



MAGISTRATES COURT *of* TASMANIA

CORONIAL DIVISION

Investigation into the death of David Cecil Mann

Ruling

Representation

Counsel assisting: E Belonogoff

Counsel for Norske Skog Paper Mills (Aust): A Mills

Counsel for the Asbestos Compensation Commissioner and the Regulator, WorkSafe Tasmania: S Thompson

The reporting of Mr Mann's death

1. David Cecil Mann died on 8 September 2020 at the age of 75 years. He died as a consequence of pneumonia due to malignant mesothelioma caused by asbestos exposure.¹
2. Mr Mann's death was reported to the coroner by a Police Report of Death for the Coroner on 9 September 2020. The basis for reporting Mr Mann's death was that it appeared to be a death due to his workplace exposure to asbestos many years previously and, in this regard, appeared to be an unnatural death.
3. A reportable death under the *Coroners Act 1995* (the Act) is, relevant to Mr Mann's death, one that ;

appears to have been unexpected, unnatural or violent or to have resulted directly or indirectly from an accident or injury..

Or, alternatively, one that;

¹ Exhibits C5 page 7; C6.

*occurs at, or as a result of an accident or injury that occurs at, the deceased person's place of work and does not appear to be due to natural causes.*²

4. Mr Mann's death was not reportable under any other definition of "reportable death" under the Act.
5. The death appears to be reportable on the above grounds, I commenced investigation pursuant to section 21(1) of the Act.
6. Mr Mann commenced employment as an apprentice fitter and turner in 1962 at Australian Newsprint Mills Ltd in New Norfolk. With the exception of three years in the Australian Army, Mr Mann spent his entire working life at the paper mill including through ownership changes to Fletcher Challenge and Norske Skog. Mr Mann retired with a voluntary early redundancy in 2004.³
7. Mr Mann was exposed to asbestos throughout his employment at the paper mill. Asbestos was contained in products that he used or worked on, including asbestos pipe lagging, rope, tape, slurry and gloves.⁴ Mr Mann's widow, Mrs Lynette Mann, recalled her late husband instructing her not to shake his work overalls prior to washing because of the asbestos fibres.⁵
8. Mr Mann was diagnosed with malignant pleural mesothelioma in January 2020.
9. Mr Mann made an application for compensation to the Asbestos Compensation Commissioner. This was approved in or around April 2020 and Mr Mann was paid lump-sum compensation and an additional age-related lump sum amount in accordance with the provisions of the *Asbestos-Related Diseases (Occupational Exposure) Compensation Act 2011*. The Commissioner also paid claims for Mr Mann's medical, rehabilitation and funeral expenses.

Requirement to hold a public inquest

10. Having been reported on the above grounds and an investigation commenced, Mr

² Section 3 of the Act – definition of reportable death- (a)(iv) and (xi).

³ Exhibit C11.

⁴ Exhibit C7 Annexure A - Occupational history.

Mann's death raised the question of whether the investigating coroner is mandated to hold an inquest under s 24(1)(ea) of the *Coroners Act 1995*. That provision provides, *inter alia*:

(1) Subject to section 25, a coroner who has jurisdiction to investigate a death must hold an inquest if the body is in Tasmania or it appears to the coroner that the death, or the cause of death, occurred in Tasmania or that the deceased ordinarily resided in Tasmania at the time of death and –

...

(ea) the deceased died at, or as a result of an accident or injury that occurred at, his or her place of work and the coroner is not satisfied that the death was due to natural causes; ...

11. In this ruling, I must therefore consider the issue of whether Mr Mann died as a result of an accident or injury that occurred at his place of work, and also consider whether mesothelioma is a 'natural cause' of death.

Mesothelioma and workplace exposure

12. Mesothelioma is an insidious neoplasm arising from the mesothelial surfaces of the human body.⁶ Put simply, it is a form of cancer of the membrane lining on the inside of body cavities and the outside of internal organs.⁷
13. There are several types of mesothelioma distinguished according to the location of the cancer. The most common is pleural (lungs), accounting for around 93 percent of cases reported to the Australian Mesothelioma Registry.⁸ Other types of mesothelioma include peritoneal (abdomen), pericardial (heart) and paratesticular (testicles).⁹

⁵ *Ibid* page 4.

