

# SUPREME COURT OF QUEENSLAND

CITATION: *Body v Mount Isa Mines Limited & Ors* [2013] QSC 188

PARTIES: **SIDNEY BODY by his litigation guardian SHARLENE BODY**  
(plaintiff/respondent)  
v  
**MOUNT ISA MINES LIMITED (ACN 009 661 447),  
XSTRATA PLC (INCORPORATED IN ENGLAND  
AND WALES UNDER THE COMPANIES ACT, 1985  
REG NO. 4345939) AND XSTRATA QUEENSLAND  
LIMITED (ACN 009 814 019)**  
(defendants/applicants)

FILE NO/S: BS 1247 of 2011

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 26 July 2013

DELIVERED AT: Brisbane

HEARING DATE: 14 June 2013

JUDGE: Boddice J

ORDER: **I shall hear the parties as to the appropriate orders, and as to costs.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – STATEMENT OF CLAIM – where the defendants make application to strike out the fifth further amended statement of claim under r 171 *Uniform Civil Procedure Rules* 1999 (Qld) – where the plaintiff claims injuries from the ingestion of lead – where the defendants contend the pleaded facts are insufficient to give a cause of action – where the plaintiff defines certain terms in the pleading – whether the pleading discloses a cause of action  
*Uniform Civil Procedure Rules 1999* (Qld), r 171  
*Dey v Victorian Railway Commissioners* (1949) 78 CLR 62, cited  
*General State Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, cited  
*Southern Cross Mine Management Pty Ltd v Ensham*

*Resources Pty Ltd* [2004] QSC 457, cited  
*Thiess Pty Ltd v FFE Minerals Australia Pty Ltd* [2007] QSC  
 209, cited

COUNSEL: G R Mullins for the plaintiff/respondent  
 W Sofronoff QC, with B F Charrington, for the defendants/  
 applicants

SOLICITORS: Slater and Gordon for the plaintiff/respondent  
 Allens Arthur Robinson for the defendants/applicants

- [1] The defendants make application, pursuant to Rule 171 of the *Uniform Civil Procedure Rules*, to strike out the fifth further amended statement of claim (“the pleading”), filed by the plaintiff on 31 May 2013, for failing to disclose a cause of action or, alternatively, for specified paragraphs be struck out on the basis they are unintelligible and internally inconsistent. At the hearing of the application, the defendants pressed only the application to strike out of the pleading as a whole.
- [2] The plaintiff’s claim, commenced in 2011, is for damages for brain injuries allegedly suffered by the plaintiff as a consequence of the ingestion of lead. As is apparent, from the heading of the pleading, the plaintiff has amended his statement of claim on a number of occasions since commencement of the proceeding.

### **Background**

- [3] The plaintiff is a child. The defendants conduct mining and smelting operations on land at Mount Isa pursuant to a mining lease granted by the State of Queensland.
- [4] The plaintiff alleges the defendant’s mining and smelting operations result in emissions containing lead being released into the atmosphere which can be absorbed by persons living nearby and cause injury, including brain damage, particularly to children.
- [5] The plaintiff alleges that he, as a child living near the lease, was liable to ingest lead from the emissions, and that as a consequence of the ingestion of lead he has suffered brain damage.

### **Pleading**

- [6] The plaintiff alleges the defendants knew of the risk of injury from the emission of lead at all relevant times, and that the sustaining of injury from such emissions was reasonably foreseeable. As a consequence, the defendants came under a duty to take all reasonable steps to ensure the plaintiff was not injured as a consequence of the emissions. This duty could have been fulfilled by warning and informing the plaintiff about the risk of injury from the absorption of lead. Had such a warning been given the plaintiff’s mother would have taken steps to avoid injury to the plaintiff.
- [7] Relevantly, the plaintiff pleads:

“7. At all material times during the period 1 January 1990 until the present day:

7.1 The Defendants conducted mining and smelting operations from the Lease, including the mining of lead and other metals;

