

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

**DDT No. 218 / 2011**

**BETWEEN:**                    **ROBERT SJOBERG**  
   Plaintiff

**AND:**                         **STATE OF NEW SOUTH WALES**  
   Defendant/Cross-Claimant

**AND:**                         **AMACA PTY LIMITED**  
   First Cross-Defendant

**AND:**                         **WALLABY GRIP (BAE) PTY LIMITED (in liquidation)**  
   Second Cross-Defendant

**AND:**                         **AMACA PTY LIMITED**  
   Second Cross Claimant

**AND:**                         **CSR LIMITED**  
   Cross-Defendant to Second Cross-Claim

**CONTRIBUTIONS ASSESSMENT DETERMINATION**

1. The Registrar of the Dust Diseases Tribunal has referred this matter to me, pursuant to Regulation 49(1) of the *Dust Diseases Tribunal Regulations 2007* (hereinafter referred to as “the Regulations”) for a determination of apportionment as between the Defendants.
2. Regulation 47(1) provides that a reference to a defendant includes a reference to a cross-defendant.
3. In accordance with Regulation 49(4), I am required to make a determination on the assumption that each of the Defendants are liable, and I am to make the determination on the basis of the Plaintiff’s Statement of Particulars and the Defendants’ replies, and thereafter applying the standard presumptions as to apportionment.
4. The *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007* (hereinafter referred to as “the Standard Presumptions Order”) provides that

apportionment is to be in accordance with the Tables set forth in paragraph 5(1) of the Standard Presumptions Order.

5. On 12 August 2011 Robert Sjoberg (hereinafter referred to as “the Plaintiff”) commenced proceedings in the Dust Diseases Tribunal of New South Wales alleging that between January 1971 and on or about December 1976 he was employed by the State Rail Authority of New South Wales as an apprentice electrical fitter and subsequently as an electrical fitter at its premises at Chullora, Eveleigh, Redfern and Clydeburn. The State of New South Wales has been sued consequent upon the provisions of s.94 of the *Transport Administration Act 1988* in relation to the liabilities of the State Rail Authority of New South Wales.
6. The Plaintiff alleged in his Statement of Claim that he was suffering from mesothelioma consequent upon his exposure to asbestos dust and fibre while employed as aforesaid.
7. On 31 October 2011 the Plaintiff filed a Statement of Particulars which relevantly alleged:
  - (i) The Plaintiff commenced employment at the apprentice training centre at Chullora and spent 12 months at the training centre. During this time the Plaintiff had to handle asbestos sheets, which were 1 foot x 1 foot. The sheets were handled on a daily basis. The Plaintiff used compressed air to blow dust off the benches which dust included asbestos dust.
  - (ii) On between 20 and 30 occasions the Plaintiff broke up asbestos sheeting and then mixed it with water into a slurry and put it around high voltage cabling. The work was extremely dusty when breaking up the sheets.
  - (iii) Additionally, the Plaintiff wore asbestos gauntlets when doing soldering work and the gauntlets gave off asbestos dust into the air.
  - (iv) The Plaintiff regularly cut and drilled bakeligh panels and cleaned it up on occasions with compressed air hose, and accordingly breathed in the dust.

- (v) Additionally, the Plaintiff carried out work on electric motors for locomotives and used asbestos tape and also removed asbestos tape and was extremely dusty. On occasions, the Plaintiff used compressed air to blow out the dust.
  - (vi) Additionally, the Plaintiff had worked for Dryclad Leisure between 1978 and 1993 as a store person and in such employment he cut sheets of compressed asbestos sheeting with a circular power saw over a 3 year period between 1978 and 1981. In all, the Plaintiff estimated that he cut 30 or 40 compressed sheets over the 3-year period. In the course of performing his work, the Plaintiff was exposed to asbestos dust and fibre.
  - (vii) Dr Breslin rated the Plaintiff's exposure as very significant and well above background community exposure at the time.
8. On 14 November 2011 the Plaintiff filed an Amended Statement of Claim, which amendment related to a claim for economic loss but otherwise repeated the matters contained in his original Statement of Claim.
  9. On 14 November 2011 the State of New South Wales issued a Cross-Claim against Amaca Pty Ltd (hereinafter referred to as "Amaca") and Wallaby Grip (BAE) Pty Ltd (in liquidation) (hereinafter referred to as "Wallaby Grip") claiming contribution or indemnity by reason of they having supplied asbestos materials to the State of New South Wales.
  10. On 30 November 2011 the State of New South Wales amended its Cross-Claim against Amaca and Wallaby Grip claiming contribution in respect of the Plaintiff's employment with Dryclad Leisure.
  11. On 30 November 2011 Amaca issued a Second Cross-Claim against CSR Ltd (hereinafter referred to as "CSR") claiming contribution from CSR in respect of any liability of Amaca.

