

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

DDT NO. 7209 of 2007

DONALD MATHISON

Plaintiff

**AMACA PTY LTD (UNDER NEW SOUTH WALES ADMINISTERED WINDING
UP) (FORMERLY JAMES HARDIE & COY PTY LTD)**

First Defendant

**AGCO AUSTRALIA LTD (FORMERLY MASSEY-FERGUSON (AUSTRALIA)
LTD)**

Second Defendant

**AMABA PTY LTD (UNDER NEW SOUTH WALES ADMINISTERED WINDING
UP) (FORMERLY HARDIE FERODO PTY LTD)**

Third Defendant

CONTRIBUTIONS ASSESSMENT

DETERMINATION

On 21 April 2008 the Registrar of the Dust Diseases Tribunal of New South Wales referred this matter to me as Contributions Assessor in accordance with Regulation 49(1) of the *Dust Diseases Tribunal Regulation 2007*.

By virtue of the provisions of subsection 49(4) of the said Regulation I am to determine the contribution that the defendants are liable to make and I am to make that determination or assumption that the defendants are liable and solely on the basis of:

1. The plaintiff's Statement of Particulars including the Statement of Claim filed in the Dust Diseases Tribunal Registry on 4 July 2007 and the compendious statements filed on 19 March 2007, and the defendants' Replies including their Amended Replies to the claim.

2. I am required to have regard to the Standard Presumptions as to Apportionment determined by the Minister for the purposes of this clause by Order published in the Gazette: Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2005.
3. By clause 3 of that order I am to undertake the task upon the basis of the papers, to apply the standard presumptions with such variations as are appropriate to the particular case but within the Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2005 made under the Dust Diseases Tribunal Regulation 2001 as has been continued for the purposes of the Dust Diseases Tribunal Regulation 2007. These presumptions were previously referred to in Clause 42 of the *Dust Diseases Tribunal Regulations 2001* which now been repealed by Regulation 97. However by subsection 2 the Standard Presumptions – Apportionment Order of 2005 continues to have effect.
4. By subclause 5 I am to apply the standard apportionment in accordance with Schedule 1.
5. In this matter it is common ground between the three defendants that they are all Category 1 defendants.
6. The plaintiff has alleged in this matter that he suffers from asbestos-related pleural disease and asbestos-related pleural plaques and pleural thickening.
7. It appears to be common ground although has not been explicitly conceded by all defendants that the plaintiff's condition is a divisible one and, in accordance with Clause 5(8) of the Standard Presumptions apportionment order of 2005, it is my duty to first determine on the basis

of the papers the existence of any separate periods of exposure. I am then required to determine 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.

8. Further, I am to treat each separate period as equal in contribution to the disease unless satisfied that a variable weighting ought apply. I am then to apply to each separate period the proportions set out in the Table to subclause (1), and I am to adjust the standard presumptions to reflect the changing apportionments in different index periods, unless one of the periods is immaterial.

The facts

1. The plaintiff was born on 18 April 1940 and is thus 68 years of age.
2. The particulars of all employment and work he performed are contained at pages 14 to 18 of his particulars. I will briefly summarize those employments that were asbestos-related as follows. The periods of time that the plaintiff worked for any particular employer are not clearly set out. I set the employments out as follows.

1955/1956	Employed by Ron West, Electrician, at Warwick, Queensland performing electrical refrigeration work. He may have removed insulation material from behind fridges. Based on his statement, query whether it was asbestos. He estimates (Answer 4.7) " <i>far less than 1% of my exposure</i> ". For practical purposes, I think we can ignore this.
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1956 for
approximately
8 months

Employed by Mack Fectner as a builder's labourer working with asbestos products including Tilux to line bathrooms, asbestos cement fibro sheeting *to ling [sic] soffits*. It involved cutting and rasping James Hardie AC sheeting. He says he was exposed to asbestos regularly with Mack Fectner and his exposure to asbestos would have been *right up until the end of my employment with him* (Answer 4.26). This period comprised approximately 2 $\frac{1}{2}$ % of his exposure. All defendants agree that this assessment of intensity was medium.

1957 to 1963

He then worked in two jobs in 1957; one performing national service for three months, and then working in a Ford dealership in Warwick before commencing in 1958 for a period of 60 months for Kirkegaard Brothers as a mechanic. During this period he worked on Massey-Ferguson tractors where he had exposure to asbestos associated with the mechanical repairs primarily relating to work performed on clutches and brakes. He says the vast bulk of these brake and clutch linings were Massey-Ferguson linings *"but sometimes I would work with Hardie-Ferodo linings. It wasn't that frequently but there was some use of the Ferodo linings at this stage. There was a significant amount of dust was generated when I was repairing brakes and clutches"*. The intensity of exposure for a period of 18.75% of the time was described as high.

