

AUSTRALIA / JUDGMENT

Roberts v Comcare [2018] NSWDDT 5

Source: caselaw.nsw.gov.au · Research copy typeset by Esheria. Not court-issued or certified.

Dust Diseases Tribunal New South Wales Medium Neutral Citation: Roberts v Comcare [2018] NSWDDT 5 Hearing dates: 28 April, 4 May 2018 Date of orders: 04 May 2018 Decision date: 04 May 2018 Before: Russell SC DCJ Decision: (1) Judgment for the plaintiff against the defendant for \$392,500

- (2) Order the defendant to pay the plaintiff's costs
- (3) Liberty to apply immediately after delivery of judgment by the High Court of Australia in *Amaca Pty v Latz* Catchwords: DUST DISEASES – damages – loss of Centrelink pension – loss of superannuation pension – whether to take into account reversionary benefit to plaintiff's spouse Legislation Cited: Law Reform (Miscellaneous Provisions) Act 1944 Civil Liability Act 2002 Dust Diseases Tribunal Act 1989 Cases Cited: *Amaca Pty Limited v Latz* [2017] SASCFC 145 *Dib v Amaca* [2017] NSWDDT 6 *Latz v Amaca Pty Limited* [2017] SADC 56 *Londos v Amaca Pty Ltd* [2017] NSWDDT 7 *Lynch v Amaca Pty Limited* [2004] NSWDDT 1 *Poole v Comcare* [2018] NSWDDT 4 *Roberts v Amaca Pty Limited* [2009] NSWDDT 28 Category: Principal judgment Parties: Donald Roberts (plaintiff) Comcare (defendant) Representation: Counsel: A Giurtalis (plaintiff) G Rundle (defendant)

Solicitors: Maurice Blackburn (plaintiff) Australian Government Solicitor (defendant) File Number(s): DDT 112/2018

Judgment

Introduction

1. Mr Donald William Roberts sues Comcare by an Amended Statement of Claim filed by leave on 28 April 2018, seeking damages at common law for the disease of mesothelioma. He alleges that he was employed by the Australian Broadcasting Corporation (ABC) from January 1956 until May 1984. Comcare is the entity responsible for the asbestos liabilities of the ABC. Mr Roberts alleges that he was exposed to asbestos dust and fibre during the course of his employment at the ABC.
2. I am grateful to the counsel and solicitors for both parties for the hard work they have put onto reaching agreement on the heads of damages. I am also grateful to Comcare itself which has indeed acted as a model litigant should. I can see that sensible concessions have been made on both sides.

3. The only issues in the case for me to decide are:

1. The claim for loss of receipt of a Centrelink age pension;
2. The claim for loss of receipt of a superannuation pension.

1. The matter was commenced by a Statement of Claim filed on 21 April 2018. On 24 April 2018 Judge Scotting ordered that the matter be removed from the Claims Resolution Process. Evidence was taken from the plaintiff at a hearing at his home in South Turramurra on Saturday, 28 April 2018.
2. The plaintiff was born on 4 January 1931 and is presently 87 years of age. He has been married for 60 years to his wife Yvonne. They have four children and six grandchildren. They live in the house which the plaintiff built in 1960.
3. The matter was taken out of the Claims Resolution Process because of the ill health of the plaintiff. The hearing resumed shortly after the bedside hearing, because by the Amended Statement of Claim Mr Roberts claimed future economic loss of two kinds. Firstly, he claimed the loss of statutory pension payments from the Commonwealth Superannuation Corporation. Secondly, he claimed the loss of an age pension from Centrelink. By the operation of s 2(2)(a)(ii) of the Law Reform (Miscellaneous Provisions) Act 1946, no damages for either species of future economic loss would be available if the plaintiff died before judgment was delivered. Thus the need for this hearing to proceed rapidly.

Exposure

1. The plaintiff was employed from 1957 until 1969 with the ABC Engineering Department based at Gore Hill. He installed the lighting mechanisms in Studios 21 and 22. To do this he had to drill through insulation material on the ceiling. When he did this he was working above his head and dust "fell like snow" onto him. He breathed in this dust. After installation of the lighting he continued to go into the studios about three times a week and sometimes had to drill through the insulation on the ceiling. He did this regularly until he left Gore Hill in 1969.
2. A report dated 10 September 1984 from the Department of Occupational and Environmental Health establishes that there was sprayed amosite asbestos on the ceilings in Studios 21 and 22.
3. The plaintiff also alleged that when doing other electrical work at Gore Hill he had to cut and drill fibro walls. A concession was made, during the bedside hearing on 28 April 2018, that there was asbestos cement fibro sheeting in the premises at Gore Hill.
4. The defendant very properly conceded breach of duty of care.

Medical History

1. The plaintiff said that he was well until he developed mesothelioma. He had back pain in early 2017 and saw his GP and a spinal specialist. He then saw Dr Ogbourne a respiratory specialist. He had a pleural biopsy at the San Hospital in mid-December 2017 and was told that he had mesothelioma.
2. The plaintiff said that at the moment his pain is "excruciating" and that he is "just coping". He has not had chemotherapy but has had radiotherapy, with no benefit. He has been on oxygen since 26 April 2018.
3. Diagnosis has been conceded by the defendant.

General Damages

1. General damages are agreed at \$330,000.

Loss of Expectation of Life

1. Damages are agreed at \$5,000.

Out-of-Pocket Expenses

1. Prior to commencing work at the ABC in 1956, the plaintiff was employed by Lars Halvorsen and Sons Pty Limited from 1947 to 1954 and by the Maritime Services Board from 1954 to 1955. In both periods of employment he was exposed to asbestos dust and fibre.
2. An application has been made to the Dust Diseases Authority and it is anticipated that the Authority will pay all of the plaintiff's medical and hospital expenses. There will be no award for out-of-pocket expenses.

