

BARRY JAMES AYRES v COMCARE

COMCARE v WALLABY GRIP LIMITED, WALLABY GRIP (BAE) PTY LIMITED

DDT No.8130/08

DETERMINATION OF APPORTIONMENT

1. The Registrar of the Dust Diseases Tribunal has referred this matter to me to determine the contribution that the Defendant and each of the Cross Defendants is liable to make pursuant to clause 49 of the Dust Diseases Tribunal Regulation 2007 (hereinafter referred to as "the Regulations"). He also invited me to appoint a single claims manager in accordance with clause 61(3)(b) of the Regulations.
2. By reason of clause 49 of the Regulations I am bound to assume that:
 - (a) the Defendant and each of the Cross Defendants is liable;
 - (b) the circumstances of the Plaintiff's exposure to asbestos are as set forth in his Statement of Particulars (Form 2).
3. Having made the assumptions above, clause 49 of the Regulations requires that my determination be made solely on the basis of:
 - (a) the Plaintiff's Statement of Particulars;
 - (b) the Defendant's reply and the Cross-Defendant's replies; and
 - (c) the standard presumptions which are incorporated in the Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007.

4. The standard presumptions of the Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007 requires that liability be apportioned upon the basis that the standard presumptions apply with such variations as are appropriate to the case, but within a permitted range.

The Plaintiff's Particulars

5. By his Statement of Particulars, the Plaintiff alleges that:
 - (a) He suffers from mesothelioma.

 - (b) That on 3 January 1962 the Plaintiff commenced his apprenticeship with the Department of Navy at Garden Island Dockyard as an apprentice fitter and turner. During the 5 years of his apprenticeship the Plaintiff worked on various naval ships which included the aircraft carriers HMAS Sydney, HMAS Melbourne, HMAS Supply, HMAS Duchess, HMAS Vendetta, HMAS Tobruk, HMAS Warrego and HMAS Hobart.
 - (c) The Plaintiff worked mainly in the engine rooms and machinery spaces of the ships and there were other tradesmen including ladders, riggers and welders working in his vicinity at the same time.
 - (d) The Plaintiff's work involved overhauling feed pumps, extraction pumps, fire pumps and boiler pipe work under the instruction of a tradesman and most of his time in the ships was spent working on pipes including high pressure boiler pipes.
 - (e) On HMAS Hobart the Plaintiff had to remove gauges and every time he touched the lagging on the pipes asbestos dust was released into the air. On HMAS Warrego the Plaintiff was involved in the removal of an LP turbine.

- (f) On the various ships that the Plaintiff worked, there were ladders removing asbestos lagging in the Plaintiff's presence. The ladders cut the asbestos lagging off and let it fall to the deck and dust went everywhere and covered all of the machinery.
- (g) The Plaintiff observed riggers removing pipes which had asbestos sectional lagging on them and when the pipes fell to the ground asbestos dust went everywhere. When the pipes were re-installed, asbestos lagging was replaced both using pipe sections and asbestos slurry.
-
- (h) The Plaintiff observed ladders removing lagging from flanges to enable the Plaintiff to work on those flanges and sometimes he removed the asbestos lagging himself.
- (i) On 21 March 1967 the Plaintiff ceased employment with the Commonwealth.
- (j) The Plaintiff returned to Garden Island Dockyard as a fitter and turner on 5 September 1967 and was present when ladders removed and replaced asbestos lagging as well as working below decks which were dusty whenever ladders were working.
- (k) The Plaintiff recalls Bells Asbestos doing some of the lagging work at Garden Island, but the Plaintiff does not recall when.
- (l) The Plaintiff ceased employment at Garden Island Dockyard on 4 March 1968.
- (m) On 17 June 1970 the Plaintiff returned to Garden Island Dockyard as a fitter and turner and was promoted to foreman fitter on 2 February 1971 where he remained until 16 July 1971 when he ceased employment at Garden Island Dockyard. During this latter period from June 1970 until 16 July 1971 the Plaintiff worked on various vessels but lagging was

done out of hours so any exposure to asbestos during this period was minimal because he did not work in the presence of ladders.

6. The Plaintiff provided a history to Dr David Bryant on 23 May 2008 in which he described his exposure in the 5 years between 1962 and 1967 as being "heavy exposure to asbestos". The Plaintiff informed Dr Bryant that:

"Part of his time during that period was in the machine shop and part of his time was working on board vessels mainly in the engine rooms and machinery spaces where either he was handling lagging or workers around him were doing so. In his first year on the marine engineering training module he spent 6 weeks on vessels, in his second year 4 weeks on vessels, in his third year he was there full time, in his fourth year he was there for 2 months, in his fifth year he was also full-time. When he was in machine shop, which was during the other periods, he was not aware of any asbestos exposure but, when he was on board the vessels, he told me that he was aware of large amounts of asbestos being in the air and, that at the end of a shift he was covered in white powder."

