

Asbestos Litigation - The Third Wave

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The third wave of asbestos claims

The first question I am going to ask is: "Is there a third wave at all?" Most of this lecture will be about trying, if not to answer it, at least to express a great deal of doubt about what has been said about it in the past.

The idea developed, as Dr Lee has explained, only in the early 1990s. It developed essentially as what it is when you think about it for a moment—merely a slogan. I am going to ask the question: "Does the third wave exist and if it does, what shape is it?"

Before I do that, I want to say two things. Firstly, appearing, as I did, for the Medical Research and Compensation Foundation (MRCF) in the course of the Jackson Inquiry, what Dr Lee has spoken of brought back some memories for me of the various ways that people can be exposed to asbestos. One of the most poignant moments in that inquiry was when Sir Llew Edwards, the Chairman of the MRCF, gave evidence. He said in his witness statement that he was keen to join the MRCF because, as a young man working in his father's electrical factory, he had himself assembled products with asbestos in them and had been exposed to it himself.

Whose responsibility now?

The other thing I want to say in opening is that one of the issues which we will come to later is that a real public policy question arises as to what should happen to, and who should take responsibility for, the vast amount of asbestos which is in buildings used in our community, and in particular in the western and south-western suburbs of Sydney, and whether or not it is safe in the positions where it is and if not, what should be done about it.

I want to pose this example for you. I went to Sydney University commencing in 1972.

Trumpeted widely at that time was Sydney University's having just opened the first modern Olympic-size swimming pool of any university in Sydney. We students used it in the first year. It was closed at the end of the first year to remove the asbestos in the roof. The university took the view of that public building that, although the asbestos was in a roof, sealed and painted over, that wasn't good enough, and that it should be removed.

Other public buildings, the Supreme Court of New South Wales and the Federal Court of Australia, have been closed floor by floor and asbestos has been removed. The view taken about public buildings, no doubt because of the responsibility of the owners, is that asbestos should be removed. One of the issues I will come to at the end is that a very different view seems to be taken about asbestos in the home. The reality is that what constitutes the third wave is essentially asbestos in various roofs and walls of houses built between about 1930 and 1960. As I am going to show you, that is what is going to be, if one doubts the statistical forecasts one sees, a great problem in the future.

What the directors of the MRCF were told

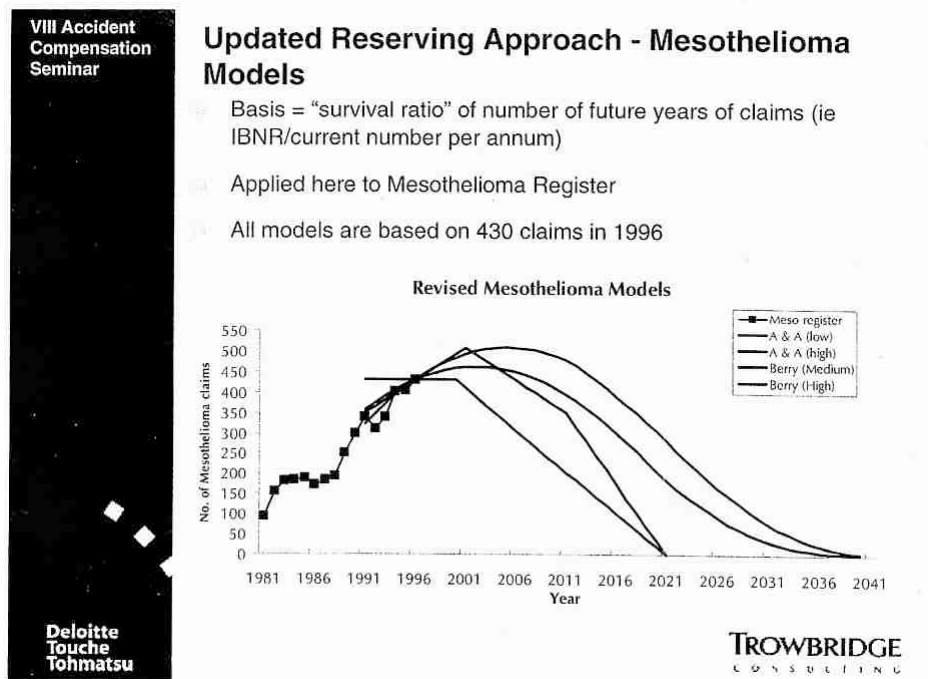
The James Hardie inquiry last year taught me that one should doubt very much the evidence one is given about the incidence of asbestos exposure. I am going to take you through what the

