Zabic v Alcan Gove Pty Ltd [2015] NTCA 2

PARTIES:	ZABIC, Zorko v ALCAN GOVE PTY LTD (ACN 000 453 663)
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 1 of 2015 (21438533)
DELIVERED:	27 March 2015
HEARING DATES:	13 February 2015
JUDGMENT OF:	RILEY CJ, SOUTHWOOD AND HILEY JJ
APPEALED FROM:	BARR J

CATCHWORDS:

TORTS – Negligence – workplace asbestos exposure – statutory bar after 1 January 1987 – when cause of action arose – damage – objective fact of damage – changes in mesothelial cells following inhalation of asbestos fibres – subsequent development of malignant mesothelioma – use of hindsight to determine that compensable damage existed – *Workers Compensation Act 1986* (NT) s 52, s 189

Workers Rehabilitation and Compensation Act 1986 (NT) s 3(1), s 52, s 189.

Martindale v Burrows [1997] 1 Qd R 243, *Wilson v Rigg* [2002] NSWCA 246; *Cartledge v E Jopling & Sons Ltd* [1963] AC 758, applied.

Orica Ltd and Anor v CGU Insurance Ltd (2003) 59 NSWLR 14; *Wardley Australia v Western Australia* (1992) 175 CLR 514, distinguished.

Gibson v Stevedoring Industry Finance Committee, Dust Diseases Tribunal 89 of 1996, 2 June 1998, unreported; *E M Baldwin & Son Pty Ltd v Plane* (1998) 17 NSWCCR 434; *Work Cover Authority (NSW) v Chubb Australia Ltd* (2000) 20 NSWCCR 614; *Pirelli v Oscar Faber and Partners* (1983) 2 AC 1; *Hawkins v Clayton* (1988) 164 CLR 539; *Gillespie v Elliott* [1987] 2 Qd R 509; *Cheney & Wilson v Duncan* [2001] NSWCA 197; *Read v Brown* (1888) 22 QBD 128; *Do Carmo v Ford Excavations Proprietary Ltd* (1983 – 1984) 154 CLR 234; *Cigna Insurance Asia Pacific Ltd v Packer* (2000) 23 WAR 159, referred.

REPRESENTATION:

Counsel:

Appellant:	G Little SC and N Connolly
Respondent:	M A Crawley

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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Zabic v Alcan Gove Pty Ltd [2015] NTCA 2
No. AP 1 of 2015 (21438533)

BETWEEN:

ZORKO ZABIC
Appellant

AND:

ALCAN GOVE PTY LTD
(ACN 000 453 663)
Respondent

CORAM: RILEY CJ, SOUTHWOOD AND HILEY JJ

REASONS FOR JUDGMENT

(Delivered 27 March 2015)

THE COURT:

Introduction

[1] The appellant is a 74-year-old man who is dying of malignant mesothelioma. He claimed damages against his former employer, the respondent. While liability was in dispute, the quantum of damage was agreed between the parties. The trial Judge concluded that the malignant mesothelioma was caused by the negligence of the defendant but dismissed the claim on the basis that it was statute barred.

[2] The issue in this appeal is whether the appellant's cause of action arose before 1 January 1987 when the *Workers Rehabilitation and Compensation*

Act 1986 (NT) (the Act) commenced. More specifically, did the appellant's cause of action arise when the malignant transformation stage commenced which is likely to have been sometime in or after 2009, or did it arise prior to 1987 when the changes in his mesothelial cells started following his exposure to the asbestos dust and fibres?

[3] The issue arises because s 189 of the Act bars the appellant's cause of action for negligence against the respondent if his cause of action arose after 1 January 1987 when the Act commenced. The trial Judge found that s 189 of the Act was a bar to the appellant's cause of action for negligence.

[4] In our opinion the cause of action arose when the changes to his mesothelial cells commenced which was prior to 1 January 1987. On 13 March 2015 we allowed the appeal and stated that our reasons would be published later.