7. The Plaintiff went on to tell Dr Bryant that when he worked from September 1967 at Garden Island he worked in the diesel section for 6 months where he "sometimes" handled asbestos and "sometimes" entered areas where ladders were working.

Comcare's Reply

8. The Defendant, Comcare, provided a reply which alleges that:
- (a) admits the diagnosis of mesothelioma;
 - (b) admits employment;
 - (c) submits that Comcare should be placed in category 2, Wallaby Grip (BAE) Ltd be placed in category 1 and Wallaby Grip Ltd be placed in category 1.

9. The Defendant alleges that the dominant purpose of its operations was and is the defence and security of the nation. The dominant purpose of the Cross-Defendant companies was to market, manufacture and sell asbestos products and to profit from that enterprise. On this basis, the Defendant submits that it is appropriate for there to be a variation on the standard presumptions to give the following apportionment: BAE and Wallaby Grip 85% and Comcare 15%.
10. The Defendant asserts that the Cross-Defendants were asbestos product specialists, pre-eminent in the asbestos industry and had an acute and unique perception of the gravity of risk of the use of asbestos products. Each were in a unique position with regard to acquiring knowledge as to all aspects of their products including the risk posed by their usage. The Cross-Defendants being manufacturers and suppliers of asbestos products could have issued warnings and published instructions to users of its products and to those it supplied about the risk to health from dust generated from using or working with its products and about the precautions that could be taken to eliminate or reduce those risks. See *AMACA v Wallaby Grip* (2005) NSWDDT 41; *James Hardie v Roberts* (1999) 18 NSWCCR 500; (*Re Lawrence*) *BHP v AMACA* (2003) NSWDDT 18 O'Meley P at paragraph 12; *CSR v Wren* (1998) 15 NSWCCR 650. The Defendant submits that it is appropriate for the Assessor to vary the standard presumptions to give effect to an apportionment whereby the Defendant is responsible only for 15%.

The Cross-Defendant's Reply

11. The Cross-Defendants jointly replied to the claims brought and allege:
 - (a) Wallaby Grip denies that it manufactured pipe sections/sectional lagging.
 - (b) Between 1962 until various dates in the mid-1970s Wallaby Grip admits that it was one of a number of suppliers of the James Hardie 85% magnesia and K-Lite ranges of composition, half pipe sections and locks.

- (c) Between 1962 until various dates in the mid-1970s Wallaby Grip admits that it supplied from time to time asbestos cloth.
 - (d) Between 1962 until various dates in the mid-1970s Wallaby Grip admits that it was one of a number of manufacturers and suppliers of asbestos composition.
 - (e) Wallaby Grip Ltd ceased operations on 30 September 1966.
-
- (f) Wallaby Grip (BAE) Pty Ltd commenced operations on 1 October 1966.
 - (g) Prior to September 1966 Wallaby Grip did not know that exposure to asbestos gave rise to a risk of personal injury.
 - (h) Prior to 30 September 1966 Wallaby Grip knew that prolonged exposure to heavy concentrations of asbestos dust and fibre might cause respiratory problems.
 - (i) Wallaby Grip Ltd admits that it ought to have known that exposure to asbestos gave rise to a risk of personal injury.
 - (j) Wallaby Grip (BAE) Pty Ltd became aware that exposure to asbestos dust and fibre gave rise to a risk of personal injury in the mid-1970s. Prior to the mid-1970s, BAE did not know that exposure to asbestos gave rise to a risk of personal injury.
 - (k) Prior to the mid-1970s BAE knew that prolonged exposure to heavy concentrations of asbestos dust and fibre might cause respiratory problems.
 - (l) BAE admits that it ought to have known prior to the mid-1970s that exposure to asbestos gave rise to a risk of personal injury.

- (m) Prior to 30 September 1966 WGL did not know that exposure to asbestos dust and fibre could cause mesothelioma.
 - (n) BAE obtained knowledge in the mid-1970s that exposure to asbestos dust and fibre could cause mesothelioma.
 - (o) Comcare, being an occupier of Garden Island Dockyard and an employer of the Plaintiff, should be placed in category 2 of the standard presumptions.
-
- (p) The two Wallaby Grip companies should be considered as one for the purposes of apportionment.
 - (q) The Wallaby Grip company should be placed in category 1.
 - (r) The standard presumptions should be varied as against the Commonwealth as due to authoritative case law and literature showing that various Commonwealth bodies, including the Department of Navy which oversaw the Plaintiff's work, knew of the dangers of asbestos well before the commencement of the Plaintiff's employment with it in 1962.
 - (s) In *Crimmins v Stevedore Industry Finance Committee* 200 CLR 1, the plaintiff contracted mesothelioma after being exposed between 1961 and 1965 on docks at Port Melbourne. The plaintiff's work there was regulated by the Australian Stevedoring Industry Authority (a Commonwealth agency or instrumentality).
 - (t) In *Stevedoring Industry Finance Committee v Ronald J. Gibson* (2000) NSWCA 179 where the plaintiff was exposed to asbestos between 1956 and 1974, the plaintiff's was regulation by the Australian Stevedoring Industry Authority, a Commonwealth agency or instrumentality, it was held that the Authority had actual knowledge as to the health hazard associated with asbestos.