- 7.2 During the process of its mining and smelting operations, the Defendants caused emissions containing lead to be released from the Lease into the atmosphere (“the Emissions”);

Particulars

- (i) The Defendants caused the Emissions to be released into the atmosphere through their:
    - (a) lead smelter stack;
    - (b) copper smelter stack;
    - (c) uncovered slag / spoil heaps;
    - (d) mining activities;
    - (e) ore transport and preparation;
    - (f) sintering and smelting operations;
    - (g) waste disposal;
  - (ii) The Emissions were, relevantly, in the form of dust, particulate fallout and fugitive emissions;
  - (iii) The Emissions were atmospherically transported and settled on buildings, roads and soil in the Town of Mount Isa;
  - (iv) The lead emitted in the Emissions is identified as the Mount Isa QLD ore body isotope having the following lead isotope ratios:
    - (a) 208/206 with a mean of 2.2224;
    - (b) 207/206 with a mean of 0.9586;
    - (c) 206/204 with a mean of 16.112; and
  - (v) The Plaintiff reserves his right to provide further particulars after the completion of disclosure.
- 7.3 The lead in the Emissions was capable of ingestion, absorption and inhalation (“Absorption”) by persons who were living within the Town of Mount Isa (including, in and after 2004, the Plaintiff).

Particulars

Lead which is released into the atmosphere (as alleged at sub-paragraph 7.2) is capable of inhalation and ingestion through the mouth and nose, and by absorption through the skin, relevantly by contact with surface soils and dust.

8. At all material times in and after 2004 the Emissions were a significant source of lead which was capable of Absorption by persons living within the Town of Mount Isa (including the Plaintiff).

Particulars

- (i) Mount Isa soils contain both geogenic soil grains and anthropogenic soil grains. The morphology and composition of the anthropogenic grains in Mount Isa soils is consistent with their having originated from the

- Defendants' mining and smelting process either as settled particles from stack emissions or as fugitive slag residues;
- (ii) Lead isotope compositions from surface soils (at a depth of 0-2cm), air filters and dust wipe samples from the Mount Isa urban area closely approximate isotope ratios of the Mount Isa ore body;
  - (iii) Surface soils in Mount Isa are enriched in other heavy metals at levels not found naturally in surface soils. By way of example, the copper ore body is located several hundred metres below the surface, but high-grade and elevated concentrations of copper are found in surface soils. The Emissions contained copper. Surface soils concentration ratios of lead and copper are highly correlated indicating that these were deposited atmospherically and co-deposited. To the Plaintiff's knowledge, there no significant sources for those deposits apart from the Emissions;
  - (iv) From the matters set out at (i)-(iii) above, it may be inferred that surface soils and dust in the Town of Mount Isa were significantly enriched with lead emitted by the Defendants; and
  - (v) The Plaintiff reserves his right to give further particulars following the conclusion of disclosure.

9. At all material times in and after 2004:

- ~~8.19.1~~ people living in the Town of Mount Isa, including children, were at risk of Absorption of lead from the Emissions;
  - ~~8.29.2~~ the Absorption of lead could cause personal injury including irreversible brain damage; and
  - ~~8.39.3~~ children, particularly those under the age of five years, who absorbed lead such that their blood lead levels exceeded 0.72 $\mu$ mol/L [15  $\mu$ gdL] were at risk of suffering irreversible brain damage, severe illness and/or interference with intellectual development.
- ("the Risk of Injury")

...

~~11.12.~~ In a report to the State of Queensland in December 1994, Dr Neville recommended ("the Neville Report") that on the basis of the results obtained in his investigation referred to in paragraph 10, community based action to reduce environmental lead exposure should be taken in Mount Isa in line with NHMRC guidelines, in particular:

- ~~11.12.2~~ determine all sources of lead exposure in the community;
- ~~11.212.2~~ develop an environmental management plan for the reduction of environmental lead exposure from all significant sources;

- ~~11.3~~12.3 identify at-risk sub-groups in the community using data available from previous environmental sampling and the known addresses of the subjects in the survey;
- ~~11.4~~12.4 ensure appropriate information was made available to the community for the control of lead exposure, in particular, by at-risk sub-groups; and
- ~~11.5~~12.5 undertake more sampling of young children on a structured, random basis to better ascertain blood levels in the age group in the community.

