

## CONTRIBUTIONS ASSESSMENT DETERMINATION

### COURT DETAILS

Court	Dust Diseases Tribunal of New South Wales
Registry	Sydney
Case Number	155 of 2009

### TITLE OF PROCEEDINGS

Plaintiff	Thomas William McLean
First Defendant	Hassell Limited
Second Defendant	Greater Western Area Health Service

The Registrar of the Dust Diseases Tribunal referred this matter to me under cover of his letter of 9 October 2009, and pursuant to Regulation 49(1) of Dust Diseases Tribunal Regulation 2007 (DDTRegs) for the determination of the contribution that each Defendant is to make to the Plaintiff's claim, the parties having failed to reach agreement as to apportionments.

The Plaintiff has sued 2 Defendants for their negligence in his exposure to asbestos dust and fibre between May 1973 and February 1975 ("the Period") in circumstances which he outlines in Part 4 (4.1) of the Plaintiff's Statement of Particulars (PSP) filed in the Tribunal on 3 August 2009. Although another period of possible asbestos exposure is identified by the Plaintiff, the action is confined to the Period.

The Defendants' materials for consideration in this contributions assessment are as follows:-

1. First Defendant (Hassell) - Reply filed 4 September 2009.
2. Second Defendant (GWAHS) – Reply filed 18 September 2009

### **Basis for Determination**

A. DDTReg 49(4) prescribes that my determination is to be made on several bases and assumptions as follows:-

- The assumption that each Defendant is liable;

- On the Plaintiff's Statement of Particulars (PSP) (Part 3 and Part 4) relating to his occupational and non-occupational exposure to asbestos; and
- On the Defendants' Replies;
- On the Standard Presumptions as to apportionment.

The relevant "standard presumptions" are set out within the Dust Diseases Tribunal (Standard Presumptions Apportionment) Order 2005 - Schedule 1.

**B.** It is alleged that the Plaintiff suffers with mesothelioma. This 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 clause directs that:-

- (i) If I am satisfied by reference to the existence of separate periods of exposure then instead of the prescribed apportionment, I should make a differential determination of the contribution of each of those periods. In this case that is not relevant.
- (ii) Proportions of involvement of separate period of exposure be determined as to number of periods, the length of such period and the duration of and intensity of exposure to asbestos within each period. Again in this case, that is irrelevant.
- (iii) I then apply to a relevant period the proportions set out in the Table which forms part of Clause 5(1) i.e. changing the apportionments for the different index periods. This is relevant to my task herein.

Clause 5(2)(a) directs that Category 1 defendants include corporations that manufacture or supply and/or Install asbestos products and applies to neither of these Defendants which by their Replies agree that each is a Category 2 Defendant.

I proceed accordingly.

**Periods of Exposure:-**

The single relevant period for consideration is May 1973 to February 1975 when the Plaintiff in the course of his employment by Hassell was exposed to asbestos dust and fibre at Broken Hill Hospital for which GWAHS is responsible as the occupier. The Period and nature of the exposure is therefore the same.

Accordingly I proceed with the exercise of apportionment as the DDT Regs direct.

**Proportional role of exposure period:-**

As already observed, the matters for consideration generally in this exercise are: - the number of periods; the length of such period; and duration of and intensity of exposure within each period. In this case they are the same

I am satisfied for the purposes of Clause 5(7) that no differential determination of the contribution made is therefore appropriate for the Period; i.e. the 2 Category 2 Defendants share equally on these bases.

**Variation of the Standard Presumption:-**

In proceeding with the Standard Presumptions, each Defendant is as noted a Category 2 Defendant (as described in Clause 5(2) of the Standard Presumptions).

There is no reason to alter the Standard Presumptions between the Category 2 Defendants unless I am satisfied that a variable contribution ought apply (Clause 5(4) and more particularly that I am satisfied that it is appropriate in the particular circumstances of the individual case (Clause 5(5)).

Clause 5(6) prescribes that considerations I might have are as to the state of actual knowledge of a Category 2 Defendant, and further its identity, capacity, size and state of sophistication. I am also to have regard to the steps the particular Defendant ought to or was capable of taking to minimize risk of harm

Further, if I do so determine therefore to make the variation I am limited by the Table in Clause 5(1) to an increase or decrease by an amount up to 20 percentage points.

Submissions of the Defendants:-

GWAHS in its Reply (Part 8) accepts the Standard Presumptions

Hassell in its Reply (Part 8.5) submits that the Area Health Service as an agency of the New South Wales State Government had access to the knowledge of other Government instrumentalities and further had the capacity, size and sophistication to control or eliminate the relevant hazard in the workplace.

I am not referred to or given any evidence to base the submission of relative knowledge between the two Defendants but am asked to vary by the maximum allowable the Standard Presumption that would otherwise direct a 50/50 allocation of liability to each Defendant.

I am nevertheless inclined, despite that shortcoming, to the view that GWAHS status as a Government instrumentality and large employer in the Period [having regard to inter alia Note 8, Clause 5, 1 of the Standard Presumptions as to knowledge] should enliven a variation of liability between the two Category 2 Defendants.

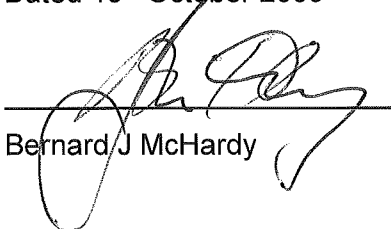
Doing the best I can, I apply and calculate that liability on the basis of an increase of 10% upward and downward of the respective Defendants' contributions.

Determination of Contribution:-

I determine that the liability be apportioned on the basis of Hassell making a 40% contribution and GWAHS making a 60% contribution to the Plaintiff's damages.

Finally and as directed by the Tribunal in accordance with Clause 61(3)(b) of the Regulations, I appoint GWAHS as the Single Claims Manager.

Dated 19<sup>th</sup> October 2009

  
Bernard J McHardy