⁶ Exhibit C9 page 2.

⁷ Australian Government, Australian Institute of Health and Welfare, *Mesothelioma in Australia 2018: Occupational Exposure*, 12 November 2019 < <https://www.aihw.gov.au/getmedia/9e6bfdbf-4ea2-460e-852d-af16266346f2/aihw-can-131.pdf.aspx?inline=true> > page 2.

⁸ *Ibid*.

⁹ Exhibit C9 page 2.

14. Past asbestos exposure is the predominant cause of subsequent development of pleural mesothelioma.¹⁰ 90 percent of cases of mesothelioma are caused by asbestos exposure, with a small number of cases considered to be due to other factors such as radiation, chronic inflammatory processes or viral infection.¹¹
15. "Asbestos" is a generic term describing a chemically and structurally diverse group of hydrated fibrous silicates. Asbestos was used widely in industrial applications, primarily in the construction industry, due to its durability and resistance to fire and chemicals.¹² For example, asbestos was able to be woven into coarse threads and used to make fire resistant mats and blankets, and its addition to base material such as cements and resins added strength to the resulting composites. When bound in composite, asbestos fibres are prevented from being dispersed as inhalable dusts. However, if the composites degenerate or are broken up, asbestos fibres are released and can enter the atmosphere and contaminate the environment.¹³
16. Mr Mann's working life coincided with the peak use of asbestos throughout Australia in the 1970s. Although it has been illegal to make, use or import materials containing asbestos since December 2003, large amounts of asbestos still remain in older structures and products.¹⁴
17. Non-occupational exposure to asbestos can also contribute to mesothelioma.¹⁵ Although non-occupational exposure cannot be completely excluded in Mr Mann's case, it is clear that his exposure to asbestos fibres whilst working at the paper mill was the primary source of his exposure.
18. Mesothelioma has a long latency period, with almost all cases appearing 15 or more years after asbestos exposure. Generally, this latency period is approximately between 30 and 40 years.¹⁶ Mr Mann's diagnosis was made some 15 years after retiring, and

¹⁰ *Ibid.*

¹¹ "Medical Issues" – Journal of Law and Medicine – Volume 7 May 2000 p 345 at 349.

¹² Australian Government, no. 6, page 2; "Medical Issues" – Journal of Law and Medicine – Volume 7 May 2000 p 345 at 347.

¹³ *Ibid.* p347.

¹⁴ *Ibid.*

¹⁵ Exhibit C9 page 2.

¹⁶ *Ibid.*

about 65 years since he began work. The development of mesothelioma in Mr Mann's case was within the recognised latency period. It is generally diagnosed at an advanced stage, with only approximately 50 percent of people surviving one year after diagnosis.¹⁷

Mesothelioma as an 'accident or injury'

19. The mandate to hold an inquest entails a coroner being satisfied, under section 24(1)(ea) that Mr Mann suffered an accident or injury. Neither 'accident' nor 'injury' are defined terms in the *Coroners Act*.

Accident

20. Accident is defined in the Macquarie Dictionary as "anything that happens unexpectedly, without design, or by chance".
21. Whilst exposure to asbestos does not *necessarily* lead to the development of mesothelioma, it is nevertheless a natural and expected possibility that this disease will develop from exposure to a known carcinogen, asbestos. This does not sit with the ordinary understanding of the term "accident", being an identifiable and known event causing harm.
22. The fact of exposure to asbestos itself could also not sensibly be classed as an 'accident' within the ordinary meaning of the Act. As a fitter and turner, Mr Mann was routinely exposed to asbestos particularly when working on pipes with asbestos lagging and creating a slurry by mixing asbestos powder with water. The fact that the extent of the potential damage from exposure to asbestos fibres was not appreciated at the time does not mean that the exposure or subsequent development of the disease could be said to be accidental.

