

ALCAN GOVE PTY LTD v ZABIC (D5/2015)

Court appealed from: Northern Territory Court of Appeal
[2015] NTCA 2

Date of judgment: 27 March 2015

Special leave granted: 15 May 2015

The Respondent was employed by Alcan Gove Pty Ltd (“Alcan”) as a manual labourer at its alumina refinery from 1974-1977. He regularly carried out repairs and maintenance of the network of pipelines at the refinery, which were insulated with asbestos lagging. In November 2013 he began to experience chest pain and shortness of breath and in January 2014 he was diagnosed with malignant mesothelioma.

The Respondent commenced proceedings in the Supreme Court of the Northern Territory against Alcan in negligence. He submitted that Alcan was negligent in exposing him to asbestos dust and fibres when it knew of the relevant dangers and failed to take any precautions for his safety. He further submitted that the cause of action arose with the inhalation of the asbestos dust which caused changes to the mesothelial cells, as opposed to when the symptoms of mesothelioma developed. Alcan countered that the claim was statute-barred on the basis that the Respondent did not suffer compensable damage until the onset of the malignancy process, most likely in 2009. It further submitted that his claim was not preserved by s 189 of the *Workers Rehabilitation and Compensation Act 1986* (NT) (“the Act”) as the damage arose after the date of the commencement of the Act on 1 January 1987.

Justice Barr found that Alcan was negligent and that its breach of duty of care had caused the Respondent’s malignant mesothelioma. His Honour however agreed that the claim was statute-barred pursuant to s 52 of the Act. This was on the basis that the cause of action arose after the relevant date, 1 January 1987, and was not otherwise preserved by s 189 of the Act.

On 25 March 2015 the Court of Appeal (Riley CJ, Southwood and Hiley JJ) upheld the Respondent’s appeal. Their Honours found that the medical evidence established that exposure to asbestos caused changes in the Respondent’s mesothelial cells well prior to 1987. The Court found that those changes were the start of a process that resulted in the Respondent suffering from malignant mesothelioma. Hence the cause of action and the compensable damage arose in 1974 and the claim was not statute-barred.

The ground of appeal is:

- The Court of Appeal erred in failing to find that the Respondent’s claim was barred by s 52 of the Act.

On 17 June 2015 the Respondent filed a summons, seeking leave to rely upon a Notice of Contention filed out of time. The ground of that Notice of Contention is:

- If the Appellant’s contention that the Respondent’s claim is barred by the operation of s 52 of the Act, then that section is invalid because it offends

against the provisions of s 50(1) of the *Northern Territory (Self Government) Act 1978* (Cth).

On 18 June 2015 the Respondent filed a Notice of Constitutional matter. As at the time of writing no Attorney-General has advised the Court of their intention to intervene.