Relevant legislation

[5] Section 52 of the Act provides, relevantly, as follows:

> (1) Subject to section 189, no action for damages in favour of a worker or a dependant of a worker shall lie against:
>
> (a) the employer of the worker;
>
> (b) …; or
>
> (c) …,
>
> in respect of:
>
> (d) an injury to the worker; or
>
> (e) the death of the worker:

(i) as a result of; or

(ii) materially contributed to by,

an injury.

(1A) …

(2) The purpose of subsection (1) is to ensure that, so far as the legislative power of the Legislative Assembly permits, no action for damages at common law shall lie in the Territory or otherwise in the circumstances described in that subsection and nothing in this Act shall be construed as derogating from that purpose.

[6] The definition of "injury" is contained in s 3(1) of the Act. Subject to the requirement that it must arise out of or in the course of a worker's employment, "injury" includes a disease and the aggravation of a pre-existing disease. The word "disease" is defined to include a physical ailment, element, disorder, defect or morbid condition whether of sudden or gradual development.

[7] Section 189(1), to which s 52 is expressly subject, provides:

(1) Where a cause of action in respect of an injury to or death of a person arising out of or in the course of his or her employment arose before the commencement of this section, a claim or action (including a claim or action at common law) in respect of that injury or death may be made, commenced or continued after the commencement of this section as if this Act had never commenced and for that purpose the repealed Act shall be deemed to continue in force.

The appellant's work environment

[8] The appellant was born in Bosnia on 13 March 1940. He arrived in Sydney in June 1970 and subsequently worked in New South Wales before moving to the Northern Territory to work for Nabalco (as the respondent was then known) at its alumina refinery near Nhulunbuy, on the Gove Peninsula.

[9] The appellant was employed as a manual labourer at the respondent's refinery from 1974 until the end of 1977. The appellant regularly carried out running repairs and maintenance of the network of pipelines at the refinery. Asbestos lagging was used extensively to insulate the pipes. The appellant, as a member of the yard gang, would attend and remove the asbestos lagging to expose the pipe, to enable qualified tradesmen to then repair or renew the pipe.

[10] The appellant removed asbestos lagging from pipes on hundreds of occasions during the period 1974 to 1977.

Breach of Duty of Care

[11] The trial Judge was satisfied on the balance of probabilities that asbestos in the workplace posed a significant risk to the health and safety of the appellant. His Honour was also satisfied that there were reasonably practicable safeguards which the respondent could have put in place at the refinery to protect the appellant and thereby obviate or eliminate the risk of injury.

[12] The trial Judge was satisfied that the respondent's failures in this regard breached its duty of care to the appellant. His Honour was satisfied that the appellant's malignant mesothelioma was caused by the respondent's breach of its duty of care.

Damage - The medical evidence

[13] The evidence of the appellant was that he began to experience chest pains in January 2014. Professor Roger Allen, a thoracic physician, noted that the appellant developed right-sided chest pain in January 2014. It is also possible that the appellant first became unwell in November 2013, when Dr Robert Edwards, a thoracic specialist, noted that the appellant had developed pain on the right side of his chest and became breathless.

[14] The parties agreed that malignant mesothelioma probably commenced within one to two years before, and almost certainly within five years before, the onset of symptoms. Professor Allen provided expert evidence in the appellant's case. He explained that, based on epidemiological studies, there is a well-accepted minimum latency period of approximately 10 years from the time of exposure to asbestos to the subsequent development of malignant mesothelioma. Professor Allen also wrote that, although the shortest latency is around 10 years, many patients develop mesothelioma many decades later, evidenced by the higher incidence of this condition in elderly patients.

