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The story of the Asbestos Relief Trust – Part 1

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The Asbestos Relief Trust (ART) is seen as a model of efficient occupational disease compensation in South Africa. This short article – Part 1 of a series – describes the background and pioneering seminal processes involved in the birth and early days of the ART.

ASBESTOS MINING IN SOUTH AFRICA

Asbestos was mined in three main areas in South Africa. Crocidolite (blue asbestos) was mined in the Northern Cape province from Prieska in the south to Kuruman in the north, amosite (brown asbestos) was mined at Penge near Burgersfort, crocidolite and amosite in the Pietersburg asbestos fields in an arc starting at Penge in the south and ending in Mailipsdrift in the north in Limpopo province, and chrysotile (white asbestos) was extracted at Msauli in Mpumalanga.[1] The Second World War was a massive boost for asbestos production in South Africa, and it was the world's second most important market-economy producer from 1950 to the 1980s.[1,2] Production peaked in 1977.[3] All asbestos mining had ceased by 2002/3, when chrysotile mining ended, having been preceded by the closure of the amosite mines by 1992 and the crocidolite mines by 1997/8.[2,4] The mining of crocidolite in the Prieska-Koegas area and the Pietersburg asbestos fields had stopped much earlier, in 1979.[5] Most of the miners employed by the asbestos mining companies lived in the general areas of the mines on which they worked.

SETTLEMENTS FOR ASBESTOS-RELATED DISEASE VICTIMS

Landmark settlements

2003 was an important year for asbestos-related disease (ARD) compensation in South Africa. In March of that year, both the Richard Meeran-run Cape Plc case, which had started in 1997, and the Richard Spoor-run Gencor case, were settled.[5,6] The latter resulted in the formation of the ART. Gencor was a major contributor to both of these settlements, providing 29% of the £10.6 million (R138 million) that went to the Cape Plc's set of claimants, and 96% of the R381 million that formed the ART.[4-6] An additional sum of R35 million went to environmental rehabilitation, and some R20 million was later added to the ART as supplementary and additional payments.[6] The Cape Plc list had grown with time and publicity – it started with five claimants in 1997, became 2 000 in January 1999 and rose to 7 500 in August 2001.[5] It was a closed settlement in that it allowed compensation to only those named on the list, whereas the ART settlement was open, and made provision for compensation to any person who met the compensation criteria set out in the Trust deed, until the year 2028.[4,7] As ARDs all have long latencies, the open settlement method was clearly a fairer deal. These settlements were groundbreaking in that the companies agreed to compensate the workers in addition to the compensation payable under the Occupational Diseases in Mines and Works Act (ODMWA),[8]

A close-up of crocidolite from the Kuruman area. The fibres visible here are approximately 6 000 times longer than regulated fibres *Photo courtesy of Jim teWaterNaude*

and it was the first class-action type settlement achieved in South Africa (Personal communication, Georgina Jephson, attorney at Richard Spoor Inc. Attorneys). The ART settlement also included environmentally-exposed victims of ARDs.[6]

Three-quarters of the claimants in the Cape Plc case came from Limpopo province and the remainder from the Prieska-Koegas area in the Northern Cape province.[5] By contrast, most of the claimants in the ART settlement (around 78%) were exposed in the Kuruman area in the Northern Cape province, with the balance exposed at Penge in Limpopo province and Msauli in Mpumalanga province, in approximately equal proportions.[9]

A third settlement was reached in 2006, in a voluntary agreement with the Swiss Eternit Group.[10] This agreement enabled ex-miners of the Kuruman and Danielskuil Cape Blue Asbestos (KCBA and DCBA) mines in the Northern Cape province to apply along the same lines as the open settlement of the ART. The Kgalagadi Relief Trust (KRT) was thus created. The terms were never spelled out but in practice R136 million was paid over for compensation purposes, for payouts until 2026.[11] The trustees of the KRT requested the ART to administer the KRT settlement as the two trusts were very similarly structured.

