffered in fear of getting the cancer. This has implications for Australia; on one hand, damages have been declared by the High Court to be 'once and for all'[67] but, on the other hand, the dust diseases regime of NSW contemplates otherwise.[68] Note that the *Simmons* approach means that if you do not get the cancer you never can collect for the fear and this is a bright line of principle for other common law jurisdictions grappling with FOC claims. Other states in the US have struggled with FOC/asbestosis claims because their normal rules allow only one tort claim for one act and do not allow a plaintiff to split their cause of action. It is clearly problematic if a plaintiff sues and wins now only for the asbestosis, later gets cancer but is barred from a further claim; the justice of the 'two disease' approach is, at least on this point, preferable. Indeed it was observed in *Marinari v Asbestos Corp., Ltd* that the majority of state jurisdictions have adopted 'the two disease rule' or 'the separate disease rule'.[69] Under such a rule

> recovery can be had in a first action only for a disease which has already manifested itself from the exposure to asbestos and the natural, predictable progression, if any, of that disease. If additional injuries from a separate disease manifest themselves in the future, such injuries will support a second action.[70]

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66 674 A.2d 232, 237 (PA, 1996).

67 *Todorovic v Waller* (1981) 150 CLR 402.

68 *Dust Diseases Tribunal Act 1989* (NSW) s 11A; *Amaca Pty Ltd v Banton* (2007) 5 DDCR 314.

69 612 A.2d 1021, 1025 (PA SCt, 1992).

70 *Marinari*, 612 A2d 1021, 1023.

Federally in the US, one can claim for emotional distress that you might later get as a second more serious disease (assuming you have a disease now and are not cut off as in *Metro-North*, but rather you might be able to win something under the principle in *Ayers*). But if the *Ayers* 'genuine and serious fear' approach is eschewed, then the argument follows that fear of future disease is unique or at least a special sort of emotional distress that should be treated differently from the pain and suffering awards for future pain and suffering routinely made to people who have been injured now and try to sue now for their full tort recovery. And if this is the case, it would mean that a later (second) tort claim would be allowed in the event of the cancer developing. Under the CLA regimes, it is unlikely that such an approach will develop in Australia. However, it seems odd that the *Simmonds/Marinari* approach allows recovery only for justified fears of cancer proven by a cancer manifesting itself. If it is fear short of GAD that is to be compensable, whether it is founded or ultimately not, the loss to the individual caused by feelings of fear and anxiety is presumably the same.[71]

V CONCLUSION

A person with asbestosis fearing cancer will buttress their fear with reasons drawn from experience (death of co-workers), or reasons that are psychosomatic in origin (a disease is made, i.e. hyperventilation). A number of subjective/emotional reasons can also be at play. Fear is not always proportional or rational and this can be the case even if there is a statistically small chance one might die of a particular type of cancer. Many people would recognise that fear conflates and intensifies small concerns to a point that an amorphous anxiety cannot be rationalised back into shape and a risk becomes, in the mind of the anxiety sufferer,

[71] Discussions with Susan Bartie (Faculty of Law, University of Tasmania) were a great assistance in clarifying this idea.

an all-consuming likelihood. The Australian legal approach recognises acute anxiety (GAD) as a mental disease and holds that anything short of it is encompassed by normal fortitude (i.e. we all have fears and worries). The concern in *Saunders*, in the case of whether or not the pension applicant suffered a war caused anxiety disorder, was whether the claimant could control their worry. This implies that most people can hold the line on fears and it is unclear why in the FELA-related FOC litigation a similar idea is not more prominent as a threshold.

The Australian courts have trodden an exemplary path and taken the opportunity to legally delimit FOC claims to only the most realistic ones, through CLA mental harm provisions and the insistence that a mental illness results from knowledge of a precursor condition (not settling merely for fears to found a claim). To this point, Australia has avoided the US experience of an "elephantine mass of asbestos cases",[72] through prudent legislative and judicial settings on issues such as FOC. To found a legal claim for fear of cancer, as *Todd* demonstrated, one needs to have more than a personal belief that one's psychological condition has deteriorated post-diagnosis with a marked condition; it must be founded in diagnosis. Over time, members of the community will become ever-more acutely aware of correlations between environmental exposures to asbestos and the development of asbestosis and cancer as a result. Better understanding of correlations and causations will necessarily have an effect on what rationales for FOC are acceptable. Until that point arrives, however, the cautious approach of Australian courts is a necessary and useful transitional stage. The science narrative has to be better by told by the medical community. Only as a result of this can findings on medical causation then be given proper influence by the legal community. The judiciary can improve its knowledge of the science, such as it is, and communicate more effectively about its needs of it.

[72] *Ayers*, 538 US 135, 166 (2003): *Hensley*, 129 SCt 2139, 5 (2009).

In a sense, the fear of plaintiffs' about cancer is ripe to be taken advantage of by lawyers, and not only in the United States. Plaintiffs have become attuned to a selective story concerning the health risks posed by asbestos exposure which is calculated by trial lawyers to key into the compensation on offer. There is no serious effort taken by the media to send clear messages to the community about asbestos-related disease. The courts in the US have taken little care to develop an understanding the epidemiology of asbestos-related disease or stem the opportunism of counsel appearing before them. The two injury approach in *Simmons* winnows out the many with unjustified fears but makes a person whose fear is realised wait half a lifetime for compensation and then gives them a nine month window in which to enjoy it (the average life expectancy of a mesothelioma sufferer from diagnosis to death). In its favour, the *Simmons* approach – as the minority in *Ayers* pointed out – was adopted by state courts to remove the unfairness of denying recovery for diseases with a long latency and that, if courts allow recovery for fear of cancer now, it reduces the purpose of the separate disease rule as there may not be enough funds for those actions that are started once the actual cancer is diagnosed.

On a positive concluding note, there is hope that a more sensible approach is emerging in the federal case law in the US. In *Campbell v CSX Transport Inc.*,[73] the railroad employer made a prima facie case showing that their former employee's alleged fear of contracting an asbestos-related cancer was not genuine and serious, as is needed to show entitlement to summary judgment in favour of damages for emotional distress under FELA. The employee deposed that he did not remember being diagnosed with asbestosis and that a doctor had never advised him that he had an increased risk of contracting an asbestosis-related cancer. This case will prove to be part of a new wave of circumspection by employers about FOC claims, at least under FELA. Certainly, the Supreme Court indicated that factual scrutiny at earlier stages by the employer might have meant that the *Ayers* case never reached the Court in the first place.

[73] 892 So2d 923 (Ala Civ App, 2004).