

Turner Freeman

Lawyers



Dust Diseases Compensation SA

G R E A T P E O P L E . G R E A T R E S U L T S . G R E A T V A L U E .

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The township of Wittenoom where blue asbestos was mined.



Workers at Wittenoom filling drums with blue asbestos.

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I hope that you find the information in this brochure both interesting and informative.

Turner Freeman has a long and proud history of representing victims of asbestos disease throughout Australia and overseas. In South Australia, Turner Freeman has represented more asbestos victims than any other law firm.

This brochure is designed to give a brief run down of the compensation entitlements available to sufferers of dust diseases depending on the type of disease, the exposure and place that the exposure occurred. It is important that anyone diagnosed with a dust disease obtains legal advice regarding the compensation options available and before any claims are lodged. Time limits apply and can be strictly enforced so it is best to get advice as soon as possible after diagnosis. We have offices around Australia and can visit you at home or in hospital if you cannot travel.

All of the advice that we provide in dust diseases claims is on a “no win, no pay” basis. This means that if you do not obtain compensation you will not have to pay any of our legal costs. If you have any queries about the information in this brochure, do not hesitate to pick up the phone and ask one of our lawyers on a no obligation basis.

I hope you enjoy the read.

Annie Hoffman
Managing Partner
Turner Freeman Adelaide



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How to make a claim

Telephone the Turner Freeman office nearest you on the toll free 1800 or office phone number (see inside back cover). Explain you have asbestos or another dust disease and you would like to speak to a lawyer. A family member or friend can make the telephone call for you. Please ask if you would like to speak to one of our people in a language other than English. You will be put through to a senior staff member who will ask you some simple questions.

- Your matter will be referred to an appropriate lawyer in our offices and you will be telephoned by the lawyer.
- Depending on how urgent your case is i.e. how ill you are, an appointment will be made for you to see your lawyer in our offices, or the lawyer will visit you at home or in hospital.
- The lawyer will obtain a 'statement' from you on how you were exposed to the asbestos or other dust, and how the disease has affected you. After you have told the lawyer what happened it will be typed up, reviewed and corrected if necessary and you will be asked to sign it.
- Whether you have a dust disease which may entitle you to claim for compensation, will be decided by your medical reports. You may need to attend a medical examination, which we will organise and pay for. Your lawyer will write to advise you whether or not you may have a claim and arrange to discuss the claim with you.
- If you then decide you wish to go ahead with your claim you must tell ('instruct') your lawyer to proceed. Then your lawyer will take the necessary steps to have your claim dealt with by the Court. You may have to appear in court personally.
- If your claim is successful you will receive a lump sum payment in compensation. If your case is urgent these procedures can be fast-tracked.

Turner Freeman works on a no win-no fee basis for dust disease claims. Unless you get compensation you will not be charged for our work.

South Australia

In South Australia all claims for asbestos conditions are brought in the District Court of South Australia.

New South Wales

In New South Wales you may be eligible to claim compensation in the New South Wales Dust Diseases Tribunal which is the specialist court set up to hear dust disease cases.

In addition you may also be eligible to receive a pension from the Dust Diseases Board if you worked in New South Wales and have a recognised dust disease. A Dust Diseases pension is separate from and in addition to any claim in the Dust Diseases Tribunal.

Queensland

In Queensland you may be eligible for compensation from WorkCover, be able to claim compensation in the Queensland courts; or in the New South Wales Dust Disease Tribunal if you were exposed to the asbestos or dust in New South Wales.

Western Australia

In Western Australia claims for compensation are available either under workers compensation legislation or at common law.

Other States

Turner Freeman has links with interstate law firms in Australia in those states where it does not have a presence.

Overseas

If you are living overseas but were exposed to asbestos in Australia we can still represent you. Contact us by phone, email or letter.

If you wish to claim in a UK court (England, Scotland or Northern Ireland) or in the United States of America, Canada and New Zealand, Turner Freeman has links with law firms that can assist you.

Dust diseases compensation

Turner Freeman has continued to expand the nature of claims filed on behalf of victims suffering from dust disease and we have litigated numerous test cases that have established important legal precedents changing the prospects for people with dust diseases.

Important victories

- The first product liability claim against an asbestos manufacturer, James Hardie & Coy Pty Limited in Australia.
- The first verdict on behalf of a child born at Wittenoom and exposed to blue asbestos dust in the township.
- The first verdict on behalf of a victim who was working with brake lining materials as a fitter in an engineering firm.
- A succession of successful judgments for workers exposed to asbestos and suffering from lung cancer.
- The first verdict on behalf of a waterside worker suffering from asbestos disease.
- The first verdict on behalf of a victim who contracted mesothelioma from doing home renovations.
- The first verdict on behalf of a victim who contracted mesothelioma after just a few hours exposure to asbestos dust when her father demolished the carport when she was a child.
- The first verdict in a contested claim in the District Court of South Australia under the Dust Diseases Act 2005 (SA).
- The first award of exemplary damages under the Dust Diseases Act 2005 (SA).

Turner Freeman has the experience and skill to provide the specialised legal services needed by victims of dust disease throughout Australia and overseas.

We represent members of

the Asbestos Victims Association of South Australia based in Adelaide; the Whyalla Asbestos Victims Support Group in Whyalla; the Asbestos Diseases Foundation of Australia based at Granville in Sydney; the Queensland Asbestos Related Disease Support Society based in Brisbane; the Australian Manufacturing Workers' Union in NSW and SA; the Electrical Trades Union of Australia in NSW. Turner Freeman represented the coalition of unions and asbestos support groups at the James Hardie Inquiry.

No win-no fee

We work on a no win-no fee basis for dust diseases claims. Unless you recover compensation you will not be charged for any work done by our firm or any expenses incurred by us in investigating your claim. Should you fail in your claim for compensation you will be liable for the whole of the other party's costs; but not for our fees and charges.

Referral and support organisations

Asbestos Victims Association (SA) Inc

Level 3, 60 Waymouth Street
Adelaide SA 5000
Tel 08 8212 6008
Toll free 1800 665 395
www.avasa.asn.au
Contact: Terry Miller – M 0418 807 834
Email ava-sa@bigpond.net.au

Whyalla Asbestos Victims Support Group

Shop 5, 87b–89 Essington Lewis Avenue
Whyalla Playford SA 5600
Tel 08 8645 0555
Contact: John Arthur – M 0416 482 673



Left to right: Insulation pipe sections manufactured at Hardie BI Factory at Camellia; worker using the number one machine at the Hardie BI factory to manufacture insulation products.