1964 to

After an 8 month interruption when he worked for Fitzroy Motors as a salesman he was then next exposed in 1964 working for one year for Winchcombe Carsons performing mechanical service work on tractors and other farm machinery. This work was similar to that previously performed on Kirkegaard Brothers and represented 3.75% of the period of exposure. He estimated his exposure at Kirkegaard at approximately 30% of his lifetime asbestos exposure and the work at Winchcombe's as about 10%. The vast bulk of brake linings during this period were Massey-Ferguson. He did use some Hardie-Ferodo brake linings during this period but I infer from his statement that this was very small.

Again, whilst working at Winchcombe Carson the plaintiff says he worked almost exclusively on the Massey-Ferguson tractors and other machinery.

He then had some respite from asbestos exposure working assisting his brother in other work for about 18 months before commencing self-employment at what was to become a business he owned, Texas Tractor Services. This business was conducted for about 8 years and he describes his exposure to asbestos during this period as very regular. During this period he also did not work exclusively on Massey-Ferguson tractors

but also did work on other vehicles. He did use Hardie-Ferodo brands as well as Massey-Ferguson in this period.

He also commenced working as a carpenter performing building work erecting various kinds of sheds and renovating various buildings which involved the use of a number of the first defendant's products. The plaintiff estimates that 40% of his lifetime asbestos exposure occurred during this period. About 90% of such exposure would have been related to his activities in the building industry and 10% to his work as a mechanic. The mechanical work involved exposure to brake and clutch linings using either Massey-Ferguson or Hardie-Ferodo. It is not clear what the percentage of each manufacturer's products he was exposed to in this period.

1975 to 1987 From between 1975 and 1987 the plaintiff was self-employed with his brother-in-law operating a business called Southwest Parcel Express. He did have asbestos exposure from performing maintenance on trucks, particularly servicing and repairing brake linings, primarily using Hardie-Ferodo products during this period. He did not perform "tractor work" during this period and says there was no use of the Massey-Ferguson brake and clutch linings. During this period he did have some ongoing asbestos exposure

associated with building an office for his business, building his own home and business premises and another house in Kenilworth Street, Warwick in about 1980. He attributes 90% of his exposure to asbestos during this period from carrying out carpentry, building and renovation work and 10% to his work on trucks.

In respect of his exposure to brake linings, he says that Hardie-Ferodo made the vast bulk of the brake linings. His exposure thus for this period is 10% brake linings and 90% fibro building products.

In his summary at p58 of his particulars he estimates 40% of his asbestos contact comes from the Massey-Ferguson brake and clutch linings, 10% from Hardie-Ferodo brake and clutch linings and about 50% from exposure to James Hardie building products made of fibro. He describes his contact with the odd brake lining from another manufacture as being fairly inconsequential.

3. In order to understand the defendants' respective treatment of the plaintiff's exposure I have reproduced the two tables that have been prepared: the first on behalf of the first and third defendants at 8.9 of their Reply together with their submissions I set out:

- 8.9 If there are more than two defendants in any one category, are there any particular factors relating to the blameworthiness of those defendants which would justify sharing the apportioned liability between those defendants other than on an equal basis? Set out the basis of your position.

Apportionment in this claim will be shared between Amaca as the alleged manufacturer for the asbestos cement building products used and also between Massey-Ferguson and Amaba who are the manufacturers for the alleged asbestos brake and clutch products used by the Plaintiff.

We provide the following calculation of apportionment:-

Year	Months	Defendant Liable	Plaintiff's Assessment of Lifetime Asbestos Exposure	Plaintiff's Assessment of Intensity	Total Assessment of Apportionment
1956	8	Amaca	5%	Medium	5%
1958-1963	60	Massey-Ferguson & "occasionally" Amaba	30% ^o	High	Massey - 24% Amaba - 6%
1964	12	Massey-Ferguson & "occasionally" Amaba	10% ^o	High	Massey - 8% Amaba - 2%
1966-1974	96	Massey-Ferguson & Amaba	40% [*]	High	Massey - 2% Amaba - 2%
1966-1974	96	Amaca		High	36%
1975-1987	144	Amaba	15% [#]	Medium	1.5%
1975-1987	144	Amaca		High	13.5%

^o The Plaintiff alleges he worked predominately with Massey-Ferguson parts, however his Statement of Particulars states there was some use of Amaba parts as well. Amaca has therefore adopted an apportionment of 80% Massey-Ferguson and 20% Amaba for this period.