directors of the MRCF were presented with and how that changed over the years 1999 through 2004.

The MRCF was essentially the rump of two manufacturing companies through which the James Hardie group manufactured and distributed asbestos between about 1915 and 1987. James Hardie was faced with the problem in 1998-1999 that it would soon need to comply with a new accounting standard. That accounting standard would require it to place in its accounts the capitalised value of future asbestos liabilities. It knew that to do that would make its accounts show a negative net equity. It needed to do something about it. Its decision, unlike other companies at the time, was that it would in effect place those two former manufacturing companies outside the group.

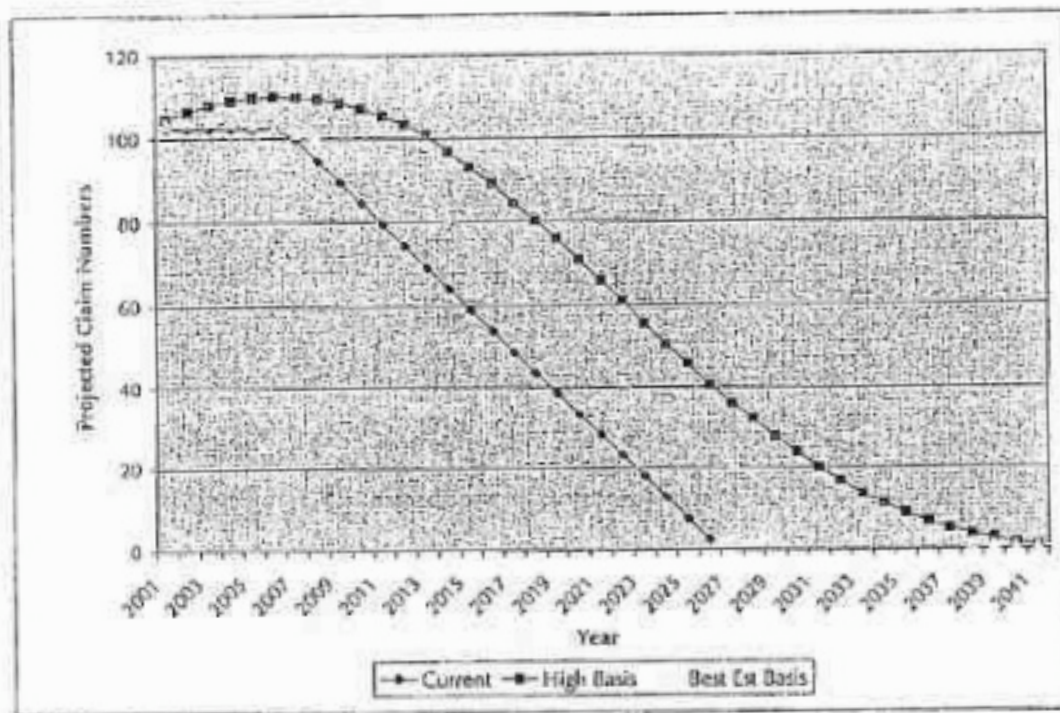
The James Hardie group did this in an environment where it needed ultimately to match the assets it was leaving with these former manufacturing companies, now placed outside the group, with the expected liabilities of those former manufacturing companies. The Group organised a series of actuarial reports to give to the new directors who were going to head up the MRCF, set up as a charity. Prior to James Hardie's placing these former manufacturing entities outside the Group, there had been a number of public discussions of the incidence of asbestos-related disease in Australia. These discussions predicted something very simple and ultimately solvable within a fairly short space of time.