Injury or disease

23. "Injury" is defined widely in the Macquarie Dictionary as "harm of any kind done or sustained" or "a particular form or instance of harm".

¹⁷ Australian Government, n 6, pages 7-8.

24. Relevant to this issue, the authorities and legislation have long drawn a distinction between ‘injury’ and ‘disease’, evident in their plain meanings. Macquarie Dictionary defines disease as “a morbid condition of the body, or of some organ or part; illness; sickness; ailment”. There is a distinction in the ordinary meaning between the two terms. Injuries are said to be sustained or acquired, and imply a sense of suddenness or immediacy. Diseases, however, are ordinarily thought to be conditions that develop, indicative of a process of physiological change over time.

Counsel assisting provided helpful and detailed submissions regarding the manner in which workers compensation legislation in Tasmania and interstate contains the terms “injury” and “disease” as distinct concepts. Asbestos-related diseases are categorised as diseases and not injuries, including within relevant Tasmanian legislation.¹⁸

25. The High Court in *Kennedy Cleaning Services Pty Ltd v Petkoska* held ‘injury’ to be a “sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state”.¹⁹ The High Court in *MRCC v May*²⁰ held more recently that ‘suddenness’ is no longer a necessary element for an ‘injury’ but it is not a concept that is irrelevant within the meaning.²¹ The majority explained that the nature and incidents of the physiological change will determine whether the definition of ‘injury’ is satisfied, noting that the concept of suddenness is often useful where there is a need to distinguish a physiological change from the natural progress of an underlying disease.²² Their Honours emphasised that this categorisation of injury was in the nature of judicial language and should not be construed as a statute defining necessary conditions or without regard to the text and scheme of an Act.²³
26. Relevant to the foregoing discussion is the fact that section 24(1)(ea) does not include the term ‘disease’. The plain reading of the phrase ‘accident or injury’ in the context of the provision tends, in my view, to imply a sudden or unexpected and readily

¹⁸ *Asbestos-Related Diseases (Occupational Exposure) Compensation Act 2011*, Section 6; “Medical Issues” – *Journal of Law and Medicine* – Volume 7 May 2000 p 345 at 348.

¹⁹ *Kennedy Cleaning Services Pty Ltd v Petkoska* (2000) 200 CLR 286 at [39] per Gleeson CJ and Kirby J

²⁰ *Ibid.*

²¹ *Military Rehabilitation and Compensation Commission v May* (2016) 257 CLR 468.

²² At para [47].

²³ At para [52].

identifiable occurrence in the workplace, this being inconsistent with the development of chronic disease unascertainable for many years.

27. The pathogenesis (disease causation within the body) of asbestos related diseases such as mesothelioma is not well understood but is believed to be due at least in part to free radical production by elements both within the asbestos fibre and encrusted surface iron. Additionally, macrophages attempting to digest the fibres generate lysosomes and oxygen radicals. In asbestosis, the lysosomes directly damage lung tissue resulting in interstitial fibrosis. The free radicals are thought to act via a complex sequence of events over a period of many years to alternate that genes associated with cell growth and proliferation culminating in malignancy.²⁴ During the long latency period, symptoms do not appear. Even when pleural symptoms appear many years later, the pathological diagnosis of malignant mesothelioma may be very difficult, given the need to consider a number of benign processes (including reactive or inflammatory conditions), and other different types of malignant tumours, sarcomas and neoplasms. Unfortunately, in mesothelioma, there is lack of ascertainable physiological change for many years until the related cancer develops.²⁵ It is only then when the condition is perceptible and capable of medical diagnosis. For Mr Mann, this occurred some 15 years following his employment.