Is dust dangerous?

Yes, very dangerous. A wide variety of dusts produce disease, with the most serious dust diseases being those caused by exposure to asbestos and silica.

What are the dust diseases?

The most significant diseases caused by exposure to dust are

- Aluminosis
- Asbestosis
- Asbestos induced carcinoma
- Asbestos related pleural disease
- Bagassosis
- Berylliosis
- Byssinosis
- Coal dust pneumoconiosis
- Cryptococcosis
- Farmers' lung
- Hard metal pneumoconiosis
- Mesothelioma
- Occupational asthma
- Silicosis
- Silico-tuberculosis
- Talcosis

Asbestosis

Asbestosis is a scarring of the spongy part of the lung. It stiffens the lungs and makes them less able to transfer oxygen. The immediate effect is breathlessness usually with exertion, but later, even minimal amounts of exercise can cause breathlessness. The disease tends to progress and severe cases result in death from respiratory failure.

Asbestos related pleural disease

Asbestos related pleural disease is a process that usually begins with an inflammation of the pleura that leads to fluid collecting in the space between the lung and the chest wall. This is also commonly referred to as a benign asbestos related pleural effusion.

The disease normally manifests sooner after asbestos exposure than mesothelioma and is quite different from mesothelioma. Symptoms include shortness of breath and discomfort. When the pleural fluid eventually goes away, the pleura on the lung may become thickened which can compress the lung.

Asbestos induced carcinoma of the lung

This is often referred to as bronchogenic carcinoma. It is recognised as being one of the most common complications of asbestos exposure and it usually causes death. Asbestos induced carcinoma of the lung is one of the most fatal of the common cancers.

It is not necessary for a worker to have asbestosis in order to attribute bronchogenic carcinoma to asbestos exposure. The attribution can be made if there has

been sufficient exposure to asbestos dust even if the person was also a smoker.

Pleural mesothelioma

Pleural mesothelioma is a malignant tumour that develops in the pleura. The pleura is a very thin layer of tissue that wraps itself around the lung and lines the inside of the chest wall. Symptoms include a rapid and substantial build up of fluid, pain and breathlessness.

Peritoneal mesothelioma

The abdomen is lined with a similar type of tissue to the pleura. The tissue is called the peritoneum. The first sign of a peritoneal mesothelioma is usually swelling of the abdomen. Apart from a substantial build up of fluid the disease causes discomfort and/or pain and obvious interference with abdominal functions.

Asbestos induced carcinoma of other organs

Asbestos dust has been implicated in cases of renal cell carcinoma and also in cases of cancer of the larynx but it is very difficult to prove at law. Medical and scientific evidence in the area of asbestos induced carcinoma of organs other than the lungs is still in a state of evolution.

Pleural plaques

Pleural plaques are the most common manifestation of past asbestos exposure. They are basically patches of thickened tissue on the surface of the lung.

Pleural plaques cause symptoms including pain in some cases but current medical and scientific knowledge does not support the proposition that pleural plaques predispose victims to other complications such as mesothelioma.

Silicosis

Ordinary silicosis, whether in its simple or complicated stage, is defined by the formation of characteristic hyaline and collagenous nodules. Accelerated silicosis occurs when there are intense exposures and is characterised by the earlier onset and very rapid progression of the disease. Acute silicosis develops after massive exposures and can occur after short periods of exposure. The condition is characterised by the presence of nodules in the lung.

Progressive massive fibrosis

Progressive massive fibrosis is often the end stage of silicosis. It occurs when the silica nodules coalesce into one formation thereby creating an appearance of progressive massive fibrosis.

Bernie Banton OAM

Bernie Banton was the first person to make a second claim for damages after being diagnosed with a second, different asbestos disease.

Bernie suffered from severe asbestos pleural disease and asbestosis since 1996 requiring constant oxygen. In 2007 Bernie was diagnosed with the separate disease mesothelioma. His mesothelioma was not related to his pleural disease or asbestosis.

Bernie was exposed to asbestos as a result of his employment with James Hardie at its insulation factory from 1968 to 1974 as a plane operator working on the production of asbestos insulation blocks and pipe sections. The conditions Bernie worked in were horrendous. Bernie described the atmosphere he worked in; "I was often covered in a fine white dust. It was on my face, skin, hair and clothes. There was so much dust on my clothes that I used compressed air to get rid of the dust..... There was so much dust around, that getting dust in my eyes and nose was just a part of the routine."

In 1996 Bernie sued James Hardie in the Dust Diseases Tribunal of New South Wales. Because he was only 54 years of age at the time Bernie, on the advice of his lawyer, Tanya Segelov, commenced and settled his claim on a provisional damages basis. This meant that Bernie was compensated for his pleural disease and asbestosis and he reserved his right to make a claim if he developed another asbestos disease such as mesothelioma or lung cancer. Initially James Hardie refused to settle his claim on a provisional damages basis. Bernie stuck to his guns and his settlement was one of the first provisional damages settlements in New South Wales.

Because Bernie's asbestosis claim settled on a provisional damages basis, Turner Freeman was able to commence a further claim in relation to his condition of mesothelioma. The further claim sought damages for his condition of mesothelioma as well as exemplary damages, that is damages designed to punish James Hardie for its behaviour in grossly exposing him to asbestos dust when it knew of the dangers in doing so and its conduct in restructuring the company in 2001 to set up a compensation fund that was grossly inadequate to compensate future victims. James Hardie tried to have the claim for exemplary damages struck out. The Dust Diseases Tribunal held that such a claim was available and this was upheld by the New South Wales Court of Appeal. Bernie's health deteriorated and the Dust Diseases Tribunal expedited his hearing, taking his evidence from his bedside at Concord Hospital. Bernie's case settled for a confidential sum days before his death.



