



## **Asbestos Diseases Society of Australia (WA)**

*Ecumenical Church Service, Redemptorist Monastery, North Perth*

“30<sup>th</sup> Anniversary of Heys and Barrow Mesothelioma Test Cases Decision-  
Reflections of a Counsel Who Appeared in the Cases”

**By Robert K O'Connor QC**

The President of the Asbestos Diseases Society of Australia Inc Robert Vojakovic AM, JP, his wife Rose Marie AM, their daughter Melita Markey Chief Operating Officer of the Society, Rev. Deacon Paul Stacey, Rev. Ken Devereux, Rev Canon Geraldine Nixon, members staff and volunteers of the Society, members of the Heys family, other distinguished guests, ladies and gentlemen.

We are here today to commemorate the 30<sup>th</sup> anniversary of the decision in the Heys and Barrow cases in the Supreme Court of Western Australia in 1988. Robert Vojakovic has invited me to address you this morning because I was one of the Counsel in those cases and he has asked me to speak to you from the perspective of one of the Counsel in the cases.

Peter Heys worked at Wittenoom for three months in 1955 bagging raw blue asbestos and Tim Barrow worked there from 1948 to 1951 as an assayer, timekeeper and foreman. Both were diagnosed in April 1986 as having malignant mesothelioma. Their cases were heard together in the Supreme Court of Western Australia for 131 days in 1987 and 1988. At the time, it was the longest civil or criminal trial ever heard in the Supreme Court.

Most unfortunately, Peter Heys died during the course of the hearing, four months before the decision was handed down. Tim Barrow lived to see the result, but, very sadly, died two months later. I am very pleased to acknowledge that we have here today Peter Heys's widow Nita and their son Clayton.

They can be very proud of the vitally important part played by Peter Heys and Tim Barrow for all other and subsequent asbestosis and mesothelioma sufferers. Peter and Tim were very courageous gentlemen who fought the brave fight against mesothelioma for as long as they could. Despite their very poor medical and physical condition and suffering, they were prepared to put themselves forward as test case litigants against CSR and Micalco, even though this caused them great stress and strain.

Over 15,000 documents were examined in preparation for the cases. At the trial, 69 witnesses gave evidence and 730 exhibits were tendered. The transcript of proceedings totalled 11,000 pages. The Court decision in their cases dramatically changed the position for all other claimants against CSR and Micalco, both in Western Australia and elsewhere. The most direct result of the victory in the Heys and Barrow cases was that the underlying principle of liability was established for another further 350 pending cases which meant that in those other 350 pending cases, and cases which would arise in the future, settlement could be reached between the parties as to what amounts of compensation should be paid. Because the cases of Heys and Barrow established the legal liability of CSR, that legal liability did not need to be again proved in the 350 pending cases and literally thousands of future cases in Australia and overseas.

The hearing lasted 8½ months. Remarkably, now long-retired Justice Barry Rowland handed down his 223-page judgment only three weeks after the hearing of the cases finished. The judgment was extremely comprehensive and detailed, extremely expeditious and, most importantly, it was right. CSR and Micalco, no doubt acting on the best legal advice available, accepted the decision and did not appeal. The judge was a very patient and careful listener who, at no stage during the 131-days hearing, revealed his feelings as to the likely outcome. The Judge's most well-known attribute as a judge was his good common sense, and that was clearly evident in his reasons for judgment in these cases.

There were not too many humorous moments in these sad and tragic cases, but I do remember one. CSR and Micalco, in their defence, put up a lot of technical arguments, so much so that, after one, Daryl Williams QC, acting for Heys and Barrow, said in exasperation to the Judge: "Well, Your Honour, that argument is ridiculous, it could only be put forward by someone who is a lawyer". To which Justice Rowland replied: "Well, he is a lawyer, so what are you complaining about??!!"

I am pleased that we also have here today Robert Vojakovic who was then in 1988, and is still now, President of the Asbestos Diseases Society of Australia and his wife Rose Marie. Robert and Rose Marie and the Society have been an absolute tower of strength and support for sufferers since 1983.

Very appropriately, Robert was a made Member of the Order of Australia 25 years ago and Rose Marie nine years ago for their invaluable services to the Society.

I note that Robert and Rose Marie's daughter Melita Markey is similarly prepared to dedicate herself to service to the community, as she is the endorsed Labor candidate for the seat of Stirling in the Federal Election due to be held by May of next year.