[15] Professor Allen's evidence about the process whereby exposure to asbestos ultimately leads to the development of malignant mesothelioma was:

> As with many cancers, the carcinogen (here asbestos) has an adverse impact on the cellular makeup of the tissues exposed to the carcinogen, and this sets off cellular and nuclear changes in the genes of the tissue, which lie dormant for some years until a trigger (often unknown), which leads to the subsequent development of malignant tumour, i.e. a domino effect. …
>
> It is an accepted fact that there are oncogenes in cells, with the genetic material influenced by processes such as methylation and acetylation, leading to the development of abnormal "switches" in the tissue which regulates cell replication and if aberrant and abnormal will predispose them to unrestrained cell growth with no internal checks and balances, i.e. a malignant tumour. It is thought that asbestos fibres which are hydrated silicates of aluminium and magnesium generate oxygen free radicals which... are known to have an adverse impact on the genetic makeup of susceptible cells, namely mesothelial cells, and hence lead to the subsequent development of malignant mesothelioma. …
>
> On the assumption that his exposure to asbestos commenced in 1974 and continued to 1977, during that period the asbestos fibres in his lungs set in train genetic abnormalities [in the mesothelial cells] which lay dormant well prior to 1987, and which led to the subsequent development of mesothelioma. …
>
> Our knowledge of the cytogenetics of carcinogenesis, including of oncogenes, is not sophisticated or precise enough to point to a particular event which occurs in one particular cell, on one particular day, to give rise to a malignancy.

[16] Dr Edwards provided expert evidence in the respondent's case which also included an explanation of the process whereby exposure to asbestos ultimately leads to the development of malignant mesothelioma. His evidence was:

> Mr Zabic had a history of exposure to asbestos whilst working at Alcan between 1974 and 1977. He has now developed a malignant mesothelioma.

> It is not possible to state the exact time that the mesothelioma would have developed. … it is known that the changes in the mesothelial cells commence very soon after the exposure to asbestos. However, it takes at least 10 years and probably 20 years before the cells are likely to become malignant. There is no upper [outer] limit as to time when mesothelioma may develop.
>
> Mr Zabic has a latency period of between 37 and 40 years for the development of the malignant mesothelioma. This is entirely in keeping with the known mechanism for malignant mesothelioma to develop.
>
> The asbestos fibres are inhaled and work their way to the periphery of the lung and eventually work their way through the visceral pleura and eventually onto the parietal pleura. They then start to cause changes within the mitochondria and other elements of the mesothelioma [mesothelial] cells. This mechanism takes many years to develop into a malignant cell.
>
> There is no upper limit beyond which mesothelioma may not develop after exposure to asbestos fibres. It is generally accepted that at least a latency period of 10 years is required before mesothelioma is likely to develop. The majority of mesotheliomas that have been diagnosed have between a 20 and 30+ year latency period. Therefore the initial commencement of mesothelioma is probably somewhere between [19]74 and [19]77 when the first changes of the asbestos fibres interacting with the mesothelial cells would have occurred.

[17] The reference to the "latency period of between 37 and 40 years" is to the time from exposure in the period 1974 to 1977, to 2014, when symptoms of malignant mesothelioma became apparent.

[18] The trial Judge found that although Dr Edwards stated that "the initial commencement of mesothelioma" probably occurred between 1974 and 1977, he was describing the stage when changes in the mesothelial cells commenced, and not the malignant transformation stage, because, on his

evidence, there is a substantial latency period of 10 to 20 years before the mesothelial cells become malignant.

[19] His Honour also found that the opinions of Dr Edwards and Professor Allen were largely consistent. Dr Edwards' opinion that the changes in the appellant's mesothelial cells would have commenced very soon after his exposure to asbestos is consistent with the opinion of Professor Allen that the appellant's exposure to asbestos caused genetic abnormalities well prior to 1987, albeit abnormalities which lay dormant.

[20] On the whole of the medical evidence it is apparent that the appellant's exposure to asbestos caused changes in his mesothelial cells well prior to 1987 and those changes were the start of a process that resulted in the appellant suffering from malignant mesothelioma. Whilst some people who experience changes in their mesothelial cells following exposure to asbestos do not develop malignant mesothelioma, the appellant was not so fortunate.