Over the years Bernie watched many of his friends and colleagues from James Hardie, including his own brother, die of asbestos diseases. As a result Bernie became a tireless campaigner for the rights of asbestos victims and workers in general, particularly during the James Hardie Commission of Inquiry and the fight to ensure that all James Hardie victims receive fair compensation. Bernie became the public face of asbestos victims during the James Hardie Inquiry and was the victims' representative in negotiations with James Hardie. Bernie's fearless passion and dedication ensured that James Hardie victims' right to compensation has been guaranteed for the next 50 years and that the plight of asbestos victims has remained in the forefront of politicians' minds and the media. Bernie's last fight was to ensure that Alimta chemotherapy treatment was put on the PBS and therefore available to all mesothelioma sufferers.

Bernie's claim highlights the importance of settling claims for benign asbestos diseases on a provisional damages basis. All New South Wales and South Australian plaintiffs have a right to settle their claims on a provisional damages basis. If you settle your claim on a full and final damages basis rather than a provisional damages basis then you can never make another claim, even if you develop mesothelioma or lung cancer. The difference between a settlement on a provisional damages basis and a full and final damages basis is normally about \$10,000 to \$20,000, that is, if you settle your claim on a full and final basis rather than a provisional damages basis you will receive an extra \$10,000 to \$20,000 now. You will however give up the right to claim further damages in the vicinity of \$200,000 to \$400,000 in the event you contract mesothelioma or lung cancer.

A state funeral was held for Bernie on 5 December 2007. It was a fitting farewell for a courageous man and a fighter who fought James Hardie on behalf of all victims up to his dying breath. His passion, determination and humour will be greatly missed by all who knew him, particularly his friends at Turner Freeman.

Avenues of compensation in SA

Victims of dust disease in South Australia have two avenues of compensation.

The Workers Compensation Act 1971 or the Return to Work Act 2014.

If you were exposed to dust at work prior to 30 September 1987 then your claim will be covered by the Workers Compensation Act 1971. If you were exposed to dust at work after 30 September 1987 then your claim is covered by the Return to Work Act 2014.

Claims brought pursuant to the Workers Compensation Act 1971 involve making an application against a former employer or in circumstances where the employer no longer exists and the insurer has not been identified, against the Statutory Reserve Fund.

You will be required to undergo a medical examination.

The maximum amount of compensation payable under the Workers Compensation Act 1971 is \$40,000 plus medical expenses and in some cases lost earnings. Claims under the Return to Work Act 2014 can result in higher amounts of compensation but as asbestos was phased out in industry by this time it rarely applies.

Common law

A common law negligence claim, in relation to a sufferer of a terminal condition such as mesothelioma or lung cancer, who at the time of diagnosis was not working is usually valued at approximately \$250,000 to \$400,000 after all costs and disbursements have been paid.

Following the introduction of the Dust Diseases Act 2005 (SA) all claims for asbestos conditions are usually brought in the District Court of South Australia. The District Court must ensure that such claims have priority and are dealt with expeditiously.

The Dust Diseases Act introduces evidentiary presumptions that assist in proving your case. If the defendant carried on a prescribed industrial or commercial process it is assumed, unless there is evidence to the contrary, that the defendant knew at the relevant time that exposure to asbestos could cause a dust disease. If you were exposed to sufficient asbestos to cause a dust disease and you have that dust disease, then it is assumed that your dust disease was caused by your exposure to asbestos. In addition the Act allows you to tender evidence from previous proceedings and rely on previous findings of courts in South Australia and elsewhere including New South Wales.

The Court will award damages for pain and suffering, loss of expectation of life, past and future out of pocket expenses including medical expenses, the commercial cost of gratuitous care and assistance that has been and will be provided as a result of your asbestos condition, the loss or impairment of your capacity to provide domestic services for the benefit of others and, where appropriate, loss of earning capacity. In addition to these compensatory damages the Act provides that a Court must award exemplary damages (damages designed to punish a defendant) if you can prove that the defendant knew that a person such as yourself was at risk of exposure to asbestos dust and knew at the time of your exposure that exposure to asbestos dust could cause a dust disease.

Claims in South Australia can proceed on a provisional damages basis. This means you claim damages for the asbestos conditions you are now suffering from and you reserve the right to make a further claim if you develop another asbestos condition in the future

Damages for pain and suffering and loss of expectation of life survive death provided proceedings are commenced in the persons lifetime.

Claims in South Australia are subject to limitation periods. An asbestos claim must be commenced within three years of you becoming aware of your asbestos related condition. The Court can extend the time limit for a period of 12 months after you become aware of a material fact such as an increase in your disability or extent of disease.

If you recover any damages at common law then you must repay any monies received for a claim brought under any Workers Compensation Acts that apply in South Australia.

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Dust diseases cases in the District Court of South Australia will be heard before Industrial Relations Court judges at the Industrial Relations Court Building on North Terrace. This is intended to help the District Court meet the need for dust diseases cases to be dealt with expeditiously.

An important victory for mesothelioma victims

John William Booth contracted malignant pleural mesothelioma, a cancer of the lining of the lung that is only caused by asbestos, when he was 71 years of age.

Mr Booth had worked with brake linings containing asbestos for a period of about 30 years, commencing from the early 1950's. The majority of the brake linings that he worked with were manufactured by James Hardie & Coy Pty Limited (now called Amaca) and a related Hardie company Hardie Ferodo Pty Limited (now called Amaba). He was also exposed to asbestos from working with brake linings manufactured by other companies, from helping his father with work on the family home using fibro sheets and from carting a load of raw asbestos fibre from the Sydney waterfront.

Mr Booth commenced proceedings in the Dust Diseases Tribunal of NSW (DDT), a specialist court established to hear cases for compensation for asbestos disease, claiming compensation from both Amaca and Amaba.

Mr Booth's case proceeded to hearing before Judge Curtis of the DDT in February 2010. A number of medical expert witnesses gave evidence in Mr Booth's case including Professor Henderson and Dr Leigh, both world recognised experts in the area of the diagnosis and cause of mesothelioma. Amaca and Amaba defended the claim vigorously. Neither company called expert medical evidence to show that their products were not a cause of Mr Booth's mesothelioma. Instead, Amaca and Amaba argued that while the state of medical knowledge was sufficient to prove that asbestos was the sole cause of mesothelioma, the state of medical knowledge did not allow Mr Booth to prove that asbestos products manufactured by Amaca and Amaba were a cause of his mesothelioma.

Judge Curtis found in Mr Booth's favour on 10 May 2010 and awarded him \$326,640 plus his costs. Judge Curtis not only accepted the evidence of Mr Booth's medical witnesses but also found that as early as 1953 Amaca should have been aware that its products could cause asbestos disease.