The public discussion in 1999-2000 was this: what was going to happen was that the asbestos curve of all asbestos-related diseases - mesothelioma, asbestosis and the other diseases - would peak somewhere in about 2005, (where we are now), and that on conservative estimates, by about 2021, and on less conservative estimates, by 2041, the incidence of asbestos-related disease would be either nil or negligible.



That was the view that presented itself when the James Hardie directors and executives invited potential MRCF directors to join the board of the MRCF. It indicated that there was going to be a definite end-point, not surprisingly a factor in the decision of those who became directors of the MRCF.

The document below is the very document they were shown, one which drew a similar conclusion. In a six months inquiry that involved many counsel and many millions of dollars of legal expenses, this document is really the core document in terms of the decision-making process of the directors who joined the MRCF. This was the document shown to them and on which they said “yes”, in February 2001.



It permitted the MCRF to be set up and to be separate from the James Hardie Group. It is James Hardie-specific. It deals with the mesothelioma numbers for James Hardie and shows what they expected would happen: a peak in 2005 and, on the worst possible view, that mesothelioma would all be over by about somewhere in the mid 2040s. There was not going to be any significant rise from a number of approximately 100, the incidence of the disease claims per year.

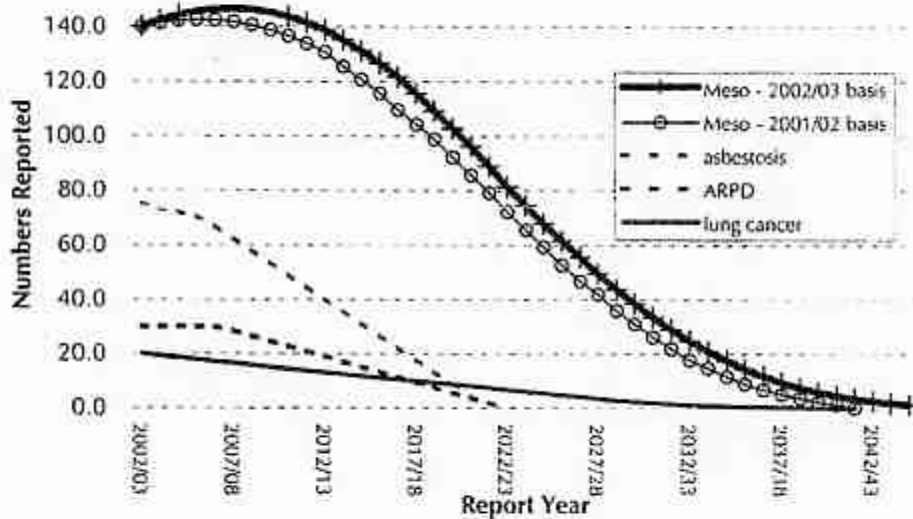
Wrong numbers

There are two issues here. One relates to the fact that those numbers were wrong. The number of mesothelioma claims was not 100 per year. It was more like 150 to 160 a year. That was to be inferred partly from the fact that Trowbridge, the actuaries who produced these data, were not given the last nine months of James Hardie data, but made their actuarial estimates based upon

incorrect data in respect of mesothelioma claims, and similarly in respect of non-mesothelioma claims.

Figure 4.1 shows our projection of the number of claims that will be reported in each future year, shown separately for each disease type.

Figure 4.1 – Claim Reporting Patterns



As Figure 4.1 indicates, the shorter latency period expected for asbestosis and asbestos related pleural disease (ARPD) is reflected in the shorter expected reporting periods compared to mesothelioma and lung cancer claims. Asbestosis claims are expected to decline in coming years, offsetting continuing increases in mesothelioma claims until 2007/08 in the total numbers of reports.

