Dust Diseases Tribunal of New South Wales Decisions

(Re ⇦ Mowbray ⇨) Brambles Holdings Ltd v British American ⇦ Tobacco ⇨ Australia Services Ltd (No 6) [2006] NSWDDT 7 (31 March 2006)

Last Updated: 8 September 2006

NEW SOUTH WALES DUST DISEASES TRIBUNAL

CITATION: (Re ⇦ **Mowbray** ⇨) Brambles Holdings Ltd v British American ⇦ **Tobacco** ⇨ Australia Services Ltd (No 6) [2006] NSWDDT 7

PARTIES:
Brambles Holdings Ltd
British American ⇦ **Tobacco** ⇨ Australia Services Ltd

CASE NUMBER: 176/01/1 of 2006

CATCH WORDS: Dust Diseases Tribunal

LEGISLATION CITED:
s25B Dust Diseases Tribunal Act 1989
s5(1)(c) Law Reform (Miscellaneous Provisions) Act 1946

CORAM: Curtis J

DATES OF HEARING: 24 March 2006

DECISION DATE: 31/03/2006

LEGAL REPRESENTATIVES

Mr GM Watson SC and Mr C Mantziaris instructed by Corrs Chambers Westgarth appeared for British American **Tobacco** Australia Services Limited, Applicant on the Motion

Mr G J Parker instructed by Ebsworth and Ebsworth appeared for Brambles Holdings Ltd, Respondent to the Motion

JUDGMENT:

Diseases Tribunal of New South Wales

Matter Number DDT176 of 2001

(Re: Mowbray)

Brambles Holdings Ltd

(Cross Claimant)

v

British American Tobacco Australia Services Ltd

(Cross Defendant)

31 March 2006

CURTIS J
RULING (No 6)

Introduction

1. Between 1964 and 1982 the late Alan **Mowbray** was employed by Brambles Holdings Ltd (Brambles) as a motor mechanic, servicing the brake pads of Brambles' motor vehicles. He contracted lung cancer in 2001 and died on 23 January 2002. Brambles was sued in negligence by Mr **Mowbray**'s wife as personal legal representative of his estate, who asserted that her husband's death was caused by asbestos fibres from the brake pads inhaled by Mr **Mowbray** in the course of his employment. On 27 February 2002 Brambles consented to the entry of judgment in favour of the plaintiff in the sum of $200,000.

2. Brambles having paid the judgment moneys to Mrs **Mowbray** now claim from British American **Tobacco** Australia Services Ltd (BATAS), contribution to the judgment and/or compensation pursuant to either **s5(1)(c)** of the **Law Reform (Miscellaneous Provisions) Act 1946** or **s75AE** of the **Trade Practices Act 1974**.

3. On 30 March 2005 I ordered that the judgment in favour of the plaintiff against Brambles be set aside. In consequence, Brambles must prove in these proceedings that had Mr **Mowbray**'s matter proceeded to trial, Brambles would have been held liable to him because as Mr **Mowbray**'s employer it unreasonably failed between 1964 and 1982 to protect him from the foreseeable dangers of asbestos inhalation.

4. I am informed by Mr G Parker for Brambles that, in discharge of its onus, Brambles wishes to establish that at relevant times there was a body of knowledge possessed by practitioners in the field of industrial health to the effect that persons employed to service brake pads containing asbestos were exposed to a foreseeable risk of contracting an asbestos-related disease. It will independently seek to prove that a reasonable employer in the position of Brambles, a transport company, should have sought advice from an expert in the field and, had it done so, it would have learned that the particular tasks upon which Mr **Mowbray** was employed were attendant with such risks to his health.

5. To establish the first proposition, Brambles relies upon a notice served pursuant to the provisions of **s25B** of the **Dust Diseases Tribunal Act 1989** in which extracts from judgments in previous decisions of the Tribunal and of the Court of Appeal are reproduced and said to be determinations upon issues of a general nature.

6. S25B is in these terms:

25B General issues already determined

(1) Issues of a general nature determined in proceedings before the Tribunal (including proceedings on an appeal from the Tribunal) may not be relitigated or reargued in other proceedings before the Tribunal without the leave of the Tribunal, whether or not the proceedings are between the same parties.

