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# FORESEEABILITY IN ABESTOS DISEASE CASES AFTER *WILLIAMS*

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1. **Foreseeability in asbestos disease cases**

(a) For any injury to be compensatable the risk of it occurring must be reasonably foreseeable. That much is trite. What is foreseeable now though can be very different from what could have been foreseen years ago. This is of course especially true of long-tail disease claims like asbestos when potentially tortious exposures can stretch back 30, 40 or even more years ago. As time passes, it becomes increasing difficult to look back through time to form a view about what should have been foreseen then, blind and ignorant to all we know now.

(b) In asbestos cases, the claimant has always had to show that the exposure complained of gave rise to a foreseeable risk of some form pulmonary injury. The very rough rule of thumb is that until the Sunday Times article in October 1965 reporting on the Newhouse and Thompson research, asbestos exposures had to be shown to be substantial since in reality the disease against which employers could be taken to have readily foreseen was asbestosis, a condition which requires a significant asbestos burden before it can be described as asbestos related as opposed to it being idiopathic.

(c) Since the special rule for mesothelioma cases was propounded 10 years ago in *Fairchild v. Glenhaven Funeral Svs* [2002] UKHL 22, post-1965 exposures seem to have been treated very differently by both sides of the industry, the feeling being perhaps that any exposure above the trivial amounted to a breach of duty since the employer or exposer could rarely show that any steps were taken to guard against the risk of mesothelioma. This apparent acceptance that the claimant only had to show more than *de minimis* exposure appears to have reached the high water mark in the 2 conjoined cases which were heard by the Supreme Court last year in *Sienkiewicz v. Greif (UK) Limited* [2011] 2 WLR 523.

In both *Willmore* and *Sienkiewicz*, the defendant did not contest the issue of foreseeability per se, in *Willmore* arguing that the exposure, if it occurred was just too little to amount to a material increase in the risk of mesothelioma, and

in *Sienkiewicz* arguing that *Fairchild* should not apply in a single exposure case where there was also enviromental exposure.

(d) Post-1965 exposure cases, where mesothelioma was then suffered, gave every appearance of morphing into an entirely new tort altogether, one where the usual causation principles were torn up and where forseeability hardly or never featured. Triviality of expsoure became the only potential issue. Or so it seemed. Having, a little grudgingly some would say, turned down the defendants' appeals in the Sienkiewicz, they left us in no doubt about what they thought of the present state of affairs.

Lord Rodgers in *Sienkiewicz* said at para. 166:

> "It is important that judges should bear in mind that the *Fairchild* exception itself represents what the House of Lords considered to be the proper balance between the interests of claimants and defendants in these cases.
>
> Especially having regard to the harrowing nature of the illness, judges, both at first instance and on appeal, **must resist any temptation to give the claimant's case an additional boost by taking a lax approach to the proof of the essential elements**."

Evn more withering, was Lady Hale's comment that the judge in *Willmore* (Nicholls J) made findings of fact that were

> "truly heroic".

(e) Since *Sienkiewicz* there have been two cases in particular that have wrenched the foreseeability steering wheel back. Both of them add little to the legal principles to be applied to asbestos cases but as we shall see both cases provide some succour for defendants. These cases raise a host of new issues for practitioners including and most importantly whether there is now a *de facto* level of exposure which must be proved in asbestos disease cases in order to establish foreseeability and therefore breach.

2. **Asmussen v. Filtrona UK Limited**

(a) In *Asmussen v. Filtrona UK Limited* [2011] EWHC 1734 (QB) the 78-year-old claimant contracted mesothelioma. She alleged that she was exposed to asbestos in the course of her employment at the defendant's cigarette filter and crepe paper factory in Jarrow. She worked there between 1955 to 1960 and then from 1962 to 1972. She did not have any exposure to asbestos in any other employments or circumstances. At the factory there were pipes about 20 feet above the floor lagged with asbestos. The factory process generally was very dusty so that there was regular vacuum cleaning to remove large amounts of, predominantly, paper dust including from the top of the pipes. Asbestos dust and fibre might also have been released during repairs to damaged lagging or during cleaning and the claimant also described one incident of possible exposure to asbestos when she had to pass under damaged asbestos lagging which was being repaired. She claimed at common law and under the Factories Acts 1937 and 1961.

(b) Mrs Asmussen lost before Simon J. He held that the test for liability in cases of asbestos-related injury was whether the risk of personal injury arising from asbestos exposure ought reasonably to have been foreseen by a careful employer, to the extent that the employer should have taken precautions or at the very least sought advice regarding what precautions he might take. This was the test promulgated by the court of appeal in *Shell Tankers UK Limited v. Jeromson* [2001] EWCA Civ 101 and as more recently applied by Swift J in *Abraham v. G. Ireson & Son (Properties) Limited* [2009] EWHC 1958.

