

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

DDT No. 322 of 2010/1

BETWEEN:

EDWARD FITZPATRICK
Plaintiff

AND

ORICA LTD
First Defendant / Cross Claimant

ORICA AUSTRALIA PTY LTD
Second Defendant

AMACA PTY LTD
First Cross Defendant

WALLABY GRIP LTD
Second Cross Defendant

WALLABY GRIP (BAE) PTY LTD
Third Cross Defendant

WALLABY GRIP (NSW) PTY LTD
Fourth Cross Defendant

**CONTRIBUTIONS ASSESSMENT
DETERMINATION**

1. The Registrar referred this matter to me by letter dated 5 October 2011 pursuant to Clause 49(1) of the *Dust Diseases Tribunal Regulation 2007 (NSW)* (**the Regulations**) for a determination of apportionment as between the defendants.
2. 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
(Standard Presumptions).

Procedural matters

3. The plaintiff, Mr Fitzpatrick, alleged in his Statement of Particulars, that he suffered pleural mesothelioma. He commenced proceedings against Orica Ltd (**Orica**) in the Dust Diseases Tribunal in late November 2010. Due to a deteriorating condition the matter was expedited and he was cross examined on 1 December 2010. Within a week Orica filed a cross claim joining Amaca Pty Ltd (**Amaca**), Wallaby Grip Ltd (**WGL**), Wallaby Grip (BAE) Pty Ltd (in liq) (**BAE**) and Wallaby Grip (NSW) Pty Ltd (in liq) (**WGL(NSW)**). There was a fifth cross defendant but that action was discontinued and the party took no further part in the proceedings. It appears that the cross claim was severed on about 9 December 2010.
4. In a fast moving matter Orica filed its Reply on 17 December 2010 which stated that it believed that from 1 October 1979 to 5 July 1996 Mr Fitzpatrick was employed by ICI Australia Operations Pty Ltd (now Orica Australia Pty Ltd). On 21 December 2010 an Amended Statement of Claim was filed joining Orica Australia as the second defendant.
5. On 22 December 2012 judgment was entered in favour of the plaintiff as against the first and second defendants. Accordingly, this contributions assessment deals with the cross claim by Orica for contribution as against the cross defendants.

Mr Fitzpatrick's Exposure

6. In his Statement of Particulars, which annexed an affidavit sworn 1 December 2010, Mr Fitzpatrick stated that he only had one period of occupational exposure to asbestos. That started when he commenced employment as a rigger with Orica

(and later Orica Australia). Mr Fitzpatrick described his exposure at paragraph 16 of his affidavit as follows:

“All of the steam control valves, steam pipes and steam level trolls which measured the capacity inside a tank were lagged with asbestos. It was my job to remove parts of the insulation inside the valves and around the pipes. I would use a wire brush to remove the insulation inside the valves and around the pipes. I would also brush the gaskets as well to remove the asbestos insulation, although in the HC valves in particular, which weren’t painted on the inside because no moisture was allowed, the gaskets would become stuck. With these valves I would use an industrial hacksaw to chip away at the insulation. All of this work was very dusty and caused dust to rise into the air around me while I worked. I could not avoid breathing in this dust.”

7. Much of this work was done in a small shed beside the workshop and later in an open air room in the new workshop. The insulation removed was swept up and he breathed it in.
8. Once he had cleaned the items ladders attended the site to reapply asbestos lagging. The new insulation *“was comprised of asbestos rope and a woolly type of asbestos substance which was placed around the pipe and encased in an aluminium covering”*. On occasion the ladders were nearby and their work caused a lot of dust to be liberated into the air. Mr Fitzpatrick says he could not avoid breathing in the dust.
9. Mr Fitzpatrick recollects double filter cartridge dust masks being available. He used them when grinding on some occasions. He used a mask for about 20% of the work he did overall.

10. This work continued until the mid 1980s. A crew in white overalls attended the site in the mid 1980s to remove asbestos from the site. Mr Fitzpatrick says this process created dust which he breathed in.

11. Mr Fitzpatrick described his level of exposure as “medium”.

12. Mr Fitzpatrick retired on 5 July 1996.

Orica’s Reply

13. Orica filed its Reply on 17 December 2010. The reply did not include a copy of the transcript of Mr Fitzpatrick’s cross examination which had occurred on 1 December 2010.

