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Case Alert

Shaping the future of insurance law

Asbestos potency is a liability apportionment factor

***Reid v Amaca Pty Ltd & Anor* [2020] VSC 276**

2 JUNE 2020

AT A GLANCE

- In this recent decision, the Victorian Supreme Court held that it should consider the type, amount and potency of the asbestos used in the relevant products when apportioning liability between two manufacturers.
- The Court accepted that amosite asbestos fibres are "at least" 10 times more potent in causing mesothelioma than chrysotile asbestos fibres and apportioned a higher degree of liability to the manufacturer of the product containing amosite asbestos.
- The decision also highlights that, in making an assessment of comparative responsibility, the Court will not adopt an "overly mathematical" approach to apportionment.

BACKGROUND

Mesothelioma is an aggressive and terminal cancer caused by asbestos exposure. The three most common types of asbestos that were used in a wide range of products, ranging from brake linings to cement sheeting, are **chrysotile** (white asbestos), **crocidolite** (blue asbestos) and **amosite** (brown or grey asbestos).

Last year, Bruce Reid (a former club doctor for the Essendon Football Club) made a significant claim for damages against Amaca Pty Ltd (formerly James Hardie) and Seltsam Pty Ltd (formerly Wunderlich Pty Ltd, a CSR Limited company), after he contracted malignant mesothelioma.

Reid alleged his exposure was to dust liberated from asbestos cement sheeting manufactured by Amaca and Seltsam and used in the construction of his house in the 1970s. Reid alleged he frequently observed the builders cutting asbestos and assisted them by sweeping up dust and debris from the works. Amaca settled Reid's claim for $1.4 million plus costs and maintained a contribution claim against Seltsam.

Seltsam disputed that Reid had been exposed to asbestos dust and fibres from its products but agreed that if Amaca proved that Reid was so exposed, that both manufacturers were equally culpable. The dispute before the Court centred on 'relative causation' – in other words, whose negligence was more causative of Reid's mesothelioma?

In determining this, the Court was asked to consider:

- Whether amosite (which was used in the Seltsam asbestos cement products to which Reid was exposed) is more causatively potent in causing mesothelioma than chrysotile (which was the type of asbestos used by Amaca in its asbestos cement products during the period of Reid's exposure)? And if so, to what extent?
- What was the degree of Reid's exposure to Amaca and Seltsam product?
- How liability ought to be apportioned between Amaca and Seltsam.

THE JUDGMENT

The Court ordered contribution for the damage to Mr Reid was 30% to Amaca and 70% to Seltsam.

At the outset, the Court said it was relevant to its analysis of 'relative causation' that Reid's mesothelioma arose from exposure to products in the same location, in the same time period, arising out of the same activities and by the same method of exposure (i.e. direct exposure to dust containing asbestos fibres).

In coming to its decision, the Court said the potency of the type of asbestos and the countervailing factors of the degree and intensity of exposure, will have the ultimate bearing on the apportionment of 'relative causation'.

Potency: amosite vs chrysotile?

The Court accepted that there is a scientific consensus that chrysotile is much less potent in causing mesothelioma than amosite and crocidolite.

The Court accepted the evidence of occupational hygienists who said: "amosite is at least 10 times more carcinogenic than chrysotile and more likely… around 100 to 550 times more carcinogenic." The Court also found that the dose of exposure (low, medium or high) does not impact the relative potency of the asbestos. This was one reason why the Court inferred that Seltsam's negligent act was 'relatively' more causative of Reid's mesothelioma.

Degree of exposure

The Court also had to determine Reid's relative exposure to asbestos from Amaca's products compared with Seltsam's products. In doing so, it accepted that Amaca products were used in internal sheeting areas of Reid's house, and that most (if not all) of the asbestos used in external sheeting areas was Seltsam products.

Amaca argued that Reid's proportional inhalation of asbestos from its products corresponded to roughly 5%-9% because:

- Amaca's products were chrysotile only, and used in internal areas
- the proportion of asbestos installed in external areas was 178m², compared to 18.m² in internal areas, and
- there was a greater capacity for amosite fibres from the Seltsam product to become airborne (by a factor of three).