When did the appellant suffer damage?

[21] As damage is an essential element in the appellant's cause of action in negligence, a crucial issue is whether the appellant suffered compensable damage:

(a) when the asbestos fibres caused changes in his mesothelial cells; or

(b) when he developed malignant mesothelioma?

Trial Judge's conclusions

[22] The trial Judge referred to the decision of Derrington J in *Martindale v Burrows,*[1] a matter involving circumstances very similar to those in the present case. In that case, Derrington J held that the damage constituting the plaintiff's cause of action occurred when the asbestos particles he ingested began to cause changes in his lungs, which occurred before the long latency period and well before the ultimate development of mesothelioma.

[23] Derrington J said:[2]

> The common law rule that a cause of action accrues only when the wrongful act causes injury beyond what can be regarded as negligible remains intact. The harm caused when the asbestos particles have produced a change significant in contributing to the final result is sufficient for this purpose.
>
> While vulnerability to injury or the potential for harm does not itself amount to an injury (*Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 527) that is different from the position where a morbid condition is initiated, leading naturally to more serious developments at a later stage. It is not a matter of potentiality in such a case simply because in other cases such a consequence might not follow. In Wardley, no harm whatever was done at the earliest stage and it was only when another event in the form of a trigger occurred that any harm followed.
>
> …
>
> It does not follow that if it is established that the condition has developed into mesothelioma, there will have been no relevant injury until the commencement of that development. The appearance of that condition establishes that the earlier morbid changes were indeed so serious as to be productive of mesothelioma at the later stage and

[1] [1997] 1 Qd R 243.
[2] Ibid 246.

> were not merely potentially so. This means that the early changes did cause harm substantial enough to amount to injury at law.

His Honour continued:[3]

> Although it is true that the initial "pathological change at the molecular level" without further pathological changes during the long latent period before the development of the mesothelioma was the only effect of such exposure at that stage, however that molecular change can be regarded as significant damage in the eyes of the law when it is established on the evidence that it led to the consequential development of mesothelioma. The substantial nature of such a change is not reduced by the postponement of grave harm flowing from it nor by its imperceptibility at the time, when in fact that state is demonstrable in the light of subsequent events.

[24] However, the trial Judge determined that he was bound to follow the decision of the New South Wales Court of Appeal in *Orica Ltd and Anor v CGU Insurance Ltd*[4] rather than the decision of Derrington J in *Martindale v Burrows*. His Honour considered that the medical evidence and other facts of the present case were essentially the same as in *Orica*, their Honours had each concluded that the employee had not suffered damage compensable at common law until such time as he suffered the onset of mesothelioma, and until that time the tort was not complete.

[25] The focus in *Orica* was the proper interpretation of an insurance policy and the meaning of the words "liable" and "liability" in the policy. The employer had settled a claim for damages by a worker, who had contracted mesothelioma, and the employer had made a third party claim for indemnity against its insurer. The issue was whether the insurer was bound to

[3] Ibid 248.
[4] (2003) 59 NSWLR 14 (*Orica*).

indemnify the employer under the terms of the relevant insurance policy. The majority of the Court of Appeal of New South Wales held that the insurer was only bound to indemnify the employer if the worker's cause of action in negligence against the employer accrued during the particular 12 month term of the policy of insurance. This depended on whether the injury constituted by the initial penetration of the lungs by asbestos fibres within that 12 month term was sufficiently material to constitute damage in a cause of action for negligence.

[26] Spigelman CJ observed that there is authority for the proposition that injury occurs upon inhalation of fibres. His Honour noted that some older authorities suggested that the injury constituted by the initial penetration of the lungs by asbestos fibres was not "sufficiently material to constitute damage for the purposes of determining whether a cause of action in negligence is complete."[5] However his Honour went on to note that this issue did not need to be decided. Rather, what needed to be determined was whether, at the time of the inhalation of fibres and within the period of the policy, the employer was "liable to pay an amount in respect of his liability" at common law "for that injury" as required by the policy.[6] His Honour expressed the view, at [32]:

> The "injury" occasioned at the time of penetration of the lung *by a fibre*, if it be an injury within the meaning of the policy at all, which I doubt, is so negligible in and of itself, as distinct from its potential,

[5] Ibid [25].
[6] Ibid [28].

