

**DUST DISEASES TRIBUNAL
OF NEW SOUTH WALES**

DDT NO. 156 of 2010

**Ronald Arthur Gallagher
Plaintiff**

**State of New South Wales
Defendant & Cross-Claimant**

**Amaca Pty Limited
First Cross-Defendant**

**Wallaby Grip Limited
Second Cross-Defendant**

CONTRIBUTIONS ASSESSMENT

Preamble

The Registrar of the Dust Diseases Tribunal has appointed me as Contributions Assessor pursuant to Clause 49(1) of the *Dust Diseases Tribunal Regulation 2007* ("the Regulation") and I have been asked to appoint a Single Claims Manager.

The plaintiff, Ronald Arthur Gallagher, sues his former employer, the State of New South Wales ("NSW"), seeking damages for personal injuries alleged to have been sustained as a result of exposure to asbestos as more fully discussed later.

NSW has cross-claimed against the first cross-defendant, Amaca Pty Limited ("Amaca") and the second cross-defendant, Wallaby Grip Limited ("WGL"). The Cross-Claims are more fully discussed later.

The plaintiff alleges that as a result of his exposure to asbestos he contracted injuries alleged as, inter alia, mesothelioma which is one of the medical conditions alleged in the Plaintiff's Statement of Particulars ("the Particulars").

Mesothelioma is an "indivisible disease" within the meaning of clause 5(7) of the *Dust Diseases Tribunal (Standard Presumptions - Apportionment) Order 2007* (hereinafter called "the Order").

The Task of the Contributions Assessor

The task of a Contributions Assessor is set out in clause 49(4) of the Regulation which is in the following terms:-

"(4) The Contributions Assessor to whom a matter is referred is to determine the contribution that each defendant is liable to make and is to make that determination on the assumption that the defendants are liable and solely on the basis of:

(a) the plaintiff's statement of particulars and the defendants' replies on the claim, and

(b) standard presumptions as to apportionment determined by the Minister for the purposes of this clause by order published in the Gazette."

Clause 49(4) of the Regulation is included in Part 4 of Division 5 of the Regulation as is clause 47(1) which provides that "A reference in this Division to a defendant includes a reference to a cross-defendant". Accordingly the contents of the Replies of cross-defendants are taken into account in the same way as are Replies by defendants. It follows that the assumption that defendants are liable extends to an assumption that cross-defendants are liable.

The standard presumptions become relevant in circumstances where there are different categories of defendants (as to which see clause 5(2) of the Order) in the proceedings. This aspect will be mentioned later.

The Plaintiff's cause of action

The Statement of Claim alleges, inter alia:-

"2 Between 1947 and 1986, the Defendant employed the Plaintiff as an apprentice fitter and turner at first and thereafter as a tradesman fitter and turner.

3 During the course of his employment with the Defendant, the Plaintiff worked at premises owned and/or occupied by the Defendant, namely the railway workshops at Bathurst and Grafton.

4 The Plaintiff was exposed to and inhaled asbestos dust and fibre at the said premises from about 1947 to about 1961.

5 In the course of his employment with the Defendant at the said premises, the Plaintiff performed repairs and maintenance and worked on the overhaul

of steam locomotives together with other workers employed by the Defendant."

These clauses make clear that the exposure to asbestos upon which the plaintiff relies is exposure which occurred during the course of his employment in railway workshops at Bathurst and Grafton.

Accordingly, this Determination proceeds on the basis that the exposure to asbestos in respect of which the plaintiff's action is brought, and in respect of which the cross claims are made, is the exposure to asbestos during his work at the railway workshops.

Other exposure to asbestos

In the Particulars the plaintiff mentions other employment by NSW. He mentions that he was a fitter and turner working as a "public servant under the supervision of the Department of Main Roads at Grafton between about 1961 and 1965." He also mentions employment as a fitter and turner working as a "public servant under the supervision of the Forestry Commission in the Bathurst area between 1966 and 1990."

In respect of each of these last mentioned employments, he says that he may have had some exposure when changing brake linings.

