



# Dust Diseases Tribunal of New South Wales

## Year in Review: 2020

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## Assessment of Damages

[Williams v Amaca Pty Ltd \[2020\] NSWDDT 2](#) (Judge Scotting)

**Decision date:**

11 March 2020

**Key Issue:**

- Assessment of damages for a mesothelioma claim.

[Piatti v ACN 000 246 542 Pty Ltd \[2020\] NSWCA 168](#) (Basten JA, McCallum JA & Simpson AJA)

**Decision date:**

23 March 2020

**Key Issues:**

- The Court of Appeal allowed an appeal, brought on behalf of the estate, concerning one component of the award of damages from the case of *Piatti v ACN 000 246 542 Pty Ltd & Anor* [2019] NSWDDT 7 (Judge Russell SC).
  - The late claimant suffered from mesothelioma.
  - Loss of capacity to provide gratuitous domestic services to a dependant suffering from vascular dementia and Alzheimer's disease.
  - The level of services needed increased after the claimant's mesothelioma became symptomatic.
- Proper construction of s 15B of the *Civil Liability Act 2002* (NSW):
  - Section 15B damages are not limited by the level or nature of services being provided by the claimant to the dependant at the time liability arose.
  - Section 15B damages survive death in circumstances where the claimant would have continued to provide domestic services but for his death.
  - Damages for future loss of capacity to provide gratuitous domestic services to a dependant can be awarded in respect of lost years.

[\*Boland v Amaca Pty Ltd \[2020\] NSWDDT 4\*](#) (Judge Scotting)

**Decision date:**

04 May 2020

**Key Issues:**

- Assessment of damages on common law principles for an asbestosis and asbestos-related pleural disease claim:
  - General damages & interest on general damages;
  - Damages for gratuitous services;
  - Future out-of-pocket expenses.
- Assessment of damages was based on common law principles because the relevant substantive law of Queensland provided that the modified assessment of damages provided for by the statute does not apply to a dust-related condition claim.

[\*Kennedy v CIMIC Group Limited and CPB Contractors Pty Ltd \[2020\] NSWDDT 7\*](#) (Judge Scotting)

**Decision date:**

31 July 2020

**Key Issues:**

- Choice of law – plaintiff exposed to asbestos in both NSW and WA.
- Assessment of damages:
  - General damages;
  - Damages for non-pecuniary loss;
  - Tariff for mesothelioma – gratuitous attendant care services;
  - Loss of capacity to provide gratuitous domestic services to a grandchild with substantial needs.

[\*Kennedy v CIMIC Group Ltd and CPB Contractors Pty Ltd \(No 2\) \[2020\] NSWDDT 8\*](#) (Judge Scotting)

**Decision date:**

07 October 2020

**Key Issue:**

- Amendment to award of damages.

## Challenge to the Contributions Assessment Determination

[\*FMP Group \(Australia\) Pty Limited v Coffs Harbour Auto Electrical Pty Limited and Ors\* \[2020\]](#)

[NSWDDT 5](#) (Judge Strathdee)

### Decision date:

19 June 2020

### Key Issues:

- Plaintiff's claim subject to Claims Resolution Process.
- Cross claim – Contribution to damages.
- Order for payment pursuant to Division 6:
  - Whether an interim payment order is an absolute right in new cross claims.
  - Whether a payment order can be made in circumstances where the Contributions Assessment Determination arose in separate proceedings to those between the plaintiff and a defendant where no cross claims are on foot.

## Choice of Law

[\*Boland v Amaca Pty Ltd \[2020\] NSWDDT 4\*](#) (Judge Scotting)

### Decision date:

04 May 2020

### Key Issues:

- Asbestosis and asbestos-related pleural disease claim involving assessment of damages on common law principles:
  - General damages & interest on general damages;
  - Damages for gratuitous services;
  - Future out-of-pocket expenses.
- Assessment of damages was based on common law principles because the relevant substantive law of Queensland provided that the modified assessment of damages provided for by the statute does not apply to a dust-related condition claim.

[\*Kennedy v CIMIC Group Limited and CPB Contractors Pty Ltd \[2020\] NSWDDT 7\*](#) (Judge Scotting)

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- Choice of law – plaintiff exposed to asbestos in both NSW and WA.
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  - General damages;
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  - Loss of capacity to provide gratuitous domestic services to a grandchild with substantial needs.