> that it does not constitute damage that is compensable at common law. (emphasis added)

[27] The trial Judge also referred to parts of the judgments of Mason P and Santow JA, both of whom agreed that the inhalation of asbestos fibres and penetration of the lung did not constitute damage sufficient for the purposes of a cause of action in tort. Mason P observed that the liability "remained inchoate, in the eyes of the tort law, because damage is the gist of the relevant cause or causes of action."[7] Santow JA dissented in the result holding that the insurance policy did apply because, in his view, the policy also covered a potential liability.

[28] Santow JA referred to a number of authorities where judges had explained the causal links between the initial inhalation of asbestos fibres followed by pathological changes and ultimately observable symptoms. These authorities included a decision of Judge Curtis in *Gibson v Stevedoring Industry Finance Committee*,[8] a decision of the New South Wales Court of Appeal in *E M Baldwin & Son Pty Ltd v Plane*[9] and the passages referred to above from the decision of Derrington J in *Martindale v Burrows*.[10]

[29] In *Gibson* Judge Curtis observed:[11]

> It is true that had the plaintiff brought his action on the day preceding the relevant date he may have failed for want of proof that his asbestos exposure had caused him damage. Symptoms did not

[7] Ibid [72].
[8] Dust Diseases Tribunal 89 of 1996, 2 June 1998, unreported (*Gibson*).
[9] (1998) 17 NSWCCR 434 (*Baldwin*).
[10] [1997] 1 Qd R 243, 246 and 248.
[11] Quoted in *Orica* at [132] (Santow JA).

> occur until 1994. At that time the flaw in the plaintiff's action would have been want of evidence that his exposure had caused him more than the possibility of loss. (See *Wardley Australia v State of Western Australia* (1992) 175 CLR 514) We do know, however, in retrospect, that the plaintiff's inhalation of asbestos fibre had caused in him pathological changes, present at the relevant date, that would inevitably and inexorably lead to the symptoms from which he now suffers. Had this evidence been available to him in 1978 he would be, albeit symptom-free, entitled to damages no less than a person negligently subjected to the HIV virus who will inevitably contract AIDS. The argument of SIFC addresses not the perfection of the tort but the availability of evidence of such perfection at the relevant date.

[30] Santow JA referred to observations by Fitzgerald AJA in *Baldwin* regarding medical evidence given in that case concerning the process of development of mesothelioma. This included the opinion that "the inhalation of asbestos fibre produces genetic mutations and eventually invasive clonal growth which results in mesothelioma."[12]

[31] Santow JA said that the process described in *Baldwin* "generally accords with the lucid description of the imperceptible but inexorable progress of the disease, given by Derrington J in *Martindale v Burrows* (at 244 - 246)."[13]

[32] In the present proceedings the trial Judge referred to and applied the observations of Santow JA which, in turn, referred to a statement by Stein JA in an earlier New South Wales Court of Appeal decision of *Work Cover Authority (NSW) v Chubb Australia Ltd*[14] to the effect that "the tort

[12] Quoting *Baldwin* at [90].
[13] (2003) 59 NSWLR 14 at [146].
[14] (2000) 20 NSWCCR 614 (*Chubb*).

was not complete until the occupational disease of mesothelioma was diagnosed."[15]

[33] The trial Judge repeated the following observations of Santow JA:[16]

> In the present case, had the employee in 1961 sought to bring proceedings for his increased risk of contracting mesothelioma, it is clear he could not have succeeded then. But that is only for want of proof, available only in hindsight, that his ingestion of asbestos fibres had caused him damage.

