

CONTRIBUTIONS ASSESSMENT

Dust Diseases Tribunal

of

New South Wales

Matter No: 7205 of 2007

(Re Oliver) Commonwealth of Australia

v

Patrick Stevedoring (QLD) Pty Limited (ACN: 009 759 826)

And

Patrick Operations Pty Ltd (ACN: 000 163 128)

Introduction

1. The Registrar of the Dust Diseases Tribunal referred this matter to me under cover of his letter of 1 May 2008, and pursuant to Clause 49(1) of Dust Diseases Tribunal Regulation 2007 (“the Regulation”) for the determination of the contribution that each defendant is to make to the plaintiff’s (original defendant) claim, the parties having failed to reach agreement as to apportionment.
2. I note that after I received the Registrar’s letter I received an amended timetable filed 12 May 2008 and it is within the timeframe contained in that timetable that I have operated.

3. The Plaintiff has sued 2 Defendants. I list the Defendants and the action each has taken for consideration in this contributions assessment as follows:-
 - (a) First Defendant (Patrick Stevedoring (QLD) Pty Limited - a Reply (3 April 2008) has been filed and served.
 - (b) Second Defendant (Patrick Operations Pty Ltd) – a Reply (3 April 2008) has been filed and served.
4. Pursuant to Clause 49(4) of the Regulation my determination is to be made on the following bases:
 - (a) The assumption that each Defendant is liable (unless Clause 49(5) applies;
 - (b) The Plaintiff's Statement of Particulars (Part 3 and Part 4);
 - (c) The Defendants' Replies; and
 - (d) The Standard Presumptions as to apportionment set out in the Dust Diseases Tribunal (Standard Presumptions-Appportionment Order 2007) "the Order".
5. I note that pursuant to Division 6 (Clause 58) of the Regulation I am required to determine apportionment of each liable defendant including all original claim defendants (the plaintiff in this claim).
6. John Oliver (the original plaintiff) alleged that he suffered from asbestosis and asbestos related pleural disease, divisible injuries.

Liability of the First Defendant

7. Although I am required to assume that each defendant is liable, pursuant to Clause 49(5) of the Regulation the defendants to the plaintiff's

(Commonwealth) claim agree that for the purposes of my role, the first defendant is not to be assumed to be liable.

8. The interpretation of Clause 49(5) in the context of Clause 58 of the Regulation is not without its difficulties. On one view, reference to “defendants” in Clause 49(5) includes original claim defendants (i.e. the Commonwealth) and hence the clause does not apply unless the Commonwealth also agrees that the first defendant is not to be assumed to be liable. The other view is that “defendants” in Clause 49(5) does not include the plaintiff (“original claim defendant”) on the new cross claim (Commonwealth). In my view, Clause 49(5) does not operate as to require the agreement of the Commonwealth for me to assume that the first defendant is not to be liable. In passing I note that John Oliver did not sue Patrick Stevedoring (QLD) Pty Limited nor Patrick Operations Pty Limited; indeed, the names of those defendants do not appear anywhere in John Oliver’s affidavit. John Oliver in his affidavit refers variously to “Patricks”, “Patrick Stevedoring Queensland Limited” and “Patricks Stevedoring”.
9. Therefore, pursuant to Clause 49(5) of the Regulation I determine that and proceed on the basis that the first defendant is not liable.

Apportionment Assessment

10. I have considered the plaintiff’s Form 1 to which is attached the affidavit of Mr John Oliver. I have also considered the Reply of the second defendant, Patrick Operations Pty Limited. I note in passing that it is abundantly to me that the Commonwealth has not sued the correct “Patricks” entity for the period prior to 1974.
11. Pursuant to the Order the Defendants are both Category 2 Defendants.
12. I note that between about 30 November 1964 to about 1978 John Oliver was exposed to asbestos when he unloaded asbestos cargoes about once per month and sometimes a few times per month with each cargo taking a few days to unload depending on the size of the cargo.

13. Mr Oliver sued in respect of divisible diseases, asbestosis and asbestos related pleural disease. The Commonwealth was (and is) cumulatively liable for 100% of Mr Oliver's damage which includes the divided or shared liability to which other tortfeasors have contributed and the shared liability of the second defendant, Patrick Operations.
14. Patrick Operations is concurrently and jointly liable only for that proportion of Mr Oliver's damage resulting from that proportion of exposure to asbestos during which it was Mr Oliver's employer.
15. For the purpose of apportioning this claim, there are two separate periods of exposure being:
 - (a) The period during which Mr Oliver was employed on a casual basis (for which the Commonwealth bears total liability);
 - (b) The period during which Mr Oliver was employed on a permanent basis by the second defendant, Patrick Operations for which liability must be apportioned between the Commonwealth and it.
16. According to Mr Oliver's affidavit he worked on the Brisbane waterfront from November 1964 to 1992 (paragraph 6) and his last exposure to asbestos was *"in about the late 1970s when containerisation was introduced"* (paragraph 21).
17. I accept that containerisation was gradually introduced on the Brisbane waterfront in the mid 1970s and that Mr Oliver's exposure ceased in about 1978. The total period of exposure is therefore approximately 14 years (168 months).
18. Mr Oliver worked on a casual basis from November 1964 until at least November 1967 when he was allocated permanently to Brisbane Stevedoring Services and worked for this employer for 3 years (paragraph 8).
19. Prior to permanency Mr Oliver worked for several different stevedoring companies, specifically recalling five of those stevedore employers but noting that he unloaded raw asbestos cargo while working for others as well (paragraph 9).

20. Mr Oliver commenced permanent employment with “Patricks Stevedoring” in about 1970 (paragraph 8).
21. Taking into account the content of the Reply filed by the second defendant and the Plaintiff’s Form 1 (containing Mr Oliver’s affidavit) content of it is sufficiently clear to me that the second defendant did not employ Mr Oliver in the Port of Brisbane prior to 3 January 1974.
22. I am of the view that the “Patricks Stevedoring” company which employed Mr Oliver up to 3 January 1974 has not been sued.
23. Accordingly, the Mr Oliver’s period of exposure during permanent employment with the second defendant is probably no more than 60 months. The proportion of Mr Oliver’s exposure with the second defendant, Patrick Operations, represents 60/168 (months) of Mr Oliver’s total exposure to asbestos: 35.71% (rounded up to 36%)
24. Therefore, the Commonwealth is solely liable for the balance of 64% of exposure which occurred during Mr Oliver’s work with other employers which the Commonwealth has not sued.
25. The proportion of the total exposure for which the second defendant, Patrick Operations, is concurrently liable with the Commonwealth is 36%.
26. Clause 5(4) of the Order requires each Defendant in the same category to be treated as equal in contribution to the percent share of that Category unless I am satisfied that a standard variation should apply.
27. I am not satisfied that the standard presumptions should be varied in these proceedings.
28. Accordingly, for the 36% of the proportion of exposure for which the Commonwealth and Patrick Operations are concurrently liable, they each should bear 50% of the liability and be attributed 18%.
29. Therefore I determine the apportionment as follows:
 - (a) Commonwealth: 36% (concurrent liability) x 50% = 18% + 64% (sole liability) = 82%

(b) Patrick Operations Pty Limited: 36% (concurrent liability) x 50% = 18%

30. I note that in the circumstances I have not been requested to appoint a single claims manager and cannot see any utility in doing so.

16 June 2008

A handwritten signature in black ink, appearing to read 'S. Tzouganatos', with a large, sweeping flourish at the end.

Spiro Tzouganatos

Elizabeth Street Chambers