The Particulars record that whilst he was working under the supervision of the Department of Main Roads he changed the brake linings on vehicles from time to time while servicing those vehicles. In the course of that work his exposure to asbestos was "Not often" and the level or intensity of exposure, as he perceived it, was "Very low". The Particulars record that the plaintiff's estimate of the percentage of his overall exposure to asbestos during this period of employment was "Less than 5%".

During the period when he was a public servant under the supervision of the Forestry Commission the Particulars record that he may have been exposed to asbestos on the odd occasion when he handled and changed brake linings. He says that his exposure to asbestos with the Forestry Commission was "Not often" and that for the first 15 years of this employment he serviced tractors in the field and that this mainly involved repairing them when they broke down. Such exposure as there was to asbestos was "Low". The plaintiff also estimates that this period of exposure constituted "Less than 5%" of his

total exposure to asbestos.

The Particulars also mention "non-work related exposure" to asbestos from about 1950s to about 1980s at his home when he was engaged in the service and maintenance of his car including the changing of brake linings from time to time.

The Particulars also record that it is the plaintiff's estimate that his exposure to asbestos at the railway workshops constituted "Not less than 95%" of his total exposure to asbestos.

In all of the these circumstances, I determine that such exposure to asbestos as the plaintiff might have experienced outside his employment at the railway workshops was not such as to constitute exposure which was material to his having contracted mesothelioma.

Exposure to asbestos at the railway workshops

The Reply filed by NSW admits that the plaintiff commenced as an apprentice on the 5 January 1948. He resigned on the 4 July 1959.

In paragraph 3.1 of the Particulars he describes the exposure during this period as "Heavy exposure".

However, later in the Particulars (paragraph 4.6) he says that in the Bathurst workshop his exposure to asbestos varied from very high exposure to medium exposure depending on what activity was going in the workshop on any given day. He went on to say that in the Grafton workshop the exposure was very low as it was a much smaller workshop and did not have any boilermakers.

Does this mean that the intensity of exposure varied according to whether the boilermakers were working in the vicinity?

The Plaintiff (paragraph 4.1 of the Particulars) says he was exposed to asbestos "By handling and maintaining metal components that used asbestos insulation and working in the vicinity of boilermakers and other labourers handling asbestos insulation.

He answers the question (paragraph 4.14 of the Particulars) "What specific activities or duties were you engaged in at the

time you were exposed to asbestos?" by saying:-

"Stripping and maintaining metal components such as valves, elements and pipes on steam locomotives that were covered with asbestos insulation. Using new asbestos cord as insulation on metal components. Climbing over, in and out of steam locomotives while they were stripped down."

The question (paragraph 4.16 of the Particulars) "If your exposure occurred whilst you were working in the vicinity of others who were using asbestos, what activities were the others who were working with asbestos engaged in?" was answered:-

"Boilermakers pulling apart and maintaining the fire boxes, boilers, steam pipes on locomotives."

What am I to make of all of this? Does it mean that the plaintiff's exposure to asbestos was very low at any time when he was not working in the presence of boilermakers? It seems to me that the answer to that question may be capable of being in the affirmative. However, the prospect of the answer being in the affirmative is not so real or great as to persuade me that I ought be satisfied that the plaintiff's exposure to asbestos was very low when he was not working in the presence of boilermakers. In other words I am not satisfied that the high to medium exposure came about only when he was working in the vicinity of boilermakers.

This last mentioned matter is important in light of the WGL submission as to the importance of Hardies 85% Magnesia blocks. WGL's Reply submits, in effect, that it was exposure to these that should attract a significant increase in the liability of Amaca.

The Reply filed by NSW

As previously stated, NSW admits that it employed the plaintiff. It also admits that it ought to have known that exposure to asbestos gave rise to a risk of personal injury at the time of the alleged exposure. NSW further admits that it occupied the railway workshops at Bathurst and Grafton.

At the time of filing its Reply NSW did not have any evidence to contradict the Plaintiff's allegations against it.

NSW submits in its Reply that it is a Category 2 defendant on the basis that it was the employer of the Plaintiff. It further submits that it ought not be determined to be a Category 1 defendant. More will be said of this later.