14. At the time the Reply was filed matters had moved very fast. It appears that Orica did not have the benefit of a medical examination of Mr Fitzpatrick at that stage. With that in mind Orica did not admit that Mr Fitzpatrick was suffering pleural mesothelioma.

15. Orica did not admit it employed Mr Fitzpatrick from 1977 to 1996. In respect of his employment it said that inquiries were continuing but:

“Orica believes that, from 1 October 1979 to 5 July 1996, the claimant was not employed by it, but was instead employed by ICI Australia Operations Pty Ltd (now Orica Australia Pty Ltd)”.

16. Orica was not in a position to contradict Mr. Fitzpatrick’s allegations of his exposure to asbestos. It did note at CI 3.5 of its Reply that Mr Fitzpatrick had not described the products that he was allegedly exposed to.

17. Orica submitted that the parties should be categorised as follows:

Orica	Category 2
Amaca	Category 1
WGL	Category 1
BAE	Category 1
WGL(NSW)	Category 1

18. As to the level of knowledge Orica submitted that it should be attributed with “*constructive knowledge at the time of the alleged exposure, but otherwise actual knowledge as to the risks of asbestos*”: Reply CI 8.3. It otherwise submitted that the Standard Presumptions should not be varied.

The Amended Statement of Claim

19. An Amended Statement of Claim was filed on 21 December 2010. The only amendments of substance was to allege that Mr Fitzpatrick was employed by Orica from “*on or about 1978 to 1 October 1979*” and to join Orica Australia as the second defendant and allege that it employed Mr Fitzpatrick from “*2 October 1979 to 5 July 1996*”. There was no amendment to the circumstances of Mr Fitzpatrick’s exposure.

20. As noted above a judgment was entered in Mr Fitzpatrick’s favour on 22 December 2010. That appears to have lead to some stasis on the file on the part of Orica and Orica Australia. Orica did not file an Amended Reply.

21. Orica Australia did not file a Reply. Nor did it file a cross claim. That is, although Orica Australia was the second defendant and consented to judgment it has taken no active step in the proceeding at all.

Amaca’s Reply

22. Amaca notes that in its cross claim Orica does not refer to any asbestos products by brand. There is a generic reference to “asbestos insulation material”. Mr Fitzpatrick did refer to asbestos lagging, asbestos insulation, asbestos rope and a woolly type asbestos. Amaca never manufactured asbestos rope. It concedes that it supplied asbestos insulation products prior to 1974. It ceased manufacturing “*any asbestos containing insulation product in 1974*”: Reply CI 5.3.

23. Amaca submits that all parties should be placed into category 2.

24. Amaca submits that the Standard Presumptions should be varied on the basis that it had ceased to manufacture any asbestos insulation material 4 years prior to Mr Fitzpatrick’s employment.

WGL’s Reply

25. WGL’s principal submission is that it ceased operations on 30 September 1966. On that basis it submits that it did not supply the products to which Mr Fitzpatrick alleges he was exposed.

26. WGL submits that it is an innocent defendant and so should have no liability.

27. In respect of the categorisation of the parties Orica should be placed into Category 2 and the other cross defendants category 1.

28. WGL submits that the Standard Presumptions should be varied against Orica on the basis that it did not provide precautions to Mr. Fitzpatrick as to the risks of asbestos and that those risks were foreseeable to an entity of the size and sophistication of Orica.

29. In support of that submission WGL relies on a large amount of material which points to Orica’s commercial size and sophistication. It had 11,500 employees in 1989,

operating profits in the hundreds of millions of dollars and very large turnovers in the relevant years.

30. WGL then puts submissions as to apportionment on the assumption that Mr Fitzpatrick's period of employment during his employment with Orica occurred between 1978 and 5 July 1996. This exposure falls within periods B, C and D of the Standard Presumptions. It then submits on a time on risk basis the apportionments are:

Period	Date	Month	Calculation	Total
B	01.01.1978 – 31.12.1978	12	$(12/222) \times 100$	5.5%
C1	01.01.1979 – 31.12.1979	12	$(12/222) \times 100$	5.5%
C2	10.01.1980 – 31.12.1989	120	$(120/222) \times 100$	54%
D	01.01.1990 – 05.07.1996	78	$(78/222) \times 100$	35%
Total		222		100%

31. In my view the assumption that Mr Fitzpatrick continued to be exposed to asbestos in the workplace until the day of his retirement does not accord with the evidence. His evidence is that his exposure ceased in the mid – 1980s.

