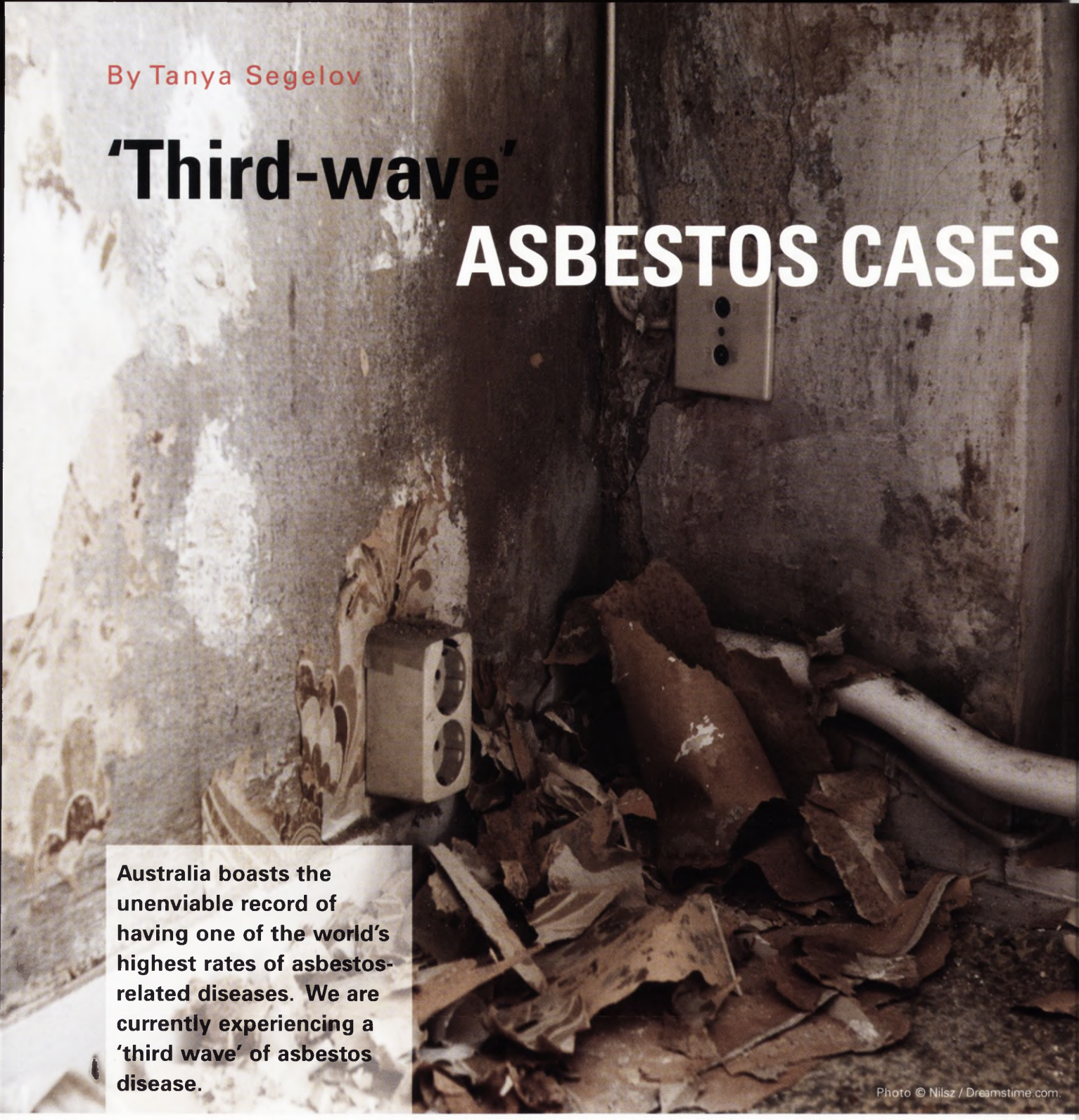
By Tanya Segelov

'Third-wave' ASBESTOS CASES



Australia boasts the unenviable record of having one of the world's highest rates of asbestos-related diseases. We are currently experiencing a 'third wave' of asbestos disease.

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The 'first wave' involved workers who contracted asbestos diseases as a result of mining and milling raw asbestos and manufacturing asbestos products. The 'second wave' involved workers who contracted asbestos disease as a result of the use of asbestos products in industry. The 'third wave' has been defined as persons who have contracted malignant asbestos disease as a result of short-term and/or low-level exposure to asbestos in the home or work place. Most members of the 'third wave' are persons who have been exposed to asbestos as a result of carrying out or being present during home maintenance and renovation work involving asbestos cement building materials.

