

**Commonwealth of Australia -v- Brisbane Wharves & Wool Dumping Pty  
Limited**  
**DDT No 7244/2007**

**Determination of Apportionment**

1. The Registrar of the Dust Diseases Tribunal referred this matter to me to determine the contribution that the Defendant and Cross Defendant are liable to make pursuant to clause 49 of the Dust Diseases Tribunal regulation 2007 (herein after referred to as “the Regulations”).
2. By reason of clause 49 of the Regulations I am bound to assume that:-
  - a. Each Defendant is liable.
  - b. The circumstances of the Plaintiff’s exposure to asbestos are as set forth and as alleged by him.
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 particulars.
  - b. The Defendant’s replies.
  - c. The standard presumptions, which are incorporated in the Dust Diseases Tribunal (Standards Presumptions – Apportionment) Order 2007 (hereinafter referred to as the “Standard Presumptions Order”).
4. The standard presumptions in the Standard Presumptions Order 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.
5. By Statement of Claim filed in the Dust Diseases Tribunal on the 4<sup>th</sup> November 2004 (proceedings numbered 413/2004) Robert James Wands (hereafter referred to as “the Plaintiff”) sued Stevedoring Industry Finance

Committee (herein after referred to as "SIFC") alleging that it was negligent and that as a result of that negligence the Plaintiff suffered injury, loss and damage. SIFC denied the allegations made by the Plaintiff.

6. On the 11<sup>th</sup> August 2005 the Plaintiff's claim against SIFC was settled by means of a payment by SIFC to the Plaintiff in the sum of \$120,000 inclusive of costs.
7. The Plaintiff in the present proceedings is the Commonwealth of Australia (herein after referred to as "the Commonwealth"), and it has assumed the liabilities and assets of SIFC. The Commonwealth alleged in its claim that the Plaintiff was employed by "Brisbane Stevedoring Services" and that "Brisbane Stevedoring Services" was either "Cenekey Services Pty Limited" (hereafter referred to as "Cenekey") or Brisbane Amalgamated Terminals Pty Limited (hereafter referred to as "Amalgamated") or Brisbane Wharves & Wool Dumping Pty Limited (herein after referred to as "Brisbane Wharves") and that such employment with either Cenekey, Amalgamated or Brisbane Wharves occurred during the period of 15<sup>th</sup> September 1948 to about 1978, and that while so employed the Plaintiff was exposed to and inhaled asbestos dust and fibre when he unloaded asbestos cargos from various vessels and stacked asbestos cargos in war ships.
8. On the 29<sup>th</sup> May 2008 the Commonwealth discontinued its proceedings as against Cenekey and Amalgamated, thus leaving the only Defendant being Brisbane Wharves.
9. The Commonwealth in bringing the present action, has filed a statement of particulars which included an affidavit supplied by the Plaintiff which included the following allegations: -
  - a. The Plaintiff began working as a casual wharf labourer on the 15<sup>th</sup> September 1948.
  - b. The Plaintiff alleged working for various Stevedoring companies whilst a casual wharf labourer, and these included Mercantile Wharf and Stevedoring Company, Patrick Stevedoring Queensland Limited, Dalgetties Capricorn Company Limited, McCarthy shipping and Agent

Company Limited, Howard Smith Industrial Limited, John Burke Shipping, McDonald Hamilton, Oxley Stevedores, Brisbane Stevedoring Services, BHP, ANL and Brett's.

- c. The Plaintiff was exposed to asbestos dust when he was required to handle and unload from the locker area and holds of ships Hessian bags containing raw asbestos. He also had exposure to asbestos dust and fibre when he was required to unload Hessian bags containing raw asbestos into the storage shed.
- d. When permanencies were introduced in 1967, the Plaintiff was allocated to Brisbane Stevedoring Services.
- e. Shortly after 1978, the Plaintiff was transferred to ANL when containerisation was introduced.
- f. The Plaintiff alleges "I handled many asbestos cargos during the period that I worked on a permanent basis for BSS, before containerisation was introduced."
- g. The Plaintiff alleges that his exposure with BSS was similar to that which he had experienced as a casual.
- h. The Plaintiff claimed injuries in the nature of asbestosis and asbestos related plural disease. (The Plaintiff's allegations indicate that the Plaintiff's condition was a divisible condition).
- i. The Plaintiff's exposure to asbestos is alleged to have occurred between 1948 and 1978.