(1A) If an issue of a general nature already determined in proceedings before the Tribunal (the "earlier proceedings") is the subject of other proceedings before the Tribunal (the "later proceedings") and that issue is determined in the later proceedings on the basis of the determination of the issue in the earlier proceedings, the judgment of the Tribunal in the later proceedings must identify the issue and must identify that it is an issue of a general nature determined as referred to in this section.

(2) In deciding whether to grant leave for the purposes of subsection (1), the Tribunal is to have regard to:

(a) the availability of new evidence (whether or not previously available), and

(b) the manner in which the other proceedings referred to in that subsection were conducted, and

(c) such other matters as the Tribunal considers to be relevant.

(3) The rules may provide that subsection (1) does not apply in specified kinds of proceedings or in specified circumstances or (without limitation) in relation to specified kinds of issues.

(4) This section does not affect any other law relating to matters of which judicial notice can be taken or about which proof is not required.

The relief sought

7. BATAS moves the Tribunal for orders that Brambles may not rely upon the purported notice on the ground that no paragraph within the notice constitutes a determination upon an issue of a general nature within the meaning of **s25B**. In the alternative, BATAS seeks an order that it have leave to relitigate those determinations that I find comply with the statute.

8. The s25B Notice in the present case raises exclusively propositions relating to foreseeability. In *Tame v New South Wales* [2002] HCA 35; (2002) 211 CLR 317 (at 331 [12]) Gleeson CJ observed that *"foreseeability may be relevant to questions of the existence and scope of duty of care, breach of duty, or remoteness of damage."*

9. It is unnecessary to consider foreseeability in the context of duty in the present case. Brambles owed to Mr **Mowbray** the duty of an employer. In the light of current authority, foreseeability may not be decisively relevant to the scope of that duty. (See *Bankstown Foundry Pty Ltd v Braistina* [1986] HCA 20; (1985-1986) 160 CLR 301 and *Maclean v Tedman* (1985) 155 CLR 314). It is however highly relevant to the question of breach. The scope of Brambles' duty to Mr **Mowbray** as his employer extended only to protecting him from foreseeable risks of harm. If the risks attendant upon his work were not reasonably foreseeable by Brambles, then Brambles was not in breach of its duty if it failed to take any steps to obviate those risks.

10. Mr Watson SC for BATAS submits that determinations upon issues of foreseeability, even when limited to breach of duty, are always case specific and not general, because that which is to be decided in an instant case is whether in all the circumstances *of that particular case* the harm was foreseeable. Further, he says, **s25B** operates exclusively upon issues of fact and, because foreseeability is a question of mixed fact and law, a determination upon that subject can never be a determination upon an issue of a general nature. For reasons which will become apparent I am not so persuaded.

The Operation of s25B

11. Little authority exists as to the correct interpretation of the words "*Issues of a General Nature*". McIntyre AJ in *Rooney v Babcock Australia Pty Ltd* [2004] NSWDDT 53 found assistance in the second reading speech given by the Attorney-General in the Legislative Council on 29 October 1998 when the Attorney said:

An additional change will prevent the relitigation without leave of the Tribunal of issues of a general nature that have been determined in prior proceedings. Possible examples of such issues may be the carcinogenic nature of certain types of asbestos fibres or the availability of safety precautions at a particular time. At present, the same general applicable issues having been determined by exhaustive and costly examination of evidence in one set of proceedings may have to be heard and determined afresh in later cases. If issues fall into the proposed general category where relitigation will be restricted the Tribunal will have a discretion to grant leave for the reopening of such issues in appropriate cases.

12. McIntyre AJ was of the opinion that the determinations upon which the plaintiff relied in *Rooney* were determinations which related variously to contractual relations between the parties, control by one party of a subsidiary, training of particular employees, and supply of materials to, and work practices at, a particular site. In consequence he held that they were not determinations upon issues of a general nature because they were *"specific to the parties in the previous litigation and the particular issues of fact involved in that case."*

13. In *McDonald v State Rail Authority* [1998] NSWDDT 4; (1998) 16 NSW CCR 695 at 720 O'Meally P, after extensively canvassing a mass of contentious medical evidence held that:

The issue resolved in the plaintiff's favour specifically stated is: carcinoma of the lung may be attributed to asbestos exposure in the absence of asbestosis where the exposure was sufficient to have caused asbestosis.

