‘BLUE WATER’ ASBESTOS CLAIMS

Peter Cowan[1] [2][3]

What are ‘Blue Water’ Cases

1. The shorthand expression ‘Blue Water’ cases is intended to refer to claims in respect of asbestos related disease made by men (usually) who served in the Merchant Navy, against their former employers, being the shipping companies which operated the vessels on which the Claimant served. Details of those vessels, and of the dates between which and capacity in which the Claimant served can usually be ascertained form the man’s discharge book – possibly obtainable from the National Archives, if otherwise lost.

Potential for Exposure

2. A person serving in the Merchant Navy might have been exposed to respirable asbestos fibres and dust in a number of ways. Most obviously he may have been an engineer, fireman, greaser or similar working in the engine room with exposure as a result of stripping asbestos for running repairs to plant and pipework while at sea, and possibly the roughshod reapplication of the insulation on completion of the work. There would be more extensive work while in port, possibly in dry dock. While land based workers may have done that work, the Claimant may well have been present in a supervisory capacity.

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[1] Oriel Chambers, 14 Water Street, Liverpool L2 8TD; 6th February 2012.

[2] Postscript – January 2016: Please note that this paper is considerably out of date and in particular precedes the majority of the unfortunate run of ‘low exposure/standards of the day/TDN13’ cases (although it was written post Williams). The views expressed about Blue Water cases remain valid in my opinion, but need to be seen through the prism of recent ‘land based’ cases. I have added a couple of footnotes, but otherwise have not updated. No liability accepted, etc…

[3] Further Postscript – November 2018: Post Bussey this seems to be standing the test of time!

3. Other seamen may have had exposure elsewhere on the vessel from maintenance or repair work – for example if the work disturbed asbestos insulation on bulkheads, or asbestos (marinite) panels in cabins.

4. There could also be exposure from the loading and unloading of asbestos cargos, especially raw asbestos packed, up to the 1960s, in hessian sacks. Even processed asbestos cargos might be dusty. Dock workers would probably handle the cargos, but the seamen might be in the vicinity, and might sweep out the holds after the unloading.

Do Special Rules Apply to 'Blue Water' Cases?

5. The point is that the statutory duties usually relied on in asbestos claims do not apply to ships at sea. The employers owed the common law duty of care to their employees, but they contend that their knowledge was less than that of land based employers, so that the standard of care owed was lower.

6. Note that it might still be possible to plead relevant statutory duties – for example when the exposure occurred during work in dry dock.

Dry Dock Work

7. Section 106 of the Factories Act 1937 (and the equivalent section in the 1961 Act) applied the provisions of parts of the Act to the reconstruction of ships. However the question is: who owed the duties imposed by the Act? Under Section 106 of the 1937 Act it is *"any person undertaking such work* [who] *shall be deemed to be the occupier of a factory"*.

8. Section 151 (1) of the Factories Act 1937 (and the equivalent in the 1961 Act) provided that any yard or dry dock (including the

precincts thereof) in which ships were constructed, reconstructed, repaired, re-fitted, finished or broken up were included within the definition of 'factory'.

9. However the cases of Rippon v Port of London Authority [1940] 1 All ER 637, Donovan v Cammell Laird [1949] 2 All ER 82, Wilkinson v Rea Limited [1941] 2 All 50 and Day v Harland and Wolff Limited [1953] 2 All ER 387 (dealing with the Shipbuilding Regulations 1931) indicate that where the dry dock was available for hire (ie a public dry dock) it was the contractor carrying out the work on the ship which was to be regarded as the occupier of the factory. The shipowner might say that it was therefore the contractor it engaged which was under the relevant duties – and the claim against the contractor would be a PL claim, with the attendant 'trigger issue' problem.

10. If one succeeded in engaging the provisions of the Factories Acts, Sections 4 (ventilation) and 47 (fumes and dust) of the 1937 Act (Ss 4 & 63 of the 1961 Act) might assist. Section 47 is in two parts. Firstly, if as a result of a process carried on in the factory (in this case, the ship) injurious or offensive dust is given off, steps should be taken to protect the persons employed against inhalation of it. The second part requires the same measures to be taken against any substantial quantity of dust – the advantage of this second limb being the absence of any need to prove that the dust was appreciated at the time to be harmful ('injurious or offensive' is to be judged by the knowledge and standards of the day, whereas 'substantial' is an unchanging fact).

11. There is an issue as to whether the duty under Section 47 is owed only to the men engaged on the dust making processes, or

whether it extends to protect others who may have been affected by elevated levels of asbestos in the atmosphere of the ship, contributed to by breaches of the section. The case of Anderson v RWE NPower PLC (Unreported – 22nd March 2010) would support the proposition that the occupier of the factory owed those other persons the duty under Section 47[4].

At Sea and Loading/Unloading Cargo

12. I lump these situations together because there is no relevant statutory duty (at least in the periods with which we are concerned) so one is considering common law negligence only.

