

WALLABY GRIP (BAE) PTY LIMITED (In Liquidation)

v

BRADFORD INSULATION (CONTRACTING) PTY LIMITED

DDT No.5077 of 2005

DETERMINATION OF APPORTIONMENT

1. The Registrar of the Dust Diseases Tribunal has 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 Regulations 2007 (hereinafter referred to as "the Regulations"). The Registrar has also invited me to appoint a single claims manager in accordance with clause 61(3)(b) of 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.
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 Defendant's Reply;
4. The standard presumptions, which are incorporated in the Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007 (hereinafter referred to as "the Apportionment Order").

5. The standard presumptions in the Apportionment Order require that liability be apportioned upon a basis that the standard presumptions apply with such variations as are appropriate to the case, but within a permitted range.

The Plaintiff's particulars

6. Kevin Penney took proceedings in the Dust Diseases Tribunal against the Commonwealth of Australia alleging that between about 1967 and about 1982 he was employed by the SAR Commissioner pursuant to the *South Australian Railways Act 1936 (SA)* as an apprentice welder and later welder at the rail yards plant depot at Mile End in the State of South Australia.
7. During the course of the Plaintiff's employment he was exposed to products containing asbestos and in addition was present while fellow workers used asbestos products.
8. The Plaintiff suffered from mesothelioma.
9. In the present case I have had the advantage of having the Plaintiff's Affidavit before me. The Plaintiff's affidavit on 27 October 2005 alleges that:
 - (a) He used "textile blankets" to slow down cooling rate of recently welded components and to protect parts of machinery from the heat and debris created when welding. The blankets were known as "asbestos blankets".
 - (b) Asbestos blankets were a dirty grey colour and had a fibrous texture, which were fairly worn. Some of them even had holes in them. Dust and fibres were released into the air when the Plaintiff picked up and shook the blankets out and folded them up after use.
 - (c) The Plaintiff frequently wrapped up components that he had welded into the asbestos to slow the cooling process down.

- (d) The Plaintiff cleaned the bay in which he worked on the basis of sweeping up once a day although more frequently if required.
 - (e) The Plaintiff was based at Mile End welding shop from about late 1967 or early 1968.
 - (f) Asbestos blankets were used frequently in connection with welding activities at Mile End.
 - (g) The Plaintiff estimated that he spent about 75% of his time working at Mile End workshop and 25% on jobs away from Mile End up to 1982.
 - (h) Apart from the asbestos blankets, the Plaintiff wore asbestos heat proof gloves in connection with welding and recalled wearing them more than 50 times but less than 100 times. The asbestos gloves were in poor condition, had holes in them and were a dirty grey colour and after using them the Plaintiff shook his hands or clapped them together to disperse the heat.
 - (i) A sweeper swept up dust and this occurred in the Plaintiff's presence.
 - (j) Towards the end of the Plaintiff's apprenticeship limpet spray was sprayed in the north-western wall of the welding shop with asbestos for fire rating. This work was carried out in the Plaintiff's presence.
10. The Commonwealth of Australia issued a Cross-Claim against Wallaby Grip (BAE) Pty Ltd (in liquidation) (hereinafter referred to as "BAE") on 26 October 2005 seeking contribution and/or indemnity pursuant to s.25 of the *Wrongs Act 1936 (SA)*, or alternatively under s.5 of the *Law Reform (Miscellaneous Provisions) Act 1946*.
11. On 8 December 2005 the Plaintiff's claim against the Commonwealth of Australia was settled in the sum of \$800,000 inclusive of costs.

12. On 8 December 2005 BAE settled the Cross-Claim brought against it by the Commonwealth of Australia by means of paying to the Commonwealth of Australia the sum of \$400,000 inclusive of costs.
13. On 20 December 2005 BAE issued a Cross-Claim against Bradford Insulation (Contracting) Pty Ltd (hereinafter referred to as "BI") seeking contribution or indemnity pursuant to s.6 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), or alternatively under s.5 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW).

The Defendants' replies

14. On 9 May 2008 BAE filed a reply by which it alleges that:
 - (a) The condition of mesothelioma was admitted.
 - (b) That the Plaintiff's exposure whilst employed with South Australian Railways between 1967 and 1982 related to exposure to:
 - (i) Asbestos gloves;
 - (ii) Asbestos blankets; and
 - (iii) Limpet spray.
 - (c) In respect of the gloves, BAE admits that it was one of a number of manufacturers of asbestos gloves during the period of the Plaintiff's employment.
 - (d) In relation to blankets, BAE admits that it was one of a number of manufacturers of asbestos blankets during the Plaintiff's period of employment with South Australian Railways.
 - (e) In respect of limpet spray, BAE denies that it manufactured or supplied limpet spray during the Claimant's alleged period of employment but

alleges that Bradford supplied and applied the limpet spray to the South Australian Railways premises to which the Plaintiff was exposed.