10. The Commonwealth alleged by its Statement of Particulars, as amended by its Amended Statement of Particulars: -

- a. That in the course of The Plaintiff's employment with Brisbane Wharves, that the Plaintiff was exposed to and inhaled asbestos dust and fibre.
- b. Those pursuant to the Standard Presumptions Order 2007, the Commonwealth, and Brisbane Wharves are both to be classified as Category 2 defendants.
- c. That pursuant to clause 49 (4) of the Regulations, the contribution of the Defendants is to be made on the assumption that the Defendants are liable.

- d. That The Plaintiff suffers from a “divisible condition”.
- e. That the contribution assessor should adopt a “broad brush approach” and should consider:-
  - i. The existence of separate time periods of exposure, and the proportion each time period represents to the whole period of exposure, making reference to the length of the periods.
  - ii. The primary Plaintiff’s assessment of the frequency and intensity of exposure to asbestos during each period.
  - iii. The responsibility of the Defendants for the damage suffered by the primary Plaintiff.
- f. That The Plaintiff alleges thirty years of exposure between September 1948 and 1978. That in the period 15<sup>th</sup> September 1948 to November 1967, 12 different Stevedoring employers, including Brisbane Wharves, employed the Plaintiff. The total period of exposure between 1948 and 1967 is two hundred and twenty eight months.
- g. The two hundred and twenty eight months should be divided between the twelve Stevedoring companies, thus resulting in nineteen months being allocated to each Stevedoring employer.
- h. That Brisbane Wharves employed the Plaintiff during the period November 1967 to about 1978, and that employment is alleged to be for eleven years, or one hundred and thirty two months.
- i. That the total period of exposure amounts to 41.9% of the total exposure period (i.e. 151 months, out of a total 360 months).
- j. That the employers had a duty of care to the Plaintiff, and that the Commonwealth was not subject to those primary duties.
- k. That the employer should bear 85% of any liability which arises during its period of risk. In other words, that the Commonwealth should bear 15% of the liability.
- l. And thus, of the calculated 41.94% of the risk, Cenekey, Amalgamated and Brisbane Wharves should bear 35.65% of the risk.
- m. The Commonwealth alleges an apportionment of 35.65% to Brisbane Wharves, but provides an alternative calculation involving the variation of standard presumption.

- n. The Commonwealth submits that the maximum variation of liability of 20% should be applied in the Commonwealth's favour, so the proportionate liability between the Commonwealth and Brisbane Wharves should be apportioned in the ratio of Commonwealth 30% and Brisbane Wharves 70%, in respect of pro rata contribution to the Plaintiff's total exposure.
  - o. On this basis, that 41.94% of the Plaintiff's exposure occurred while employed by Brisbane Wharves and that Brisbane Wharves should contribute 29.36% made up as to 41.94% times 70% equals 29.36%, rounded to 30%, taking a "broad brush approach".
11. Brisbane Wharves relies upon a reply and an amended reply. The significance of the position of Brisbane Wharves is that it did not operate as a Stevedore company in the port of Brisbane until 1968, and that it therefore could not have employed the Plaintiff prior to 1968.
12. Brisbane Wharves, in dealing with the question of apportionment submits as follows:-
- a. That both the Commonwealth and Brisbane Wharves are Category 2 defendants.
  - b. The standard presumption should be varied to reflect that SIFC and the Australian Stevedore Industry Authority, as agents of the Commonwealth, had actual knowledge of the risk of asbestos.
  - c. That Brisbane Wharves could only have had constructive knowledge – there being no evidence of actual knowledge.
  - d. Brisbane Wharves could only have employed that The Plaintiff for a period of 10 years, and accordingly, the proportion of Brisbane wharve employment as against the whole period of exposure, is approximately 33%.
  - e. In support of its allegations Brisbane Wharves cites a number of bases upon which it is seen that Brisbane wharves could not have employed the Plaintiff prior to 1968.
  - f. That the Commonwealth and Brisbane Wharves should each bear 50% of the 33%, which is alleged to be 16.65%.
  - g. That because of clause 15 (1) of the Standard Presumptions Order, the liability of the Commonwealth should be increased to 70%, thus

