Asbestos in the environment: the Armley tragedy


Mrs June Hancock

Margereson & Hancock v JW Roberts Ltd

Adrian Budgen, Irwin Mitchell Solicitors, Sheffield, England

In *Margereson and Hancock v JW Roberts Limited*', the English Courts were faced for the first time with the task of delineating the liability of a manufacturing company for environmental cancers caused by emissions from its factory premises.

Both Arthur Margereson and June Hancock had lived near the former JW Roberts asbestos factory in Armley, Leeds, and had contracted the fatal cancer, mesothelioma, the only known cause of which is exposure to asbestos. The JW Roberts factory, which closed in 1958, was part of the manufacturing empire of Turner and Newall Limited (now T & N Plc), the effective defendant.

The incidence of asbestos-related disease was originally confined to the asbestos textile industry: the so-called first wave of asbestos-related disease. Yet, as asbestos found more and more industrial applications, so other occupational groups (especially those working in shipyards, construction and railway engineering industries, in which asbestos was widely used for insulation purposes) began to experience the toll of death and disease. This became known as the second wave. Such cases have generated a substantial number of compensation claims in tort by injured workers and their dependants. The *Margereson and Hancock* cases are unique in that they are the first examples of the third wave of environmental asbestos cases to reach the courts in the UK.

The *Margereson and Hancock* case was remarkable for two principal reasons. Firstly, the plaintiffs had not worked for the defendant company and claimed to have been exposed to asbestos in the vicinity of its factory in Armley, Leeds. Secondly, the exposure was before and a little after the Second World War, a time when mesothelioma had not been recognised as a specific form of cancer. That specific risk was not identified, other than in medical and scientific literature, until the mid 1960's, some years after the Roberts factory in Armley finally closed, and many years after the alleged exposure.

The case was fought on the facts (the extent of exposure was very much in issue); liability/foreseeability (the argument being that any exposure was not negligent because of the state of knowledge at the time); and limitation. There was also argument raised about the correct identity of the defendants. In the event, the defendants failed on all arguments. They were also under severe criticism for their conduct of the case.

The Margereson writ was issued in 1991 and was followed by a long and tortuous process of discovery. The trial judge, Mr Justice Holland, expressed his displeasure and irritation at the defendant's conduct of the litigation in no uncertain terms, characterising it as *"reflecting a wish to contest these claims by any means possible, legitimate or otherwise, so as to wear them [the plaintiffs] down by attrition"*.

Mr Justice Holland continued :

T & N Plc as a large industrial organisation must inevitably find itself from time to time involved in litigation. Trying to conduct such an exercise in attrition, particularly against legally aided individuals, flies in the face of the philosophy of litigation as it should be, and certainly as it will be ... hampers one's own advisers and, above all, "puts up the back" of the trial judge.

The fact that Mr Justice Holland made these criticisms must be significant, even though he was careful to say in his judgment that he put those matters "on one side" when resolving the real issues.

The case was widely reported in the press as a "test case" and a "landmark ruling". It was suggested that the judgment had widespread implications in other circumstances and in other industries. In fact, the decision was based entirely on well-developed principles of duty of care, despite the reliance on a very recent authority, and the particular facts as the trial judge found them in the case of these two particular plaintiffs. Mr Justice Holland was heavily influenced by the evidence that the conditions in this particular factory were worse than in any of the defendant company's other factories. There was evidence from the documents that Turner & Newall were paying more in compensation to more workers in the Armley factory than any of its subsidiary companies. (Interestingly, it was never disputed by the defendants that the steps taken by them to alleviate the problems of dust contamination were woefully inadequate). There was virtually unchallenged evidence, as Mr Justice Holland found, that the conditions in the immediate vicinity of the factory were similar to the conditions inside, particularly on the loading bays.

In the event, the Court of Appeal dismissed the defendant company's appeals from a finding of liability. In doing so, the court interpreted Mr Justice Holland's decision at first instance as being essentially concerned with findings of fact, none of which should be disturbed. The issues of legal principle at stake were described as "elementary". Despite this assessment, there is considerable room for debate concerning the significance of this decision from the point of view of future cases of environmental asbestos-related disease, and more generally. In particular, the legal principles clarified by the Court of Appeal might not have been regarded as "elementary" before the resolution of these Appeals.

What has the Armley case (as it is commonly known) achieved?

