

Liability Issues arising out of Latency Claims

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Liability Issues Arising out of Latency Claims

1. Introduction

In this paper¹, we consider the following:

- the concept of and potential for latency claims to arise
- the core legal and legal policy issues associated with latency claims
- recent developments in the UK and Australia that have consequences for the treatment of latency claims
- the implications of these decisions on the insurance industry – insurers, insurance policy coverage for latency claims, reinsurers and policyholders.

We make a number of recommendations for consideration by the insurance industry as to the future response to, and management of, latency claims in Australia.

The experience of the insurance industry in Australia and the United Kingdom (**UK**) in relation to asbestos-related claims and liabilities provides a useful backdrop against which to consider these issues and we draw where relevant, on such experiences and legal developments as examples of how we anticipate policy and law will develop in relation to latency claims more generally.

2. The Concept of Latency - What is a Latent Claim?

Dictionaries variously describe the concept of latency as follows:

Latency – the state of being latent or concealed.

*Latent – hidden, concealed, present but not visible or apparent pathology (of an infectious agent) remaining in a resting or hidden phase, dormant or underdeveloped.*²

Latent – dormant, undeveloped but capable of development.

*Latent period – the time between stimulus and reaction or the time between the contracting of a disease and the appearance of symptoms.*³

A latent claim involves a negligent or actionable act or omission giving rise to a loss or damage at a time, after the act or omission, usually substantially later. The consequences

¹ An earlier version of this paper was first presented at an Allens Arthur Robinson (**AAR**) Insurance Forum in July 2006. The focus of that paper was on 4 recent decisions of the UK courts having consequences for the treatment of latency claims. Since that time there have been a number of relevant events that have taken place, including the passing of the *Compensation Act 2006* in the UK with the last minute amendment to deal with mesothelioma claims following the House of Lords decision in *Barker v Corus* [2006] UKHL 20 which introduced the concept of proportionate damages in respect of those claims where it could only be shown that multiple defendants had materially caused or contributed to the risk of the contraction of the disease of mesothelioma following exposure to asbestos. These matters are disclosed at section 10 of this paper:

² Macquarie Dictionary.

³ The Chambers Dictionary.

of the act or omission remain hidden or unrealised for some time and the longer the period of latency the greater the difficulties of dealing with liability issues.

Examples of actual or potential latent claims are found in the following scenarios:

- **Mesothelioma** – a disease associated with exposure to asbestos, non-dose dependent and having a latency period in the order of forty years. The incidence of asbestos claims is expected to peak between 2010 and 2020⁴. There is no cure and death commonly results within 12 to 18 months of the onset of symptoms. It is a very distressing way to die.
- **Variante Creutzfeldt – Jakob disease (vCJD)** – the human equivalent of bovine spongiform encephalopathy (BSE) or mad cows disease. It is estimated that a minimum incubation period for vCJD could be as great as between 40 – 60 years although this is not clear. It is said that vCJD can also be transmitted from human to human by blood transfusions. Since 1995, 192 people have died – mainly in Britain. Other possible transmission avenues include human and veterinary vaccines prepared from bovine materials.⁵
- **Mobile phone radiation emissions** – radiofrequency radiation from handsets results in low-energy electromagnetic waves travelling into a user's head. So far, studies suggest that mobile phone radiation produces biological changes in humans but these changes have only been benign. A Swedish study published in October 2004 in *Epidemiology*⁶ showed a four-fold increase of benign (non-cancerous) brain tumours in people who had been using a mobile phone for more than 10 years. The increase in acoustic neuroma tumours occurred in the side of the head where the person used the phone. Technology is constantly changing. Third generation (3G) phones apparently emit higher rates of radiation than earlier models. Brain conditions – such as brain tumours, can also take years to develop.
- **Increasing ability of medical science to associate factors with diseases and conditions**⁷ On 21 July, the ABC ran a story about a study that found a link

⁴ *Asbestos – Implications of the NSW Government's Legislative Reforms*, Neil Donlevy Jonathan Perkins Presented at the Institute of Actuaries of Australia XV General Insurance Seminar 16-19 October 2005. High level estimates of asbestos liabilities in Australia conducted in August 2004, predict present value median estimate in excess of \$8bn.

⁵ World Health Organisation – www.who.int/mediacentre/factsheets/fs180/en/-u

⁶ Löhn S, Ahborm A, Hall P, Feychting M. *Mobile phone use and the risk of acoustic neuroma*. *Epidemiology* 2004; 15:653-659.

⁷ See also the recent developments in French law concerning the *DES Daughters*. Diethylstilbene (or DES) was a synthetic oestrogen prescribed to women who experienced miscarriages or premature deliveries and was originally considered effective and safe but studies in 1971 revealed that women exposed to DSE had an increased risk of a rare cervical cancer. It wasn't until 1977 that France imposed a ban on the drug. Two women who developed this cancer and whose mothers were prescribed the drug have recently successfully sued the French manufacturer of the drug. Their case went through the civil courts, courts of appeal and finally the supreme court. The basis of the award of damages is interesting – it signifies a distinct change by the courts in the evaluation of causal link between the defect in the drug and the damage and reduced the burden of proof for the claimants. The damage essentially skipped a generation – was the court being sympathetic in this case to the evidentiary burden the claimants would ordinarily face?. Apparently there is a DES third generation beginning to reach an age where their health problems can be studied – a study of DES grandsons conducted in 2002 in

between calcium and the development of breast cancer cells. Is it possible that in the future, milk consumption or the consumption or use of some similar common product will be linked with an increased risk of certain cancers?

- **Defective construction** – The existence of a construction defect as a result of inappropriate building methods, or poor building practices, or inappropriate materials results in a subsequent 'failure' or condition of the building causing damage or loss to the present owners. Asbestos building products are a good example of the type of risk as is the toxic mould problems that have occurred in homes.
- **Failure to advise** – a solicitor, accountant or other professional adviser fails to advise or incorrectly advises a client about a material matter in respect of a transaction or claim. The client subsequently suffers a loss. He or she may not realise at the time of receiving the advice that they have a claim on the basis that the professional adviser owed a duty to advise or warn about the matter and failed to do so or provided wrong advice. It may be many years later when the consequences of the advice become known.

All of these scenarios demonstrate the concept of latent risk. Claims involving latent risks clearly create challenges for those who do or may create risks of latent claims, the community that is potentially exposed to the risks, government, insurers, courts and those claimants who as a result of exposure to a latent risk, suffer damage or loss usually a considerable period of time after the event of exposure or omission.

The response of our legal system to these risks raises significant policy issues and it worthwhile identifying these before we move to consider the legal issues and recent developments in case law and legislation to address the peculiar issues associated with latent claims.

3. Policy Issues associated with Latency Claims

3.1 The policy questions

The liability that the general law and legislation impose upon individuals and entities for loss or damage occasioned to others arising out of acts or omissions of those individuals or entities raises significant issues of principle and values for a community where the loss or damage does not become apparent until a long time after the act or omission that has given rise to it. Should the person who was responsible for the loss, the person who suffered the loss or the community bear all or part of the loss and in what circumstances? Moreover what level of risk of loss or damage will the law and community tolerate before liability is sheeted home to a person.

Netherlands reported a higher rate of genital birth defects in boys born to DES daughters. International Law office – Product Liability, 10 August 2006. See *Supreme Court holds manufacturer liable for cancer in two women*.

There can be both complex issues in explaining the cause of the loss and there may be multiple causes. There are then complex issues as to whether the explanation is a cause which the law will recognise as attributing liability to another person.⁸

Where the loss or damage arises immediately or within a short time frame after the act or omission, the liable party can immediately recognise and respond to the consequences of the act or omission and the cost that has arisen. This fits in with the relatively short time periods in which we measure financial outcomes. Such losses are more easily insured.

However, where the loss or damage does not emerge for 10, 20, 30 or 50 years, even assuming that it can be demonstrated that the original act or omission in fact was the cause of that loss or damage in the sense that the law makes a person liable, the wrongdoer, if that person was an individual, may have died or become insolvent or would become insolvent by reason of bringing home the liability. Where the wrongdoer is an entity (which is the more common situation), the entity may have itself ceased to exist, be under insolvent administration, or be under new ownership and the individuals responsible for the original acts may have long left the entity.

The costs and risks for a person being potentially liable should not be underestimated either, as in the search for an explanation and whether there is legal liability considerable expense may be incurred. Death, disappearance and insolvency of potential liable parties focuses the inquiries more intently on those still left standing. The laws governing proportionate liability and contribution will play a critical role where there is potentially more than one wrongdoer.

3.2 Risk taking and innovation

With innovation and development comes associated risk taking. The difficulty with latent risk is that the consequences of the risk taking may not be known for many years after the adoption and use of new products and technologies. There is some argument that as our society becomes more risk adverse there is greater reluctance and concern about risk taking in the interest of progress, which could diminish the availability of new resources such as beneficial prescription drugs or increase the price of such products beyond the reach of those who may need them most. In developing legal policy around questions such as who should bear or be responsible for loss suffered as a consequence of latent risks, governments and courts have to undertake a fine balancing exercise to ensure that developments in the law do not have a detrimental effect on innovation and enterprise.

The key question is the level of risk that is tolerated before liability is triggered and the problems of changing attitudes over time.

3.3 The problem of the time lag

The time lag means that the cost arising from delayed loss or damage is less likely to change behaviour – it is too late. The focus turns to compensation of the victim and who should fund that cost.

⁸ See the discussion on the difference between philosophical cause and legal cause in *H. L. A. Hart and Tony Honore, Causation in the Law (1985)* at pp 19-25.

The long time lag provides a severe challenge in relation to the gathering of evidence, the identification of explanations or possible explanations, the determination of whether there is a legal liability and proof of that liability. This is initially a barrier for the claimant but it also creates potential prejudice to the defendant where the defendant may have destroyed or lost records and where key witnesses important in dealing with the factual assertions of exposure to the dangerous agent have either died or disappeared.

Our post industrial scientific age has assisted in being able to identify causative agents in respect of long delayed injuries and diseases. However in many instances, this science has relied largely on epidemiological or statistical analysis to show relationships between the outcomes and the causes and more often than not there is still a gap in the science in demonstrating a factual cause or link between original acts and omissions and ultimate outcomes.⁹ In other words the general causative findings of science may not satisfy the legal requirements of showing that a particular person caused the particular loss of or damage to the plaintiff.

In our world today there is an absolute welter of scientific investigation in respect of new products and environmental agents and views are often contradictory suggesting that a particular product or agent may or may not have potential to bring about adverse outcomes. The manner in which individuals, entities and the community react to those suggestions and findings today may be critical in terms of the liability that may attach to some individual or entity at a later time if the product or agent causes an injury or disease. Where a potential cause of loss or damage is identified and many years later substantial loss or damage emerges from that cause then there is great pressure to conclude that there was sufficient knowledge to lead a reasonable person to warn of the risk or take other steps to avoid the risk.