Second reading speech

28. Section 24(1)(ea) was introduced to the *Coroners Act* following the *Coroners Amendment Act 2005*. No other Australian coronial jurisdiction has a similar provision.²⁶
29. In this case, it is appropriate to consider extrinsic material in attempting to confirm the interpretation conveyed by the ordinary meaning of the phrase “accident or injury”.
30. The second reading speech for the amending Act provides little assistance on the

²⁴ "Medical Issues" – *Journal of Law and Medicine* – Volume 7 May 2000 p 345 at 348.

²⁵ *Ibid.*

²⁶ *Coroners Act 2003 (Qld)* s 8(3); *Coroners Act 1997 (ACT)* s 13; *Coroners Act 2009 (NSW)* s 6; *Coroners Act 2008 (Vic)* s 4; *Coroners Act 1993 (NT)* s 12(1); *Coroners Act 2003 (SA)* s 3; *Coroners Act 1996 (WA)*.

issue:²⁷ In summary, it outlined that there were “concerns”, particularly from the union movement, that inquests were not being held in relation to certain workplace deaths on the west coast (including an aircraft crash, truck accident and two deaths resulting from falls) and that the coroner should be obliged to hold an inquest in all cases where the work-related death did not occur due to natural causes, unless the coroner agreed to a family request not to hold a formal hearing, being satisfied that this was not contrary to public interest. The second reading speech also emphasised the pressure on the Tasmanian and other governments to enact industrial manslaughter laws, and, whilst the Tasmanian government did not then intend to legislate to criminalise workplace deaths, it considered that the circumstances surrounding a workplace death should be examined in open court.

31. The stated intention of the provision was to place a uniform “*obligation on coroners to hold an inquest in all cases where the work-related death is found, after autopsy, not have occurred due to natural causes, unless the coroner agrees to a family request not to hold a formal hearing.*”²⁸ The second reading speech cited cases where workplace injuries had occurred suddenly and unexpectedly and did not deal with industrial diseases.
32. I will return shortly to my conclusion about whether mesothelioma is an accident or injury, as further matters need to be discussed.

Natural causes

33. The mandate to hold inquests into deaths resulting from an accident or injury occurring at a person’s place of work is tempered by the words “*and the coroner is not satisfied that the death was due to natural causes*”. Thus, no inquest is mandated where the person died of natural causes. The reference to determination of natural causes in this provision must be directed to situations whereby a fatal natural medical event occurs *at* a deceased’s place of work. In such a situation, the coroner is not required to hold a mandatory inquest under section 24(1)(ea), no doubt because of the likely lack of connection between workplace practices and procedures and the death.

²⁷ Tasmania, *Parliamentary Debates*, House of Assembly, Jacksons (Minister for Justice and Industrial Relations), 8 November 2005.

²⁸ *Ibid.*

34. I note that, practically speaking, it could virtually never be the case that a person dies due to mesothelioma at his or her workplace – the condition in its end stage inevitably requires high care and hospitalisation. At this point, it is a diagnosable terminal condition and therefore it is not a case where the cause of death is uncertain.
35. Mr Mann did not die at his workplace and therefore, in this ruling, it is only strictly necessary to determine whether he died *as a result* of an accident or injury that occurred at his workplace. The mention of natural causes, however, is part of the provision and may inform how the section is to be interpreted. It is also important to consider whether death from mesothelioma arising from asbestos exposure in a workplace is a death by “natural causes” or, equivalently, a death that is “not unnatural”. This will also affect whether such a death is reportable to the coroner in the first instance (assuming, of course, that death is not reportable on any other ground).
36. ‘Natural causes’ is not defined in the Act, nor is it defined in other Australian coronial jurisdictions. The phrase has not been judicially considered in Australia.
37. The limited authority provides only that ‘unnatural’ is an ordinary word, which should be given its ordinary meaning.²⁹ The Macquarie Dictionary defines unnatural as ‘not natural; not proper to the natural constitution or character’.
38. Freckleton and Ranson highlight the difficulty of determining the distinction between natural and unnatural deaths in respect of reporting to the coroner. They provide the example of deaths from pneumonia caused by Legionnaire’s Disease. In these cases the disease may have been acquired from general exposure to the organism in its natural state in the environment or as a result of an increased concentration of the organism where air-conditioning systems have not been appropriately serviced. They question whether the negligence involved in the latter scenario could cause the disease to be categorised as unnatural.
39. The authors state:

