St John's CHAMBERS

Asbestos and minimal risk: Is there a threshold?

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Veronica Bussey (Widow & Executrix of the estate of David Edwin Anthony Bussey) v 00654701 LTD (Formerly Anglia Heating LTD) [2018] EWCA Civ 243

CA (Civ DiV) (Jackson LJ, Underhill LJ, Moylan LJ) 22/02/2018

"There are currently around 2,500 deaths from mesothelioma each year in the UK." (NHS Choices website 2018)

Let that sink in. That means that in this country nearly 7 people a day are dying from the most devastating of all occupational illnesses.

But it is perhaps not at all surprising given that mesothelioma can be caused by the victim ingesting only a single fibre of asbestos.

In the case of *Bussey* the Court of Appeal has examined whether there is a narrow test for breach of duty following the findings in *Williams v University of Birmingham* [2011] EWCA Civ 1242 which appeared to establish a need for Claimants to show they were exposed to greater concentrations of asbestos fibres then the "safe" level set out in the TDN13 (March 1970 and January 1971 Technical Data Note 13 (TDN 13), Department of Employment and Productivity).

The test of an employer's liability for common law negligence is well known and based on the judgment in *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776, 1783, Swanwick J:

"From these authorities I deduce the principles, that the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood· of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent."

In relation to the "recognised and general practice" category and the "clearly bad" category lay a potential third; potential risks which might be transferred, with the improved knowledge and technology, into the category of those against which an employer should take care, *Thompson v Smiths Shiprepairers (North Shields) Ltd* [1984] Q.B. 405 applied (see paras 29-30, para.40 of judgment).

In *Jeromson v Shell Tankers UK Limited* [2001] EWCA Civ 100; [2001] ICR 1223, two former employees of Shell developed mesothelioma after being exposed to asbestos in ship engine rooms in one case between 1952 and 1957 in the other case between 1957 and 1961. Their widows brought fatal accident claims against Shell which succeeded. Hale LJ, in dismissing Shell's appeal, stated that:

"However, where an employer cannot know the extent of any particular employee's exposure over the period of his employment, knows or ought to know that exposure is variable, and knows or ought to know the potential maximum as well as the potential minimum, a reasonable and prudent employer, taking positive thought for the safety of his workers, would have to take thought for the risks involved in the potential maximum exposure. Only if he could be reassured that none of these employees would be sufficiently exposed to be at risk could he safely ignore it."

Despite the “no safe minimum” in relation to mesothelioma not being known until 1965 the Court upheld the decision that a prudent employer still ought to have taken precautions based on the general risks known at the time.

In *Maguire v Harland and Wolff PLC* [2005] EWCA Civ 1; [2005] PIQR P21 (a case of para-occupational exposure of a woman who washed her husbands work clothes covered in asbestos) Judge LJ held that it was not until 1965 when it “began to be appreciated” that there could be no safe or permissible level of exposure to asbestos dust. The claim failed on foreseeability grounds.

In *Williams v University of Birmingham* [2011] EWCA Civ 1242, the widow of a deceased physics student who was exposed to environmental asbestos during experiments lost her appeal. Aikens LJ held the test for breach of duty to apply was:

“Ought the University reasonably to have foreseen the risk of contracting mesothelioma arising from Mr Williams’ exposure to asbestos fibres by undertaking speed of light experiments in the tunnel in the manner contemplated – and done in fact – to the extent that the University should (acting reasonably) have refused to allow the tests to be done there, or taken further precautions or at the least sought advice?” [35]

TDN13 required action only if exposure was above the 2 fibre/ml over a 10 minute or 4 hour sample period. Above that level ventilation measures and respirators/protective equipment were required by the Asbestos Regulations 1969.

Aikens LJ held that there could only have been a breach of duty by the University if:

“…it would have been reasonably foreseeable to a body in the position of the University in 1974 that if it exposed Mr Williams to asbestos fibres at a level of just above 0.1 fibres/ml for a period of 52-78 hours, he was exposed to an unacceptable risk of asbestos-related injury.”

TDN13 was said to be the best guide as to what levels were acceptable in 1974 and the appeal failed on the issue of foreseeability.

Jackson LJ examined the position in relation to Mr Bussey as he cut and caulked pipes in 1965-68.

