

**JOHN JABLONSKIS v ROLLS-ROYCE AUSTRALIA LIMITED, STATE OF NEW
SOUTH WALES & 000 111 955 PTY LIMITED**

**ROLLS ROYCE AUSTRALIA LIMITED v AMACA PTY LIMITED AND DELTA
ELECTRICITY (Second Cross Claim)**

**000 111 955 PTY LIMITED (Under External Administration) v WALLABY GRIP
LIMITED, WALLABY GRIP (BAE) PTY LIMITED, DELTA ELECTRICITY AND
ERARING ENERGY (First Cross Claim)**

**DETERMINATION OF APPORTIONMENT
[Amended pursuant to Clause 49 (10) of Dust Diseases Tribunal Regulations
2007]**

1. The Registrar of the Dust Diseases Tribunal referred this matter to me to determine the contribution that each Defendant and Cross-Defendant is liable to make pursuant to clause 49 of the Dust Diseases Tribunal Regulations 2007 (hereinafter referred to as "the Regulations").
2. In the present matter, there is no Statement of Particulars (Form 2) provided by the Plaintiff.
3. However, I am provided with the Plaintiff's Statement of Claim and an affidavit of the Plaintiff sworn on 11 December 2008 together with a transcript of his evidence, which was taken on 11 December 2008.
4. For the purposes of this determination, I am asked to assume that the Plaintiff's exposure to asbestos is as set forth in his affidavit and in the transcript of his evidence.

5. Having made the assumption that the circumstances of the Plaintiff's exposure to asbestos are as set forth in his affidavit and in the transcript of his evidence, my determination has been made solely on those matters and the standard presumptions which are incorporated in the Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007 (hereinafter referred to as "the Standard Presumptions Order").
6. The standard presumptions in the Standard Presumptions Order requires that liability be apportioned upon the basis that the standard presumptions apply with such variations as are appropriate to the case, but within a permitted range.

The Plaintiff's Statement of Claim

7. The Plaintiff alleges that:
 - (a) Between 1955 and 1959 he was employed by Rolls-Royce Australia Ltd (hereinafter referred to as "Rolls Royce") as a boilermaker at the Wallerawang Power Station. During the course of this employment the Plaintiff was exposed to and inhaled asbestos dust and fibre from asbestos insulation materials.
 - (b) From about 1959 to 1963 the Plaintiff was employed by the State of New South Wales at the Newcastle State Dockyards (hereinafter referred to as "Newcastle State Dockyards") and during the course of this employment the Plaintiff was exposed to and inhaled asbestos dust and fibre.
 - (c) From about 1963 to 1970 the Plaintiff was employed by 000 111 955 Pty Ltd ("hereinafter referred to as "Melesco") as a boilermaker and during the course of this employment he was exposed to and inhaled asbestos dust and fibre.

The Plaintiff's affidavit

8. The Plaintiff alleges that:

- (a) From 1955 to 1959 the Plaintiff was employed by Rolls Royce (then known as John Thompson Australia Ltd) as a boilermaker working at the Wallerawang Power Station on the construction of boilers 1-6, predominantly welding of special steel boiler tubes. The work was mainly on-site and the Plaintiff pre-heated the boiler tubes, welding the lengths together and then wrapping the tubes in asbestos sheeting to "normalise" the tubes and keep them warm. As the tubes were welded together they were preheated and wrapped in asbestos cloth to allow them to cool slowly. There were thousands of these tubes in each boiler. After a time, the heat of the pipe caused the asbestos sheeting to become brittle and fray which caused dust and fibres to go everywhere. The sheeting was white asbestos woven cloth which was about ¼ inch thick and it came in a roll which the Plaintiff cut to a length and used it until it began to fall apart with use and heat. On occasions, the Plaintiff used asbestos rope on the smaller pipes and the asbestos rope came in a spool. The Plaintiff cut pieces off to replace old frayed rope. The rope also gave off dust and fibre.

- (b) As well as working at the workshop, the Plaintiff worked on the half finished boilers one by one welding tubing together using asbestos cloth and asbestos rope. The boiler tubing came in assorted lengths and was welded to form 120 foot lengths. Number 1 boiler was finished and tested while number 2 boiler was being tubed. After the pressure testing the ladders started their work. The main steam line was installed after each boiler was completed, so they used asbestos block and slurry on completed boilers. The main steam line was already in place and there were ladders working putting on asbestos blocks, pipe sections and slurry alongside, above and below the Plaintiff. The Plaintiff worked on the economiser, the super heater and the main body of the boiler and around lag pipes and the turbine hole.

