"What is Reasonable?"

Bussey, Williams and the Problem of Low Level Asbestos Exposure

Philip Turton

We give every single case the care and attention it deserves.

ROPEWALK CHAMBERS

+44 (0) 115 947 2581 - www.ropewalk.co.uk

If, as seems likely, the recent decision in *Bussey -v- Anglia Heating* (12th March 2017, unreported) marks a fresh attack on the decision in *Williams -v- University of Birmingham [2012] PIQR P4*, it may be that insurers and Defendant's legal representatives should prepare for a more difficult future in low dose mesothelioma claims. Whilst the decision itself favoured the Defendant, His Honour Judge Yelton, who tried the case as a High Court Judge, expressly rejected the invitation of Claimant's Counsel not to follow *Williams* on the basis that, if that case had been wrongly decided, it was for the Court of Appeal or the Supreme Court to overturn it. It thus seems likely that the Claimant will strive to renew her argument before a higher forum.

What is at stake is whether or not an employer is entitled to rely upon the publication "*Standards for Asbestos Dust Concentrations for Use with the Asbestos Regulations 1969*", more commonly referred to as Technical Data Note 13 or "TDN13", as a basis for contending that, between 1965 and 1976, exposure to a low level of asbestos dust or fibre should not give rise to a breach of duty.

Exposure to asbestos dust has been known to be dangerous for a long time. Some sources suggest that Pliny the Younger identified asbestos related illness prevalent amongst Roman slaves, but negative health effects in asbestos workers were clear by the late Victorian era, confirmed, in 1930, by the publication of the well-known paper by Merewether and Price: "*Report on the effects of Asbestos Dust on the Lungs and Dust Suppression in the Asbestos Industry*".

These risks however were associated with asbestosis, a cumulative disease. The level of knowledge anticipated illness in cases where there was high or prolonged exposure. This perception, which supported a view that limited exposure was not dangerous, prevailed until the 1960s when a more sinister connection was identified. That mesothelioma, a horrible cancer peculiarly associated with asbestos exposure, could be caused by small amounts of exposure to asbestos dust or fibre gained currency and widespread publicity after February 1965, when Newhouse and Thompson published their paper "*Mesothelioma of the Pleura and Peritoneum following Exposure to Asbestos in the London area*" in the British Journal of Industrial Medicine. The subsequent publication of their findings by the Sunday Times meant that knowledge of the new danger became widespread, although it took the Government four years to bring forward the Asbestos Regulations 1969, specifically to address the risk. 1965, accordingly, marks the date of a shift in perception, to a position where it began to be appreciated that exposure to lower levels of asbestos dust, could have fatal consequences.

How an employer, reasonably, should have assessed and acted upon the knowledge which developed after 1965 lies at the heart of the argument which arises over *Williams*. What, if any, level of exposure might an employer reasonably permit, judged by the standards prevailing, without being in breach of duty?

The argument is not an uncommon one and has arisen in relation to just about every disease which has fallen to be considered by the courts over the years. The starting point always turns out to be the classic statement of principle of Swanwick J in *Stokes -v- Guest, Keen and Nettlefold (Bolt & Nuts) Limited [1968] 1 W.L.R. 1776:*

> *"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."*

This judicial statement of principle has received widespread approval and has been applied over a sustained number of years. What matters, in applying it, is the thrust of the contemporaneous material available to a reasonable and prudent employer, from which they might inform themselves as to the degree of risk and the steps reasonably to be taken to meet it.

In relation to asbestos, that material developed through the 1960's and 1970's and beyond. Thus in 1960 the Ministry of Labour published "*Toxic Substances in Factory Atmospheres*" suggesting a maximum permissible concentration for asbestos exposure of 177 particles per cubic centimetre over an eight hour weighted period. Subsequent publications in 1966 and 1968 under the title "*Dust and Fumes in Factory Atmospheres*" identified a similar limit of 5 million particles per cubic foot – which, in fact, is the same measurement when adjusted to a metric standard.

The superficial attraction of this "*limit*" is undermined when one notes that the unit of measurement is American. In Britain the measurement would be expressed in fibres per millilitre (*f/ml*). It is not easy to convert the former to the latter, as Lord Justice Judge noted in *Maguire -v- Harland and Wolff plc [2005] PIQR P21*. Whilst a broad "*hygiene standard*" could still be calculated to fall somewhere in the range of 5/30 f/ml, the position is further bedevilled by the fact that, in the 1960's when these recommendations were published, the means to assess and measure levels of dust were limited - arguably unavailable to many employers. The best that might be said is that whilst there was a notional published limit for asbestos exposure in the 1960's, neither its identification nor its means of measurement were easily available to the average employer.