Gratuitous Attendant Care Services

1. Section 15A of the Civil Liability Act 2002 applies to the determination of civil liability for damages for gratuitous attendant care services in proceedings brought under s 11 of the Dust Diseases Tribunal Act 1989.
2. By s 15A(4) the phrase "attendant care services" as defined in s 15(1) applies under s 15A. So does the phrase "gratuitous attendant care services".
3. Section 15(1) provides: "In this section: 'Attendant Care Services' means any of the following:
 - (a) services of a domestic nature,
 - (b) services related to nursing,
 - (c) services that aim to alleviate the consequences of an injury. 'Gratuitous Attendance Care Services' means attendant care services:
 - (a) that have been or are to be provided by another person to a claimant, and
 - (b) for which the claimant has not paid or is not liable to pay."

1. Section 15A(2) provides that the hourly rate prescribed by s 15(5) applies to the calculation of damages, although the restriction in s 15 as to a minimum number of hours does not apply – s 15A(2).
2. The plaintiff said that before his diagnosis (which was in mid-December 2017) he was in good health and was active. He said that his wife (who is 82) is now doing everything for him and that his children help when they can.
3. Damages for past and future gratuitous assistant care are agreed at \$57,500

Economic Loss Generally

1. In 2017 I decided two cases concerning claims for loss of an age pension from Centrelink - *Dib v Amaca* [2017] NSWDDT 6 and *Londos v Amaca Pty Ltd* [2017] NSWDDT 7. For reasons set out at paras [114-170] in *Dib*, I came to the view that damages for loss of the age pension were not available at law. My decisions were followed by Judge Kearns in *Poole v Comcare* [2018] NSWDDT 4.
2. A different conclusion on the age pension issue was reached by Judge Gilchrist in the District Court of South Australia in *Latz v Amaca Pty Limited* [2017] SADC 56. His Honour's view was affirmed on appeal (by majority) in *Amaca Pty Limited v Latz* [2017] SASCFC 145. An appeal from that decision to the High Court of Australia, by special leave, has been heard and judgment was reserved on 17 April 2018. That judgment should settle the age pension issue once and for all.
3. Given the exigencies surrounding delivery of this judgment, I will simply follow my own decisions in *Dib* and *Londos*. If my finding in those cases was wrong as a matter of law, as a result of the pending decision of the High Court, then that can be quickly cured by a suitable consent judgment, a reconsideration under s 13(6) of the Dust Diseases Tribunal Act 1989, or an appeal.
4. The superannuation pension issue thrown up in this case was not considered by me in *Dib* or *Londos*. Loss of a work-based pension was awarded by Judge Gilchrist in South Australia and his decision was affirmed (by majority) on appeal. In *Dib* I referred to two decisions of Judge Curtis in *Lynch v Amaca Pty Limited* [2004] NSWDDT 1 and *Roberts v Amaca Pty Limited* [2009] NSWDDT 28 where his Honour awarded damages of the type sought in this case. My obiter remarks in *Dib* were that different considerations applied where the loss was of a pension earned through exercise of the plaintiff's earning capacity, as opposed to an age pension – see *Dib* at para [151].
5. Once again, I see no point in detailed consideration of this issue, given that it will soon be settled by delivery of the judgment of the High Court in *Latz*. I do note that the Full Court of the Supreme Court of South Australia found (by majority) that loss of a superannuation type pension was compensable and that the nett present value of any reversionary pension payable to the claimant's spouse had to be deducted.

6. For the reasons set out by the majority in Latz my view is to the same effect on both issues, but again, given the exigencies surrounding delivery of this judgment, it is not a matter which I have considered at any length.

Past Economic Loss

1. The plaintiff will receive his age pension and his Commonwealth pension right up until his death. There is therefore no claim for past economic loss.

Future Economic Loss

1. I find that the plaintiff is entitled to the present value of the loss of receipt of his Commonwealth Superannuation Scheme pension. This figure is agreed at \$87,000.
2. I find that there has to be a deduction for the present value of the reversionary benefit to the plaintiff's wife. This figure is agreed at \$95,000.
3. The nett result is that there will be no award of damages for loss of the future receipt of the superannuation pension. If I am wrong on that point, then the damages for loss of the superannuation pension should be \$87,000.
4. I find that there is no entitlement to damages for loss of future receipt of the Centrelink age pension. If I am wrong on that point, then the damages for loss of the Centrelink pension should be \$32,000.

Conclusion

1. I award the following heads of damage: General damages \$330,000 Loss of expectation of life \$5,000 Past economic loss Nil Future economic loss Nil Out-of-pocket expenses Nil Gratuitous attendant care services \$57,500 TOTAL \$392,500
1. My orders are:
 1. Judgment for the plaintiff against the defendant for \$392,500.
 2. Order the defendant to pay the plaintiff's costs.
 3. Liberty to apply immediately after delivery of judgment by the High Court of Australia in Amaca Pty v Latz.

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated. Decision last updated: 07 May 2018

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.caselaw.nsw.gov.au/decision/5aef8d9ee4b087b8baa88cf2>

CASE PAGE <https://chat.esheria.ai/case-law/australia/roberts-v-comcare-2018-nswddt-5-2018>

Prepared on 29 October 2026 · Esheria