These considerations are critical in terms of establishing in the context of negligence whether or not there is a duty of care to particular persons and what the standard of care should be. The judgment of these matters in hindsight is particularly difficult because of the strong temptation to project current attitudes to the past.¹⁰

⁹ An excellent discussion of this is found in : Alexander Danne "*McTear v Imperial Tobacco: Understanding the role and limitations of expert epidemiological evidence in scientific litigation*" (2006) 13 JLM 471. Also *Expert medico-scientific evidence before tribunals: Approach to proof, expertise and conflicting opinions*, Kune, R and Prof G Kune, (2006) 13 AJ Admin L69. See also the comments of the Chief Justice of NSW Supreme Court, Speigelman CJ, in *Seltsam Pty Ltd v McGuinness* (2000) 49 NSWLR 262, in which he noted at [89] that: "evidence of possibility, including epidemiological studies, should be regarded as circumstantial evidence which may, alone or in combination with other evidence, establish causation in a specific case.

¹⁰ The recent decision of the New South Wales Court of Appeal in *Seltsam Pty Limited v McNeill* (2006) NSWCA 158 illustrates the difficulty where the Court of Appeal overruling the Judge at first instance has found that a manufacturer of asbestos in 1961 did not owe a duty of care to a person who assisted for about 12 hours over several days in the construction of a house using asbestos sheet as at that time there would be no foreseeable risk of injury to that class of person. Moreover, it was incorrect to conflate the duty owed to industrial workers to casual end users having regard to the detailed evidence available as to the dangers of asbestos at that time. Special leave to appeal to the High Court was refused in this case.

3.4 The Asbestos Experience

There is no doubt that the asbestos experience is illustrative of the dilemmas we now face in that:

- at the time of use there may be both advantages and disadvantages in the use of a product such as asbestos and few, if any, economical alternatives;
- over time, more and more scientific information becomes available as to the impact of the product such as asbestos on individuals. To some extent this impact may of itself have been hidden by virtue of its long latency period as is the case for the terrible cancer, mesothelioma (with a 30-40 year latency period);
- the reaction of manufacturers, miners and users to the developing knowledge will no doubt be influenced by the potential losses of a highly profitable business, the then community attitudes about industrial and product dangers and scepticism about the dangers. The fact that perhaps the dangers in relation to the product were not fully realised by or are hidden from the community, results in little or no community pressure for change. These factors are an important component of how moral and legal fault is later assessed;
- regardless of the terrible outcomes, it is the ability to prove scientifically as a matter of fact that the ingestion of asbestos is the likely sole cause of mesothelioma that has led in later years and today to the bringing home of the long term liability to the organisations responsible for the mining, manufacture, distribution and use of asbestos for the losses that are now occasioned. Compare the issues relating to tobacco where the fact that there may be competing agents which result in lung cancer has given rise to the scientific and evidentiary struggle to not just link lung cancer and other diseases with tobacco from an association or statistical perspective but to actually link the actual tobacco smoking of the individual who suffers lung cancer to the cancer of that individual;
- difficulties of proof under our traditional liability laws have resulted in searches for other bases of liability – failure to adequately warn of dangers that are known or ought be known; breach of statutory duties such as those that fall under the rubric of occupational health and safety laws or under the more recent environmental laws; and
- problems created by the need to exercise hindsight in relation to the difficult issues as to whether or not there is a duty of care to particular classes of persons and what the standard of care was many years before the decisions on these issues are made.

3.5 Barriers to recovery

It is clear that where a large number of people are affected, the values of our community favour compensation to the individuals via the imposition of liability on the entities responsible for the ultimate loss. This is so, especially where there is an actual or perceived moral wrongdoing but the law of liability nevertheless means that there are a number of very significant barriers for those seeking compensation. In some cases, these

may be overcome by legislation such as that found in the *New South Wales Dust Diseases Tribunal Act 1989*¹¹ or more recently, the South Australian *Dust Diseases Act 2005*¹²

Even if successful in obtaining a judgment, there are further barriers in relation to the recovery of that judgment because entities who are responsible have ceased to exist, become insolvent or taken steps to shield the entity from future liability. We have seen in Australia the reaction of the community and Governments to those who seek to shield themselves from liability particularly where they or their owners are perceived as being financially able to pay in the ongoing James Hardie saga. In the USA, the use of the Chapter 11 bankruptcy laws to achieve the same result are not so severely questioned, but the consequences have been that a large number of companies have shed their liabilities and emerged from that bankruptcy to continue to conduct business.

3.6 The growing ranks of potentially liable defendants

In an increasing mobile economy where workers and families move around and between companies and where different organisations play various roles in the manufacture and distribution of products that may prove to be dangerous or lethal, it is very likely that a large number of people may contribute to the eventual injury. This raises another legal causation issue as to the relative legal liability of different parties in the manufacturing and distribution chain, the knowledge of each of the risk and the operation of laws of joint and several liability.

Initially, in the United States of America, asbestos claims were brought against asbestos manufacturers but most of those have been forced into insolvency so we now see that the principal targets of litigation are peripheral solvent parties who may have contributed to the loss (eg. distributors or users and their insurers).

One of the interesting aspects of the asbestos crisis in Australia is that most of the major first line defendants are still solvent or, in the case of the James Hardie subsidiaries, are now likely to be supported by their prior owner.

Because of work mobility or the fact that where a person is a contractor, they will be carrying out work at different sites, it is likely that in most asbestos litigation, there will be more than one defendant. The costs of multi party litigation are enormous and raise significant issues not only of who should bear the liability but as between those who are held liable to bear a liability, how should the liability be shared. A key question is who bears the risk of insolvency? This is likely to be an issue in many disease cases particularly where the cumulative effect of exposure is important eg how many different brand or type of mobile phone have you used and from how many different vendors were they purchased.

¹¹ See, for example, section 12A which removes limitation periods and provisions such as section 25A and 25B allowing material in prior proceedings and general issues determined in prior proceedings to be relied upon in subsequent proceedings.

¹² Under this recent Act, the South Australian Government has created the District Court of South Australia as the exclusive jurisdiction in which dust diseases claim are to be brought and has emulated (and in some respects gone further than) the framework and mechanisms of the NSW Dust Diseases Tribunal.

Another issue is the greater likelihood in a globalised economy for multijurisdictional issues to arise. Where may a claimant sue and what substantive or procedural law applies becomes another critically determining question for recovery.¹³

3.7 Government responses

Asbestos liabilities provides a good an example of governmental policymaking and legislation to deal with the claims and change law and procedure after the claims have emerged.

So far in Australia most of the changes brought about by government intervention have been in respect of modifying common law principles to allow claimants to bring their claims in courts against potentially liable parties. Australia has not embraced the broad based Governmental accident compensation systems of the type found in New Zealand although it has done so in some States and Territories in some areas such as workers' compensation and motor vehicle accidents. Most notably, the New South Wales government created a separate workers' compensation system for dust diseases including asbestos which is funded by future premiums on current and future employers.¹⁴

In other jurisdictions, particularly in the European Union, government response has been in the form of compensation or health services schemes to assist those who have been affected by injuries and diseases such as those caused by asbestos exposure. These responses raise questions in respect of who should be entitled to benefit.

There are also important policy issues of priority in the case of insolvency. Should victims of wrongdoing be preferred and how? This is a question currently being considered by the Corporations and Market Advisory Committee (**CAMAC**) in relation to long tail liabilities and in particular, whether the protection for future unascertained personal injury claimants should be strengthened where the solvency of the responsible company may be doubtful.¹⁵

¹³ There have been a number of cases where plaintiffs injured in New Zealand have brought proceedings in the Dust Diseases Tribunal in NSW to try to avoid the consequences of the statutory compensation scheme in New Zealand which prevents plaintiffs from bringing claims for compensatory damages 'in any court in New Zealand'. A critical issue in these cases is the place of the tort because under Australian conflict of law rules Australian courts must apply the law of the place of the tort in order to determine the claim. In *Frost v Amaca*¹³ the DDT held that a claim by a plaintiff who was injured as a result of exposure to asbestos products in New Zealand was located in NSW where the products were manufactured and hence was governed by NSW law. The NSW Court of Appeal overturned the decision on appeal and criticised the DDT for not looking at the whole of the cause of action in determining the place of the tort. It found that while the place of manufacture was NSW, Mr Frost's injury was not the result of any defective manufacturing process. Rather it was the manufacture together with the distribution of the products in New Zealand which led to Mr Frost's exposure to risk and gave him his cause of action. The Court of Appeal also held that the prohibition on bringing proceedings 'in any court in New Zealand' in the New Zealand legislation prevented the Mr Frost from bringing proceedings governed by New Zealand law in Australia. The Court of Appeal's decision in *Frost* is subject to an application for special leave to appeal to the High Court which we expect will be heard either late this year or early next year. If the Court of Appeal's decision is overturned, plaintiffs exposed in New Zealand and other foreign jurisdictions to asbestos from products manufactured in Australia will likely be able to bring claims in Australia.

¹⁴ See *Workers Compensation (Dust Diseases) Act 1942*.

¹⁵ One of the ideas that CAMAC has been asked to consider is whether in certain circumstances, people with future personal injury claims should be on the same footing as current creditors of the company for the purposes of certain corporate transactions affecting share capital or deferring payments to shareholders until all creditors are paid. We understand that the final report is not anticipated to be delivered before the end of 2006.

It is notable in the James Hardie Scheme that the legislation giving effect to it gives a near absolute priority to those who suffer injury or death who bring action in Australia for exposure in Australia. Foreign exposures and claims for property loss or pure economic loss (not associated with death or personal injury) are excluded.¹⁶ This is a good example of how issues of pragmatism impact on Government policy. We discuss this further below.

There are wide questions here that go to the respective responsibilities of Government, individuals and entities in our community for the long term consequences of today's behaviour. Central to this is the way in which the community deals with those who are the victims of negligence or accidents. This is an issue central to the Senate's recent *Workplace Exposure to Toxic Dust Inquiry Report* of May 2006. The inquiry arose out of circumstances in relation to exposure of workers to silica in the sandblasting industry. The report recommends that there be a rationally consistent, identification, assessment and compensation system for persons affected by workplace related exposure to toxic dust.

3.8 Pragmatism and policy

Economic and other similar constraints on the ability of the community and individuals who may be wrongdoers to afford to meet the liabilities normally imposed or to pay compensation are a critical component in the debate as to how the policy outcomes should be developed. Similar issues arise for injured persons who may not have the resources to seek out an explanation for their loss or to find out whether they have a right of recovery from a person on whom the law will impose liability.

There are a number of notable examples of Governments resolving policy issues by balancing pragmatism with needs and liabilities. It is a critical component to the formulation of the motor accident schemes around Australia where, in some cases, full compensation measured in a common law sense is foregone so as to provide compensation for all those injured or who are killed in motor accidents or where, within a common law scheme, common law damages are restricted for those less seriously injured so that full compensation is able to be paid to those who are most seriously injured having regard to the political concerns relating to the affordability of premiums for ordinary persons within the community.

The identification of these pragmatic constraints, particularly where they impact upon the cost of insurance or the cost of providing benefits is a key element of policy formulation in this area.