- (u) In *David Charles Brown v Cockatoo Dockyard Pty Ltd* (1999) NSWDDT 22 the plaintiff was employed by Cockatoo Dockyard from 1948 until 1950 and the Commonwealth was found to have a non-delegable duty of care to the plaintiff due to elements of control over Cockatoo Dockyard. In that case, Johns J found against the Commonwealth.
- (v) The standard presumptions should be varied to the maximum against the Commonwealth because:
 - (i) it was the country's largest employer with actual knowledge of the dangers of asbestos dust at least as at 1950;
 - (ii) it exercised a high level of direction and control over the work carried out on its ships at Garden Island;
 - (iii) it was in a unique position due to its size and sophistication to best protect the plaintiff from asbestos exposure.
- (w) Wallaby Grip submits that a final portion should be Comcare 55% and Wallaby Grip 45%.
- (x) Wallaby Grip submits that it did not have actual knowledge that exposure to asbestos dust and fibre could cause mesothelioma until the mid-1970s at which time it commenced placing warnings on all of its products that contained asbestos.
- (y) Wallaby Grip relies on *(Re Rainer) State Rail Authority (NSW) v Wallaby Grip Ltd* (1999) NSWDDT 12.

Factual Conclusions

12. I draw the following conclusions from the above:

- (i) The Plaintiff suffers from mesothelioma.
- (ii) The condition from which the Plaintiff suffers is indivisible.
- (iii) The type of asbestos to which the Plaintiff was exposed is unknown.
- (iv) The lag time between exposure and diagnosis is sufficient as against the Defendant and the Cross-Defendants.
- (v) The Plaintiff was an employee of the Defendant, and while so employed was exposed to asbestos dust and fibre.
- (vi) The Cross-Defendants supplied asbestos, and performed lagging work.
- (vii) Not all of the asbestos to which the Plaintiff was exposed was provided or supplied by the Cross-Defendants.
- (viii) In all the circumstances, it is likely that 75% of the Plaintiff's exposure to asbestos was associated with asbestos provided by the Cross-Defendant.
- (ix) The Defendant had a non-delegable duty of care.
- (x) The Defendant was aware of the risks of asbestos as submitted by the Cross-Defendants.
- (xi) The Defendant is in category 2 and the Cross-Defendants are in category 1.
- (xii) Given that approximately 75% of the asbestos to which the Plaintiff was exposed was provided by the Cross-Defendant, it is apparent that the Cross-Defendants cannot be liable for approximately 25% of the exposure, but that the Defendant is liable for that 25% of exposure.

- (xiii) As to the approximately 75% of asbestos exposure for which the Defendant and the Cross-Defendants are liable, the liability should be shared as to one third by the Defendant and two thirds by Wallaby Grip. Thus the Defendant is responsible for 25% of the Plaintiff's exposure to the Cross Defendant's asbestos and lagging.
- (xiv) Thus, having regard to the exposure to which Wallaby Grip could not be responsible, the apportionment should be 50% to the Defendant and 50% to Wallaby Grip.


Standard Presumptions

- 13. Given the factual conclusions, the question arises as to whether the standard presumptions should be varied.
- 14. In each period the Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007 permits me to increase or decrease the percentage attribution by no more than 20 percentage points.
- 15. I have determined a liability to contribute having regard to the relative culpability of the Defendants and causal potency of their contribution.
- 16. In the present case, the standard presumptions should not be varied.

Determinations

- 17. I make the following determinations:
 - (a) The Plaintiff's condition is mesothelioma and is indivisible.
 - (b) The Defendant falls into category 2.
 - (c) The Cross-Defendants fall into category 1.

- (d) The Cross Defendants seek to be treated as one entity.
 - (e) The duration, intensity and exposure to asbestos during the earlier period of employment (i.e. the first 5 years) was substantially greater than any exposure to asbestos subsequently.
 - (f) The Defendant and the Cross-Defendants are to contribute in the following proportions:
 - (i) The Defendant 50%.
 - (ii) Wallaby Grip 50%.
 - (g) I appoint the Defendant as the SCM (see clause 61(3)(b) of the Dust Diseases Tribunal Regulations 2007).
-



J.L. Sharpe

14 November 2008