...

~~14.15.~~ In a memo of 22 November 1995, Mr Prickett advised the Mount Isa City Council (“the Prickett Report”) that investigation over a number of years indicated the widespread occurrence of lead above 300 ppm throughout all parts of Mount Isa as a consequence of the following factors:

- ~~14.1~~15.1 the discharge of tailings and other contaminated liquid wastes via many drainage channels into the river. Deposits of tailings were identified from Death Adder Gully northwards;
- ~~14.2~~15.2 the indiscriminate removal of soil from the river for use as top dressing up to the early 1970’s;
- ~~14.3~~15.3 evidence obtained from analysis of residential roof space and roof gutters indicated widespread distribution of heavy metals contained in dust emanating from the lease. In addition, it was possible that particulate fallout from the smelter stacks had added to this burden;
- ~~14.4~~15.4 heavy metals leaving the lease on work clothing and boots;
- ~~14.5~~15.5 heavy metals leaving the lease on plant and equipment sent offsite for repair;
- ~~14.6~~15.6 vehicles leaving the lease without being washed due to breakdown of washing facilities and/or insufficient or inefficient facilities; and
- ~~14.7~~15.7 overburden from open cut mining operations being used to stabilise a number of properties in Mount Isa. Subsequent decomposition of this material released the heavy metal salts which then became mobile.

~~15.16.~~ By 1996, the Defendants:

- ~~15.1~~16.1 knew of the contents of the Neville & Prickett Reports and had possession of the documents comprising those reports;
- ~~15.2~~16.2 believed the facts and opinions contained therein to be true;
- ~~15.3~~16.3 knew that people within Mount Isa were at risk of absorbing lead emitted by the Defendants;
- ~~15.4~~16.4 knew that if children, particularly those under the age of 5, absorbed lead such that their blood lead levels exceeded 0.72  $\mu\text{mol/L}$  [15 $\mu\text{g/dL}$ ] that they were at risk of suffering irreversible brain damage, severe illness and/or interference with intellectual development;
- ~~15.5~~16.5 knew that 15% of children in Mount Isa could reasonably be expected to have blood lead levels exceeding 0.72  $\mu\text{mol/L}$  [15  $\mu\text{g/dL}$ ];
- ~~15.6~~16.6 knew that many children under the age of 5 from the town of Mount Isa who had undergone blood tests in the preceding 10 years had demonstrated blood lead levels exceeding 0.72 $\mu\text{mol/L}$  [15  $\mu\text{g/dL}$ ];
- ~~15.7~~16.7 knew that children living in Mount Isa were particularly vulnerable to the Absorption of lead and were at risk of serious injury as a consequence; and
- ~~15.8~~16.8 knew that practical steps could and should be taken by parents to reduce the risk of the Absorption of lead including the steps described at sub-paragraph 31.1(b).
- ~~16.17.~~ At all material times in and after 2004 the Risk of Injury was reasonably foreseeable by the Defendants.

#### Particulars

The Plaintiff refers to and repeats the matters alleged at paragraphs 5 to 7 and 9 to 16, including the particulars given under those paragraphs.

....

- ~~25.26.~~ At all material times while he was living in the Town of Mount Isa, the Plaintiff was vulnerable to the Absorption of lead from the Emissions (as alleged at sub-paragraph 7.2) and was at risk of serious injury as a consequence.
- ~~26.27.~~ During the period November 2004 to present, the Plaintiff has, without his knowledge or consent, absorbed into his body lead from the Emissions.

#### Particulars

The Plaintiff refers to and repeats the matters alleged at paragraphs 5 to 8 and 18 to 25, including the particulars given under those paragraphs.

...