His Honour clearly intended that this statement should constitute a determination of an issue of a general nature in order that the exhaustive and costly examination of evidence in that case should not be repeated in subsequent cases without leave of the Tribunal.

14. In *Judd v Amaca Pty Ltd* (2002-2003) 25 NSWCCR 488, after observing that the parties in *McDonald* had not correctly formulated the issue for determination by His Honour, I said at paragraph 55 that:

an appropriate formulation may be "in the absence of any causal circumstance peculiar to the plaintiff, carcinoma of the lung may be attributed to asbestos exposure in the absence of asbestosis when the exposure was sufficient to more than double the risk of contracting lung cancer in an individual". Such formulation admits of the possibility that in an individual case the lung cancer may be attributed to asbestos where the relative risk at large is less than two, but circumstances peculiar to the plaintiff permit a finding of causation.

15. In *Eaton v Carrier Air Conditioning Proprietary Limited* (unreported DDT 84 of 2003, 3 September 2004) O'Meally P summarised an extract from the judgment of Beazley JA in *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307 at 332C in these words:

At 1962 and through to the 1970s it was believed by those in the field of industrial health that end users of asbestos products, such as persons in the brakes servicing industry, could be at risk if exposed to dust containing asbestos fibre. During this period there was a substantial body of evidence available to those in the field of industrial health which raised explicit concerns about even low levels of asbestos exposure and it was foreseeable that there was a risk of harm to a person so exposed.

16. His Honour then held that this was a determination upon an issue of fact. This must be so because the defendants in that case, manufacturers of asbestos products, did not operate *in the field of industrial health.* A determination that those defendants ought themselves have foreseen the risks associated with low levels of asbestos exposure required a further step in the reasoning process. So much is apparent from the judgment of Ipp JA in the successful appeal by a co-defendant from His Honour's judgment in the primary proceedings (*McPherson's Ltd v Eaton* [2005] NSWCA 435).

17. While these cases illustrate the application of **s25B** they do not address in useful terms the appropriate test. The Shorter Oxford English Dictionary includes within the definitions of the word “general”: *"Not specifically limited in application; applicable to a whole class of objects, cases, or occasions.... True for a variety of cases..."*

18. To my mind that which is necessary to constitute a determination of an issue of a general nature is that the determination be necessary to resolve a contested issue of fact upon which a verdict may turn, that the issue is potentially relevant to the disposition of a whole class of cases, and that a factual presumption in accordance with that determination be sufficient to resolve the same issue if it is contested in the subsequent case in which the section is invoked.

19. If the issue is addressed in the judgment, and a conclusion reached, that conclusion stands as a determination for the purpose of **s25B** notwithstanding the fact that the party succeeding on that issue failed or succeeded on some other basis.

20. Although it is here unnecessary to decide, I can see no good reason to confine the nature of general issues to pure questions of fact. Determination of an issue of a general nature may involve conclusions upon questions of mixed fact and law. An example would be a determination that a defendant of an identifiable class (such as a distributor of asbestos products) owed a duty to a person to whom he caused injury (such as a tradesman) because such an injury to that class of plaintiff was foreseeable to a reasonably informed defendant of that class. If the determination were wrong in law, because policy questions intrude into conclusions as to duty, the remedy would lie in appeal on the question of law from the subsequent decision in which the provisions of **s25B** had been invoked. Such an appeal would proceed upon the factual basis established by the application of **s25B.**

Do the statements contained within the present s25B Notice comprise determinations upon issues of a general nature?

21. A **s25B** Notice should usefully not only identify the issue of a general nature determined in the earlier

case, but state how that issue arises in the current proceedings. Mere recitation of a passage from a judgment with no reference to the facts there in issue, nor succinct statement of the general issue there decided, is not helpful. In particular, judicial pronouncements to the effect that for many years asbestos has been recognised as dangerous do not assist in deciding in an instant case if the hazard there to be considered was reasonably foreseeable by the particular defendant. The defects in the present Notice were remedied by Mr Parker for Brambles in submissions, which have been recorded in paragraph 4 above.