The detailed projections of claim reports are shown in Appendix B.

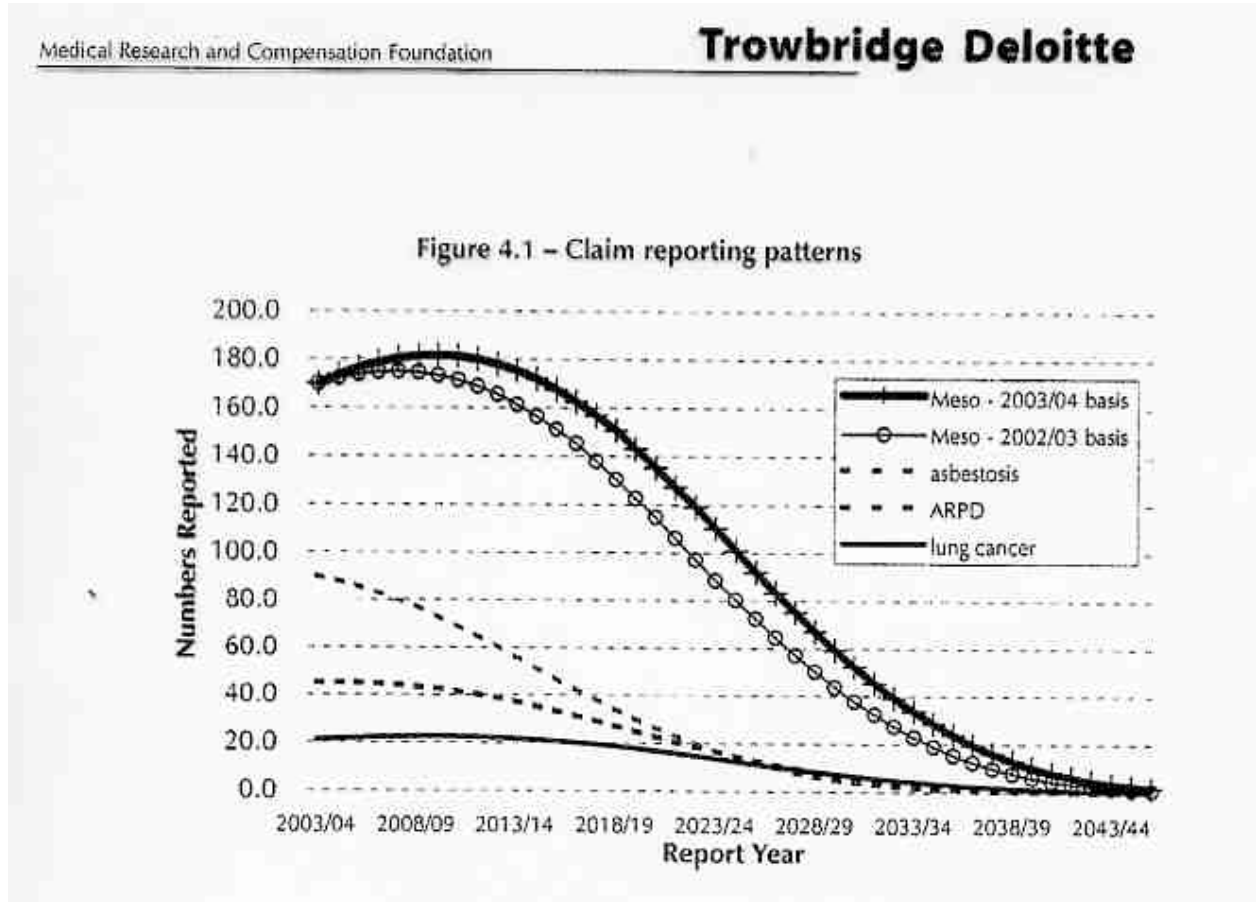
What Figure 3 shows was that there was no further peak to come for asbestosis-related claims, but that they would simply decline to zero in either 2020 or in the mid-2030s.