3.9 The centrality of tort law

Except in the areas of workers compensation and motor accident schemes, the working out of rights to compensation in our communities have been largely left to development of tort law supplemented by legislation. Those who fail to establish liability fall back on to their own assets, the support of their family and the broader support of the community through social welfare and other social security schemes. It is notable that the image of the millionaires v. the paupers in the context of those seriously injured in motor car accidents

¹⁶ See *James Hardie Former Subsidiaries (Winding up & Administration) Act 2005* and particularly the definition of "payable claim" in section 4(1).

has been a driving force in the recent Government decision in New South Wales to establish the Lifetime Care and Support Scheme¹⁷ to provide quality care regardless of fault where the loss arises from a motor accident. But, from a principled point of view, why should the same outcome not accrue to those who suffer a similar loss from other events in our community. If you are going to become a quadriplegic in New South Wales it is better to do so as the result of a motor accident than from falling out of a tree.

The central issues are cost, the level of care and compensation and the values of the community, that is, this is a pragmatic decision made to extend the benefits to motor accidents victims because the benefit can be costed, it is perceived to be affordable and to be relatively easily implemented. Extensions of this type of benefit to other categories of persons injured in the community is much more difficult unless a broad based accident compensation scheme was to be adopted. However, this example relates to non-latent losses and the issues presented by latent claims can be far more difficult to deal with.

The particular issues that have arisen in respect of asbestos claims and other types of latent loss and damage are being continually explored by the courts and are supplemented by legislative changes. For those interested in latent claims (other than those arising from asbestos and tobacco which are generally excluded from the reforms), a careful study of the recent tort reform legislation around Australia is a necessity. Similarly, the developments that have now occurred in the United Kingdom through a series of decisions of the House of Lords and the Court of Appeal and the government's response to those decisions, indicate the steps forward and backwards which the courts and the legislature are taking in struggling to bring about just results in this most difficult area.

The decisions of courts in these areas quite often involve a quasi legislative outcome in that they not only impact the future but they affect claim that have already arisen. The costs that are incurred by expanding liability in respect of acts or omissions that have already occurred raise important issues of policy for the justice system. This tends to explain the conservatism of the courts in developing the general law. However, the courts do not have actuaries and others sitting in the courtroom able to advice on the likely cost impacts of the decisions that are made.

3.10 The exposure of insurers

Sitting behind these decisions and legislative change is the insurance industry who need to deal not only with the developing risks associated with disease and injury and losses and damage that emerge many years after the events giving rise to them but also need to deal in that context with the changing legal environment which has the potential to significantly increase or decrease the exposures they might face.

A good example of the sovereign or government risk is found in the asbestos area where legislation after the event significantly lowered a number of barriers facing victims in successfully obtaining compensation. As well as this, as already noted there is the potential for courts to make decisions which have a retrospective effect which is significantly exaggerated in respect of latent claims because of the high propensity for a

¹⁷ *Motor Accidents (Lifetime Care & Support) Act 2006*

large number of those claims not to either have arisen or not to have been finalised prior to the court decision.¹⁸

It is clear that insurers have either not recognised or fully priced for this risk and therefore, there are issues as to who should bear the cost of the increased exposure of both the liable party and to the insurer. Similarly, if liabilities that are insured are removed by legislative action eg a universal compensation scheme, is that a windfall or to what extent are insurers required to contribute to the cost of the scheme?

Again, it is interesting to note the sophistication of the New South Wales Motor Accident Scheme where the Government recognised that legislative change which increased the exposure of an insurer after writing the policy, was a cost that went to the account of Government unless sufficient notice was given to allow for repricing.¹⁹ Similarly insurers have been required to account for windfall gains where written policies benefit from a change in law.

It is important to see these developments in a wider context for there is a real need to develop thinking and debate about the fact that science can now much better link outcomes to causes and that the law needs to take account of the fact that its principles were largely developed in an industrial society where the focus was on compensating loss or damage that arose immediately from acts or omissions. Just as today we are able to measure minute particles of contaminants and dangerous substances, we are also able, or becoming more able, to firstly associate or link those substances to adverse outcomes and to a lesser extent show how an agent has caused the loss or damage of a particular individual.

There are real questions as to whether the general law is able to appropriately sheet home liability for compensating for the loss or damage in a fashion that is both fair and in alignment with our community's expectations and how our law should develop. This has significant implications for insurers. For example, is it appropriate to require proof of causation on the balance of probabilities? Is it enough to show a certain level of statistical connection? How should the law deal with competing agents or causes? Should the law differentiate by reference to the vulnerability of the victims? When should there be a duty to warn of risk? Should liable parties and insurers have to bear the full cost of changes in law after the event that operate retrospectively?

Should the law and in what circumstances impose joint and several liability on wrongdoers who have significantly different degrees of culpability? If liability is several, how is the victim protected from the insolvent, dead or disappeared defendant?²⁰

¹⁸ See, for example, the *Dust Diseases Tribunal Act 1989* (NSW) and the *Dust Diseases Act 2005* (SA)

¹⁹ See section 9 of the Industry Deed between licensed insurers and the New South Wales Government.

²⁰ See for example, the UK Government's recent response to the decision in *Barker v Corus* in which the House of Lords introduced several liability whereby a defendant employer was only liable for their respective contribution to the risk of the claimant contracting a disease. By section 3 of the Compensation Act 2006, the UK government introduced special provisions for dealing with mesothelioma claims, the test for causation in such instances and providing for joint and several liability of all responsible persons.

A number of recommendations in respect of these issues including the need for leadership by the insurance industry on this debate are set out at Section 8 of this paper.

4. Legal issues associated with latency claims

4.1 A summary of key issues

The legal issues typically associated with latency claims relate to the following concepts:

- (a) **Causation** – What is the appropriate test of legal causation for latent claims. Are there factors that justify exceptions to traditional common sense causation principles?
- (b) **Determining when a cause of action arises** - Is it at the time of the negligent act or omission or some other later date? If at a later date what is the criteria for establishing that date?
- (c) **Determining when damage arises** - At what time does a claimant suffer damage? When is that damage recoverable? Should this be different from the date on which the cause of action arises? To what extent is the potential for future damage recoverable where there is no or little existing damage or loss?
- (d) **The type of damage that is recoverable** – this particularly focuses onto the circumstances where psychological damage may arise and when fear of the future is a factor.
- (e) **Multiple defendants** - Where there are multiple defendants each potentially liable for damage caused, should their liability be apportioned jointly or proportionately, and if proportionately, on what bases or factors? How should contribution rules be formulated?
- (f) **Impact of limitation laws** - At what point in time does the clock start ticking for a claimant? Is it from the time of "negligent act" or some later point in time?
- (g) **Will a public or product or liability or some other insurance policy cover the loss?** – What is the event that must occur during the period of cover?

These issues arise for the claimant seeking to recover damage as well as for defendants and their insurers. For example, the issues might arise in the following ways:

For insurers and defendants:

- challenges in identifying the next 'asbestos-type' risk today that will give rise to future claims;
- difficulty, if not impossibility, in underwriting and pricing the latent risk;
- the use of policy wordings and policy coverage to deal with latent risk in both claims made and occurrence based policies; and
- dealing with long tail liability – normally in frank injury cases, there may be delay in commencing or notifying a claim and there may be long delays to settlement but in latency cases there are initially significant delays before the claimant even knows

that a claim has arisen and then there are further delays in relation to notification and ultimate settlement.

For claimants:

- establishing the explanation for their damage or loss and whether it gives rise to a legal liability in situations where there may be potential multiple causes of loss or gaps in scientific knowledge or evidence so as to establish a clear, irrefutable link between cause and effect and the difference between general scientific causation and the precise causation required by the law;
- where and when a cause of action arises;
- identification of the appropriate parties to join as defendants; and
- limitations periods.

To reiterate, the following are some of the important principles that form the legal background to cases involving latency claims

4.2 Concept of *actionable claim*

It is a well established principle of law that an action for negligence does not arise until non-minimal damage is suffered. The damage need not be substantial, but it must be more than minimal.²¹

4.3 Limitation periods

As a general principle, limitation periods start to run from the date of damage (ie. when the cause of action accrues), whether or not this is known to the plaintiff. This principle was confirmed by the House of Lords in *Cartledge v Jopling & Sons*²² involving a claim for pneumoconiosis. At the time, the relevant limitations act only provided relief by way of extending the usual limitation period to plaintiffs in circumstances where fraud or mistake was involved and had concealed the right of action. Applying the legislation, the court determined that it could not extend the limitation period in the circumstances where the plaintiff's lack of knowledge about their entitlement to claim was the result of something other than fraud or mistake eg, a latent disease not medically identified.

This hard principle has since been ameliorated by changes to limitation statutes.²³

The High Court recently considered similar issues in the context of the Victorian Limitations Legislation in the case of *Stingel v Clark*.²⁴ While this case is very much about the statutory interpretation of the relevant limitation legislation, it does raise potential avenues for claimants who have suffered an injury or event, but only experience diseases or disorders a considerable period of time after such event.

²¹ See for example: *Orica Ltd v CGU Insurance Ltd* [2003] NSWCR 331

²² [1963] A.C 758

²³ See now in New South Wales ss60F-62 Limitation Act 1969 (NSW)

²⁴ [2006] HCA 37 (20 July 2006)

4.4 Causation principles

Generally, in order to be successful in a claim for damages, a claimant must establish that the defendant's wrongdoing on the balance of probabilities caused (in the sense that the law attributes liability) the injury, disease or actual damage suffered by the claimant. This means that the claimant must demonstrate that the defendant's conduct did in fact result in the damage of which the claimant complains and the damage is not too remote a consequence of the defendant's action. Proving causation is the key element for a claimant's successful action. The proof that the wrongdoing was generally likely to give rise to the injury, disease or damage in a group is not enough but may be part of the thread of proof to support a particular claim for particular loss.²⁵

The law approaches causation not in a pure scientific sense or in the sense that each element that explains the outcome is causative, that is what events or occurrences contributed to the particular outcome, but by looking for a cause that will result in the attribution of liability eg a negligent act, and uses what is often referred to as the broad commonsense approach.²⁶ At a base level, factual level legal causation is concerned with making the connection between a defendant's wrong and the claimant's damage.

(a) The Australian approach

In Australia, the causation principles can be summarised as:

- *common sense causation*; and
- whether or not it is more probable than not that the act caused or materially contributed to the loss.²⁷

The Australian approach necessitates that the claimant is able to show that on the balance of probabilities, the defendant at least materially contributed to the injury suffered. This has also been described as the "robust" and pragmatic approach" to prove causation.

What is clear is that for a claimant to be successful, they need to satisfy a test of causation which is greater than simply demonstrating that it is possible that their injury was caused by the defendant's default – it must be more probable than not. Nor can the impossibility of excluding a factor as a possible cause of act of injury be used to assert that such a factor must therefore be the cause of injury. In other words, causation means something more than a possibility or association.

(b) The UK approach

In the United Kingdom, the standard causation rules are normally expressed as requiring that it must be proved on a balance of probability that the defendant's conduct **did** cause the actual damage complained of in the sense that it would not otherwise have happened.

²⁵ See *Seltsam Pty Ltd v McGuinness* (2000) 49 NSWLR 262; [2000] NSWCA 29; and the discussion in A.Danne op.cit.

²⁶ See Clerk & Lindsell on Torts, para 2-02; *March v E M H Stramare Pty Ltd* (1991) 171 CLR 506

²⁷ *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307; *March v Stramare* op.cit.