(c) Simon J repeated the oft-quoted principle that foreseeability of injury was to be tested against the standard of the well-informed employer who kept abreast of developing knowledge and applied that understanding without delay (the *Stokes v. Guest, Keen and Nettlefold (Bolts and Nuts) Limited* [1968] 1 WLR 1776 test). Applying those standards Simon J found that during neither period of employment could the exposure alleged amount to a foreseeable risk of mesothelioma.

(d) As ever in these types of cases it was the individual factual matrix which determined the outcome. The judge found that only "*very occasional repairs*" were made to asbestos lagging and that when these happened although the potential exposure to asbestos dust was present it was "*very small*". He appeared to accept the claimant's expert (Ian Glendenning) when he said that the claimant's exposure was at a level above that commonly found in the air in the general environment when the claimant walked underneath the pipework lagging repair on a single occasion. The expert evidence was that the exposure on that occasion was small to very small, being between 0.01 fibre/ml to 2 fibre/ml. He also said that if the claimant had been at a distance of 20 feet from the work being carried out as the judge accepted she probably was, the figure for exposure to fibres might be in the order of 10% of even these figures. At such low levels the judge considered that the defendant, during neither period of employment, should have appreciated that the claimant was at risk of asbestos-related injury so the failure to take any appropriate precautions was not negligent.

(e) Simon J thought that the allegations of breaches of the Factories Acts which involved consideration of the phrase "*likely to be injurious*" added nothing to the common law position and that "*likely to be injurious*" used within section 47 of the Factories Act 1937 and section 63 of Factories Act 1961 in his view plainly involved a degree of foresight. In this regard he followed Swift J in *Abraham* (above). He rejected the proposition that these provisions should be construed as meaning "*may be injurious*". Moreover regulation 2(3) of the Asbestos Regulations 1969 ("*to such an extent as is liable to cause danger to the health*" of employee) similarly involved a degree of foresight which he thought was consistent with the observations of the House of Lords in the deafness case *Baker v. Quantum Clothing Group Limited* [2011] UKSC 17 where the statutory duties under consideration in that case were said to be subject to the requirement that they "*be judged according to the general knowledge and standards of the times*".

(f) In *Asmussen* the defendant contended that, in judging the standards to be expected of the defendant at the time, the court should have regard to

Technical Data Note 13 (TDN 13) issued by the Factory Inspectorate in March 1970 entitled "Standards for Asbestos Dust Concentrations for Use with the Asbestos Regulations 1969". TDN 13 provided guidance on how factory inspectors would interpret the expression "*dust consisting of or containing asbestos to such as extent as is liable to cause danger to the health of employed persons*" and how such measurement might be made. The defendant relied upon TDN 13 in that the guidance thereunder in respect of chrysotile and amosite was as follows:

> "Where the average concentration of asbestos dust over any 10-minute sampling period is less than 2 fibres/cc… HM factory inspector will not seek to enforce the substantive provisions of the regulations".

(g) The judge made no findings of fact about the significance of TDN 13 on the issue of the standard to be expected of the defendant at the time (even though the defendant accepted that in retrospect the guidance could be seen to have been "*gravely erroneous*"). Simon J did accept though that the claimant, when she was exposed to asbestos when she watched the asbestos lagging on the pipework being repaired and then walked underneath the same, was at a level which was "*probably below the advised enforcement levels in Note 13. Although the exposure was very slight it would have materially enhanced the risk from background or environmental contamination*". To this extent then the judge appeared to accept that it was not wrong to have regard to TDN 13.

(h) The claimant in *Asmussen* argued that TDN 13 could not be relied upon because it was concerned with (potentially criminal) enforcement and not safety and that the Note specifically drew attention to the fact that it was issued for the guidance of inspectors and that only the courts could make binding decisions on these matters. Secondly, TDN 13, the claimant submitted, should have been read in the light of the other information available to employers to the effect that exposure to any dust should be reduced to the practicable minimum and that, thirdly, the Note should have been read in the light of the knowledge that mesothelioma could be caused by slight exposure to asbestos fibres. It did not seem that the judge was

particularly impressed by any of these arguments although it is fair to say that he did not expressly make a finding on them. Nevertheless, as we have seen above, he did think it relevant that the claimant's exposure was below the exposure levels mentioned by TDN 13.

