

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

DDT No. 162/ 2009

BETWEEN:

STATE OF NEW SOUTH WALES
Plaintiff

AND

AMACA PTY LIMITED
Defendant

**CONTRIBUTIONS ASSESSMENT
DETERMINATION**

1. The Registrar has appointed me as the Contributions Assessor in this matter pursuant to Clause 49(1) of the *Dust Diseases Tribunal Regulation 2007 (NSW)* (**the Regulations**).
2. The determination is to be made by me on the papers, on the assumption that the defendant is liable, and applying the standard presumptions prescribed in the *Dust Diseases Tribunal (Standard presumptions – Apportionment) Order 2007* (**the Standard Presumptions**).
3. The plaintiff is the State of New South Wales (**NSW**). NSW was the sole defendant in proceedings brought by Hilma Doris Lisson (**Mrs Lisson**). Those proceedings have resolved and NSW now brings a claim against Amaca Pty Ltd (**Amaca**) seeking contribution or indemnity pursuant to s 5 of the *Law Reform (Miscellaneous Provisions) Act 1946*.
4. In forwarding the file to me the Registrar also included the file in Mrs Lisson's proceedings (DDT No 8230 of 2008) which provides the background to her claim and the basis upon which she alleges she was exposed to asbestos dust and fibre. Before turning to the facts of the claim as between NSW and Amaca it is necessary to set out the facts of Mrs Lisson's exposure.

Mrs Lisson's Exposure

5. Mrs Lisson was diagnosed with pleural mesothelioma. In her Statement of Particulars Mrs Lisson gives her history of employment between 1948 and 1994 in which she worked as a machinist for various garment manufacturers. She was not exposed to asbestos in the workplace. Her only recollection of exposure to asbestos was as a result of washing the clothes of her late husband, Kenneth Lisson (**Mr Lisson**) in the period March 1955 to about 1983: Mrs Lisson Statement of Particulars Part 3.2.
6. Evidence of Mr Lisson's occupational exposure was given by Mrs Lisson as well as several of his former colleagues Dennis Claxton and Bruce Everett as well as his son Bradley Lisson who worked with his father for several months in the 1970s. Extracting information from those sources Mr Lisson's history of employment and exposure to asbestos is as follows:
 - (a) Mr Lisson was born in 1934. From 1949 to 1993 Mr Lisson was employed by the Department of Public Works (**the DPW**). The DPW was his sole lifetime employer. He trained as a fitter and turner and was later promoted to the position of supervisor.
 - (b) A large part of Mr Lisson's employment involved him being present at the James Hardie factory in Camellia (**the Camellia Factory**) to inspect and test asbestos cement pipes manufactured by Amaca and supplied to DPW.
 - (c) Mr Lisson started at the Camellia Factory several years after starting with DPW.
 - (d) The testing involved running water through the pipes to test for pressure. He also measured the circumference and thickness of the pipes. The testing involved asbestos cement pipes exploding from time to time. The pipe department where he worked was described by Mr Claxton as "dusty". Bradley Lisson worked at the Amaca factory and said because his father was an inspector he spent most of his time on the factory floor where the pipes were manufactured, lathed and finished.
 - (e) Mr Lisson moved from the Amaca factory into an office job in the city in about 1984 or 1985.
 - (f) He wore overalls to work and when he came home Mrs Lisson washed them.
7. Mrs Lisson described her exposure to asbestos as follows:

"4.1(e) Kenneth brought home his overalls for me to wash, and I washed a couple of pairs of overalls at the end of each week. Kenneth had 2 or 3 pairs of

overalls that he used every week. As he dirtied the overalls he left each pair in the laundry and then I washed them all at the end of the week together.

(f) *At the end of each week Kenneth's overalls were covered in white dust. I picked one pair of overalls up at a time from the laundry tub and took them outside to shake them over the grass. I shook them as hard as I could, before returning to the laundry to collect the next pair of overalls and repeat the process all over again. I took each pair of overalls separately into the back yard and shook the dust off each pair over the lawn before I washed them. Because I am so short and Kenneth's overalls were so big, I would be covered in white dust when I shook the overalls out. It was in the air all around me.*

(g) *The overalls were dusty, and I didn't want to ruin my washing machine. I initially washed the overalls using a gas copper, but I still shook the dust off the overalls before washing them because there was just so much dust on them. After I shook each pair of overalls, I could see the dust in the air. I then washed his overalls separately from the other washing. I performed the task the same way every weekend during the period that Kenneth was working at James Hardie".*

8. NSW admits employing Mr Lisson in the period alleged, that he was exposed to asbestos and that the description of the intensity of his exposure was correct.
9. NSW has filed an Amended Reply which sets out its arguments on apportionment as against Amaca. Amaca has also filed a Reply.

Categorisation of Defendants

10. NSW contends that it should be placed in category 2 and Amaca in category 1.
11. Amaca submits that NSW should be placed into Category 1 on the basis that it was an installer and in category 2 on the basis that it was Mr Lisson's employer.
12. The question of whether or not DPW was an installer of asbestos products is difficult to address on the facts of this case. Reviewing the material I am entitled to consider (Regs

49(4)) there is no evidence that DPW was an installer of the asbestos cement pipes that were manufactured at the Camellia Factory.

