



[\[Home\]](#) [\[Databases\]](#) [\[WorldLII\]](#) [\[Search\]](#) [\[Feedback\]](#)

Dust Diseases Tribunal of New South Wales

You are here: [Austlii](#) >> [Databases](#) >> [Dust Diseases Tribunal of New South Wales](#) >> [2009](#) >> [\[2009\] NSWDDT 23](#)

[\[Database Search\]](#) [\[Name Search\]](#) [\[Recent Decisions\]](#) [\[Noteup\]](#) [\[Download\]](#) [\[Context\]](#) [\[No Context\]](#)
[\[Help\]](#)

Brian Anthony Mooney v Amaca Pty Ltd [2009] NSWDDT 23 (24 September 2009)

Last Updated: 14 October 2009

NEW SOUTH WALES DUST DISEASES TRIBUNAL

CITATION:

Brian Anthony Mooney v Amaca Pty Ltd [\[2009\] NSWDDT 23](#)

PARTIES:

Brian Anthony  **Mooney**
Amaca  Pty Ltd

MATTER NUMBER(S):

CATCHWORDS:

DUST DISEASES TRIBUNAL :-
General Damages
Loss of Superannuation
Griffiths v Kerkemeyer Damages

LEGISLATION CITED:

CASES CITED:

Griffiths v Kerkemeyer [\[1977\] HCA 45](#); [\(1977\) 139 CLR 161](#)

TEXTS CITED:

CORAM:

Curtis J

DATES OF HEARING:

9 September 2009 - 11 September 2009.

DATE OF JUDGMENT:

24 September 2009

LEGAL REPRESENTATIVES

Mr P C B Semmler QC with Mr S Tzouganatos instructed by Turner Freeman appeared for the plaintiff

Mr D J Russell SC instructed by DLA Phillips Fox appeared for the defendant Amaca Pty Ltd

JUDGMENT:**Dust Diseases Tribunal of New South Wales****Matter Number 81 of 2009****Brian Anthony Mooney**

v

Amaca Pty Ltd (formerly James Hardie and Coy Pty Ltd)

24 September 2009

JUDGMENT

CURTIS J

1. The plaintiff, Brian Anthony Mooney, who was born on 2 March 1950, worked as a labourer for Mr Doug McKillop, an electrical contractor, during school holidays, and occasionally at weekends, between 1964 and 1967. In the course of this employment he was exposed to and inhaled asbestos dust and fibre released from building and insulation materials manufactured by James Hardie and Coy Pty Limited.

2. As a result of this exposure Mr Mooney has contracted malignant mesothelioma of the pleura. Amaca does not dispute that it owed a duty to Mr Mooney, and that his disease resulted from breach of that duty. He is entitled to verdict and judgment.

General Damages

3. Mr Mooney is 59 years of age. He has been happily married to his wife Janis for 36 years and has three children and four grandchildren. Before he fell ill he was extremely fit and active, and successful in his career as a senior executive with the Nestle Company. He ran 8 km five times each week, competed in the City to Surf event, and ran in half marathons.

4. In mid-2005 Mr Mooney developed right-sided chest pain. In January 2007 he developed fluid on his right lung requiring pleural aspiration. On 25 January 2007 Dr William Meldrum-Hanna, a cardiothoracic surgeon, performed pleural biopsy, right sided pleural aspiration, and a talc pleurodesis. During the surgery Mr Mooney developed atrial fibrillation. He was an inpatient for four days.