²⁹ Freckleton and Ranson – Death Investigation and the Coroners Inquest page 165

Further problems can arise in relation to natural deaths that are the result of exposure to socially acceptable and legal toxic agents. It is probable that many so-called natural deaths are the direct or indirect result of indulging in socially acceptable behaviour such as smoking or drinking alcohol. Does this factor render such deaths unnatural? What is or should be the coroner's role in the investigation or analysis of such deaths? If such deaths were considered always to be reportable, it is almost certain that the current facilities and administrative procedures available to coroners for investigating deaths be completely inadequate.”

40. The coronial systems in Victoria and Queensland treat deaths caused by asbestos-related diseases, including mesothelioma, as ‘not unnatural’. While those jurisdictions use language framed in the negative, in this context ‘not unnatural’ and ‘natural’ have a shared meaning.
41. In November 2009, the Victorian State Coroner made a determination, although not as a ruling in an individual case, that asbestos-related deaths did not constitute ‘unnatural’ deaths within the meaning of the *Coroners Act 2008 (Vic)*. This matter was referred to the Coronial Council of Victoria which published a report in January 2012. That report concluded that *“there are sound medical and legal factors that support the State Coroner’s position that ARDs are not reportable.”*³⁰ It did not identify those factors explicitly but explored policy issues which do not assist in establishing the medical and legal basis for the determination.
42. The Queensland State Coroner’s Guidelines provide that mesothelioma in asbestos workers is not an unnatural cause of death on the basis that the development of the disease often involves the complex interplay between multiple environmental and genetic factors.³¹ The Guidelines further cite the conventional distinction between natural and unnatural deaths as reflective of the distinction adopted by the World Health Organization in ICD-10 between natural and ‘external’ causes. It notes that the Australian Bureau of Statistics uses the ICD-10 to classify causes of death on death

³⁰ Victorian Government, Coronial Council of Victoria, *Second Reference Report: Asbestos Related Deaths and the Coronial Jurisdiction*, 31 January 2012 < https://files.justice.vic.gov.au/2021-06/coronial_council_victoria_second_reference_report_asbestos_related_deaths_and_the_coronial_jurisdiction.pdf> page 16.

certificates.³² ICD-10 recently been superseded by ICD-11. It is not clear what affect this may have on the Queensland State Coroner's Guidelines.

43. In the United Kingdom, coroners routinely investigate deaths from industrial diseases including mesothelioma, on the basis that such deaths are legislatively defined as 'unnatural'.

Other considerations

44. There is a good argument for reporting to the coroner the death of a person from mesothelioma, particularly on the basis that exposure to asbestos in a workplace environment should not be part of the normal course of work day events, is an unsafe practice and benefits by the scrutiny of the coronial system. The cancer arises from bodily disease processes but, without the exposure many years before, the disease could not have developed. If a death certificate is signed by a medical practitioner to the effect that a patient has died as a result of natural causes, being mesothelioma, then that death cannot be subject to the glare of coronial scrutiny, which may be appropriate in many such cases.
45. However, the difficulties of investigating the origins of a lengthy and chronic disease are obvious. The genesis of the disease may be within a workplace, outside a workplace or parts of both. If within a workplace, the time/s of exposure causing the ultimate malignancy is likely to be uncertain. If the time is uncertain, the coroner may be unable to effectively investigate the particular workplace procedures and standards at the relevant time. The coroner is also unlikely to be able to obtain evidence from relevant witnesses, given the uncertainty surrounding time of exposure and the passage of time until discovery of the disease.
46. It is trite to say that the dangers of asbestos, particularly in the workplace, are now recognised, regulated and mitigated.
47. For this ruling, I received very helpful submissions from Mr Thompson, counsel for the Asbestos Compensation Commissioner (and WorkSafe Tasmania). He provided a

³¹ Queensland Courts, *State Coroners Guidelines*, v 3 amended July 2019, ch. 3 page 7.