The publication of TDN13 in 1970 at least adopted a British measurement. Further, since it was expressly intended to accompany the Asbestos Regulations 1969, it was bound to be given currency. Any employer charged with considering the risk posed by his employees' work with asbestos could reasonably be expected to take that as a starting point (and possibly an end point as well). TDN13 made a different recommendation for chrysotile, amosite and fibrous anthophyllite to that for crocidolite. The latter, more toxic, was given a four hour time-weighted average exposure "*limit*" of 0.2 f/ml. By contrast, chrysotile and amosite, considered to be less dangerous, were given a limit, over a four hour sampling period, time weighted, of 2 f/ml, with a further "*maximum*" of 12 f/ml when averaged over a 10 minute sampling period. The guidance was in terms that, where the average concentrations did not exceed these measurements:

> *"…Her Majesty's Factory Inspectorate will not seek to enforce the substantive provisions of the Regulations, in particular Regulations 7 and 8".*

In other words, providing an employer could demonstrate dust levels below those prescribed, they could regard themselves as safe from prosecution.

The issue was developed further in 1976 with the publication of a further Guidance Note: *"Asbestos Hygiene Standards and Measurement of Airborne Dust Concentrations"*, more commonly known as Environmental Hygiene 10 or "*EH10*". This guidance replaced TDN13 but adopted the same levels for assessing whether or not there had been compliance with the Asbestos Regulations. By 1976 however the wording had been widened:

> *"(a) Exposure to all forms of asbestos dust should be reduced to the minimum that is reasonably practicable; and*
>
> *(b) in any case, occupational exposure to asbestos dust should never exceed ….. (*here the same limits were incorporated from TDN13)*".*

The first requirement, that exposure to all forms of asbestos dust should be reduced to a minimum which was reasonably practicable, on the face of it, might be thought to prevent an employer taking refuge solely behind the measurement. Rather, from 1976 what was arguably required was a broad assessment of levels of exposure and the steps which might reasonably be taken to minimise it, by reference to maximums which were never to be exceeded. Nonetheless, David Pittaway QC applied the same measurements as standards in *McCarthy -v- Marks & Spencer plc [2014] EWHC 3183 (QB)*

The focus of this article, though, is the period from 1965 to 1976 which has presented as the significant area of battle as to what, if anything, constituted "*acceptable*" or "*reasonable*" exposure at the time.

In *Williams,* the Court of Appeal was asked to consider low level exposure to an Undergraduate which took place over a period of no more than 78 hours at a level marginally above 0.1 fibres per millilitre between 1970 and 1974. The Defendant's submission was that this, at the time, would not have given rise to an unacceptable or foreseeable risk of asbestos related injury. Lord Justice Aitkens took TDN13 to be the best guide to what was an unacceptable level of asbestos exposure, treating the publication as a guideline. In his view the University was entitled to look to the limits in that publication and to consider that they "*set the standard*" they ought to follow. On that basis the level of exposure found was so small that the University could not be said to have been in breach of duty.

There is a tension between the decision in *Williams* and the earlier decisions of *Jeromson -v- Shell Tankers/Cherry Tree -v- Dawson [2001] ICR 1223* and *Maguire.* In *Jeromson*, a claim for mesothelioma arising from exposure during work in engine rooms in the 1950's, the Judge found, in each of the two cases, that the Claimants were likely to encounter intense concentrations of dust on a regular basis, albeit generally for minutes at a time, but occasionally for hours and at high intensity. The Defendant's argument that this exposure did not give rise to breach of duty, prior to knowledge of mesothelioma, got relatively short shrift. The Trial Judge had found that asbestos dust was known to be dangerous, without there being clear knowledge of what constituted safe levels of exposure. If the Defendants had made enquiry they would, most likely, have been told of further steps which could be taken to limit exposure, not least by the provision of a respirator. In the premises, the Judge had correctly directed himself, and was entitled to conclude that harm was foreseeable, so that the Defendants were found liable.

Maguire was a claim for secondary exposure, the deceased being the Claimant's wife, who had contracted mesothelioma as a consequence of washing the Claimant's overalls when he worked as a boilermaker in the Liverpool shipyards. The Claimant's employment had ended in the early months of 1965. Whilst the Claimant himself had avoided ill health, his wife, tragically, was less fortunate and, not being an employee, the claim could only be brought at common law. It was not seriously disputed that the Claimant's own exposure was heavy or that, if he had suffered injury, he would have established a breach of duty. Fairly simple precautions would have reduced levels of exposure for both of them. Whilst the Judge found that the Defendant must have known that employees' wives would be exposed to asbestos on their husbands' clothes, the essential question was whether, in that position, the risk to the Claimant's wife herself was reasonably foreseeable. By a majority, the Court of Appeal concluded that a risk of pulmonary injury of some form should have been identified but, whilst Mance LJ was prepared to conclude that, given the Defendant's serious breach of its duty of care to the Claimant, it would then be obvious that his wife was also at risk, neither Lord Justice Judge, nor Lord Justice Longmore, who constituted the majority, thought the standards of the time fixed the Defendant with knowledge of a foreseeable risk to those living in the same household as an asbestos worker, or laundering their clothes. Lord Justice Longmore found the case difficult and, critically given the arguments over *Williams*, thought also that the question of permissible concentrations would only arise where it was impracticable to reduce exposure to dust overall.