12. On 21 December 2011 the State of New South Wales filed a Reply which relevantly alleged that:

- (i) Between 18 January 1971 to 18 June 1976, the State of New South Wales employed the Plaintiff.
- (ii) The State of New South Wales should be placed in Category 2 while Amaca and Wallaby Grip should be placed in Category 1.
- (iii) If the State of New South Wales is a Category 2 Defendant then there should be no variation in the standard presumptions against it. However, if the State is a Category 1 Defendant and a Category 2 Defendant, then the standard presumption should be varied.
- (iv) On a calculation of the time of the Plaintiff's exposure, the State of New South Wales alleges that the total exposure in elapsed time would be approximately 1 year, while the Plaintiff's exposure as against Dryclad extended over a period of 3 years.
- (v) The apportionment should be:
  - (a) State – 8.75%
  - (b) Amaca – 83.12%
  - (c) Wallaby Grip – 8.13%
- (vi) The apportionment as between the State of New South Wales and Dryclad period of exposure should be 25% State of New South Wales and 75% Dryclad.

13. CSR filed a Reply on 23 December 2011 which relevantly alleges:

- (i) During the period 28 September 1964 to 26 June 1974 CSR and Amaca were partners in the Hardies BI Partnership. The Partnership manufactured certain asbestos containing products.

- (ii) CSR notes that the Claimant did not identify any partnership products.
- (iii) There is, accordingly, no evidence that the Plaintiff was exposed to any partnership products.
- (iv) Amaca, CSR and Wallaby Grip should be placed in Category 1 and State of New South Wales in Category 2. In addition, the State of New South Wales should be included as a Category 1 Defendant.
- (v) CSR submits in the alternative that the apportionment should be State of New South Wales 70% and Amaca 30%, or alternatively State of New South Wales 40%, Amaca 41.25%, Wallaby Grip 15% and CSR 3.75%.

14. Wallaby Grip provided a Reply on 11 January 2012 and relevantly alleges that:

- (i) BAE did not manufacture or supply woven insulation or asbestos sheeting, but it did supply (as one of a number of manufacturers) asbestos gauntlets between 1972 and 1976. Additionally, BAE admits that it manufactured asbestos tape between 1972 and 1976 and that it was one of a number of suppliers of asbestos tape. At no time did BAE manufacture or supply bakelight.
- (ii) Amaca, Wallaby Grip and the State should be placed in Category 1. The State should also be placed in Category 2.
- (iii) The standard presumptions ought to be varied in relation to the State of New South Wales and to take into account its actual knowledge of the dangers of inhaling asbestos dust and fibre and that the standard presumptions should be varied by 20 percentage points against the State.
- (iv) The liability should be:
  - (a) State of New South Wales – 54.25%
  - (b) BAE – 1.05%
  - (c) Amaca – 14.7%

- (v) In respect of the first period and having regard to the Dryclad period, the apportionment for that period should be adjusted so that the final apportionment should be:
  - (a) State of New South Wales 54.25%
  - (b) Amaca 44.7%
  - (c) BAE 1.05%

15. Amaca filed a reply on 10 January 2012 which relevantly alleges that:

- (i) The Plaintiff's claim is for two periods, namely 1971-1976 and 1978-1981.
- (ii) Amaca denies manufacturing gauntlets, woven insulation or tapes.
- (iii) Amaca submits that "asbestos sheets" are not particularised in relation to generic product description.
- (iv) The State of New South Wales should be categorised as Category 1 and Category 2 and that Amaca, Wallaby Grip and CSR should be placed in Category 1.
- (v) The standard presumptions should be varied against the State of New South Wales by a maximum of 20 percentage points as a Category 2 Defendant by reason of its size and sophistication.
- (vi) In the first period the Plaintiff was exposed to dust from gauntlets, woven insulation tape and asbestos sheet and, accordingly, the liability should be for such products as follows:
  - (a) Gauntlets – 25% (Wallaby Grip)
  - (b) Woven insulation – 25% (Wallaby Grip)
  - (c) Tape – 25% (Wallaby Grip)
  - (d) Asbestos sheets – 12.5% (Wallaby Grip)
  - (e) Asbestos sheets – 6.25% (Amaca)
  - (f) Asbestos sheets – 6.25% (CSR)

(vii) Thus in period 1 the apportionment should be:

- (a) State of New South Wales – 77.5%
- (b) Wallaby Grip – 19.68%
- (c) Amaca – 1.41%
- (d) CSR – 1.41%

16. On 19 January 2012 Amaca filed an Amended Reply which relevantly alleged that:

- (i) In the first period, namely 1971-1976, it was an innocent Defendant. In the second period, 1978-1981, it again asserts that it was an innocent Defendant.
- (ii) That it contests the *Woelfl* decision and repeats the calculations made previously.