~~29.30.~~ As a consequence of his Absorption of lead and subsequent blood contamination, the Plaintiff:

~~29.430.1~~ has suffered impairments in fine motor functioning, expressive and receptive language, verbal memory and social perception;

~~29.230.2~~ suffered brain damage and dysfunction;

~~29.330.3~~ suffered significant impairment of neuropsychological function, including executive function; and

~~29.430.4~~ suffered significant impairment to neuropsychological function including attention and executive functions.

~~30.31.~~ By reason of the matters alleged at paragraphs 5 to 26, the Defendants owed the Plaintiff a duty to take all reasonable steps to ensure that the Plaintiff was not injured as a consequence of the Emissions, in particular, to take all reasonable steps:

31.1 to warn and inform the Plaintiff (by his mother, as a member of the class of persons living within the Town of Mount Isa):

- a. of the Risk of Injury;
- b. that children's exposure to lead may be decreased or mitigated by:
  - (i) limiting children's access to play in areas and soil uncovered by grass;
  - (ii) ensuring that children wash their hands and scrub under the nails before eating;
  - (iii) providing children with a diet rich in calcium and increasing fruit intake;
  - (iv) washing food that may come into contact with the ground before eating;
  - (v) ensuring that the home is cleaned and free of dust;
  - (vi) cleaning roofs, gutters, air-conditioning units and other household appliances;
  - (vii) regular blood testing to determine blood lead levels.

~~31.32.~~ In and after November 2004, in breach of the duty of care owed to the Plaintiff the Defendants failed to take all reasonable steps to warn and inform the Plaintiff as alleged at sub-paragraphs ~~30~~ 31.1 and 31.2.

Particulars

- (i) The Defendants could reasonably have, but did not, provide each household in the Town of Mount Isa with a pamphlet or other written information communicating the warning and information described at sub-paragraphs ~~30~~ 31.1(a)-(b) at least six-monthly;
- (ii) The Defendants could reasonably have, but did not, instigate and repeat public education programs and media advertisements in the Town of Mount Isa, including by way of billboard advertisements placed in and around the town, communicating the warning and information described at sub-paragraphs ~~30~~ 31.1(a)-(b), at least six-monthly.

~~32.33.~~ Had the Plaintiff's mother been warned and informed of the matters described at paragraph sub-paragraphs ~~30~~ 31.1(a)-(b) she would have taken steps to ensure that the Plaintiff was not exposed to the risk of Absorption of lead including by:

~~32.433.1~~ monitoring and limiting the Plaintiff's exploratory hand-to-mouth behaviour including pica;

~~32.233.2~~ regularly cleaning all floors with wet mopping to minimise dust accumulation;

~~32.333.3~~ wiping indoor surfaces (furniture, window and sliding door tracks, bench tops) regularly with a wet cleaning cloth to minimise dust accumulation;

~~32.433.4~~ following the steps described in paragraph sub-paragraph ~~30~~ 31.1(b) to reduce the plaintiff's exposure to lead;

~~32.533.5~~ ensuring that toys, blankets, dummies and other children's items were damp-wiped regularly and stored away from open areas of dust deposition; and

~~32.633.6~~ alternatively, by moving away from Mount Isa, as a result of which the Plaintiff's exposure to lead and the consequences of that exposure would have been avoided." (errors in original)

**Defendant's submissions**

- [8] The defendant contends the pleaded facts are insufficient, as a matter of law, to give rise to a cause of action. There are three bases for this contention.

