

IN THE DUST DISEASES TRIBUNAL  
OF NEW SOUTH WALES

DDT No.145 of 2009

BETWEEN: **MICHAEL PATRICK FOSTER**  
Plaintiff

AND: **RICE GROWERS LIMITED**  
First Defendant

**WATER ADMINISTRATION MINISTERIAL  
CORPORATION**  
Second Defendant

**TELSTRA CORPORATION LIMITED**  
Third Defendant

**CONTRIBUTIONS ASSESSMENT DETERMINATION**

1. The Registrar of the Dust Diseases Tribunal has referred this matter to me pursuant to clause 49(1) of the *Dust Diseases Tribunal Regulations 2007* ("the Regulations") for a determination of apportionment as between the Defendants.
2. In accordance with Regulation 49, I can only have regard to the Statement of Particulars provided by the Plaintiff and the replies as filed by the Defendants.
3. In the present matter Michael Patrick Foster (hereinafter referred to as "the Plaintiff") issued a Statement of Claim on 5 June 2009 claiming provisional damages for asbestosis and psychiatric injury.

4. On 28 September 2009 the Plaintiff filed an Amended Statement of Claim correcting the identity of the Second Defendant.

5. By the Plaintiff's Statement of Claim (as amended) the Plaintiff alleges that

(i) He was employed by Rice Growers Ltd (hereinafter referred to as "Rice Growers") between 1962 and 1964 performing maintenance and building construction work in the area of Darlington Point and Griffith in the State of New South Wales and in the course of that employment was exposed to and inhaled asbestos dust and fibre.

(ii) Between 1964 and 1970 he was employed by the Water Conservation & Irrigation Commission (hereinafter referred to as "Water Conservation") as a carpenter in the Riverina area in the State of New South Wales and in the course of that employment was exposed to and inhaled asbestos dust and fibre.

(iii) Between 1972 and about 1979, and later between about 1980 and 1987, the Plaintiff was employed by the Postmaster General and Telecom Australia (hereinafter referred to as "Telstra") and in the course of that employment was exposed to and inhaled asbestos dust and fibre.

6. The Plaintiff provided a Statement of Particulars dated 5 June 2009 in which he, inter alia, alleges as follows:

(i) That the Plaintiff suffers from asbestosis which was diagnosed on 23 April 2008.

(ii) That between 1956 and 1959 the Plaintiff was employed as a full-time carpenter by Frank Mirabelli & Co of Leeton and was exposed to asbestos in the course of that employment. The Plaintiff's work involved cutting and installing asbestos sheeting. While employed by Mirabelli the Plaintiff was involved in building 37 Housing Commission homes in Darlington Point and other houses in Leeton. The level of exposure was high while using a power saw or fibro cutting and moderate when handling or nailing asbestos sheeting. While employed by Mirabelli the Plaintiff's exposure to asbestos was variable,

but over the period of approximately 2 days per 5 day week.

- (iii) That between mid-1959 and late 1961 the Plaintiff was employed by John Fishburn of Bellingen and was exposed to asbestos in the course of that employment. While employed by John Fishburn the Plaintiff was involved in cutting and installing AC sheeting in building homes and other houses and units in the Bellingen/Urunga area, churches [the Anglican Church at Urunga] and high schools at Dorrigo. The level of exposure was high while using a power saw or fibro cutting and moderate when handling or nailing asbestos sheeting. While employed by Fishburn the Plaintiff's exposure to asbestos was variable, but over the period of approximately 2 days per 5 day week.
- (iv) Between 1962 and mid-1962 the Plaintiff was employed by Burdon & March as a full-time carpenter and was exposed to asbestos. While employed by Burdon & March the Plaintiff was exposed to asbestos while cutting and installing AC sheeting in building homes [portable dwellings] for workers at Wyangala Dam, Cowra, and New South Wales. While employed by Burdon & March the level of exposure was high while using a power saw or fibro cutting and moderate when handling or nailing asbestos sheeting. While employed by Burdon & March the Plaintiff's exposure to asbestos was variable, but over the period of approximately 2 days per 5 day week.
- (v) Between early 1963 and late 1964 the Plaintiff was employed by Rice Growers and was exposed to asbestos. While employed by Rice Growers the Plaintiff was engaged in cutting and installing AC sheeting. The level of exposure was high while using a power saw or fibro cutting and moderate when handling or nailing asbestos sheeting. While employed by Rice Growers the Plaintiff's exposure to asbestos was variable, but over the period of approximately 1 day per 5 day week.
- (vi) Between late 1964 and late 1970 the Plaintiff was employed by Water Conservation as a full-time carpenter and was exposed to asbestos. While employed by Water Conservation the Plaintiff was engaged in cutting and installing AC sheeting, and asbestos was present around various asbestos

pipes. The level of exposure was high while using a power saw or fibro cutting and moderate when performing maintenance to the pipes. While employed by Water Conservation the Plaintiff's exposure to asbestos was variable, but over the period of approximately 1 days per 5 day week. While employed by Water Conservation the Plaintiff built and maintained bridges and pipes and also built and maintained houses.

