



Dust Diseases Tribunal of New South Wales

2023 Year in Review

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Assessment of Damages

Armitage v State of New South Wales [2023] NSWDDT 3

Judge Strathdee, 21 July 2023

Assessment of damages for the mesothelioma claim of a now-deceased widow who contracted mesothelioma by the inhalation of asbestos dust and fibre on her late husband's work clothes.

Key Issues

- Comparison of / regard to awards of general damages made in other cases appropriate in an assessment of general damages: *Planet Fisheries Pty Limited v La Rosa* (1968) 119 CLR 118 at 125.
- Assessment of damages:
 - General Damages
 - Interest on General Damages
 - Damages for Loss of Expectation of Life
 - Past *Griffiths v Kerkemeyer* Damages
 - Interest on Past *Griffiths v Kerkemeyer* Damages

Held: The orders of the Tribunal are

- (1) Judgment for the plaintiff against the defendant in the sum of \$605,296.32.
- (2) The defendant to pay the plaintiff's costs on an ordinary basis as agreed or assessed up to and including 7 December 2022.
- (3) The defendant to pay the plaintiff's costs on an indemnity basis as agreed or assessed from 8 December 2022.

Torok v Allianz Australia Insurance Ltd [2023] NSWDDT 2

Judge Russell SC, 23 May 2023

Assessment of damages for the mesothelioma claim of a worker who worked at the Cockatoo Island Dockyard. The plaintiff could not give direct evidence of exposure. Judgment for the plaintiff.

Key Issues

Issues for determination: Senior Counsel for the defendant insurer identified the following issues

- (1) The dates when Mr Torok worked at Cockatoo Dockyard.
- (2) Whether Mr Torok had more than de minimis exposure to asbestos during his employment at Cockatoo Dockyard.
- (3) While there is no dispute that there was asbestos used at Cockatoo Island, where it was and whether the plaintiff had any contact with or exposure to asbestos remains in issue.

Damages: The plaintiff claimed

- General Damages
- Interest on Past General Damages
- Damages for Loss of Expectation of Life

Held: The orders of the Tribunal are

- (1) Grant leave to the plaintiff nunc pro tunc pursuant to the *Civil Liability (Claims Against Third Party Insurers) Act 2017* for the plaintiff to bring these proceedings.
- (2) Judgment for the plaintiff against the defendant for \$457,500.
- (3) Order each party to pay his or its own costs of the Hearing on 27 March 2023.
- (4) Subject to Order (3) above, order the defendant to pay the plaintiff's costs.

Costs

Furka v Allianz Australia Insurance Ltd (re Torok) [2023] NSWDDT 4

Judge Russell SC, 31 July 2023

The plaintiff sought indemnity costs following the delivery of judgment for the plaintiff in the substantive proceedings. The plaintiff had made an Offer of Compromise and a Calderbank Offer.

Key Issues

Offer of Compromise:

- Clause 89 of the *Dust Diseases Tribunal Regulation 2019* (NSW) sets out the consequences when an offer of compromise is made by a plaintiff, but is not accepted by a defendant, and the plaintiff obtains a judgment for an amount more favourable than the terms of the offer.
- The defendant submitted that the Tribunal should exercise its power to order “otherwise in an exceptional case and for the avoidance of substantial injustice”.
- The primary basis for the submission was that the plaintiff served a significant amount of evidence after the Offer of Compromise had expired.
- Found: ***Vale v Eggins No. 2*** [2007] NSWCA 12 distinguished.
 - The additional evidence did no more than multiply the examples of the extensive use of asbestos at Cockatoo Dockyard and was similar to material served on the defendant before the expiry.
 - There was no significant change in the plaintiff’s case and the defendant had sufficient material before the expiry to make an informed decision as to whether or not the plaintiff could establish the inference sought.
 - The plaintiff did not have an obligation to serve any material.
 - It is unlikely the additional material would have changed the defendant’s approach as the defendant had maintained a fixed position in spite of the evidence served.