[34] Santow JA then referred to authorities to the effect that one cannot sue for the risk of contracting mesothelioma, where there is no physical change or established harm.[17]

[35] In our opinion it is not correct to say that in every case there can be no cause of action until mesothelioma has been diagnosed. The question can only be resolved by reference to the evidence in the particular case. While damage must be measurable or beyond what can be regarded as negligible the issue of whether and when damage is suffered is a matter of fact.[18]

[36] In the present case the trial Judge considered each of the particulars of ongoing damage claimed in the Statement of Claim, and observed that the appellant was not suffering from any of those problems prior to or as at 1 January 1987. However his Honour did not consider whether the changes

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[15] Ibid [33].
[16] *Orica* (2003) 59 NSWLR 14 at [149].
[17] Ibid [149] – [150].
[18] *Wilson v Rigg* [2002] NSWCA 246 at [23] (Giles JA, with whom Santow JA and Foster AJA agreed at [60] and [61]).

in the appellant's mesothelial cells following his inhalation of the asbestos fibres constituted damage.

Respondent's contentions

[37] The focus of the respondent's submissions, and of the decision in *Orica*, is the principle that a cause of action in tort does not arise until damage occurs, and that the damage must be material as distinct from minimal.

[38] This raises a number of questions, including:

(a) what is meant by material as distinct from minimal damage; and

(b) whether it is sufficient that the damage actually existed when the cause of action arose or whether it must be capable of proof at that time?

[39] The respondent referred to two well-known passages from the speech of Lord Pearce in *Cartledge v E Jopling & Sons Ltd.*[19] In that case the plaintiffs each contracted pneumoconiosis after inhaling noxious dust over a period of years. This resulted in them sustaining damage to their lungs without their knowledge. It was held that damage occurred when the ingested material began to cause any serious pathological change, even though it might have not been medically detectable nor productive of symptoms. Notwithstanding their lack of knowledge, the plaintiffs' actions were statute barred because they had arisen earlier than the 6 year limitation period.

[19] 1963] AC 758 (*Cartledge*). Their Lordships agreed with the reasons of Pearce LJ at 772 (Reid LJ), 773 (Evershed LJ) and 775 (Morris LJ).

[40] His Lordship said:[20]

> It is a question of fact in each case whether a man has suffered material damage by any physical changes in his body. Evidence that those changes are not felt by him and may never be felt tells in favour of the damage coming within the principle of de minimus non curat lex. On the other hand, evidence that in unusual exertion or at the onslaught of disease he may suffer from this hidden impairment tells in favour of the damage being substantial. There is no legal principle that lack of knowledge in the plaintiff must reduce the damage to nothing or make it minimal.

[41] And, further:[21]

> The cause of action accrued when it reached a stage, whether known or unknown, at which a judge could properly give damages for the harm that had been done.

Proof of damage

[42] It is well established that a cause of action may arise before damage is known or ascertainable.[22] Further damage may occur notwithstanding that the cause of action is already complete.[23]

[43] The respondent relied upon the passage in *Cartledge* at 781 as authority for the proposition that a cause of action only arises when a plaintiff could successfully claim damages. However, Lord Pearce immediately went on to note that the point of damage had been reached in that case prior to October 1950, when the plaintiffs' lungs were first damaged by pneumoconiosis

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[20] Ibid 779.
[21] Ibid 781.
[22] See for example *Wardley Australia v Western Australia* (1992) 175 CLR 514, 555 (Toohey J) citing *Cartledge* [1963] AC 758; *Pirelli v Oscar Faber and Partners* (1983) 2 AC 1; *Hawkins v Clayton* (1988) 164 CLR 539; and *Gillespie v Elliott* [1987] 2 Qd R 509.
[23] *Wilson v Rigg* [2002] NSWCA 246 at [21] (Giles JA) citing *Hawkins v Clayton* (1988) 164 CLR 539 at 556-7, 559 and 587 and *Cheney & Wilson v Duncan* [2001] NSWCA 197 at [26].

which they each contracted after inhaling noxious dust over a period of years. This was so even though the disease and damage were unknown to the plaintiffs at that time, the damage could not have been detected by X-ray prior to October 1950, and the damage could not have been proven at that time.