What happened then was that the MRCF separated from the James Hardie Group in February 2001. The transaction went ahead. The James Hardie group relocated to the Netherlands in a scheme of arrangement in which the Supreme Court of New South Wales was told that all was secure in terms of the former James Hardie holding company left here in Australia and that any future asbestos claimants would be taken care of.

New data

Until the separation occurred, the control of public information about Hardie's claims experience had been under Hardie's control. After the separation, information about James Hardie's claims experience came into the control of the MRCF, which began to realise two things:

- (1) the data they had been given in the graph that I have shown you was wrong; and
- (2) when they asked for a realistic assessment of what the future looked like, between 2002 and 2004 (before the Jackson Inquiry even started), here is what they got. The curves started to look a little different from the ones they had been shown in February 2001. The first of them was produced in 2003.



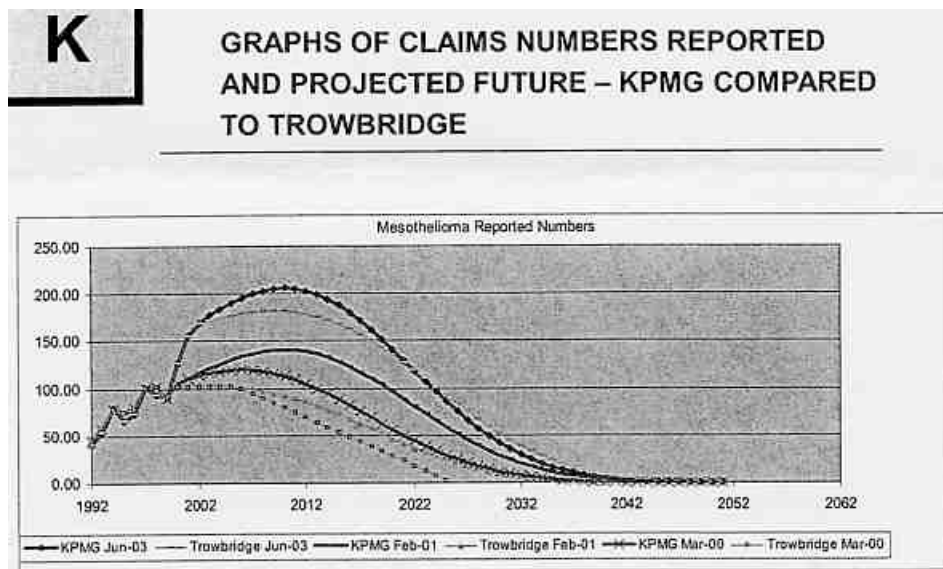
2001 had passed; 2005 was looking uncomfortably close. So what happens? The peak goes out to about 2010 or 2008 and the end-point is about 2044. The numbers here are more realistic. They are up to the level of 180 mesothelioma claims per annum, which is much more like the true data which had been withheld from the directors in February 2001. Again, it is subdivided for various diseases. These are the same actuaries, Trowbridge, who had given all the other reports, including the reports presented both to the MRCF directors and to Hardie's board before that.

What is happening here is that, in terms of estimating what the third wave is likely to look like, this must obviously be seen as a mixture of first, second and third waves. In other words, this is a mixture of those persons who were employed by asbestos manufacturers, end-users who are the

second wave and then finally bystanders, who constitute the third wave. It is showing that, as time progresses, the view about what the curve looks like is changing.

The Jackson Inquiry was then called and something very strange happened. The James Hardie group took a position which perhaps no-one quite expected. They produced an actuarial report by KPMG which put the claims numbers and the future estimate of claims and time in a framework which was far, far worse than had been previously thought. They said that the figure which had been provided as a capitalised value of future claims for Hardie's at the time the foundation was separated was some \$290 million. What the KPMG report to the inquiry said was, "No, no, it is a figure of 1.5 billion, of which approximately one third is constituted by legal costs".