22. I now address in turn each extract included in Brambles' s25B Notice.

1. Although, as at 1962 and through to the 1970s there was a degree of uncertainty in the literature about a number of aspects of the hazards of asbestos, its overall effect was that asbestos was dangerous and that chrysotile could not be excluded as a product which caused asbestos related diseases. It was believed that end users, such as persons in the brake servicing industry could be at risk if exposed to dust containing asbestos fibre, although there were also studies and investigations, such as those conducted by Dr Rathus, and later by Ms Sowden, which indicated that brake service workers were not at risk because the level of dust emitted was very low. However, given that during this period, when there was a substantial body of evidence which raised explicit concerns about even low levels of asbestos exposure, it was foreseeable that there was a risk of harm to a person so exposed.: Bendix Mintex Pty Limited & Ors. v. Barnes (1997) 42 NSWLR 307 @ 332C; See also: Eaton v. Carrier Air Conditioning Pty Limited (3 September, 2004) O'Meally P. [15].

23. This is the extract, a summary of which by O'Meally P in *Eaton* appears in par 15 supra. The plaintiff, Mr Barnes, contracted mesothelioma and alleged that this disease resulted from his work as the operator of a suburban service station removing and installing brake pads which contained asbestos. He sued the manufacturers of the brake pads, Bendix Mintex Pty Ltd and Jsekarb Pty Ltd. His claim was resisted upon the basis that Mr Barnes' exposure to asbestos dust, being light and intermittent, did not give rise to a foreseeable risk of contracting mesothelioma, and further that as a matter of fact that exposure did not cause his mesothelioma.

24. Although Mr Barnes succeeded on both issues at first instance he failed in the Court of Appeal upon the issue of causation. The members of the court were however unanimously of the opinion that he should succeed on the issue of foreseeability. The statement extracted appears in the judgment of Beazley JA whose reasoning was expressly adopted by Mason P on this issue.

25. That Beazley JA was speaking of information generally available rather than peculiarly to the parties is apparent from a later passage of her judgment in which, after observing that while Jsekarb had actual knowledge of the risk, Bendix-Mintex did not, Her Honour continued:

However, lack of knowledge is not sufficient to protect [Bendix-Mintex] from a finding that the risk of injury to Mr Barnes from exposure to asbestos was foreseeable. As I said, the literature and studies were generally available in the relevant area and were sufficient to establish that there was a foreseeable risk of injury of the kind suffered by Mr Barnes.

26. What was the issue here determined and is that an issue of a general nature? Mr Watson SC submits that the extract relied upon by Brambles amounts to no more than a determination that a manufacturer of asbestos brake pads ought reasonably have foreseen that persons working in the brake servicing industry could be at risk from asbestos fibre. Such a determination, he says, has no application outside the facts of the case and cannot be a determination upon a general issue. I do not agree.

27. The answers to the questions posed depend upon the degree of abstraction with which those questions are approached. In order to reach the conclusion that the manufacturers ought reasonably have foreseen

the risk to Mr Barnes, the court first addressed the more general question of what information was contained within "*the literature and studies...generally available in the relevant area".* That literature was extensively canvassed in the judgment before conclusions were reached that "*It was believed that end users, such as persons in the brake servicing industry could be at risk if exposed to dust containing asbestos fibre"* and *"there was a substantial body of evidence which raised explicit concerns about even low levels of asbestos exposure, it was foreseeable that there was a risk of harm to a person so exposed"*

28. Those conclusions constitute determinations upon issues of a general nature which were in dispute in the *Barnes* litigation and which are apparently in dispute in the present litigation. The further and consequential finding that the manufacturers of asbestos brake pads ought to have been aware of the information contained within the literature and studies is here irrelevant. The determinations do not themselves establish that Brambles, a transport company, knew or ought to have known of the risks. They establish only that a reasonable person informed by that literature would have been aware of the risks.

29. Consistently with the decision of O'Meally P in *Eaton,* I hold that this portion of the **s25B** Notice constitutes a determination upon an issue of a general nature.

30. *2. In summary therefore, the knowledge available in the field of industrial health at least by 1960 was that the inhalation of asbestos was dangerous. It had been known for many years that it could cause asbestosis and by 1960 that it could cause mesothelioma.: Bendix Mintex Pty Limited & Ors. v. Barnes (1997) 42 NSWLR 307 @ 331F; See also: Eaton v. Carrier Air Conditioning Pty Limited (3 September, 2004) O'Meally P. [6].*

I accept the submission by BATAS that the second sentence of this statement includes a factual error. The first sentence is of such generality as to be of no assistance. A factual presumption in accordance with such a determination is not sufficient to resolve any contested issue in this case. Brambles may not rely upon this determination.