3. **Williams v. University of Birmingham**

(a) TDN 13 was the subject of the Court of Appeal's consideration in the case of *Williams v. University of Birmingham and another* [2011] EWCA Civ 1242. The deceased died of malignant mesothelioma. The claimant alleged that this was the result of the material increase in the risk of mesothelioma caused by the deceased's exposure to asbestos when he worked in a 90-foot service tunnel below Birmingham University carrying out scientific experiments in 1974 in his final year as an undergraduate. The tunnel contained central heating pipes which were lagged with asbestos. It was not disputed that the lagging gave rise to some exposure to asbestos whilst the deceased was carrying out experiments during repeated visits over an eight-week period. The level of exposure found by the judge was close to or above 0.1 fibre/ml$^2$ but less than 0.2 fibre/ml$^2$. All types of asbestos fibres but particularly crocidolite fibres were included within the exposure levels. She found that the deceased worked in the tunnel between 52 to 78 hours in total. She found that the exposure materially increased the risk of mesothelioma and that the university knew or ought to have known that the pipe lagging in tunnel was asbestos and that low level exposure, particularly to crocidolite, could cause mesothelioma. On this basis the claimant won at first instance.

(b) The Court of Appeal in *Williams* considered that the circuit judge had asked the wrong question about whether the defendant was in breach of duty. She erred in approaching the issue of breath of duty by considering the question of whether the deceased's exposure in the tunnel was more than *de minimis* rather than framing the question as follows: Was it reasonably to have been foreseen by the university that the risk of contracting mesothelioma arising from such levels of low exposure was such that it should have refused to

allow the experiments to be done or taken further precaution or at the least sought advice?

(c) Aikens L J, who gave the lead judgement gave further assistance as to how the breach of duty issue should be approached once it is found that exposure is more than *de minimis*. He said at paragraph 44:

> "But, assuming that the exposure was more than *de minimis*, it was, in my view, necessary to ask a further question. That is whether, given the degree of actual exposure, it ought to have been reasonably foreseeable to the university (with the knowledge a reasonable university should have had in 1974) that, as a result, Mr Williams would be likely to be exposed to the risk of personal injury in the form of contracting mesothelioma.
>
> To determine that question, it seems to me the judge had to make findings about
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> (1) the actual level of exposure to asbestos fibres to which Mr Williams was exposed;
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> (2) what knowledge the university ought to have had in 1974 about the risks posed by that degree of exposure to asbestos fibre;
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> (3) whether, with that knowledge, it was (or should have been) reasonably foreseeable to the university that, with that level of exposure, Mr Williams was likely to be exposed to asbestos-related injury;
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> (4) the reasonable steps that the university ought to have taken in light of the exposure to asbestos fibres to which Mr Williams was exposed in fact; and
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> (5) whether the university negligently failed to take the necessary reasonable steps".

(d) The difficulty with the first instance judgment it seems was the failure by the judge to record any specific conclusion about the degree of knowledge the university should have had in 1974 on the danger of exposure to asbestos at any particular levels. She simply stated three general propositions, namely that the risks posed by asbestos in general and by crocidolite in particular were known by the mid 1960s, secondly that the association of mesothelioma with asbestos exposure had been known since 1960s and that "low level" exposure, particularly to crocidolite, can cause the disease and, lastly, that the university knew or ought to have known by 1974 that the pipe lagging in the tunnel was asbestos.

(e) Specifically, the Court of Appeal criticised the failure to make any finding as to whether the level of exposure as found for the length of time found gave rise to reasonably foreseeable risk of asbestos related injury

> "…in the sense that a reasonably informed body in the place of the university in 1974 ought to have appreciated that if it had been told that Mr Williams was exposed to that level and length of exposure to asbestos fibres it should have foreseen that it would (or even could) expose Mr Williams to an unacceptable risk of personal injury, viz. contracting mesothelioma" [paragraph 56].

(f) Although both sides in *Williams* relied upon occupational hygiene consultants (Alvin Wooley for the claimant and Martin Stear for the defendant) the Court of Appeal's judgment does not indicate whether either of these experts attempted to address the question posed by Aikens LJ. What this meant was the Court of Appeal was able to fill the void and go on to consider what was the level of exposure beyond which the university could not fail to take steps to guard against or, at the least, take advice on. The defendant repeated the argument used in *Asmussen* that TDN 13 was of central importance. Aikens LJ agreed with the defendant's submission that there could only be a breach of duty of care by the defendant if the judge had been able to conclude that it would have been reasonably foreseeable to the university in 1974 that a level of just above 0.1 fibres/ml for a period of 52 to 78 hours posed non-acceptable risk of asbestos-related injury.