³² *Ibid* page 9.

summary of Tasmania's asbestos compensation scheme and legislation, the work health and safety legislation as it applies to asbestos and the role of WorkSafe. In particular, the compensation scheme ensures that workers with an asbestos-related disease reasonably attributable to exposure to asbestos at work, can access statutory compensation. The scheme is non-adversarial and provides no-fault and timely compensation to eligible workers and their families. I also note that the current legislation, WorkSafe practices and government initiatives all focus upon raising awareness of the danger of asbestos and preventing asbestos-related diseases.

48. I note that asbestos-related diseases are the subject of similar compensation schemes throughout Australia.
49. Mr Thompson submitted that Mr Mann's death did not result from an accident or injury and was not unexpected or unnatural. It was not required to be the subject of mandatory inquest, and in fact was not a death reportable to the coroner.
50. Counsel assisting also submitted that death caused by mesothelioma from exposure to asbestos at the place of work is not one that resulted from an *accident or injury*. She also provided useful submissions and arguments both for and against mesothelioma being considered an unnatural death.
51. Counsel for Norske Skog, Ms Mills, agreed with counsel assisting that Mr Mann's death is not required to be the subject of a mandatory inquest. She submitted on behalf of her client:

"As the dangers of asbestos became known, steps were taken to, where possible, remove asbestos from the paper mill site at Boyer.

Norske Skog has continued to maintain an Asbestos Register for asbestos where it has not been possible for it to be removed. The Asbestos Register identifies the location, material form (e.g. cement sheeting) and the material type (e.g. chrysotile 5-25%), the risk level, the current status (e.g. active or closed), date tested, action (e.g. seal or remove).

Norske Skog has implemented an Asbestos Identification and Removal

Procedure and all high-risk applications of asbestos, such as insulation, have been removed from the site.

Norske Skog has also implemented an Asbestos Testing and Labelling Procedure. The Identification and Removal Procedure was supported by an Asbestos Awareness Training Package for all employees.

Norske Skog is very aware of the dangers of asbestos and continues to take all active steps to maintain the procedures as outlined above to minimise the risk of exposure to all its employees.

Norske Skog expresses their sincere condolences to Mr Mann's family."

52. I fully accept that the paper mill has taken the steps as outlined.

Conclusion

53. I find that Mr Mann's death from mesothelioma was not the result of an accident or injury that occurred at his place of work and is not subject to a mandatory inquest under section 24(1)(ea) of the *Coroners Act 1995*.
54. As discussed, the harmful effects of exposure to asbestos is not identifiable at the time and does not result in detectable physiological change. Instead, it becomes a fatal cancer many years later. It is a chronic and terminal disease and it does not accord with the ordinary meaning of the words 'accident' or 'injury' or the authorities I have cited. Further, in most cases there will be little benefit and little public interest in holding an inquest in circumstances where evidence is uncertain and unavailable. Additionally, the dangers of asbestos have been recognised and ameliorated with sufferers compensated, and therefore coroner's recommendations will be unnecessary in most cases.
55. Whilst not without difficulty, I am persuaded that death caused by mesothelioma secondary to asbestos exposure should be categorised as a death due to natural causes, or causes that are not unnatural. I have expressed reasons for both views. Ultimately, the condition is a disease with a very lengthy latency period, comparable to diseases caused by some other toxins, with little value in investigation.

56. It also follows that Mr Mann's death was not, in hindsight, a death reportable to the coroner as it was not a death that appeared to have been unexpected, unnatural or violent or to have resulted directly or indirectly from an accident or injury.
57. As I am now satisfied that Mr Mann's death was from natural causes and not reportable on any other basis, I do not have jurisdiction to further investigate. I intend to make the required findings in chambers under section 28(1) of the Act.
58. I do not in any way criticise the reporting of Mr Mann's death, which has provided an opportunity to clarify the issues arising in his death and other similar deaths.