

**IN THE DUST DISEASES TRIBUNAL
OF NEW SOUTH WALES**

DDT No. 2011/267

BETWEEN:

**HENRY JOACHIM FUESSEL
Plaintiff**

AND:

**BRUCE & SOWTER PTY LIMITED
First Defendant**

**LIVERPOOL PLUMBING CO PTY LIMITED
Second Defendant**

**NISBET & DURNEY (CONTRACTING) PTY
LIMITED
Third Defendant**

**NISBET & DURNEY PTY LIMITED
Fourth 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* (hereinafter referred to as “the Regulations”) for a determination of apportionment as between the Defendants.
2. Regulation 49 requires me to make the determination on the assumption that the Defendants are liable and that such determination is to be based upon the Plaintiff’s Statement of Particulars and any Replies by the Defendants, and thereafter the operation of the standard presumptions as contained in the *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007* (hereinafter referred to as the “Standard Presumptions Order”).
3. Henry Joachim Fuessel (hereinafter referred to as “the Plaintiff”) commenced proceedings in the Dust Diseases Tribunal on 26 September 2011 against Bruce & Sowter Pty Ltd (hereinafter referred to as “Bruce & Sowter”), Liverpool Plumbing Co

Pty Ltd (hereinafter referred to as "Liverpool Plumbing") and Nisbet & Durney (Contracting) Pty Ltd (hereinafter referred to as "Nisbet & Durney Contracting").

4. In the Plaintiff's Statement of Claim, the Plaintiff alleges that:
 - (i) From about 15 February 1962 to about 1968 the Plaintiff was employed by Bruce & Sowter as an apprentice and thereafter as a plumber and was exposed to asbestos dust and fibre.
 - (ii) From 1971 to about 1975 the Plaintiff was employed by Liverpool Plumbing as a plumber and was exposed to asbestos dust and fibre.
 - (iii) From about 1975 to about 1984 the Plaintiff was employed by Nisbet & Durney Contracting as a plumber and was exposed to asbestos dust and fibre.
 - (iv) As a result of the Plaintiff's exposure as aforesaid, the Plaintiff alleges that he sustained a malignant pleural mesothelioma (which of course is an indivisible condition).
5. On 5 October 2011 the Plaintiff amended his Statement of Claim by adding a Fourth Defendant, Nisbet & Durney Pty Ltd (hereinafter referred to as "Nisbet & Durney") and alleged as against Nisbet & Durney that from about 1975 to about 1984 the Plaintiff was employed by Nisbet & Durney as a plumber and was exposed to asbestos dust and fibre.
6. In support of the amendment to the Statement of Claim, the Plaintiff filed an affidavit of Jonathan Francis Walsh which alleged the following:
 - (i) From about 1975 to January 1980 the Plaintiff was employed by Nisbet & Durney as a foreman plumber.
 - (ii) From January 1980 Nisbet & Durney closed down and the Plaintiff joined Nisbet & Durney Contracting.

7. Bruce & Sowter was incorporated on 5th June 1963, and thus the Plaintiff's assertions in regard to his employment commencing before this time must be incorrect.
8. On 4 October 2011 Judge Kearns of the Tribunal took evidence when there was an appearance for the Plaintiff and for Nisbet & Durney.
9. Before the Court on that occasion was an affidavit of Henry Joachim Fuessel of 2 October 2011.
10. On 6 October 2011 the solicitors previously acting for Nisbet & Durney Contracting ceased to appear for them.
11. On 10 October 2011 the Plaintiff filed a Statement of Particulars which, so far as is relevant, alleged the following:
 - (i) The Plaintiff's exposure with Bruce & Sowter was described as low to medium level of intensity, and that exposure occurred 2-3 times a month. The Plaintiff estimates his exposure at Bruce & Sowter accounted for 35% of his total exposure. In the employ of Bruce & Sowter the Plaintiff was exposed to asbestos cement pipes, asbestos cement flat sheets, asbestos cement cold water pits, asbestos heat-resistant gloves, asbestos heat resistant welding blankets, asbestos insulation pipe sections and more asbestos used in lagging.
 - (ii) In relation to the Plaintiff's employment with Liverpool Plumbing, the Plaintiff alleges that his exposure occurred 2-3 times per month and was of a low to medium level of intensity and represented 20% of his total exposure.
 - (iii) In relation to the Plaintiff's employment with Nisbet & Durney from 1975 to 1980, the Plaintiff alleges that he was exposed 2-3 times per month with such exposure being low to medium level of intensity and represented 30% of his total exposure.

