

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

DDT No. 8054 of 2008

BETWEEN:

COMCARE
Plaintiff

AND

CONSOLIDATED STEVEDORES (QLD) PTY LTD
First Defendant

AND

CONSOLIDATED STEVEDORES HOLDINGS PTY LTD
Second Defendant

AND

CONSOLIDATED STEVEDORES PTY LTD
Third Defendant

**CONTRIBUTIONS ASSESSMENT
DETERMINATION**

1. The Registrar referred this matter to me by letter dated 25 June 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 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. The matter before me is in effect in the nature of a cross-claim. In the principal proceedings (being No 143 of 2005) Harold William Kildey (**Kildey**) sued the Stevedoring Industry Finance Committee (**SIFC**). Comcare is the successor in title to SIFC.
4. The original proceedings were settled for \$120,000 inclusive of costs.
5. Comcare now sues the first defendant Consolidated Stevedores (Qld) Pty Ltd (**CS (Qld)**), the second defendant Consolidated Stevedores Holdings Pty Ltd (**Holdings**) and the third defendant Consolidated Stevedores Pty Ltd (**Stevedores**).

Mr Kildey’s Employment and Asbestos Exposure

6. Comcare has annexed to its Statement of Particulars a copy of the affidavit of Mr Kildey sworn 9 January 2006 from which I extract the following facts:
 - (a) From 6 October 1948 to 9 August 1986 he worked on the Brisbane waterfront as a casual and permanent waterside worker.
 - (b) As a casual waterside worker he was required to unload raw asbestos cargos from inside the hulls of various ships.
 - (c) When permanent employment was introduced Mr Kildey was allocated to work for “Consolidated Stevedoring” – Affidavit paragraph 17.
 - (d) Whilst working for Consolidated Stevedoring Mr Kildey was required to unload asbestos cargoes.

- (e) As to when his exposure ceased he states that: *“I find it very difficult to pinpoint the last date of my exposure to asbestos whilst working for Consolidated Stevedores and doing the best I can, I believe I may have unloaded asbestos cargoes up until the early 1970s and prior to the 1974 Brisbane floods”*: Affidavit paragraph 17.
 - (f) He unloaded asbestos cargoes 3 to 4 times per year which took between one and four days to complete.
 - (g) His exposure while employed by Consolidated Stevedoring was largely the same as the exposure experienced as a casual employee.
 - (h) Mr Kildey became aware that in 2005 he was suffering from asbestosis.
7. The issue of Mr Kildey’s exposure is relevant to determining which of the defendants are on risk by reason of the date of incorporation of some of the defendants. Comcare contends that exposure to asbestos continued until 1974 whereas the defendants rely on Mr Kildey’s description of his exposure ceasing in “the early 1970’s”. There is obviously some measure of speculation as to when Mr Kildey’s exposure to asbestos ceased. Accepting that there is an artificiality to nominating a date I will proceed on the assumption that his exposure ceased on 30 June 1973.
8. I will assume that Mr Kildey commenced as a permanent employee in about January 1968. Therefore he was exposed to asbestos dust and fibre as an employee for 5 years and 6 months (66 months). His exposure commenced in about October 1948 and ceased on 30 June 1973 (296 months). Therefore his employment exposure was for $66/296$ months = 22.3%.
9. The replies filed by CS(Qld), Holdings and Stevedores submit as follows:
- (a) CS(Qld) was not registered as a company until 30 July 1973 and so cannot be on risk for any liability in respect of Mr Kildey;

(b) Stevedores was incorporated on 25 October 1967 and *“...is a non-active company and there are no longer any records available in relation to its operations. However, it appears the Third defendant operates in NSW only”*.

10. The Replies filed by CS(Qld) and Stevedores deny liability to contribute on the basis that they are “innocent defendants” in accordance with clause 49(5) of the Dust Diseases regulation 2007. That clause provides:

“The defendants may agree that for the purposes of the Contribution Assessor’s determination a particular defendant should not be assumed to be liable to contribute, in which case the defendant is not to be assumed to be liable for that purpose (including for the purposes of the application in that case of the standard presumptions as to apportionment). This subclause does not apply in a case in which the matter was referred to the Contributions Assessor before the commencement of this clause”.

11. I consider the concept of “defendant” in clause 49(5) includes each of CS(Qld), Holdings and Stevedores as well as Comcare so that it is only if all the parties agree that a party is an innocent defendant for the purpose of clause 49(5) that that entity can avoid liability. Comcare does not agree that there are any innocent defendants. I reject the submission that each of CS(Qld) and Stevedores are innocent defendants and therefore I shall proceed on the assumption that all of the defendants are liable.

12. I do consider there is sufficient evidence (being the ASIC historical search) to support the contention that CS(Qld) cannot be liable because it did not exist as a corporate entity at the time that Mr Kildey alleges he was employed on the Brisbane waterfront and exposed to asbestos dust and fibre. I therefore find that CS(Qld) can have no liability in respect of Comcare’s claim.

13. I reject the contention that Stevedores cannot be liable because it only operated in Sydney – Stevedore Reply at 3.1. There is no evidence before me regarding Stevedore’s operations other than the ASIC search and in applying the Standard Presumptions I must assume all defendants are liable. I may have been persuaded to come to a different view if compelling evidence was put before me regarding Stevedore’s non operation in Queensland at the relevant time.

Categorising the Parties

14. All parties agree that each of Comcare, Holdings and Stevedores are Category 2 defendants.

Adjustment of Standard Presumptions

15. Mr Kildey’s suffered asbestosis and pleural plaques which are divisible injuries. Therefore the liability is shared between Comcare and the defendants.

16. The defendants submitted that the Standard Presumptions should be varied to reflect that Comcare had actual knowledge of the risks of asbestos and referred to *Crimmins v SIFC* [1999] HCA 59 and *SIFC v Gibson* [2000] NSWCA 179.

17. Comcare submitted that I should apply the reasoning of Judge Curtis in (*Re Cassar*) *SIFC v James Patrick & Co Pty Ltd* [2005] NSWDDT 60 such that the plaintiff be liable for 15% and the employer 85%. His Honour was not constrained by the principles set out in the Standard Presumptions. It is not possible for me to adjust the Standard Presumptions in the proportions applied by his Honour. Of course the defendant in *Cassar* was a different

entity and the facts and circumstances which gave rise to its higher liability were unique to that case. I do not think I can increase the liability of Stevedores or Holdings simply by analogy with the decision in Cassar. Further, there is no compelling evidence to make an adjustment to the Standard Presumptions by reference to the factors set out in Clause 5(6). I have no evidence regarding the size, identity, capacity and state of sophistication of Stevedores or Holdings.

18. I do not propose to adjust the Standard Presumptions.

19. Therefore I find that the period that Mr Kildey was exposed to asbestos in employment comprised 22.3% of his career exposure and that should be divided equally amongst each of the category 2 defendants:

Comcare $1/3 \times 22.3\% = 7.4\%$

Stevedores $1/3 \times 22.3\% = 7.4\%$

Holdings $1/3 \times 22.3\% = 7.4\%$

The balance of his exposure (77.7%) should be attributed solely to Comcare in the absence of other identifiable defendants giving it a gross liability of 85.1%.

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

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David Jay

Contributions Assessor

2 July 2008