On pipes up to 3 inches in diameter the Plaintiff used gas welding and above that he used electric welding. While the Plaintiff did his work, the ladders did the outside of the boiler and then the Plaintiff moved onto the next boiler in line and the ladders worked on all the other piping structures. The Plaintiff identifies asbestos lag pipes being the ones on which he worked and also identifies Hardies 85% magnesia showing the asbestos pipe sections and blocks that he saw. The Plaintiff alleges that he breathed dust on a daily basis.

- (c) While working for Rolls Royce, the Plaintiff estimated that 35% of his total exposure occurred from 1955 to 1959.
- (d) The Plaintiff worked at the State Dockyard between 1959 and 1963 where he worked as a welding inspector in the engine room inspecting the welds on the new ship and some other ships that had been brought in for repairs. Before the repairs were done, the pipes were stripped of the asbestos lagging by iron workers and was taken away to be disposed, however, on some occasions, the lagging was left lying around in the vicinity in which the Plaintiff worked. The Plaintiff observed men sweeping up the broken bits of asbestos pipe sections or plaster type insulation and recalled asbestos lagging on pipes and on condensers of old ships.
- (e) The Plaintiff estimates his exposure to asbestos during this period of employment at 5%.
- (f) From 1963 to about 1970 the Plaintiff was employed as Melesco's factory at Yennora where he performed work as a specialist welder working mainly on the boiler tubes which were wrapped in asbestos sheeting, super heating tubes and making branches for the main steam line. The size of the tubes determined the manner in which they were welded. For tubes measuring below 3 inches gas welding were used, and for those measuring above 3 inches electric welding was used.

- (g) Approximately 90% of the work was at Melesco's factory at Yennora, however, the Plaintiff did travel to various places including Gladstone, Torrens, Lake Munmorah Power Station and Wangi Wangi Power Station to "trouble shoot" which involved replacing super heater tubes that had blown out. The Plaintiff observed the whitish asbestos blocks on the outside of boilers, debris from these blocks on the pants that he worked on and ladders doing repairs as he was inside the boiler working on tubes.
- (h) On the outside of the boiler, there were large plastic-like asbestos blocks and to enter the boiler these blocks had to be removed and when removed they would crumble and fall apart. The fragments of the blocks would be trampled on and created more dust in the vicinity in which he was working. At Yennora, 15 or 20 men were doing the same work using asbestos cloth as the Plaintiff was doing and the Plaintiff got their dust.
- (i) The Plaintiff estimates that 60% of his asbestos exposure occurred at Melesco.
- (j) The Plaintiff alleges that he has asbestosis, which was diagnosed in 2007.

Transcript of evidence

9. The Plaintiff asserted that:
- (a) While working at Wallerawang he was employed as a boilermaker and Rolls Royce did not employ the ladders doing work at Wallerawang. The Plaintiff did no lagging work himself at Wallerawang.
 - (b) When he wrapped the welds in the asbestos cloth, it normally took about 2 hours and the cloth in question would be used repeatedly. The

Plaintiff did about 4 welds per shift and to do this needed to take the blanket on or off 4 or 5 times.

- (c) The Plaintiff asserts that the greatest exposure that he had to asbestos was to the cloth.
- (d) In respect of the woven blankets, the Plaintiff did not identify where they came from, but knew that they came simply from the storeroom where they came on a large roll, which was approximately 6 feet wide.
- (e) The Plaintiff used asbestos rope very rarely.
- (f) The ladders used handsaws to cut the pipe sections.
- (g) The Plaintiff worked in station A at Wallerawang Power Station and worked at boiler B, 6 boilers A, B, C at Wallerawang. The Plaintiff worked on boilers 1 to 5 and the beginning of the sixth, but did not finish the sixth.
- (h) The Plaintiff worked at Wallerawang with the asbestos cloth on a daily basis.
- (i) The Plaintiff did not recall attending Wangi Wangi.
- (j) The Plaintiff attended Lake Munmorah Power Station. The Plaintiff attended Lake Munmorah "weekly, 3 times".
- (k) There was no lagging work done at the Melesco factory.
- (l) At Melesco the Plaintiff's exposure was greater to the cloth than it was to the lagging.
- (m) The Plaintiff did not see the cloth, just the bits of cloth laid out.

