

IN THE DUST DISEASES TRIBUNAL
OF NEW SOUTH WALES
DDT No. 209/2010

NOEL GEORGE ARTHUR THOMSON

Plaintiff

COMCARE

Defendant

Cross-claimant

DPSPL PTY LIMITED

First Cross-Defendant

CARDROSS PTY LTD

Second Cross Defendant

OXLEY STEVEDORING CO PTY LTD

Third Cross Defendant

DP WORLD HOLDINGS (AUSTRALIA) LTD

Fourth Cross Defendant

HOWARD SMITH LTD

Fifth Cross Defendant

MCARTHUR SHIPPING AND AGENCY CO PTY LTD

BURNS PHILP & CO LTD

Seventh Cross Defendant

HURRICANE WIRE PRODUCTS (AUST.) PTY LTD

Eighth Cross Defendant

NEWSTEAD WHARVES PTY LTD

Ninth Cross Defendant

CONTRIBUTIONS ASSESSMENT
DETERMINATION

1. The Registrar referred this matter to me pursuant to the *Dust Diseases Tribunal Regulation 2007* (“*the Regulations*”) for a determination of apportionment. My determination is to be made on the papers, on the assumption that each Defendant is liable, and by applying the *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007* (“*the Standard Presumptions*”).
2. For convenience, I will where necessary refer to the parties as:

Defendant/Cross-claimant – “**Comcare**”

First Cross-Defendant “**DPSPL**”

Second Cross-Defendant – “**Cardross**”

Third Cross-Defendant “**Oxley**”

Fourth Cross-Defendant “**DP World**”

Fifth Cross-Defendant “**Howard Smith**”

Sixth Cross-Defendant “**McArthur**”

Seventh Cross-Defendant “**Burns Philp**”

Eighth Cross-Defendant “**Hurricane**”

Ninth Cross-Defendant “**Newstead**”

I take the opportunity to note that the Cross-defendants are commonly represented and that as far as I can see have commonly replied so that throughout I will refer to them generically as “**the Cross-defendants**”

3. Basis for Determination

- A. Regulation 49(4) prescribes that my determination is to be made on several bases and assumptions as follows:-
 - The assumption that each Defendant is liable;
 - On the Plaintiff’s Statement of Particulars (PSP) ; and

- On the Defendant's and 9 Cross-Defendants' Replies; I note there have in fact been amended and Additional Replies filed and served as a consequence of issues raised which I will discuss below; and
- On the Standard Presumptions as to apportionment.

The relevant "Standard Presumptions" are set out within the Dust Diseases Tribunal (Standard Presumptions Apportionment) Order 2007 - Schedule 1.

- B.** Mr. Thompson suffers with asbestosis and asbestos related pleural disease. Each is a divisible disease. Clause 5(8) of the Standard Presumptions directs the methodology which I should adopt in determining apportionments when considering multiple contributions to a claim involving a divisible disease. More specifically, this directs that:-

(8) Where the disease is a divisible disease (i.e. asbestosis or pleural disease), the independent Contributions Assessor will first determine (on the basis of the papers) the existence of any separate periods of exposure. A determination will then be made of what proportion to the whole, each separate period of exposure bears having regard to the number of such periods, the length of each such period, and the duration of and intensity of exposure to asbestos within each period⁶. The Contributions Assessor is to treat each separate period as equal in contribution to the disease unless satisfied that a variable weighting ought apply. The Contributions Assessor will then apply to each separate period the proportions set out in the table above. Where periods of exposure span the index periods specified in the Table to subclause (1), the Contributions Assessor is to adjust the standard presumptions to reflect the changing apportionments in different index periods, unless one of the periods is immaterial

- C.** Accordingly:

- (i) I determine on the basis of the papers the existence of separate periods of exposure that do direct a differential determination of the contribution of each exposure period; and
- (ii) I determine that I should calculate the proportions of the whole each separate period of exposure bears having regard to the number of periods, the length of such period and the duration of and intensity of exposure to asbestos within each period that are described by the Plaintiff in the material available to me for consideration

Relevant Facts:

