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.

With special thanks to Robin Stewart QC and to Jenny Steele and Nick Wikeley, University of Southampton. ■

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† 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. ■

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