Given the nature of latent risks and claims, the issue will often depend heavily on expert evidence. In some situations, where there is scientific uncertainty about causal mechanisms, the court may be persuaded to draw an inference that there must have been a causal connection between the defendant's wrong and the claimant's damage. But this raises difficult issues and often involves a very close analysis of the expert evidence.

Sometimes (although as an exception to the usual rules) this can be on the basis that the defendant's wrong made a *material contribution* to the damage, while acknowledging that the contribution might not have been the sole or even the main cause of the harm. The evidence may demonstrate a potential for harm but cannot show to the law's satisfaction or standard of proof that the potential has in fact been realised.²⁸ Sometimes the evidence points only to a material increase in the risk of claim to the claimant, but for policy reasons, the court nonetheless concludes that the causal link has been established. *Barker v Corus* reapplying the principles of *Fairchild v Glenhaven Funeral Services Ltd* is such an example and we discuss this below.

Another approach can be to adopt a probabilistic analysis by reference to the chance that the claimant had of avoiding the harm, then award damages by reference to that chance of loss rather than on an all or nothing basis. The traditional rule requires that the cause is more probable than not and as a consequence, the defendant is liable for the whole of the loss. If the probabilistic approach is to be used logically, the defendant should only be liable for that percentage of the loss that that defendant was likely to have caused. As we observe, this seems to be a potential flaw in the *Barker v Corus* reasoning where the percentage liability of the severally liable defendants is merely seen as a percentage of the actual loss that emerged. What damage are they liable for? Is it really the chance or percentage to which it may be said they caused the loss? Those percentages will not necessarily aggregate to 100% they may be higher or lower.

Cases involving multiple causes where the damage sustained by a claimant may have been the result of a number of events give rise to challenges for the courts. In such cases, the court is clearly faced with a choice as to which of several causes, including the defendant's actions, are to be treated as the operative or effective cause of the loss for the purposes of attributing legal responsibility. Multiple causes come in different shapes and sizes. Sometimes there might be two events, of which one is sufficient to have caused the claimant's damage.

²⁸ This was the test postulated in *McGhee v National Coal Board* (1972) 3 ALL ER1008. This case is also referred to as the Brickdust Dermatitis Case. The House of Lords was confronted with a situation in which there were two possible competing causes of injury. Ultimately, the House of Lords found in favour of the claimant on the basis that the employer had breached its duty in not providing washing facilities. Reliance was placed on the earlier decision in *Bonnington Castings Ltd v Wardlaw* [1956] 1 OR ER 615. For the proposition that a claimant will still succeed in an action if it can be shown that the fault of the defendant caused or materially contributed to the injury. There may be two separate causes, but it is enough if one of them is caused by the fault of the defendant notwithstanding that there were other factors for which the defendant was not liable for any negligence which had contributed to the injury.

Sometimes a defendant's conduct sets off a sequence of events, each one of which is a necessary link in the causal chain between the initial wrong and the claimant's damage, and the court has to determine whether any of the intervening events can be said to be so significant causally so as to break the causal link. In these types of cases the court has to exercise a choice as to whether the defendant's wrongful conduct constituted the legal cause of the damage. In Australia, we have tended to see the courts falling back on the pragmatic approach of the common law and invoke judicial "commonsense" as a guiding principle. In the UK, given the more 'pure' approach to causation (being a but for test), the courts have developed 'exceptions' to the rule. This has been particularly evident in asbestos-related claims such as mesothelioma as illustrated by *Fairchild and Barker v Corus*.

5. Statutory Liability Regimes

5.1 Trade Practice Act 1974 – Part VA - Liability for Defective Goods

Besides developments in the common law, we have seen the introduction of statutory liability regimes which are likely to have a significant impact on future latency claims particularly where they arise from the manufacture or importation of goods but the impact will depend on factors such as the period of latency and whether the particular claim falls within the circumstances covered by the statutory provisions. A good example of this in Australia is the *Trade Practices Act 1974 (Cth) (TPA)*, and in particular, Part VA dealing with liability for defective goods.²⁹

Part VA establishes a statutory code for dealing with defective goods by providing a series of statutory rights of action against a manufacturer and importer. These rights are not based in contract or tort and create a right for a person who suffers injury (including personal injury), loss or damage caused by defective goods to recover damages from the manufacturer. It is a strict liability regime, although there are a number of defences available to a manufacturer.

These provisions extend beyond traditional concepts of manufacture and can extend to injuries arising from the growing of and sale of food as seen in the *Wallis Lake Oysters Case*³⁰ involving contaminated oysters. Although the High Court found no negligence the legislation nevertheless imposed liability for the defective goods.

The TPA purposely defines defect broadly and the concept of manufacturer is also broadly scoped to include importers and those who brand goods. There is a defect in a product if the safety of that product is not such as persons generally are entitled to expect (section 75AC(1)). This is an objective standard based upon what the public at large expects from the product and is not a standard determined by what the particular individual

²⁹ We note that in the UK, there is the *Consumer Protection Act 1987* which has similar provisions relating to defective products with the same particular objective in removing the issue of fault from defective product litigation and introducing a strict liability approach.

³⁰ *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 177 ALR 18.

expected from the product. This standard will not require goods to be absolutely free from risk. Thus a product may have a defect within the meaning of the law even though it is not in the ordinary sense "defective". It may deliver all that the manufacturer intended and that the consumer wished for but may have some undesirable side effect which causes loss, and thereby be defective.

There are different types of defects which may fall within this legislation. Three potentially of relevance are design defects which relate to the design, structure or composition of the good; manufacturing defects which arise where the process of construction or assembly might go wrong; and instructional defects which are caused where the manufacturer gives incorrect or inadequate warnings and instructions on how to use the product.

The legislation sets out certain factors which will be considered in order to provide assistance in deciding what is the standard of safety persons generally are entitled to expect from a product (section 75AC(2)). All the circumstances are to be taken into account including:

- the manner in which and purposes for which a product is marketed;
- its packaging;
- the use of any mark in relation to it;
- any instructions for or warnings given;
- the use to which it could reasonably be expected that a product would be put;
- the time at which the product was put into circulation (generally when a product left the control of the manufacturer/importer).

To protect against stifling innovation, the Government has included a specific provision which states that a product is not defective solely because a safer product is subsequently put on the market (section 75AC(3))

If there are two companies liable for the damage caused by a defective product, they are liable jointly and severally (section 75AM).

Any person who suffers damage wholly or partly due to a defect in a product may rely on the provisions. It might be the consumer, or even a dependant of a person injured as a result of a defect. A person can recover for personal injury suffered (section 75AD). In addition a person who suffers loss because someone else suffers personal injury or dies can recover (section 75AE). A claimant can also recover loss or damage to property (excluding the defective product) provided that the damaged property:

- is of a kind ordinarily acquired for personal, domestic or household use; and
- the person using the damaged property suffers loss due to the damage (section 75AF)

Defective goods may also damage or destroy land or buildings or fixtures. This loss can be recovered (other than damage to commercial property) provided the damaged goods were acquired for private use (section 75AG).

The claimant must prove on the balance of probabilities the following elements:

- that the product has a defect;
- that he or she suffered injury or damage; and
- that the defect and the damage are linked (ie that the defective product caused the damage).

The plaintiff does not have to show that he or she has not misused the product.

There are defences available to a defendant under the legislation (section 75AK). These include:

- that the defect did not exist at the time when a product was supplied by the manufacturer;
- that the defect was solely due to compliance of a product with mandatory regulations issued by the government; or
- that the state of scientific and technical knowledge at the time a product was supplied by their manufacturer was not such as to enable the defect to be known (the "state of the art defence").

Contributory negligence is relevant only to an assessment of damages (and not liability) and will be considered by the Court when awarding damages (section 75AN).

Claims must be brought within three years of the date of the damage or injury or the date when the plaintiff ought reasonably to have been aware of all the relevant facts to bring a claim, whichever is later (section 75AO). However, Section 75AO(2) provides that a claimant may not bring a claim against a manufacturer more than ten years after the date the product was first supplied by its manufacturer.

In circumstances where you have latency claims not arising for a considerable period of time after the limitation period of 10 years, such as has been the case in asbestos-related claims, then these provisions are unlikely to provide any new significant bases for claims against manufacturers. However, where matters may involve shorter latency periods, the strict liability regime provides an attractive alternative to sheet home liability to a manufacturer.

there is a risk identified in the asbestos experience that it is possible in "asbestos" like circumstances that the *Trade Practices Act* could be subsequently amended to address the limitation period if circumstances suggest that it was having the unintended consequence of severely limiting the ability of consumers to be able to pursue claims against manufacturers for defective products. This sovereign risk is one of particular concern to insurers.

Although these sections have played little or no part in asbestos litigation because they were not introduced until 1992 there is no doubt that in future claims involving latent claims arising out of goods they will be heavily relied on. For example claims that may arise from mobile phones or similar products would be covered by them and as shown in the *Wallis Lake Oyster* case they may provide a relatively easy road to recovery.

5.2 Dust Diseases Act 2005 (South Australia)

The South Australian Government passed the *Dust Diseases Act 2005*, with the objective of providing more expeditious remedies for those suffering from disabilities resulting from exposure to dust.³¹ What is interesting about this legislation is that the government has sought to make provision for a test of causation in the context of a dust disease action by providing that once it is established that an injured person suffers from a dust disease and was exposed to asbestos dust in circumstances in which that exposure might have caused or contributed to the disease, it will be presumed in the absence of proof to the contrary that the exposure to asbestos dust caused or contributed to the injured person's dust disease. Further, the Act provides that if a person at a particular time carried on a prescribed industrial or commercial process that could have resulted in the exposure of another to asbestos dust, it will be presumed in the absence of proof to the contrary, that that person knew at the relevant time, that exposure to asbestos dust could result in a dust disease.

This amends the common law principles of causation and foreseeability and provides a statutory based framework for dust disease claimants to recover compensation from persons who have exposed a claimant to asbestos. It remains to be seen as to whether this will broaden the scope of defendants to asbestos claims brought in South Australia but this is likely.

This legislation illustrates the sovereign risk that potentially liable parties and their insurers can face when politics changes the law in a way that in some cases will assist victims but not necessarily do justice to defendant in the sense that their position is altered retrospectively. There is a moral judgment involved in these changes that needs to be carefully considered.

6. Developing Case Law

In this section we consider developing case law, particularly in the area of asbestos related claims and consider the way in which the courts are addressing some of the difficult legal issues concerning causation, limitation, interpretation of policies of insurance and apportionment of liability.

³¹ Act No.78 of 2005 which came into operation on 8 February 2006, two months after assent. It is generally understood that this Act was a political response to a number of related events that converged between 2004 and 2005 concerning in particular asbestos claimants in South Australia. There was significant lobbying by plaintiff lawyers and asbestos victim groups following the impact of *BHP Billiton v Schultz* (2004) 221 CLR 400. In view of concerns that the impact of this case would disadvantage South Australian residents and severely limit their ability to seek redress in the NSW Dust Diseases Tribunal. There was also concern that South Australian residents potentially faced much lower general damages awards in dust diseases claims by comparison to their counterparts in NSW, and in particular that the proceedings in South Australia for dust disease claimants was more cumbersome than that available through the Dust Diseases Tribunal in NSW. There was also a high profile case in South Australia involving a relatively young mother of twins, *Haylock v Amaca Pty Limited* [2005] SAS 413, who had been diagnosed with mesothelioma and there was concern surrounding her ability to obtain appropriate compensation and redress in the South Australian courts. This case also followed shortly after the High Court decision in *CSR v Eddy* [2005] HCA 64, which abolished the entitlement to *Sullivan v Gordon* damages at common law.