- (n) While working at Melesco the Plaintiff spent 90% of his time at the factory and 10% of his time visiting sites.
- (o) The Plaintiff may have left Melesco in 1969 and not 1970.

Rolls Royce Cross-Claim

10. Rolls Royce alleges:

- (a) That Amaca Pty Ltd (hereinafter referred to as "Amaca") manufactured, supplied and distributed to consumers including Rolls Royce and Delta Electricity (hereinafter referred to as "Delta") asbestos containing products including asbestos insulation materials.
- (b) Delta was the owner and occupier of Wallerawang Power Station and had the care, control and management of work carried out at those premises and was the employer/head contractor of subcontractors carrying on work with asbestos.
- (c) The materials manufactured or supplied by Amaca were installed in the Wallerawang Power Station by Delta, its employees and subcontractors from about 1955 to 1959.

Melesco Cross-Claim

11. Melesco alleges:

- (a) That Wallaby Grip Ltd (hereinafter referred to as "Wallaby Grip") and Wallaby Grip (BAE) Pty Ltd (hereinafter referred to as "BAE") were manufactures and suppliers of asbestos and asbestos products including products to which the Plaintiff was exposed.
- (b) At all material times, Wallaby Grip and/or BAE were the suppliers of asbestos products to Melesco.

- (c) At all material times, Delta was the owner of Lake Munmorah Power Station and Eraring Energy (hereinafter referred to as "Eraring") was the owner and occupier of Wangi Wangi Power Station.

Rolls Royce Reply

12. Rolls Royce provided a Reply which asserts the following:
- a) Rolls Royce, State Dockyard, Melesco and Delta should be each classified in Category 2.
 - b) Amaca and Wallaby Grip and BAE should each be classified in Category 1.
 - c) Rolls Royce was supervised by Delta when it performed its contract at Wallerawang Power Station.
 - d) The affidavit of John Michael Moore identifies the products of Amaca being used at Wallerawang Power Station.

Melesco's Reply

13. Melesco provided a Reply which asserts the following:
- a) Melesco, Delta, Rolls Royce, State Dockyard should be classified in Category 2.
 - b) Wallaby Grip, BAE Amaca should be classified in Category 1

Wallaby Grip & BAE Reply

14. Wallaby Grip & BAE provided a Reply which asserts as follows:
- a) Wallaby Grip, BAE, Melesco, should be classified in Category 1,
 - b) Delta should be classified in Category 2
 - c) Melesco should be classified in Category 2 as well as Category 1.
 - d) That Wallaby Grip and BAE are innocent defendants, but operated separately and never at the same time (change over date being 1.10.1966)

- e) If Wallaby Grip and BAE are not innocent defendants then liability should be borne as to 35% by Rolls Royce, 5% by State of NSW, 24.5% by Melesco, 5.8 by Wallaby Grip, 7.7% by BAE, 11 by Delta, 11% by Eraring and nil% by Amaca

Delta Reply

15. Delta provided a Reply which asserts as follows:
- a) Rolls Royce, State of New South Wales, Melesco, Wallaby Grip, BAE and Amaca should be classified in Category 1
 - b) State of New South Wales and Melesco should also be classified in Category 2.
 - c) Delta should be classified in Category 2.
 - d) That liability should be borne as to 17.5% by Rolls Royce, 5% by State of NSW, 33.9996% by Melesco, 12.9996 by Wallaby Grip, 12.9996 by BAE, 4.375 by Delta and 13.125% by Amaca.

Amaca Reply

16. Amaca provided a Reply which asserts as follows:
- a) Amaca did not manufacture asbestos cloth or rope.
 - b) Amaca was not the sole supplier of asbestos products.
 - c) Wallaby Grip, BAE should be classified in Category 1.
 - d) Rolls Royce, State Dockyard, Melesco and Delta should be each classified in Category 2.

Standard Presumption Order

17. Having regard to the Standard Presumption Order, the following factual considerations are to be noted:
- (a) The Plaintiff suffers from asbestosis.