What Hardie's then did was to run the rest of the inquiry on the issue that the legal costs and medical expenses were too high. This is the curve they produced.



Have a look where the peak has moved to. Have a look where the end-point has moved to. The peak is now around about 2012 and the end is somewhere about 2052 or 2053. The curves I have shown you were all produced within the period from 1999 to 2004. The views about what is going to happen in terms of future behaviour of asbestos claims had changed dramatically in that time, in circumstances where greater public scrutiny through the inquiry process was being addressed to the way the calculations were being done.

I have shown you this material to emphasise that, although actuaries do their best epidemiologically, the circumstances and time at which one of their reports can be produced can make a very big difference to what the report says about the future.

How the Jackson enquiry affected claims

The reality is that the inquiry was itself, I think, a strong indicator of the underlying causes for the changes in claims behaviour. The inquiry itself resulted in a very dramatic change in the claims behaviour of the old James Hardie's companies. If one is looking at the third wave, one is trying to discover the underlying factors that cause one to form judgments about whether this curve or some other curve is the correct one. You can look to a number of factors which may be possible causes, apart from the underlying disease process itself. The disease process is, of course, a product of exposure; so one is really ultimately looking to what the exposure patterns

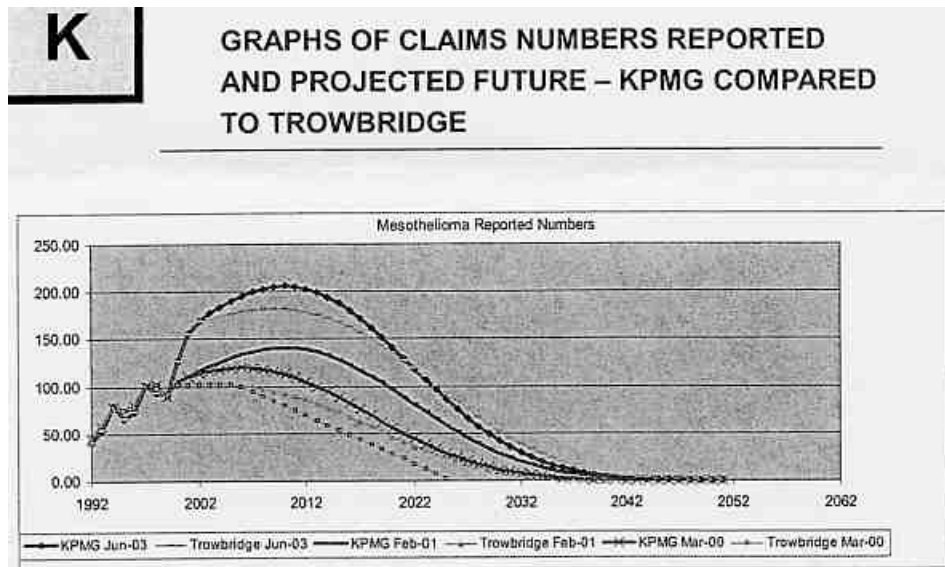
were 20, 30, 40 years ago, what they are likely to be in the present and therefore to predict the curves for the future.

The interesting thing was that what happened during the course of the inquiry was that, in one sense, all these numbers started, once again, to go out the window, because the KPMG curve that you now see was a curve which was a snapshot of how the world would look, not in June 2004 when it was produced, but in June 2003. What actually happened in the inquiry, and this was part of Commissioner Jackson's observations in his report, was that the claims numbers against the MRCF dramatically increased by about 50 or 60 percent. And those claims were as legitimate as any others previously dealt with by the MRCF in earlier years.