This review of recent cases is a sample of a small sector of the issues that can arise in latency claims. It does not deal with other critical issues such as rules of evidence, the issues of foreseeability in respect of the scope of the duty of care, the issues of foreseeability in respect of the damages recoverable, the rules relating to what damages are recoverable, the rules relating to what is an appropriate standard of care particularly when that must be measured in hindsight after the elapse of many years, the particular issues of survivorship of causes of action, compensation to relatives claims, and the interrelationship of the tort rules, the statutory provisions, other compensation schemes and the systems in our community providing social security and medical and hospital care to those who suffer injury or disease.

6.1 Recent Developments in the UK

Over the past 18 months, we have seen a number of interesting judgements from the UK Court of Appeal and House of Lords. In some instances, the Courts have applied novel constructs to deal with the imperfect fit of existing legal principles and precedent to the particularly complex factual scenarios involved in latent risk cases.

While UK law is not directly applicable to our jurisdiction – it is clear that the decisions of the UK Court of Appeal and House of Lords will have a highly persuasive influence on our courts in Australia particularly where the same issues have not yet been dealt with directly by the High Court. These decisions will also no doubt influence the way insurers and reinsurers might seek to address latency risk in relevant underwriting decisions, product pricing and policy wordings. They may also have direct relevance to UK reinsurers of Australian insurers who have existing exposures.

We note that three of these cases consider asbestos related diseases, but the principles derived from the decisions are equally relevant when considering other latent risk claims and how these might be treated by courts in the future.

The four cases are:

- *Barker v Corus*³² which follows on from the *Fairchild v Glenhaven Funeral Services*³³ and *McGhee v National Coal Board*. These cases deal with causation questions;
- *Rothwell v Chemicals Insulating Co Ltd*³⁴ on the issue of "actionable claims";
- *Law Society v Sephton & Co (a firm)*³⁵ on the issue of when a cause of action for economic loss accrues for the purposes of the limitation legislation; and
- *Bolton Metropolitan Borough Council v Municipal Mutual Insurance and Commercial Union Assurance Company Ltd*³⁶ on the issue of when an injury occurred in the context of 2 public liability insurance policies.

³² Decision of the House of Lords, 3 May 2006 – [2006] UKHL 20; All ER (D); [2006] NLJR 796, [2006] 2 WLR 1027

³³ [2002] 3 All ER 305.

³⁴ [2006] EWCA Civ 27

³⁵ [2006] UKHL 22

We also consider and compare these developments to the current position under Australian law.

6.2 ***Barker v Corus* – Causation Tests and Proportionate Liability**

This is by far one of the most important judgments on the issue of latent claims that has occurred in recent times.

But, before considering the issues in *Barker v Corus*, it is relevant to take a step back and review the earlier decisions of the House of Lords in *Fairchild* and *McGhee* as these are important markers on the pathway to the principles enunciated in *Barker v Corus*. As noted above, *McGhee* was the first of the cases in which the House of Lords started to articulate an exception to the general rule of causation in providing that it would be unrealistic and contrary to ordinary common sense to hold that negligence which materially contributed to the risk of injury did not materially contribute to the cause of the injury.

(a) ***Fairchild v Glenhaven Funeral Services Ltd*³⁷**

This is the groundbreaking asbestos case where more than one person exposed the defendants to asbestos but the scientific evidence was inadequate to show which exposure caused the resultant mesothelioma.

(i) **Facts and Issues**

In this decision, the House of Lords had to address what the Court of Appeal described as "an unbridgeable evidential gap" in the three cases involving claimants who had contracted mesothelioma after exposure to asbestos fibres during periods of employment with various defendants. The nature of the disease and the evidence before the court meant that it was impossible to prove when the asbestos fibre triggering the disease was inhaled and therefore to which relevant period of employment the injury related. Without being able to prove these facts, the lower courts had consistently ruled that the claimants were unable to satisfy the test of causation – ie, on the basis of the conventional "but for" test, the claimant had not been able to establish that his mesothelioma would not have occurred but for the breach of duty by a specific employer.³⁸

In each of the three cases before the court, the claimant had been employed at different times and for differing periods by more than one defendant. The employers owed the claimants a duty of care to take all reasonable measures to prevent the employee from inhaling asbestos dust because of the known risk that such dust, if inhaled, might cause mesothelioma.

³⁶ [2006] EWCA Civ 50

³⁷ (2002) 3 ALL ER 305; (2002) UKHL22; (2003) AC32; (2002) 3 WLR 89.

³⁸ As we note below Australian courts have side stepped this issue by focusing on whether there is evidence on the balance of probabilities that a defendant has contributed to the disease. The evidence led becomes critical in these circumstances. See []

Unfortunately the claimants were exposed to significant quantities of asbestos dust with the end result that a considerable period of time after the exposure, all three claimants had contracted mesothelioma.

(ii) Reasoning and comments

The House of Lords effectively extended the principle that had been recognised by the Lords in the case of *McGhee v National Coal Board* that in certain circumstances the plaintiff need not prove on the balance of probabilities that the defendant's tortious conduct in fact caused or materially contributed to the claimant's injury. Two of the members of the House – Lord Hutton and Lord Rodger adopted the approach that an inference can be drawn that the material increase in the risk was equivalent to a material contribution to the damage, and therefore a failure to take steps which would bring about a material reduction of the risk involves a substantial contribution to the injury. The other members of the House, held that the creation of a material risk of mesothelioma was sufficient for liability to be established.

In *Fairchild*, the Court of Appeal had unanimously rejected the claims for applying the conventional causation "but for" test. In doing so it stated:

"As much as we would like to accommodate the argument for the claimants, in our judgment they contained an inherent illogicality. If we were to accede to the claimant's argument, we would be distorting the law to accommodate the exigencies of a very hard case. We would be yielding to a contention that all those who have suffered injury after being exposed to a risk of that injury from which someone else should have protected them should be able to recover compensation even though when they are quite unable to prove who was the culprit."

The House of Lords in contrast were prepared to bridge the evidential gap by providing a cause of action against a defendant who has *materially increased the risk* that the claimant will suffer damage and may have caused, but cannot be proved to have done so because it is impossible to show on a balance of probability that some other exposure to the same risk may not of caused it instead.³⁹

Lord Bingham in his judgment in *Fairchild*, noted the overall object of court law is to define cases in which the law may justly hold one party liable to compensate another. Are these not such cases? His Lordship noted that if the mechanical application of generally accepted rules leads to unfortunate results, there must be room to question the appropriateness of such an approach in such a case.

His Lordship also referred to the decision of the High Court of Australia in *March v E&M Stramare Pty Ltd*⁴⁰ in particular the decision of Mason CJ who did not accept that the "but for" (*causa sine qua non*) test ever was or now should become the exclusive test of causation in negligence cases.

³⁹ See Lord Hoffman's judgment in *Barker v Corus*

⁴⁰ OP Cit

In particular Mason CJ noted⁴¹

The "but for" test gives rise to a well known difficulty in cases where there are two or more acts or events which would each be sufficient to bring about the Plaintiff's injury. The application of the test gives the result, contrary to common sense that neither is a cause....In truth the application of the test proves to be inadequate or troublesome in various situations where there are multiple acts or events leading to a Plaintiff's injury... The cases demonstrate the lesson of experience namely, that the test applied as an exclusive criterion of causation, yields unacceptable results and that results which it yields must be tempered by the making of value judgments and the infusion of policy considerations.

Deane J, similarly opined:

"The question whether conduct is a cause of injury remains to be determined by value judgement involving ordinary notions of language and common sense."⁴²

The Lords presented a six stage test for similar cases noting that each case had to be decided on its particular facts. It is significant to note that the House of Lords considered their approach to the case as being an example of an incremental approach to the development of tort law and not a departure from established principles.

In *Fairchild* the defendants had conceded that if they were liable then they were jointly and severally liable. It was this unexplored issue that now led the House of Lords to re-explore the consequences of their views in *Baker v Corus*.

(b) *Barker v Corus*

(i) Facts and Issues

In this decision, the House of Lords considered three cases involving different scenarios of claimants having suffered mesothelioma. In the situation of *Barker*, the claimant had experienced 3 material exposures, one of which was during a period of self employment as a plasterer. The other 2 exposures to asbestos were in consequence of breaches of duty by employers of the claimant. The House of Lords had to consider in effect 2 questions:

1. what are the limits to the *Fairchild* exception and what factors must be present to satisfy the *Fairchild* test ie, provided the claimant can establish a defendant's conduct materially increased the risk of injury to the claimant, the inference can be drawn that the defendant materially contributed to the damage?
2. what is the extent of the liability under this exceptional test of causation? In other words, is it joint and several or dependant on the extent to which each defendant's breach of duty created the risk of the claimant contracting the disease?

(ii) Reasoning and Comments

⁴¹ At page 516

⁴² At page 524

Barker v Corus confirmed the view that an essential condition for the operation of the *Fairchild* principle is that the mechanism which caused the damage, whatever it is, is the same and does not arise out of another potential causative agent. For example, the *Fairchild* exception should not ordinarily apply in lung cancer cases where these may have been caused by exposure to asbestos or some other cause such as smoking, and it cannot be proved which is more likely to be the causative agent.⁴³ This limiting rule clearly reflects the usual 'floodgates' concern but if the decision in *Fairchild* is a development in principle it is difficult to see the 'principled' reason for this limitation. It is a pragmatic limit but it is also a limit that arises in part from the fact that the case did not have to address the question of multiple causative agents.

On the question of apportionment, the House of Lords held that in the case of the *Fairchild* exception, the evidence before the court is not sufficient to establish that the actions of either or one of the tortfeasors by itself was sufficient to cause mesothelioma. In fact, a defendant might have had nothing to do with the onset of the disease. The majority held that the defendants under the *Fairchild* exception are each held liable because they have each created a *material risk* that the claimant would contract mesothelioma. This appears to be a very significant restatement of the *Fairchild* principle.

Accordingly the damage or basis of liability is that which arises from the creation of the risk or the chance of causing the disease and not the material contribution to the disease. The House of Lords were of the view that chances are infinitely divisible and different people can be separately responsible to a greater or lesser degree for chances of an event happening. Hoffmann LJ in particular, considered it was important to determine whether the characterisation of the damage as a "risk" of contracting mesothelioma was fair. That is, does fairness require that the claimant should recover in full from any defendant liable under the exception. Significantly:

"The attribution of liability according to the relative degree of contribution to the chance of the disease being contracted would smooth the roughness of justice which a rule of joint and several liability creates. The defendant was a wrongdoer, it is true, and should not be allowed to escape liability altogether, but he should not be liable for more than the damage that he caused and, since this is the case in which science can deal only in probabilities, the law should accept that position and attribute liability according to probabilities. The justification for the joint and several liability rule is that if you caused harm, there is no reason why your liability should be reduced because someone else also caused the same harm. For when liability is exceptionally imposed because you *may* have caused the harm, the same considerations do not apply and fairness suggested that more than one person may have been responsible, liability should be divided according to the probability that one or other cause the harm."⁴⁴

⁴³ See Lord Hoffmann's judgement at paragraph 24

⁴⁴ Paragraph 43 of Lord Hoffman's judgement.