[44] This conclusion is consistent with the distinction to be drawn between fact of damage and proof of damage when defining a cause of action. In *Read v Brown*,[24] Lord Esher MR stated (Pollock B agreeing), that a cause of action comprises:

> …every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.

[45] This passage was referred to with approval by Wilson J in *Do Carmo v Ford Excavations Proprietary Ltd*.[25]

[46] Determining whether a cause of action has arisen involves an assessment of objective fact, rather than an assessment of the subjective capacity of a plaintiff to muster proof.

[47] It follows that hindsight is permitted in determining when a cause of action accrues. The aim is to ascertain when relevant facts, namely the presence of compensable damage, objectively came into existence. A Court should not

[24] (1888) 22 QBD 128, 131.
[25] (1983 – 1984) 154 CLR 234, 245. See also *Cigna Insurance Asia Pacific Ltd v Packer* (2000) 23 WAR 159 at [31] (Malcolm CJ).

be limited to ascertaining whether relevant facts were provable or discoverable at a particular time. For example, the outcome in *Carteldge* would not have been possible without the Court using contemporary medical evidence to infer when undetectable damage first occurred in the past. Hindsight is frequently employed when one is endeavouring to ascertain the cause or causes of an injury or damage which does not become manifest until some later time.[26]

[48] In the present case we consider that hindsight can be used to establish that there was compensable damage, namely changes to the mesothelial cells, prior to 1987. The toxic carcinogen amphibole asbestos had lodged in the appellant's lungs and caused genetic change leading to aberrant and abnormal cell growth which culminated many years later into malignant mesothelioma. The cause of action arose when the non-negligible damage was first suffered. The subsequent mesothelioma is part of the damage arising in the accrued cause of action.

[49] That damage was no less real, significant and compensable than it would have been had there been medical investigative technologies available at the time that could have identified the damage.

Was the damage to the plaintiff material or minimal prior to 1987?

[50] The policy underlying the principle stated by Lord Pearce in *Cartledge* at 779, is that the law should not entertain claims for damages where the

[26] See for example *Orica* at [72] (Mason P) and at [141], [149] & [154] (Santow JA) and the passage from *Gibson* quoted at [29] above.

physical effects of the injury are no more than negligible. Otherwise, costly litigation could be commenced which is out of proportion to the damage in issue.[27]

[51] Injury or damage can be material although it is unknown or symptomless. This is clear from decisions including *Cartledge*, where the House of Lords held that in cases of latent dust injury damage would occur upon the 'secret onset' of the disease.[28] Their Lordships held it would be wrong to deny a right of action to a plaintiff who can prove his lungs are damaged but cannot prove any symptoms or present physical inconvenience.[29] Lord Pearce considered that the 'secret onset' of a disease occurs when there is 'material damage by any physical changes in the body.'[30]

[52] The respondent relied on his Lordship's observation that evidence that those changes were not and would not be felt by a plaintiff told against their constituting damage.[31] However, his Lordship went on to say that evidence that a plaintiff would suffer upon the onslaught of the disease told in favour of the damage being substantial.[32] It is a question of fact in each case and "in borderline cases it is a question of degree."[33]

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[27] *Rothwell v Chemical & Insulating Co Ltd* [2008] 1 AC 281, 299-300 (Hope LJ).
[28] *Cartledge*, 778 (Pearce LJ).
[29] Ibid.
[30] Ibid 779.
[31] Ibid.
[32] Ibid.
[33] Ibid.