13. For a claim in negligence against a land based employer, the standard of care demanded by the courts for it to be found that there has been compliance with the employer's duty to take reasonable care for the safety of its employees is fairly well established. In the recent[5] case of Abraham v G Ireson & Son [2009] EWHC 1958 (QB) Swift J quoted from past cases as follows:

> *51. The issue in this case is, as identified by Hale LJ in Jeromson, whether the risk of personal injury arising from the claimant's exposure to asbestos ought reasonably have been foreseen by a careful employer to the extent that the employer should have taken precautions or at the very least sought advice as to what, if any, precautions he should take.*
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> *52. As to the foreseeability of injury in areas involving developing knowledge, in Stokes v Guest, Keen and Nettlefold (Bolts & Nuts) Limited [1968] 1WLR 1776 at 1783, Swanwick J said:*
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> *"…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*

[4] Now authoritatively confirmed by the Supreme Court in McDonald v National Grid [2014] UKSC 53

[5] It was recent when I first wrote this paper!

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".

53. In Thompson v Smiths Shiprepairers (North Shields) Ltd [1984] QB 405 at 415-6, Mustill J (as he then was) said:

"Between these two extremes [i.e. "without mishap" and "clearly bad"] is a type of risk which is regarded at any given time (although not necessarily later) as an inescapable feature of the industry. The employer is not liable for the consequences of such risks, although subsequent changes in social awareness, or improvements in knowledge and technology, may transfer the risk into the category of those against which the employer can and should take care… In my judgment, this principle applies not only where the breach of duty is said to consist of a failure to take precautions known to be available as a means of combating a known danger, but also where the omission involves an absence of initiative in seeking out knowledge of facts which are not in themselves obvious. The employer must keep up to date, but the court must be slow to blame him for not ploughing a lone furrow".

54. In considering the issue of foreseeability of risk, it is necessary to examine the literature about asbestos exposure which was in existence at the material time.

…

14. Swift J cited the judgment of Buxton J in Owen v IMI Yorkshire Copper Tube (15th June 1995, unreported) as follows:

> *"On the basis of these widely-published documents, and also having regard to the evidence of Mr Browne, I find that a reasonably informed employer would have been aware from at least 1949 that care should be taken with*

> *asbestos; that he would have known from the middle 1950s that exposure to asbestos should be kept to the lowest possible level; and that from 1965 he should have known that there was a new and uncertain hazard, in the shape of mesothelioma, that made reduction in exposure levels imperative. At the same time such an employer should have very actively pursued the use of alternative materials for asbestos which, I find, were available by the mid-1960s."*

15. This passage in Buxton J's judgment was cited with apparent approval by Hale LJ in Jeromson v Shell Tankers [2001] PIQR P265 and must surely be regarded as definitive so far as substantial, even if intermittent, exposure is concerned (being the type of exposure which was under consideration in Owen).

16. Similarly in Rice v National Dock Labour Board [2008] EWHC 3216 (QB) it was held that the NDLB was negligent in permitting dock workers to handle very dusty asbestos cargoes without respiratory protection, from 1955 onwards. That is not to say that such exposure prior to 1955 would not have been found negligent, because the earliest employment in that case was 1955 so there was no need to consider any earlier exposure.

17. However Swift J in Abraham pointed out that these cases (specifically Owen and Jeromson) were dealing with quite heavy (even if intermittent) exposure, and that the propositions must be read in that light. In the case of light and intermittent exposure, this is only regarded as having occurred in breach of a common law duty of care insofar as it was permitted from about 1965 onwards – and

beware Williams v University of Birmingham [2011] EWCA Civ 1242[6].

18. Is there any reason to suppose that the standard of care is lower for 'Blue Water' employers than for land based employers? Those employers would like to think so, but I would disagree. The argument they run in support of the surprising proposition that they should be judged less strictly is that as they did not run factories, they were unaware of the literature which is relied on to establish the aforesaid standard of care in respect of land based employers. The (only) case which they rely on is Smith v P & O Bulk Shipping [1998] 2 Lloyds LR 81.

Smith v P & O Bulk Shipping [1998] 2 Lloyds LR 81

19. This case concerned a shoregang deck worker who was employed by a shipping line (the New Zealand Shipping Line) between 1954 and 1971 and subsequently died from mesothelioma. The judge (Sir Maurice Drake) found that there was light and intermittent exposure, amounting to 'well over 2 hours' exposure in the 17 years' (sic). This was from the loading of manufactured asbestos goods and bags of lagging, and deck repairs involving asbestos. The deceased did not handle or disturb the asbestos himself, but would have passed by others doing the tasks in question.

20. The judge held that this exposure did not occur in breach of duty. He held that it was not until the 1977 M notice (M 796) that

[6] And things have got worse since then, making even this assessment look optimistic. **… but have improved back to the *status quo ante* thanks to Bussey.**

the shipowner was on notice that short term light exposure was risky.

