

**ANTOINETTE TONIA SULTANA v GEORGE WESTON FOODS LIMITED &
STEGGLES PTY LIMITED**

DUST DISEASES TRIBUNAL OF NSW CASE NO: 100 of 2011

**DETERMINATION OF APPORTIONMENT PURSUANT TO CLAUSE 49 OF THE
*DUST DISEASES TRIBUNAL REGULATION 2007***

1. I have been appointed the Contributions Assessor pursuant to clause 49(1) of the *Dust Diseases Tribunal Regulation 2007* (NSW) (**'the Regulation'**).
2. In coming to this determination of apportionment (**'Determination'**), I have had regard to the plaintiff's statement of particulars filed on 1 July 2011, the reply filed by the first defendant (**'GWF'**) on 12 August 2011 and the reply filed by the second defendant (**'SPL'**) filed on 29 July 2011.
3. I am not aware of any agreement between GWF and SPL as contemplated by clause 49(5) of the Regulation and, as such, I will proceed on the assumption that each of the defendants are liable as required by clause 49(4) of the Regulation.

FACTS

4. The plaintiff alleges she suffers mesothelioma. I note that fact is not conceded by either GWF or SPL. For the purpose of the Determination I will proceed on the basis that the plaintiff does suffer mesothelioma. That, of course, is an indivisible condition as contemplated by clause 5(7) of the *Dust Diseases Tribunal (Standard Presumptions - Apportionment) Order 2007* (**'the Order'**).
5. The plaintiff alleges that she was exposed to asbestos dust and fibre as follows:
 - 5.1 From September 1979 and December 1981 in the course of employment by GWF. She alleges that during that period:
 - (i) she worked at GWF's factory at Marsden Park as a process worker under and in fairly close proximity to steam pipes lagged with insulation material that contained asbestos;

(ii) some of the insulation was in poor repair and *'falling off'*.

She, accordingly, alleges regular modest bystander exposure and, further, *'occasional'* exposure as a consequence of being in the vicinity of maintenance work where the lagging was removed. She does not provide any specific particulars as to the frequency at which she worked under deteriorated as distinct from 'sound' lagging nor the frequency of her exposure when the maintenance work was undertaken.

5.2 In the course of attending to wash her husband's (**'Frank's'**) work clothes in the period between September 1979 and August 1984. During this period, Frank was employed by GWF in the maintenance department and was required to periodically undertake work on or cleaning up lagging and, I find, during this period undertook weekend work for 6 weeks during which he assisted in the removal of an asbestos cement fibro roof and preparation for the installation of a new roof at GWF's premises . During this period, the plaintiff alleges she regularly came into physical contact with Frank whilst he was wearing overalls contaminated with asbestos dust and fibre.

5.3 In the course of laundering Frank's work clothes between August 1984 and December 1989 during which period Frank was employed by SPL in work which was roughly equivalent to the work Frank performed during his employment with GWF. The plaintiff was also exposed during this period as a consequence of physical contact with Frank when he was wearing overalls contaminated with asbestos dust and fibre.

6. I note the plaintiff particularises another maintenance project on which Frank worked, being the removal of a boiler lagged with insulation containing asbestos. It is not clear from the material before me when that work occurred.

7. Doing the best I can on the factual material before me, I find that:

7.1 the plaintiff was exposed in the course of employment by GWF between September 1979 and December 1981 (the **'Bystander Exposure'**).

7.2 the plaintiff was exposed to asbestos dust and fibre as a consequence of physical contact with Frank and as a consequence of washing Frank's work

clothes between September 1979 and December 1989 (**'the Laundry Exposure'**);

7.3 the laundry exposure was consistent and uniform throughout the entire period;

CATEGORISATION OF DEFENDANTS

8. Both GWF and SPL submit that each defendant is appropriately categorised as a Category 2 company as contemplated by clause 5(2)(b) of the Order. I agree and so find.

