

Australia: James Hardie court ruling another affront to asbestosis victims

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An Australian court last month ruled that former directors and senior executives of the building products company James Hardie Industries had breached the Corporations Act by issuing a false statement to investors in 2001 about the company's asbestosis compensation fund. At that time, the directors were preparing to move the company's headquarters offshore, cutting it adrift from its asbestos victims and future damages claims.

In a 2001 media release, designed to ensure approval from shareholders for the move and to give the false impression to victims that all future claims would be met, the company claimed that its Medical Research and Compensation Fund (MRCF) was "fully funded". The fund, set up to deal with thousands of asbestosis claims, was later found to have a \$1.3 billion shortfall.

In his judgment on April 23, New South Wales Supreme Court Justice Ian Gzell said board members had engaged in "misleading conduct". Media and business commentators said the ruling left the directors' reputations "in tatters" and would make it difficult for them to retain board positions in other companies. Former James Hardie chair Meredith Hellicar stood down from the boards of AMP and Amalgamated Holdings Limited.

The Australian Securities and Investment Commission (ASIC), which prosecuted the case, is seeking fines of up to \$200,000 and disqualification from managing share market-listed companies. Hellicar and others are likely to appeal, a process that could drag on for years. Nevertheless, legal experts described the ruling as a landmark that put all companies on

notice to consider their "corporate social responsibility".

In reality, the outcome is an affront to the many thousands of people suffering terminal asbestos-related diseases, especially when the company was aware for decades of the life-threatening effects of its products and attempted to evade liability by moving offshore.

The first asbestosis compensation case was brought against James Hardie in 1939. By the late 1950s, hundreds of cases of lung damage had been reported, but the company maintained operations as normal, with scant regard for the safety of its employees and customers. Dust levels in its plants ran at up to eight times the acceptable levels, even for those years.

Despite a mounting number of victims, little action was taken and only in 1979 the company told shareholders it was negotiating a product warning with the health authorities. There was little cause for concern, CEO Andrew Reid added, because "only" about 100 workers had contracted asbestosis in the previous 15 years. James Hardie continued using asbestos in its building products right up until 1987.

According to Australian Safety and Compensation Council statistics, the number of new mesothelioma cases per year is expected to increase from 156 in 1982 to 1,000 by 2010. The Nurses Association in 2004 told its members they would be caring for an estimated 54,000 sufferers of asbestos-related diseases over the following 15 years, with about 18,000 likely to die.

Elizabeth Thurbon, whose husband died of cancer from Hardie's asbestos cement, expressed disgust with

the court ruling when interviewed by ABC television's "The 7.30 Report": "When I watched my husband fight for breath in agony, I wanted to see those people in striped pyjamas behind bars, not wandering around Sydney in corporate suits. A company that deliberately and knowingly exposed people to a product that kills, and kills painfully and breathlessly. So how can I feel happy about what's happening? You know, let's get it in perspective."

As the NSW Supreme Court verdict was handed down, the company revealed that the Asbestos Injuries Compensation Fund, set up in 2005 to replace the underfunded MRCF, faced a significant shortfall this year and might be unable to meet its commitments by 2013 "due to the downturn in the United States housing market" that accounts for 80 percent of Hardie's income.

Under a deal struck in 2005 between the company, asbestos victims' representatives and the Australian Council of Trade Unions (ACTU), the company is only required to pay up to 35 percent of its operating cash flow into the fund.

Stockbroking analysts said that this year the fund was likely to receive just \$35 million (\$US22.4 million) and that next financial year it would pay nothing. Yet, victims' payouts are expected to be significantly above the \$69.2 million allocated last year.

The funding agreement, primarily organised by former ACTU secretary Greg Combet, now a frontbencher in the Rudd Labor government, was designed to protect the company's profits at the expense of asbestosis victims. In 2007, Anthony Wamsteker, the chief executive of the union-backed Members Equity bank praised Combet's "commercial nous," saying that Combet "realised that if the company was to keep on providing compensation over the long term, it had to remain profitable".

As a result, the asbestosis sufferers now face having their compensation payments reduced or cut off because of the global economic crisis and the company's profit decline. Plaintiff lawyer Tanya Segelov told the *Australian Financial Review* on April 23 that the average claim on the fund, of about

\$280,000, was expected to rise significantly. "More and more of the claims I see are from younger people," she said. "It might be people who helped mum with the washing or dad build a shed."

Once again asbestosis sufferers could find themselves consumed in a long drawn-out battle to secure compensation. Due to the company-friendly deal engineered by Combet and the ACTU, however, James Hardie is in a strong legal position in the current global economic climate to turn its back on the fund and asbestos victims.



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