(g) Aikens LJ specifically found that the university was entitled to rely on recognised and established guidelines such as TDN 13. Neither of the medical or occupational hygiene experts concluded that at this level of exposure the university ought reasonably to have foreseen that the deceased would be exposed to an unacceptable risk. TDN 13, as we have seen above, gave the enforcement level for average concentrations of chrysotile, amosite fibres and anthophyllite at below 0.2 fibres/cc or 0.1 mg/$m^3$. In respect of crocidolite however, TDN 13 says:

> "Regulations will apply in full whenever workers are engaged in processes involving crocidolite because the concentration of this mineral, that is believed to be liable to be dangerous to health, is very small indeed. An approved form of respirator will be required to be worn unless the concentration in a breathing zone of work in a crocidolite process can be maintained below 0.2 fibres/cc or 0.1 mg/$m^3$ when measured as the average concentration over a 10-minute sampling period…".

(h) Whilst the Court of Appeal did not expressly deal with whether the level of exposure found by the judge (at a level close to or above 0.1 fibres/$m^3$ but less than 0.2 fibres/$ml^2$) and which contained particularly crocidolite fibres exceeded at or above the 0.01 mg/$m^3$ referred to by TDN 13. Clearly though neither of the occupational hygienists in the case thought that it did not.

(i) It must follow then that Aikens LJ has set a base level of exposure which claimants must now show was at least matched or exceeded before it can be said that any particular defendant is in breach of duty. This is the first occasion when a court, let alone an appellate court, has set a minimum level. The question is begged as to whether the TDN 13 level can, on its own, be used to inform the court as to breach of duty in respect of exposures pre-dating its publication. It may be difficult for a claimant to suggest that lower exposure levels would give rise to a breach of duty before 1970 so long as these exceeded *de minimis* levels since this would involve the court finding that standards to be expected of a defendant were more onerous *before* 1970 than afterwards which would be inconsistent with the developing state of knowledge about asbestos and mesothelioma risks arising therefrom.

2. **What then is *de minimis* exposure ?**

(a) The first step in any asbestos disease claim is for the claimant to show that the exposure was more than trivial or, in other words, more than *de minimis*. In *Sienkiewicz v. Greif (UK) Limited* [2011] 2 WLR 523 the deceased's exposure was found to be only 18% higher than the environment level. It will be remembered that in *Sienkiewicz's* breach of duty had been conceded in the event that exposure was found to have been at least double the environment al level and more than *de minis* in any event. In reality the only issue was

causation. The Supreme Court did not spend very long on the issue of what constitutes *de minimis*. Lord Phillips at paragraph 108 said only this:

> "I doubt whether it is ever possible to define, in quantitative terms, what for the purposes of the application of any principle of law, is *de minimis*. This must be a question for the judge on the facts of the particular case. In the case of mesothelioma, a stage must be reached at which, even allowing for the possibility that exposure to asbestos can have a cumulative effect, a particular exposure is too insignificant to be taken into account, having regard to the overall exposure that has taken place. The question is whether that is the position in this case" (emphasis added).

(b) While Lord Phillips came to consider the facts in *Sienkiewicz's* and the deceased's particular exposure he put the question slightly differently namely: could anyone reasonably conclude that there was no significant possibility that the incremental exposure to which Greif had subjected the deceased was instrumental in causing her to contract the disease. However Lord Phillips went on to say that:

> "The reality is that, in the current state of knowledge about the disease, the only circumstances in which a court will be able to conclude that wrongful exposure of a mesothelioma victim to asbestos dust not materially increased the victim's risk of contracting the disease will be where that exposure was insignificant compared to the exposure from other sources…"

No other members of the Supreme Court made any particular comments on the *de minimis* issue.

(c) The *de minimis* issue was revisited by the Court of Appeal in *Williams* because in that case Dr Gibbs for the defendants had concluded that the deceased must have been exposed to substantial amounts of crocidolite somewhere other than at the university. The Court of Appeal though rejected the contention that there has to be a comparative exercise between all sources of exposure to see if the exposure sued for is too insignificant in comparison to be taken into account. Whilst Aitkens LJ left open the possibility that a judge might conclude that having examined all other possible sources of exposure the source which is proved to have been the result of a tortious exposure is so

insignificant that it could not in fact have materially increased the risk of the victim contracting the disease, he found that all a first instance judge has to do is ultimately "*make a finding of fact that the tortious exposure of the victim to asbestos fibres at the hands of the defendant materially increased the risk that the victim would contract mesothelioma and that he does not have to do a comparative exercise*".

(d) Although Aitkens LJ had some doubts about the first instance judge's reasoning about whether the deceased in *Williams* had been exposed to more than *de minimis* levels of exposure, he found that she did not make an unreasonable conclusion that he was so exposed even at the low level so found.

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