arriving at the Commonwealth being liable for 90% of the liability and for Brisbane Wharves being liable for 10%.

### Conclusions

13. On the basis on the material presented by Brisbane Wharves, it is clear that employment with Brisbane Wharves could only have commenced in 1968.
14. Each of the Commonwealth and Brisbane Wharves should be placed in Category 2.
15. The Standard Presumption should be varied to reflect the fact that the Commonwealth had actual knowledge of the risks of asbestos (see *Crimmins v. SIFC* 200 CLR 1, *SIFC v. Gibson* 20 NSWCCR 417).
16. Brisbane Wharves had constructive knowledge of the risks of asbestos and there was no evidence of actual knowledge.
17. Having regard to the identity, capacity, size, status sophistication and unparalleled access to medical, scientific and industry knowledge of the Commonwealth and its agents, including SIFC, when compared to the identity, capacity, size and status sophistication and knowledge of Brisbane Wharves, it is appropriate to view the liabilities as not being equal.
18. Mr Wands sued in respect to a divisible disease, namely asbestosis and asbestos related plural disease.
19. The Commonwealth is cumulatively liable for 100% of the Plaintiff's damage for the whole of the period of the Plaintiff's exposure to asbestos on the waterfront.
20. Having regard to the periods of exposure, it is clear that the Plaintiff was employed and exposed to asbestos, in the period 1968 to 1978 and that such employment was with Brisbane Wharves.
21. That the period of employment with Brisbane Wharves is approximately 33.3% of the whole period of the Plaintiff's exposure.
22. That even though there may have been some reduction in exposure in the latter period of the Plaintiff's employment with Brisbane Wharves, for purposes of this contribution it is assumed that all exposure from 1948 to 1978 was the same.
23. For the period of the Plaintiff's exposure with Brisbane Wharves, the Commonwealth and Brisbane Wharves should each bear 50% of the liability,

and thus each be attributed with 16.65% of the liability for the whole of the Plaintiff's exposure.

24. I have determined the liability to contribute having regard to the relative culpability of the Commonwealth and Brisbane Wharves, and the causal potency of the contributions requires that the standard presumptions should be varied by 20% maximum in the case of the Commonwealth.

#### Determinations

25. I make the following determinations:

- a. The Plaintiff's condition is divisible.
- b. Each defendant falls into Category 2.
- c. The duration and intensity of exposure to asbestos during each period of employment was similar.
- d. The periods of exposure can be identified as:
  - i. Non-Brisbane Wharves exposures – 66.6%.
  - ii. Brisbane Wharves exposure – 33.4%.
  - iii. The Commonwealth and Brisbane Wharves are equally liable for the period during which Brisbane Wharves employed the Plaintiff.
- e. The standard presumptions are to be varied upwards in the case of the Commonwealth by 20%.
- f. Accordingly, apportionment is for the Commonwealth 90% (i.e. –  $33.3\% \times 70\%$  [50% plus 20%] = 23.31% plus 66.6% (sole liability equals 89.91% rounded to 90%) and Brisbane Wharves  $33.3\% \times 30\%$  (i.e. – 50% less 20%) = 9.99% rounded up to 10%.

Dated September 24, 2008



J.L. SHARPE