* The Plaintiff states at paragraph 4.11 in his Statement of Particulars that during this period he assesses apportionment between building work and the use of brake and clutch linings as follows:-

- Brake and clutch linings 10%
- Asbestos cement building products 90%

Therefore Amaca will bear 90% of the 40% for this period which is 36%. The remaining 4% is to be apportioned between Massey-Ferguson and Amaba and this has been done on an equal basis as the Plaintiff states he used both manufacturer's products on a regular basis.

The Plaintiff assesses that the period 1975-1987 represents 15% of his lifetime asbestos exposure. During this period, the Plaintiff again undertook mechanic work with exposure to asbestos brake and clutch products and carpentry work. The Plaintiff states that 10% of the time he was exposed to brake products as a mechanic and the remaining 90% when working as a carpenter. Therefore the 15% is able to be apportioned easily between Amaba and Amaca.

We therefore calculate apportionment as follows:-

- Amaca 54.5%

- Amaba _____ 11.5%
- Massey-Ferguson _____ 34%

However, we note that the Plaintiff provides the following estimate of his exposure:-

- Amaca _____ 50%
- Amaba _____ 10%
- Massey-Ferguson _____ 40%

Amaca believes the Plaintiff's evidence should be accepted on the basis that the Plaintiff worked with brake and building products throughout his career and has the requisite knowledge to make an assessment of apportionment.

4. Massey-Ferguson's response contained in its Reply filed on 20 February 2008 submits that as there are no Category 2 defendants to this claim the standard presumption as to apportionment table in clause 5(1) of the Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order of 2007 (“**the Standard Presumptions**”) does not apply to this claim and, assuming liability, the Category 1 defendants would share 100% of the total liability between them.
5. I am required to assume that the defendants are liable.
6. AGCO suggests that I should vary contribution based upon Amaca's capacity, size and state of sophistication and its role as a leading manufacturer of asbestos in the asbestos industry.
7. However, as Category 1 defendants, the defendants are assumed to have actual knowledge
8. While it may be the first time that the second defendant has been sued in this jurisdiction, the second defendant was a major manufacturer and supplier of world-famous tractors that were widely used and remain used in Australia. AGCO's table which appears at p34 of its submissions I reproduce.

Period (not as defined in the Standard Presumptions)	Dates	No. months	Defendants liable	Plaintiff's assessment of % of total exposure ¹	Plaintiff's assessment of intensity of exposure ²	AGCO's initial % assessment of liability apportionment ³
1	1956	8	Amaca	5	Medium	5
2	1958-1963	60	AGCO Amaba	30	High	24 ⁴ 6
3	1964	12	AGCO Amaba	10	High	8 ⁵ 2
4	1966-1974	96	AGCO Amaba Amaca	40	High	2 ⁶ 2 36
5	1975-1987	144	Amaba Amaca	15	Medium (Amaba) High (Amaca)	1.5 ⁷ 13.5

Total: 100%

Total: 100%

Therefore total apportionment on the sole basis of the information in the table above (and without variation in respect of Amaca and Amaba's capacity, size and state of sophistication, steps that ought to have been taken by them to minimize the risks of harm, and the greater toxicity of the type of asbestos to which the Plaintiff was exposed by Amaca) would be as follows:

- Amaca: 54.5% (Plaintiff says 50%, Amaca and Amaba both say 38.5%)
- AGCO: 34% (Plaintiff says 40%, Amaca and Amaba both say 48%)
- Amaba: 11.5% (Plaintiff says 10%, Amaca and Amaba both say 13.5%)

In relation to the proposed apportionment as calculated by Amaca and Amaba in their Replies, it should be noted that both parties failed to account for the Plaintiff's exposure to Amaba products in Period 2. In addition and more significantly, Amaca and Amaba have not taken account of the Plaintiff's 90:10 split as between exposure to Amaca and Massey-Ferguson/Amaba products respectively in Period 4. Accordingly, Amaca and Amaba's calculation of apportionment based on the information in the Plaintiff's Statement of Particulars is incorrect.

Furthermore, Period 4 in the table above amounts to 30% of the total period of exposure (96 of 320 months) and Period 5 is 45% of the total period (144 of 320 months).

¹ According to the Statement of Particulars (section 4).

² According to the Statement of Particulars (section 4).

³ Based solely on the information in the Statement of Particulars.