17. Initially I am required to determine the existence of any separate periods of exposure pursuant to clause 5(8) and make a determination of what proportion of the whole each separate period bears having regard to the number of such periods, the length of each period, the duration of and the intensity of exposure to asbestos present in each such period. It is thus not appropriate to determine the relative contribution simply on the basis of the elapsed years between the various periods of exposure.

18. On the information presently before me it appears that

- (i) The Plaintiff was employed by the State of New South Wales between 18.1.71 and 18.6.76;
- (ii) The Plaintiff was employed by Dryclad for many years but the only exposure he had to asbestos in that period was for about 3 years;
- (iii) The Plaintiff's exposure to asbestos in the Dryclad years which consisted of approximately 30 asbestos sheets being cut by him over a 3 year period;
- (iv) In comparing the two periods of exposure, the Dryclad years was less intense and lighter than the earlier period of employment;
- (v) The exposure during the employment with the State of New South Wales accounts for 75% of the Plaintiff's total exposure.

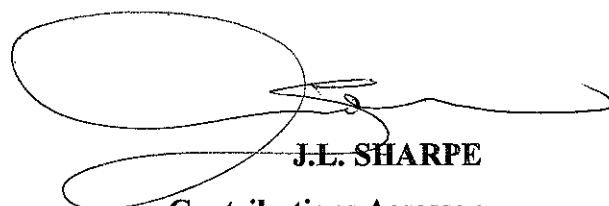
- (vi) The exposure during the Plaintiff's employment with Dryclad accounts for 25% of the Plaintiff's total exposure.
19. Any exposure between 1 January 1961 and 31 December 1978 is expressed to be in Period B in which a Category 1 Defendant is presumed to be 65% liable and a Category 2 Defendant 35% liable.
20. The difficulty in the present case is the lack of any real identification of any of the asbestos product used by the Plaintiff (with the exception of the compressed sheeting referred to in the Dryclad period).
21. On the information before me, I have determined that of the Plaintiff's exposure to asbestos dust and fibre in the first period of employment that only 40% thereof can be identified as being to a product of Amaca, Wallaby Grip or CSR, and that the remaining 60% was not identified as being supplied by any individual supplier.
22. I determine that Amaca, Wallaby Grip and CSR each fall into Category 1.
23. I determine that the State of New South Wales falls into Category 2.
24. Insofar as the Category 1 Defendants are concerned during the period of the Plaintiff's employment with the State of New South Wales, the liability should be divided equally between Wallaby Grip and Amaca. As between Amaca and CSR, on the information (or the lack thereof) I determine that it should be borne 75% Amaca and 25% CSR.
25. In the present case, having regard to the operation being conducted by the State of New South Wales, both in terms of its complexity and size, I determine that there should be a variation in the Standard Presumptions by 20%.
26. Thus the following calculations as to liability are made:

- (i) State of New South Wales – 75% of total exposure x 60% = 45% + 75% of total exposure x 40% x 55% (35% + 20% standard presumptions variation) = 16.5%. **Total = 61.5%**
- (ii) Amaca – 25% (Dryclad period) + 75% of total exposure x 40% x 45% x ½ = 6.75% less 25% = 5.0625%. **Total = 30.0625%**
- (iii) Wallaby Grip - 75% of total exposure x 40% x 45% x ½. **Total = 6.75%**
- (iv) CSR - 75% of total exposure x 40% x 45% x ½ = 6.75% less 75%. **Total = 1.6875%**

27. Therefore, I determine the total liability of the Defendants and Cross-Defendants as follows:

|       |                            |                       |
|-------|----------------------------|-----------------------|
| (i)   | State of New South Wales - | <b>61.5%</b>          |
| (ii)  | Amaca -                    | <b>30.0625%</b>       |
| (iii) | Wallaby Grip               | <b>6.75%</b>          |
| (iv)  | CSR                        | <b><u>1.6875%</u></b> |
|       | <b>Total</b>               | <b>100%</b>           |

28. Pursuant to clause 61 of the Regulations, I appoint the State of New South Wales as the Single Claims Manager as it is the Primary Defendant defined under clause 61(9) of the Regulations.

  
**J.L. SHARPE**  
**Contributions Assessor**

10 February 2012