- 4. From the Plaintiff's Statement of Particulars (PSP)** The Plaintiff worked between 1964 and 1997 on the Brisbane waterfront; as a casual waterside worker for numerous stevedoring companies including the cross-defendants named herein (though the Plaintiff notes that this is not an exhaustive list) until 1968 where after he was allocated as a permanent employee to Brisbane Stevedoring Services ("BSS") where he remained "*until just prior to the 1974 Brisbane floods*". The Plaintiff's estimate is that from 1964 till about 1972 he manually unloaded raw asbestos cargo (*unloading about 4 to 5 loads of asbestos cargo each year*) with most of his exposure to asbestos occurring when he worked as a casual. He subsequently worked for numerous stevedoring companies as a permanent worker but at 4.26 the Plaintiff notes "*I believe my last date of exposure to asbestos occurred sometime in the early to possibly as late as the mid 1970's...when containerisation was fully implemented...*"
5. The Plaintiff's summation of his exposure is: "*...90% of my asbestos exposure occurred as a casual and about 10% thereafter when working for Brisbane Stevedoring Services*" (PSP 4.7) Whilst conceding that he "*worked for so many different companies it is impossible to be precise about the companies that [I] was allocated to when handling the raw asbestos*". (PSP 4.1 top p13). I of course as noted above am commissioned to proceed on the basis that all of the Defendants are liable but pause to note that with a divisible disease consideration arises that some of the blame apportionable in this matter cannot be brought to bear as some employers are apparently forgotten or deregistered and their share cannot be divided between the employer Cross-defendants .
6. The Plaintiff gives more details of the intensity of his exposure in 4.1 and it is generally accepted by all defendants in the replies that 90% of the exposure was in the casual employment. The significant issue that is raised between the Defendant and, commonly, the Cross-Defendants is the differential responsibility of the port inspectors (for which Comcare is liable) and the employers (of which the Plaintiff has been able to identify for the Cross-claimant to sue the 9 Cross-defendants).

7. Category of Each Defendant:

I determine that all of the Defendant and Cross-defendants are Category 2 Defendants for the purpose of my application of the standard assumptions as directed.

8. For its part Comcare argues in its Reply filed 22 November 2010 that:

- On the basis of the PSP the Plaintiff had 12 employers between which on a “time on risk” basis the 90% exposure to asbestos described by the Plaintiff divides to 7.5% per company.
- Comcare also argues that my “unfettered discretion” allows me to vary apportionment between the Category 2 defendant and Cross-defendants and refers me to decisions of the Tribunal which it submits directs the relative culpability of 85% to the Stevedoring company employers and 15% to Comcare. (In particular to the decision of Curtis J in Re Bowie [2005] NSWDDT and to a Contributions Assessment (In Re: Lake) which it is said by Comcare follows the methodology in Re Bowie
- Ascribing the full 10% for the permanent employment to Comcare and a balance of 32.4% (after ascribing $85\% \times 7.5\% = 6.4\% \times 9 = 57.6\%$ to the Cross-defendants) for the 90% of exposure in casual employment that Comcare should have 42.4% and each of the 9 Cross-defendants have 6.4% liability.

9. The common Reply from the 9 Cross-defendants (para 6.3) pleads the actual knowledge of Comcare in contrast to the (asserted) lack of knowledge of the Cross-defendants during the exposure period and again refers me to (other) case law (SIFC v Gibson DDT 89 of 2006 [unreported]). I am told nothing of how that sits with Re Bowie or how it is distinguished and why I should prefer it over Curtis J’s decision. The Cross-defendants go on commonly in their Replies filed 24 December 2010 to say:

- they presume on the basis that the Plaintiff names 12 stevedoring company employers but can’t remember others and that only 9 are sued, that they (the Cross-defendants) comprise 50% of his casual work employment in that (90% of his) exposure period; and
- consequently the 9 Cross-defendants share 50% of that 90% liability: $45/9=5\%$ each; and
- by reference to a contribution assessment in another matter based on “actual knowledge” that a 20% uplift should be applied to Comcare’s proportion of liability. Some numbers are then set out at 8.2 on p12 of the Reply which I cannot follow but seem to propose 13.5% liability on the Cross-defendants.

10. As a result of the Cross-defendants' Replies, Comcare on 17 January 2010 filed an Additional Reply to the Replies of the Cross-defendants, arguing:

- against the application of the contributions assessment raised by the Cross-defendants for relevance and lack of a copy; and
- for variation of the standard presumptions by reference to the further potential liability of Workcover Queensland (the indemnifier of the Cross-defendants as noted para 7 of their respective Replies) for the missing or forgotten employers; and
- that the Cross-defendants submission has incorrect mathematics in 8.2 of the Cross-defendants' Replies (not specified)

11. On 9 February 2011 I received directly from solicitors for the Cross-defendants further documents which I was subsequently informed by the Tribunal had also been filed being:

- Amended Replies from all 9 Cross-defendants; and
- Additional Replies from all 9 Cross-defendants; and
- A letter dated 28 January 2011 from solicitors for the Plaintiff.

12. It is worth repeating what I have observed in 3.A above that my task is to make my assessment based on the PSP and the Replies. Each of the parties would, however, have me directed by determinations in other matters and extraneous considerations, including contribution assessments in other matter, correspondence passing between them but not included in the Replies and a letter solicited by the Cross-defendants' representative from the Plaintiff's solicitors which is annexed to the Additional Reply. (Whilst there has been no further or additional Reply from Comcare I have some concerns at the Cross-defendants eliciting of further and somewhat differing particulars from the Plaintiff in this way where arguably Comcare has not had the opportunity to make yet further Reply. The letter requesting the further particulars does not appear to have been copied to Comcare or its legal representatives and the Plaintiff's solicitor's letter first appears with the Additional Replies.)