DIFFERENTIAL DETERMINATION - SEPARATE PERIODS

9. Clause 5(7) of the Order requires me to consider whether separate periods of exposure exist to facilitate a differential determination of the contribution of each such exposure period.
10. GWF submits in s8 of its reply that it is appropriate to consider the matter on three differential periods, being:
- 10.1 the period during which the plaintiff was employed by GWF and received both Bystander Exposure and Laundry Exposure;
 - 10.2 the period after the plaintiff ceased employment but received Laundry Exposure while Frank was employed by GWF; and
 - 10.3 the period of the Laundry Exposure while Frank was employed by SPL.
11. SPL submits that I should differentiate between the period GWF was responsible for exposure as distinct from the period SPL was responsible for exposure.
12. Both approaches are roughly consistent.
13. I am satisfied that separate periods of exposure exist which warrant a differential determination of the contribution of GWF and SPL. In considering the different causal culpability, I will apportion based upon the quantity of exposure for which GWF and SPL are respectively responsible. The first task is to assess the quantity of the Bystander Exposure for which GWF is exclusively responsible. The second task is to

apportion liability for the Laundry Exposure for which GWF and SPL are successively responsible.

THE BYSTANDER EXPOSURE

14. In that respect, the plaintiff had occasional bystander exposure when she worked in areas of the GWF factory where the asbestos lagging was in poor condition and occasionally when maintenance work requiring the disturbing of insulation was undertaken directly in her work area. There is no evidence which directly quantifies the extent of this exposure. I find that it was light and occasional, in the order of, on average, 10 to 15 minutes per month. Accordingly, during the 26 month employment period, the Bystander Exposure was 6.5 hours in duration.

THE LAUNDRY EXPOSURE

15. Otherwise, with the Laundry Exposure comprised shaking out dust from Frank's work clothes which the plaintiff says occurred for 5 to 10 seconds in a confined space (the laundry) and then it was necessary for the plaintiff to sweep the laundry to '*clean up*' the dust. Obviously, the plaintiff would also be working in a '*dusty environment*' whilst she did the washing. Further, the plaintiff had physical contact with Frank on a more or less daily basis during the period. I find that the Laundry Exposure is properly assessed at 15 minutes per week between September 1979 and December 1989 (575 weeks), being about 143.75 hours.

APPORTIONMENT

16. As such, the Bystander Exposure was 4.5% of the overall exposure. GWF is exclusively liable for that exposure.
17. The Laundry Exposure was 95.5% of the exposure. GWF was Frank's employer for 48% of the time and SPL for 52% of the time.
18. Thus, the Laundry Exposure is apportioned as follows:
- 18.1 GWF - 48% of 95.5% = 45.84%
- 18.2 SPL - 52% of 95.5% = 49.66%
19. Accordingly, I apportion contribution as follows:

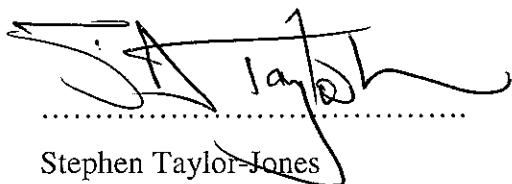
19.1 GWF:

(i)	Bystander Exposure	4.50%
(ii)	Laundry Exposure	<u>45.84%</u>
	Total	50.34%

19.2 SPL: **49.66%**

20. I have considered the submission by GWF that it is appropriate for me to exercise discretion to increase the culpability of SPL on the basis that the exposure for which SPL is responsible occurred later in time. I reject that submission in this instance because the totality of the exposure occurred between 1979 and 1989 and I do not accept that there was a substantial difference in the understanding of the risks presented by inhalation of a relatively modest concentration of asbestos dust in '*laundry work*' during that period. I particularly note that there is no evidence before me that SPL had actual knowledge of any increased level of knowledge of the risk presented by inhalation of dust as a consequence of '*laundry work*'.
21. I appoint GWF as the Single Claims Manager.

Dated this 26th day of August 2011.



Stephen Taylor-Jones

Contributions Assessor