31. *3. Connection between asbestos exposure and mesothelioma was suspected in 1931 but not firmly established until the article by Wagner and others in 1960 in the "British Journal of Industrial Medicine": Bendix Mintex Pty Limited & Ors. v. Barnes (1997) 42 NSWLR 307 @ 329G.*

I accept the submission by BATAS that this statement is factually incorrect. Brambles may not rely upon it.

32. *5.* (Paragraph 4 of the Notice repeats in error paragraph 2) *Asbestos has been a well known hazard in industry for at least sixty years: Bendix Mintex Pty Limited & Ors. v. Barnes (1997) 42 NSWLR 307 @ 29CD.*

Again a factual presumption in accordance with this determination is not sufficient to resolve any contested issue in this case. Brambles may not rely upon this determination.

33. *6. The Trial Judge held, that as no measurements had been taken of the dust concentration in the atmosphere of the factory, and as the evidence was equivocal as to whether the presence of visible dust in the atmosphere established a concentration excess of 5 million particles per cubic foot:*

'It is impossible, therefore to say with certainty whether the Plaintiff during the twelve months or so of his employment was exposed to concentrations which were greater or were less than five million particles per cubic foot, but it is clear that he was employed in an environment which, according to the standards of the day was unsafe. He was employed in a factory where precautions, which had been recommended over many years and recorded and repeated in the available literature, were not taken. He was employed in a factory in which principles of occupational hygiene which had been in existence

throughout this century were not observed.'

This finding was open on the evidence.: CSR Limited v. Wren (1998) 44 NSWLR @ 490 B-D. The Cross Claimant submits the passages at 471D-G make clear the precautions to which His Honour was referring were the reduction in the concentration of dust in the air and the length of exposure to dust and that such recommendations had been included in the Merewether & Price report of 1930 referred to at 472B.

This statement appears in the judgment of Beazley and Stein JJA in *CSR Ltd v Wren* (1997) 44 NSWLR 463 at 490. That case concerned a plaintiff employed in a managerial capacity within the office of a factory which manufactured asbestos products. It is difficult upon this extract to appreciate exactly what issue of a general nature was thereby determined and what factual presumption in accordance with the determination is to be called in aid in the present case. On the face of it I cannot see how the decision upon the facts in *Wren* can help resolve the issue of foreseeability as it arises between BATAS and Brambles in the present case. I rule that Brambles may not rely upon the statement extracted from the judgment in *Wren.*

34. *7. By 1950 it was known that asbestos was toxic, that it was dangerous, that it was carcinogenic and that it was capable of causing fibrosis leading to death. Precautions to reduce the dangers of exposure to asbestos, and the consequences of such exposure, were repeatedly made in literature published by each of the medical scientific and industrial communities before 1950. Wren v. CSR Limited [1997] NSWDDT 7; (1997) 15 NSWCCR 45 @ 57D-E.*

This is a further extract from the judgment in *Wren.* For the reasons advanced in the preceding paragraph I rule that Brambles may not rely upon this statement.

35. *8. Exhibit "W." contains a publication by Margaret Becklake entitled "Asbestos Related Diseases of the Lung and other Organs, their Epidemiology & Implications for Clinical Practice" and in that text, Miss Becklake sets out in diagrammatic form the representation of the growth of the asbestos industry and the recognition of the associated biologic effects. Accepting, as I do, that that fairly reflects the state of knowledge disclosed by other documents tendered pursuant to section 25, it would appear that by the time the Plaintiff entered the employ of the Defendant (1953) it was established that exposure to asbestos had a concomitant risk of development of asbestosis, that there was a probable relationship between the development of lung cancer and exposure to asbestos, and that there was, within the industry, a suspicion that mesothelioma may be a possible side effect.: Raif v. SG Sayer Pty Limited [1995] NSWDDT 6; (1996) 13 NSWCCR 393 @ 405A-C.*

Mr Raif, the plaintiff in that matter, was employed as an asbestos lagger by CSR Pty Ltd, a manufacturer of asbestos products. The statement extracted refers explicitly to the asbestos industry. Again I find it difficult to appreciate exactly what issue of a general nature was there determined which determination is sufficient to resolve any contested issue in the present case. Brambles may not rely upon this extract.

