

**IN THE DUST DISEASES TRIBUNAL
OF NEW SOUTH WALES**

DDT No. 8038 of 2008

BETWEEN:

COMCARE
Cross Claimant

AND

CONSOLIDATED STEVEDORES HOLDINGS LTD
First Cross Defendant

CARDROSS PTY LTD
Second Cross Defendant

**CONTRIBUTIONS ASSESSMENT
DETERMINATION**

1. The Registrar referred this matter to me by letter dated 13 November 2008 pursuant to Clause 49(1) of the *Dust Diseases Tribunal Regulation 2007* (NSW) (**the Regulations**) for a determination of apportionment as between the defendants.
2. The determination is to be made by me on the papers, on the assumption that the Cross Defendants are liable, and applying the standard presumptions prescribed in the *Dust Diseases Tribunal (Standard presumptions – Apportionment) Order 2007* (**Standard Presumptions**).

The Principal Proceedings

3. Comcare sues Consolidated Stevedores Holdings Ltd (**CSH**) and Cardross Pty Ltd (**Cardross**) by way of cross claim. In the principal proceedings

Comcare was sued by Gordon Thomas Horn (**Horn**). On 23 September 2008 verdict and judgment was entered for Mr Horn against Comcare in the sum of \$138,000 inclusive of costs.

4. In the principal proceedings Comcare filed a Reply to the Mr Horn's Statement of Particulars on 30 May 2008. As it was the only defendant to the principal proceedings it did not make submissions regarding the apportionment of liability.
5. Although Comcare filed its cross-claim on 27 June 2008 it has not filed a further Reply which specifically addresses submissions regarding apportionment. Each of CSH and Cardross has filed replies. Accordingly, the only submissions I have on apportionment regarding the cross claim are those of the cross defendants.

Mr Horn's Employment and Asbestos Exposure

6. Mr Horn worked as a worker on the waterfront for most of his professional life. He worked on the Brisbane and Sydney waterfronts from 1954 to 1991. In his Statement of Particulars he gave a very detailed recollection his experience of exposure to asbestos although his recollection of dates of employment is much less comprehensive. That is probably in part due to the non-permanent employment status of workers on the waterfront that existed prior to about 1967.
7. I set out below a summary of the relevant material from Mr Horn's Statement of Particulars:
 - (a) He worked on the Sydney waterfront as a waterside worker from 1954 to 1956. He worked as a stevedore for Patrick's, Macquarie, Darling Island, Port Jackson, Browns and the Union Steam Ship Company and

was employed on a casual basis. He recollects unloading asbestos cargoes for Macquarie Stevedoring which is not a cross defendant.

- (b) Mr Horn was transferred to the Brisbane waterfront in about 1956. He worked there until his retirement in 1991. He had several short periods where he worked elsewhere including in Urangan for the sugarcane season, from 1957-1961 he worked the fruit season in Tasmania and worked for a couple of years at Burnie in Tasmania.
- (c) At the Brisbane waterfront he recalls working for Mercantile Wharf and Stevedoring Co Pty Ltd, Patrick's Stevedoring, Dalgety Capricorn Stevedoring & Co Pty Ltd, Consolidated Stevedores and Howard Smith Industries Pty Ltd. Mr Horn states:
"I worked as a casual waterside worker up until about 1967 which is when permanency was introduced on the Brisbane waterfront which meant I was allocated to a specific stevedoring company. I was allocated to Consolidated Stevedores and later transferred to Patrick's Stevedores where I remained up until my retirement in 1991. I may have worked for Consolidated Stevedores as a permanent waterside worker for about two or three years before being allocated to Patrick's Stevedoring".
- (d) Mr Horn unloaded raw asbestos using a large rope sling. Workers went into the hull to manually fill the sling with hessian sacks containing raw asbestos. When the sling was removed from the hull it created a dust storm. Mr Horn recollects that it literally rained asbestos.
- (e) He unloaded asbestos frequently on the Brisbane wharves. He unloaded asbestos about once a month and the task took 1 to 4 days.
- (f) His last date of asbestos exposure occurred in 1978.
- (g) Mr Horn was not provided with a mask on the job.
- (h) He was diagnosed with asbestosis and asbestos related plural disease.

How long was Mr Horn employed by the cross defendants?

8. The issue of Mr Horn's employer in the period that he was employed on the Brisbane waterfront is important in determining each of the cross defendant's respective liabilities. CSH submits that the period that it is on risk cannot have commenced prior to its registration as a company on 24 January 1968. In support of that submission it annexed an historical search of the company. I accept that submission.
9. Cardross was formerly known as Patrick Stevedoring Co (Qld) Pty Ltd. The solicitors annexed a letter from Amanda Commins of Wesfarmers Ltd (which purchased various Patrick's entities in 2001) explaining the corporate history of Patrick's stevedoring operations on the Brisbane waterfront as follows:

"I confirm:

