

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

**DDT No. 8055 of 2008**

BETWEEN:

**MARY DELIZIO (AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE  
FRANK DELIZIO)**

Plaintiff

AND

**COMCARE**

First Defendant

**E A WATTS PTY LTD**

Second Defendant

**AMACA PTY LTD (FORMERLY JAMES HARDIE & COY PTY LTD)**

Third Defendant

**SELTSAM PTY LTD**

Fourth Defendant

**CONTRIBUTIONS ASSESSMENT  
DETERMINATION**

1. The Registrar referred this matter to me 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 Defendants are liable, and applying the standard presumptions prescribed in the *Dust Diseases Tribunal (Standard presumptions – Apportionment) Order 2007* (**Standard Presumptions**).

3. By the Amended Statement of Claim Mary Delizio was substituted as the plaintiff following the death of her husband Frank Delizio.

### **Mr Delizio's Exposure**

4. A Statement of Particulars was filed on 22 July 2011. The plaintiff alleges Mr Delizio experienced asbestosis, asbestos related pleural thickening and bilateral pleural thickening. During his career he had several periods of exposure to asbestos working as a builder, carpenter or joiner.
5. In 1952 Mr Delizio worked on a building site at CSR Ltd site at Rhodes doing carpentry work. For a few days he laid corrugated AC sheets. He described his asbestos exposure as low and thinks it comprised less than 2% of his lifetime exposure. He does not know who supplied the AC sheets he worked with and did not use protective equipment.
6. From 1952 to 1953 Mr Delizio worked on a multi story residential building site for John Speers in Hunters Hill. He cut and fitted AC sheets to eaves of the roof. This work lasted about 2 weeks and he describes his exposure as low. It comprised less than 2% of his lifetime exposure to asbestos. He says the AC sheeting was provided by "James Hardie or Wunderlich". He was not provided with protective equipment.
7. From 1958 to 1960 Mr Delizio worked for two unidentified brothers who built cottages in the Punchbowl. Mr Delizio worked on the internal fit out which involved cutting and fitting AC sheeting. He recalls using Tilux to line the walls in the bathrooms and kitchen, and the walls and ceiling in the laundry. As well as cutting and fitting the sheets he swept up the dust and debris. He was exposed on a daily basis for 8 months. The exposure was described as "medium" and comprised less than 10% of his lifetime exposure. The products he used were "James Hardie and Wunderlich". He was not provided with protective equipment.

8. From 1964 to 1965 Mr Delizio worked for a builder called E A Watts when building the Roselands Shopping Centre doing formwork and general carpentry. He says he worked with and in the vicinity of ladders who were spraying steel beams and columns with insulating material. The SOP then says "*The Plaintiff (sic) does not know and cannot say whether the insulating material being sprayed on the beams and columns contained asbestos*". This work lasted for 4 to 8 weeks out of a total of 13 months on site. In his affidavit, which is annexed to the Statement of Particulars, he says "*Again, I do not believe that I was exposed to any asbestos whilst working on this site*". He describes the intensity of exposure as medium and that it comprised less than 5% of his career exposure. I take that estimate to be a reference to exposure to insulating material of unknown composition rather than asbestos.
  
9. From 1969 to 1982 Mr Delizio was employed by the Department of Defence as a ship's joiner at HMAS Naval Dockyard at Garden Island. He describes 3 types of exposure to insulating work:
  - (a) Stripping out old lagging from bulkheads and then installing new material. Removing it caused the dust to go everywhere.
  - (b) Stripping out old lagging from pipes and duct work and reinstalling it. The replacement insulation material was insulwool and did not contain asbestos.
  - (c) Pulling out lagging on air conditioning ducts and then reinstalling insulation. The work was dusty and he got the dust all over his clothes and skin. The new material installed was a layer of insulation which was glued onto sheets of plastic or vinyl and Mr Delizio believed it contained asbestos.
  
10. Mr Delizio worked in the vicinity of ladders stripping out old lagging. Mr Delizio worked on the refit of HMAS Sydney, HMAS Melbourne, HMAS Hobart, HMAS Perth, HMAS Vampire, HMAS Supply, HMAS Parramatta and HMAS Brisbane. He also built a shed that stored the insulating material. One of the last jobs he did was to disassemble this shed. The walls were covered with dust and powder from the insulating materials so that it was impossible to avoid the dust.