Both Amaca and Amaba subsequently appealed to the NSW Court of Appeal. Both companies argued that the asbestos contained in their products could not be proven to be a cause of Mr Booth's mesothelioma. Three Appeal Judges of the NSW Court of Appeal unanimously dismissed the appeals awarding costs to Mr Booth on 10 December 2010.

Both Amaca and Amaba sought special leave of the High Court of Australia to appeal the decision of the NSW Court of Appeal. On 10 June 2011, the High Court of Australia granted Amaca and Amaba leave to appeal the decision of the NSW Court of Appeal but only on a limited basis, that being whether the expert evidence relied on by Mr Booth could establish that the asbestos in Amaca's and Amaba's

brake linings was a cause of Mr Booth's mesothelioma. In addition, the High Court required Amaca and Amaba to pay Mr Booth's costs of the proceedings in the DDT, NSW Court of Appeal and High Court, regardless of the outcome because Amaca and Amaba were using Mr Booth's case as a test case that might establish a precedent to be followed in other cases.

The hearing of the appeals took place in the High Court of Australia on 4 and 5 October 2011. The Court delivered its decision on 14 December 2011 dismissing Amaca's and Amaba's appeals by a 4 to 1 majority.

The outcome of the case is of critical importance to all future mesothelioma victims. The High Court rejected Amaca's and Amaba's argument that the expert medical evidence relied on by Mr Booth did not establish that asbestos from their brake linings was a cause of Mr Booth's mesothelioma. The Court accepted Mr Booth's expert medical evidence that all of his exposure to asbestos caused his mesothelioma and as asbestos from the brake linings manufactured by Amaca and Amaba that Mr Booth worked with made a significant contribution to the asbestos in his lungs, they were responsible for Mr Booth's mesothelioma.

Mr Booth's case is a very important victory for all present and future mesothelioma victims. This is because Amaca and Amaba tried to argue that the medical evidence relied on by Mr Booth could not prove that asbestos from their brake linings caused his mesothelioma. If Amaca and Amaba had succeeded, then all future claims for compensation for mesothelioma would have been denied. It is estimated that about 20,000 people will be diagnosed with mesothelioma over the next 30 years. Had Mr Booth failed then those people would not be able to claim compensation.

The District Court of South Australia is bound to follow the decision of the High Court. Further the Dust Diseases Act in South Australia allows other mesothelioma claimants to rely on the findings and evidence in the Booth case.

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Mr Booth's case is a very important victory for all present and future mesothelioma victims



Mr John Booth

Landmark win against BHP in the High Court of Australia

Turner Freeman Partner, Annie Hoffman, brought a claim for Mr van Soest against BHP in 2012 after he was diagnosed with mesothelioma, a deadly lung cancer caused only by exposure to asbestos.

Mr van Soest was employed by BHP at their Whyalla Shipyard in 1962 for 11 weeks as a painter and docker. He worked on the construction of the PJ Adams where he worked in the vicinity of ladders installing asbestos insulation around pipes and boilers. Mr van Soest was also required to assist the ladders on occasions to cut up and install insulation containing asbestos.

BHP aggressively defended the case at trial. Although BHP admitted that Mr van Soest had been exposed to asbestos dust at BHP, it argued that it could not have known that the level of exposure to asbestos dust that Mr van Soest suffered was dangerous in 1962. At the time the National Health & Medical Research Council of Australia (“NHMRC”) had prescribed a limit of exposure to asbestos dust below which it was thought that there was little risk of contracting an asbestos related disease. BHP argued that Mr van Soest’s exposure to asbestos dust at Whyalla did not exceed the NHMRC standard and therefore it was not required to do anything to protect Mr van Soest from the dangers of asbestos.

The trial judge rejected this argument finding that because BHP did not measure the level of asbestos dust in the air on the PJ Adams, there was no way of knowing how much exposure to asbestos dust that Mr van Soest actually suffered. The court found however that it was known in 1962 that persons working in the ship building industry had contracted asbestos related diseases and that BHP should have been aware that workers like Mr van Soest were at risk of exposure to asbestos dust. In the circumstances the court found that

BHP was required to do something to protect Mr van Soest from exposure to asbestos including providing him with a respirator or a warning in relation to the dangers of asbestos dust.

The trial judge’s decision was handed down on 17 June 2013. BHP appealed the decision and unfortunately Mr van Soest passed away shortly after on 24 July 2013.

Mr van Soest’s son continued the fight against BHP in the Supreme Court of South Australia. He successfully defended BHP’s appeal, the Supreme Court handing down its decision on 19 December 2014 against BHP.

Following this decision BHP sought special leave to appeal to the High Court of Australia against the decision of the Supreme Court. This was BHP’s last roll of the dice in its efforts to avoid paying compensation to Mr van Soest’s estate.

The application for special leave to appeal was heard in the High Court on 19 June 2015. Again, BHP argued that it did not have to do anything to protect Mr van Soest from his exposure to asbestos dust on the PJ Adams in 1962. Chief Justice Robert French and Justice Stephen Gageler rejected BHP’s argument and dismissed its application for special leave to appeal. The decision marks an end to a 3½ year legal battle against the company. The case was run aggressively by BHP as a test case and is a culmination of a series of hard fought legal battles with BHP. The decision will have a significant impact on all current and future victims of asbestos disease from the Whyalla Shipyard, as well as other industrial users of the product.

SA worker wins landmark asbestos case - two years after his death

BITTERSWEET VICTORY

ANDREW HOUGH

A SOUTH Australian worker's victory over mining company BHP Billiton has given hope to thousands of asbestos victims in their battle for compensation. The High Court yesterday dismissed BHP's final challenge to a \$358,000 payout awarded to for-

mer Whyalla shipyard worker Willem van Soest, who died of asbestos-related cancer in 2012 during his legal battle. His family is celebrating the "bittersweet" win, which victims hope will end what they say is BHP's "aggressive litigation" against ex-staff.

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© The Adelaide Advertiser, 20 June 2015, Andrew Hough

Parker vs BHP Billiton Limited

On 18 July 2011 His Honour Judge Lovell of the District Court of South Australia handed down his decision in the matter of Parker v BHP Billiton Limited. The decision was the first dust diseases judgement in Australia against BHP in which liability was fully contested. Mr Parker was successful in his claim not only receiving an award for compensatory damages, but also being the first person to obtain an award for exemplary damages under the *Dust Diseases Act 2005 (SA)*.