21. Some 'Blue Water' employers now tout this case as support for the proposition that no exposure to asbestos on board ships was negligent and therefore actionable until 1977. This is a gross misrepresentation of what the case (which is anyway of only persuasive authority) decides. Even on its own terms:

(i) It is dealing only with light, intermittent, neighbourhood exposure. The shipowner's own expert witness (Captain Parker) confined his evidence of lack of knowledge to such cases, in contra distinction to cases where the employee has worked '*directly with or on asbestos*';

(ii) It does not suggest that shipowners were entitled to be oblivious to Factory Inspector reports. On the contrary these were cited at length on the footing that shipowners would/should have been aware of their contents. The judge simply took a particular view about what shipowners may reasonably have concluded about the low level exposure in question in the absence of a specific warning to them from government.

22. Furthermore, there are reasonable grounds for arguing that the case was wrongly decided, and that the judge should have found that the shipowner was negligent in allowing the exposure in question from 1965/6 onwards[7] (even on dry land such exposure would probably not have been found to have been negligent prior to 1965

[7] This point is now much less secure - the exposure in the case was so low that by the standards of recent 'low exposure' land based cases the result may now have been the same in a land based case.

– see above). It is arguably wrong for the reasons set out in the following paragraphs.

23. Firstly, it sits ill with the general proposition that any reasonably careful employer should have known by 1965 of the hazards of even low level exposure to asbestos – even if the shipowners did not read the reports of the Inspectors of Factories, did they not read the Sunday Times which raised the alarm regarding 'workmen's clothing' – see Maguire v Harland & Wolff Plc [2005] EWCA Civ 1[8].

24. Secondly, the judge was not referred to the earlier case of Walker v Port of London Authority & Others 4th March 1988, unreported. In this case the judge held that the Port authority was negligent from 1960 onwards (there was no finding for the 1950s as the employment in that case only began in 1960) in permitting a dock worker to be exposed to substantial quantities of respirable asbestos fibres and dust generated as a result of unloading hessian sacks containing asbestos. There was no relevant statutory provision on which the Claimant could rely against the Port authority. The finding was one of negligence. As the review of contemporaneous documents at pages 13-15 of the transcript show, concern was expressed about the practice of packing asbestos into hessian bags as early as 1947. In 1954 the Factory Inspectorate wrote to Union Castle strongly recommending that approved dust respirators should be used by dockers unloading asbestos. Later, in 1967, there was a similar recommendation in the International Labour Office's re-issued Code of Practice relating to safety and health in dock work.

[8] Although query where this stands following Williams – **this footnote can be ignored post Bussey.**

25. Walker contains comments (albeit first instance and non-binding) which are helpful in refuting the assertion that 'Blue Water' shipping companies had less guilty knowledge, or means of knowledge, than land based employers. In that case the Port Authority, which was the employer of the dock workers, took third party proceedings seeking a contribution against various shipping lines. Those proceedings failed, not on the basis that the shipping companies had less knowledge or means of knowledge, but on the basis that the Port Authority as employer owed the relevant duties to their employees, with the shipping lines being entitled to assume that the employer would take proper steps to protect its employees (see page 22 of the transcript). At page 25 of the transcript the trial judge, Tucker J, said:

> *"Neither do I have to decide whether it is established that the* [shipping companies] *knew or ought to have known of the danger. Had I had to consider this question I would have found that the same means of knowledge were available to* [them] *as were available to the* [Port Authority] *with the qualification that the Blue Book*[9] *made no mention of the danger."*

26. Thirdly, in a similar vein, in Jeromson the judge at first instance said as follows:

> *"*[Counsel for Shell] *also relied upon the fact that it was not until July 1976 that asbestos was added to the list of dangerous substances under the Merchant Shipping Legislation, and not until 1977 that an M Notice was issued. I hope I will be forgiven for not prolonging this Judgment by considering such submissions and documents in detail. To an extent they are undermined by the decision of Tucker J in Walker but generally, I do not consider that a*

[9] This being a reference to the list of hazardous cargoes

> *reasonable employer is entitled to await a statutory obligation before taking reasonable precautions. Moreover, some of the documents in the 1960s, to which I was referred, contained more wishful thinking than rigorous analysis."*

26. Fourthly, the expert relied on heavily by the judge in Smith, Captain Parker, was discredited at first instance in Jeromson partly for relying on documents which had been revealed as questionable in Walker without bringing that case to the judge's attention, even though he had been an expert witness in that case too.

Conclusion

27. There is no good reason to believe that 'Blue Water' cases demand a lower standard of care than that demanded (in negligence) of land based employers – so substantial albeit intermittent exposure should be actionable from at least the 1950s onwards, whereas light, intermittent exposure should be actionable from about 1965 onwards. The former proposition is not undermined by any reported case. The latter proposition is at first glance somewhat undermined by Smith, but there are powerful reasons to believe that Smith would not be followed, were the point to be fought again.

28. There is still likely to be a little more difficulty in 'Blue Water' cases, because of the likely unavailability of helpful statutory duties including Ss 4 and 47 of the 1937 Act, S 5 of the 1959 Act (safe place of work) and Ss 4, 29 and 63 of the 1961 Act, which can be more onerous then the common law duty of care.

[2018 postscript: the lack of any trial on this issue over many years rather suggests that defendants know that the so-called Blue Water defence would not hold water].

Peter Cowan[10] – 6th February 2012

[10] Please take advice in individual cases – this is a general review only and is not to be relied on in any specific case.

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