

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

DDT No. 7137 of 2007

BETWEEN:

COMMONWEALTH OF AUSTRALIA
Plaintiff

AND

OXLEY STEVEDORING CO PTY LTD
Defendant

**CONTRIBUTIONS ASSESSMENT
DETERMINATION**

1. The Registrar referred this matter to me by letter dated 8 July 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 Defendant is liable, and applying the standard presumptions prescribed in the *Dust Diseases Tribunal (Standard presumptions – Apportionment) Order 2007* (**Standard Presumptions**).

The Principal Proceedings

3. The principal proceedings involved Cyril Raymond Kerr (**Kerr**) as plaintiff and the Stevedoring Industry Finance Committee (**SIFC**) as defendant. Those

proceedings were settled. The Commonwealth of Australia now brings this action as the successor in title to SIFC against Oxley Stevedoring Co Pty Ltd (**Oxley Stevedoring**).

Mr Kerr's Employment and Asbestos Exposure

4. The Commonwealth has annexed to its Statement of Particulars a copy of the affidavit of Mr Kerr sworn 7 April 2005 in which Mr Kerr gave a history of his employment, exposure to asbestos dust and fibre and the injuries he incurred.
5. I extract the following facts (save in respect to his recollection of the period of his employment where there is conflicting evidence) from Mr Kerr's affidavit:
 - (a) In 1947 Mr Kerr obtained employment with a carpenter named George Kerr. He recalls occasionally cutting and handling asbestos cement sheets. His exposure to asbestos was minimal.
 - (b) In 1948 he obtained employment as a carpenter with the Queensland Housing Commission. He worked with asbestos cement sheeting but his exposure was minimal.
 - (c) Mr Kerr work as a stevedore on the Brisbane waterfront from around 1949 until 1975. He was employed as a "holder" and his role was to work in holds and lockers within vessels loading and unloading various cargoes including raw asbestos (Affidavit ¶ 10).
 - (d) He unloaded raw asbestos cargoes a few times a year and the job of unloading it could last up to a week.
 - (e) He described working for several stevedoring companies and said:

"I cannot specifically recall which stevedoring companies I unloaded raw asbestos for except I do recall unloading raw asbestos cargoes whilst working for Oxley Stevedores on numerous occasions. I recall that Oxley Stevedores used to unload a lot of the asbestos that came from Tommy Manville in Canada. It was well known on the waterfront

that Tommy Manville had a company that exported a lot of asbestos to Australia. I do not recall unloading asbestos other than the Manville asbestos. Oxley's unloaded a lot of this and I think that the great bulk of my asbestos exposure as a casual was with Oxley's and when permanency was introduced in the late 1960s I worked for Oxleys as a permanent in gang 39 and continued to unload asbestos" (my emphasis) (Affidavit ¶ 17).

(f) Mr Kerr worked as a permanent employee of Oxley Stevedoring from the late 1960s until 1975. His asbestos exposure ceased in 1975.

6. Mr Kerr was diagnosed with asbestosis and pleural plaques. Those are divisible diseases.

Mr Kerr's Employment

7. The Commonwealth of Australia submit that Mr Kerr was employed as a waterside worker from 7 December 1949 to about 1975. It submits that he was exposed to asbestos "when employed as a casual waterside worker between 7 December 1949 and 1960 and worked with the defendant during this period and from 1960 he was employed solely by the defendant until 1975".

8. By contrast Oxley Stevedores submit that it was only registered as a company on 18 March 1960. In support of that submission it annexed an ASIC historical search. It could not have employed Mr Kerr prior to its existence. Oxley Stevedores annex a document obtained under subpoena from Wesfarmers Ltd which states that a review of their records shows that Mr Kerr was registered as a waterside worker on 7 December 1948. This dovetails with Mr Kerr's recollection that he commenced employment on the wharves prior to 28th birthday in May 1949 (Affidavit ¶ 10). Oxley Stevedores

submit that his permanent employment should be assumed to have commenced in about 1967.

9. I make the following findings regarding Mr Kerr's employment:
 - (a) He commenced employment in about December 1948;
 - (b) He worked as a casual worker for Oxley Stevedores (and other stevedores) from April 1960 until December 1967; and
 - (c) He worked as a full time employee of Oxley Stevedores from January 1968 until June 1975 (7 years and 6 months or 90 months).

10. For the purposes of making the calculations I shall assume Mr Kerr's total period of employment (in round figures) is January 1949 to June 1975 – a period of 26 years and 6 months (318 months) inclusive.

Categorising the Parties

11. Each of the Commonwealth and Oxley Stevedores are Category 2 defendants.

The Plaintiff's Exposure as a Casual

12. Oxley Stevedores submit that there is no evidence as to when during the period prior to his permanent employment that Mr Kerr was employed on a casual basis. I accept that contention.

13. Oxley Stevedores then submit in respect of his period of exposure as a casual employee that the liability should be apportioned equally the thirteen stevedoring companies that Mr Kerr identifies as having worked for as a casual. Applying that reasoning Oxley submits that its liability is 2.2% based on the following calculation:

18.03.1960 to 31.12.1967 is approximately 93.5 months

93.5 months / 13 (casual employers) = 7.2 months

7.2 months (Oxley casual) out of 319 months (total exposure) = 2.2%

14. I consider that methodology would have substance if there was no evidence from Mr Kerr regarding his exposure to asbestos whilst working as a casual employee. In this case, however, Mr Kerr specifically recollected that:

“I think that the great bulk of my asbestos exposure as a casual was with Oxley’s”.

15. As is often the case the plaintiff did not give an exact figure of his estimated exposure but doing the best I can I find that the “great bulk” meant that 80% of his exposure to asbestos as a casual employee was while working for Oxley Stevedores.

Adjustment of Standard Presumptions

16. Mr Kerr’s suffered asbestosis and pleural plaques which are divisible injuries. Therefore the liability is shared between the Commonwealth and Oxley Stevedores.

17. Oxley Stevedores submitted that the Standard Presumptions should be varied to reflect that the Commonwealth had actual knowledge of the risks of asbestos: *Crimmins v SIFC* [1999] HCA 59 and *SIFC v Gibson* [2000] NSWCA 179.

18. The Commonwealth 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 Commonwealth be liable for 15% and Oxley Stevedores 85%. While accepting that his Honour saw fit to adjust the liability of the employer

substantially in that case I consider it is dangerous to apply apportionments by analogy to other cases. Justice Ipp counselled against that course in *Patrick Operations Pty Ltd v The Commonwealth* [2006] NSWCA 142.

19. 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 Oxley Stevedores.

20. I propose to apportion the liability as between the Commonwealth and Oxley Stevedores for the period they were jointly on risk in the proportion 50:50.

Summary

21. I make the following findings regarding responsibility for Mr Kerr's exposure:

22. Commonwealth solely responsible January 1949 – March 1960:

135 months of 318 months = 42.4%

23. Casual employment April 1960 – December 1967: 93 months of 318 months = 29.3% total liability.

This period of employment is split equally between the Commonwealth and all casual employers = 14.65%.

Oxley Stevedores responsible for 80% of the casual employer's risk = $80\%(50\% \times 29.3\%) = 11.7\%$

24. Permanent employment by Oxley Stevedores January 1968 – June 1975: 90 months of 318 months = 28.3%

Oxley Stevedores responsible for 50% of 28.3% = 14.2%

Therefore I find the total liability of Oxley Stevedores as $11.7\% + 14.2\% = 25.9\%$

The balance of the liability rests with the Commonwealth.

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

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David Jay

Contributions Assessor

11 July 2008