BHP put every matter in issue apart from Mr Parker's employment. Mr Parker worked at the BHP Whyalla Shipyard between 1964 and 1966 and again between 1970 and 1977. He was employed as a shipwright and worked primarily on the slipway on the early construction of ships at the Shipyard where he was not exposed to asbestos. Mr Parker was however required to work from time to time, and for a period of about twelve months when on light duties between 1971 and 1972 at the fitting out wharf. Lagging work was carried out at the fitting out wharf using asbestos insulation materials. Mr Parker suffered bystander exposure to asbestos dust and fibre as a result.

Judge Lovell summarised in detail the lay witness evidence called on behalf of Mr Parker. Judge Lovell made findings in relation to the working conditions at the Shipyard as a result of this evidence. The Judge found that at night limpet asbestos was sprayed and during the day lagging with preformed asbestos pipe sections, asbestos slurry and asbestos rope was carried out. Further, he found that asbestos marinite sheets were installed throughout the accommodation areas and that asbestos mattresses were used and made on board the ships.

In relation to the issue of foreseeability, that is whether or not BHP knew or ought to have known during the period of Mr Parker's exposure to asbestos that exposure to asbestos was dangerous, Mr Parker tendered bundles of material being historical, medical, industrial and scientific articles, about the dangers of exposure to asbestos going back to the early 1900s.

Further, Mr Parker called Mr Gordon Stewart, industrial hygienist, and Dr Margaret Becklake, epidemiologist, who both gave evidence concerning what was known at particular points in time as to the dangers of exposure to asbestos. As a result of this evidence, Judge Lovell made findings in relation to foreseeability, and specifically he found that "...it was not in dispute in the literature after the 1930s that employers needed to be aware of the



Laying steel plates for first offshore drilling rig built at Whyalla, 1966.

dangers of working with asbestos and that precautions should be taken to reduce the risk.”

Judge Lovell went on to find that by the 1960s the dangers posed to shipyard workers was well documented in the literature. He found that BHP either knew or ought to have known of the risk of injury of exposure to asbestos to Mr Parker.

In its defence, BHP called an expert industrial hygienist, Mr Alan Rogers. Mr Rogers gave evidence in relation to various standards of exposure to asbestos that were in force during the period of Mr Parker's employment. Specifically, the National Health & Medical Research Council (“NH&MRC”) published standards in relation to exposure to asbestos. BHP attempted to rely upon these standards in their defence, arguing that in order for Mr Parker to succeed in his claim, he needed to prove that his exposure exceeded the relevant NH&MRC standard for exposure to asbestos. Mr Rogers carried out an assessment of Mr Parker's exposure to asbestos using a retrospective analysis method. As a result of these calculations, Mr Rogers estimated Mr Parker's exposure to asbestos whilst employed by BHP at a level well under the relevant standard published by the NH&MRC at the time.

Judge Lovell was critical of Mr Rogers' assumptions and selection of studies relied upon in carrying out his calculations. He described Mr Rogers' evidence in

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Parker vs BHP Billiton Limited ...continued from page 11

relation to this aspect as “most unsatisfactory”.

The plaintiff relied upon the standards that were published by the NH&MRC and tendered by the defendant. The plaintiff argued that the NH&MRC standards were advisory only, did not establish limits of exposure that were intended to define levels of exposure as being “safe” and were only to be interpreted by appropriately trained industrial hygienists. Judge Lovell found that even if Mr Rogers’ calculations were right, and Mr Parker’s exposure to asbestos whilst employed by BHP fell far below the NH&MRC standard of the day, the standards were only a guide and were not determinative of the question of BHP’s duty of care, or breach of that duty, to Mr Parker. Further, Judge Lovell noted that BHP never carried out any testing during Mr Parker’s employment at the fitting out wharf to ascertain the level of asbestos dust and fibre in the atmosphere on ships it constructed. Therefore there was no way of BHP ever knowing whether or not the levels of asbestos dust in the air ever exceeded or fell below the relevant standard.

After weighing up all of the evidence, the Judge found that BHP did very little to protect its employees from exposure to asbestos at its shipyards before 1973. Specifically, the Judge found that BHP did not warn its workers about the dangers of exposure to asbestos, did not provide masks or respirators, and did not reduce the amount of dust in the atmosphere by using extractor fans, wetting down methods or industrial vacuum cleaners.

Judge Lovell then considered the medical evidence called in Mr Parker’s matter. BHP disputed that Mr Parker suffers from asbestosis. The Judge preferred the plaintiff’s evidence called from Professor Ruffin, respiratory physician, and found that Mr Parker suffers from asbestosis causing a 20% disability. The Judge found that Mr Parker’s non-asbestos related conditions were the major cause of his disability and made a reduction in his damages accordingly on account of these conditions by two-thirds.

Mr Parker was also exposed to asbestos whilst employed at shipyards in the UK. As the condition of asbestosis is a divisible injury in law a reduction needed to be made from Mr Parker’s damages for his exposure to asbestos in the UK for which BHP was not responsible. The Judge found that 50% of Mr Parker’s exposure to asbestos occurred in the UK and reduced his damages accordingly. Following these reductions, Mr Parker was awarded the sum of \$52,124.93 in compensatory damages.

Judge Lovell then went on to consider Mr Parker’s claim for exemplary damages. Compensatory damages are awarded to compensate a person for the loss they have suffered. Exemplary damages are different. They are designed to punish a defendant for their conduct. Exemplary damages are rarely awarded at common law. In 2005 the South Australian Parliament introduced a new test for exemplary damages under section 9(2) of the Dust Diseases Act 2005 (SA) which allows a plaintiff to claim exemplary damages against a defendant where it can be proved that the defendant knew that the plaintiff was at risk of exposure to asbestos dust and knew at the time of the plaintiff’s exposure to asbestos dust that exposure to asbestos dust could result in a dust disease. Judge Lovell considered that the plaintiff had satisfied the test required under the Act.

Mr Parker was the first person to obtain an award for exemplary damages under the Dust Diseases Act 2005 (SA).

