

BETWEEN:

MARION ISOBEL MEYERS

Plaintiff

AND

AMACA PTY LIMITED

First Defendant

TELSTRA CORP LTD

Second Defendant

**CONTRIBUTIONS ASSESSMENT
DETERMINATION**

1. By letter dated 7 October 2008 I was appointed the Contributions Assessor by the Registrar pursuant to Clause 49(1) of the *Dust Diseases Tribunal Regulation 2007* (NSW) (**the Regulations**).
2. The plaintiff is Marion Meyers (**Meyers**) and she sues Amaca Pty Ltd (**Amaca**) and Telstra Corp Ltd (**Telstra**) for damages as a result of contracting malignant mesothelioma.
3. Each of Amaca and Telstra have filed a Reply and an Amended Reply. For ease of reference I will refer only to the most recent submissions in the Amended Replies.
4. The determination is to be made by me on the papers, on the assumption that the defendants are liable, and applying the standard presumptions prescribed in the *Dust Diseases Tribunal (Standard presumptions – Apportionment) Order 2007* (**the Standard Presumptions**).
5. Mrs Meyers was born on 25 August 1941 (aged 67). She was employed in various roles (and intermittently) from 1956 to about 1982 principally as a process worker in manufacturing industries. She has no recollection of any occupational exposure to asbestos.

6. She alleges that she suffers mesothelioma as a result of exposure to asbestos dust and fibre from laundering the clothes of her husband and son. The disease was diagnosed in March 2008.
7. Mrs Meyers recollects four periods where she considers she was exposed to asbestos dust and fibre. The details of her estimated exposure are set out in a table at 3.2 of her Statement of Particulars and detailed below:

Start Date	End Date	Address where exposure occurred	Brief description of activity you were engaged in (eg home renovation, washing clothes)
About 6 months in early 1960s		3 Miller Road, Green Valley, NSW	I may have been exposed to asbestos from being near building work that was being carried out on property adjacent to mine. That work involved the construction of homes made from asbestos cement ("AC") sheets
About 1970	About 1972	3 Miller Road, Green Valley, NSW and other locations including the family car	I was exposed to asbestos from laundering my husband's work clothing, from hugging him when he came home from work, and from sharing a car with him. He had to handle AC products because of his work at Traversi Jones.
About 1980		3 Miller Road, Green Valley, NSW	My husband and my son built greyhound kennels in the backyard. They used AC sheets for this. I was exposed to asbestos from laundering their clothes the next day.
About 1984	About 1989	3 Miller Road, Green Valley, NSW, 527 Hume Highway, Casula and other locations including my son's car	I was exposed to asbestos from laundering my son's work clothing, and from using his car. My son worked for Telecom as a linesman, and had to maintain, drill into, cut, remove and destroy pits and pipes that were made from AC.

8. Mrs Meyers then sets out in further detail her recollection of exposure to asbestos dust and fibre. In essence it is her contention that her exposure to asbestos dust and fibre occurred principally as a result of laundering the clothes of her husband, Geoffrey John Meyers (**Geoff Snr**), and her son Geoffrey John Meyers (**Geoff Jnr**).

9. There is no statement or affidavit evidence from Geoff Snr or Geoff Jnr on the Tribunal file. Such evidence would have been of assistance to me in making this assessment, particularly in circumstances where Telstra allege that any exposure incidental to Geoff Jnr's work was *de minimus*. I do not make that observation as a criticism of Mrs Meyers or her legal representatives but simply note that such evidence would have been of assistance in making the determination.

