

Giuseppe Trecapelli –v- Oirt Pty Limited, ACN 003 451 910 Pty Limited & Amaca Pty Limited

Amaca Pty Limited –v- CSR Limited

DDT No 7627/07

Determination of Apportionment

1. The Registrar of the Dust Diseases Tribunal referred this matter to me to determine the contribution that each 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 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 solely on the basis of:
 - a. The Plaintiff's Statement of Particulars
 - b. The Defendants' Replies
 - c. The Standard Presumptions, which are incorporated in the Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007.
4. The Standard Presumptions in the Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007 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.

The Plaintiff's Particulars

5. Giuseppe Trecapelli (hereinafter referred to as "The Plaintiff") has brought proceedings in the Dust Diseases Tribunal against three Defendants, namely Oirt Pty Limited (First Defendant), ACN 003 451 910 Pty Limited (Second Defendant) & Amaca Pty Limited (Third Defendant). The Third Defendant has cross-claimed against CSR Limited (The Cross Defendant).
6. By his Statement of Particulars the Plaintiff alleges that: -
 - a. He suffers from

- i. Asbestos Related Pleural Disease in the form of Pleural Plaques.
 - ii. Generalised anxiety disorder.
- b. In relation to the First Defendant:
- i. The First Defendant employed him as Truck driver for 7 to 8 months in 1969.
 - ii. The First Defendant between 25.9.70 until 30.7.91 employed him as Truck driver.
 - iii. In the course of his employment with the First Defendant he was exposed to asbestos dust and fibre.
 - iv. In the course of his employment he loaded asbestos products at the First Defendant's factories onto his truck, and then delivered them to various worksites.
 - v. At the First Defendant's premises the Plaintiff was exposed to asbestos dust when fellow workers were involved in pipe lagging and breaking up of the asbestos.
 - vi. At the worksites the Plaintiff was present while other workers, to whom he made deliveries of asbestos products, were using the asbestos for pipe lagging.
 - vii. In about 1980 or 1981 the Plaintiff delivered asbestos products daily to Caltex Refinery at Kurnell.
 - viii. The Asbestos products were mainly in the form of tubes and sheeting manufactured by the Third Defendant. The Plaintiff alleges "much of my work involved handling bags of asbestos dust".
 - ix. On "seldom" occasions the Plaintiff attended at the Third Defendant's premises where he loaded asbestos products onto his truck for transport to the First Defendant's premises.
 - x. When he attended the Third Defendant's premises he was exposed to asbestos products.
 - xi. Additionally, the Plaintiff alleges that he broke up pieces of asbestos using a hammer to turn the pieces into fine powder, which was then used as "mortar" for insulation.
 - xii. Additionally, in 1988 or 1989, the Plaintiff removed asbestos products from various sites and deliver to the tip. These products were wrapped in plastic but the Plaintiff still breathed in asbestos dust.
 - xiii. Additionally, the Plaintiff relies upon a report of Dr. Bryant (dated 8.8.07) where a clear history is given to the doctor of exposure to asbestos dust when handling "asbestos rope". It is clear that the Plaintiff's assertion that the Third Defendant supplied all asbestos products must be open

to some doubt given the lack of any credible evidence that the Third Defendant ever supplied asbestos rope.

- xiv. His exposure to asbestos while employed by the First Defendant was "daily". The Plaintiff worked 8 to 10 hours per day 5 days per week as well as overtime on weekends. The intensity of exposure was "high".
 - xv. After 1989, disposable masks and overalls were provided to the Plaintiff.
 - xvi. The Plaintiff estimates that 85% of his exposure occurred while employed by the First Defendant.
- c. In relation to the Second Defendant:
- i. The Second Defendant from 31.7.1991 to 2.5.1994 employed him as Truck driver.
 - ii. In the course of his employment with the Second Defendant he was exposed to asbestos dust and fibre.
 - iii. In the course of his employment he loaded asbestos products at the Second Defendant's factories onto his truck, and then delivered them to various worksites.
 - iv. At the Second Defendant's premises the Plaintiff was exposed to asbestos dust when fellow workers were involved in pipe lagging and breaking up of the asbestos.
 - v. At the worksites the Plaintiff was present while other workers, to whom he made deliveries of asbestos products, were using the asbestos for pipe lagging.
 - vi. The Asbestos products were mainly in the form of tubes and sheeting manufactured by the Third Defendant. The Plaintiff also alleges "much of my work involved handling bags of asbestos dust".
 - vii. On "seldom" occasions the Plaintiff attended at the Third Defendant's premises where he loaded asbestos products onto his truck for transport to the Second Defendant's premises.
 - viii. When he attended the Third Defendant's premises he was exposed to asbestos products.
 - ix. His exposure to asbestos while employed by the Second Defendant was "daily". The Plaintiff worked 8 to 10 hours per day 5 days per week as well as overtime on weekends. The intensity of exposure was "high".
 - x. Disposable masks and overalls were provided to the Plaintiff.
 - xi. The Plaintiff estimates that 15% of his exposure occurred while employed by the Second Defendant.

- d. In relation to the Third Defendant:
 - i. The Plaintiff alleges that the Third Defendant manufactured all of the "new" asbestos products.
 - ii. The Plaintiff's allegations as against the Third Defendant are as set out above.

The First Defendant's Reply

- 7. The First Defendant by its Reply alleges that: -
 - a. The Plaintiff has pleural plaques only.
 - b. The Plaintiff does not have a dust related condition.
 - c. Pleural plaques are caused by asbestos exposure.
 - d. If the Plaintiff was exposed then the Plaintiff's exposure more likely than not occurred before 1983, because of the fact that The Third Defendant ceased to supply asbestos cement sheets in 1982/83.
 - e. The First and Second Defendants should be placed in Category 2, and the Third Defendant and the Cross Defendant should be placed in category 1.
 - f. That the standard presumption should be varied as against it by 20%.