11. In this role the plaintiff says Mr Delizio was exposed almost daily save for 2 years where he worked at Marrickville and Rosebery where there was no exposure. The intensity of exposure was high and he estimates that it comprised 75% or more of his lifetime exposure. He did not receive protective equipment.
12. On a casual basis between 1950 to 1969 Mr Delizio did work on cottages for family, friends and neighbours. It was mostly building timber frames but sometimes involved cutting and fitting asbestos cement sheets. This exposure was about 8 weeks in total over 20 years. He describes the exposure as low and comprising less than 5% of his lifetime exposure. He worked with James Hardie and Wunderlich products.
13. Finally Mr Delizio used Tilux in the period 1951 to 1955 in the construction of his home and garage at 37 Karne St, Narwee. The exposure was light and lasted for about a month. It comprised less than 5% of his lifetime exposure. The AC sheets used for the exterior of the house were manufactured Wunderlich.

#### **Comcare's Amended Reply**

14. Comcare admits that it employed Mr Delizio in the period alleged. It is presently making enquiries as to whether Mr Delizio was exposed to asbestos as he alleges. Comcare admits that it occupied or controlled the Garden Island Dockyard. It admits that it was aware that exposure to asbestos gave rise to a risk of injury in the period alleged. It admits that it owed a common law duty of care but does not admit breaching that duty.
15. Comcare submits that the parties should be categorised as follows:

Comcare	Category 2
EA Watts	Category 2
Amaca	Category 1
Seltsam	Category 1

16. It submits that the Standard Presumptions should not be varied as against the Category 2 defendants. However, they should be varied against Amaca and Seltsam on the basis that they were manufacturers and engaged in intensive supply of those products to the NSW building and construction industry. The Standard Presumptions should be increased by 10% against those parties.

17. Comcare submits that its liability should be as follows (assuming the 10% adjustment to the Standard Presumptions):

#### **Index Period B**

Employed 120/160 months.

$75\% \times 25\%$  (category 2 defendant)  $\times 75\%$  (Total Garden Island Exposure) = 14%

#### **Index Period C**

Employed 40/160 months.

$25\% \times 30\%$  (category 2 defendant)  $\times 75\%$  (Total Garden Island Exposure) = 6%

Comcare liability is 20% of the plaintiff's total entitlement and Amaca is liable for the balance being 55%.

18. Comcare did not make submissions about the other 25% of the plaintiff's alleged exposure.

#### **EA Watts**

19. EA Watts has not filed an appearance or a Reply.

#### **Amaca's Reply**

20. Amaca note that the identification of the asbestos products Mr Delizio claims to have been exposed to is not strong. It notes that the products are described as “fibro”, “Tilux”, “spray”, “lagging” and “flat sheets of asbestos cement”. It says it did not manufacture asbestos products containing spray. Mr Delizio did not allege that insulwool contained asbestos. It admits that it manufactured Tilux but says that Mr Delizio’s identification of it can be questioned because there were similar products on the market.

21. In my view Mr Delizio had a long history of working with asbestos sheeting products for employers as well as in his own home. It is reasonably likely that Mr Delizio purchased the Tilux for use in his own home renovations. His recollection that he worked with Tilux is acceptable in that context.

22. Amaca accepts that from the 1950s it became aware that the inhalation of asbestos could cause asbestosis but in limited circumstances of inhalation.

23. Amaca submits that there is not sufficient evidence to establish that Mr Delizio was exposed to asbestos products that it manufactured or that if he was exposed that such exposure materially contributed to his illness.

24. Amaca submits the parties should be categorised as follows:

Comcare	Category 1 and 2
EA Watts	Category 2
Amaca	Category 1
Seltsam	Category 1

25. It submits Comcare should be placed into category 1 on the basis that it was the installer of asbestos products. It then submits that the Standard Presumptions should be varied against it by 20% on the basis that Comcare, as Mr Delizio’s employer, had day to day control over his work environment. It also had access to

relevant medical information as to the dangers of asbestos. It had actual knowledge of those dangers at the time of Mr Delizio's exposure.

26. Amaca submits that it is an innocent defendant pursuant to clause 53 of the Regulations. It points to the fact that in his affidavit (paragraphs 27 and 100) who the manufacturer of certain product he was exposed to. It also cited *McCallagh v State of QLD* [2003] NSWDDT 3 where it was held that the DDT was unable to make a finding as to contribution where it was invited to "*determine a proportion of an unknown proportion*". It then submits that any liability it is responsible for should be reduced to what is attributable to it.