Judge Lovell considered the evidence tendered by the plaintiff in relation to BHP’s knowledge of the dangers of exposure to asbestos, and other relevant factors to an award of exemplary damages including the conduct of BHP, the size and wealth of BHP and the need to punish BHP. He noted that asbestos is no longer used by BHP and therefore, there is no need for deterrence in relation to the use of asbestos any more. Taking all these matters into consideration, His Honour awarded Mr Parker \$20,000 by way of exemplary damages against BHP.

BHP appealed the decision to the Full Court of the Supreme Court of South Australia.

In the Supreme Court BHP argued again that according to the scientific knowledge available in the 1970s, and the WH&MRC standard, they could not have known that Mr Parker was at risk of contracting asbestosis while working at its shipyard. BHP also argued that Mr Parker had been awarded too much by way of compensation and that the award of \$20,000 for exemplary damages should be overturned.

On 18 June 2012 the Full Court dismissed BHP’s appeal and upheld Judge Lovell’s award of exemplary damages.

Trevor Reynolds wins fight for justice



DESPAIR: Mr Reynolds at home yesterday with wife Glenis. . . he says his life "effectively ended six or seven months ago". **Picture:** Sam Wundke

On Friday 15 December 2006 the District Court of South Australia handed down its first ever decision under the Dust Diseases Act 2005 and awarded Mr Trevor Reynolds, a 66 year old Adelaide man suffering from mesothelioma a sum of \$326,048.83.

Mr Reynolds was in good health until September 2005, working as a sub-contractor tow truck

operator. He planned to keep working until he was at least aged 70 years. In September 2005 Mr Reynolds suffered a chest infection.

After further symptoms and investigations, he was diagnosed in January 2006 with mesothelioma. He was devastated by the diagnosis. Mr Reynolds was exposed to asbestos from January 1956 until August 1961 as an apprentice fitter and turner with the South Australian Railways at the Islington Railyards.

Mr Reynolds commenced proceedings against the Commonwealth (who have assumed the liabilities of the South Australian Railways) initially in the Dust Diseases Tribunal of New South Wales and was subsequently transferred to the District Court of South Australia. Mr Reynolds' condition deteriorated and his evidence was heard by the District Court of South Australia at his home on 4 September 2006. The rest of the matter was heard by the District Court on 6, 7 & 8 December 2006 before Judge Soulio.

Turner Freeman acted for Mr Reynolds.

Trevor angry at compo fiasco

Kim Wheatley
TREVOR Reynolds has 12 weeks to live, yet his dying days are spent frustrated with the highest legal official, Attorney General Michael Atkinson.
 The former fitter and turner contracted mesothelioma after working at the Islington rail yards more than 40 years ago. His compensation case against the Commonwealth has been stuck in court this week.
 But it is a small matter of procedure that has led to a delay of more than a year. The Government has refused to pay the compensation until it has agreed to fund a new law.
 "I'm angry," says Mr Reynolds. "I've spent a lot of money on my case and I've been waiting for a long time. I want to see the money." Mr Reynolds says he is not angry at the Government but at the delay.
 "I've been waiting for a long time. I want to see the money." Mr Reynolds says he is not angry at the Government but at the delay.
 "I've been waiting for a long time. I want to see the money." Mr Reynolds says he is not angry at the Government but at the delay.

Compensation for SA tradesman

Between 1963 and 1979 Turner Freeman client William Abel worked as a sheetmetal worker, assistant plumber, foreman plumber, production manager and manufacturing manager for Atco. Atco built transportable buildings made of asbestos cement fibro sheets which were manufactured and supplied by James Hardie & Coy Pty Limited. Mr Abel cut and installed the asbestos cement sheets manufactured and supplied by James Hardie and worked in the vicinity of others who were using the fibro sheets manufactured and supplied by James Hardie.

In July 2005 Mr Abel collapsed in the shower. He was rushed to hospital where scans showed that he was suffering from a large right sided pleural effusion (fluid on the lung). Fluid was drained from Mr Abel.

In August 2005 Mr Abel underwent an operation to drain more fluid and take biopsies of his lung. Mr Abel's treating doctors suspected that he was suffering from the asbestos cancer, mesothelioma and Mr Abel was told that this was the likely diagnosis. The results of the biopsies showed that Mr Abel was not suffering from mesothelioma.

As a result of the surgery and the pleural effusion, Mr Abel developed pleural thickening. The pleural thickening continues to cause him restriction resulting in breathlessness and tightness in his chest.

After undergoing investigation for mesothelioma, Mr Abel developed a psychiatric condition of an Adjustment Disorder with mixed anxiety and depressed mood. Mr Abel continued to fear that he would one day contract the asbestos cancer mesothelioma.

Mr Abel instructed Turner Freeman to commence proceedings on his behalf against Amaca Pty Limited (formerly James Hardie & Coy Pty Limited) in the District Court of South Australia. Proceedings were filed on 14 January 2008.

Mr Abel's case proceeded to hearing in 2009. James Hardie disputed Mr Abel's claim saying that during the period 1963 to 1979 it did not nor ought not to have known of the dangers from cutting and handling asbestos cement sheets. At the hearing Mr Abel called evidence to show that during the period he worked with James Hardie's products, James Hardie knew that any exposure to asbestos was dangerous and could cause serious injuries to persons such as Mr Abel.

Judgment in Mr Abel's case was handed down on 23 July 2010. Mr Abel succeeded in his claim against James Hardie and was awarded damages for pain and suffering as well as for the care and assistance provided by his wife and family as a result of his asbestos disease, his past and future medical and other expenses and interest. All up Mr Abel was awarded the sum of \$155,967 plus costs on a provisional damages basis. The award was a provisional damages award allowing Mr Abel to bring a further claim against James Hardie if he contracted mesothelioma or lung cancer. Mr Abel's Judgment was the first provisional damages Judgment in South Australia.



Mr Abel and his lawyer Annie Hoffman

Commonwealth Employees

If you are a current or former Commonwealth employee or current or former member of the Australian Defence Force you have the following entitlements if your asbestos conditions are attributable to your employment by the Commonwealth or the Australian Defence Force.

Entitlements under the Commonwealth Safety Rehabilitation & Compensation Act, 1988

You may be entitled to a lump sum for permanent impairment, weekly payments of compensation for any work related incapacity, medical expenses and possibly compensation for pain and suffering.