1. *Patrick Stevedoring (Qld) Pty Ltd was formerly known as Smith Patrick Stevedoring (Qld) Pty Limited. This company operated in Gladstone and Port Alma and hired in labour from AEWL. This company never operated as a stevedore in the Port of Brisbane. This company's name was changed to Patrick Stevedoring (Qld) Pty Ltd in February 1984.*
2. *Patrick Stevedoring Co (Qld) Pty Limited operate as a stevedore in the Port of Brisbane until 3 January 1974 and commenced sometime after 6 October 1955. It had no permanent employees before November 1967. The company changed its name to Cardross Pty Ltd on 31 December 1973. It was subsequently deregistered and no longer exists.*
3. *Patrick Operations Pty Ltd commenced operating as a stevedore in the Port of Brisbane on 4 January 1974.*

I note that the above information has been conveyed to the Commonwealth via its solicitors and to its solicitors acting for the Stevedore Industry Finance Committee and Comcare on very many occasions since 2004..."

10. Relying on that correspondence the solicitors for Cardross submit that its last time on risk must have been 4 January 1974 as that was the last day on

which it operated as a stevedore on the Brisbane waterfront. If there was exposure to asbestos by Mr Horn after that time it was as an employee of a Patrick's subsidiary that is not a party to the cross claim.

11. In the absence of any evidence to the contrary I accept that Cardross' risk ceased on or about 4 January 1974. If there was a period of employment with Patrick's after this time it was by an entity that is not party to this proceeding.

Categorising the Parties

12. Comcare, CSH and Cardross are each Category 2 defendants.

Adjustment of Standard Presumptions

13. Mr Horn suffered asbestosis and asbestos related pleural disease which are divisible injuries. Therefore the liability is shared between Comcare and the cross defendants.

14. The cross defendants submitted that the Standard Presumptions should be varied to reflect that Comcare had actual knowledge of the risks of asbestos, had an overarching duty to waterside workers and had the capacity to require workers to take precautions which it did not: *SIFC v Gibson* [2000] NSWCA 179.

15. As Note 6 to Clause 5 of the Standard Presumptions indicates that standard presumptions are designed to take account of the relative state of knowledge of the respective parties. When one considers the facts in *SIFC v Gibson* [2000] NSWCA 179 it is apparent in that case that the trial judge (Curtis J)

apportioned 75% liability to Patricks and 25% to SIFC. That decision was not overturned on appeal despite being the subject of argument.

16. CSH and Cardross suggest that Comcare's liability should be increased by the full 20% allowed by the Standard Presumptions. That would appear to go against the decision in *SIFC v Gibson*. In fact, the apportionment in that case indicates that the Patrick's companies should bear the greater weight of any liability however as Comcare has not filed a Reply and no other party makes that submission I propose to apply the Standard Presumptions without variation and apportion liability for the category 2 defendants equally.

17. Each of CSH and Cardross set out in detail the reasoning for determining the appropriate apportionment. In summary each submits that:

(a) Mr Horn's total period of employment on the Sydney and Brisbane waterfront was 5179 days.

(b) Mr Horn recollects being employed by CSH for about 2 or 3 years. This requires a level of "guesstimate" of his actual employment. CSH submits 2.5 years from the date CSH came into existence – being 911 days. That appears to me to be a reasonable assumption in the circumstances of this case and the evidence before me.

(c) Cardross submits that the total period that Mr Horn worked as a casual employee on the Brisbane waterfront was 1853 days (ie the period from 10 August 1956 to 23 January 1968 (commencement of permanent employment) less employment away at Urangan, Beauty Point and Sydney)).

(d) Mr Horn identifies five different employers in the casual period on the Brisbane waterfront. There were at least 17 stevedoring operations on the waterfront at that time and Cardross submits that it is reasonable to assume Mr Horn was employed by at least 10 of them. That submission, while perhaps supported by logic, is at best speculative. There is meagre support for the submission in the Statement of

Particulars of Mr Horn to the effect “*I worked for various stevedoring companies that include but are not limited to...*” The difficulty with accepting a submission that he was employed by at least 10 stevedoring companies is that even if that were true it is not then clear that he unloaded asbestos during periods of that employment. I propose to assume that Mr Horn worked for 5 employers for equal periods of which he was exposed to asbestos. Therefore Cardross is responsible for 1/5th of his casual exposure of 1853 days or 371 days.

(e) Cardross submits that its period of permanent employment of Mr Horn is 24 July 1970 to 4 January 1974 being 1260 days.

18.I find that Mr Horn’s duration and intensity of exposure in each period of employment by the cross defendants was roughly equal.

19.I find that Cardross’ period on risk is 1631 days out of 5179 = 31.5%. I find that CSH’ risk to be 911 days out of 5179 = 17.6%.

20.As I do not propose to adjust the Standard Presumptions the period on risk as between Comcare and the stevedoring companies is apportioned equally at 50% each. Thus the total liabilities are:

CSH	$50\% \times 17.6\% = 8.8\%$
Cardross	$50\% \times 31.5\% = 15.8\%$
Comcare (the balance)	75.4%

21.I have not been asked to appoint a Single Claims Manager.

.....
David Jay

Contributions Assessor
17 November 2008