Justice not for all

Along with these successful settlements, the case on behalf of around 400 Swaziland ARD victims from the Havelock chrysotile mine was suspended in 2003 because Turner and Newall, the company that owned the mine, had filed for bankruptcy in 2001.[5]

Because it had been shown that ~85% of the 7 500 named individuals on the Cape Plc list had signs of ARD, they were all compensated in a sweep of pragmatism. All were paid within a year, on a sliding scale: mesothelioma and asbestos-related lung cancer sufferers receiving the highest payments of R71 500 each.[5] Because Gencor had contributed significantly to this settlement, it was proscribed that no-one who had received compensation under the Cape agreement could be later paid by the ART, even if he or she had worked on the Kuruman or Penge mines when under Gencor control.[10]

The ART settlement, being open, meant that money would need to be paid out equitably over the 25 year lifetime of the Trust. Unlike the Cape Plc (which had a named list), there was no indication of either the expected number of successful claimants, or how much money each should receive.[6] Faced with this huge uncertainty, and needing to administer the new fund judiciously, the trustees employed the services of a prominent health care actuary. He determined both the likely incidence of compensable claims over the 25 year life of the ART, and the amounts that should be paid to individuals in each of the four categories of diseases set out in the Trust deed, viz. asbestosis / pleural thickening with mild to moderate lung function impairment (ARD1), or with severe lung function impairment (ARD2); asbestos-related lung cancer (ARD3); and mesothelioma (ARD4).[4,7] Using published papers and some commissioned work, he developed an elaborate model which estimated that some 16 800 individuals would submit claims to the Trust, of which 5 036 (30%) would be successful. This was subsequently revised to 5 162. Of these, 219 (4.2%) would be environmental claimants, 150 (2.9%) would have lung cancer and 556 (10.8%) would have mesothelioma; the balance would have asbestosis and/or pleural thickening.[4] No definitive figures were provided for the expected ARD1/ARD2 ratio.

In order to calculate the compensation amounts, pain and suffering, loss of future earnings, and medical expenses that individuals in each class of disease were likely to encounter were taken into account, as well as the available funds.[4,6] The amounts payable vary, but the average compensation since 2003 has been approximately R40 000, R80 000, R170 000 and R350 000 for each of the categories ARD 1-4 described above. These amounts are paid over and above any compensation that the claimants might receive under the ODMWA.

For a case to be compensable, a victim needs to show that he/she was both exposed to asbestos from one of the operations run by the funders of the ART, and has a compensable disease.[7] The saga of how the ART enabled the fulfilment of these two seemingly simple conditions will be told in Part 2.

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An unrehabilitated crocidolite mine dump near Kuruman *Photo courtesy of Jim teWaterNaude*

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The story of the Asbestos Relief Trust – Part 2

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The logos of the Asbestos Relief Trust and the Kgalagadi Relief Trust

Part 1 of the story of the Asbestos Relief Trust (ART) described the background birth of the Trust, and the pioneering seminal processes of the early days. Part 2 explains eligibility for financial compensation from the ART or the Kgalagadi Relief Trust (KRT).

The sections of the ART and KRT Trust Deeds[1,2] headed "Proof of exposure" and "Proof of disease" encapsulate what the Trusts are about, namely compensating qualifying claimants who have demonstrable asbestos-related disease. In compensable cases, sufferers need to show that they have an asbestos-related disease and that they were exposed to asbestos from one of the operations during the time periods run by the founders of the ART or the KRT.

PROOF OF EXPOSURE

Both environmental and occupational claims are considered compensable. The trustees are obliged to review all sources of asbestos exposure throughout the claimant's lifetime – from both qualifying and non-qualifying operations; it is the responsibility of the claimant to furnish documentary proof of exposure.

The ART-qualifying operations are those which were owned by Griqualand Exploration and Finance Company Limited (GEFCO), or African Chrysotile Asbestos (ACA), and those in which General Mining Corporation (Gencor) had a stake. The KRT-qualifying operations are those that were owned by Danielskuil Cape Blue Asbestos (DCBA) and Kuruman Cape Blue Asbestos (KCBA). Derived from internal working documents of the Trusts, a simplified list of qualifying operations without the ownership periods is shown in Table 1.