I was a Junior Counsel in the cases and played only a limited role. I was in Court for only 26 of the 131 days. We had two Queen's Counsel, Daryl Williams and David Ashley. Peter Heys and Tim Barrow were extremely fortunate to have them leading their case. Despite the cases being so long and detailed, Daryl Williams was in complete control of all details at all times. He divided the work up between the legal Counsel and solicitors and ensured that we performed as a co-ordinated team. Daryl later went on to become the Federal Member for Tangney in the House of Representatives, became Attorney-General for the Commonwealth, retired from politics, returned to practise at Francis Burt Chambers, and is now retired.

David Ashley QC was from the Melbourne Bar. He was a specialist in torts and industrial law and had been Queen's Counsel in some earlier asbestosis litigation. He had genuine heartfelt compassion for the victims and he had determination and drive to ensure that the cases were presented as fully and strongly as possible. He later became a Judge of the Victorian Court of Appeal and is now retired.

One of the other Junior Counsel was Robert Viol who had to leave the team quite early when he was appointed a Judge of the District Court of Western Australia. He is now retired.

Another Junior Counsel was Roger Macknay, who later became a Queen's Counsel, a Judge of the District Court of Western Australia, then head of the Corruption and Crime Commission, and is now retired.

I was also one of the Junior Counsel for Heys and Barrow. I will speak a little later about my role. I was appointed a Queen's Counsel about 15 months after these cases were decided.

We had two very hard-working , dedicated, strong solicitors from Slater & Gordon, namely John Gordon, who also acted as a Junior Counsel for a period, and Sue Tait. John became a partner in the firm , based in Melbourne. Sue became the President of the Intellectual Disability Review Tribunal in Melbourne. Luisa Formato of Slater & Gordon also provided valuable assistance, and the staff of the firm were very committed workers throughout the whole of the cases.

On the other side, the first defendant, CSR, a wealthy public company, had as its leading Counsel David Malcolm QC who was at the height of his powers as the leader of the WA Bar and one of the top advocates in Australia. On 16 March 1988, day 62 of the cases, he announced to the Court at 2.17 pm immediately after the luncheon break that , as per Premier Peter Dowding's announcement at 1.30 pm, he

had the duty and honour to advise that he had been appointed the next Chief Justice of Western Australia and sought leave to withdraw from the case. Justice Rowland congratulated him, praised him in magnanimous terms and granted him leave to withdraw.

Junior Counsel for CSR was Michael Skinner of the Sydney Bar. It is one of the responsibilities of Junior Counsel to take over the conduct of a case if, for any reason, the Queen's Counsel is unable to present it. The departure of David Malcolm from the Bar table must have been Michael Skinner's worst nightmare becoming a reality.

At a later stage, CSR engaged Tom Hughes QC of the Sydney Bar to lead their legal team. He had the reputation at the time of being the highest paid Counsel in Australia.

Another Junior Counsel for CSR was Julie Bishop who became the Federal Member for Curtin in the House of Representatives and has been so for over 20 years, she became Deputy Leader of the Federal Parliamentary Liberal Party, and has held ministerial portfolios including successfully being Australia's Foreign Minister for over six years.

The second defendant, Micalco, was represented by Stephen Archer, who was then a prominent and very experienced Counsel in Sydney and Perth, and Neil McKerracher who was later appointed a Queen's Counsel and who has been a Judge of the Federal Court for over 10 years.

Whereas Counsel for CSR and Micalco were engaged at their full normal commercial rates, Counsel for the plaintiffs were acting on Legal Aid, the rates being just over half their normal rates This was a very generous gesture by Daryl Williams QC and David Ashley QC.

I pay tribute to Legal Aid WA who were prepared to finance these two test cases no matter how long they took. A special allocation of funds was provided for by the WA State Government for the conduct of these two particular cases. The Government was also very helpful in getting Parliament to extend the Statute of Limitations period for a very long period, thereby enabling hundreds of victims to lodge their statements of claim. The victims and their families owe debts of gratitude to Brian Burke's and Peter Dowding's Labor Governments for their efforts at that time.

I also pay tribute to former MP Larry Graham. His efforts led to families of victims who died before court decisions were reached in their favour being able to claim damages for the pain and suffering of the deceased victims. In 2002 Parliament enacted the Law Reform (Miscellaneous Provisions (Asbestos Diseases ))Act which enabled families to claim these damages. Prior to that legislation, the damages claim for the pain and suffering endured by the dead victim died with the victim. That had happened in the case of Peter Heys who died four months before the end of the trial.