- [9] First, the defendants are obliged by statute to operate the lease pursuant to plans approved by the Minister. Failure to do so may result in termination of the lease. At the relevant time, a condition of the operation of the lease was that the amount of dust and gases generated on the lease, and affecting adjacent lands, had to be at a level acceptable to the Minister. There were specified limits on the air emissions standards in respect of the prescription of limits for concentrations of lead.
- [10] The applicants contend that as there is no allegation in the pleading that they have conducted the operations on the lease negligently, or in breach of the terms of the statute, there is no basis for a finding that it owed the pleaded duty. They are conducting the operation in accordance with the terms of the statute, and the existence of such a duty would be inconsistent with the statute.
- [11] Second, the pleading alleges the emissions, and their harmful effects, were known by persons or entities other than the defendants. The duty of care, if it arises, must therefore also apply to those persons. As the particular duty alleged is a duty to warn, there is an obligation for the plaintiffs to establish circumstances creating a relationship which would give rise to such a duty on the part of the defendants. There is no authority to support a proposition that a person carrying out a statutory duty in accordance with the terms of its obligations is under an additional duty to warn those who might be affected by the performance of that duty.
- [12] Third, the pleading is fundamentally flawed as it pleads the applicants breached a duty to warn the plaintiff in circumstances where the plaintiff does not propose to prove that lead emitted from the lease caused or contributed to any injury suffered by the plaintiff. The pleading pleads the applicants caused emissions of lead, which were capable of absorption by persons and could thereby cause injury, but also pleads that the plaintiff's injury was suffered "as a consequence of the absorption of lead and subsequent blood contamination" in circumstances where the pleading specifically pleads that the absorption of lead can occur from the ground and other sources.

### **Plaintiff's submissions**

- [13] The plaintiff submits the application ought to be dismissed as the duty of care, breach thereof, and the causative link between that breach and the plaintiff's injuries are pleaded sufficiently to establish a cause of action. Whether the plaintiff ultimately succeeds at trial is properly to be determined after hearing evidence.
- [14] The plaintiff contends the fact the defendants operate their lease pursuant to a statutory obligation does not prohibit the existence of the relevant duty of care. Any party exercising statutory powers has a duty to exercise those powers with reasonable care so as to prevent injury which has been occasioned or is likely to be occasioned by the exercise of those powers, unless the imposition of such a duty would be incompatible with the other duties, statutory or otherwise, imposed on that party. The imposition of a duty to warn on the defendants would not be incompatible in the circumstances.
- [15] The plaintiff further contends that in determining whether the defendants owed a duty of care, and have breached that duty, it is irrelevant that others may also owe a duty of care.
- [16] Finally, the plaintiff contends the pleading properly pleads that the ingestion of lead from the emissions generated by the operation of the lease by the applicants was a substantial cause of the absorption of lead. To succeed, it is unnecessary for the

plaintiff to establish that the plaintiff's injuries were only caused by the ingestion of lead from the emissions. If the ingestion of lead from the emissions was a substantial cause of the plaintiff's injury, that will establish the applicant's liability as a matter of law.

### Applicable legal principles

- [17] The power to strike out a pleading on the ground that it fails to disclose a cause of action is to be exercised sparingly, and in only the clearest of cases.<sup>1</sup> In considering applications, it is relevant to have regard to the purpose of a pleading, which is to ensure the parties know the case they have to meet.<sup>2</sup> A plaintiff's obligation to plead a case properly and sufficiently includes an obligation to plead causation.
- [18] The obligation in respect of causation was summarised by Chesterman J (as his Honour then was) in *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd*<sup>3</sup>:

“[15] The parties are agreed upon the relevant principles. In any cause of action in respect of which causation is an essential element it is necessary to plead the material facts which are said to give rise to the causal connection. In particular it is necessary to plead the facts which lead to a reasonable inference that the acts complained of (here the relevant non-disclosure) and the alleged later event (here the making of the dragline agreement) stand to each other in the relation of cause and effect. Douglas J put it this way in *LBS Holdings Pty Ltd v The Body Corporate for Condor Community Title Scheme 13200 & Ors* [2004] QSC 229 (at para [3]):

‘... The principle relied on is that facts must be set out which lead to a reasonable inference that the acts complained of and the loss claimed stand to each other in the relation of cause and effect and that the plaintiff must plead the necessary facts showing that causal link ...’

