IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D5 of 2015

ON APPEAL FROM THE
NORTHERN TERRITORY COURT
OF APPEAL

BETWEEN:

ALCAN GOVE PTY LTD
(ABN 000 453 663)
Appellant

and

ZORKO ZABIC
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1 These submissions are in a form suitable for publication on the internet.

Part II: Issues

2 The appellant seeks to persuade this Court that there is a distinction between the actionability of a negligence claim based on damage which was appreciated or appreciable before a limiting statute came into effect and a negligence claim based on damage which, although substantial, was neither appreciated nor appreciable before such limitation took effect. Such distinction is supported neither by principle nor the law. It discriminates against victims of long latency diseases on a purely arbitrary basis and produces uncertainty in relation to an acceptable as against unacceptable latency period. This arbitrary outcome has been avoided by the legislative bodies in various States and Territories abolishing or severely restricting limitation defences in the case of long latency dust diseases. The Northern Territory has enacted such legislation.

3 The issues in the appeal are:

(a) What is the test to be applied to determine whether the requirements of sec 189 of the *Return to Work Act* (NT) ("the Act") are satisfied?

Filed on behalf of the Respondent
Shine Lawyers
Level 6, 30 Makerston Street
BRISBANE QLD 4003

Date
Tel (07) 3006 6000
Fax (07) 3229 1999
Ref Roger Singh CO2:9336005

(b) Does a cause of action for a negligently inflicted mesothelioma arise at the time the asbestos fibre was inhaled, when non trivial damage is suffered whether identified or identifiable at that time, or when the disease becomes apparent?

(c) Does sec 52 of the Act bar Mr Zabic's claim for damages? If it does, is it constitutionally valid as against the respondent?

4 Mr Zabic has raised the Notice of Contention that the legislative power of the Northern Territory had to be exercised in accordance with the requirements of sec 51 (xxxi) of the *Constitution*.

(a) At 1st January 1987 the respondent had a chose in action which conferred on him a right to sue his employer at common-law in the event that he developed mesothelioma.

(b) If the appellant's contention is correct ie sec 189 of the Act does not preserve the respondent's rights to sue his employer the employer has acquired the respondent's property other than on just terms and sec 52 of the Act is invalid as against the respondent.[1]

(c) In respect to the Notice of Contention, the respondent relies upon the Notice of Contention, Summons and the Affidavit of Roger Singh in support of the Summons, filed in the High Court Registry and served upon the appellant on 17th June 2015.

Part III: Notice under sec 78B of the *Judiciary Act 1903*

5 Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is necessary.

(a) In respect to the service of these documents, the respondent relies upon the Affidavit of Service of Roger Singh filed and served upon the appellant on 18th June 2015.

(b) Further to this Affidavit, replies have been received from the Attorney-General for South Australia dated 12th June 2015 and the Attorney-General for Queensland dated 15th June 2015 stating they do not intend to intervene.

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[1] *Georgiadis v Australian & Overseas Telecommunications Corporation* [1994] HCA 6; (1994) 179 CLR 297, *Smith v ANL Ltd* [2000] HCA; 58; 204 CLR 493; [8] [9] [16] [17] [20] [27] [29] [35] [36] [43] [45] [53] [78] [79 – 80] [83] [80] [91] [96] [103] [105 – 106] [157] [159] [164] [168] [176] [181] [192] [194 – 198], *Attorney-General for the Northern Territory v Chaffey, Santos v Chaffey* (2007) 231 CLR 651.

Part IV: Factual Narrative. Numbered as in the Appellant's Submissions.

6 The respondent accepts the recitation of facts in the appellant's submissions but adds: In 1977 he suffered orthopaedic injury and became totally incapacitated for work.

7 The assertion of paragraph 7 is accepted.

8 The evidence of the medical experts before the trial judge was, as stated in the Court of Appeal judgement at [15] – [20]:

> 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, ie a domino effect....
> >
> > It is accepted fact that there are some 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, ie 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.

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 develop. The majority of mesotheliomas that have been diagnosed have between a 20 and 30+ year latency period. Therefore the initial commencement of the 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.

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.

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 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.

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.

> 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 {AB 115.05-06 [15]-[20]}.

The effect of the medical evidence was that while it was true to say that it would not have been possible immediately prior to 1st January 1997 to state that the changes in Mr Zabic's mesothelial cells (or any genetic abnormalities) would probably lead to the development of malignant mesothelioma, it is now known that in the opinion of the medical experts that was in fact the case.