Should you die from an asbestos related condition a dependant may have a right to lodge a claim under the Commonwealth Safety Rehabilitation & Compensation Act, 1988. Your dependant would have to show dependence upon you. There also may be a sum to cover funeral expenses. Amounts may also be payable to your dependent children.

Entitlements under the Veterans' Entitlements Act, 1986

In certain circumstances ex-members of the Australian Defence Force may have entitlements under the Veterans' Entitlements Act, 1986. These entitlements result in a pension and not a lump sum. You do not need to prove the Commonwealth was at fault to receive payment under either the Commonwealth Safety Rehabilitation & Compensation Act, 1988 or the Veterans' Entitlement Act, 1986.

If you make a common law claim for the same asbestos condition for which you have been accepted by the Department of Veterans' Affairs, then there could be an effect on your Veterans' Affairs pension. It could also affect treatment expenses that the Department of Veterans' Affairs has paid in relation to that asbestos condition. Every case is considered separately.

Negligence action for damages

Where exposure to asbestos occurred prior to 30 November 1988 you may sue for negligence at common law. You are not restricted by the operation of the Commonwealth Safety Rehabilitation & Compensation Act, 1988. Proceedings against the Commonwealth are commenced in the District Court of South Australia and in other State Courts.

In relation to the Commonwealth claims to ensure your rights are protected it is particularly important you seek legal advice before deciding whether or how to claim.

It is important that legal advice is sought by current or former Commonwealth employees before any decision is made about the type of compensation to pursue.



A wide variety of dusts produce disease, with the most serious dust diseases being those caused by exposure to asbestos and silica

Asbestos compensation in the United Kingdom

If you were exposed to asbestos in the UK and later get an illness caused by asbestos, you can claim compensation in the UK, even if you no longer live there. If you have had contact with asbestos both in the UK and in Australia, you can make separate claims in the UK and Australia.

Court action

You can make a court claim in the UK for mesothelioma, asbestos related cancer, asbestosis and pleural disease.

In the UK a court action will usually be against your employer if you worked with asbestos. If you worked near someone else who used asbestos, you may be able to claim against their employer, or the manufacturer of the asbestos products. If you lived near an asbestos factory, you may have a claim against the factory. Claims can be made against companies which have gone out of business since 1969.

You can get a no win-no fee arrangement for the legal costs of a claim in the UK. This is known as a conditional fee agreement.

UK Government benefits

If you have any asbestos disease except pleural plaques through coming into contact with asbestos at work in the UK at any time since July 1948, you should apply for Industrial Injuries Disablement Benefit.

You can claim for a family member who had an asbestos illness and has died. However you must apply to the Benefits Agency and be appointed as the person appropriate to deal with this within 12 months after the death.

Payment under the Pneumoconiosis, etc (Workers' Compensation) Act 1979

This is a one-off payment from the Department of Work and Pensions, a UK Government department. You can claim for yourself or for a relative who had an asbestos illness and has died. To get a payment, you must be eligible for Industrial Injuries Disablement Benefit and your employer must have gone out of business and you or your lawyer must not have started a court action for compensation for an asbestos illness. However, it is nearly always worthwhile applying for a 1979 Act payment even if your employer is still in business.

Receiving a payment under the 1979 Act does not stop you starting a court action afterwards.

There are time limits for applying. You should apply as soon as you know you have an asbestos condition. Don't wait for the outcome of your other claims.

Turner Freeman has been conducting claims in the United Kingdom with the assistance of lawyers in England, Scotland, Northern Ireland and Wales for over 20 years and has assisted British migrants to recover millions of pounds in compensation.

James Hardie Commission of Inquiry

In March 2004 the then Carr New South Wales Government announced a special Commission of Enquiry into the Medical Research and Compensation Foundation established by the James Hardie group to be heard by Commissioner David Jackson.

Poisonous history

James Hardie was the largest manufacturer of asbestos products in Australia, manufacturing asbestos cement building products, insulation products, and asbestos brake linings in New South Wales, Victoria, Queensland, South Australia and Western Australia from 1917 to 1987. In February 2001 James Hardie set up the Medical Research and Compensation Foundation (MRCF). The purpose of the MRCF was to pay off all of James Hardie's asbestos liabilities. James Hardie put \$293m into the fund for all future asbestos liabilities, with any left-over monies to be spent on research.

Marathon enquiry

Despite outcries by unions, victims support groups and Turner Freeman, James Hardie assured the governments, unions, the stock exchange and the public that the MRCF was fully funded and had sufficient funds to meet all legitimate compensation claims anticipated for people injured by James Hardie's asbestos products. James Hardie then entered into a scheme of arrangement whereby the company left Australia and relocated to the Netherlands leaving asbestos victims access only to the \$293m of the MRCF.

Negotiations

The Commission sat for nearly 200 hearing days, hearing evidence from James Hardie's former directors, employees, actuaries and solicitors. Following detailed submissions made by the parties, the Commissioner handed down a two volume report. The Commissioner found that James Hardie established the MRCF for commercial reasons, that is to rid itself of its asbestos liabilities so that it could raise capital and list on the US Stock Exchange. The Commissioner found that the MRCF was massively under-funded, a situation that James Hardie's CEO, Peter McDonald knew and that the Board ought reasonably to have known. Commissioner Jackson found that James Hardie's action and that of its CEO, Peter McDonald and CFO, Peter Schaffron, were in breach of the law.

Just prior to the closing submissions, James Hardie made a conditional offer to pay for future asbestos liabilities if the common law system of claims was abolished. This offer was rejected by the New South Wales government, unions and support groups. Following the release of the Commission's report, and after pressure by governments, unions, media and the public, James Hardie agreed to fund all of its future asbestos liabilities.

Months and months of negotiations then followed between the New South Wales government, unions and asbestos support groups and James Hardie as to the mechanism by which James Hardie would fund its future

asbestos liabilities. The agreement reached requires James Hardie to make payments to the fund to ensure future victims have access to compensation.

Pro bono

Turner Freeman acted for the coalition of the unions and asbestos support groups at the Commission. Turner Freeman attended at the Commission hearings, cross-examined witnesses and made detailed submissions. Turner Freeman's partners, Armando Gardiman and Tanya Segelov devoted their time over an eight month period to the Commission of Inquiry. (Turner Freeman acted in the Commission on a pro bono basis).

Killer dust inhaled in child's play

Belinda Dunn was a sprightly four-year-old when she climbed a pile of building off cuts in front of her family home in Adelaide.