Firstly, it has demonstrated that harm to the lungs, in one form or another, has been foreseeable, as a risk of exposure to asbestos, since the turn of the century - more than the life-time of virtually everyone alive in this country today. Thus, we can illustrate, through this case, that ▶

negligence employs a foreseeability test which extends further than that which was literally foreseen by the defendant company, or by the industry as a whole. This may be variously interpreted as an essentially non-economic judgment as to responsibility, or (conversely) as an attempt to attribute a "true" economic cost to activities such as those of the defendants. Whichever interpretation is chosen, it appears that reasonable foreseeability, as applied in the law of tort, does not entirely correspond with the projected profits and losses of business.

Secondly, this case has put into the public domain all the T & N documents on knowledge/foreseeability, which were photocopied by Chase Manhattan Bank for their litigation in New York. It is perhaps worth pointing out that, although the many thousands of documents originally emanated from T & N's documents repository in Manchester, England, they came to these two plaintiffs from Chase Manhattan Bank and they formed the plaintiffs' discovery list in the first place, rather than the defendant's. Furthermore, when the plaintiff's legal representatives asked, before and during the trial, for specific documents, they were never forthcoming, part of the process that the trial judge described as "attrition". However, when the Judge asked for documents, T & N were able to produce them within 24 to 48 hours.

In conclusion, there is no prospect in the future of arguing that there was no negligence because the specific risk of mesothelioma was not foreseeable, it being sufficient for a finding that some pulmonary disease was foreseeable, which is probably true of any exposure to dust. It is also clear that claims arising from mesothelioma in the future will come from a much wider selection of the population, the traditional industries associated with asbestos exposure becoming less important.

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Adrian Budgen is a Partner in the Personal Injury Department of Irwin Mitchell, Solicitors, based in Sheffield, England. Adrian represented June Hancock in the case of *Margereson and Hancock v JW Roberts Limited*. Adrian has a special interest in asbestos disease litigation and has prepared various booklets and papers on the subject. Adrian is also a member of the English Law Society's Specialist Personal Injury Panel.
phone +44 114 274 7777 or **fax** +44 114 275 3306.

† reported in Times Law Reports [April 1996] and in P.I.Q.R. 1996, Part 2, p154 and P.I.Q.R. 1996, Part 5, p358.

Passive smoking is discrimination

Francey & Meeuwissen v Hilton Hotels of Australia Pty Ltd
(Human Rights and Equal Opportunity Commission, Innes, 25 September 1997, unreported)
Simon McGregor, APLA Policy Officer

Meeuwissen and Francey made a successful complaint of discrimination under s6, 11, 23 and 24 of the *Disability Discrimination Act* 1992 (Cth) against the Sydney Hilton on the grounds of less than favourable treatment arising from a disability.

Meeuwissen has asthmatic tendencies following a double lung transplant necessitated by cystic fibrosis. She lives in Adelaide, but attended Juliana's Nightclub at the Sydney Hilton on Francey's invitation. After three quarters of an hour, the complainants left the nightclub due to Meeuwissen being seriously affected by environmental tobacco smoke. Both complainants were aware of the nightclub's policy of allowing smoking and protested to the management, but were ignored.

Meeuwissen had felt fine following a non-smoking function she had attended earlier in the evening. But, as patrons arrived at the nightclub and commenced smoking, Meeuwissen rapidly lost her capacity to breathe. The condition continued to physically affect her the next day. Because her condition prior to her transplant had kept her from participating in such common social functions as attending nightclubs, she had hoped this would improve following the operation. Hence, Meeuwissen was very disappointed that she could not enjoy the Hilton's nightclub on this occasion. Francey's complaint was on the basis that he was an associate of Meeuwissen within s4(e) of the Act.

The Commissioner found that the Hilton had indirectly discriminated against the applicants whilst providing them with services, because the applicants were required to tolerate environmental tobacco smoke. Further, the management knew of the situation, and did nothing about it. The Commissioner applied followed the High Court case of *Walters v Public Transport Corporation* (1991) 173 CLR 349 in reaching this conclusion.

The condition with which the complainants were forced to comply was not reasonable in the circumstances, and therefore the Hilton was not exempted from compliance with the Act. The Commissioner adopted the reasoning in *Scott and Ors v Telstra* (1995) EOC 92-717, and ruled that as 10% of the Australian population have asthma and are affected by environmental smoke, the condition was unreasonable.

The defence of unjustifiable hardship was not made out, despite evidence of the financial cost of eliminating the problem, as these considerations did not outweigh the community interest in having the objects of the Act upheld.

Meeuwissen was awarded $2000 and Francey $500. ■

Simon McGregor is APLA's Policy Officer. Simon can be contacted via **email** smcgregor@apla.com