27. If that line of argument is not accepted then Amaca then submits that by the application of Cl 5(8) of the Standard Presumptions I am required to treat each period as equal unless satisfied that a variable weighting should apply. Amaca submits that a variable weighting should applying given Mr Delizio's description of the duration and intensity of exposure for each period.

28. In summary Amaca submits that the liabilities should be as follows:

Amaca	10%
Seltsam	10%
EA Watts	5%
Comcare	75%

I infer Amaca's calculation of the contribution is made applying three assumptions. First, all exposure to AC sheets when no employer is identified (being 20%) is shared equally between it and Seltsam. Secondly, EA Watts assumes the entire liability for that period of employment because Mr Delizio was unable to identify any manufacturer or supplier of products he may have been exposed to. Thirdly, Comcare assumes the entire liability on the basis that the claimant has not served any evidence to show that he was exposed to asbestos dust and fibre during this period and so all liability of this period must be attributed to Comcare.

## Seltsam's Reply

29. Seltsam notes that none of its products were identified by name. As with Amaca, the reference to asbestos products was to generic names such as "fibro" or asbestos cement flat sheets. For that reason it does not admit that it breached any duty of care owed to Mr Delizio. If exposure to Seltsam's products could be provided Seltsam accepts that it owed Mr Delizio the usual duties of care.

30. Seltsam submits that the parties should be categorised as follows:

Comcare	Category 1 and 2
EA Watts	Category 2
Amaca	Category 1
Seltsam	Category 1

Comcare should be categorised as a category 1 defendant on the basis that Mr Delizio described relagging pipes and bulkheads which "*clearly demonstrates that Comcare was an installer of asbestos containing products*".

31. As with Amaca, Seltsam puts a primary and secondary submission in respect of contribution. Its primary submission is that no product manufactured by it was identified by Mr Delizio. It refers to (*Re McCullagh*); *Seltsam Pty Ltd v State of Queensland* [2003] NSWDDT 3 and *Berengo v Amaca Pty Ltd* [2010] VSC 496 in support of the contention that the evidence is insufficient to apportion any liability to Seltsam. For that reason it is an innocent defendant pursuant to CI 53 of the Regulation.

32. By its secondary submission it points to the fact that there is an inconsistency in the dates of alleged exposure to asbestos in the Amended Statement of Claim with those alleged in the Statement of Particulars. The most glaring inconsistency is in paragraph 5 of the Amended Statement of claim which alleges that "*between 1946*

*and about 1957 the first Defendant employed the Plaintiff as a civilian boiler attendant within the department of Defence*". There is no evidence of that in his affidavit. In fact, he says that he migrated to Australia in 1950: Affidavit of Frank Delizio paragraph 14.

33. I agree that there is an inconsistency between the Amended Statement of Claim and the affidavit. I consider the affidavit is the preferable document to rely upon as it was sworn by Mr Delizio. The allegation of employment from 1947 does not appear in the Statement of Claim and its transcription appears to be an error that should be corrected.

34. Seltsam notes that for the cottage work (1958 – 1960) there is no allegation in Mr Delizio's affidavit of exposure to asbestos from any Wunderlich product: see affidavit paragraphs 45 – 47. By contrast the Statement of Particulars nominates the manufacturers for this period as "James Hardie or Wunderlich". The difficulty in relying on the Statement of Particulars is that it was prepared by the current plaintiff, Mary Delizio as representative of Mr Delizio's estate. It is not clear the extent of knowledge that Mrs Delizio had in respect of Mr Delizio's exposure.

35. As to the Comcare period from 1969 to 1982 Seltsam notes that no products or manufacturers are identified in the plaintiff's evidence and so Comcare should be liable for the entire period.

36. In respect of the casual weekend work Mr Delizio does refer to Wunderlich products were used on external walls but Mr Delizio's own recollection as to which products were used and where is poor. As such Seltsam submits that any exposure to its products is minimal and that Amaca should bear most liability.

37. The final apportionments Seltsam submits are:

Periods of exposure	Estimate	Defendants liable	Final apportionment
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Period (a) 1952 – 1953	Less than 4%	Amaca	Comcare 76% Watts 5% Amaca 18.5% Seltsam 0.5%
Period (b) 1958 – 1960	Less than 10%	Amaca	
Period (c) 1962/3 – 1964/65	Less than 5%	Watts	
Period (d) 1968 – 1982	75% or more	Comcare	
Period (e) 1950 - 1969	Less than 5%	Amaca 4.5% Seltsam 0.5%	

## Findings

38. The medical evidence showed evidence of pleural thickening and symptoms consistent with an underlying diagnosis of asbestosis. He was not examined by the defendants' medical practitioners. Those conditions are divisible.