13. Nevertheless I acknowledge that in the Cross-defendants' common Amended Replies the mathematics are corrected but it is still asserted that the Cross-defendants should equally share 13.5% of the liability with the balance of 86.5% (the sum of 10% for the permanent work, 45% for the unidentified casual employers and 70% x 45% i.e.31.5% [by way of my making a discretionary 20% uplift of the 45% asserted as the Cross-defendants' share of the casual work liability]).

14. Further, in the Additional Replies the Cross-defendants commonly:

- take issue with Comcare's submissions in its Additional Reply (1 a-f) that the Cross-defendants' insurer Workcover Queensland ("*Workcover*") has escaped its fair share anyway by the absence of the Plaintiff's unrecalled or deregistered casual employers and therefore should not enjoy a 50% reduction for absent employers.
- say correctly that Workcover is not a defendant in the proceedings.
- assert that contrary to Comcare's assertion of Workcover's ability to identify "*all possible employers*" that it is Comcare as the successor to the SIFC (Stevedoring Industry Financing Committee) which is better placed to identify the employers.
- assert (apparently misquoting from the annexed 28 January 2011 letter) that a "substantial" [the word used in the letter is "significant"] part of the Plaintiff's casual exposure was with BSS which is not sued because it is deregistered and this is raised in support of the submission the Cross-defendant makes for reduction of their collective liability to 50% of 90% as discussed in 9 above.

Assessment:

15. It is not in my view contemplated by the Regulations that there should be the to-ing and fro-ing in the filing of Replies and Additional Replies and the direct correspondence with me that has occurred in this matter and I have expressed my concern about at least a question of fairness that might arise when the Replies and letters are delivered in this ad hoc way.

16. I find that I am not assisted by submissions both ways as to case-law (in one case unreported) that seeks to support quite diametrically opposite positions as to a greater responsibility of the port inspectors (for which Comcare is liable) and the employers of which the Plaintiff has been able to identify the 9 Cross-defendants. Comcare says 85% should go to the employers for the period of causative employment based on *Re Bowie* and the Cross-defendants say a variation upward to 70% should be made to the port inspector's (Comcare's) otherwise 50% share of the common period of causative employment (in this case 90% of the total exposure) based on the unreported case and the Contribution Assessor's decision in *Commonwealth of Australia v BWWD Pty Limited* DDT No 7244/2007. (BWWD)

17. Whilst I am not directed to have regard to or follow assessments in other matters, it is worthwhile noting that there is a significant difference in the Plaintiff's history in BWWD in that his account was of similar exposure in the permanent and casual employment with BSS (Annexure 2 p3 (g) Cross-defendants' additional Replies). Such a variation raises an immediate example of the reservations I have as to relevance where the Parties have accepted a 90:10 ratio between casual and permanent exposure in this matter.

18. I find it difficult to weigh the competing 70:30 and 15:85 arguments as to proportions having regard to the “missing” casual employers and the Plaintiff’s belief that the port inspectors “*made the rules and had control over our work*” as against Curtis J’s finding in Re Bowie by reference to employers’ statutory duties which I do find to be a compelling distinction.

19. 12 companies are named as employers but allowing for the Plaintiff’s forgetfulness (in the PSP he says “*it is impossible to be precise about the companies that I was allocated to when handling raw asbestos*” whereas in the solicitors January 28 letter the Plaintiff is reported to say that “*a significant proportion of the 90% of exposure that occurred as a casual occurred with BSS as it did with Patricks... [and]... significant asbestos exposure with Newstead ...*”). I do not regard the other separate correspondence I have been sent as within my contemplation but do consider the 28 January letter (Annexure 1 to the Cross-defendants’ additional Replies). I will assume 15 employers so that dividing that on a “time-on-risk” basis for the 90% would mean 6% liability to each company. On an “intensity-of-exposure” basis adjustment should also be made for the apparently more culpable Cardross, Newstead and BSS employment and I make that by adjusting that 6% down to 5% liability to each of the Cross-defendants bar ascribing say 8% to Cardross and Newstead.

20. In the end I prefer the Curtis J approach by reason of the statutory duties but rather than an 85:15 ratio I make the 20% downward variation to the Standard Presumption of 50:50 in favour of Comcare for the casual period of exposure i.e. 70:30

18. I ascribe apportionment as follows:

<u>Permanent Period</u> Comcare	10%
<u>Casual Period (90% exposure)</u>	
First Cross-Defendant “DPSPL”	70% x 5% = 3.5%
Second Cross-Defendant – “Cardross”	70% x 8% = 5.6%
Third Cross-Defendant “Oxley”	70% x 5% = 3.5%
Fourth Cross-Defendant DP World”	70% x 5% = 3.5%
Fifth Cross-Defendant “Howard Smith ”	70% x 5% = 3.5%
Sixth Cross-Defendant “McArthur ”	70% x 5% = 3.5%
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