9 It was agreed that the malignant mesothelioma probably commenced no earlier than five years before the onset of any symptoms. Where it was established that it had developed from the genetic damage occurring between 1974 and 1977 it is not correct to say that he could not have contracted his mesothelioma any earlier than November 2008. It is not appropriate to sever the outcome (mesothelioma) from its cause and pre-malignant development.

10 Mr Zabic takes no issue with what is stated there save to say that the respondent was required to prove its case on liability and damages were agreed during the course of the trial.

11 It is noted that the words **arise or** have been omitted from the Act in its more recent form. One inference to be drawn from the amendment is that there is a distinction in the legislation between a cause of action that arises and one that lies indicating that the former is not concerned with a completed tort whereas the latter is.

12 See above paragraph.

13 The assertion of paragraph 13 is accepted.

14 In the recitation of the statutory definitions the appellant has limited its reference to a physical or mental ailment omitting the other words in the section namely, **disorder, defect or morbid condition**. These are all contained in the definition of disease and constitute injury under the Act an important consideration given the appellants reliance on Spigelman CJ's remarks in *Orica v CGU Insurance* (2003) 59 NSWLR 14 concerning the fact that it was

doubtful that the inhalation of asbestos fibre constituted an injury under the Act under consideration there.[2]

15-20 The statements are accepted.

21 Mr Zabic contends the Court of Appeal was clearly correct.

22 Mr Zabic contends that the question to be resolved was whether his cause of action had arisen as at 1st January 1987. Plainly on the evidence, uncontroversial as it was from the medical experts, it had. The contention that the cellular changes were dormant and were likely to remain dormant appears to be the opinion of appellant Counsel contrary to the medical evidence in the case. It was agreed that it was not possible as at 1st January 1987 to know whether or not a mesothelioma would develop. Mr Zabic rejects the contention in the next sentence and says that as at 1st January 1987 he had suffered serious and substantial damage sufficient to satisfy a number of the categories within the definition of injury in the Act.

23 It is now known that he had suffered real and substantial damage by 1st January 1987 albeit that he could not then bring an action successfully because he lacked the proof that he now has.

24 Unlike the facts of *Wardley Australia v Western Australia* (1992) 175 CLR 514, Mr Zabic's damage was not dependant on the intervention of any extrinsic or outside agency or third party involvement to complete his damage. His condition was established and ongoing leading irrevocably, short of some other contingency ending his life earlier, to a malignant mesothelioma.

25 Contrary to the assertion by the appellant Mr Zabic's cause of action had arisen by 1st January 1987. The breach of the duty owed to him had occurred and the asbestos fibres had caused changes within the mitochondria and other elements of the mesotheliomal cells.

26 The amount of damage necessary to complete a tort is injury beyond what could be regarded as negligible.[3]

27 There is well settled authority on point; ie *Cartledge v E Jopling & Sons* [1963] AC 758, *Rothwell v Chemical Insulating and another* [2008] 1 AC 281,[4] *Martindale v Burrows* [1996] 1 Qd R 243 where many of the leading authorities are helpfully reviewed on evidence materially similar to the present case.

28 The appellant's submission is contrary to the authorities, in particular *Cartledge* which established that a cause of action accrues whether the damage is detectable or not so long as it

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[2] *Orica v CGU Insurance Limited* (2003) 59 NSWLR 14 at [25].
[3] *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 at 771-772.
[4] *Rothwell v Chemical Insulating Co Ltd and another* at [1] [8] [11] [13] [19] [39] [42 C-D] [47G-H] [50] [64 D-F] [67] [68 C-D *they were not the first stage of any asbestos related disease*].

was more than negligible. The respondent has not been able to locate any authority to the contrary as contended by the appellant.