- (iv) In relation to Nisbet & Durney Contracting, the Plaintiff alleges that his exposure was low to medium intensity 2-3 times per month, and represented 15% of his total exposure.

12. Included in the Statement of Particulars provided by the Plaintiff was the following:

- (i) An affidavit of the Plaintiff dated 2 October 2011 in which the Plaintiff records having worked at a number of sites. The Plaintiff asserts that Bruce & Sowter employed him until 1969. The Plaintiff identifies certain gloves as being identical to those that he refers to in a brochure called Products of Repute. The Plaintiff alleges that when installing plumbing and gas systems he was given protective welding equipment which equipment included a facemask, gloves and a protective blanket. He described using this equipment occasionally when welding metal pipes. The Plaintiff does not identify the maker or manufacturer of the protective blanket. The Plaintiff does identify pipe sections as being Hardies 85% magnesia. These were used when working on installing water and gas pipes in plant rooms and buildings. The use of these pipe sections was made by others, but in the presence of the Plaintiff. In addition, the Plaintiff identifies asbestos powder but is unable to identify the manufacturer of the same. In terms of the time that the Plaintiff worked in plant rooms while he worked at Bruce & Sowter, he estimated it at 5%. While working for Liverpool Plumbing the Plaintiff identifies having worked with asbestos rope, but does not identify the manufacturer of such rope, but identifies that he did have contact with asbestos when installing vent pipes in the same manner that he described above by working with Bruce & Sowter. While working with Nisbet & Durney, the Plaintiff identifies installing water and gas pipes being identical to the work performed in Bruce & Sowter, and that insulation work was carried out by other tradesman in the Plaintiff's presence. The Plaintiff also identifies work installing asbestos cement pipes and also used asbestos gloves being of the same kind as previously described. The Plaintiff used that equipment involving the gloves approximately once every fortnight. The Plaintiff specifically nominates having worked at Granville Technical College, Petersham's Girls High School, Minda Remand Home and Lidcombe State Hospital

(ii) Professor Breslin provided a report on 15 September 2011 and that report was included in the Plaintiff's particulars. To Dr Breslin the Plaintiff alleged that by working for Bruce & Sowter he had to drill through asbestos cement eaves, occasionally use asbestos cement pipes and put asbestos cement sheets behind domestic hot water heaters, used asbestos mats for welding and also used asbestos gloves. While working for Liverpool Plumbing, the work was similar to that with Bruce & Sowter. As Nisbet & Durney his work was mainly as a supervisor and there was some occasional asbestos usage when welding and on pipes. In particular, Professor Breslin identified asbestos exposure through drilling asbestos cement sheets, including particularly eaves, cutting asbestos cement pipes and asbestos cement sheet, using asbestos mats for welding and asbestos gloves. The Plaintiff did not personally ever do any lagging or remove any lagging, nor was he around as he recalls it when this was done. The Plaintiff did not do any spraying of ceilings, nor was he around when that was done. He never wore a mask, and averaging it over his whole life, the Plaintiff thought that he'd been exposed about twice a year on average for up to one week each time.

(iii) The other documents provided with the Plaintiff's Statement of Particulars do not assist in terms of the history of the Plaintiff's exposure to asbestos.

13. Based on the above information, I determine that the Plaintiff had the following relevant periods of employment:

- (i) Bruce & Sowter – 5.6.63 until 12.68 – 5.5 years
- (ii) Liverpool Plumbing – 1971 – 1975 – 4 years
- (iii) Nisbet & Durney Contracting – 6.75 – December 1980 – 1.5 years
- (iv) Nisbet & Durney – January 1980 – 1984 – 4 years.

14. Thus on the information before me, the total period of relevant exposure to asbestos dust and Fibre was in the order of 15 years. This does not take into account the exposure between 15.2.1962 and 5.6.63, when there appears to be an "empty chair".