What was going on? The simple, commonsense explanation must be that the publicity of the inquiry and the public interest in the issue of asbestos had brought these claims forward. All the other factors that one might think would cause these increases were pretty much the same. The activities of plaintiffs' lawyers, the awards of judicial tribunals, the nature of damages awards and any other things you can think of were more or less the same. The only thing which had changed was the attention given to the issue. This leads one to believe that, given that what came forward were quite genuine claims, there is a fairly large pool of persons who suffer these diseases who simply don't claim until there is enough public attention given to these issues. That is another way of assessing what the third wave is going to look like in the future.

Are the latest data accurate?

I am going to look at figure 5 slightly more closely, ask some questions about it and give you my prediction for the appearance of the third wave.



The KPMG prediction, which is the latest publicly available in this country, has an end-point 50 years away and a peak in about 2012. That curve contains a very gruesome calculus. It contains the mixed-up product of the first, second and third waves. What it is really saying is that the generation of the first wave will die out and then the second wave will die out. Then, when that curve falls, all the people who were exposed at the times when massive distribution of asbestos was occurring will have a limited life span; it will then fall away at the limit of their life-spans.

I have a different view about what will happen. This has not been tested by any of the actuaries in the inquiry because the issue was not really one which the Commissioner had to inquire into, and that is really a product a couple of factors:

1. The third wave is the general public, all of us, bystanders who have been casually and incidentally exposed to asbestos. Dr Lee's findings are that mesothelioma, in particular, can be caused by surprisingly low exposures to asbestos in one's life, perhaps lower than we have thought previously. There are still masses of asbestos in houses and public buildings in Sydney. There is, at this stage, no clear requirement for its removal, nor any plan for its removal from houses. The view seems to be that it is safe where it is. However, people do accidentally expose it from time to time, especially during home renovations. Any council or public authority response to that is currently fairly disorganised. Individual councils have said that they are taking steps, like Ashfield Council, but that is not yet widespread. What does one do? Do you put a warning on every house sale or do you make sure that the asbestos is removed or do you label the assessed areas in any particular house?
2. The other factor is that there is little epidemiological data specifically on the third wave. Everyone is still focussing on what is happening to the fall in the curve, which is really the end of the first and second waves. People have not thought about what the third wave will ultimately look like.

My prediction

My view is this: the third wave is not a wave but an asymptote. The curve will never reach the bottom axis. What will happen is that, over time, there will be a continuing low level of claims, probably declining over generations to come, of asbestos-related disease. I say that because of the factors I have mentioned, because asbestos is there in the background of our environment, because there are no plans to remove it and because the key question, which perhaps Dr Lee is better able to answer, is: if mesothelioma can be caused by relatively low exposures to asbestos, and a lot of the bystander cases that are arising now are in people who have only been members of a household for a fairly brief period of time or persons who have worked briefly in an asbestos environment, can mesothelioma be caused in these circumstances?

So that is why I say that even this curve is wrong, and given the history of curves so far, I am sure that you would agree with me that they don't look all that reliable. My prediction, open for debate, is that there is actually an asymptote and that, probably even over three or four generations, that curve will never meet the bottom axis. Public policy needs to respond to that. That has relevance to the negotiations now taking place. If you take to heart what I have just said, that the first and second waves are largely accounted for in our thinking, but that the third wave is not, then the third wave involves the difficult issue of what one does either about removing asbestos from domestic houses and public buildings or warning about it. Until that is effectively addressed as a public issue, this problem will continue.

The publicly announced settlement which is going to take place is one in which the Government presumably will legislate to require the James Hardie group, either through MRCF or through another entity, to fund to a level in accordance with a publicly agreed formula, to about \$1.5 billion over 40 years. That may exclude remediation claims, which may not be accounted for in that legislative structure. What I am referring to as the third wave has still not been addressed financially. With James Hardie now in Holland, if anyone wants to do something about the remediation issue, another legal minefield lies ahead.

That is the message for tonight. I hope that Dr Lee can answer the question I have posed for him, because I haven't answered the ones he posed for me.