29 The authorities set out do not support the contention in paragraph 28. *Cartledge* was approved in *Hawkins v Clayton* (1987) 164 CLR 539 at [23], [24] and [39] and in *Wardley* per Toohey J at [29] and [30]. In *Crimmins v Stevedoring Industry Finance Committee* [1999] HC I 59, 200 CLR 1 Callinan J said:

> It was common ground that because of the slow onset of mesothelioma Mr Crimmins did not suffer any compensable injury until long after he stopped working in the dusty conditions and the Authority ceased to exist.[5]

His Honour considered the liability of the Authority for insidious, slowly emerging damage or injury and held that the use of liabilities had to be considered in the light of this disease among other factors.[6] The common ground referred to was elaborated on by Kirby J who took into account perceived problems with the limitation provisions of Victorian law causing the plaintiff in that case to seek to have the accrual of the cause of action found to date from the appearance of the malignancy rather than rely on the conventional rule.[7]

30 The appellant in the present case is contending for the contrary principle to that in *Cartledge* to enable the defendant to benefit from the non-discoverability of the damage to bar the action which arises from the common law and confers an unfettered right to damages absent a valid statutory bar. Such a result would work the mischief identified by Lord Pearce at 778.2. It would also render otiose the *Limitation Act* (Northern Territory) amendments in dust diseases cases in the Northern Territory which took place in 2007.

31 Other than the observations of Spigelman CJ in *Orica,*[8] *Cartledge* is understood to be a decision of longstanding authority which has been followed by the High Court and the New South Wales Court of Appeal among many other jurisdictions as establishing a principle to determine when a cause of action accrues in a personal injury case.[9]

32 *Cartledge* establishes an important principle in personal injury law that damage to complete a cause of action in negligence may be suffered without the claimant being aware of its effects. The inclusion of the words *may never be felt*[10] in the speech of Lord Pearce demonstrates the different factual circumstance considered between a de minimis and a non negligible injury.

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[5] *Crimmins v Stevedoring Industry Finance Committee* [1999] HC I 59, 200 CLR 1 at [363].
[6] *Crimmins v Stevedoring Industry Finance Committee* [1999] HC I 59, 200 CLR 1 at [365].
[7] *Crimmins v Stevedoring Industry Finance Committee* [1999] HC I 59, 200 CLR 1 at [183].
[8] *Orica v CGU Insurance Limited* (2003) 59 NSWLR 14 at [25].
[9] *Wilson v Rigg* [2002] NSWCA 246 at [21] [23], *Scarcella v Lettice* [2000] NSWCA 289 at [11] – [15].

33 *Rothwell* considered the case of symptomless pleural plaques in the context of whether they constituted damage so as to complete a cause of action. The appeal proceeded on the basis that although the plaques were a pathological injury they did not cause symptoms (in all but rare cases where there would be a cause of action), did not increase susceptibility to other asbestos – related diseases or shorten life expectancy. Lord Hoffman emphasized the distinction between plaques and the disease of pneumoconiosis considered in *Cartledge* and reaffirmed the correctness of the holding and principle laid down in that case. It was a question of fact as to whether actionable harm had been suffered and in borderline cases that was a matter of degree.[11] He went on to say:

> The important point was that, save in the most exceptional case, the plaques would never cause any symptoms, did not increase the susceptibility of the claimants to other diseases or shorten their expectation of life. They had no effect on their health at all.[12]

34 It can hardly be said that pre malignant cellular damage leading to a mesothelioma can be said to be consistent with *making one better, as in the case of a successful operation, or with being neutral, having no perceptible effect upon one's health or capability.*[13]

35 The submission is one of fact and ignores the appellant's own evidence at trial ie: Therefore the initial commencement of mesothelioma is probably between [19]74 and [19]77 when the first changes of the asbestos fibres interacting with the mesothelial cells would have occurred {AB88.20-.30 [56]}.

36 Footnote 3 refers to *Footner v Broken Hill Associated Smelters* (1983) SASC 58 which dealt with now significantly outdated medical opinion. The question of degree of damage suffered by a particular time being a question of fact must be influenced by the state of medical knowledge at the time and the content of that evidence. In contrast to *Footner*, *Martindale v Burrows* involved a detailed analysis by Derrington J of the medical evidence given at that time (not materially different from the present case in most relevant respects) and the legal principles involved with consideration of many of the relevant cases. His Honour's analysis of the cases and the principles applying to the determination of the date of the accrual of a cause of action is, it is submitted, clear, logical and in accord with high authority. It is respectfully submitted his Honour's view could be endorsed by this Honourable Court in respect of a mesothelioma case.

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[10] *Cartledge v E Jopling & Sons Ltd* [1963] AC 758.
[11] *Rothwell v Chemical Insulating Co Ltd and another* [2008] 1 AC 281 at [8].
[12] *Rothwell v Chemical Insulating Co Ltd and another* [2008] 1 AC 281 at [11].
[13] *Rothwell v Chemical Insulating Co Ltd and another* [2008] 1 AC 281 at [7].