The periods of eligibility are limited to those in which the operations were owned by one of the aforementioned companies. This excludes some people who one might think are eligible. For example, the Wandrag crocidolite mine at Kuruman was never owned by the founding companies, so individuals exposed to asbestos from this mine do not qualify for compensation, unless they were exposed during a short period in the 1990s when the mine was rented by the founders. Similarly, individuals exposed to asbestos from the Penge amosite mine prior to 1981 would not qualify for compensation from the Trusts because Penge was bought by the founders of the ART in late 1981. Furthermore, because Gencor paid a large settlement amount in the preceding Cape PLC action, any worker who was paid from that settlement was specifically excluded from being eligible to claim from the ART.[3]

Additional conditions for eligibility stated in the Trust Deeds are that: 1) any asbestos exposure that occurred in the 10 years preceding death due to mesothelioma or asbestos-related lung cancer cannot be considered in the review of the exposure history, and 2) any award by the Trusts in the case of asbestosis or asbestos-related pleural thickening is apportioned according to exposure to asbestos in the qualifying and non-qualifying operations. For example, if a person worked at a non-qualifying operation for two years and at a qualifying operation for three years, the award would be 60% of what it would have been had that person worked only at a qualifying operation, regardless of the length of time worked.

Recognising that most claimants lack resources and have difficulty gaining access to documentary proof of employment, the trustees actively sought out and filed any existing work records from the founding companies (personal communication, John Doidge, ART Trustee). These were initially kept in the Trust offices in Kuruman, and were referred to when claimants presented for possible compensation. Trust staff would need to search through old dusty envelopes and boxes to locate the relevant files – a manually laborious process. Because of the inherent risks of storing paper records and the need to expedite the process of searching, the ART decided to digitise the records. An intensive eight months followed – from November 2007 to June 2008 – when more than 810 000 records were scanned and saved. Future searches for work records were thus electronically enabled.[4] Search fields now include the full name, surname and identity or passport number of the employee, and searches are conducted by an experienced operator in the Johannesburg Trust office. The Medical Bureau for Occupational Diseases (MBOD) has also been granted access to this information to assist its staff to check work histories in asbestos-related disease cases.

Where claimants can neither be found on this system nor produce proof of employment, the trustees accept affidavits – provided that the information so disclosed can be verified beyond reasonable doubt, as decided by the Trust Manager and

Professors Jeebhay and Goodman consider a case at a SOMP reading for the ART

a trustee. Here too, the trustees have facilitated the process by providing claimants with access to former fellow mine employees who have been trained to take affidavits and are able to assist the claimants' recall of people, places and events.

The remainder of this article deals with occupational claims because the process of compensating environmental claimants introduces another layer of complexity – to be described in Part 3.

PROOF OF DISEASE

The compensable diseases recognised by the Trust Deeds are 1) asbestosis and/or pleural thickening with mild to moderate lung function impairment, or 2) with severe lung function impairment, 3) asbestos-related lung cancer, and 4) mesothelioma at any site. Other asbestos-related cancers excluded by the Trusts but recognised by the International Agency for Research on Cancer are laryngeal and ovarian cancer.[5] These are not included in the Trust Deeds as they were defined as asbestos-related cancers in 2009, some years after the Trust Deeds were penned.

Once claimants have shown that they were employed at a qualifying operation, and if they have not previously been medically tested at the Trust's expense, they are issued with a medical letter to attend a local service provider, usually a general practitioner (GP). The letter entitles the claimant to undergo a medical history and physical examination, a closed loop spirogram, and a chest radiograph at the Trust's expense. These are bundled and couriered to the Cape Town ART office where an expert panel (see Specialist Occupational Medicine Panel – Box 1) evaluates the evidence for asbestos-related disease and provides a decision as to whether the claimant is eligible for compensation. This decision is communicated to the claimant by the same GP at a follow-up medical examination which is again paid for by the Trust.