32. As I do not accept the premise of WGL's calculations I will not recapitulate their detailed further calculations in respect of each period referred to in the table above. It is sufficient to say that in summary WGL submitted that it and WGL(NSW) were innocent defendants and the liabilities for the other entities is as follows:

Orica	70%
Amaca	27.5%
WGL	NIL
WGL(NSW)	NIL
BAE	2.3%

Total

100%

33. WGL(NSW) did not file a Reply. In WGL's Reply it is apparent that WGL(NSW) ceased operations on 1 July 1974.

WGL(BAE) Reply

34. WGL(BAE) submits that it ceased operations on 31 December 1979. It denies it supplied asbestos rope to Orica between 1978 and 1996. The description of the product Mr Fitzpatrick was exposed to is, in WGL(BAE)'s submission, extremely vague and not particularised by the plaintiff or cross claimant.

35. WGL(BAE) submits that it, too, is an innocent defendant.

36. The submissions, and reasoning, as to contributions are in similar terms to those put by WGL.

Findings

37. In my view, there is a significant difficulty in apportioning liability in this matter. As I have noted above the plaintiff's original claim only joined Orica. It was later amended to join Orica Australia on the basis that it was his employer for the period 2 October 1979 to 5 July 1996. It did so following Orica's submission in its Reply that it was not Mr Fitzpatrick's employer for that period.

38. For the purposes of this affidavit I find that Mr Fitzpatrick was employed by Orica Australia from 2 October 1979 to 5 July 1996.

39. The terms of the judgment are confidential but it is sufficient to note that Orica Australia assumed a significantly greater amount of the plaintiff's liability such that it reflects his period of employment with it.

40. Orica Australia did not file a Reply and did not file a cross claim. Accordingly, there is no cross claim against any cross defendant in respect of Mr Fitzpatrick's period of employment with Orica Australia ie 2 October 1979 to 5 July 1996.

41. I consider that each cross defendant is only liable to contribute in respect of those periods where it is a cross defendant to a formal cross claim. That conclusion is consistent with the decision reached by Mr Kearney in his supplementary contributions assessment dated 7 September 2009 in the matter of *McCartney v State of New South Wales & Ors* (DDT proceedings No 54 of 2009). Even if I am wrong about that the cross defendants can only be liable to Orica as a proportion of the contribution they made to Orica's liability. That is, a function of the amount of Orica's liability to judgment.

42. In respect Orica's cross claim I make the following findings:

- (a) Mr Fitzpatrick was employed by Orica from 1978 to 1 October 1979. I assume that the employment commenced on 1 January 1978.
- (b) Mr Fitzpatrick suffered pleural mesothelioma.
- (c) His exposure ceased in about the mid 1980s. I assume that is 1 June 1985.

43. Applying Clause 3 of the Standard Presumptions the relevant factual considerations are:

- (a) Exposure to asbestos occurred from 1 January 1978 to about 1 June 1985.
- (b) This was the only period of exposure in Mr Fitzpatrick's lifetime.
- (c) Mr Fitzpatrick was exposed to asbestos insulation described as "*asbestos lagging, asbestos insulation, asbestos rope and a woolly type asbestos*".
- (d) The exposure was reasonably regular, several times per week, and at a medium level of intensity.

(e) Masks were available to Mr Fitzpatrick but he only wore them 20% of the time.

He was not warned of the dangers of asbestos inhalation by his employer.

(f) The disease suffered is mesothelioma. That is an indivisible disease.

44. Exposure to asbestos occurred in Periods B and C.

45. I accept Orica's submissions and categorise the parties as follows:

Orica	Category 2
Amaca	Category 1
WGL	Category 1
BAE	Category 1
WGL(NSW)	Category 1

46. I also accept WGL's submission that the Standard Presumptions as against Orica should be increased by reason of its size and sophistication. The evidence in that regard is compelling. It was part of a large international organisation whose specialty was chemical production and supply. Judge Curtis found that the risk of injury was foreseeable to Orica for a comparable period in the matter of *Lawrence v Orica Ltd & Ors* [2004] NSWDDT 17.

