

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

DDT No. 280/09

GORDON HENRY FLEMING

Plaintiff

AMACA PTY LIMITED

First Defendant

SELTSAM PTY LIMITED

Second Defendant

**CONTRIBUTIONS ASSESSMENT
DETERMINATION**

The Registrar referred this matter to me pursuant to the *Dust Diseases Tribunal Regulation 2007* (“*the Regulations*”) for a determination of apportionment. My determination is to be made on the papers, on the assumption that each Defendant is liable, and by applying the *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007* (“*the Standard Presumptions*”).

Besides the above named parties Seltsam has issued a cross claim against NSW Land & Housing Corporation. For convenience, I will refer to the parties as:

First Defendant – “*Amaca*”
Second Defendant – “*Seltsam*”
Cross Defendant – “*NSW*”

Basis for Determination

- A.** Regulation 49(4) prescribes that my determination is to be made on several bases and assumptions as follows:-
- i. The assumption that each Defendant is liable;
 - ii. On the Plaintiff’s Statement of Particulars (PSP) ; and
 - iii. On the Defendants’ Replies;
 - iv. On the Standard Presumptions as to apportionment.

The relevant “Standard Presumptions” are set out within the Dust Diseases Tribunal (Standard Presumptions Apportionment) Order 2007 - Schedule 1.

B. Mr. Fleming suffers with mesothelioma which is an indivisible disease. Clause 5(7) of the Standard Presumptions directs the methodology which I should adopt in determining apportionments when considering multiple contributions to a claim involving an indivisible disease. More specifically, this directs that:-

(7) Where the disease the subject of the claim is an indivisible disease (i.e. mesothelioma or lung cancer), the apportionment above will apply to the whole of the claim unless the Contributions Assessor is satisfied that by reference to the existence of separate periods of exposure, a differential determination of the contribution of each such exposure period ought to be made. If so, a determination will then be made of what proportion to the whole each separate period of exposure bears having regard to the number of such periods, the length of each such period, and the duration of and intensity of exposure to asbestos within each period. The standard presumptions will then be applied to each separate period. Where periods of exposure span the index periods specified in the Table to subclause (1), the Contributions Assessor is to adjust the standard presumptions to reflect the changing apportionments in different index periods, unless one of the periods is immaterial.

Accordingly:

- (i)** I determine on the basis of the papers the existence of separate periods of exposure that do direct a differential determination of the contribution of each exposure period; and
- (ii)** I determine that I should calculate the proportions of the whole each separate period of exposure bears having regard to the number of periods, the length of such period and the duration of and intensity of exposure to asbestos within each period that are described by the Plaintiff in the material available to me for consideration; and
- (iii)** I will then apply Clause 5(1) to each period.

Relevant Facts:**From the Plaintiff's Statement of Particulars (PSP):**

The Plaintiff earned his living as a fibrous plasterer having commenced his apprenticeship as a 15 year old in 1951 and worked variously for a number of employers, in a partnership and finally for himself until 2008 in circumstances where commonly and, as he describes it in his Form 1, in largely similar circumstances throughout, he was exposed to asbestos dust and fibre.

From 1951 to 1958 whilst employed by Building Linings in NSW he was involved in the manufacture of fibrous plaster. Without giving any detail as to time or duration he describes Housing Commission work where although he was shut up working inside, carpenters working outside were cutting asbestos cement fibro (hereafter "fibro") with hand saws and fixing them to eaves. He did not do any sweeping. He recalls fibro ceilings and bathrooms without describing his presence during their construction.

For 4 years until 1962 he describes his work for Purss Brothers of NSW where again unspecified Housing Commission work was done in circumstances of the same description as the Building Lining work. There was a significant difference however in that the Plaintiff recalls working with Versilux a type of fibro which he cut with fibro cutters and installed in bathrooms. He describes dust gathering along the cuts that he "blew away" and "wiped the remainder with my hand".

For 12 months he did the same work for RC Barbee in Wollongong working with versilux and "near carpenters cutting fibro and installing eaves" with asbestos exposure the same as the Purss period.

For the next 18 months working for Wollongong Plaster Interiors he describes the same type of exposure as "previously described when working for Purss. (Purss type exposure)

He returned to RC Barbee and for an unspecified period in 1965 had further Purss type exposure.

For the next 2 years he worked for Dave Leighton and had further Purss type exposure.

The Plaintiff then went into partnership for 6 years and formed a company called Wollongong Wallboards Pt Limited installing gyprock Versilux and Villaboard. The latter 2 products were cut with fibro cutters and installed in bathrooms toilets and laundries. The description of his dust exposure is the same as the Purss type exposure. He again describes carpenters working outside and cutting fibro with handsaws and fixing them to eaves. The Plaintiff recalls purchasing the Versilux and Villaboard from the CSR depots around Wollongong.

From 1973 the Plaintiff started working for himself and his description of asbestos exposure is the same as for the prior 6 years in his partnership up until 2008.

The Plaintiff has sued the 2 named defendants as the manufacturers and suppliers of the fibro to which he was exposed. Seltsam has cross claimed against the NSW Land and Housing Commission as the occupier of sites on which the Plaintiff was exposed.

