

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

DDT No. 7050/ 2007

BETWEEN:

ANDREW DEPASQUALE
Plaintiff

AND

ALLIANZ AUSTRALIA INSURANCE LIMITED
First Defendant

AMACA PTY LTD
Second Defendant

ALLIANZ AUSTRALIA WORKERS COMPENSATION (NSW) LIMITED
Third Defendant

CGU WORKERS COMPENSATION (NSW) LIMITED
Fourth Defendant

ACE INSURANCE LIMITED
Fifth Defendant

**CONTRIBUTIONS ASSESSMENT
DETERMINATION**

1. By letter dated 11 August 2008 I was appointed the Contributions Assessor by the Registrar pursuant to provisions of the *Dust Diseases Tribunal Regulation 2007 (NSW) (the Regulations)*.
2. The plaintiff is Andrew Depasquale (**Depasquale**) and he sues Amaca Pty Ltd (**Amaca**) as supplier and each of Allianz Australia Insurance Limited, Allianz Australia Workers' Compensation (NSW) Ltd, CGU Workers

Compensation (NSW) Ltd and Ace Insurance Limited (**together the Insurers**).

3. 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* (**the Standard Presumptions**).

Background to the Involvement of the Insurers

4. Mr Depasquale's lawyers filed a Statement of Claim on 28 February 2007 which joined one defendant only – Alliance Australia Insurance Ltd (**Allianz Australia**). Paragraph 1 of the Statement of claim alleged that Allianz Australia was the insurer LifeSavers (Australasia) Ltd (**LifeSavers**).
5. It is apparent from Mr Depasquale's Statement of Particulars that his only occupational exposure to asbestos was during his employment by LifeSavers in two periods between December 1958 – November 1961 and then February 1962 to September 1993.
6. LifeSavers was deregistered on 30 December 2003 pursuant to s 509 of the *Corporations Act 2001*.
7. There are numerous Notices of Motion amongst the Tribunal papers which go to identifying and joining the proper defendant insurers. It is unnecessary to consider or address the details of those motions other than to say that that Judge Kearns delivered judgments on 31 January 2008 and 27 March 2008 which granted the plaintiff leave to file a Further Amended Statement of Claim.

8. The Further Amended Statement of Claim was filed by the plaintiff on 27 March 2008 which joined each of Allianz Workers' Compensation (NSW) Pty Ltd (**Allianz Workers'**), CGU Workers' Compensation (NSW) Ltd (**CGU**) and Ace Insurance Ltd (**ACE**) as the third, fourth and fifth defendants to the principal proceedings.
9. In the Further Amended Statement of Claim the Insurers have been sued as the insurers of LifeSavers. The Further Amended Statement of Claim does not specify the separate periods that each of the Insurers was on risk. It is apparent from the judgements of Kearns J that that remains a live issue in the proceedings.

Mr Depasquale's History of Exposure

10. Mr Depasquale alleges that he suffers asbestosis, ARPD and sequelae. He was diagnosed with the condition in March 2006.
11. Mr Depasquale worked predominantly in the starch department for approximately 30 years. There were 14 hot rooms in the starch department which had steam pipes insulated with asbestos insulation materials. He identifies pipe sections manufactured by James Hardie used in the hot rooms.
12. Mr Depasquale was required to clean the steam pipes with a brush and dust pan. He also recalls ladders undertaking lagging work in close vicinity to where he worked and during those times he inhaled asbestos.
13. There was also less intense exposure to asbestos from damaged corrugated asbestos roofing as well as when steam pipes were being repaired. He recollects some exposure to asbestos from asbestos rope but was unable to identify the rope manufacturer.

14. Mr Depasquale's recollection of his exposure to asbestos was that it was high when working near the ladders and believed he experienced fairly intense exposure when cleaning pipes and hot rooms.

15. Mr Depasquale states in his Statement of Particulars that his last exposure to asbestos was around "late 1984".

Amaca's Reply

16. Amaca submitted that the defendants fall into the following categories:

- Amaca – Category 1.
- Allianz Australia – Category 2.
- Allianz Workers – Category 2.
- CGU – Category 2.
- ACE – Category 2.

17. Amaca submits that there is no basis for a variation of the Standard Presumptions.

18. I replicate Amaca's submissions in respect of apportioning liability in the form of the following Table:

Period	Months	Period Exposure Percentage	SPA Percentage	Final Apportionment
A. Before Jan 1961	24	8%	75% manufacturer 25% employer	Amaca – 6% LifeSavers 2%
B. 1/1/61 – 31/12/89	11 + 202 =	72%	65% manufacturer 35% employer	Amaca – 47% LifeSavers 25%

	213			
c. 1/1/79 – 31/12/89	60	20%	60% manufacturer 40% employer	Amaca – 12% LifeSavers 8%
TOTAL	297	100%	Amaca 65% LifeSavers 35%	

The Insurers Submissions on Contribution

19. Allianz Australia and Allianz Workers' joined in the submissions made by the fourth defendant (**CGU**) in respect of the apportionment of liability.