5. Although Dr Meldrum-Hanna told Mr Mooney and his wife that the pathology appeared to be mesothelioma, there was some doubt about this, and on 19 April 2007 Dr Despas, the treating physician, told Mr Mooney that he did not have mesothelioma.
6. Mr Mooney's symptoms continued. He developed a dry cough, breathlessness, lethargy, fatigue, and night sweats. In July 2008, a cardiologist, Dr Bill Petrellis, diagnosed the problem as related to cardiac fibrillation and Mr Mooney was twice treated with cardioversion in the Sydney Adventist Hospital.
7. In August 2008 Mr Mooney became very ill, with extreme breathlessness and fatigue. He was admitted to Baulkham Hills Private Hospital on 4 September 2008, and the following day 3.2L of fluid was drained from his lung. He was told that the results from the fluid were negative for malignancy.
8. On 15 September 2008 Mr Mooney was again admitted to the Sydney Adventist Hospital where he underwent a further right-sided pleural aspiration, open biopsy and another talc pleurodesis. He suffered extreme pain following the surgery. On 22 September 2008 Dr Meldrum-Hanna told Mr Mooney that he had mesothelioma. Mr Mooney was understandably devastated.
9. On 10 October 2008 Mr Mooney consulted Professor Brian McCaughan with a view to surgical removal of the tumour. He was told that this was not a realistic option unless the tumour was caused to shrink. To this end Mr Mooney received chemotherapy under the care of Dr Rina Hui, an oncologist. The chemotherapy caused numerous side-effects including fatigue so extreme that Mr Mooney became confused and couldn't think straight, depression, biliousness, tinnitis, hoarseness, and extreme and constant night sweats.
10. On 11 December 2008 a CT scan confirmed that there had been no shrinkage of the tumour, but to the contrary, it had grown slightly. Professor McCaughan suggested that Mr Mooney have additional chemotherapy.
11. Notwithstanding further chemotherapy and radiotherapy the tumour continued to advance. It has spread to his abdomen. Lumps have formed on the right side of his body. He suffers episodes of excruciating right-sided chest pain, and requires increasing doses of strong analgesics.
12. Further administration of chemotherapy between June and August of 2009 has caused additional side-effects including diarrhoea, nerve pain and neuropathy.
13. Mr Mooney has received hours of counselling and support designed to alleviate his extreme mental anguish. I cannot see how such intervention could blind him to his circumstance. His pain and suffering will increase inexorably until the moment of his untimely death. Of this he is terribly conscious. Dr K. Foster, an eminent physician who treated many persons suffering from this disease, has said that "*one almost wishes that people dying of mesothelioma will become unconscious, because it is a most miserable death*".
14. Mr Mooney has suffered over a longer period than most people who contract mesothelioma; his disease was probably contracted in 2005. His earlier mental suffering was compounded by the false hopes created and dashed by inconstant medical diagnosis. His relative youth and extreme fitness had augured well for a long and energetic old age. No amount of money can properly compensate Mr Mooney for the deprivation of his life, however he should have the comfort of knowing that the community through the Tribunal does not value that life cheaply.
15. I assess general damages in the sum of \$290,000. I allow interest on \$200,000 at 2 per cent from 1 July 2005, (4.25 years); \$17,000.

Loss of expectation of life

16. In respect of the loss of 26 years on the life tables, I allow the now conventional sum of \$26,000.

Past and Future Economic Loss

Wages and Bonuses

17. Mr Chris Katehos of the accounting firm Furzer Crestani Services, and Ms Tamara Lindsay of Forensis Accounting, have prepared a joint expert report. In this report Mr Katehos has calculated the past and future economic loss, excluding superannuation losses, at \$373,930. Ms Lindsay calculates the loss at \$370,237.

18. These figures have been subjected to a 3 per cent deduction for vicissitudes. Because of the very short period of future earnings, less than six years, I believe this percentage to be appropriate.

19. The report records the differences in the assumptions made by each expert. For instance, Ms Lindsay assumed that Mr Mooney would survive only until 19 September 2009, whereas Mr Katehos assumed a life expectancy until 16 December 2009. The latter assumption is now probable. Conversely I think that in relation to the annual leave entitlements on termination of Mr Mooney's employment, Ms Lindsay's assumptions are more justified.

20. I do not think that the slight difference in the outcome requires that I descend into the detail of all of the differences, and I allow the midway figure of \$372,084.

Superannuation

21. The experts have agreed that if Mr Mooney were to have remained uninjured, the present value of his superannuation payment on his retirement date of 2 March 2015 is in the order of \$954,000.

22. In March 2009 Mr Mooney closed his superannuation account, withdrawing the balance of \$708,582 and placing it in term deposits. He did this because he feared that financial conditions would result in a capital loss if he left this money in the fund.

23. The experts further agree that the earnings on the sum of \$708,582 for the period from March 2009 to 2 March 2015 should be taken into account in reducing the nominal capital loss. They agree as to the rate of earnings but disagree as to the effect of taxation upon those earnings.

24. Mr Katehos, on the instructions of Mr Mooney's solicitors, has assumed that the earnings will be taxed at the marginal rate of 40 per cent, and calculated that the loss of superannuation amounts to \$227,093 net of 3 per cent vicissitudes.

25. Ms Lindsay upon the same assumptions as to earnings, but upon the assumption that the earnings are not taxed, calculates the loss of superannuation as \$149,182 net of 3 per cent vicissitudes, and upon the assumption of 15 per cent tax rate, as \$177,799 net of 3 per cent vicissitudes.