37 It is not accepted that the stated cases are in point. They concerned an insurer's liability to indemnify an employer in respect of liability to pay damages during the currency of a policy of insurance. It is not contended that Mr Zabic could have enforced his right of action prior to 1st January 1987. He had no proof or means of proof at that time that his lungs contained the seed of a fatal disease. His case is that by that time he had a cause of action in negligence in the event that mesothelioma or another debilitating asbestos related disease developed.[14]

38 See above.

39 In *Orica* Spigelman CJ said: There is authority for the proposition that injury occurs on the inhalation of fibres.[15] The reasoning in *Favelle Mort v Murray* [1976] HCA 13, 133 CLR 580 as Santow JA shows, is to the effect that the entry of a virus into the body is itself an *injury* within the meaning of the Act and, therefore of the policy. In *GRE Insurance v Bristile* (1991) 5 WAR 440, the Full Court of the Supreme Court of Western Australia applied this reasoning and concluded that the inhalation of asbestos fibres into the body was the *injury* and not the subsequent commencement of mesothelioma and:

> ...older authorities suggest that the injury constituted by the initial penetration of the lungs by asbestos fibres is not sufficiently material to constitute damage for purpose of determining whether a cause of action is complete.[16] It is not necessary to decide any such question here... It might be that an injury has occurred at the time of inhalation and penetration of the lungs, even if the disease of mesothelioma can only be said to have commenced at a later date when the malignancy develops on the lung. See *Martindale v Burrows* at 245.[17]

Mason P said:

> I agree with Santow JA's analysis as to the process whereby it was established that the risk of injury to which he was negligently exposed came home during this period , with the consequence that the negligent employer fell under a potential liability to compensate the worker , his estate and dependants according to tort law. But that

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[14] *Crimmins v Stevedoring Industry Finance Committee* [1999] 200 CLR 1 at [8] [14] [15] [16] [136] [146] [194-196] [199] [200] [257].
[15] *Orica v CGU Insurance Limited* (2003) 59 NSWLR 14 at [24].
[16] *Orica v CGU Insurance Limited* (2003) 59 NSWLR 14 at [25]. See also: *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 at 774.1 and 779.3 (a pneumoconiosis case) and *Footner v Broken Hill Associated Smelters Pty Ltd* (1983) 33 SASR 58 at 74.3.
[17] *Orica v CGU Insurance Limited* (2003) 59 NSWLR 14 at [26].

> liability remained inchoate, in the eyes of tort law, because damage is the gist of the relevant cause or causes of action.[18]

Santow JA said in conclusion to the passage cited by the appellant:

> But that is only for want of proof, available only in hindsight, that his ingestion of asbestos fibres had caused him damage.[19]

At [151] he continued with:

> I agree with Nicholson J that the injury occurred when the fibres were inhaled. In my view sufficient damage occurred at that particular time to give rise to an action in tort.

40 *Lay v Employers Mutual Limitation* (2005) 66 NSWLR 270 involved other primary issues and the observations cited were obiter.

41 *Brown v North British Steel Foundry* (1968) SC 51 can not stand with *Cartledge* and, unlike the more recent cases, has not used hindsight to determine the degree of damage at the time of inhalation. It ought not be followed.

42 As above.

43 See paragraph 41.

44 In *BAI (Run Off) v Durham* (the "*Trigger Litigation*") [2012] UKSC 14; [2012] 1 WLR 867 Lord Mance said:

> It may be that in the case of some long tail diseases, the victim can be said to have incurred or caught them at the same time as the initial ingestion or scratch giving rise to them. But it is clear that this is not the position with inhalation of asbestos in relation to either asbestosis or mesothelioma. No cause of action arises from exposure or inhalation alone: *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39, [2008] 1 AC 28. Damage is only incurred when mesothelioma develops. Only when it develops does the victim incur damage which is legally relevant, **and even then this is not because any physical link necessarily exists or can be proved between the mesothelioma and the original exposure (emphasis added).** The rule in *Fairchild* and *Barker* imposes liability for the mesothelioma upon persons who have exposed the victim to asbestos and so created a risk of mesothelioma. But it is not a rule which, even as between employers and employees, deems the latter to have suffered injury or disease at the time of any exposure.[20]

His Lordship states:

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[18] *Orica v CGU Insurance Limited* (2003) 59 NSWLR 14 at [72].
[19] *Orica v CGU Insurance Limited* (2003) 59 NSWLR 14 at [149].
[20] *BAI (Run Off) Ltd v Durham* [2012] UKSC 14 at [52].