I have been asked to talk about my role, so I will briefly do so. The company which employed Heys and Barrow was known at the time as Australian Blue Asbestos, which later changed its name to Micalco, which is the name I will use. It was a wholly-owned subsidiary of CSR. The problem for the workers was that Micalco had assets of only \$337 and negligence insurance cover on each employee for only \$2,000. Accordingly, if the workers succeeded against Micalco only, there would be a pyrrhic victory or the winning of the battle but not the war. What an unconscionable situation that was. Any successful damages claim would not have been able to be met by Micalco from its own resources or its insurance cover. It was therefore necessary that the plaintiffs succeed against the parent company, CSR, which had huge financial resources.

It was our argument that everything that Micalco did, it did on behalf of CSR. If the corporate veil was lifted from Micalco, it could be seen that, in reality, the party carrying out all the relevant actions was CSR. Our primary argument was that there was the requisite proximity between CSR and the employees of Micalco. Our secondary argument was that the necessary connection could be made by lifting the corporate veil which hung around Micalco. I was engaged on this crucial part of the cases because I was a specialist in taxation law and sometimes the Commissioner of Taxation attempts to lift the corporate veil by looking through or past the particular corporate taxpayer conducting the income-producing activities and seeing who is really pulling the strings behind the party which is appearing to be engaged in the activities.

I have with me today three bound volumes of papers from these two cases. The first two volumes consist of the written decisions by both sides at the end of the cases. The submissions by Heys and Barrow total 865 pages, while the submissions of CSR and Micalco total 95 pages. I am sure that the detailed and comprehensive submissions on behalf of Heys and Barrow were of very great assistance to Justice Rowland in the preparation of his 223 pages of reasons for judgment which is the third volume I have here.

In his decision, Justice Rowland made a two-page list of findings which held that Micalco had engaged in various actions which in reality it had carried out for CSR. Justice Rowland concluded (p 218)-

“Now, whether one defines all of the above in terms of agency, and in my view it is, or control, or whether one says that there was a proximity between CSR and the employees of (Micalco), or whether one talks in terms of lifting the corporate veil, the effect is, in my respectful submission, the same. There was “the necessary degree of proximity of relationship” between each plaintiff and CSR to give rise to a duty of care on the part of CSR to take reasonable care for the safety of each plaintiff commensurate with and identical to the duty owed by (Micalco). And it failed to exercise such care. For the reasons I have previously outlined, the knowledge,

actions and responsibilities of the directors of (Midalco) are also those of CSR. ... In my view, CSR is liable to each plaintiff.”

That conclusion meant success for Peter Heys and Tim Barrow and thousands of other workers and their families!

A book was written on the two cases:”Blue Murder:Two thousand doomed to die- the shocking truth about Wittenoom’s deadly dust” by Ben Hills The book is dedicated “For the men, the women and the children of Wittenoom who will die because CSR Ltd put its profits before their lives.”

Rock group Midnight Oil had a hit parade song about it titled “Blue Sky Mining”.

Another book titled “That disreputable Firm... The Inside Story of Slater & Gordon” has been written by historian Michael Cannon. Chapter 10 is headed “Wittenoom, Thy Name is Death”. The opening paragraph in that chapter reads as follows:

“ It would have been kinder for the Colonial Sugar Refining Co Ltd to take its Wittenoom asbestos miners out into the hot Western Australian sunshine and shoot them. But such mercy killings might have caused a little public disquiet. The executions which did take place were a more leisurely affair, conducted out of the public view over several decades.”

On 24 November 2000, 18 years ago, I opened the Conference Room at the Council House offices of Slater & Gordon which is named in honour of Peter Heys and Tim Barrow. I made a speech on that occasion which was similar to this speech today.

After that speech in 2000, three grandsons of Tim Barrow told me that in half an hour that morning they had learned more about their grandfather than in the rest of their lives. I hope that my speech today has provided information and knowledge about Peter and Tim to people who were not around when their great victory was won in the Supreme Court 30 years ago.

It is, generally speaking, the professional and ethical duty of a barrister to act for whichever side briefs her or him to act, but there is great personal satisfaction when, as here, you act for “the good guys” and the case is successful.