Belinda played for a few hours on the remains of a renovated carport, singing "I'm the king of the castle" before the pile was taken to an Adelaide tip.

Those few hours on her "castle" – sheets of deteriorating ...fibro – would give her incurable cancer....

A week after giving birth to her son Nathan.... Mrs Dunn was diagnosed with the aggressive cancer mesothelioma.... The disease's only known cause is asbestos....

Mrs Dunn settled a damages claim for an undisclosed amount with Amaca, formerly James Hardie, whose sheets she played on that day.

Mrs Dunn was represented by Turner Freeman. It was one of the first of the compensation cases to award damages to someone exposed to asbestos dust for such a short time, and as a child.

© *The Australian*, 25 January 2002, Iain Payten
Photographer Chris Pavlich



A mother's courage gets law changed

Melissa Haylock contracted mesothelioma at the age of 41 years. Her only exposure to asbestos was as a small child when, in 1964, her father carried out renovations on their home in Adelaide. Melissa's cot was near her father as he worked handling, cutting, rasping and drilling asbestos cement fibro sheets. Melissa's father picked her up to cuddle and play with her while he was covered in asbestos dust. Melissa made a claim against James Hardie, the manufacturer of the asbestos cement sheets her father used. (At the time Melissa contracted mesothelioma she had eight year old triplets).

Damages

Melissa claimed, amongst other damages, for the cost of replacing the care that, but for her condition of mesothelioma, she would have provided to her children. At the time her claim was commenced, the law in South Australia did not permit such damages to be awarded.

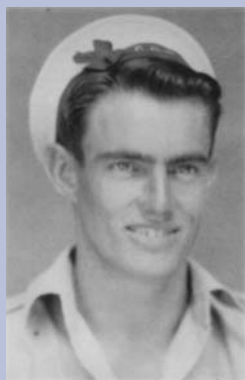
Advocacy

The Asbestos Victims Association in South Australia made submissions to the Government on behalf of Melissa, and lobbied to have the law changed to allow

persons such as Melissa to claim for the cost of replacing their services for the benefit of others.

Campaign

After much lobbying and media attention, the law was amended. Turner Freeman was able to settle Melissa's claim for a substantial figure that included damages for the cost of replacing her services as a mother, the first such case in South Australia. Melissa's courageous battle and public plea has resulted in a new system for asbestos claims in South Australia that will benefit all those who come after her.



Wartime mines exploded around him but asbestos dust the real enemy

Les Lawler was one of thousands of ex-servicemen exposed to asbestos dust during his time in the Navy and like others he contracted the deadly cancer mesothelioma.

HMAS Pirie

His only exposure to asbestos was for two and a half years, from 1943 to 46 when he served as a stoker on the Corvette, HMAS Pirie. Les had to clean the boilers every two or three months. The fuel pumps and steam and water pipes were lagged with asbestos cloth, asbestos rope or a slurry containing asbestos.

Les had to remove the lagging and then replace it whenever a repair job had to be done. He had to rip the asbestos off with his hands, cut the new cloth and stitch it around the pipes. There was no way he could avoid breathing in the dust.

Like a dust storm

The worst of it was when mines exploded near the ship making it vibrate, "the boiler room was like a dust storm," Les told his Turner Freeman lawyer.

Even when he slept there was asbestos dust in the air. His hammock was slung under the steam pipes. "Whenever the guns were fired ...the air was thick with asbestos dust," he said.

Just before his death Les gained a substantial compensation pay out, which went some way to make up for the pain and distress he has suffered with mesothelioma. It also provided security for his wife Ailsa. Les did not have to actually attend the court as his case was settled out of court.

Compensation benefits don't necessarily affect other entitlements

"It is important to understand that just because you are receiving benefits from the Department of Veterans' Affairs, it does not necessarily mean that you are prevented from bringing a claim for damages at common law," his lawyer explained. "Each case is different and we always check with the Department of Veterans' Affairs before commencing a claim. In Les's case his pension was unaffected by receiving a lump sum compensation payment."

Les Lawler joined the Navy when he was a boy of 18. He died in 2002.

Australia's Most Experienced Dust Practice

Turner Freeman has the largest and most experience dust diseases practice in Australia. For over 30 years we have represented thousands of victims of dust diseases. Ten of Turner Freeman's partners practice exclusively in the area of dust diseases claims and have over 100 years of dust diseases litigation experience between them. Our senior expert lawyers are:



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Other services Turner Freeman offers

Did you know...

Turner Freeman also specialises in the following types of claims:

- Workers compensation
- Motor vehicle accidents
- Industrial deafness
- Skin cancer
- Public place incident
- Superannuation and disability claims

Turner Freeman can assist you to obtain compensation in these types of matters on a No Win No Fee basis. For further assistance please call 1800 002 066 today.

The people at Turner Freeman speak a number of different languages. When we do not have a lawyer who speaks your language, we can access interpreters



Exposure Registration Form

**Turner
Freeman**

Lawyers

If you would like to register any previous exposure to asbestos please fill in this form and return it to us. We will maintain an obligation free file on your behalf at our office

Name _____

Address _____

Date of Birth _____ Telephone _____

Circumstances of Exposure

Place(s) where exposed or if home renovating, address where renovations occurred _____

Employer (if employment based exposure) / Occupier of site (if contractor) _____

Time period of exposure _____

Product(s) exposed to _____

Any precautions taken to prevent exposure yes / no (please circle)

Signature _____ Date _____

Turner Freeman will open a file and take steps to register exposure on an obligation free basis.

If a person has been exposed to asbestos in South Australia employment, but has not developed any asbestos disease, it is prudent that their exposure to asbestos be registered and Turner Freeman Lawyers can assist in this regard. If you have been exposed please complete this form and return it to

**Turner Freeman Lawyers
GPO Box 11049
Adelaide SA 5001**

If you have any questions regarding this form or would like any information regarding compensation entitlements for asbestos exposure please contact us on (08) 8213 1000 or toll free, 1800 088 677.

All persons exposed to asbestos in South Australia should note that strict time limits apply to lodging claims for compensation for past asbestos exposure. A person has 3 years from when they become aware of their asbestos condition to commence court proceedings, with an extension of 12 months available from the date you become aware of a material fact.

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Turner
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Lawyers