Calderbank Offer:

- Whether the rejection of the offer was unreasonable in all the circumstances of the case.
- One of those circumstances is the length of time for which the offer is left open.
- Found: Non-acceptance was not unreasonable in the circumstances as the offer was left open for a short time period.

Held: The plaintiff succeeded in its costs argument based upon the Offer of Compromise and failed in its argument based upon the Calderbank Offer. The defendant was ordered to pay the plaintiff’s costs on a party and party basis up to and including the date of the Offer of Compromise being served, and on an indemnity basis from the next day.

Evidence

Torok v Allianz Australia Insurance Ltd (No. 2) [2023] NSWDDT 5

Judge Russell SC, 17 May 2023

This decision concerns the admissibility of documents, described as “industrial histories”, which relate to claims for workers compensation made by workers from the Cockatoo Island Dockyard.

Key Issue

- **Whether the evidence is admissible as business records pursuant to the exception in s 69 of the *Evidence Act 1995 (NSW)*.**
- Found: the documents are part of the Dust Diseases Board’s business records having been created and kept by that business; the statements are taken from workers with personal knowledge of their exposure to dust at Cockatoo Island; and the histories were taken for the purpose of the worker applying for compensation and not taken for the purpose of conducting any Australian Court proceeding.

Held: The documents were admitted in their entirety.

Torok v Allianz Australia Insurance Ltd (No. 3) [2023] NSWDDT 6

Judge Russell SC, 27 March 2023

This decision concerns the admissibility of representations made by a deceased worker in his Form 1 statement of particulars and s 67 notice of reliance on s 63 of the Evidence Act 1995 (NSW).

Key Issues

There were three objections raised to the tender of the evidence. At issue was:

- Whether the evidence is relevant to a fact in issue.
- Whether use of the evidence should be confined.
- Whether the evidence was of little weight and its probative value outweighed by prejudice.

Held: The Form 1 statement and the s 67 notice tendered were admitted for all purposes.

Application for Permanent Stay

Feetam v Linfoot and Ors [2023] NSWDDT 1

Judge Strathdee, 28 April 2023

The applicant (and 7th defendant) sought a permanent stay of proceedings pursuant to s 67 of the Civil Procedure Act 2005 (NSW). The application was dismissed.

Background

- The plaintiff commenced proceedings on 9 June 2022 alleging he was exposed to silica dust in the course of his employment with various employers between 1979 and 2018.
- One of the employers was a partnership between Mr and Mrs Binns. Mr Binns died in 2015. Mrs Binns, who is 80 years of age, has dementia. Mrs Binns has no business records.
- The applicant/7th defendant claimed that the continuation of proceedings against Mrs Binns would be manifestly unfair.

Key issues

A review of relevant guiding authorities provides that (see at [27] and citations therein):

- The onus of proving that a permanent stay of proceedings should be granted lies squarely on a defendant.
- A permanent stay should only be ordered in exceptional circumstances.
- A permanent stay should be granted when the interests of the administration of justice so demand.
- The categories of cases in which a permanent stay may be ordered are not closed.
- One category of case where a permanent stay may be ordered is where proceedings or their continuance would be vexatious or oppressive.
- The continuation of proceedings may be oppressive if that is their objective effect.
- Proceedings may be oppressive where their effect is ‘seriously and unfairly burdensome, prejudicial or damaging’.
- Proceedings may be stayed on a permanent basis where their continuation would bring the administration of justice into disrepute amongst right-thinking people.
- A delay between the accrual of the cause of action and the commencement of proceedings may also be a ground upon which a Court may grant a permanent stay in an exceptional case, but only ‘where it is demonstrated, on the balance of probabilities, that it will not be possible to obtain a fair trial’.

Held

There was nothing exceptional or extraordinary in the circumstances of the case to warrant a permanent stay.

Leave to Commence Proceedings against Insurer

Morrison v AAI Limited t/as Vero Insurance [2023] NSWDDT 7

Judge Russell SC, 25 August 2023

The plaintiff sought leave to commence and continue proceedings against the insurer of the plaintiff's employer. Leave was granted pursuant to ss 4 and 5 of the Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW).

