

Anita Pohlner –v- Amaca Pty Limited & Goodyear Australia Pty Limited

Amaca Pty Limited –v- CSR Limited

DDT No 8237/2008

Determination of Apportionment

1. Consequent of an order by the President of the Dust Diseases Tribunal on 16th March 2009, 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 Regulation 2007 (hereinafter referred to as "the Regulations").
2. By reason of clause 49 of the Regulations, I am bound to assume that
 - a. Each Defendant and Cross Defendant is liable.
 - b. The circumstances of the Plaintiff's exposure to asbestos are as set forth in his Statement of Particulars (Form 2).
3. Having made the assumptions above, clause 49 of the Regulations requires that my determination be made on the basis of:
 - a. The Plaintiff's Statement of Particulars
 - b. The Defendants' and Cross Defendant's Replies, and where appropriate,
 - c. The Standard Presumptions, which are incorporated in the Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007 [which requires that liability be apportioned upon basis that the standard presumptions apply with such variations as are appropriate to the case, but within a permitted range].
4. In the present case I have had the benefit of certain Affidavits, which have been filed by the Plaintiff, and I have taken these documents into account as part of the Plaintiff's particulars.

The Plaintiff's Particulars

5. Anita Pohlner (hereinafter referred to as "the Plaintiff") by her Statement of Particulars provides the following:
 - a. The Plaintiff suffers from a left side malignant mesothelioma;
 - b. In the period 1969 to 1976 the Plaintiff washed her father's overalls, which were contaminated with asbestos dust and fibre. The Plaintiff's

father worked at Goodyear Australia Pty Limited (hereinafter referred to as "Goodyear");

- c. In the period 3.7.1975 and 29.9.75 the Plaintiff washed her brother's overalls, which were contaminated with asbestos dust and fibre. The Plaintiff's brother worked at Amaca Pty Limited (hereinafter referred to as "Amaca");
- d. Between 1981 and 1982 the Plaintiff prepared sanded and cleaned and painted the external walls of a house at 41 Duffy Street Merrylands, and was exposed to asbestos dust and fibre which emanated from Amaca's products;
- e. In October 1985 the Plaintiff cleaned up following demolition and construction work to the front of the house at 41 Duffy Street Merrylands and was exposed to asbestos dust and fibre which emanated from Amaca's products;
- f. Between 1997 and 1997/8 the Plaintiff was present when major renovation took place to the rear of the house at 41 Duffy Street Merrylands and was exposed to asbestos dust and fibre which emanated from Amaca's products when a fibro wall was demolished;
- g. The Plaintiff washed her father's overalls over a period of about 7 years and her brother's overalls over a period of about 3 months on most Saturdays, and had regular exposure to the asbestos dust and fibre;
- h. The Plaintiff had isolated intense exposure when cleaning up after building work which occupied a total of about 3 weeks;
- i. The asbestos dust and fibre to which the Plaintiff was exposed, was sufficiently intense for it to be visible in the air around her;
- j. The Plaintiff's exposure to asbestos products was Amaca's flat asbestos cement fibro sheets;
- k. The Plaintiff provided various histories to her treating doctors (see the reports attached to the Plaintiff's Statement of Particulars);
- l. Professor Breslin has obtained a consistent history from the Plaintiff and concludes that the Plaintiff has "had asbestos exposure domestically" commencing in 1969 and continued intermittently till 1976 (clothes washing) and brief periods of renovations exposure in 1985 and mid 1990's, without any occupational exposure;
- m. Dr. Pooley provides a report as to the asbestos content of 4 samples, presumably taken from the Plaintiff's premises at 41 Duffy Street Merrylands which show crocidolite and amosite (sample 1), crocidolite, amosite and chrysotile (sample 2), crocidolite, amosite and chrysotile (sample 3), crocidolite, and amosite (sample 4);