[53] In *Favelle Mort Ltd v Murray*[34] it was held that the entry into the body of a virus which resulted in a morbid physical condition did constitute an injury for the purposes of workers compensation legislation.[35] This decision has been applied in support of the conclusion that the inhalation of asbestos fibres resulting in mesothelioma constitutes an "injury" for the purposes of a sickness and accident insurance policy,[36] and also in relation to workers compensation policies in Western Australia,[37] and in New South Wales.[38]

[54] In *Orica* the Court was not called upon to consider whether changes in the mesothelial cells subsequent to the year during which the initial injury occurred could constitute compensable damage. Whilst the main focus of the decision was the injury "occasioned at the time of penetration of the lung by a fibre",[39] and to a lesser extent the onset of mesothelioma, the Court did not consider the relevance and effect of the intermediate stage of the development of mesothelioma which arises when changes in the mesothelial cells had occurred as in the present case.

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[34] *Favelle Mort Ltd v Murray* (1975 – 1976) 133 CLR 580.
[35] This decision has been applied in other cases, including *Connair Pty Ltd v Frederiksen* (1979) 142 CLR 485 (an infection due to the entry into the body of bacteria or a virus) and *Ansett Transport Industries (Operations) Pty Ltd v Srdic* (1982) 42 ACTR 45 (a disease caused by the entry of toxic bacteria into the bloodstream).
[36] *American Home Assurance v Saunders* (1987) 11 NSWLR 363.
[37] *GRE Insurance Ltd v Bristile Ltd* (1991) 5 WAR 440.
[38] *Orica* at [24] – [28] (Spigelman CJ), at [63] (Mason P) and at [136] – [141] (Santow JA).
[39] (2003) 59 NSWLR 14 at [32] (Spigelman CJ).

[55] We consider that the views expressed by Derrington J in *Martindale v Burrows*, particularly the following passage, are directly applicable to this matter:[40]

> The appearance of that condition establishes that the earlier morbid changes were indeed so serious as to be productive of mesothelioma at the later stage and were not merely potentially so. This means that the early changes did cause harm substantial enough to amount to injury at law.

[56] On the medical evidence in the present matter, it is clear that the changes to the appellant's mesothelial cells had a causative relationship to his subsequent symptoms and suffering of malignant mesothelioma. Hindsight and the evidence of the two medical experts establish that the changes to the mesothelioma cells constituted compensable damage because those changes constituted a significant contributing factor to the final result. They did not merely constitute potential harm. Those changes constituted damage that was material and not minimal.

Was the harm prior to 1987 contingent or prospective?

[57] The respondent contended that the appellant's damage prior to 1987 was prospective and contingent, and therefore not compensable. The respondent referred to *Wardley Australia Ltd v Western Australia*,[41] where the High Court held that damage had not been suffered at the time of the defendant's negligent misrepresentation because a future event had yet to occur before any damage would result.

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[40] [1997] 1 Qd R 243, 246.
[41] (1992) 175 CLR 514.

[58] This was not the case here. Although the medical evidence was to the effect that a person with abnormalities in the mesothelial cells may or may not acquire malignant mesothelioma, the appellant's condition was such that the cells would so develop. That conclusion is now established, albeit with the benefit of hindsight.

Conclusions

[59] We consider that the appellant sustained an injury of the kind defined in the Act during and following his inhalation of asbestos fibres.

[60] More relevantly, we consider that the appellant sustained compensable damage at the time when such inhalation caused changes in his mesothelial cells. According to the medical evidence these changes began to occur very soon after the appellant's exposure to asbestos, and prior to 1987.

[61] Even though such changes were not symptomatic, and even if such changes may not have been discoverable by medical investigation methods available then, or even now, the subsequent development of the appellant's malignant mesothelioma establishes that the damage to the appellant's mesothelial cells, prior to 1987, was material damage, and thus compensable. That damage inevitably and inexorably led to the onset of malignant mesothelioma.

[62] The fact that the damage which he had prior to 1987 has become worse and symptomatic does not gainsay the conclusion that he did in fact have compensable damage, and thus a cause of action, prior to 1987.

[63] Accordingly we allowed the appeal.