Background

- If the plaintiff's cause of action arose before 24 June 1993, then the decision of the High Court in **Smith v ANL** [2000] HCA 58 meant that the purported abolition of the plaintiff's common law rights was invalid.
- If the cause of action arose after 24 June 1993, then he had no right to common law damages and there would be no utility in granting leave to sue the insurer.

Key Issues

Criteria for a grant of leave: Based on the Court of Appeal's decision in *Avant Insurance Ltd v Burnie* [2021] NSWCA 272, an applicant for leave under s 5 has to establish three elements.

- (1) There is an arguable case that the holder of the insurance policy would be liable to him.
- (2) There is an arguable case that the insurance policy responds to that liability.
- (3) There is a real possibility the insured will be unable to satisfy any judgment against it.

When did the cause of action accrue?

- The High Court's reasoning in **Alcan Gove Pty Ltd v Zabic** [2015] HCA 33 concerning the aetiology of mesothelioma applied.
- Found that the plaintiff's cause of action arose before 24 June 1993. As a result of the High Court's decision in *Smith v ANL*, he did not lose his right of action because of the Seafarer's Act or the Transitional Act.

Held: The orders of the Tribunal are

- (1) Grant leave nunc pro tunc pursuant to ss 4 and 5 of the Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW) to the plaintiff to commence and continue these proceedings against AAI Ltd t/as Vero Insurance in respect of any liability for damages and costs against Svitzer Towage Holdings Pty Ltd (formerly known as Howard Smith Industries Ltd).
- (2) Order that the costs of the plaintiff's Notice of Motion filed on 9 March 2023 be costs in the cause.
- (3) Dismiss the sixth defendant's Notice of Motion filed on 15 June 2023.
- (4) Order the sixth defendant to pay the plaintiff's costs of the sixth defendant's Notice of Motion filed on 15 June 2023.

Leave to Re-Litigate due to New Evidence

Bennett v Workers Compensation Nominal Insurer and Ors [2023] NSWDDT 8

Judge Scotting, 29 November 2023

The defendants were granted leave to re-litigate the proceedings due to the availability of new evidence. Leave was granted pursuant to s 25B(2) of the Dust Diseases Tribunal Act 1989 (NSW).

Background

- The plaintiff commenced these proceedings in June 2023. The defendants admitted liability and the matter was listed for an assessment of damages hearing on 30 October 2023.
- On 27 July 2023, by a notice pursuant to s 25B of the *Dust Diseases Tribunal Act 1989* the plaintiff sought to rely on five matters as having previously been decided by the Tribunal in ***Harris v Commercial Minerals & Ors*** (1990) DDT 31/90 (Johns J).
- These matters went to the aetiology and characterisation of PMF.
- On 13 October 2023, by a notice of motion the defendants sought leave to re-litigate the five matters in *Harris*.

Key Issues

Section 25B(2): In deciding whether or not to grant leave, the Tribunal must have regard to the following:

- (1) The availability of new evidence (whether or not previously available).
- (2) The manner in which the earlier proceedings in which the relevant finding was made, were conducted.
- (3) Any other matters that the Tribunal considers relevant.

New Evidence:

- New evidence is not the same as fresh evidence.
- As it is referred to in s 25B(2), it is evidence that has not previously been given in the Tribunal.
- The new evidence sought to be relied on by the defendants was suggestive of a scientific consensus on the aetiology of silicosis and PMF that had emerged over the last 10 years.
- The new evidence suggests that PMF is a divisible condition.
- The new evidence – supported by references that did not exist at the time when *Harris* was decided – calls into question the first of Johns J’s conclusions that silicosis and PMF are separate conditions.

Decision: Orders in summary (1) Leave granted to the defendants. (2) Defendants to pay the plaintiff’s costs of re-litigating the issues, irrespective of the outcome, and including the notice of motion, on an indemnity basis. (3) List the matter for directions on Monday 5 February 2024.