- n. Warwick Gazzard has provided a report identifying the asbestos cement building materials used in the construction of the premises at 41 Duffy Street Merrylands and identified the products of Amaca;
6. The Plaintiff has provided an affidavit in which she identifies as the source of asbestos dust to include:
- (i) Her father worked at Goodyear Australia over a long period of time between 1960 and 1976 and that she washed his clothes over many years. The Plaintiff describes doing the washing about 80% of the time. The washing was performed in an inside laundry which was a small room. The Plaintiff turned the pockets of her father's overalls inside out and shook them hard. When she shook the overalls she could see dust in the air where she was standing.
 - (ii) James Hardie (Amaca) employed her brother between 3 July 1975 and 29 September 1975 and while he worked there she washed his overalls in the same manner as her father's.
 - (iii) She washed her father's overalls from when she was about 12 years old from 1969 and did it every Saturday morning because her mother worked in a laundry at one of the local hotels. She washed her brother's overalls with her father's overalls. She did the washing until her father retired in 1976.
 - (iv) The property at 41 Duffy Street, Maryland was purchased in 1978 and when it was purchased it was a small fibro cottage. There was fibro on the outside walls and a fibro garage. There was fibro on the roof of the garage.
 - (v) At Duffy Street a significant amount of building work was carried out when the property was purchased in September 1978 which included:
 - (a) In about 1979 the Plaintiff and her husband painted the external walls of the house, which involved sanding it down and cleaning it up and then painting it. The Plaintiff's husband did most of the sanding and the Plaintiff did about half the painting.
 - (b) In about 1982/83 the whole of the house was clad in UPVC cladding.
 - (c) In October 1985 a large sliding door was put into the front of the house which involved demolition and re-assembling which work was done by workmen, but when it was done there was dust everywhere, including dust which went into the house which the Plaintiff cleaned up using a dustpan and broom and then a vacuum cleaner.
 - (d) In 1996 the Plaintiff and her husband demolished the internal entrance area to the house when the wall lining was a mixture of fibro and gyprock. Some of the walls were fibro and the rest were gyprock. The work took a couple of days. The Plaintiff did the demolition work herself using a hammer standing on a ladder.

- (e) In 1998 the Plaintiff did a large renovation, which involved the rear wall of the house being demolished. The wall was made of fibro. A builder did the work.
7. Eric Charles Moore has provided an affidavit sworn 9 January 2009 in which he deposes to
- a. having worked at Goodyear;
 - b. the operations of Goodyear;
 - c. the presence of a lot of pipes in Goodyear all lagged with asbestos
 - d. that asbestos dust blew in from Amaca's premises, which were adjacent to Goodyear's premises.
8. Brian Coggin has provided an affidavit in which he states that:
- a. He is the brother of the Plaintiff;
 - b. He worked at Goodyear for a period of 2-3 years between 1963 and 1966. He gives evidence as to the operation of Goodyear and that dust blew in from Hardies.
 - c. The Plaintiff's father was also working at Goodyear while the brother was working there.
 - d. He also obtained employment at James Hardie between July 1975 and September 1975 and confirms having the Plaintiff launder his clothes.

First Defendant's Reply

9. The Amaca provided a reply and alleges as follows:
- a. Amaca accepts that the Plaintiff has the alleged condition;
 - b. Amaca accepts that the Plaintiff's condition was caused by exposure to asbestos;
 - c. Any flat asbestos cement fibro sheets used by the Plaintiff were not sufficiently particularised because of their reference to generic product and not to manufacturers. The same comment applied to lagging;
 - d. If the Plaintiff was exposed to any asbestos contained in insulation material manufactured by Amaca between 1964 and 1974, Amaca submits that such exposure would have been to products manufactured by the Hardie-BI Partnership;
 - e. Amaca first became aware in the mid-1960s that the inhalation of asbestos fibres could cause mesothelioma, but only in circumstances involving the inhalation of crocidolite fibres during processes involving

the handling of raw crocidolite in a factory manufacturing asbestos containing products or a crocidolite mine or mill;

- f. Amaca admits it failed to discharge its common law duty if there was exposure;
- g. Amaca should be placed in category 1;
- h. CSR should be placed in category 1;
- i. Goodyear should be placed in category 2;
- j. The standard presumption should be varied against Goodyear by increasing it by 15%;
- k. Goodyear should be attributed with actual knowledge;
- l. Amaca alleges that Goodyear was a very large company and was very sophisticated;
- m. Amaca submits that the apportionment should be determined as to 50% for Goodyear, 25% for Amaca and 25% for CSR;

Second Defendant's Reply

10. Goodyear provided a reply and alleges:
- (i) Admission of the Plaintiff's alleged condition;
 - (ii) That the Plaintiff's alleged condition was caused by asbestos exposure;
 - (iii) That the Plaintiff's exposure so far as Goodyear were concerned would extend between 1969 and 1976;
 - (iv) That Goodyear admits that it employed the Plaintiff's father;
 - (v) Goodyear expected evidence to establish that it had no knowledge of the dangers posed by asbestos during the relevant period, nor did it receive any warning from Amaca;
 - (vi) That Amaca should be placed in category 1;
 - (vii) Goodyear should be placed in category 2;
 - (viii) That the standard presumption should be varied to the maximum extent available as against Amaca for the reasons as set forth.
 - (ix) For the reasons identified, Goodyear regards apportionment to be 80% Amaca and 20% Goodyear.