10. I summarise Mrs Meyers allegations of exposure as follows:
 - (a) **Building work at Green Valley** – For a period of about 6 months when the family moved to a home in Green Valley in the 1960s construction of dwellings in the area was continuing. Sometimes work with AC sheeting took place a few metres from her kitchen window. She walked past the construction site to hang out her washing.
 - (b) **Geoff Snr's Employment by Traversi Jones** – From 1970 to 1972 Geoff Snr was employed as a delivery man for Traversi Jones. The work involved delivering building materials to work sites. Geoff Snr loaded and unloaded AC sheeting from his delivery truck, sheets occasionally broke and he was required to pick them up and return them to the depot, he cleaned his delivery truck with a broom (this was described as dusty work). Mrs Meyers says that AC sheets were cut in the Traversi Jones loading dock using a power saw. Sheets were cut at the dock for 1 in 12 of Geoff Snr's deliveries. Mrs Meyer's exposure occurred when she hugged her husband on returning home, when she shook out and laundered his work clothes at the end of the day and when she used the car after Geoff Snr had used it to travel to and from work. Traversi Jones exclusively supplied James Hardie product.
 - (c) **Greyhound Kennel** – In 1980 Geoff Snr and Geoff Jnr built a greyhound kennel in the backyard on a Sunday using AC sheets. The sheets were cut using a grinder. Mrs Meyer washed their clothes at the end of the job. She believes James Hardie AC sheets were used for this purpose.

- (d) **Telecom** – Mrs Meyer alleges Geoff Jnr was exposed to asbestos whilst employed as a linesman. She recollects that her son was employed by Telstra from about 1984 to about 1990. She says in her Statement of Particulars that *“He (Geoff Jnr) lived with me at the family home in Green Valley, and then Casula when we moved in about 1985. He left home in about 1989”*.
- (e) In the course of his employment Geoff Jnr was involved in the maintenance and repair of “pits and pipes”. The work was in “established areas” (the suburbs are not identified) which involved removing asbestos pits and pipes and replacing them with non asbestos products. Mrs Meyers washed her son’s clothes at the end of each day. Dust accumulated in his pockets as well as in the trousers where he had rolled them up. Mrs Meyers turned out the cuffs and clouds of dust were given off. She swept the dust up with a broom. She also used Geoff Jnr’s car on occasions and believes the interior of his car was dusty.

11. Mrs Meyers could not reliably estimate the percentage proportion of her exposure of each incident.

12. The factual matters that are relevant to my apportionment determination (see clause 3 of the Standard Presumption Order) include:

- (a) Mrs Meyer suffers from mesothelioma, and indivisible disease;
- (b) She was exposed to asbestos in four periods in about 1960, 1970-1972, 1980 and 1984 – 1989;
- (c) The only identifiable exposure occurred as an incident of laundering the clothes of her husband and son following their alleged exposure to asbestos;
- (d) It cannot be said with certainty the type of asbestos she was exposed to;
- (e) The lag time between her exposure and diagnosis is consistent with the latency period of mesothelioma, accepting that the earlier exposure is more likely to be causative; and
- (f) No effective steps were taken to advise Mrs Meyer of the dangers of exposure to asbestos or to protect her against exposure.

Categorisation of Defendants

13. Both defendants submit that the parties should be categorised as follows:

- Amaca Category 1
Telstra Category 2

Application of the Standard Presumptions

14. In making this determination I must assume that each defendant is liable: Dust Diseases Tribunal Regulations Reg 49(4) (**the Regulations**), unless the defendants agree that a particular defendant should not be assumed to be liable: Regulation 49(5).

Telstra's Submissions

15. Telstra submits that it is an innocent defendant for the purposes of Regulation 53. It does so on the basis that "the plaintiff has not provided evidence of exposure to asbestos from her son during Telstra's employment": Amended Reply CI 8.1. It further submitted that if Mrs Meyer is able to provide evidence of exposure as a result of her son's work then any exposure was negligible and not causative of her illness. In support of that submission it refers to the report of Professor ABX Breslin dated 11 August 2008. Accepting that that is the acme of its submissions Telstra helpfully puts alternative submissions in the event I find that it is liable.

16. Telstra submits that I should take a broad brush approach as enunciated by Judge Curtis in *Bitupave Ltd v NSW Associated Blue Metal Quarries Pty Ltd* (1996) 13 NSWCCR 634. Taking into consideration that approach it submits that the exposure to Amaca's product being first in time and the exposure being more frequent and intense then it should assume the lion's share of any liability.