15. On the basis of 15 years this periods of exposure in approximate percentage terms are as follows:
 - (i) Bruce & Sowter – 37%
 - (ii) Liverpool Plumbing – 27%
 - (iii) Nisbet & Durney Contracting – 10%
 - (iv) Nisbet & Durney – 27%

16. On 10 October 2011, Nisbet & Durney issued a Cross-Claim against Bruce & Sowter (hereinafter referred to as “the First Cross-Claim”) claiming contribution.

17. On 10 October 2011, Nisbet & Durney issued a Second Cross-Claim against Liverpool Plumbing claiming contribution (hereinafter referred to as “the Second Cross-Claim”).

18. On 10 October 2011, Nisbet & Durney issued a Third Cross-Claim (hereinafter referred to as “the Third Cross-Claim”) against Nisbet & Durney Contracting.

19. On 10 October 2011 Nisbet & Durney issued a Cross-Claim (hereinafter referred to as “the Fourth Cross-Claim”) against the State of New South Wales claiming complete indemnity or contribution by reason of the fact that at all material times the State of New South Wales was the owner and occupier of the Petersham Girls High School, Minda Remand Home and Lidcombe State Hospital, and that between February 1962 to about 1969 the Plaintiff was employed by Bruce & Sowter, and during the course of that employment he was required to work at premises including the boiler rooms and plant rooms at Petersham Girls High School, Minda Remand Home and Lidcombe State Hospital. The Plaintiff was required to work installing water and gas pipes in the plant rooms of the Petersham Girls High School, Minda Remand Home and Lidcombe State Hospital and, as such, the Plaintiff was exposed to asbestos dust and fibre.

20. Nisbet & Durney has provided a Reply which relevantly alleges:
 - (i) All Defendants and the State should be treated as Category 2 Defendants.

- (ii) The Standard Presumptions should not be altered except in the case of the State of New South Wales;
 - (iii) There was no asbestos exposure to which the Plaintiff may have been exposed in the employment of Nisbet & Durney;
 - (iv) That there should be no apportionment in respect of Liverpool Plumbing (however in this regard I am bound to rely on the Plaintiff's allegations).
21. No other Defendant or Cross-Defendant has filed a reply.
22. Initially, I am required to 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, and the duration of and intensity of exposure to asbestos present in each such period. It is thus not appropriate to determine the relative contribution simply on the basis of the elapsed years between the various periods of exposure.
23. Based upon the material available to me, I determine the contributions between the periods to be:
- (i) The period of employment with Bruce & Sowter – 37%
 - (ii) The period of employment with Liverpool Plumbing – 27%
 - (iii) The period of employment with Nisbet & Durney Contracting – 10%
 - (iv) The period of employment with Nisbet & Durney – 27%
24. For the purposes of this determination, I have treated Bruce & Sowter, Liverpool Plumbing, Nisbet & Durney Contracting, and Nisbet & Durney, and State of New South Wales as Category 2 Defendants.
25. It seems to me that I am bound to find liability on the State of New South Wales even though as a matter of law there may be no liability brought home against the State: see *Leighton –v- Fox [2009] 240 CLR 1*. However, I am not in a position to assess the liability of the State, and will proceed on the basis that I am to assume that the State

of New South Wales is liable. I determine that the period of employment with Bruce & Sowter accounts for a total of 40% of the Plaintiff's total exposure, and of that the State of New South Wales accounts for 5%.

26. Based on the material before me, the following calculations as to liability can be made:

- (i) Bruce & Sowter – 35%
- (ii) State of New South Wales – 5%
- (iii) Liverpool Plumbing – 30%
- (iv) Nisbet & Durney Contracting – 10%
- (v) Nisbet & Durney – 20%

27. Therefore, I determine the total liability of the Defendants and Cross-Defendants as follows:

Bruce & Sowter	35%
Liverpool Plumbing	30%
Nisbet & Durney Contracting	10%
Nisbet & Durney	20%
State of New South Wales	5%
Total	100%

28. Pursuant to clause 61 of the Regulations, I appoint the Fourth Defendant as the Single Claims Manager as it is the primary defendant defined under clause 61(9).



J.L. SHARPE
Contributions Assessor

13 October 2011