47. I propose to vary the standard presumptions as against Orica by increasing them by 10% for each of Period B and Period C.

48. WGL contends that it is an innocent defendant. The reasoning being that WGL ceased operations in 1966 and so any asbestos materials used by Orica during Mr Fitzpatrick's employment could not have been supplied by it. As to the installation of new material from 1978 to 1985 I think that submission is correct. However, it is apparent from Mr Fitzpatrick's description of his exposure that the majority of his exposure to asbestos occurred while he was removing old insulation from valves using a wire brush or hacksaw. It cannot be said that that insulation material was

not supplied by WGL. Equally on the evidence it could have been supplied by WGL(BAE), WGL(NSW) or Amaca.

49. For the purposes of this contributions assessment I accept that none of Amaca, WGL or WGL(NSW) supplied product that was used in the re-lagging that occurred in Mr Fitzpatrick's workplace in 1978 or 1979.

50. The apportionment for each period of the Orica exposure is as follows:

Period	Date	Month	Calculation	Total
B	01.01.1978 – 31.12.1978	12	$(12/22) \times 100$	54.55%
C	01.01.1979 – 10.10.1979	10	$(10/22) \times 100$	45.45%

51. Mr Fitzpatrick was unable to estimate the percentage of exposure each period was responsible for. Doing the best I can, and relying on his affidavit, I consider 80% of his exposure occurred in removing existing asbestos from the industrial instruments and ensuing cleanup of the workshop as well as some very minor exposure when the facility was being cleared of asbestos in the mid 1980s. The other 20% was experienced in and around the work of the ladders when the material was being re-installed. Accepting that none of Amaca, WGL or WGL(NSW) are responsible for this then WGL(BAE) bears that responsibility on behalf of the category 1 defendants.

52. Therefore the calculations are as follows:

Period B – Standard Presumptions 65:35 After variation 55:45

For the 80% exposure in removing lagging $80\% \times 54.55\% = 43.64\%$

Party	Category	Calculation	Total
Orica (employer)	2	$45\% \times 54.55\% \times 80\%$	19.63%
Amaca	1	$55\% / 4 \times 54.55\% \times 80\%$	6.00%
WGL	1	$55\% / 4 \times 54.55\% \times 80\%$	6.00%
NSW	1	$55\% / 4 \times 54.55\% \times 80\%$	6.00%

BAE	1	55%/4x54.55% x80%	6.00%
Total			43.63%

For the 20% exposure in re-installing lagging $20\% \times 54.55\% = 10.91\%$

Party	Category	Calculation	Total
Orica (employer)	2	45% \times 54.55% \times 20%	4.91%
BAE	1	55% \times 54.55% \times 20%	6.00%
Total			10.91%

Period C – Standard Presumptions 60:40 After variation 50:50

For the 80% exposure in removing lagging $80\% \times 45.45\% = 36.36\%$

Party	Category	Calculation	Total
Orica (employer)	2	50% \times 45.45% \times 80%	18.18%
Amaca	1	50%/4 \times 45.45% \times 80%	4.55%
WGL	1	50%/4 \times 45.45% \times 80%	4.55%
NSW	1	50%/4 \times 45.45% x80%	4.55%
BAE	1	50%/4 \times 45.45% x80%	4.55%
Total			36.38%

For the 20% exposure in re-installing lagging $20\% \times 45.45\% = 9.09\%$

Party	Category	Calculation	Total
Orica (employer)	2	50% \times 45.45% \times 20%	4.55%
BAE	1	50% \times 45.45% \times 20%	4.55%
Total			9.1%

53. The final apportionments for Orica's cross claim in the period 1978 to 1 October 1979 are:

Orica $4.55\% + 18.18\% + 4.91\% + 19.63\% = 47.25\%$ (rounded)

BAE $4.55\% + 4.55\% + 6.00\% + 6.00\% = 21.1\%$

Amaca	$4.55\% + 6.00\% = 10.55\%$
WGL	$4.55\% + 6.00\% = 10.55\%$
NSW	$4.55\% + 6.00\% = 10.55\%$

54. The Registrar has not asked me to appoint a Single Claims Manager.

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David Jay
Contributions Assessor
10 October 2011