

COMCARE V CARDROSS PTY LIMITED & ORS

MATTER NO. DDT 8206 OF 2008

CONTRIBUTIONS ASSESSMENT

INTRODUCTION

1. These proceedings are a claim by Comcare for contribution from five stevedoring companies to the settlement paid by Comcare to Luke William Thomas Lake ('Mr Lake') in proceedings being DDT no. 168 of 2005 (the 'Original Proceedings') on 26 July 2006. Mr Lake alleged that he that he developed asbestos related pleural disease - a divisible disease - (amongst other conditions) as a consequence of exposure to asbestos dust and fibre in the course of work on the Brisbane waterfront as a wharf labourer between September 1948 and about 1975. The five defendants in the current proceedings being Cardross (D1), Hurricane (D2), Newstead (D3), DPSPL (D4) and Patrick (D5) are alleged by Comcare to have employed Mr Lake from time to time and caused him to be exposed.
2. The proceedings are being litigated on the basis that the claim is subject to Division 6 of Part 4 of the *Dust Diseases Tribunal Regulation 2007*. I cannot see how that is the case nor how the proceedings are subject to the Regulation at all. I will below briefly state my reasons for that view but, bearing in mind, there is no objection raised by any defendant I will also undertake an apportionment of contribution in accordance with the Regulation and the *Dust Diseases Tribunal (Standard Presumptions - Apportionment) Order 2005*.
3. I have had regard to the statement of particulars filed by Comcare on 25 July 2008, and the Reply filed by each defendant. I note that a number of documents are annexed to the statement of particulars including Mr Lake's affidavit and the pleadings in the original proceedings.
4. Further I note that Comcare, after each defendant filed a reply, filed an amended statement of particulars on 8 December 2008. The defendants object to that document being considered by me on the basis that the Regulation does not contain any provision permitting Comcare to amend the particulars in the way it purports to do. The defendants argue that no further facts have come to light which would trigger Comcare's obligation to amend particulars (that obligation arising from clause 29 of the Regulation). I have read the amended particulars and note the additions. For the reasons which will be explained in more detail below the additions to the particulars are of no significance to my decision as to the appropriate contributions.

PROCEDURAL ISSUES

5. The Original Proceedings were commenced by the filing of a statement of claim on 15 June 2005.

6. The Original Proceedings were amended on 26 July 2006 to substitute Comcare for SIFC following the passing of the *Asbestos - Related Claims (Management of Commonwealth Liabilities) Act 2005* and to add an additional particular of injury being '*adjustment disorder with anxious mood*'.
7. The Original Proceedings were settled and an agreement as to judgment was filed and judgment entered on 26 July 2006.
8. In order for a contribution claim such as that maintained by Comcare to be subject to the Regulation it must fall within Division 6 of Part 4. The threshold consideration for application of the Division is clause 54 which relevantly provides as follows:

'54 Application and interpretation

- (1) *This Division applies to a claim for contribution (the **new cross-claim**) made by a defendant (including a cross-defendant to a claim) (the **original claim**) when proceedings on the new cross-claim are commenced after the original claim has been settled or determined, but only if the original claim was commenced by statement of claim filed on or after 1 July 2005.'*

9. The original statement of claim, being filed on 15 June 2005, obviously predates the threshold date prescribed by clause 54(1). As such the claim is not within Division 6.
10. Further I am unaware of any provision within the Division or the Regulation generally which permits the parties to consent to the Regulation having effect (nor indeed am I aware if such an agreement has been reached). Regardless of the situation, as mentioned above, I will proceed to apportion contribution in accordance with the Regulation and the Order.

FACTS

11. Mr Lake deposed in his affidavit of 3 July 2006 to having been employed by 16 stevedoring companies between September 1948 and 1987.
12. Prior to about 1974 he was employed on a casual and then permanent portable basis during which time he worked intermittently and periodically for 15 stevedoring companies. From 1974 he worked for Patrick relevantly for about a 12 month period. I say 'relevantly' because Mr Lake alleged exposure to asbestos dust and fibre in his statement of claim up to 1975. It may be that he was exposed later in time (his affidavit on one view implies exposure until the late 1970s) but any exposure after 1975 is obviously irrelevant because Comcare's claim for contribution in a divisible injury case is limited to tortfeasors responsible for exposure to asbestos dust and fibre which caused a loss for which Comcare paid damages. That must be limited to the period up to 1975.
13. Of the 15 stevedoring employers nominated by Mr Lake in the period up to 1974 Comcare has sued four, Cardross, Hurricane, Newstead and DPSPL.
14. DPSPL did not exist prior to 1964 and thus could not have employed Mr Lake in circumstances where he was exposed to asbestos dust and fibre in the 1948 to 1964

period. Otherwise, Cardross, Hurricane and Newstead operated during the entire period of the Mr Lake's work.

