

## DASREEF PTY LIMITED v HAWCHAR (S313/2010)

Court appealed from: New South Wales Court of Appeal  
[2010] NSWCA 154

Date of judgment: 6 July 2010

Date of grant of special leave to appeal: 10 December 2010

From 1999 to 2005 Mr Hawchar worked for Dasreef Pty Ltd ("Dasreef"), a stonemasonry business in Flemington which specialised in sandstone. He had previously worked with sandstone in his native Lebanon and he also did some private stonemasonry work from 2002-2005. In late 2004 Mr Hawchar was diagnosed with scleroderma and his symptoms quickly became disabling. He ceased work for Dasreef and was paid workers' compensation benefits. In May 2006 Mr Hawchar was also diagnosed with silicosis.

In October 2007 Mr Hawchar commenced proceedings in the NSW Dust Diseases Tribunal seeking common law damages on account of his scleroderma and silicosis. (The scleroderma claim was later dismissed at the request of Mr Hawchar's counsel.) With respect to the silicosis claim, Mr Hawchar was successful on liability, with Curtis J awarding him \$131,130.43. This amount reflected 20/23 of Mr Hawchar's total exposure to silica dust.

On appeal the issues included:

- (i) Whether the primary judge erred in admitting the evidence of Dr Basden (Mr Hawchar's expert) because Dr Basden lacked sufficient relevant expertise.
- (ii) Whether the primary judge erred in relying upon his experience as a judge in a specialist tribunal.
- (iii) Whether the primary judge erred in drawing an adverse inference from Dasreef's failure to call expert evidence from Mr Rogers, an occupational hygienist.
- (iv) Whether the primary judge erred in allocating 20/23 of the silica dust exposure to Dasreef without taking account of any non-negligent exposure.

On 6 July 2010 the Court of Appeal (Allsop P, Basten & Campbell JJA) unanimously held that Dr Basden had sufficient relevant expertise to provide an opinion about the concentration of silica dust in Mr Hawchar's work environment. The inexact nature of that estimate did not make his opinion inadmissible. Its legitimacy was also not undermined simply because it was based on certain assumptions. The Court found that Curtis J did not err in drawing on his experience in a specialist tribunal and that his Honour had correctly approached the matter on the basis that all Mr Hawchar's exposure (to silica dust) at Dasreef was through Dasreef's negligence.

The grounds of appeal include:

- The Court of Appeal erred in holding that the evidence of Dr Basden was inadmissible pursuant to s 79 of the *Evidence Act* (NSW) as an expert opinion that the concentration of respirable silica in the air in the respondent's breathing zone during the 30-40 minutes the primary Judge found the respondent was cutting stone with an angle grinder exceeded 200mg/m<sup>3</sup>.