The Second Defendant's Reply

- 8. The Second Defendant by its Reply alleges that: -
 - a. The Plaintiff has pleural plaques only.
 - b. The Plaintiff does not have a dust related condition.
 - c. Pleural plaques are caused by asbestos exposure.
 - d. If the Plaintiff was exposed then the Plaintiff's exposure more likely than not occurred before 1983, because of the fact that The Third Defendant ceased to supply asbestos cement sheets in 1982/83.
 - e. The First and Second Defendants should be placed in Category 2, and the Third Defendant and the Cross Defendant should be placed in category 1.
 - f. That the standard presumption should be varied as against it by 20%.

The Third Defendant's Reply

9. The Third Defendant by its Reply alleges that: -
- a. The Plaintiff has pleural plaques only.
 - b. The Plaintiff does not have any disability arising from the pleural plaques.
 - c. Pleural plaques are caused by asbestos exposure.
 - d. It cannot identify the asbestos products allegedly used by the Plaintiff because of the absence of trade names.
 - e. Each of the Defendants should be placed into Category 1, as the First & Second Defendants were insulation companies installing asbestos insulation. The Cross Defendant should be placed in category 1.
 - f. Before 1978 there were no warnings provided by the Third Defendant as to its asbestos products.
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The Cross Defendant's Reply

10. The Cross Defendant by its Reply alleges that: -
- a. The Plaintiff has pleural plaques only.
 - b. The Plaintiff does not have any disability arising from the pleural plaques.
 - c. Between September 1964 and June 1974 the Cross-Defendant and the Third Defendant manufactured certain asbestos containing insulation products in partnership. Such products did not include asbestos sheeting.
 - d. Each of the Defendants should be placed into Category 1, as the First & Second Defendants were insulation companies installing asbestos insulation. The Cross Defendant should be placed in category 1.
 - e. The Cross Defendant suggests a model for apportionment and concedes that CSR should be liable for 5%.

Discussion

11. Having regard to Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007 – the following factual considerations are to be noted:
- a. The Plaintiff suffers from asbestos related pleural disease in the form of inter alia pleural plaques.
 - b. The condition from which the Plaintiff suffers is divisible.
 - c. The total length of alleged exposure to asbestos was almost 25 years. It is unlikely that in the last few years of his employment the level of exposure to asbestos dust was great, but the mere

fact that the Third Defendant allegedly ceased manufacturing asbestos products in 1983, does not of itself answer the Plaintiff's assertions (which I am bound to accept), given the probability of continued use of the product after 1983 and the Plaintiff's allegations relative to the exposure to old asbestos product.

- d. The type of asbestos to which the Plaintiff was exposed is unknown.
 - e. The lag time between exposure and diagnosis is sufficient as against the Defendants.
 - f. The Plaintiff was in each case an employee of the First or Second Defendants.
 - g. The First Defendant did not take any steps to minimise the risks of being exposed to asbestos, prior to 1990, and those steps were limited to the provision of paper masks and overalls. The Second Defendant took steps to minimise exposure to asbestos but limited to the provision of paper masks and overalls. The Third Defendant took steps after 1978 in that it commenced to provide warnings after that time, but regard must be had to the decision of Duck J in Lorizio and the appeal therefrom as to the suitability of the warnings.
12. The Plaintiff asserts that 85% of his exposure occurred with the First Defendant and 15% occurred with the Second Defendant.
 13. On the basis of the all of the material placed before me, it seems to me that the relevant contributions should be assessed as 90% and 10%.
 14. Each of the Defendants and the Cross Defendant should be placed in Category 1.
 15. While the Plaintiff asserts that all of the products that he come into contact with were the products of the Third Defendant, it is apparent that this is not the case given the products which were "foreign" to the Third Defendant.
 16. Given the above factual considerations, the question arises as to whether the standard presumptions should be varied.

Application of the Standard Presumptions

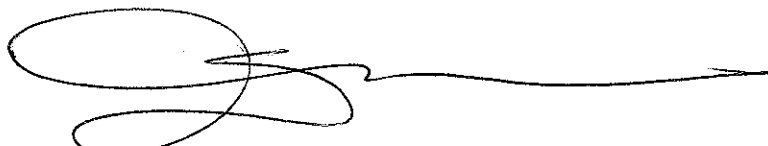
17. In each period the Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007 permits me to increase or decrease the percentage attribution by no more that 20 percentage points.
18. I have determined the liability to contribute having regard to the relative culpability of the Defendants and the causal potency of their contribution.

19. In the present case the standard presumptions should not be varied.

Determinations

20. I make the following Determinations:
- a. The Plaintiff's condition is divisible.
 - b. Each Defendant should be placed in Category 1.
 - c. The Duration, and Intensity of the exposure to asbestos during each period of employment was not similar, and was more intense prior to 1983.
 - d. The periods of exposure can be identified as set forth above
 - e. The Defendants are to contribute in the following proportions:
 - i. The First Defendant = 54%
 - ii. The Second Defendant = 7.5%
 - iii. The Third Defendant = 33.5%
 - iv. The Fourth Defendant = 5%
 - f. I appoint the First Defendant as the SCM (See CI 61 (3) (b) of the Dust Diseases Tribunal Regulation 2007)
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Dated September 4, 2008



J. L. SHARPE