The Cross Claim

In paragraph 4 NSW says "that if the plaintiff was exposed to asbestos in the course of his employment with it, the asbestos exposure arose from products containing asbestos ... which were manufactured and/or supplied to the cross claimant by the cross defendants".

The negligence particularised against the cross defendants includes (paragraph 4.5) "Manufacturing and supplying (*asbestos*) utilised in insulation knowing (*it was*) likely to be cut and handled by workers (such as the plaintiff) and that workers would work in close proximity thereto and thus exposing workers to ingestion and inhalation of asbestos". The italics are mine.

I infer from the contents of the Particulars and from the terms of the Reply and Cross-Claim that NSW used insulation materials which included insulation materials for which the Cross-Defendants are alleged to be liable. Of their very nature insulation materials require installation before those materials can effect the insulation for which they were required.

Replies to Cross-Claims

A Contributions Assessor is required to assume that the Cross-Defendants are liable.

Each Cross-defendant admits that it is a category 1 defendant.

The WGL Reply submits that, as between Cross-Defendants, a greater percentage of liability ought be apportioned to Amaca. However, clause 5(4) of the Order requires that, in the event that there is more than one defendant in either Category of defendant, "then the Contributions Assessor is to treat each defendant as equal in contribution to the percentage share of that Category unless satisfied that a variable contribution ought apply".

The WGL Reply does not satisfy me that a variable contribution ought apply.

Is NSW a Category 1 Defendant?

The Cross-Defendants submit that NSW is a Category 1 Defendant whereas NSW submits that it is not.

Between 1947 and 1959, NSW operated the network of passenger and freight rail services in the state. It was a very extensive network with a great number of steam locomotives and passenger carriages. The plaintiff and others were permanently employed carrying out the work particularised by the plaintiff. This work included installation of asbestos insulation by the plaintiff and others.

Notwithstanding the submissions to the contrary in the NSW Reply I am of the opinion that NSW is an "Installer" within the meaning of clause 5(2)(a) of the Order and as such it is a Category 1 defendant.

As previously mentioned, a Contributions Assessor is required to assume that cross-defendants are liable. Part of the contents of the Replies of the cross-defendants amount to the cross-defendants, in effect, making cross-claims against the cross-claimant in that they seek contribution from the cross-claimant in its capacity as an installer. That part of the NSW Reply dealing with its argument as to why it ought not be determined to be a Category 1 defendant is designed to limit its liability to the plaintiff and its liability as between itself and the cross-defendants. It seems to me that where there is an allegation (whether the allegation is made by a plaintiff or cross-defendant seeking contribution) that a defendant is liable a Contributions Assessor is required to assume that liability exists.

In any event, I determine NSW to be a Category 1 defendant in its capacity as an installer.

Categories of defendants

There are, therefore 3 Category 1 defendants being NSW, Amaca and WGL and 1 Category 2 defendant.

Pursuant to the provisions of clause 5(3) of the Order I am required to calculate a separate share for the role of NSW in each Category.

Index Periods

The plaintiff's action is in respect of a period between 5 January 1948 and 5 July 1959 all of which comes within Index Period A.

Standard Presumptions

During Index Period A the Standard Presumptions provide that liability is to be apportioned between the Categories of defendants in the ratio of 75:25 unless the Contributions Assessor is satisfied (as specified in clause 5(5) of the Order) that the Standard Presumptions ought be varied.

I am not satisfied that as between NSW and the cross-defendants that the Standard Presumptions ought be varied.

Apportionment

On the basis that there are 3 Category 1 defendants and 1 Category 2 defendant and so as to maintain the ratio of 75:25 between the defendants in Category 1 and Category 2 I apportion liability of 30% to each of the Category 1 defendants and liability of 10% to the Category 2 defendant.

Conclusion

I determine NSW to be (30 + 10) 40% liable with each of Amaca and WGL being 30% liable.

I appoint NSW as Single Claims Manager.

Dated 24th August 2010

Peter O'Connor
Contributions Assessor