## Contribution between Tortfeasors

[Amaca Pty Limited v The University of Sydney; \(Re: John William Starr\); The University of Sydney v Amaca Pty Limited; \(Re: John William Starr\) \[2020\] NSWDDT 1](#) (Judge Russell SC)

### Decision date:

20 February 2020

### Key Issues:

- CAUSATION — Apportionment between asbestos supplier and employer
  - Factors to be considered in assessing the exposure to asbestos dust by each tortfeasor:
    - 1) Relative Causal Potency;
    - 2) Relative Blameworthiness.
- EVIDENCE
  - Parties must call evidence or rely upon s 25(3) and s 25B of the *Dust Diseases Tribunal Act 1989* (NSW).
  - Tribunal cannot take into account knowledge gained from hearing other cases.

## Costs

[Rafaraci v ACN 000 761 973 Pty Ltd & Ors \[2020\] NSWDDT 3](#) (Judge Russell SC)

**Decision date:**

06 May 2020

**Key Issue:**

- COSTS
  - Discretionary order that plaintiff is not to have certain costs.



## Discovery

[Harper v Sydney Local Health District \(No. 2\) \[2020\] NSWDDT 11](#) (Judge Russell SC)

### Decision Date:

08 December 2020

### Key Issues:

- PROCEDURE — DUST DISEASES – discovery – facts in issue
  - Whether discovery should be confined to documents relating to period of alleged asbestos exposure.
  - Whether documents created outside exposure period would have probative value or be relevant to a key fact in issue.
  - Discovery necessary to ensure that outstanding issues in dispute are properly tried.
  - Consideration of Rule 4 of the Dust Diseases Tribunal Rules 2019.

## Removal from Claims Resolution Process

[Harper v Sydney Local Health District \[2020\] NSWDDT 9](#) (Judge Russell SC)

### Decision Date:

19 November 2020

### Key Issues:

- PROCEDURE
  - Plaintiff suffering from malignant pleural mesothelioma and malignant peritoneal mesothelioma.
  - Several complex liability and causation issues.
  - Large claim for past and future economic loss.
  - Mediation delayed with no prospect of it being held by parties.
  - Whether proceedings should be removed from the Claims Resolution Process pursuant to cl 20(1)(c) of the Dust Diseases Tribunal Regulation 2019 (NSW).

## Restitution

[L & A Fazzini Pty Ltd v Amaca Pty Ltd \[2020\] NSWDDT 12](#) (Judge Scotting)

### Decision Date:

27 November 2020

### Key Issues:

- Restitution – Contribution and/or indemnity
  - Fazzini agreed to settle a plaintiff’s claim. This represented an election between putting the plaintiff to proof and settling with the plaintiff. Fazzini could not then assert that it is entitled to restitution by way of a complete indemnity on the basis that it has not been proved to be liable, when it had agreed that it was a tortfeasor liable to the plaintiff.
  - Distinguished from [Power Technologies Pty Ltd v Energy Australia \[2010\] NSWCA 107](#) because there was no relevant “unjust” factor (e.g. mistake of fact or law, compulsion including duress, total failure of consideration or acceptance of benefit) justifying restitution.

## Service: Extension of time

[Gauld v Woodall-Duckham Ltd & Ors \[2020\] NSWDDT 10](#) (Judge Russell SC)

### Decision Date:

20 November 2020

### Key Issues:

- PROCEDURE
  - Stale Statement of Claim.
    - Case arising out of asbestos exposure during employment many decades ago.
  - Whether court should exercise its power to extend time for service.
    - Legal representatives experienced difficulty in ascertaining the relevant workers compensation insurer due to passage of time.
    - No deliberate decision by plaintiff or legal representatives to delay service of originating process.
  - Whether there would be prejudice to the estate of the deceased plaintiff if the extension of time is not granted.
  - Whether there would be prejudice to the defendant if application is granted.

## Statutory Interpretation

[Read v Comcare \[2020\] NSWDDT 6](#) (Judge Russell SC)

### Decision date:

16 July 2020

### Key Issues:

- Whether there was a liability of the Commonwealth or a Commonwealth authority to the plaintiff when claim made.
  - *Asbestos Related Claims (Management of Commonwealth Liabilities) Act 2005* (Cth), ss 3, 5.
- Whether the ACT Electricity Authority was a Commonwealth authority.
  - *Asbestos Related Claims (Management of Commonwealth Liabilities) Act 2005* (Cth), s 3.
- Whether the ACT Electricity & Water Authority was a Commonwealth authority.
  - *Asbestos Related Claims (Management of Commonwealth Liabilities) Act 2005* (Cth), s 3.
- Whether potential or contingent liability of the Commonwealth or a Commonwealth authority was transferred.
  - *Australian Capital Territory Electricity Supply Act 1962* (Cth), ss 5, 6, 17, 18, 19, 20, 23, 35.
  - *Electricity and Water Ordinance 1988* (ACT), ss 4, 5, 31, 84, 90.
  - *Electricity and Water (Corporatisation) (Consequential Provisions) Act 1995* (ACT), s 4.