### Discussion

- [19] An application of the relevant legal principles easily disposes of the first of the defendants' arguments. Whilst whether a duty of care can be imposed upon a person or entity carrying out its operations in accordance with its statutory obligations, is a question of law, whether the imposition of such a duty is incompatible with that party's other duties, statutory or otherwise, cannot be determined in isolation. That question must be determined having regard to all of the circumstances, including a consideration of any evidence led in relation to the operation of the applicants' activities. That being so, it cannot be said that that question must so clearly be determined in the applicants' favour that the court ought, in the exercise of its discretion, to strike out the pleading for failing to disclose a cause of action.
- [20] A similar conclusion is reached when considering the applicants' second contention. Whether others were susceptible to owing a duty to warn cannot, so clearly result in the conclusion that the applicant could not owe such a duty of care as to warrant the exercise of the court's discretion to strike out the plaintiff's pleading.

<sup>1</sup> *Dey v Victorian Railway Commissioners* (1949) 78 CLR 62 at 91; *General State Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 122-9.

<sup>2</sup> See, generally, *Thiess Pty Ltd v FFE Minerals Australia Pty Ltd* [2007] QSC 209 at [38].

<sup>3</sup> [2004] QSC 457 at [15].

- [21] The applicants' third contention is in a different category. The plaintiff has chosen, to define certain terms, including "the emissions", "absorption" and "the risk of injury", in the pleading. The use of defined terms means the pleading must be read in a particular way. For example, the allegation that people living in Mount Isa were at risk of absorption of lead from the emissions (paragraph 9.1) contains an allegation that the absorption of lead therein referred to is only that caused by the operation of the lease by the defendant. However, the allegation that absorption of lead could cause personal injury (paragraph 9.2) is not limited to the absorption of lead from the emissions. That allegation is that there was a risk of personal injury from the absorption of lead generally.
- [22] This distinction is significant when considering the pleading of causation. The risk of injury, as defined, includes both the risk of the absorption of lead from the emissions, and the absorption of lead generally. It is that combined risk, defined as the "risk of injury", which is pleaded to be reasonably foreseeable.
- [23] Whilst the plaintiff pleads he was vulnerable to the absorption of lead from the emissions (paragraph 26), and that during the period November 2004 to the date of the pleading, he had absorbed into his body lead from the emissions (paragraph 27), the plaintiff pleads that as a consequence of "his absorption of lead" and subsequent blood contamination, he has suffered various impairments as well as brain damage and dysfunction (paragraph 30). By its terms, paragraph 30 is referring to the absorption of lead generally.
- [24] Whilst the plaintiff contended paragraph 30 ought properly to be understood as an allegation that his impairments, brain damage and dysfunction were caused by the absorption of lead from the emissions, that is not the allegation in paragraph 30. The distinction drawn in other aspects of the pleading, between the absorption of lead from the emissions and the absorption of lead generally, renders paragraph 30 to be properly read, in its present form, as an allegation that the plaintiff's injuries were as a consequence of his absorption of lead generally.
- [25] Such an allegation is insufficient to establish a cause of action against the defendants, particularly in circumstances where the plaintiff specifically pleads that the emissions were a significant source of lead which was capable of absorption by persons living in Mount Isa. That allegation contains within it an acceptance that there were other significant sources of lead capable of absorption.
- [26] That being so, it does not follow, as a matter of law, that the plaintiff's absorption of lead, alleged in paragraph 30 to be the cause of his injuries, is as a consequence of the absorption of lead from the emissions as opposed to the absorption of lead from another significant source of contamination separate and distinct from any contamination by the absorption of lead from the emissions.

### **Conclusions**

- [27] The defendants have established the present pleading fails to plead a causal link between their alleged breach of duty and the plaintiff's injuries. Whilst the deficiency in the pleading may be corrected by yet a further amendment of the pleading, there is substance in the applicant's contention that its application should be determined on the present pleading.
- [28] The pleading is properly to be struck out as failing to disclose a cause of action against the defendants. However, the plaintiff ought to be given leave to re-plead.
- [29] I shall hear the parties as to the appropriate orders, and as to costs.