From the Defendants' Replies:

Amaca says that the Plaintiff worked with one of its fibro products (Versilux) and one of Seltsam's (Villaboard) until 1978 whereafter it is the only liable defendant.

Seltsam attaches a copy of an affidavit sworn by the Plaintiff on 21 December 2009 to its Reply. It is not apparent to me whether Amaca, whose Reply is dated 23 December 2009 has had the opportunity to address the affidavit. In his affidavit the Plaintiff goes further in the detail of asbestos products that he recalls than he does in the PSP. Seltsam points to the Plaintiff's description of other fibro products including "flat sheets", "Tilux", "Super Six Corrugated Sheets" and "Hardie compressed thick sheets" variously throughout the exposure period. I note also descriptions of the use of "an angle grinder with a masonry disc or a power saw" by the Plaintiff in para 13 of his affidavit in his Purss employment and in paras 14 to 18 he says his further exposure was of the same kind. In para 19 he describes using a power saw to cut holes in Villaboard and says he "inhaled a lot of dust from Villaboard (and Versilux) in this period of my work" (i.e. the 6 years of his partnership from 1968-1973). He swears that he purchased most of his asbestos products from CSR depots directly. The Plaintiff also asserts at para 24 extensive use of CSR cornice cement which he declares "contained asbestos for periods of time" without providing further evidence about that. CSR is not sued and nothing is put to me about the manufacturer of the cornice cement.

I am inclined to the view that the normal staging of work in the construction of houses would mean that consistent with the way I read the PSP the plasterer's work was done indoors and carpenter's work outside so that the main culpable fibro exposure which the Plaintiff suffered was directly in the course of his own work. Accordingly I find that the duration and intensity of exposure was largely consistent throughout the 33 years of work where I find exposure to asbestos products occurred. It is not apparent to me why the Plaintiff failed to refer to the use of grinders or power saws after 1962 in the PSP but doing the best I can noting there is urgency in the Plaintiff's situation and having regard to Amaca's Reply not addressing the affidavit I give greater weight to the facts as set out in the PSP.

NSW makes no relevant factual observations on these matters.

Category of Each Defendant:

I determine that Amaca and Seltsam are Category 1 Defendants and NSW is a Category 2 Defendant,

Time Periods:

Amaca submits at 8.9 of its Reply that there are 4 exposure periods to consider relevant to apportionment:

- 1951 to 1960;
- During 1961;
- 1962 to 1977;
- 1978 to 1982.

Seltsam however takes a more deliberate approach breaking the periods down to:

- 1951 to 1958;
- 1958 to 1962;
- 1962 to 1963;
- 1963 to 1966;
- 1966 to 1968;
- 1968 to 1973;
- 1973 to 1984.

On the evidence before me though not greatly specific I conclude that NSW has a normal Category 2 share of the liability by virtue of housing commission work between 1951 and 1962. The Plaintiff's evidence of Housing Commission jobs after 1958 is "some housing commission work at Berkeley" in both the PSP and his affidavit. For the purposes of my assessment I determine that the confined description of that work means it likely did not continue throughout the 4 years from 1958 to 1961 before his 1962 employment with RC Barbee and I will therefore apply the Category 1 & 2 percentages for the pre 1 Jan. 1961 period. (Period 1)

I determine that although there are further asbestos containing Amaca products identified by the Plaintiff in his affidavit that in preferring the PSP the significant difference for apportionment purposes otherwise as between Amaca and Seltsam's contribution is that the Plaintiff only used Seltsam's Villaboard after 1967 and until it stopped manufacturing Villaboard in 1977. Amaca and Seltsam should share liability throughout this period. I find that relevant asbestos exposure continued until 1984 so that I should make a differential determination for the purposes of Clause 5(7) above based on 3 further periods viz.:

- 1962 to 1966 (Period 2) Amaca product only;
- 1967 to 1977 (Period 3) Amaca and Seltsam products;
- 1978 to 1984 (Period 4) Amaca product only.

Variation of the Standard Presumptions:

I make my apportionment with the above time weighted differentiation to have regard for 5(7) but do not otherwise vary the Category 1 and 2 percentages prescribed in the Standard Presumptions

Apportionment:

Period 1

Amaca (10/33 years) x 75% = **22.73%**
NSW (10/33) x 25% = **7.58%**

Period 2

Amaca (5/33) x 100% = **15.15%**

Period 3

Amaca (11/33) x 50% = **16.665%**
Seltsam (11/33) x 50% = **16.665%**

Period 4

Amaca (7/33) x 100% = **21.21%**

Accordingly my Contributions apportionment is:

Amaca (22.73 + 15.15 + 16.665 + 21.21) = **75.755 %**
Seltsam = **16.665%**
NSW = **7.58%**

Although the Registrar has not requested it in his letter of 12 January 2010 I note that this matter is proceeding to Mediation on 14 January 2010 and accordingly I nominate Amaca randomly as the single claims manager pursuant to regulation 61(4) of the DDT Regulation 2007.

Dated at Sydney this 13th day of January 2010


Bernard McHardy