- (vii) Between 1972 and late 1979 the Plaintiff was employed by Telstra and was exposed to asbestos. While employed by Telstra the Plaintiff's exposure to asbestos was every day. While employed by Telstra asbestos was contained in the homes at which telephone services were installed or serviced and the asbestos was in the form of AC sheeting which had to be cut or drilled through. There was also asbestos in the form of loose asbestos thermal insulation in the ceilings, which had to be crawled through and moved to allow laying and fixing of cabling. The Plaintiff was involved in subscriber installation and maintenance at various addresses in the Griffith, Narrandera, Leeton and Hay areas as well as Canberra and Murrumbateman region, and elsewhere.
- (viii) Between late 1980 and mid-1987 the Plaintiff was employed by Telstra and was exposed to asbestos. While employed by Telstra the Plaintiff's exposure to asbestos was every day. While employed by Telstra asbestos was contained in the homes at which telephone services were installed or serviced and the asbestos was in the form of AC sheeting which had to be cut or drilled through. There was also asbestos in the form of loose asbestos thermal insulation in the ceilings, which had to be crawled through and moved to allow laying and fixing of cabling. While employed by Telecom, the Plaintiff was involved in subscriber installation and maintenance.
- (ix) The Plaintiff estimates that 4% of his exposure occurred while he was employed by Mirabelli, 5% of his exposure occurred while employed by Fishburn, 1% of his exposure occurred while employed by Burdon & March, 4% while employed by Rice Growers, 6% while employed by Water Conservation and 80% while employed by Telstra.

7. Telstra provided a Reply on 19 August 2009 and relevantly alleges:
- (i) Not admitting the diagnosis of asbestosis.
  - (ii) Admits that the Plaintiff was employed from 24 May 1973 to 6 November 1981 [but that the Plaintiff apparently did not work for 11 months of the claimed period of employment with Telstra as recorded by Dr. Breslin], and from 1 November 1982 until 27 June 1987 (at which time he had a motor vehicle accident and did not return to work after being retired unfit on 10 May 1989).
  - (iii) That the Defendants should each be placed in Category 2.
  - (iv) That according to Professor Breslin Telstra's contribution having regard to duration, intensity and type of asbestos exposure was 20%.
  - (v) That as between the various parties responsible for the Plaintiff's condition, there is an empty chair of 31%, Rice Growers 5%, Water Conservation 28% and Telstra 36%.
8. Water Conservation has filed a Reply dated 24 September 2009 which provides relevantly:
- (i) It does not admit the diagnosis of asbestosis.
  - (ii) That the exposure to asbestos would have been slight during its period of exposure.
  - (iii) That each Defendant should be placed in Category 2.
  - (iv) That the apportionment should be Empty Chair 20%, Rice Growers 15%, Second Defendant 15%, Water Conservation 15% and Telstra 50%.

9. Water Conservation filed an Amended Reply on 1 October 2009 which relevantly provides similar particulars as in its original Reply, but correctly naming the Second Defendant.
10. Rice Growers filed a Reply on 16 October 2009 which relevantly provides:
  - (i) Does not admit the pleaded diagnosis of asbestosis.
  - (ii) That each of the Defendants should be placed in Category 2.
  - (iii) That a broad brush approach to apportionment should be Empty Chair 20%, Rice Growers 5%, Water Conservation 25% and Telstra 50%.
11. The condition upon which the Plaintiff's claim is divisible.
12. Initially the Contribution Assessor must determine the existence of any separate periods of exposure pursuant to clause 5(8) of the Standard Presumptions Order and make a determination of what proportion of the whole each separate period bears having regard to the number of such periods, the length of each period, the duration and the intensity of exposure to asbestos present in each such period.
13. Based upon the material available to me, I determine the contribution between the periods of exposure to be:
  - (i) Frank Mirabelli – 2.5 years between late 1956 and early 1959
  - (ii) John Fishburn – 2.5 years between mid-1959 and late 1961.
  - (iii) Burdon & March – 6 months between early 1962 and mid-1962.
  - (iv) Rice Growers – 2 years between early 1963 and late 1964.
  - (v) Water Conservation – 6 years between late 1964 and late 1970.

- (vi) Telstra – 13 years, after taking into account the absences as referred to by Telstra.
14. Thus the total possible period of exposure to asbestos dust and fibre was 26.5 years, but this does not take into account the frequency or level of exposure to asbestos dust and fibre in each period of employment.
15. The employment with Frank Mirabelli and John Fishburn and Burdon & March involved exposure 40% of the days worked, Rice Growers and Water Conservation involved exposure 20% of the days worked, Telstra occurred for approximately 13 years with daily exposure.
16. The employment with Frank Mirabelli and John Fishburn and Burdon & March, Rice Growers and Water Conservation involved high exposure when using power saws or fibro cutters, and moderate when handling asbestos sheeting, Telstra exposure was moderate except for working in ceilings when it was high.
17. Based upon the material before me, I determine the contribution between the various periods to be:
- (i) Frank Mirabelli – 15%
  - (ii) John Fishburn – 15%
  - (iii) Burdon & March – 5%
  - (iv) Rice Growers – 5%
  - (v) Water Conversation – 15 %
  - (vi) Telstra – 45 %
18. Thus the “empty chair” accounts for 35% of the exposure.

19. I determine that each of the Defendants falls into Category 2.
20. In the present case the standard presumptions take into account various aspects of the liability of the Defendants and, accordingly, there should be no variation of the standard presumption.
21. Turning to the Plaintiff's claim in respect of the Defendants, I determine the total liability of the Defendants in relation to the 65% liability to the Plaintiff as follows:

(i)	Rice Growers –	5% =	8%
(ii)	Water Conservations –	15% =	23%
(iii)	Telstra –	40% =	69%
	Total –		100%

22. Pursuant to clause 61 of the Regulations I appoint Telstra as the Single Claims Manager as it is the primary defendant defined under clause 61(9).

**J.L. SHARPE**

Contributions Assessor

24 November 2009