Should any treatable condition be detected, the GP is asked to treat or appropriately refer the claimant for further tests or treatment. In cases of suspected asbestos-related cancers, the Trust Deeds require that a diagnosis is based on tissue histology. The claimant is then referred to the nearest tertiary medical centre. All further investigations are paid for by the Trust, including transport and accommodation, as none of the rural areas where asbestos was mined is closer than 250 km from a medical centre that houses an X-ray computed tomography scanner and has access to tests such as bronchoscopy, needle biopsy or video-assisted thoracoscopic surgery (VATS) – all of which are used to diagnose lung cancer and mesothelioma.

Once a claimant is certified as having a compensable asbestos-related disease, the case is referred to the ART staff in Johannesburg, who manage the legal aspects.

Part 3 of the story of the ART will deal, in some detail, with the vexed question of how the ART and the KRT manage environmentally-exposed cases.

CONFLICT OF INTEREST STATEMENT

Dr teWaterNaude has been employed by the ART as Medical Manager since 2005.

ERRATUM

In Part 1 of The story of the Asbestos Relief Trust, the sentence "A third settlement was reached in 2006, in a voluntary agreement with the Swiss Eternit Group" should read "A third settlement was reached in 2006, in a voluntary agreement with Becon AG, which manages the asbestos-related issues of the former Swiss Eternit Group (SEG)."

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Table 1. ART and KRT qualifying operations

ART crocidolite operations	KRT crocidolite operations
Asbes (Mill & Shaft)	Bestwell (Shaft)
Bretby (Mill & Shaft)	Billinghurst (Shaft)
Bute (including Heuningvlei Mine & Mill)	Bosrand (Shaft)
Coretsi (South, West & East)	Boxmoor/Carrington
Eldoret Mill (aka Merencor Mill)	Central Mill
GEFCO (Sterkspruit & GCM)	Corheim (Shaft)
Greyling (Complex, North & South) (Shafts)	Four Shaft (Shaft)
Kuruman (Central Workshop & General Office)	Grasmere (Shaft)
Merencor (Shaft)	Klipfontein (Mill & Shaft)
Mt Vera (Shaft)	Kuruman East (Shaft)
Orcadia (Shaft)	Langley (Shaft)
Pomfret (Mill & Shafts, including Innes Shaft)	Mansfield (Shaft)
Reries (Mill & Shafts)	Mill Site (Shaft)
Strelly/Bergrand (2 farms; Shaft on Strelly)	Mimosa (Shaft) (pre-1952)
Whiterock (Shaft)	Newstead (Shaft)
ART chrysotile operations	Noordhoek (Shaft)
ACA (Diepgezet)	Ouplaas (aka Oudeplats) (Shaft)
Havelock	Owendale (Mill & Shaft)
ART amosite operations	Salamander/East Mine (Shafts)
Penge (post-1981) & Burgersfort Depot	Sardinia (Shaft)
ART manufacturing operations	Warrandale (Shaft)
AC Pipes	Whitebank (Shaft)
Rocla	Whitedale (Shaft)
Superconcrete	Winstead (Shaft)
Superocla	Witkloof (Shaft)
Unipipe	Witkloof West (Shaft)
United Cement Industries	

THE SPECIALIST OCCUPATIONAL MEDICAL PANEL (SOMP)

The Trust Deeds require that claimants' chest X-rays (CXRs) be interpreted according to the International Labour Organization (ILO) classification of radiographs of pneumoconioses and that the spirometry be interpreted by the percentage impairment. For this purpose, the Trusts convened a panel of medical specialists who familiarised themselves fully with the ILO system of reading CXRs, as well as the lung function criteria for compensation as set out in the ART Trust Deeds. The initial panels comprised three specialists. However, as they developed experience and confidence in the new procedures, the configuration soon changed to two specialists reading all the medical information, one being a radiologist and the other an occupational medicine specialist or practitioner. The ILO system of grading the CXRs for quality was adapted to similarly grade the spirograms. Unreadable tests were sent back to be repeated. This allowed the SOMP to ensure that the quality of the submitted tests was of a high standard. Typically, the best tests come from GPs who employ the services of trained radiographers and spirometrists.