A study by Musk et al in the *Medical Journal of Australia*, dated 5 September 2011, found that home renovations are causing an alarming number of asbestos-related diseases in Australia, including in women. The study found that 35.7 per cent of female mesothelioma cases and 8.4 per cent of male mesothelioma cases in Western Australia between 2005 and 2008 were attributable to home renovation. This research supports anecdotal evidence from lawyers practising in the area of dust disease that over the last ten years there

has been an increasing number of mesothelioma claims for non-industrial exposures, usually as a result of undertaking or being present while home renovations were carried out, with an increasing number of these claims being brought by women and persons under the age of 60 years. This is significant, given that the latency period for mesothelioma is an average of 37 years.

Asbestos was widely used in Australia as a building material up until 1983. It is said that between the end of World War II and 1983, two out of every three homes contained asbestos cement building materials typically used on eaves and in wet areas such as bathrooms, laundries and kitchens. Asbestos continued to be used in asbestos cement sheets until 1983, in asbestos cement pipes until 1987, and in asbestos brake linings until the use of asbestos was banned in Australia altogether in 2003.

Many materials containing asbestos are still present in homes, government buildings (including schools and hospitals) and commercial buildings. Many of these materials are now over 40 to 50 years of age (the peak usage of asbestos containing materials occurring before the 1970s). Many have been exposed to weathering (including severe weather events such as fire, floods and cyclones), contact with machinery, vibration and human activity. Prior to 1978, no warning was placed on these materials advising that they contain asbestos.

Mesothelioma is caused only by exposure to asbestos. While the 'one fibre theory' is generally not accepted (that is, the inhalation of one asbestos fibre can cause mesothelioma), there is no known, 'quantifiable' threshold of exposure to asbestos for the causation of mesothelioma.

The 'third wave' claims raise new issues for those involved in asbestos litigation, particularly in relation to issues of foreseeability and causation.

FORESEEABILITY

By far the large majority of asbestos claims brought in the 1980s and 1990s resulted from workplace exposure. These exposures tended to be heavy and in an industrial setting. The question of foreseeability in such claims was largely resolved by the mid-1990s, with Fitzgerald AJA in *E M Baldwin & Sons Pty Ltd v Plane* saying that:

> 'Whatever might have been the position earlier, it is futile for an employer who exposed an employee who now has an asbestos-related disease to substantial amounts of asbestos dust during a period within the last 35 years to litigate foreseeability in the Dust Diseases Tribunal of New South Wales in other than exceptional circumstances.'[1]

In *Seltsam Pty Ltd v McNeill*,[2] the New South Wales Court of Appeal distinguished 'third wave' or low-dose home renovation type exposures from industrial or occupational exposures. Father McNeill alleged that he contracted mesothelioma as a result of exposure to asbestos on two occasions; firstly, in about 1960 when he installed ceilings on a verandah and one room extension using five or six sheets of fibro (not sued on) and, secondly, when in about 1961 he fixed the defendant's corrugated asbestos cement sheeting to the roof of a rumpus room in the backyard of the home of his sister. This work was carried out over two or three days for a number of hours on each occasion. Father McNeill drilled holes in the sheets and screwed the sheets down, as well as cutting the sheets to size.

The New South Wales Court of Appeal, in overturning the decision of the Dust Diseases Tribunal of New South Wales, distinguished factory situations and other industrial situations involving the manufacture and use of asbestos products from that of Father McNeill. It noted that reasonable foreseeability in relation to the former had *'long been clearly known'*.[3]

The Court did not accept that the category of end-user was broad enough to include both persons handling asbestos cement sheets in workplace situations such as carpenters and fixers in housing construction and the occasional casual user, such as Father McNeill, whose exposure was over a period of 10 to 12 hours at most.[4] The Court required Father McNeill to prove that the defendant knew or ought to have known of the risk to *'a home handyman who does not encounter the product in an industrial or commercial continuing situation, who works on the product for a few hours only on one handyman project, not as part of what is otherwise his working life'*.[5] The Court found that Father McNeill had failed to prove that the defendant knew, or ought to have known, of such risk in 1961.

Father McNeill relied upon what the defendant ought to have known, as there was no evidence of the defendants' actual knowledge as at 1961.