26. I can see no reasonable basis for the assumption that the earnings in question would be taxed at 40 per cent.

27. The object of the exercise is to restore the plaintiff to the position in which he would have been but for his illness. In this case that object would be satisfied if on 2 March 2015 a fund of \$954,000 existed which Mr Mooney could have disposed of as he wished either during his lifetime or by testamentary disposition. It is reasonable to assume that such a disposition would be to his wife. It is further reasonable to suppose that the present sum of \$708,582 will be in the hands of Mrs Mooney upon Mr Mooney's death.

28. Mrs Mooney, who formerly worked full-time as a teacher, ceased work in August 2008 to care for her husband. Mr Mooney's 2008 personal income-tax return records the taxable income of his spouse as \$54,873. If Mrs Mooney is to return to work after the death of her husband I assume that her earnings will be similar.

29. The 40 per cent marginal rate of taxation applies to income between \$80,001 and \$180,000 in respect of the taxation year 2008-2009. From 2009-2010 the marginal rate on that earnings band is 38 per cent.

30. Ms Lindsay points out that if the sum of \$708,582 is invested in Australian shares returning franked dividends, no tax would be payable if Mrs Mooney is otherwise unemployed, because her income from such dividends will be less than \$80,000.

31. In the alternative, although Ms Lindsay did not refer to this, if Mrs Mooney is employed, she is entitled to salary sacrifice up to \$50,000 each year to a superannuation fund, the contribution being taxed at 15 per cent. Mrs Mooney may then replace this outgoing with the earnings from the \$708,582, which are assumed not to exceed \$50,000.

32. I think that Mrs Mooney will probably resume employment after the death of her husband and the loss of his support. I also think it reasonable that she salary sacrifice an amount equivalent to the income stream from the investment of \$708,582 into a superannuation fund. The object of this income stream is the generation of a capital fund accessible at a future time, not the creation of present income. I adopt Ms Lindsay's calculations in which the earnings on the fund of \$708,582 will be taxed at 15 per cent.

33. I find that the lost value of superannuation is \$177,799.

Loss on Motor Vehicle

34. This is agreed in the sum of \$28,862.

Past Griffiths v Kerkemeyer

35. Mrs Mooney has prepared a schedule that details the many hours that she has spent attending to her husband's care until 9 September 2009. The commercial cost of the attendances totals \$63,292.94. It is apparent from this schedule that some of the hours recorded involved no more than companionship during medical attendances. Although it is perfectly understandable that Mrs Mooney would offer the comfort of her presence to her husband, the measure of this head of damage is need.

36. At the request of the plaintiff's solicitors, Ms Joanne Oates, an accredited occupational therapist, attended upon Mr Mooney on 8 April 2009 and prepared a report dated 22 April 2009. In this report Ms Oates estimated the commercial value of past care from 1 December 2006 to 30 April 2009 as \$26,911.69. She estimated the cost of care for the period 1 May 2009 to 30 September 2009 at \$23,817.28. The total of these two sums is \$50,728.97.

37. I allow the sum of \$50,728.97 in respect of past care. I allow interest on \$26,911.69 at 4.5 per cent for 1.5 years (most of the care being provided in the later part of this period); \$1,816.54, and interest on \$23,817.28 at 4.5 per cent for 0.4 years; \$428.71. The total in interest is \$2,245.25.

Future Griffiths v Kerkemeyer

38. Ms Oates estimated the commercial value of gratuitous care between 1 October 2009 and a probable date of death on 16 December 2009 at \$22,460.31. I accept this evidence.

Past and Future Out-Of-Pocket Expenses

39. No claim is made because of Mr Mooney's entitlement to payments from the Dust Diseases Board.

Summary of Damages

\$

General Damages	290,000
Interest on General Damages	17,000
Loss of Expectation of Life	26,000
Past and Future Loss of Income	372,084
Loss of Superannuation	177,799
Loss on Motor Vehicle	28,862
Past <i>Griffiths v Kerkemeyer</i>	50,729
Interest on past <i>Griffiths v Kerkemeyer</i>	2,245
Future <i>Griffiths v Kerkemeyer</i>	22,460
TOTAL	987,179

40. Judgment for the plaintiff in the sum of **\$987,179**. The defendant Amaca Pty Ltd to pay the plaintiff's costs.

Mr P C B Semmler QC with Mr S Tzouganatos instructed by Turner Freeman appeared for the plaintiff

Mr D J Russell SC instructed by DLA Phillips Fox appeared for the defendant Amaca Pty Ltd

AustLII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#)

URL: <http://www.austlii.edu.au/au/cases/nsw/NWDDT/2009/23.html>