Cross-Defendant's Reply

11. CSR by its reply alleges that:
- (i) Admits the claim for mesothelioma.
 - (ii) Admits that the Plaintiff's mesothelioma was caused by exposure to asbestos.
 - (iii) That during the period September 1964 to June 1974 CSR and Amaca were partners in the Hardies-BI Partnership and the Partnership manufactured certain asbestos contained in insulation products. CSR does not admit that the Plaintiff was exposed to any such products.
 - (iv) The Plaintiff makes no allegation of exposure to insulation products manufactured by Hardies-BI Partnership.
 - (v) The products manufactured by the Hardies-BI Partnership were limited in number and time (September 1964 to June 1974).
 - (vi) That each of the Defendants and the Cross Defendant should be placed in category 1.
 - (vii) As a primary submission, CSR submits that apportionment should be 96.38% against Goodyear, 3.62% against Amaca and nil against CSR.
 - (viii) As a second submission, given that Amaca was solely responsible for the day-to-day management of the factory and manufacturing activities, the apportionment should be 96.38% Goodyear, 3.62% Amaca and nil CSR.

Factual Considerations

1. The Plaintiff suffers from mesothelioma.
2. The condition the Plaintiff suffers is indivisible.
3. The type of asbestos to which the Plaintiff was exposed is in part known and in part not known.
4. The lag time between exposure and diagnosis is sufficient as against Defendants and the Cross-Defendant.
5. Neither Defendant nor the Cross-Defendant took any steps to minimise the risk of being exposed to asbestos.

Factual Conclusion

6. For a period of approximately 84 months the Plaintiff was exposed to her father's clothes approximately once a week.
7. The asbestos dust and fibre to which the Plaintiff's father was exposed came, in the main, from Amaca's premises and operation.

3. Between 1969 and 1974 Amaca and CSR were in partnership in the operations of Amaca and Amaca and CSR are equally liable for the Plaintiff's exposure during this period. For the Period 1974 to 1976, Amaca was solely responsible for exposure during this period.
9. For a period of 3 months in 1975 the Plaintiff was exposed to her brother's clothing approximately once a week.
10. In 1982 over two weekends there was some painting/renovation of the house.
11. In October 1985 over one day there were house renovations.
12. On the basis of exposure being as described by the Plaintiff, it seems that the following general apportionment can be made, namely:
 - (i) 92% of the exposure occurred as a result of asbestos dust associated with the Plaintiff's father's clothing while he was employed at Goodyear and thus 75% of the exposure occurred while Amaca and CSR were in partnership, and 25% occurred while Amaca operated its premises on its own;
 - (ii) 3% of the Plaintiff's exposure occurred as a result of the washing of the Plaintiff's brother's clothing whilst Amaca employed him.
 - (iii) 3% occurred while painting the house in 1982 and that would involve the products of Amaca.
 - (iv) 2% of the exposure occurred while house renovations were occurring, and again this involved the products of Amaca.
13. The standard presumption, in the 84-month period between 1969 and 1976, a category 1 employer is to be 65% liable while a category 2 employer is to be 35% liable with a variation allowed by 20 percentage points.
14. Dealing with that period between 1969 and 1976 [the 84 month period] while the Plaintiff's father worked at Goodyear, the standard presumption should apply subject to an increased variation of 20% as against Amaca/CSR until 1974 and thereafter as against Amaca. Accordingly, the apportionment for that period should be 75% for Amaca/CSR, 25% for Amaca and 15% for Goodyear.
15. In relation to the Cross-Claim, it is asserted by Amaca that there was a joint agreement, and while it is true that CSR alleges that day-to-day control was vested in Amaca, both CSR and Amaca are category 1. Apportionment in relation to that period should accordingly be equal.

Determination

16. I make the following determination:
 - (a) The Plaintiff's condition is mesothelioma, which is an indivisible condition.
 - (b) Amaca falls into category 1.
 - (c) Goodyear falls into category 2.

- (d) CSR falls into category 1.
- (e) The duration intensity of the exposure to asbestos during each period of employment was similar.
- (f) The Defendants are to contribute in the following portions:
 - (i) **Amaca = 56.87%** [i.e. 48.87% for father's Goodyear exposure (85% of 92% = 78.2% x 75% x 50% = **29.32%** + 25% of 92% = 78.2% x 25% = **19.55%**) + 3% for brother's Amaca exposure + 3% for 1982 renovation exposure + 2% for additional renovation exposure]
 - (ii) **Goodyear = 13.8%** [i.e. 15% of 92% of total exposure, for father's Goodyear exposure]
 - (iii) **CSR = 29.33%** [i.e. 85% of 92% = 78.2% x 75% = 58.65% x 50%]
- (g) I appoint the Amaca as the SCM (see clause 61(3)(b) of the *Dust Diseases Tribunal Regulations 2007*).



J.L. Sharpe

19 March 2009