Maguire was not considered by the Court of Appeal in *Williams*, a matter cited to His Honour Judge Yelton in *Bussey*, in support of a submission that the former should be departed from. So, as is likely to be submitted to a higher court in due course, if there are practicable steps which an employer can take to reduce exposure to asbestos, it matters not what guidance there may be as to maximum permissible levels of exposure, particularly where the same provide a guide to enforcement only. An employer should take the steps reasonably to be expected of him bearing in mind the overall danger, a submission which rests on the generally dangerous nature of asbestos dust.

Thus, so the argument goes, the Court of Appeal fell into error in *Williams*. Rather than direct themselves by reference to TDN13, the Court should have asked whether exposure could have been further reduced, taking account of the dangerous nature of the dust. The argument may overlook the very low level of exposure found to have occurred in *Williams* - a distinction with the Claimants' exposure in *Jeromson* and of the Claimant himself in *Maguire*. There the Court of Appeal, on each occasion, was able to conclude that further enquiry would have led the Defendant to take steps which had not otherwise been considered. By contrast, in *Williams*, the expert evidence called seems to have accepted that the University would not reasonably have foreseen a risk or that the exposure which occurred was at a level which could be regarded as unacceptable.

This distinction, between exposure to significant quantities of dust and to very low levels, was considered by Mrs Justice Swift in *Abraham -v- G Ireson & Son [2009] EWHC 1958.* The case, arising from light exposure to dust, which was capable of being reduced further, between 1956 and 1961 in the course of employment with a small plumbing firm. Whilst the Judge accepted the Claimant's submission that a reasonable employer could not safely assume there would never be sufficient cumulative exposure to cause injury, foreseeability of injury had to be tested against the standard of the well informed employer keeping abreast of developing knowledge. If a recognised and established practice existed an employer could shelter behind it, unless that practice was clearly bad or the employer had a greater than average knowledge. Since neither had applied to the Defendant in the late 1950s, the claim failed.

Similar reasoning was adopted by Mr Justice Bean in *Hill -v- John Barnsley & Sons [2013] EWHC 520 (QB)*. The Claimant was exposed to low levels of asbestos from 1968 to 1970 when working in power stations. The Judge was referred to *Williams* and considered there to be "*nothing controversial*" about the decision, which applied "*basic principles of the law of tort*". The effect of it was that if, in the period 1970 to 1974, the levels in TDN13 would not be exceeded, the Court was entitled to find that asbestos related injury was not reasonably foreseeable. The Judge, using that building block, then went further and concluded that, if the same was an acceptable level of exposure in 1970, it should also be regarded as acceptable in 1968 and 1969.

This approach was considered correct by His Honour Judge Yelton in *Bussey* in relation to exposure in the period 1965 to 1968, held to be "*very limited in time*" and at "*a very low level*". Again, and following *Williams*, the Judge

concluded that it would be "*perverse*" if the standard prior to the publication of TDN13, accompanying the Asbestos Regulations 1969 as it did, was held to be higher than any which followed. For that reason, even though exposure pre-dated the publication of TDN13, it could be taken as a reasonable indicator of the level of exposure which an employer could regard as acceptable, or at least, not requiring of further steps.

Thus, if in the period 1965 to 1976, exposure to asbestos is found to be so low that it would not have engaged enforcement by Her Majesty's Factory Inspectorate, if in other words it was below the levels prescribed in TDN13, a Defendant, currently, may avoid a finding of liability at common law, applying conventional principles of guilty knowledge. It is arguable that this is no more than the usual approach, consistent with arguments which have found favour in relation to other diseases. The Courts have carefully considered contemporaneous literature available to employers in determining how liability may follow in cases brought years later, looking for some reasonable guide upon which an employer might have placed acceptable emphasis.

This it is which will be challenged in relation to TDN 13 if *Bussey* is proceeds to the Court of Appeal. On current waiting times that may not be until the latter half of 2018, if the Court grants permission.

Philip Turton
June 2017

Disclaimer:

The information and any commentary on the law contained in this article is provided free of charge for information purposes only. The opinions expressed are those of the writer(s) and do not necessarily represent the view of Ropewalk Chambers as a whole. Every reasonable effort is made to make the information and commentary accurate and up to date, but no responsibility for its accuracy and correctness, or for any consequences of relying on it, is assumed by the writer(s) or by Ropewalk Chambers. The information and commentary does not, and is not intended to, amount to legal advice to any person on a specific case or matter. You are expressly advised to obtain specific, personal advice from a lawyer about your case or matter and not to rely on the information or comment contained within this article.