13. The concept of “installer” is described in Cl 5(2) of the Standard Presumptions to include “*the designer and manufacturer of particular plant and equipment which included asbestos as part of its design, as well as a company which is engaged to install the plant in accordance with the manufacturer’s instructions*”. It may well be that DPW was responsible for the installation of the pipes but there is simply no evidence on that issue. Even if DPW was an installer there is no allegation that Mr Lisson was ever present or personally involved in that installation process. For that reason I do not propose to place NSW in category 1 on the facts available to me in this case.

14. Accordingly, I categorise the parties as follows:

Category 1 Amaca

Category 2 NSW

Application of the Standard Presumptions

15. NSW contends that the Standard Presumptions should be varied by increasing them by 20% as against Amaca on the basis that it had actual knowledge of the dangers of asbestos. I reject that submission because the Standard Presumptions already take into account the fact that manufacturers were cognisant of the actual knowledge of the dangers of asbestos (see Cl 5(1) fn 6).

16. NSW then submitted that the apportionment attributed to Amaca should be increased because of its size, identity, capacity and state of sophistication which point to a greater culpability and relative blameworthiness. In my view the apportionment prescribed by the Standard Presumptions presently take that into account.

17. Amaca submits that NSW should have its liability increased by 20% on the basis that:

- (a) It was a very large and sophisticated employer;
- (b) It is/was a government entity and had access to materials held by the New South Wales State Government and the Department of Health as to the dangers of the use of asbestos; and
- (c) NSW had control over Mr Lisson as his employer (whilst in the Amaca factory premises) and owed him a non-delegable duty of care to provide him with a safe

system of work. It submits that NSW should have supplied protective equipment to Mr Lisson.

18. It seems to me that the latter of Amaca's submissions is really directed at the duty owed to Mr Lisson rather than Mrs Lisson. Even if Mr Lisson were given a facemask and provided with a safe system of work it would have had no effect on Mrs Lisson as her exposure arose due to cleaning her husband's overalls at home.
19. On first view I was minded to increase the liability of NSW for the reasons identified in paragraph 17(a) and (b) above. However, it is necessary to remember that the facts of this case are not as to the level of knowledge of NSW with respect to Mr Lisson but with respect to Mrs Lisson, being a third party. The issue of the existence of a duty of care and breach in respect of third parties is a difficult issue and has been the subject of a very lengthy judgment in the Court of Appeal this year: *Caltex Refineries (Qld) Pty Ltd v Stavara* [2009] NSWCA 258.
20. The facts of this case are very unusual. Although Mr Lisson was employed by DPW he spent almost 30 years working in the Camellia Factory. That is where his exposure occurred.
21. I would have been satisfied that NSW was aware of the dangers of asbestos with respect to Mr Lisson but there is no material to indicate that it had any special knowledge of the dangers to third parties, such as Mrs Lisson. Without more, I would have been minded to increase the liability of NSW by about 10% from the mid 1960s. However, I consider the fact that Mr Lisson's exposure occurred in the Camellia Factory to be a particularly important factor which weighs against Amaca.
22. So, although NSW employed Mr Lisson the circumstances of his exposure and the party with most control over whether he should be protected (as well as Mrs Lisson) was in fact Amaca as it owned and operated the facility as occupier where his exposure occurred. Even though Amaca wasn't Mr Lisson's employer it owed a duty of care to him as an entrant to its premises.
23. Weighing those respective factors against each of NSW and Amaca I have formed the view that they balance each other out. Accordingly, I do not amend the Standard Presumptions against either party.

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

- (a) Mrs Lisson suffered from mesothelioma. Mesothelioma is an indivisible disease;
- (b) She was exposed to asbestos in the period March 1955 to about 1984 (when he went to work in the city in an office role);
- (c) Mrs Lisson’s exposure was high and did not vary materially in the years she was exposed;
- (d) The lag time between her exposure and diagnosis is consistent with the latency period of mesothelioma;
- (e) Mrs Lisson was a third party and had no relationship with Amaca or NSW by reason of employment, occupier/entrant or supplier/user;
- (f) Both Amaca and NSW were large and sophisticated entities; and
- (g) No effective steps were taken by Amaca or NSW to advise Mr Lisson or Mrs Lisson of the dangers of exposure to asbestos.

The Apportionment

25. Reviewing the material from Mrs Lisson file she says that her exposure commenced in March 1955: Statement of Particulars CI 3.2. Mr Claxton says that Mr Lisson’s employment at the Camellia Factory ceased in 1984 or 1985 when Mr Lisson moved to the city office. I have assumed that Mrs Lisson’s exposure ceased in December 1984.

26. By reference to the Table of Standard Presumptions exposure occurred in the following periods:

Period	Years	Percentage of Total	Apportionment
Mar 1955 – Dec 1960 (Period A)	5.75	19.33%	Amaca: 75% NSW: 25%
Jan 1961 – Dec 1978 (Period B)	18	60.5%	Amaca: 65% NSW: 35%
Jan 1979 – Dec 1984 (Period C)	6	20.17%	Amaca: 60% NSW: 40%

27. Accordingly the cumulative apportionment is as follows:

NSW	$19.33\% \times 25\% + 60.5\% \times 35\% + 20.17\% \times 40\% = 34.1\%$
Amaca	$19.33\% \times 75\% + 60.5\% \times 65\% + 20.17\% \times 60\% = 65.9\%$

28. I have not been asked to appoint a Single Claims Manager.

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David Jay

Contributions Assessor

16 December 2009