Inferentially, contributions to damage should be determined according to the time of exposure to which each defendant is responsible, but also allowing for the intensity of the exposure and the type of asbestos involved.

The damages recoverable from each defendant is the loss occasioned by the exposure to the risk. It is assumed that this is the "proportionate" part of the indivisible damage from the disease mesothelioma.

Lord Hoffmann⁴⁵ says:

"Treating the creation of the risk as the damage caused by the defendant would involve having to quantify the likelihood that the damage (which is known to have materialised) was caused by that particular defendant. It will then be possible to determine the share of the damage which should be attributable to him. The qualification of chances is by no means unusual in the courts."

This solution is essentially pragmatic rather than logical. The House of Lords did not set out how the apportionment would operate in practice, but indicated that the degree to which a defendant contributed to the risk would be a matter of fact for a trial judge. At the heart of the issue is the very fact that science and medical knowledge cannot definitively say what the cause was. If the process is random then each defendant may have a 100% responsibility for the chance of risk created. Yet the court decided that the damage was to be apportioned. No consideration was given to the evidentiary gaps and other difficulties that arise where one or more defendants are not before the court.

However, there is some knowledge that may help and that is that factor such as:

- type of asbestos;
- intensity of exposure;
- period of exposure;
- whether the exposure was the first or last in the sequence.

all may go to the "chance" or percentage. But if the liability is several, does that mean that the aggregate chance or percentage equal 100% - they may not but this decision suggests that is the starting point.

The working out of these principles involve some considerable complexity. The complexity may be even greater in non-asbestos cases where the medical views are not so developed and the identification of the factors relevant to apportionment may not be so clear. There have been more than 30 years of asbestos litigation and many cases have considered apportionment issues which give considerable guidance as to the principles to be adopted in apportionment cases.

In New South Wales the issue has already been confronted. The Apportionment Order developed as part of the response to the NSW Government Review of the legal and administrative costs associated with the Dust Diseases Tribunal, allocates contributions between defendants in accordance with an apportionment methodology which is premised on factors such as:

⁴⁵ At p16, para 36

- disease type;
- length and intensity of exposure;
- asbestos type;
- year of exposure

and many others.

This type of legislative response sought to eliminate the significant costs and difficulties of proof involved by these types of processes.⁴⁶ But importantly it was built upon the history of cases developing the factual issues relevant to apportionment.

Dissent

Lord Rodger of Earlsferry provided a strong dissenting judgment in which he contended that the characterisation of the defendant employers' wrongful creation of a material risk of injury, which if materialised, forms the basis of liability was a substantial departure from the settled law. His Lordship also noted the irony that the majority decision of the House of Lords would benefit the interests of insurers and defendants as they will no longer bear the risk of insolvent or unidentifiable defendants. He notes that the result is that the claimants will often end up with only a small proportion of the damages which would normally be payable for their loss in circumstances where defendants or their insurers are no longer available to be pursued.

This confronts directly the community and government issue in the "moral" context of asbestos and like agents.

(iii) Government Response

What followed this decision is another example of the readiness of government to step in and amend the law where it considers there are valid policy and political reasons to do so. On 25 July, some 2 months after the House of Lords decision in *Barker v Corus*, the UK Parliament passed the *Compensation Act 2006*. Why this is significant is that at the eleventh hour, a new clause 3 was added to the Bill to address the consequences of *Barker v Corus*. Section 3 of the *Compensation Act 2006* deals with mesothelioma claims, and although originally foreshadowed that the provisions would only apply to workplace injuries, the legislation presented to and passed by parliament was not limited in this way.

Section 3 of the *Compensation Act 2006* essentially provides that a person is a responsible person if they have negligently or in breach of their statutory duty, caused or permitted another person to be exposed to asbestos, and that person contracts mesothelioma as a result of exposure to asbestos. Because of the state of medical science, it is not possible to determine with any certainty which exposure caused the person to become ill, but the provision of Section 3 provides that the responsible person is considered to be liable in tort by virtue of the exposure in

⁴⁶ See Dust Diseases Tribunal (Standard Presumptions Apportionment) Order 2005.

connection with damage caused to the victim by the disease, whether by reason of having materially increased a risk or for any other reason.

Section 3 further provides that the responsible person will be liable in respect of the whole of the damage caused to the victim by the disease, irrespective of whether or not that person has in fact been exposed to asbestos by others, or where there may be other exposure by the responsible person which is non tortious. The responsible person is entitled to seek contribution from any other responsible person, and in the absence of an agreement as to apportionment between responsible persons, the court can make findings in relation to the appropriate contributions, depending on the relative length of the period of exposure for which each is responsible. Section 3 also provides that a responsible person includes a reference to an insurer of a responsible person.

The Act contemplates the making of a number of supporting and enabling regulations, particularly to facilitate recovery of contribution from insolvent insurers under the *Financial Services Compensation Scheme (FSCS)*.

The passing of this legislation has some interesting consequences in respect of determining when a liability arises under an insurance policy and in this regard, we consider this legislation might now in fact limit the applicability of the Court of Appeal decision in *Bolton Metropolitan Borough Council* as discussed at Section 6.5 of this paper.

Closer to home we have seen a number of recent examples of where Government has stepped in to ameliorate the impact of judge made law . In 2005 in *CSR v Eddy* (another asbestos case), the High Court held that *Sullivan v Gordon* damages (or damages to compensate a claimant for their inability to continue to provide gratuitous services to dependants as a result of their injury/disease) was not available at law. Shortly after both the NSW and South Australian state governments responded with legislation to overturn the impact of that decision. South Australia was also motivated by the impact of the *BHP v Schultz* cross vesting decision that had the potential to limit South Australian resident's access to the sympathetic DDT in New South Wales.

Again insurers are faced with very uncertain sovereign risks where the disease and those responsible for it are seen to have a moral culpability that leads governments to vary the effect of the common law.

6.3 Rothwell v Chemical & Insulating Co

When does a cause of action accrue? When is there damage? Are the "worried well" able to recover damages for prospective loss?

(i) Issue

In the case of *Rothwell and Chemical & Insulating Co Ltd*,⁴⁷ the UK Court of Appeal was asked to opine on whether the development of pleural plaques together with the risk of contraction of one or more long term asbestos related diseases when linked to the anxiety at the prospect of suffering such a disease, was an actionable claim capable of enforcement by a Court under English Law. This decision is currently on appeal to the House of Lords

(ii) Facts

The Court of Appeal considered eight appeals in respect of ten claims for personal injury together as test cases. In each of the appeals it was not contested that each of the claimants had been negligently exposed by their defendant employer to asbestos dust. The exposure was said to have three foreseeable consequences:

- the claimants had developed pleural plaques;
- the claimants are at risk of developing one or more long term asbestos related diseases; and
- the claimants had suffered anxiety at the prospect that they may suffer such disease.

One of the claimants, Mr Grieves differed from the others in that he had developed a depressive illness as a result of worrying about the consequences of his exposure to asbestos.

Pleural plaques are essentially localised areas of pleural thickening on the lungs which consists of fibrous tissue. The pathology is still uncertain but it is understood generally that the presence of asbestos fibres lead to a prolonged low grade inflammatory response in the body resulting in the release of chemical mediators which internally contribute to the laying down of fibres tissue⁴⁸. This fibrous tissue may be identified by x-ray but in most cases does not cause any discomfort or symptom.

Pleural plaques are rarely detected during the first twenty years following exposure to asbestos. The frequency in the extent of the occurrence of pleural plaques has a relationship with the quantity of fibres inhaled and the duration of exposure. In a sense they are markers demonstrating exposure to asbestos but their presence doesn't normally occasion any symptoms. Given the absence of symptoms, pleural plaques are usually only established by way of a chest x-ray or CT scan or on a post-mortem or autopsy often incidental to some other investigation. Plaques do not in themselves threaten or lead to other asbestos induced conditions such as asbestosis or mesothelioma nor are they necessary pre-cursors to such conditions. They simply evidence exposure to asbestos.

(iii) Reasons and Comments

It is well understood that at common law, none of those consequences, ever experienced on their own would constitute damage capable of founding a cause of action in negligence.

⁴⁷ Decision of the Court of Appeal, 26 January 2006 – Rothwell's claim was heard together with 5 other claims as part of a test case. Earlier descriptions of this case in the High Court have been to *Grieves v FT Everard & Sons Ltd*.

⁴⁸ As explained in Rothwell see Lord Phillips CJ judgement at paragraph 10.

The common issue in the cases was whether by associating the claim for pleural plaques with one or more of the other consequences (anxiety or depression), sufficient damage can be demonstrated to establish a cause of action. Pleural plaques undoubtedly constitute a physiological change in the body (similar to the scenario of the benign brain tumours found in the Swedish mobile phone radiation study referred to in the introduction of the paper). However, but for the 1% of claimants who actually experience symptoms associated with pleural plaques, no one has suggested that pleural plaques has significant or adverse effects on any bodily function and being internal has no effect on appearance. Ignoring the 1%, no one is any worse physically for having pleural plaques.

It is a principle of common law that negligence is not actionable *per se* but only actionable on proof of damage. While such damage need not be substantial, it must be more than minimal. The English and Australian courts have not entertained a claim for fear of future illness, incapacity or death where these are not the potential consequences of physical injury. The reason why anxiety has not been treated as a free standing head of damage is one of policy in the English legal system so even where the defendants conduct foreseeably caused psychiatric harm to a claimant, policy places restrictions upon the circumstances in which this can give right to a claim in negligence.⁴⁹ This was a relevant consideration in the case of Mr Grieves.

Two principles or policies came into play in the case of *Rothwell*. The first policy was the principle that a claim should be brought within a reasonable time of the cause of action arising. This principle is reflected by the statute of limitations. In many respects the legislature has amended the limitation statutes to provide that the limitation period will run for a claim for personal injury from the time the claimant first becomes aware that they have sustained significant injury – commonly a three period is allowed.

The other principle is that litigation should be finite so that a claimant can only bring one action in respect of damage attributable to that cause of action. Some legislatures have ameliorated this principle by providing for the award of provisional damages such as in the case of the Dust Diseases Tribunal in New South Wales. The existence of provisional damages in cases such as these give the claimant an option to either accept a once and for all judgment or to obtain initial damages and wait and see what the final outcome is.

The Court of Appeal decided that there was no legal precedent to extend or depart from legal principle and permit the aggregation of the two heads of claim so as to constitute sufficient damage to give rise to an actionable claim.