> Neither the exposure to asbestos nor the risk that this might one day lead to mesothelioma or some other disease is by itself injury giving rise to any cause of action: see *Rothwell v Chemical and Insulating Co Ltd* the House decided that not even the emergence of pleural plaques marking the past exposure to asbestos constituted injury for the purpose of giving a cause of action. In order to fall within the principle in *Fairchild* and *Barker*, the development of mesothelioma is a precondition...[21]

And continues;

> In reality, it is impossible, or at least inaccurate, to speak of the cause of action recognized in *Fairchild* and *Barker* as being simply "for the risk created by exposing" someone to asbestos.[22]

The statements of law in this case are relevant to the complex issues of causation existing in the United Kingdom but have nothing to say about causation or the rising of a cause of action in the common law of Australia. It is noteworthy that *Cartledge* is not mentioned in the judgments. Clearly this case was not intended to affect the existing law other than as it related to the *Fairchild*[23] exception.

45 As above.

46 See paragraph 44.

47 These contentions are erroneous.

48 The use of hindsight is not only permissible, it is commonplace particularly in the area of proof of causation.

49 These contentions are erroneous.

50 Mr Zabic's claim was not barred for the reasons following:

Part V: Legislation

51 *Northern Territory (Self-Government) Act 1978* (Commonwealth)

Sec 6 conferred upon the Legislative Assembly power to make laws for the peace, order and good government of the Territory. This power was expressly subject to other provisions of the Act.[24]

Sec 50 provides:

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[21] *BAI (Run Off) Ltd v Durham* [2012] UKSC 14 at [64].
[22] *BAI (Run Off) Ltd v Durham* [2012] UKSC 14 at [65].
[23] *Fairchild (suing on her own behalf) etc. v Glenhaven Funeral Services Ltd and others etc* [2002] UKHL 22, see also *Barker v Corus* [2006] UKHL 20.
[24] *Attorney-General for the Northern Territory v Chaffey, Santos v Chaffey* (2007) 231 CLR 651.

(1) that the power does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms.

(2) Subject to section 70, the acquisition of any property in the Territory which, if the property were in a State, would be an acquisition to which paragraph 51(xxxi) of the *Constitution* would apply, shall not be made otherwise than on just terms.

52 *Interpretation Act* (Northern Territory)[25]

Sec 18 provides:

Definitions in or applicable to an Act to apply except so far as the context or subject matter otherwise indicates or requires.

53 *Return to Work Act* (Northern Territory)

Sec 3 states:

Interpretation

"disease" includes a physical or mental ailment, disorder, defect or morbid condition, whether of sudden or gradual development and whether contracted before or after the commencement of Part V;

"Injury", in relation to a worker, means a physical or mental injury arising before or after the commencement of the relevant provision of this Act out of or in the course of his employment and includes:

(a) a disease…

Sec 52 provides:

Abolition of certain rights to bring action.

(1) Subject to section 189 no cause of action for damages in favour of a worker… shall arise or lie against the employer of the worker… in respect of – (a) an injury to the worker.

(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

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[25] *Amendments Incorporation Act* (Northern Territory) sec 6 states that: In any reprint by the Government Printer of an Act or regulations, the Act or regulations may be printed without the inclusion of:…(b) the date of the making of the Act or regulations; and sec 4 subpara (1) states: Where an Act has been amended, the provision of that Act relating to the citation of that Act shall be deemed to have been amended by substituting for the citation provided for in that Act the citation provided for by section 49(1)(c) of the *Interpretation Act* and, in a reprint of that first-mentioned Act as amended, prepared after the commencement of the *Amendments Incorporation Act 1978*, that citation shall be substituted accordingly.

described in that subsection and nothing in this Act shall be construed as derogating from the purpose.

Sec 189 (1) provides:

Claim etc. before or after commencement of Act

Where a cause of action in respect of an injury... to a person in the course of his 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... 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.

54 *Limitation Act* (Northern Territory)

Sec 12 states:

Actions in contract, tort etc.