In other cases involving similar low-dose home renovation-type exposures against Amaca Pty Limited (formerly James Hardie & Coy Pty Limited), reasonable foreseeability has been established based on James Hardie's *actual* knowledge. In *Amaca Pty Limited (formerly James Hardie & Coy Pty Limited) v Patricia Margaret Hannell as executor of the estate of David Richard Hannell* (dc),[6] the Western Australian Court of Appeal upheld the finding of reasonable foreseeability against Amaca in relation to the exposure of Mr Hannell, which occurred in 1983, 1985 and 1990 as a result of work carried out with asbestos cement products in his home and an associated fence. And in *Amaca Pty Limited (formerly James Hardie & Coy Pty Limited) v Moss*,[7] the Western Australian Court of Appeal upheld the finding of reasonable foreseeability against Amaca in relation to the exposure of Mr Moss, when he renovated his home and fence on four separate occasions during the period 1989 to 1990.

In both *Hannell* and *Moss*, the Western Australian Court of Appeal followed *McNeill* to the extent that they found that each belonged to a class of a handyman or occasional user who occasionally or intermittently, from time to time, was exposed to asbestos from cutting, sawing, sanding and drilling asbestos products.[8]

The question of foreseeability in low-dose home renovation-type exposures will depend on the year of exposure, with the dangers of low-dose exposures causing mesothelioma increasingly being published in the 1960s, as well as evidence as to the defendant's actual knowledge.

BREACH OF DUTY OF CARE

The question of warnings was raised in *Booth v Amaca Pty Limited & Anor*.[9] This case concerned exposure from brake linings from 1953 to 1982. Amaba (formerly Hardie Ferodo >>

While workplaces are highly regulated in relation to identifying and handling asbestos, there is little or no regulation in relation to domestic premises.

Pty Ltd and the manufacturer of brake linings from 1962) argued that, from April 1978, it placed a warning on slips of paper in the packaging of its brake linings. The warning noted that *'breathing asbestos can damage your health'* but did not refer to death or cancer, and also noted that *'free asbestos ...is unlikely'*. Judge Curtis found that this warning was *'entirely inadequate'*[10] and was not persuaded *'that the warning given was adequate to enter the consciousness of Mr Booth as a warning of sufficient threat to require precautions'*.[11] Further, he accepted Mr Booth's submission that the warning that should have been given was that formulated by Beech J in *Lo Presti v Ford Motor Company of Australia*.[12]

The adequacy of James Hardie's warning had previously been considered by the Western Australian Court of Appeal in the matters of *Hannell* and *Moss* referred to above. The Court considered the two warnings placed by James Hardie on its building materials. The first warning in 1978 was found to be inadequate.[13] The later warning, from 1982, which warned that breathing asbestos dust could cause serious damage to health including cancer, was found to be adequate for the class to which Mr Hannell belonged.[14] The Court of Appeal rejected the trial judge's finding that the evidence showed that the product was such a danger that a warning should have been placed to the effect that the product should not remain in situ and should not be worked on.[15]

The cases of *Moss* and *Hannell*, however, were not decided on the question of warning. Both men carried out renovations to existing structures. The Court of Appeal found that neither purchased the products nor was there any evidence that if warnings had been affixed to the products at the time of manufacture that they would have had any effect on Mr Moss or Mr Hannell, as there was no evidence that the labels would have remained in place and been visible to a later purchaser. In fact, the Court found that it was significantly likely that any labels affixed to a fence or sheet would not have been visible to the men.[16]

The Court of Appeal then considered the question of whether the defendant should have engaged in mass marketing to warn members of the class (handypersons and occasional users) of the dangers to which they were exposed. The Court held:

> 'The frequency and scope of the advertisements that would be necessary to reach the majority of members of the class (membership of which would continuously change) would itself communicate a warning of a kind disproportionate to the low risk involved...Mass media advertising of a very low risk of serious harm, particularly having regard to the myriad of sources of such risk to which people are exposed on a daily basis is not a reasonable or practicable response to such risk.'[17]

The Court noted that neither Hannell or Moss had made their claims on the basis that the defendant should have ceased manufacturing or supplying the products before they were installed in the 1970s.

CAUSATION

Any questions as to causation in third-wave or low-dose exposure cases have largely been determined by recent decision of the High Court in *Amaca Pty Limited v Booth*,[18] where the High Court affirmed the 'cumulative effect theory' in relation to causation of mesothelioma; that is, that all non-trivial exposure to asbestos plays a causal contribution to the ultimate development of mesothelioma.[19]

DAMAGES

The large number of claims for younger persons has resulted in large verdicts, both in relation to pain and suffering and as result for claims for economic loss and damages for replacement services.