In Mr Grieves' circumstances, the Court of Appeal refused to support the contention that a defendant should be liable in respect of a situation where they have negligently exposed a claimant to the risk of sustaining a disease and be held liable for psychiatric injury resulting from an anxiety at the risk of contracting such disease where the psychiatric reaction was one that was not foreseeable in respect of a claimant of ordinary fortitude. As a result, although Mr Grieves had developed a recognised psychiatric illness, he was not entitled to damages. This is the issue at the heart of the Maddalena's case that was returned by the

⁴⁹ *Tame v New South Wales; Annetts v Australian Stations* (2002) HCA35

High Court to the W.A. District Court for a rehearing.⁵⁰ While the High Court's judgment focuses on the role and powers of an appellate court, particularly in respect of expert evidence given in a court below, the case highlights the difficulty faced by claimants in proving psychiatric injury. In Maddalena's case, he feared that he would contract mesothelioma, however under Australian law, damages are not available in respect of fear unless that fear manifests itself in some form of medically recognised psychological injury. The case highlights the subjective nature of psychiatric symptoms and the difficulty in proving such a psychiatric condition. That is not to say that psychiatric or psychological damage cannot be established in Australian courts.⁵¹ Of course, once a claimant has overcome the hurdle faced of proving that he or she suffers a recognised psychiatric injury, the claimant must still prove that the injury was a reasonably foreseeable consequence of exposure to asbestos.

6.4 Economic loss claims – when is damages to occur - *Law Society v Sephton*

We now move from asbestos to a claim for economic loss.

(i) Issue

The issue before the House of Lords was at what point in time did a cause of action arise for the purposes of the limitation statutes under English law.

There were competing arguments about the point in time at which the claimant was said to have suffered damage. It is important to note here that the claim is by the Law Society who had indemnified those who actually suffered the loss. The issue is when did the Law Society in its capacity as an indemnifier suffer damage by the solicitor misappropriating his trust monies where there is a claim for negligence against the solicitor's accountant by the Society for recovery of indemnified losses rather than a claim against the solicitor himself.

(ii) Facts

A solicitor in a law firm misappropriated client funds over a period of six years. During the time when the funds were being misappropriated, a firm of accountants had issued certificates to the effect that they had examined the solicitor's accounts and were satisfied that the solicitor had complied with the Solicitor's Account Rules. The Law Society relying on the reports issued by the accountant did not investigate the solicitor's practice until it was alerted by a complaint lodged by a client of the solicitor. The Law Society notified the firm of accountants that it intended to hold that firm liable in respect of the payments out of the Compensation Fund made by the Law Society to clients of the solicitor to replace the money that had been misappropriated. When the claim was finally issued by the Law Society against the firm of accountants, the accountants argued that the claim was out of time as the limitation period had expired a long time ago. The Law Society claimed that this was not so and in the alternative, if it was, the firm of accountants was estopped from relying on the limitation period in view of representations made by it.

⁵⁰ *CSR v Maddelina* (2006) HCA1

⁵¹ See for example, the recent decision in *Canute v Comcar* [2006] HCA 47, where the High Court held that psychological sequelae suffered as a consequence of an initial physical injury, constituted a separate injury giving rise to a right to compensation under the *Safety, Rehabilitation and Compensation Act 1988 (Cth)*

The accountant firm argued that the Law Society's cause of action accrued at the point in time when the money was misappropriated by the solicitor as this was the act that gave a client of the law firm an entitlement to make a claim on the Compensation Fund and in turn triggered the liability of the Law Society to pay such a claim. The Law Society said no, the point in time when it suffered damage was when a payment was actually made from the Compensation Fund. The first court held against the Law Society, the decision was reversed by the Court of Appeal and subsequently appealed to the House of Lords.

(iii) Reasons and Commentary

The House of Lords decided that the damage did not arise until the Law Society had to make payment out of the Compensation Fund.

The House of Lords had to consider and clarify the question of contingent liabilities and referred to and followed the High Court of Australia decision in *Wardley Australia Ltd v State of Western Australia*.⁵²

The House of Lords held that the misappropriation of the funds gave rise to the possibility of a liability to pay a grant out of the Compensation Fund contingent upon the misappropriation not being otherwise made good and a claim in proper form being made. Until such a claim was made, the Fund sustained no loss or damage. So the act of the accountant did not give rise to a cause of action until that loss arose.

It should be noted that this case and the High Court in *Wardley* deserve close reading for the very difficult issues as to when loss does arise in many commercial transactions. These cases have important implications for issues under professional indemnity and directors and officers covers.

6.5 Bolton Metropolitan Borough Council case

Issue

In this case, the Court was concerned with identifying when an injury *occurred* in the context of two public liability insurance policies held by Bolton Metropolitan Borough Council. Again this is an asbestos case.

The claim arose as a result of Mr Green developing mesothelioma. He had 2 separate periods of exposure to asbestos fibres. His exposure occurred a considerable period of time before he developed a malignant tumour or later experienced symptoms associated with that malignancy. The courts had to determine when Mr Green was injured for the purposes of the defendant's insurance policy.

(i) The Facts

Mr Green had been employed by sub-contractors who had been engaged to carry out building works with the Bolton Metropolitan Borough Council and Mr Green had been negligently exposed to asbestos between 1960 and 1963. Mr Green was later employed by another party between 1965 and 1970 and then again after 1973 where he was further exposed to asbestos. Mr Green consulted his doctor as a result of breathing difficulties in

⁵² (1992) 175 CLR 514

around August 1990. In January 1991 he was diagnosed as suffering from mesothelioma and died in November that year.

The argument before the Court was essentially an argument between the insured and insurer as to when the insured's liability arose and accordingly which policy of insurance responded to indemnify the insured. The Bolton Municipal Borough Council argued that its liability arose in 1980 which was the time when medical evidence indicated Mr Green's mesothelioma occurred. The insurer on risk at this time denied liability saying that if any insurer was liable, it was the insurer at the time when Mr Green was first exposed to the asbestos.

The Bolton Municipal Borough Council had two public liability policies. Both policies were similarly worded and provided an indemnity in respect of bodily injury or illness occurring during the currency of the policy.

The Court of Appeal had to consider under the policy wordings (rather than under the law of negligence) at what moment in time, in the context of the disease of mesothelioma, did the injury, illness, loss or damage occur. Was it:

- (a) at the time of exposure to asbestos;
- (b) at the time at which the malignancy first occurred which was expected in around 1980; or
- (c) at the moment in time at which the Claimant became symptomatic.

At first instance, the Court had held that the mere inhalation of fibres did not amount to bodily injury or illness and accordingly the Bolton Metropolitan Borough Council only became liable to Mr Green at the time at which he developed a serious injury which was in or around 1980 when the malignancy and tumours was said to have first occurred.⁵³

(ii) Decision and Comments

There was a significant amount of detailed medical expert evidence before the Court as to the cause and development of the disease of mesothelioma. At paragraph 21 of the Judgement, the evidence of Dr Moore-Gillon was noted:

"So far as Mr Green is concerned, the escape of a cell from normal cellular control mechanism probably occurred within a margin of one year either side of 1980. Before 1979/1981 the death of macrophages had occurred as a result of engulfing asbestos fibres, cells had undergone genetic alteration as a result of the presence of fibres, but Mr Green did not have mesothelioma and was not inevitably fated to developed mesothelioma; his body was no different was anyone else who lives and/or works in a town or city; to the medical profession he was not ill, although his far above normal exposure to fibres in the course of this work meant that the risk of his developing mesothelioma was correspondingly greater. In 1979/1981 a malignant tumour developed. It is an agreed fact that he would have had the first symptoms attributable to his mesothelioma in 1990."

⁵³ We note that in the Bolton case, there were other issues between the parties including the issue as to whether or not an insurer could rely on the late notification condition against the insured and whether the exclusion of double insurance would limit the liability of one of the insured

The Court of Appeal unanimously upheld the decision at first instance to the effect that the description of injury or illness in the context of the policy wording did not include inhalation of asbestos fibres (which will not necessarily result in a disease developing but which is a necessary precursor to the disease).

The Court of Appeal dismissed the argument that injury occurred at the point when the bodies natural defence mechanisms were operating to destroy or neutralise the fibres as soon as they were inhaled on the basis that this was inconsistent both with the principle and authority. On the basis of principle it was argued that it would be inconsistent because the contract between the parties, that is the contract of insurance, was an agreement to indemnify against liability.

It was said it cannot be right that at this stage of initial exposure or initial bodily reaction to such exposure, there could be a liability in respect of which the council could require to be indemnified under any public liability insurance policy. It was noted that at the point in time of inhalation of the asbestos fibres, Mr Green could not have sued for personal injury because he had suffered no injury at this stage.

It was also noted that as a matter of authority, words such as injury or damage in indemnity agreements did not include injury or damage which will happen in the future. The Court of Appeal relied on a number of first instance cases that had established a pattern to the effect that actionable injury did not occur on exposure or when an initial bodily change is happening but only at a much later date when a malignant tumour is first created or when identifiable symptoms first occur. On this basis it was held that injury could not be equated to insult received by the body when exposure first occurs.

Reference was made to the US position deriving from the case in *Keene Corporation v Insurance Co. of North America*⁵⁴ which had decided that all insurers at risk from the time of first exposure to the diagnosis of disease should be liable to the insured. This is referred to as the multiple trigger or sometimes triple trigger theory. The Court of Appeal rejected the suggestion that it should be concerned with the multiple trigger theory noting that it had been adopted in the United States for policy reasons in relation to the vastly greater numbers of asbestos disease sufferers in that country and it saw no reason to adopt it in this particular case where the same policy considerations were not present. References were also made to the Court of Appeal decision in *Orica Ltd v CGU Insurance Ltd*⁵⁵ but noting that the case was too different to be of assistance.

With respect, we consider that the analysis in *Bolton* as to what constitutes an injury for the purposes of the policy of insurance, confuses an injury for legal purposes and what might be termed the *medical* injury. An analysis of the Australian law would appear to support the conclusion that injury does in fact occur at the point in which the asbestos fibre penetrates the lining of the lung. The fact that this injury does not necessarily give rise to a disease is neither here nor there but if in fact it does give rise to a subsequent cancer, then the Australian courts would seem to take the view that in those circumstances the injury is

⁵⁴ 667 F 2d 1034 (1981)

⁵⁵ 2002 NSW CA 331

the original ingestion of fibre. The decisions in the Australian courts including the *Orica* case have not been given consideration by the High Court.

It should also be noted that as more becomes known about the disease of mesothelioma and the expert evidence becomes more sophisticated (as heralded by Bolton), it is possible that such discoveries may challenge the existing legal principle as to what relevantly constitutes an "injury" in the context of mesothelioma cases under Australian law. The decision also creates potentially great uncertainty where the point of first development of a tumour does not give rise to symptoms until sometime later and as a consequence the time at which the tumour first developed may be very unclear and this in turn will present *Barker v Corus* type issues as to which policy responds. In the *Bolton Case* itself there seemed to be a curious level of evidential certainty about the time the tumour first developed which doesn't seem to accord with medical views on this issue expressed elsewhere. It may be that the structure of the policies in this case simplified the issues and so this did not need to be closely explored. But if injury in the context of slowly developing diseases is given this meaning then the insuperable problems of the type in *Cartledge v Joplin* will arise for insureds without the legislative solution of limitation legislation providing relief. From a policy perspective it appears to be an inappropriate outcome and highlights the need for very careful drafting of liability policies where they are intended to cover disease.