(1) Subject to subsection (2) the following actions are not maintainable after the expiration of a limitation period of 3 years from the date on which the cause of action first accrues to the plaintiff or to a person through whom he claims:

...

(b) an action founded on tort including a cause of action founded on a breach of statutory duty;

(2) However

(a) no limitation period applies to an action for damages for personal injury arising from a dust disease;

(3) In this section:

"dust disease" means a pathological condition of the lungs, pleura or peritoneum that is attributable to dust.

55 *Law Reform (Dust Diseases) Amendment Bill* (Serial 116), presentation and second reading; debate adjourned dated 30th August 2007.

56 *Law Reform (Dust Diseases) Amendment Bill* (Serial 116), second reading in continuation; bill read a third time dated 16th October 2007, at pages 6-8.

Part VI: Respondent's Argument

57 Mr Zabic proved that as a result of breaches of the duty owed to him by his employer between 1974 and 1977 he was exposed to and inhaled amosite asbestos fibre which caused in

him a morbid condition of his lungs that ultimately developed into malignant mesothelioma. His damages, were he entitled to them, were agreed at $425,000. His cause of action was in negligence and arose from the general law.

58 The general law recognizes the power of legislative bodies to pass laws restricting the right to litigate stale cases so balancing the right of a plaintiff to sue against the right of a defendant to avoid having to defend stale or oppressive cases.

59 The legislature also retains the right to prospectively abrogate common law rights.

60 The Legislative Assembly of the Northern Territory operating under powers conferred on it by the Commonwealth enacted the *Workers Rehabilitation and Compensation Act* (now *Return to Work Act* (NT)). That Act could not validly contain a provision for the acquisition of property on other than just terms.

61 The Act provided that from 1st January 1987 no action would lie against an employer by a worker in respect of an injury suffered by a worker.[26]

62 The Act contained sec 189 which provided relevantly in the respondent's case: Where a cause of action in respect of a disease, disorder, defect or morbid condition of Mr Zabic's lungs and pleura of gradual development arising out of or in the course of his employment arose before 1st January 1987 an action at common law in respect of that disease, defect or morbid condition may be commenced 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.

63 By 1st January 1987 Mr Zabic was suffering from a disease, disorder, defect and morbid condition of his lungs and pleura of gradual development arising out of breaches of the duty owed to him by his employer in the course of his employment. He was therefore by that time within the circumstances prescribed by the section to trigger its operation and was entitled to commence an action based on those circumstances at any time, when he had the necessary proof subject to any relevant statutory limitation bar.

The common law principles.

64 In a latent disease case (typically a dust disease case) the cause of action accrues when a breach of duty has been causative of non-negligible damage even though the damage has not been discovered or is discoverable at that time.[27]

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[26] *Return to Work Act* (Northern Territory) sec 52 (1) (a) and (d).

[27] See: *Martindale v Burrows* [1996] 1 Qld R. 243, 248, 10, *Cartledge v Jopling* [1963] AC 758,772,776,780-81,784, *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59, 200 CLR 1, *Wardley Australia*

65 Although the cause of action accrues when non-negligible damage is first suffered the subsequent mesothelioma is still part of the accrued cause of action.[28]

66 Causes of action may be inchoate where breach of duty has occurred but damage was not manifest. **Just entitlements** arise on breach.[29]

67 The just entitlements referred to in *Crimmins* must arise from the cause of action in negligence. It is therefore submitted that a cause of action arose when the negligence occurred even if the completion, perfection or proof of damage occurred later.

68 Legislation should be construed to avoid the abolition of rights arising from the general law.[30]

69 For the foregoing reasons it is submitted that they respondent established that his cause of action for negligence had arisen prior to 1st January 1987.

The appellant's reliance on *Orica v CGU*.

70 In addition to the respondents analysis of the judgment in *Orica* above it should be noted that the New South Wales Court of Appeal has itself considered the limitations of that case in at least two subsequent decisions.

