

CONTRIBUTIONS ASSESSMENT

DUST DISEASES TRIBUNAL

MATTER NO: 285/10 & 285/10/1

RONALD DESMOND COWAN

Plaintiff

COMCARE

Defendant/Cross Claimant

CARDORSS PTY LTD

First Cross Defendant

PATRICK OPERATIONS PTY LTD

Second Cross Defendant

DETERMINATION

INTRODUCTION

By letter dated 4 August 2011 bearing the signature of the Registrar of the Dust Diseases Tribunal I am appointed Contributions Assessor in these proceedings.

I have been provided with the file of the Dust Diseases Tribunal that contains the following material upon which I rely in making this determination:

1. Plaintiff's Statement of Particulars ("Particulars")
2. Defendant's Reply
3. First and Second Cross Defendant's Reply

In addition to the material described at 1-3 above I rely on the Standard Presumptions set out in Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007.

I assume that the defendant and the cross defendants are liable. I note that the cross defendants argue that they have a defence at law to the claim for contribution by the defendant.

I will refer to the defendants as "Comcare", "Cardross" and "Patricks". There is no dispute that the defendants are all Category 2 defendants.

PLAINTIFF'S ALLEGATIONS OF EXPOSURE

Where I refer to “exposure” or its derivation this is to be taken to mean exposure to and inhalation into the plaintiff’s respiratory system of asbestos dust and fibre.

The plaintiff was exposed to asbestos while he worked on the waterfront in Brisbane. He says that from 1964 until some time in the late 1970s he engaged in the unloading of shipments of raw asbestos. The plaintiff says that the circumstances of his exposure changed over the time he worked on the waterfront. As I understand his description at all relevant times the raw asbestos was contained in hessian bags. In “*the early 1970s*” the way in which the raw asbestos was transported changed. The hessian bags were placed on pallets and shrink wrapped. This event reduced exposure. Subsequently on a date that is not identified by the plaintiff the asbestos was transported in containers at which time there was no further exposure.

The plaintiff was employed from 18 November 1964 until 1967 as a casual during which time his labour was allocated to various stevedoring companies by Australian Stevedoring Industry Authority (“A.S.I.A”). In 1967 the plaintiff says he was permanently allocated to “*Patricks Stevedores.*” It is apparent that in fact his employer was initially Cardross and then from 1 January 1974 it was Patricks.

It is important to reproduce the plaintiff’s description of the change in his exposure:

“My exposure to raw asbestos continued when I worked with Patricks as a permanent as the bags were still in hessian bags for a period of time. What then occurred is they were put on pallets and shrink wrapped which reduced considerably the asbestos

exposure and then containers were used and there was no further exposure. It is hard to be precise but probably from about the early to mid 1970s this process took place so my exposure to asbestos was primarily from 1964 to 1967 as a casual and then continuing on as a permanent although decreasing in the early 1970s.”

The Plaintiff says that inspectors from ASIA were “*regularly present on the waterfront both when I was a casual and a permanent with Patricks and they knew what was going on.*”

CONTRIBUTION ASSESSMENT

There is no dispute that Comcare is the only party liable for exposure that occurred prior to 1967 at which point the plaintiff was permanently allocated.

Comcare submits that approximately 79% of the plaintiff’s exposure occurred while he was employed by the Cross Defendants. This submission is based on a straight “time on risk” approach. Comcare submits I should rely on a decision of Curtis J in Re Bowie that is said to be authority for the proposition that proper contribution between the government regulatory waterfront authority and employers is 15% - 85%.

The Reply by Cardross and Patricks attaches a letter indicating that the plaintiff’s employment with Patricks could only have commenced on 1 January 1974.

Cardross and Patricks make the following points:

- It is believed that pallets and shrink wrap were introduced in approximately 1968.
- 70% of exposure occurred when the plaintiff was a casual, 25% when he was employed by Cardross and 5% when he was employed by Patricks
- Comcare should be 70% liable for exposure in the Cardross and Patricks period given its identity, size, sophistication and status as a Commonwealth agency; alternatively Comcare should be 50% liable for this exposure.
- Re Bowie cannot be relied upon because it relates to exposure on the Sydney waterfront

It is not possible to accurately identify when the relevant change in the circumstances of exposure occurred. If these dates could be accurately identified that would make the task of assessing proper contribution quite a deal more straight forward. As it is the task here is laden with balancing the available material and application of a broad brush. I consider that the plaintiff's evidence that his exposure occurred "*primarily from 1964 to 1967 as a casual and then continuing on as a permanent although decreasing in the early 1970s*" to be particularly relevant.

I interpret this evidence to mean that the introduction of pallets occurred "*in the early 1970s.*" What this means is not clear and doing the best I can I interpret that pallets were introduced in 1972. This means that the plaintiff was exposed to asbestos from the uncovered hessian bags for approximately three years (1965, 1966, 1967) while he was a casual and for approximately four years (1968, 1969, 1970, 1971) while he was employed by Cardross. This equates to approximately 43% with Comcare and 57% with Cardross.

It is clear that the plaintiff attributes most of his exposure to the period prior to when pallets were introduced. I consider that 80% of total exposure occurred in this period. Of the balance of exposure I consider that 15% occurred while the plaintiff was employed by Cardross and 5% while the plaintiff was employed by Patricks.

As to proper contribution between Comcare and Cardross and Comcare and Patricks I do not consider that Comcare should be 70% liable. For the periods the plaintiff was permanently allocated he was owed a very high standard of care by his employers. It may be true that the A.S.I.A inspectors "*knew what was going on*" and that Comcare had the ability to take steps to eliminate exposure earlier than when containers were introduced however the duty owed by employer was paramount. I consider that in all the circumstances contribution between Comcare on the one hand and Cardross and Patricks on the other hand should be equal.

The contribution for Comcare should be 43% of 80% which is 34.4% plus 50% of 20% which is 10%. The contribution for Cardross should be 57% of 80% which is 45.6% plus 50% of 15% which is 7.5%. The contribution of Patricks should be 50% of 5% which is 2.5%. I consider that in order to produce a just and equitable apportionment of liability these figures should be adjusted so that Comcare is 50% liable which results in adjustment of the contribution of Cardross and Patricks by a total of 5.6% or 4.2% to Cardross and 1.4% to Patricks.

Accordingly I determine contribution to be:

- Comcare - 50%

- Cardross – 48.9%
- Patricks – 1.1%

I appoint Comcare as Single Claims Manager.

A handwritten signature in black ink, appearing to be 'Toby Tancred', written in a cursive style.

Toby Tancred

Date 8 August 2011.