39. I categorise the parties as follows:

Amaca	Category 1
Seltsam	Category 1
Comcare	Category 2
EA Watts	Category 2

40. There are many aspects of this matter that are difficult to assess when attempting to complete a contributions assessment.

41. In my opinion, Comcare was not in the business of asbestos installation. To the extent that installation occurred at its facilities that was incidental to its role of providing defence services and facilities. I do not propose to adjust the Standard Presumptions as against Amaca or Seltsam. The Standard Presumptions already

take account of the fact of the relative state of knowledge of the dangers of asbestos as well as the factual matters referred to in CI 3 of the Standard Presumptions.

42. Although the proceedings were commenced in February 2008. Mr Delizio passed away on 17 February 2010. There is an undated but sworn affidavit from Mr Delizio. No substantive steps were taken in the proceedings until mid 2011 when his wife, who was the sole beneficiary of his will, sought leave to be substituted as the plaintiff. After that leave was granted a Statement of Particulars was filed on 22 July 2011 that was verified by Mary Delizio. The difficulty is that there is material in the Amended Statement of Claim and Statement of Particulars that is inconsistent with or at odds with Mr. Delizio's affidavit. For instance:

- (a) The Amended Statement of Claim (paragraph 5) alleges that Mr Delizio was employed between 1946 and about 1957 as a civilian boiler attendant with the Department of Defence. According to his affidavit Mr Delizio did not arrive in Australia until 1950 and he doesn't allege being employed by the Department of Defence in this period. That role is not referred to in the Statement of Claim.
- (b) In his affidavit Mr Delizio refers to building fibro cottages between 1958 and 1960 (paragraph 44 – 51). The only product he identifies by name is Tilux. He does not refer to any other Amaca products or at all to Seltsam products. Yet in the Statement of particulars the manufacturers are identified as "*James Hardie and Wunderlich*".
- (c) Paragraph 17 of the Amended Statement of Claim alleges that Amaca manufactured and/or supplied products containing asbestos used on the premises owned and/or occupied by Comcare. Unsurprisingly, Mr Delizio does not identify who manufactured or supplied the products he believes he was exposed to in this period in his affidavit. When one goes to the Statement of Particulars the claimant answered "No" to the questions (CI 4.9 and 4.10):
  - (a) Do you know who was the manufacturer and/or supplier of those asbestos products?
  - (b) Do you know where the products were purchased from?

(d) By the Amended Statement of Claim EA Watts is sued on the basis that it employed Mr Delizio and in the course of that employment he was exposed to and inhaled asbestos dust and fibre (paragraph 16). In his affidavit Mr Delizio says he worked around ladders and describes the environment as very dusty. He concludes (paragraph 55) by stating that *“I do not know whether the insulating material that was being sprayed was made with asbestos or not”*.

43. In my view the evidence in Mr Delizio’s affidavit should be preferred to the content of the Statement of Particulars. The Statement of Particulars is verified by the claimant. There is no evidence of the extent of her knowledge of Mr Delizio’s exposure to asbestos. It seems inherently unlikely that Mrs Delizio can reliably identify the manufacturers of the asbestos cement products (as has occurred in the Statement of Particulars) for the cottage period when Mr Delizio did not do so in his affidavit. To the extent that there are inconsistencies between the Statement of Particulars and the affidavit I consider the affidavit should be preferred.

44. I give no weight to the allegations in the Amended Statement of Claim that are unsupported by corroborative evidence. In that regard absent a cross claim by Comcare (or any supporting evidence in its Reply) or any evidence in Mr Delizio’s affidavit as to the manufacturer or supplier of the asbestos exposure that occurred while employed by the Department of Defence it is not possible, or appropriate, to attribute any liability to manufacturers for that period.

45. The only material relied upon by Comcare in its Reply is the following submission:

*“The third defendant (Amaca Pty Ltd) has also been joined to these proceedings on the basis that it manufactured and/or supplied asbestos products to Garden island for the entirety of the relevant period”*.