While the Court found that the majority of asbestos used on the house was Seltsam product (again, justifying a greater contribution from Seltsam), it rejected Amaca's proposed mathematical approach to apportioning Reid's damages.

In doing so, the Court observed that there was a lack of evidence regarding how Reid was exposed. This meant the Court could not conclude whose product Reid had inhaled more of, particularly in the context of an otherwise identical exposure profile (as he was exposed to asbestos dust in the same location, at the same time and while performing the same activities).

Therefore, the Court adopted a 'rational' approach and based its decision on the potency and quantity of the asbestos products supplied by each manufacturer.

The Court held that the evidence established that more Seltsam product was used in the construction of the house. That fact, coupled with the accepted greater potency of amosite, led it to find that Seltsam's actions were of greater relative importance than Amaca's in causing the plaintiff's mesothelioma.

Having considered all of those matters, Justice Incerti concluded:

> *"I cannot distinguish between the parties on the issue of respective culpability. I consider the plaintiff's exposure to Seltsam product was of more relative importance in causing the damage suffered by the plaintiff than the plaintiff's exposure to Amaca product. I consider Seltsam's contribution to the plaintiff's damage was 70% (with the remaining 30% from Amaca)."*

IMPLICATIONS FOR INSURERS & DEFENDANTS

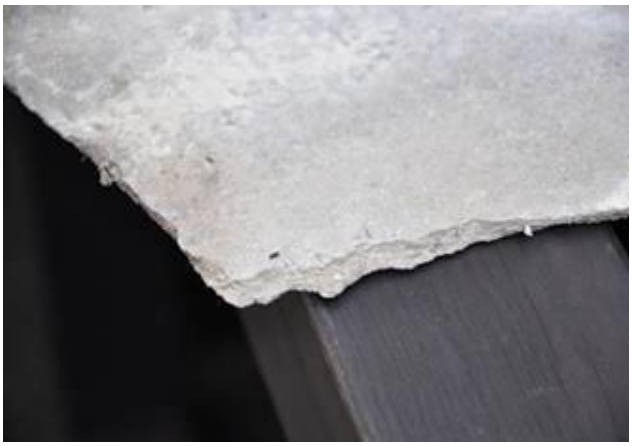
Where co-defendants to asbestos claims are trying to resolve contribution, the causal potency of the type of asbestos should be considered.

If possible, investigations should be undertaken at an early stage to ascertain the composition and type of asbestos products that were being used, together with information about the quantity used and how they were used. This could be done by having an expert take samples and measurements of the asbestos product (if it still exists), locating and speaking with witnesses, or by investigating the company's historical work processes and/or its asbestos purchases.

The latency period (30-60 years) that exists in such claims can make obtaining such evidence challenging. The absence of evidence will restrict the factual findings a Court can make and can limit the strength of any contribution arguments made regarding 'causal potency' and/or 'causal relevance.'

Types of asbestos

- **Chrysotile** (white asbestos): Chrysotile was the most commonly used asbestos and can still be found in many homes and buildings. It is white in colour and has a high flexibility and good heat resistance.
- **Amostie** (brown or grey asbestos): Amosite asbestos is brown or grey in colour. It is particularly strong and heat resistant. Exposure to amosite has a comparatively higher cancer risk compared to chrysotile.
- **Crocidolite** (blue asbestos): Crocidolite is the most dangerous asbestos. It blue in colour and has extremely fine and sharp fibres, meaning it can be easily lodged in the lungs if inhaled.



Chrysotile (white asbestos) was commonly used in cement sheet. It was also used in brake pads, gloves, blankets, rope, gaskets and as pipe insulation.

Amosite (brown or grey asbestos) was frequently used in pipe insulation and cement sheet. It can also be found in insulating board and ceiling tiles.

Crocidolite (blue asbestos) was the most potent. It was mined in Australia, including by a CSR owned company who operated a mine in Wittenoom, Western Australia. Wittenoom is now declared a contaminated area. Interestingly, Midnight Oil's hit 1990s song 'Blue Sky Mine' was inspired by the plight of workers exposed to asbestos at Wittenoom. Blue asbestos was used to insulate steam engines. It was also used in some spray coatings, pipe insulation as well as plastic and cement products.

NEED TO KNOW MORE?

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