17. It further submits that if a time on risk analysis is used (that is, comparing strictly days of alleged exposure) then Mrs Meyer's exposure to Telstra asbestos should only be for three years (as compared to the five referred to in her Statement of Particulars) on the basis of her history of exposure given to Professor Breslin.

18. Telstra further submitted that the relative blameworthiness of Amaca was much greater than Telstra. It had a basic level of sophistication for matters not related to telecommunications. By contrast Amaca was in the business of manufacturing of asbestos cement products over decades.

19. Telstra put some supplementary submissions regarding Amaca's Amended Reply. Its ultimate submission as to apportionment was that Telstra should not be responsible for

any liability, but if an apportionment was appropriate the split should be Amaca 95% Telstra 5%.

Amaca's Submissions

20. Amaca's submissions were based on a "time on risk" analysis of the entire exposure. Its calculation was based on an assumption that each of Geoff Snr and Geoff Jnr worked 5 days a week for 48 weeks per year. It provided a table which summarised its submission:

Period	Years	Discrete exposure	%Amaca	%Telstra
Period 1	1970-1972	480 days	29%	
Period 2	1980	1 day	de minimus	
Period 3	1984-1989	1200 days		71%
TOTAL		1681 days	29%	71%

21. Amaca have proceeded on the assumption that the intensity of exposure was roughly the same, that the kennel exposure (Period 2) was negligible and that period of exposure during 1960 is not attributable because no specific product or manufacturer is identified.

22. It is sufficient to note that the submissions of each of Telstra and Amaca result in polar opposite results of apportioned liability.

Findings

23. I reject Telstra's submission that Mrs Meyer's exposure to asbestos that was incidental to her laundering her son's clothes was negligible. The evidence of Mrs Meyer regarding the intensity (as distinct from the duration) of her exposure is not detailed. On the one hand Mrs Meyer's description of dust accumulated in the folds of her son's trousers and the need to sweep up at the end of the day would indicate that the Telstra exposure was greater than that from Amaca. I agree with Professor Breslin's opinion that Geoff Jnr's exposure to asbestos was not likely to be very intense as he was simply removing pipes and pits. It is not at all clear if, and to what extent, the pits and pipes required cutting prior to their removal.

24. On the other hand the description of the work conditions of Geoff Snr indicate he was exposed to actual asbestos dust liberated following it being cut in the loading yard. He was also handling ac sheeting daily.
25. On balance I consider that Mrs Meyer's incidental exposure to asbestos dust was likely to be roughly the same for each of the respective periods.
26. I reject Telstra's submissions that it should be considered to be on risk for only three years rather than the five referred to in Mrs Meyer's Statement of Particulars. Mrs Meyers is clear in her Statement of Particulars that her last exposure was when "*her son moved out of home, in about 1989*": Statement of Particulars CI 4.26. A document that was sworn by her and filed with the Tribunal should be preferred to the content of Professor Breslin's report where there is a discrepancy.
27. I accept Telstra's submission that the exposure to asbestos in the 1980s is likely to be less causative of Mrs Meyer's loss than the exposure in the 1970s (applying the PETO formula of causal potency). That would result in an adjustment in Telstra's favour.
28. I consider that I should not take into account the exposure in 1960 as the source of the asbestos manufacturer is not identified and that the kennel exposure on one Sunday in 1980 is de minimus.
29. Finally, I consider I must apply a time on risk analysis in accordance with the CI 5(8) of the Standard Presumptions. On that basis Amaca is responsible for 29% and Telstra 71%. I allow a small adjustment in Telstra's favour given that the last of the alleged exposure involving it occurred in 1989.
30. Accordingly I find the following apportionments apply: Amaca 35% Telstra 65%.
31. I have been asked to appoint a Single Claims Manager. I appoint Telstra.

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David Jay

Contributions Assessor

9 October 2008