⁴ While the Plaintiff alleges he worked predominantly with Massey-Ferguson (AGCO) parts, his Statement of Particulars states that there was some use of Hardie Ferodo (Amaba) parts as well. Amaca and Amaba's 80:20 apportionment (from their Replies) has been adopted here.

⁵ As with Period 2, the Plaintiff worked predominantly with Massey-Ferguson parts but in the Statement of Particulars admits "occasional use" of Hardie Ferodo brake linings. Amaca and Amaba's 80:20 apportionment (from their Replies) has been adopted here.

⁶ According to the Statement of Particulars 90% of the alleged exposure during Period 4 was from Amaca products and only 10% to Massey-Ferguson/Hardie Ferodo products. (Contrary to Amaca and Amaba's claims in their Replies that no apportionment is made by the Plaintiff for this period and their subsequent proposal for a 50:50 split between the two types of work. AGCO has, however, kept a 50:50 split as between Massey-Ferguson and Hardie Ferodo products as no distinction is made by the Plaintiff in that regard.)

⁷ Again, according to the Statement of Particulars 90% of the exposure during Period 5 was to Amaca products and only 10% to Hardie Ferodo products. There was no alleged exposure to Massey-Ferguson products as the Plaintiff allegedly dealt only with truck brakes, no tractors.

Exposure to all products was "high" in Period 4 and in Period 5 exposure to Amaca's products was also "high", while exposure to Amaba's was "medium" (according to the Plaintiff in his Statement of Particulars).

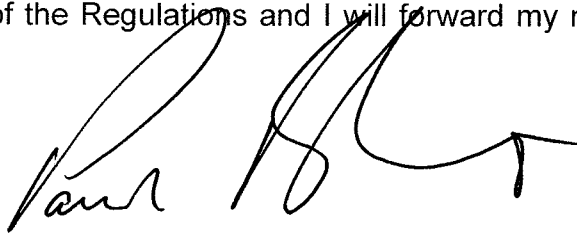
Further, AGCO submits that Amaca and Amaba had knowledge of the dangers of asbestos to health throughout the relevant periods of the Plaintiff's exposure, but only in the latter half of Period 5 did they provide specific warnings in this regard. In AGCO's view those periods should therefore be attributed with a greater proportion of liability (in addition to the Plaintiff's estimation of his exposure) and liability be increased accordingly for Amaca and Amaba for all periods.

Accordingly, in view of the preceding paragraphs and the judicial commentary in respect of Amaca and Amaba, assuming liability of all Defendants as alleged, AGCO believes that liability should be apportioned as follows:

- **Amaca: 65%**
- **AGCO: 20%**
- **Amaba: 15%**

9. In my view, the submissions of AGCO in relation to the failure of the first and third defendants to account for the plaintiff's exposure to Amaba products in Period 2 and Period 4 are based upon the plaintiff's evidence which the parties appear content to accept is made out. In my view, 90% of the plaintiff's exposure, or 36% of 40% of Period 4, is attributable to Amaba and Amaca.
10. In Period 2 it is not clear what percentage should be referable to the plaintiff's occasional use of Hardie-Ferodo brake linings.
11. Amaca's submission and the AGCO submissions for different reasons both come to the conclusion that Amaca's amount of exposure, notwithstanding that the plaintiff's own estimate of his exposure is 50%, is higher (54.5% on Amaca's own submission and 65% on AGCO's).
12. In my view, AGCO's arguments, to the extent that they are based on the failure to provide warnings or greater knowledge on behalf of Amaca, should be rejected as they are all Category 1 defendants.

13. It is clear that the periods of 1958 to 1974 were significant periods and all involved exposure to AGCO's products. It seems to me that the 20% that they submit is unrealistic, notwithstanding the fact that for substantial periods of time the plaintiff did have quite a deal of exposure to building products, particularly in the 1966 to 1974 period.
14. At the end of the day I am asked to perform an assessment on the basis of the most meagre materials and have to do the best I can. Amaca on its own case is 54.5% liable based on a temporal apportionment. I have allowed some weighing in that period for a high intensity of total exposure, particularly in Period 4.
15. I assess Amaca's liability at 55%. I assess AGCO's at 35%. I assess Amaba's at 10%.
16. I appoint Amaca to be the single claims manager in accordance with Clause 60 of the Regulations and I will forward my memorandum of fees to it.

A handwritten signature in black ink, appearing to read "Paul Blackett", is written over the text of item 16.

Dated 1st day of May 2008

PAUL BLACKETT SC
CONTRIBUTIONS ASSESSOR.