- (b) The condition from which the Plaintiff suffers is divisible.
- (c) The total length of the Plaintiff's employment with Rolls Royce is 4 years. The total length of the Plaintiff's employment with State Dockyard is 4 years. The total length of the Plaintiff's employment with Melesco is 7 years.
- (d) The total length of exposure to asbestos was 15 years.
- (e) The lag time between exposure and diagnosis is sufficient as against each of Rolls Royce, State Dockyard and Melesco.
- (f) The Plaintiff was in each case an employee of Rolls Royce, State Dockyard and Melesco.
- (g) None of the Defendants or Cross-Defendants are said to have had direct knowledge of the risk of asbestos but constructive knowledge can be imputed to all Defendants and Cross-Defendants.
- (h) None of the Defendants or the Cross-Defendants took any steps to minimise the risk of being exposed to asbestos.

Factual conclusion

- 18. As against Eraring, while the Plaintiff referred to Wangi Wangi Power Station in his Affidavit, and given the fact that the Plaintiff did not admit to having been at Wangi Wangi Power Station or recalling the name of Wangi Wangi Power Station, it is with some relief that the Cross Claim against Eraring has been discontinued.
- 19. The Plaintiff himself estimates his exposure as being in the order of 35% with Rolls Royce, 5% with State Dockyard and 60% with Melesco.

20. While it is asserted that the Plaintiff was exposed to asbestos rope or the asbestos cloth while he worked for Rolls Royce, it is impossible to identify by whom the asbestos rope or the asbestos cloth was manufactured or supplied.
21. However it is asserted that the asbestos rope or the asbestos cloth used while the Plaintiff worked for Melesco, was provided by Wallaby Grip (until September 1966) or by BAE (after 1966).
22. Insofar as the pipe sections are concerned, these were almost certainly, and in any event on the balance of probabilities, manufactured and supplied by Amaca.
23. Delta was the owner of Wallerawang Power Station and responsible for the overall work performed by various subcontractors at the Power Station.
24. Delta was the owner of Lake Munmorah Power Station and responsible for the overall work performed by various subcontractors at the Power Station.
25. Given the above factual conclusions, the question arises as to whether the standard presumptions should be varied.

Standard presumptions application

26. In each period, the Standard Presumptions Order permits me to increase or decrease the percentage attribution by no more than 20 percentage points.
27. I have determined the liability to contribute having regard to the relative culpability of the Defendants and the causal potency for their contribution.
28. In the present case, the standard presumptions should not be varied.

Determination

29. The Plaintiff's condition of asbestosis is divisible.

30. Rolls Royce falls into category 2.
31. State Dockyard falls into category 2.
32. Melesco falls into category 2.
33. Delta falls into category 2 (I have accepted the assertions made that Delta supervised the work at Wallerawang).
34. Wallaby Grip falls into category 1.
35. BAE falls into category 1.
36. Amaca falls into category 1.
37. The level and intensity of exposure was not in any way similar, and insofar as the Cross Defendants are concerned was not co-extensive with the whole of the Plaintiff's exposure while employed.
38. The relevant periods of exposure can be identified as:
 - (a) Rolls Royce 35% of total asbestos exposure.
 - (b) State Dockyards 5% of total asbestos exposure.
 - (c) Melesco 60% of total asbestos exposure.
39. The contribution is to be made in the following proportions:
 - (a) During employment with Rolls Royce,
 - 40% Rolls Royce,
 - 40% Delta,
 - 20% Amaca.

(b) During employment with State Dockyard,
5% State Dockyard.

(c) During employment with Melesco,
58% Melesco,
2% Delta.
15% Wallaby Grip
25% BAE

40. Accordingly, the Defendants are to contribute in the following proportions:

(a)	Rolls Royce	40% of 35% =	14%
(b)	State Dockyard	100% of 5% =	5%
(c)	Melesco	58% of 60% =	34.8%
(d)	Amaca	20% of 35% =	7%
(e)	Wallaby Grip	15% of 60% =	9%
(f)	BAE	25% of 60% =	15%
(g)	Delta	40% of 35%	
		+ 2% of 60% =	<u>15.2%</u>
		Total	100%



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John L. Sharpe

Costs Assessor

16 December 2008