36. *9. In 1953 the state of knowledge was such that asbestos dust was perceived as being a dangerous material per se and in certain concentrations, that is, over five million particles per cubic foot of air, it was probably very dangerous: Raif v. SG Sayer Pty Limited [1995] NSWDDT 6; (1996) 13 NSWCCR 393 @ 405E.*

For reasons expressed in the preceding paragraph I rule that Brambles may not rely upon this extract.

37. *10. In the absence of any causal circumstance peculiar to the Plaintiff, carcinoma of the lung may be attributed to asbestos exposure in the absence of asbestosis when the exposure was sufficient to more than double the risk of contracting lung cancer in an individual: Judd v. Amaca Limited (No.2) 25*

NSWCCR 488 @ 502-503 [55].

This is an extract from one of my own judgments. Notwithstanding the doubt I expressed in paragraph 56 of that judgment that this passage would be amenable to the operation of **s25B**, I have changed my mind in the light of my present reflection. In any event BATAS does not oppose Brambles relying upon this extract and I rule that this statement constitutes a determination upon an issue of a general nature.

Leave to reargue the determinations in Barnes

38. BATAS submits that, if the s25B Notice in relation to the determination in *Barnes* be found to comply with the requirements of the section, it should have leave to relitigate that determination because it contains factual error. That error is said to be revealed in a report of Dr Julian Lee dated 19 March 2006 which has been tendered. Dr Lee does not address in his report the terms of the determination in *Barnes* and does not canvass the literature to which Beazley JA referred in the judgment. No opinion expressed by Dr Lee in his report is in terms incompatible with the determination. No material has been placed before me which suggests that Beazley JA incorrectly summarised the literature to which she refers or that some other material exists which would cast doubt upon her conclusions.

39. **S25B(2)** provides that in deciding whether to grant leave to a party to reargue an issue of a general nature, I am to have regard to the availability of new evidence, the manner in which the earlier proceedings were conducted, and such other matters as I consider relevant. BATAS offers no new evidence, and the trial and the appeal in *Barnes* were conducted upon a thorough examination of material relevant to the issue.

40. Mr Watson submits that **s25B**, unless carefully applied, has the potential to offend against the *Audi alteram partem* rule. I am conscious of the force of this submission, however BATAS has had every opportunity in this interlocutory proceeding to produce evidence which may cast doubt upon the conclusions reached by the trial judge and Beazley JA in *Barnes* as to the information contained within the literature and studies generally available in the relevant area.

41. Mr Watson further submits that one consideration relevant to leave is the recent debate in legal circles concerning the sustainability of the presently undemanding test of foreseeability, and the utility of providing a factual vehicle for the re-examination of that test in the High Court. Because the determination in *Barnes* relates, not directly to the contentious issue of foreseeability by Brambles, but to the state of knowledge existing within a particular community, I do not believe that this submission carries weight.

42. In *Tame v New South Wales* [2002] HCA 35; (2002) 211 CLR 317 McHugh J at 356-7[108] said:

Because reasonable foreseeability is a compound conception of fact and value, policy considerations affecting the defendant or persons in similar situations arguably enter into the determination of whether the defendant ought reasonably to have foreseen that his or her acts or omissions were "likely to injure your neighbour".

Foreseeability as a legal concept concerns risks which reasonably *should* have been identified by a particular observer. Questions of value and policy are relevant. Knowledge, in the same legal context, does no more than assist in the identification of those risks which a person informed by learning experience and expertise, *could* have recognised. Knowledge in this respect may be objectively determined and become the legitimate subject of a **s25B** Notice.

43. Leave to re-argue the determination in *Barnes* is refused.

44. I will hear the parties on costs.

Mr G M Watson SC and Mr C Mantziaris instructed by Corrs Chambers Westgarth appeared for British American **Tobacco** Australia Services Limited, Applicant on the Motion
Mr G J Parker instructed by Ebsworth and Ebsworth appeared for Brambles Holdings Ltd, Respondent to the Motion

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