7. Consequences for the Drafting and Interpretation of Insurance Policies

7.1 Policies of insurance

The manner in which policies of insurance might provide cover for an insured in the context of latency claims will depend largely on the policy wording and the proper construction of the policy.

The policy of insurance might attach at any one of the following points:

- (a) when the cause of action accrues;
- (b) when the act or omission giving rise to the loss occurs eg alignment with the cause that attributes legal liability;
- (c) notification of a claim or of facts and circumstances that may give rise to a claim (claims made policies). However, the operation of retroactive dates in the policy may result in a gap in cover; or
- (d) some other test (eg, injury or first manifestation of injury or specified event).

As the *Bolton Case* illustrates a lack of careful consideration to these issues having regard to the type of policy is likely to result in potential mispricing by the insurer and lack of cover (or lack of adequate cover) for the insured.

7.2 Occurrence policies

Where policies are drafted by reference to an occurrence, the critical issue is the term used to describe that thing which must occur during the policy period for the policy to attach. If as may be commonly found in a number of policies, it is an occurrence that gives rise to an

injury and it is the occurrence that must occur during the policy period, then one can conclude notwithstanding *Bolton* that the relevant date for the attachment of the policy is the date of exposure to the agent that causes the injury.

If, however the policy specifies that the injury must occur during the policy period, then we have issues as to what this is with competition between:

- the initial impact of the agent on the body;
- the development of the medical injury;
- the date on which there is non minimal damage giving rise to a cause of action.

In *Bolton*, it appears that the court has assumed that the last two items are roughly at the same point of time although it is very unlikely that the claimant would be aware that the event of injury has in fact occurred. Moreover, notwithstanding the confidence of the medical advice provided to the court in *Bolton* as already noted here may be very significant issues as to the time at which this medical injury actually occurred because it will not be observed but rather will depend upon estimates as to when it is likely to have occurred following examination of the plaintiff when the injury has in fact been identified.

The fact that in the case of asbestos there is an actual physical entry of the fibre into the lung at the time of exposure, perhaps makes it easier to determine, as has been the case in Australia, that an injury occurs at that point of time. In fact, the simplicity of this approach is evidenced by the UK government's *Compensation Act 2006* and referencing relevant injury or cause of the mesothelioma to the period of exposure.

However, the issue may be much more difficult where the agent that gives rise to the disease or injury is an electromagnetic wave or perhaps a virus. The physicality of the impact of the agent on the body may not be present and that may lead courts to take a differing view as to when the injury occurs but there will still then be substantial problems as to identifying the point of time at which the subsequent medical injury does in fact arise.

This compounds the problem for insurers and also for claimants under those policies because the claimant may have substantial difficulties in proving, on the balance of probabilities, that the relevant injury occurred at a particular point of time where a particular policy was in force. Will the courts in these circumstances seek to resolve the matter by taking steps of the type found in *Fairchild* to bring home the liability to either the insurer at a particular point of time or insurers over a period notwithstanding the problems of proof? It is difficult to see the legal principle that would support such an approach.

If other descriptives are used, then they need to be considered having regard to the type of issues that are now emerging in asbestos litigation and the type of issues that might arise in the context of those types of diseases and risks that have been identified as perhaps giving rise to latent claims in the future.

From an insureds' point of view in an occurrence based policy there is much sense in ensuring that the policy attaches to the explanation of the disease that the law treats as having caused or contributed to the loss. If it is some other point of time then insurers in periods after the problem has started to emerge may be able to exclude the developing liability. The problem for insurers is the proper pricing of latent claims that may emerge from what on the surface appear to be normal activity but one that turns out to be far riskier

than anticipated where the normal references to historical data fails to anticipate the likely losses.

Insurers have a number of ways of limiting their liability either by excluding particular matters, by imposing aggregate or sub-limits on policy covers and by other means. Historically, insurers have tended to exclude particular risks (eg, Y2K, asbestos, nuclear), but these are really responses to 'known' risks and as we have seen in the case of asbestos, the exclusion provisions have come late in the piece and well after significant liability has occurred. However, one possible way of dealing with latent claims is by considering whether or not the policy should contain a provision that the cause of action must arise within a particular number of years after the policy expiry date for the policy to respond. This may protect insurers in enabling insurers to better estimate the cost of such an exposure and to not unduly expose them to matters which are likely to be unable to be priced.

This may also be an approach that could be a basis for sharing risks between insured and their insurers and the general community particularly where a risk may be possible but its extent is unknown.

We think that the use of specific exclusions aimed at particular products or consequences is a fairly blunt and possibly ineffective tool and that more sophisticated thought needs to be given to the issue starting with a better appreciation of what insurers may be able to price and better relate that to the policy wording. This requires a sophisticated understanding of the law and of potential future change. The issues of sovereign risk arising from future changes in law that increase liability should perhaps be expressly dealt with by limiting the liability under the policy in some of those circumstances.

Consideration needs also to be given to legislative provisions such as the strict liability for manufacturers and importers under legislation such as the Trade Practices Act for defective goods. These perhaps need specialised treatment in policies especially if the legal cause or trigger for liability differs from those under negligence principles.

7.3 Claims made policies

A claims made policy essentially depends on a claim having arisen, that is in accordance with the cases which we have discussed and in accordance with Australian law, there must be non-minimal damage in the policy period for a claim to have arisen. Once that claim is notified to the insured, then the insured can notify the claim to the insurer and be covered under the policy. However, more difficulty may arise in relation to the notification of facts and circumstances. Many policies now deal with this issue in the context of section 40 of the *Insurance Contracts Act 1984*. It permits an insured to give notice to the insurer of "facts that might give rise to a claim against the insured" and if such notice is given during the policy period, then the policy will respond to any subsequent claims as if the claim had been notified in that period.

Now imagine an insured who becomes aware that scientific advances are suggesting that a product or agent made or used by the insured may give rise to a latent disease or injury. At the point of time where those facts "might" give rise to a claim, the notification can be made and so there is a potential in a developing circumstance where latent claims may

arise for insureds to protect themselves by taking advantage of the provisions of section 40. This has the consequence that claims made policies may end up being exposed in a way familiar to asbestos insurers by reason of such notifications even though, at the time of the notification, it is not clear as to who would be the claimant and how many, if any, claims would in fact emerge.

Clearly, insurers need to rethink a number of these issues in order to better deal with the issues of latent claims.

If the dissentient views in *Rothwell* are accepted by the House of Lords, then we are likely to see firstly in the United Kingdom and perhaps in Australia an outbreak of claims similar to those in the United States of America by "worried well". It will be very important to watch to see how the House of Lords deal with the appeal in *Rothwell*.

8. Recommendations

It is clear that insurers have either not recognised or fully priced for latent risk claims and therefore, there are issues as to who should bear the cost of the increased exposure of both the liable party and to the insurer. As there is great uncertainty as to which causes may result in future latent claims – it is therefore very difficult to cost or price for these risks and, as has been demonstrated in this paper, the insurer faces the unenviable task of seeking to price risks which may subsequently be increased by virtue of government action and legislation, which in turn has a retrospective affect on potential liabilities.

Again, it is interesting to note the sophistication of the New South Wales Motor Accident Scheme where the Government recognised that legislative change which increased the exposure of an insurer after writing the policy, was a cost that went to the account of Government unless sufficient notice was given to allow for repricing.⁵⁶

It is important to see these developments in a wider context for there is a real need to develop thinking and debate about the fact that science can now much better link outcomes to causes and that the law needs to take account of the fact that its principles were largely developed in an industrial society where the focus was on compensating loss or damage that arose immediately from acts or omissions. Just as today we are able to measure minute particles of contaminants and dangerous substances, we are also able, or becoming more able, to firstly associate or link those substances to adverse outcomes and to a lesser extent show how an agent has caused the loss or damage of a particular individual.

8.1 Critical Role for Insurers in leading the debate

Because of the importance that insurance plays in pooling and shifting risk, it is critical that the insurance industry be at the forefront of these discussions. For this to occur, the industry must fully understand the manner in which the law is developing and find ways, if possible, to underwrite these types of risks either alone or in conjunction with Government.

⁵⁶ See section 9 of the Industry Deed between licensed insurers and the New South Wales Government.

The fact that our science is able to identify risk and link consequences to particular events in both an associative and a causative fashion is a critical part of the underlying matrix to the insurance issues.

If these risks are to be insured under occurrence type policies that attach at the point of the creation of the risk that gives rise to the loss, then long latency periods provide a prudential supervision challenge. How can you protect against insurer insolvency and the simpler problems of record keeping? The problem of identifying the policy and the reinsurances protecting it 20 years after the event is not to be underestimated.

There are also serious issues for claims provisioning if the potential claim is not identified or able to be identified until many years after the event insured. As a consequence, there are apparent profits and apparent strength in an insurer which does not in fact exist. This is especially true where there are very long latency periods and where it may not be known until some considerable time after the insurance has expired as to whether there is likelihood of a claim or not.

As we have already observed, critical to the insurance industry, is a full understanding of these mechanisms and the risks which they are really underwriting in respect of losses that may not emerge for many years. If the insurer will not cover the loss because it cannot properly assess and price that loss, then it will fall back to the community.

8.2 What is the most appropriate model for compensators of latency claims?

The critical question for our community is what is the most appropriate way to guard against these outcomes and where they occur to compensate those who suffer loss. In many areas, there are now strong preventive regulatory regimes which prevent the distribution of product without rigorous testing (eg. drugs). The laws relating to misleading and deceptive conduct provide a more blanket approach by imposing liability on those responsible for ultimate loss by reason of failure to warn of or describe a known risk or where representations are not reasonable.

In Australia, generally speaking the principles of compensation are found in a liability law where the person who suffers the loss is able to recover compensation if that person can show, in the manner required by law, that there is another person or entity liable for the loss. The rights of recovery are then supported by insurance arrangements and, in particular, rights of cut through to insurers where liable parties have become insolvent.⁵⁷

Governments have approved proportionate liability in cases of economic and property loss but not in cases of death or personal injury. Notwithstanding this, the common law distinguishes between divisible injuries (eg. asbestosis) and indivisible injuries (eg. mesothelioma) and this results in those being serially responsible for exposure to dangerous agents having a several liability in respect of divisible injuries and a joint and several liability for indivisible injuries. This distinction largely rests on the ability or inability of science to relate the injury back to different types of exposures at different times and to be able to apportion the contribution of different parties who contribute to the final outcome.

⁵⁷ Section 601AG Corporations Act 2001; section 51 Insurance Contracts Act 1984; section 6 Law Reform (Miscellaneous Provisions) Act 1946

But where this is possible, the plaintiff bears the risks of death, disappearance or insolvency of the wrongdoer.⁵⁸

9. Conclusion

Insurers and reinsurers are currently focussed on debates concerning what may be regarded as more current and visible liability risk issues as demonstrated by topics such as climate change and the associated extreme weather conditions. However, for the reasons illustrated in this paper, insurers should be equally concerned about the liability risks and their exposure arising from latent claims which in many cases may relate to insurance policies written a considerable time ago.

⁵⁸ See the discussion of the position in the USA and UK in Jane Stapleton "Two Causal Fictions at the Head of US. Asbestos Doctrine", (2006) 122 L.Q. R. 189.