- (f) BAE alleges that the gloves and the blankets contained chrysotile.
 - (g) From the mid-1970s BAE provided warnings to its customers about the dangers of asbestos and safe handling instructions.
 - (h) BAE acquired actual knowledge of the danger of asbestos in the mid-1970s.
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- (i) BAE admits that it ought to have known prior to the mid-1970s of the dangers of asbestos.
 - (j) BI should be placed in category 1.
 - (k) BAE submits that, in accordance with Part 5(4) of the Apportionment Order, a variable contribution ought to apply in respect of BAE and BI.
 - (l) Professor Breslan in his report of 26 November 2007 attributes causal potency of each asbestos product as 80% to blankets, 10% to gloves and 10% to limpet spray.
 - (m) BAE submits the apportionment between BAE and BI should be 90% BAE and 10% BI.
15. BI by its reply alleges that:
- (a) That it did not manufacture asbestos gloves, asbestos blankets or asbestos limpet spray.
 - (b) BI alleges that it did not supply or install asbestos gloves, asbestos blankets or limpet spray.

- (c) However, BI admits that from time to time between 1964 and 1974 it sprayed asbestos insulation at various sites in the State of South Australia.
 - (d) The Plaintiff alleges in his affidavit that the spraying of the limpet spray occurred towards the end of his apprenticeship, which BI alleges would have been in about 1972.
 - (e) That BAE is a category 1 Defendant.
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- (f) That the spraying of the limpet spray occurred towards the end of his apprenticeship, which BI alleges, would have been in about 1972.
 - (g) That BI is a category 1 Defendant.
 - (h) That BI could only be liable to contribute 10% to this claim.
 - (i) There is insufficient evidence to enable a finding to be made against it.
 - (j) BI does not consider that it would have been liable to the Plaintiff had it been joined as a Defendant.
 - (k) That there is "no evidence" which would allow a determination of a just and equitable contribution against BI.
 - (l) In support of this allegation, BI relies upon *Re McCullough; Seltsam Pty Ltd v The State of Queensland* (2003) NSWDDT 3.
 - (m) That, even if BI's products were installed at the premises where the Plaintiff worked, the Plaintiff was an employee of another entity and BI was not in a position to warn the Plaintiff.
 - (n) That BI was not a manufacturer of insulation material.

- (o) BI does not admit the calculation of Professor Breslan.
- (p) BI does not admit the apportionment as to 90% and 10%.

Factual considerations

16. Having regard to the Apportionment Order, the following factual considerations are to be noted:

- (a) The Plaintiff suffered from mesothelioma.
 - (b) The condition from which the Plaintiff suffered is indivisible.
 - (c) The type of asbestos to which the Plaintiff was exposed is unknown.
 - (d) The lag time between exposure and diagnosis is sufficient as against both BAE and BI.
 - (e) Neither Defendant took any steps to minimise the risks of being exposed to asbestos.
17. Given the above factual considerations, the question arises as to whether the standard presumption should be varied.

Application of the standard presumptions

- 18. The Apportionment Order permits me to increase or decrease the percentage of contribution by no more than 20 percentage points.
- 19. I have determined the liability contribute having regard to the relative culpability of the Defendants and the causal potency of their contribution.
- 20. In the present case, the standard presumptions should not be varied.

Determination

21. I make the following determinations:

- (a) The Plaintiff's condition was indivisible.
- (b) BIC and BA both fall into category 1.
- (c) The duration and intensity of the exposure to asbestos during each period of employment was similar.
- (d) Given the Plaintiff's exposure to asbestos, it appears that 80% of it was associated with the use of asbestos blankets, 10% associated with the use of asbestos gloves and 10% because of limpet spray.
- (e) Accordingly, the Defendants are to contribute in the following proportions:
 - (i) BAE 90%;
 - (ii) BI 10%.
- (f) I appoint BAE as the SCM (see clause 61(3)(b) of the Dust Diseases Tribunal Regulations 2007).

22. I have reached the conclusions as to apportionment on the basis of the material before me, and bearing in mind that I must accept for the purposes of the contribution determination that each of the Defendants is liable for the appropriate contribution on such information as is placed before me.


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John L. Sharpe

1/12/08