20. CGU referred to the clause 5(2) of the Standard Presumptions and submitted as follows:

“The first (sic), fourth and fifth defendants are insurance (sic) companies. They are in the business of insurance and were not involved in business as described by either clause 5(2)(a) or (b).

The fourth defendant submits that the only defendant appropriately categorised for the purpose of assessing contribution is accordingly the second defendant.

The position by the fourth defendant, being that, in effect, the insurer is not a defendant upon who contribution can be assessed by a contributions assessor, is not novel. A decision to that effect was made by Contributions Assessor Buckley in the matter of Labrum (No 94 of 2005)

In summary the fourth defendant submits that the only defendant liable to make a contribution in these proceedings is the second defendant, Amaca, and 100% should be apportioned to it”.

21. ACE made a similar submission to the other insurer defendants. It referred to the decision of Contributions Assessor Buckley in *Labrun* (sic *Labrum*) and submitted that Amaca is the only defendant liable to make a contribution and should be apportioned 100% of that liability.

22. I reject the submission that I should follow the reasoning in *Labrum* and that Amaca should be solely responsible for the plaintiff's loss. I do so for the following reasons:

- (a) Clause 4(4) of the Standard Presumptions requires that, when determining apportionment, I must assume that all defendants are liable. Applying that principle I determine that the insurers are each liable.
- (b) Category 2 "includes all other defendants": Standard Presumptions Cl 5(2). The insurers are "other defendants".
- (c) The defendants have not agreed as between themselves that any of the defendants are not liable pursuant to Clause 5(2) of the Standard Presumptions. I note in quoting clause 5(2) of the Standard Presumptions in the fourth defendant's Reply the only words from the lengthy clause omitted were "*(except for any defendant that is to be excluded from the apportionment, as agreed by the defendants)*".
- (d) LifeSavers was Mr Depasquale's employer. It plainly falls into Category 2 and as the insurer of LifeSavers the Insurers are on risk in respect of their liabilities to Mr Depasquale. It is a small intellectual leap to take that as LifeSavers' insurer each of the Insurer defendants are responsible for that liability.
- (e) I was not referred to decisions contrary to Contributions Assessor Buckley's decision in *Labrum* including his decision in *Willard* (6008 of 2006) made approximately 3 months later in which he held that the liability of the insurer (in that case QBE) should reflect that of the deregistered employer. With respect I think the reasoning in *Willard* is plainly correct. It is in conformity with the decision of Contributions Assessor Sharpe in *Gibson* (6290 of 2006) and the multitude of decisions in which Comcare and WorkCover Queensland have been apportioned liability.
- (f) In circumstances where Clause 2(2) of the Standard Presumptions require that I make an apportionment that is "just and equitable" it

would be plainly unjust and inequitable to apportion 100% of the liability to Amaca.

23. Accordingly I find that the Insurers fall into Category 2.

The Standard Presumptions

24. Having regard to the Standard presumptions the following factual considerations are noted by me:

- (a) Mr Depasquale suffers from asbestosis, ARPD and sequelae.
- (b) His condition is divisible.
- (c) His exposure to asbestos occurred over more than 20 years.
- (d) The lag time between his exposure and diagnosis is sufficient for the defendants to be causative of the injury.
- (e) Exposure occurred in periods A, B and C of the Standard Presumptions while employed by LifeSavers.
- (f) Neither LifeSavers nor Amaca took any steps to minimise the risks of Mr Depasquale's exposure to asbestos.

25. I am satisfied that there is no need to vary the Standard Presumptions.

26. The Insurers' only submission in respect of apportionment was that they could not be liable. I have rejected that submissions for the reasons set out above. They did not make any alternative submission in respect of apportionment and so the only submission I have to consider is Amaca's. I accept those submissions subject to the following minor amendments which reflect the plaintiff's stated history of exposure in the table in CI 3.1 of his Statement of Particulars

Period	Months	Period Exposure Percentage	SPA Percentage	Final Apportionment
A. 12/58 – 01/61	12	4%	75% manufacturer 25% employer	Amaca – 3% Employer 1%
B. 01/61 – 11/61 AND 02/62-12/78	11 + 201 = 213	72%	65% manufacturer 35% employer	Amaca – 47% Employer 25%
c. 1/79 – 12/84	71	24%	60% manufacturer 40% employer	Amaca – 14% Employer 10%
TOTAL	296	100%	Amaca 64% Employer 36%	

27. The Insurers are together liable to contribute 36% of the plaintiff's loss.

28. It is apparent from the decisions of Kearns J that the issue of liability of the Insurers remains a live issue. There was no sufficient evidence to accurately apportion the liability of the Insurers. Doing the best I can I make the following apportionments:

Allianz Australia	80%
Allianz Workers	10%
CGU	5%
ACE	5%

29. Therefore the final apportionments are as follows:

Amaca	64%
Allianz Australia	28.8%
Allianz Workers	3.6%
CGU	1.8%
ACE	1.8%

30. I have been asked to appoint a Single Claims Manager. I appoint Amaca as it is the Primary Defendant according to the definition in Cl 61 of the Regulations.

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David Jay

Contributions Assessor

20 August 2008