46. An allegation in a Statement of Claim is not proof of the fact alleged.

47. I consider that each defendant is only liable to contribute in respect of those periods where it is a cross defendant to a formal cross claim. That conclusion is consistent with the decision reached by Mr Kearney in his supplementary contributions assessment dated 7 September 2009 in the matter of *McCartney v State of New South Wales & Ors* (DDT proceedings No 54 of 2009). Even if I am wrong about that Amaca can only be liable to Comcare as a proportion of the contribution it made to Comcare's liability. On the present material there is no evidence that Amaca contributed to Comcare's liability.
48. Accordingly, Comcare is solely responsible for the 75% of exposure that occurred at the Department of Defence facilities.
49. Each of Seltsam and Amaca submit that they are innocent defendants. As I read Cl 49(5) the defendants may agree between themselves that a party is an innocent defendant (which has not occurred here). It is not a matter which I can unilaterally determine. Accordingly, I do not accept that submission. At least in respect of Amaca Mr Delizio did identify being exposed to Tilux during his work. That would have the effect of ruling out Amaca as an innocent defendant, at least for the purposes of Cl 53 of the Regulations.
50. Both Amaca and Seltsam submit that I am unable to determine a just and equitable apportionment of liability to be attributed to each of it and refer to (*Re McCullagh*); *Seltsam Pty Ltd v State of Queensland* [2003] NSWDDT 3 and *Berengo v Amaca Pty Ltd* [2010] VSC 496.
51. (*Re McCullagh*); *Seltsam Pty Ltd v State of Queensland* [2003] NSWDDT 3 was a case where the plaintiff suffered mesothelioma. The principal proceedings were settled for \$380,000 with contributions made by each of Amaca and Seltsam. Seltsam then cross claimed against the State of Queensland. There were several unique features to that case. As the principal proceedings were settled there had been no finding of Seltsam's relative culpability to the plaintiff's injury: *McCullagh* at

[7]. The plaintiff was not cross-examined: at [11]. There was a question as to the proportion of exposure to chrysotile vs amphibole asbestos prior to 1960 that made assessing causal potency difficult for the President: at [13]. Absent actual evidence the President was able to take judicial notice of certain matters taking into account his significant experience in the jurisdiction regarding the extent to which any exposure to asbestos was causative of mesothelioma: at [15]. His honour ultimately concluded at [16] that:

*“Before I can make an assessment of any contribution which should be made to the judgment sum by the State of Queensland I must be able to find the causative potency and culpability of exposure to the products of each of JHC and Wunderlich.”*

52. It was not the case that no party was found liable in *McCullagh*. Amaca and Seltsam made contributions to the settlement. The difficulty was finding a proportion of Seltsam’s culpability attributable to the State of Queensland.

53. I observe that the role of the trial judge in the Dust Diseases Tribunal and that of a Contributions Assessor is substantially different. My starting point is to assume that the defendants are liable. I must then apply the principals set out in the Standard Presumptions. The Court of Appeal has noted (*Bradford Insulation Industries Pty Ltd v Babcock Australia Pty Ltd* [2011] NSWCA 117; *QBE Insurance (Australia) Ltd v Wallaby Grip Ltd* [2007] NSWCA 43) that the Claims Resolution process is a “*rough and ready*” procedure. There will necessarily be a measure of estimate or informed speculation in some cases. It is different to a trial. In my view, my task is to allocate to each of Amaca and Seltsam the proportion of their culpability doing the best I can rather than accepting that the task is beyond any assessment. The CRP has inbuilt rights of appeal and costs consequences for defendants who are no content with the decision reached.

54. In my view the defendant EA Watts would be in the best position to argue that it was an innocent defendant. The highest the allegation against it goes is that he worked

in the vicinity of ladders but he did not know whether the material contained asbestos. Nevertheless, I accept the Mr Delizio's estimate that this comprised 5% of his lifetime exposure.

55. In respect of the remaining 20% there is necessarily a measure of estimation as the contribution to be made by Amaca and Seltsam. Mr Delizio does state that he worked with Tilux but does not identify any Wunderlich products by name. Doing the best I can it appears that Mr Delizio predominantly used James Hardie products. I allocate the liabilities for exposure to AC sheeting products as follows:

Amaca	13%
Seltsam	7%

56. Accordingly the final apportionments are as follows:

Comcare	75%
EA Watts	5%
Amaca	13%
Seltsam	7%

57. I appoint Comcare as the Single Claims Manager.

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David Jay

Contributions Assessor  
4 January 2012