71 *Vero Insurance Ltd v Power Technologies Pty Ltd* [2007] NSWCA 226 (29 August 2007) where the Court said at [151-152]:

> The appellant is only liable under the policy in respect of such sums that the respondent became legally liable to pay for compensation in respect of bodily injury... occurring during the period of insurance and the trial judge found that the bodily injury suffered by Mr Barlow occurred during each of the several periods of insurance effected from 1 October 1967 to 1 October 1974.[31]

That finding was based upon the medical evidence before his Honour and the reasoning of Derrington J in *Martindale v Burrows*, and Nicholson J in *GRE Insurance Limited.*

72 At [156] and following the Court considered the judgments in *Orica* and said:

> ...although this exegesis has been lengthy, it has been necessary to examine the context in which the Court made its comments in *Orica Ltd.* As is apparent from an examination of the judgments of both the Chief Justice and the

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Ltd v Western Australia [1992] HCA 55, (1992) 175 CLR 514, Toohey J at [29] [30], *Wilson v Rigg* [2002] NSWCA 246 at [21] [23], *Scarcella v Lettice* [2000] NSWCA 289 [11] [14] [15] [26].

[28] *Crimmins v Stevedoring Industry Finance Committee* [1999] 200 CLR 1 1 at [195], *Wilson v Rigg* at [21], *Scarcella v Lettice* at [31], *Martindale v Burrows.*

[29] *Crimmins v Stevedoring Industry Finance Committee* [1999] 200 CLR 1 at [8] [14] [15] [16] [136] [146] [194-196] [199] [200] [257].

[30] *Crimmins v Stevedoring Industry Finance Committee* [1999] 200 CLR 1.

President, the comments made in respect of the time at which a cause of action accrued for the purpose of determining liability was a consideration that had to be undertaken in the context of a policy which indemnified for liability incurring in the period of the policy. It becomes, therefore, almost trite to point out that the policy in this case which provides indemnity for sums that the respondent "shall become legally liable to pay for compensation in respect of bodily injury occurring during the period of insurance" is a policy which responds in respect of a bodily injury which occurs during the period of insurance and in respect of which the insured shall become legally liable to pay compensation. In that regard, the judgments in *Orica Ltd*, including that of Santow JA to which I have made only passing reference, were to the same effect, namely that, in the case of mesothelioma, it is accepted the injury occurred at the time of inhalation and penetration of asbestos fibre.[32]

73 *Commonwealth Steel Company Ltd v Certain Underwriters at Lloyds* [2010] NSWCA 31 (12 March 2010). The Court said:

> It is necessary now to turn to *Orica*. The policy with which the Chief Justice was concerned in *Orica* required that both injury and liability occur within the policy period. This is an important distinction from the present policies, in particular by reference to the discussion in [55]-[57] of the Chief Justice's reasons. ... No detailed argument was put forward on this point or to the extent to which several actions can, or cannot, be brought for separate damage suffered.[33]

At [36] it continued:

> There may have been multiple injuries over the years attributable to a series of tortious acts or omissions which might properly be understood as separate causes of action. The question might most clearly arise in the context of a statute of limitations.

And at [39]:

> In any event the Chief Justice's views were obiter in a case concerning a quite different insurance policy. We do not consider that what His Honour said

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[31] *Vero Insurance Ltd v Power Technologies Pty Ltd* [2007] NSWCA 226 at [13].
[32] *Vero Insurance Ltd v Power Technologies Pty Ltd* [2007] NSWCA 226 at [177].
[33] *Commonwealth Steel Company Ltd v Certain Underwriters at Lloyds* [2010] NSWCA 31 at [35].

should be accepted as determinative of the problem of construction posed by the policies in question here.

74 At [41] the Court said:

> The defendants further submitted that was how this Court in *Vero* applied the Chief Justice's reasons in *Orica*... A number of questions arose, only two of which are relevant to the present case. The first such issue was whether the bodily injury occurred during the relevant period of insurance. This was not the subject of admissions as it is here. A trial occurred before Curtis J in the Dust Diseases Tribunal. In respect of the issue, a relevant question was whether the inhalation of asbestos fibres was bodily injury. Beazley JA (with whom Campbell JA and Harrison J) agreed distinguished the reasoning of the Chief Justice, partly in the passages to which we have been referred and in earlier passages, as irrelevant because of the fundamentally different policy wording with which he was dealing.

75 The appeal should be dismissed.

Part VII: Time estimate

76 The respondent would seek no more than 2 hours for the presentation of the respondent's oral argument.

Dated:

	Bret Walker S.C.		Graeme Little S.C.
Phone	(02) 8257 2527	Phone	(02) 9336 5390
Fax	(02) 9221 7974	Fax	(02) 9336 5353
Email	maggie.dalton@stjames.net.au	Email	glittle@estc.net.au

Counsel for the respondent