15. In Mr Lake's affidavit he recalls (at paragraph 23) more asbestos unloading work occurring when employed by Hurricane, DPSPL and Newstead. In submissions Comcare and the defendants take a different approach as to the significance of this deposition. Comcare propounds that Mr Lake's specific reference to those companies ought to be taken as implying that the majority of the exposure arose as a consequence of working for those companies. The defendants assert that no significance should be placed upon that recollection.
16. It is impossible to make a final and concluded decision in the absence of detailed questioning and cross-examination of Mr Lake on the issue. There is insufficient precision in the language of the affidavit to conclude if there was any exposure other than in employment with the nominated employers, the extent to which exposure occurred with Hurricane, DPSPL and Newstead by comparison to the other employers, and whether there was any difference in frequency, intensity or any other circumstances of exposure.
17. Doing the best I can I find that the specific reference to Hurricane, DPSPL and Newstead does have some significance in that on balance Mr Lake's recollection is that more exposure occurred when working for those companies but it is not fair to say that it follows little or no exposure occurred in the course of employment by the other companies. As such I propose to install a '*loading*' of two as to one during the casual and permanent casual periods across all of the 15 stevedoring companies.
18. Finally Mr Lake concedes that in the latter period of his employment, that relevantly being the 12 months or so employed by Patrick, his unloaded asbestos cargoes half as often. I note that Patrick in its reply asserts that the work conditions on the wharves had improved substantially by the mid to late 1970s with the introduction of palletisation and ultimately containerisation and the consequent reduction in the extent, intensity and duration of exposure to asbestos dust. As such I propose to impose a 50% reduction '*loading*' for the Patrick period of employment.
19. Although I note there are some arguments raised by one or more of the defendants as to liability issues I note I am bound by the Regulation and the Order to assume that all parties are liable and then undertake an assessment in accordance with the Order.

PERIODS

20. In accordance with clause 5(8) of the Order I will first determine the separate periods relevant to contribution and then, taking into account the number of the periods, the length of the period, and the duration and intensity of exposure (in effect my loadings), assess appropriate contributions.
21. In my view there are three relevant periods being:
 - 21.1 Period 1 - being between 1948 and December 1964 when 14 Stevedoring companies employed Mr Lake (a 16 year period);
 - 21.2 Period 2 - being between January 1965 and October 1974 during which period 15 Stevedoring companies employed Mr Lake (a period of 10 years); and

- 21.3 Period 3 - being between October 1974 and October 1975 when the plaintiff was employed by Patrick.
22. Using a time on risk assessment with a 50% loading for the Patrick period the proportion of asbestos exposure received by the plaintiff during the periods is as follows:
- 22.1 Period 1 - 60%;
- 22.2 Period 2 - 38%
- 22.3 Period 3 - 2%
23. As I find that all of the parties to the proceedings are category 2 corporations the specific periods nominated in the table in clause 5(1) is not relevant to my assessment.
24. The next step is to apportion contribution between Comcare and the 5 defendants.

CONTRIBUTION - PERCENTAGES

25. In accordance with my 'loading' Hurricane, DPSPL and Newstead are loaded by a factor of 2 in comparison to the other Stevedoring employers including the first defendant, Cadross.
26. The appropriate assessment method is in my view to apportion contribution to each employer's period in accordance with the loading and then assess contribution as between Comcare and the relevant employer defendant or, in the circumstances where no employer defendant is sued, exclusively to Comcare.
27. In circumstances where both Comcare and an employer defendant are sued I find the appropriate apportionment between them for that particular period is in accordance with the methodology of *Cassar and Bowie*, in effect 15% to Comcare and 85% to the employer I note that those decisions were delivered after findings as to the extent of actual knowledge of Comcare's predecessor and having regard to those issues.
28. Accordingly, taking into account the loadings, the exposure proportions are as follows:

Period 1

- 28.1 Cardross period of employment 6.25% of 60% - 3.75%
- 28.2 Hurricane period of employment 12.5% of 60% - 7.5%
- 28.3 Newstead period of employment 12.5% of 60% - 7.5%
- 28.4 No employer nominated 68.75% of 60% - 41.25%

Period 2

- 28.5 Cardross period of employment 5.5% of 38% - 2.09%

- 28.6 Hurricane period of employment 11% of 38% - 4.18%
- 28.7 Newstead period of employment 11% of 38% - 4.18%
- 28.8 DPSPL period of employment 11% of 38% - 4.18%
- 28.9 No employer 61.5% of 38% - 23.37%

Period 3

- 28.10 Patrick period of employment 100% of 2% - 2%

29. Each employer is liable to contribute 85% of the culpability of its employment period, Comcare is liable to contribute 15% during each employment period and 100% of the periods in which there is no employer sued.

30. It follows accordingly that the liability to contribute is as follows:

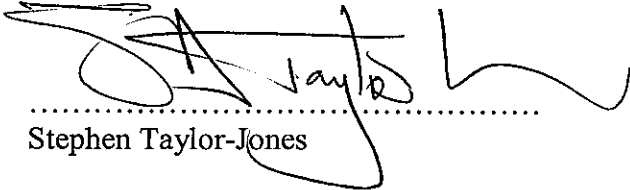
30.1	Cardross -	Period 1: 85% of 3.75% -	3.12%; plus	
		Period 2: 85% of 2.09% -	1.87%	
		Total		4.9%;
30.2	Hurricane -	Period 1: 85% of 7.5% -	6.38% plus	
		Period 2: 85% of 4.18% -	3.55%	
		Total		9.93%;
30.3	Newstead -	Period 1: 85% of 7.5% -	6.38% plus	
		Period 2: 85% of 4.18% -	3.55%	
		Total		9.93%;
30.4	DPSPL -	Period 2 85% of 4.18% -		3.55%;
30.5	Patrick -	Period 3: 85% of 2% -		1.7%;
30.6	Comcare -	15% of each of the abovementioned employment periods as nominated plus 100% of the periods in which there has been no employer sued		
		Total		69.99%.

31. I have stated my assessment on this basis as it is clear to me from the clause 58, and in particular clause 58(1)(d) of the Regulation that it is appropriate to include contribution by Comcare, a defendant in the Original Proceedings, as having a liability.

SINGLE CLAIMS MANAGER

32. I note that all 5 defendants are represented by the same firm of solicitors. As such there is probably little significance to appointment of one or other of the defendants as the single claims manager but, in accordance with the Regulation, I appoint the second defendant to be the single claims manager.

Dated this 19th day of January 2009



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Stephen Taylor-Jones