The highest award for general damages in the Dust Diseases Tribunal of New South Wales has been in the matter of *Mooney v Amaca Pty Limited*,[20] for a 59-year-old man suffering from mesothelioma who endured symptoms for four-and-a-half years and underwent treatment, including chemotherapy. In the ACT, a 72-year-old plaintiff was awarded $300,000 in general damages, having endured symptoms for approximately six years, including surgical interventions, chemotherapy and radiotherapy.[21] In Victoria, the Victorian Court of Appeal upheld a jury verdict awarding $730,000 for damages for pain and suffering and expectation of life to a 62-year-old man with mesothelioma.[22]

A larger number of claims by younger plaintiffs, particularly women, have resulted in an increasing number of claims for replacement services, particularly in states such as New South Wales, where to claim such services the plaintiff must be caring for a person as a result of age or physical or mental incapacity.

The claim of *Amaca Pty Limited v Novak*[23] considered whether damages could be awarded to a grandmother for the loss of her ability to care for her grandchildren. The plaintiff, Mrs Margaret Dawson, who suffered mesothelioma, was aged 64 at the time of her death. Mrs Dawson lived with her daughter and her husband, each of whom worked full-time, while Mrs Dawson cared for their two children. Mrs Dawson claimed for her loss of capacity to care for her grandchildren. The trial judge found that the grandchildren were dependent on Mrs Dawson and awarded damages pursuant to s15B of the *Civil Liability Act* 2002 (NSW) in the amount of $193,307.

The defendant appealed on the basis that the grandchildren were not dependent; that the services were provided not to the grandchildren, but to their parents; and that the provision of these services was not reasonable. The New South Wales Court of Appeal upheld the trial

judge's verdict. The Court of Appeal found that the length of time Mrs Dawson provided care to her grandchildren, the frequency with which the care was provided, and the extensive nature of the care she provided were such that there was an evidential basis upon which the trial judge could conclude that the grandchildren were dependent on Mrs Dawson. Further, the Court found no legal error in the judge's conclusion that Mrs Dawson provided services to her grandchildren by looking after them.

CONCLUSION

Despite predictions that by 2010 Australia would have reached the peak of mesothelioma claims, we have yet to reach this milestone. While there is no doubt that high-dose diseases such as asbestosis are on the decline, the prevalence of asbestos, particularly fibro sheeting, in buildings in Australia, most with no warning that the product contains asbestos and with our penchant for do-it-yourself home renovations, mesothelioma will continue to be diagnosed for decades to come. While workplaces are highly regulated in relation to the identification and precautions for handling asbestos, there is little or no regulation in relation to domestic premises. Further, with the James Hardie companies having successfully negotiated the exclusion of remediation claims from the Final Funding Agreement with the New South Wales government, it will be up to home-owners or government to foot the bill for removing asbestos from homes. ■

Notes: **1** *E M Baldwin & Sons Pty Ltd v Plane* (1998) NSWCCR at [111]. **2** [2006] (NSW CA 158 26 June 2006). **3** *Ibid*, para 28. **4** *Ibid*, para 36. **5** *Ibid*, para 38. **6** [2007] WASC 182 (2 August 2007). **7** [2007] WASC 162 (2 August 2007). **8** *Moss*, para 127, NSWDDT 8. **9** See decision on appeal: *Amaba Pty Ltd v Booth; Amaca Pty Ltd v Booth* [2010] NSWCA 344 at para 237. Special leave to appeal to the High Court was granted, but limited to the question of causation. **10** *Ibid*, paras 206-12. **11** *Ibid*, para 219. **12** [2008] WASC 12 (19 February 2008), *Booth*, para 220. **13** The 1978 label cautioned only that breathing asbestos dust can damage health. **14** The class being a handyman or occasional user who occasionally or intermittently from time to time was exposed to asbestos from cutting, sawing, sanding and drilling asbestos products: *Moss*, para 127. **15** *Hannell*, para 362. **16** *Moss*, paras 225-8. **17** *Hannell*, para 366. **18** *Amaba Pty Ltd v Booth; Amaba Pty Ltd v Booth* [2000] HCA 53 (14 December 2011). **19** See Tanya Segelov, 'Causation in malignant dust diseases cases: lung cancer and mesothelioma', *Precedent*, Issue 105, July/August 2011, pp33-7. **20** [2009] NSWDDT 23 (24 September 2009). **21** *Parkinson v Lend Lease Securities and Investments Pty Ltd* [2010] ATSC 49. **22** *Amaca Pty Ltd (under New South Wales administered winding up) v King* [2001] VSCA 447 (22 December 2001). A special leave application has been filed in relation to this decision. **23** [2009] NSWCA 15 (17 March 2009).

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