He held that Aikens LJ was not setting out a universal test for breach of duty based on TDN13:

"In my view TDN13 does not establish a 'bright line' to be applied in all cases arising out of the period 1970 to 1976. Still less is it a bright line to be applied to asbestos exposure in a different period whether before or after 1970 to 1974.

At this point in the analysis I regard it as relevant that neither Jeromson nor Maguire was cited in Williams. If Aikens LJ had those two decisions in mind, I do not think that he would have suggested (if indeed he did suggest) that TDN13 was a general yardstick for determining the foreseeability issue.

A more nuanced approach is required than that. It is necessary to look at the information which a reasonable employer in the defendant's position at the relevant time should have acquired and then to determine what risks such an employer should have foreseen.

…Paragraph 61 should not be read as making TDN13 a universal test of foreseeability in mesothelioma cases."

In *Bussey*, it was clear that the judge below had incorrectly treated *Williams* as determinative, notwithstanding *Jeromson* and *Maguire* which had raised doubts about a safe lower limit of asbestos exposure.

On the judge's findings of fact the asbestos levels to which Mr Bussey was exposed came close to but did not exceed those mentioned in TDN13.

At the time the Anglia had no way of measuring the actual level of asbestos to which he was exposed nor could it compare those levels with TDN13 as it had not yet been published.

All that the Anglia knew was that his work regularly exposed Mr Bussey to small quantities of asbestos dust.

There were two simple means of reducing Mr Bussey's exposure: doing cutting and caulking outside or wearing a respirator. Anglia could not have known whether his exposure was liable to cause mesothelioma.

If the judge had not felt constrained by *Williams* he would have looked at the issues of foreseeability and breach more broadly and might have concluded a reasonably prudent employer ought to have foreseen the risk and given it could have been avoided by simple precautions, that it was not a risk which was acceptable.

Jackson LJ referred to the passage in *Jeromson* and the principle that an employer with limited knowledge should "*have to take thought for the risks involved in the potential maximum exposure";* in the absence of clear evidence about exposure levels Anglia could not be sure that it was safe to ignore that risk.

TDN13 set out considerations which might have triggered a prosecution by the Factory Inspectorate after 1970: it was relevant but not determinative in every case.

The judgment in favour of the employer therefore had to be set aside. However, since the employer had adduced no factual evidence as to the state of its knowledge in the 1960s, it was not possible for the instant court to determine liability and the case was remitted on that issue (paras 31-36, paras 43-53, paras 57-61).

Underhill and Moylan LJJ differed from Jackson LJ's in his use of the term "unacceptable" in the context of the risk of asbestos-related injury on the basis that it meant the level of risk remaining after taking all proper precautions, as it might be misleading: it was important to split the question of foreseeability from the question of what precautions it was reasonable to take against the risk of asbestos exposure. Although the term "unacceptable" had been used in Williams, it was doubtful whether it formed part of the ratio (para.63).

Per Jackson LJ (dissenting) - Given that anyone who worked in proximity to asbestos faced some risk of mesothelioma, and that it was not possible to eliminate that risk altogether by taking precautions, the residual risk after taking all proper precautions might be regarded as an "acceptable" risk (para.43).

The implications are that the gloves are off for Claimants. Defendants should feel less secure than before as TDN13 will not now provide a clear cut defence to breach of duty in the relevant period.

Each case will turn on its fact and evidence of "guilty" knowledge is likely to become critical in every case with greater emphasis on Defendant's establishing what they ought to have known and investigating their resources at the time.

Could Bussey push the guilty knowledge period back even before 1965?

In the recent case of *Hawkes v Warmex* [2018] EWHC 205 the High Court concluded that even in 1946 almost twenty years before the non safe minimum warnings began

that fragments of asbestos on workers' clothes could constitute a breach of duty. So it seems possible that in individual cases breach might be found for very low level exposure much earlier than the mid-sixties.

Williams v University of Birmingham [2011] EWCA Civ 1242

Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd [1968] 1 WLR 1776, 1783

Thompson v Smiths Shiprepairers (North Shields) Ltd [1984] Q.B. 405

Jeromson v Shell Tankers UK Limited [2001] EWCA Civ 100; [2001] ICR 1223

Maguire v Harland and Wolff PLC [2005] EWCA Civ 1; [2005] PIQR P21

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